

Law, Ethics and Governance for All Leaders, including an Overview of New and Emerging Issues

HIB Law Update

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DISCLAIMER

This presentation is intended as a summary of law only, and is not meant as legal advice. Please consult your attorney to obtain legal advice.



Workshop Materials

All session documents can be accessed at

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This folder can be accessed for 30 days from the workshop date.

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<u>Overview</u>

- HIB Definition
- Legislative Update
- Case Law/News



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HIB DEFINITION

- Can include gestures, written, verbal & physical acts, & electronic communication
- May be single or series of incidents
- Can take place on school property, school-sponsored function or school bus, or off school grounds

- The gesture, act or communication is <u>reasonably</u> <u>perceived</u> to be motivated by any <u>actual</u> or <u>perceived</u> characteristic:
 - Race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, mental, physical or sensory disability or any other distinguishing characteristic
 - "Other Distinguishing Characteristic" is broadly interpreted
 - Vegetarianism, lice, quiet, new kid, parents, etc.
 - HOWEVER, need evidence to support conclusion regarding characteristic, can't simply check "Other"

The Gesture, Act or Communication:

<u>Substantially disrupts/interferes</u> with the orderly operation of school or rights of other students

- Substantial disruption only has to be for one student. Can be dramatic or more subtle (change in demeanor, increased fear/anxiety)
- Needs to be more than a momentary annoyance

- One of these three:
 - Has effect of--or creates reasonable fear of-physical/emotional harm to student or damage to student's property, or
 - Has effect of insulting/ demeaning any student or group of students, or
 - Creates a hostile educational environment for the student by interfering with student's education or by severely or pervasively causing him/her physical or emotional harm.

<u>Unpacking the HIB Definition</u>

Bullying v. Conflict

- During a conflict, name-calling, threats and other conduct that might look like bullying can occur. However, a conflict and bullying are very different.
- Unlike bullying, during a conflict people are equally involved in some type of disagreement. Conflict is considered mutual, meaning everyone is more or less evenly involved.
 - HIB is primarily one-sided, but not always 100% one-sided
 - Incident may be HIB first, then become conflict or vice versa

Determining Substantial Disruption

Is there evidence of a **lasting**, **negative impact**, **beyond that moment?**

Have you **consulted** with:

- The student
- The student's assigned school counselor
 - Did the school counselor meet with the student subsequent to the alleged incident and assess the student's social-emotional well-being?
- The parents/guardians
- The student's assigned teachers
- The student's coach and/or club advisor
- The student's friends

Substantial Disruption Key Questions

During and/or subsequent to the incident:

- Did the student miss school?
- Did the student miss class?
- Did the student's academic performance suffer?
- Did the student **change his or her routine** to avoid the alleged aggressor(s)?
- Conversely, did the student voluntarily choose to resume positive interactions with the alleged aggressor (e.g., playing together, eating lunch together, working together on school projects, etc.)

Substantial Disruption Key Questions

- Did the student change his or her routine to avoid certain locations in the school or on school grounds?
- Was the student sad, upset, and/or crying? If yes, for how long? What evidence do you have to support this?
- Did the student otherwise exhibit signs of a major change in demeanor or behavior? (e.g., withdrawn, anxious, aggressive, etc.)
- Did the student seek support or counsel from a trusted adult? If so, who?
- Do parents report a **disruption at home** (loss of appetite, lack of sleep, generally sad or upset)?

Recently Approved Legislation, P.L. 2021, c.338 – S1790

- Drafted in response to tragic death of 12-year-old student by suicide
- Signed into law on January 10, 2022
- Significantly improved based on work of NJPSA's Government Relations Team
- Impacts parental rights and responsibilities, district protocols and reporting obligations, defines range of potential responses to acts of HIB and creates new State-level position

- If student commits crime of "cyber-harassment," creates option for municipal court to order that a minor, under age 16, along with a parent or guardian, attend a class or training to reduce tendency towards such behavior or raise awareness of dangers associated with cyber harassment.
- Provides that parent or guardian **may be fined** up to \$100 for a first offense, and up to \$500 for subsequent offenses for failing to comply with court order
- Creates potential for parent or guardian to be liable in a civil action if parent demonstrates willful or wanton disregard in the exercise of supervision of minor

- If school district policy permits preliminary determination to be made on whether to launch HIB investigation, then:
 - Data on the number of times an incident was determined to be outside definition of HIB and not investigated
 - NJDOE shall review data as part of state monitoring process
 - Supt must be notified in writing of each determination and has authority to order HIB investigation

- Provides parameters for responding to first, second or subsequent acts of HIB by a student
 - 1st offense copy of investigation placed in student record, student may be subject to remedial measures (counseling, behavior intervention services, discipline determined by principal in consultation with appropriate staff)
 - 2nd offense Same as 1st offense
 - 3rd offense Same as 1st offense PLUS school principal required to develop <u>individual student intervention plan</u> which shall be approved by superintendent (may require parent and student to complete a class or training program)
 - Supt. and principal shall consult with law enforcement regarding reporting obligations under MOA

- District must keep written record of date, time and manner whenever district notifies parent or guardian about alleged HIB incident
- Written reports of alleged HIB filed by staff member or contracted service provider shall be filed on a numbered form developed by NJDOE
- Form submitted promptly by principal to superintendent EVEN IF preliminary determination made not to do HIB investigation
 - Kept on file at school, <u>NOT part of student record unless incident results in discipline for other reasons or otherwise required to be maintained (educationally relevant)</u>
 - Must make forms available for <u>online submission</u> as part of anonymous reporting

- Requires districts to include on website the current version of the NJDOE document — Guidance for Parents on the Anti-Bullying Bill of Rights
- Creates position of School Climate State
 Coordinator in NJDOE

- Provisions on <u>cyber harassment crime</u> go into effect immediately
- Other provisions go into effect in July 2022



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NEW LEGISLATION

<u>New Legislation – Reporting Discipline</u> <u>Data on School District Website</u>

P.L. 2021, c.387 – Requires School Report Card to include information on the number, percentages, and demographics of students who receive one or more suspensions, or are subject to physical restraint or seclusion techniques, or who were reported to or arrested by law enforcement pursuant to the MOA between Education and Law Enforcement.

<u>Legislative Update</u>

- P.L. 2021 c. 208 (8/24/2021) Requires BOE of school district with high school or middle school to provide a program for the enforcement of the policy against hazing and adopt appropriate penalties for violation of the policy
- Penalties for violations of the policy may include:
 - Withholding of diplomas or transcripts pending compliance with the rules;
 - Rescission of permission for the organization or group, whose student members are being penalized under the anti-hazing policy, to operate on campus or school property or to otherwise operate under the sanction or recognition of the school district or nonpublic school; and
 - Imposition of probation, suspension, dismissal, or expulsion.
- A penalty imposed under this section shall be in addition to a penalty imposed for violation of any other school district or nonpublic school rule to which the violator may be subject.
- Policy adopted shall apply to each act conducted on or off campus if the acts are deemed to constitute hazing.

New Legislation – Student Suspension

- P.L. 2019, c. 479 (1/21/2020) Requires principal convened meeting between student and appropriate school personnel after multiple suspensions or proposed expulsion from public school to identify behavior or health difficulties. Effective immediately.
 - Personnel school psychologist, school counselor, school social worker, student assistance coordinator, or member of the school's intervention and referral services team.
 - Principal may convene meeting after first suspension if deemed appropriate.

New Legislation – Student Suspension

P.L. 2019, c. 479 (1/21/2020)

- Purpose of the meeting shall be to identify any behavior or health difficulties experienced by the student and, where appropriate, to provide supportive interventions or referrals to school or community resources that may assist the student in addressing the identified difficulties.
- Requirements DNA to removal from regular education program pursuant to Zero Tolerance for Guns Act or other instance in which the safety and security of other students or school staff requires the student's immediate removal.

Hairstyle Discrimination Prohibited

- P.L. 2019, c.272 NJ LAD Revised. Prohibits
 discrimination against persons <u>because of traits</u>
 <u>historically associated with race</u>, particularly focused
 on discrimination based on hair texture and style,
 designated as the "Create a Respectful and Open
 Workspace for Natural Hair Act" or "CROWN Act".
- "Race" is inclusive of traits historically associated with race, including, but not limited to, hair texture, hair type, and protective hairstyles.
- "Protective hair styles" includes, but is not limited to, such hairstyles as braids, locks, and twists.

New Legislation - Surveys

- P.L. 2021, c. 156 This bill allows school districts to administer anonymous voluntary surveys concerning student health once prior written notification has been provided to parents and legal guardians. Specifically, the school district would be able to administer a survey concerning:
 - the use of alcohol, tobacco, drugs, and vaping;
 - sexual behavior and attitudes;
 - behaviors that may contribute to intentional or unintentional injuries or violence; or
 - physical activity and nutrition-related behaviors.

P.L. 2021, c.32 - What the Statute Says

C.18A:35-4.36a Curriculum to include instruction on diversity and inclusion.

1. a. Beginning in the 2021-2022 school year, each school district shall incorporate instruction on diversity and inclusion in an appropriate place in the curriculum of students in grades **kindergarten through 12** as part of the district's implementation of the New Jersey Student Learning Standards.

b. The instruction shall:

- (1) **highlight** and promote diversity, including economic diversity, equity, inclusion, tolerance, and belonging in connection with **gender and sexual orientation**, race and **ethnicity**, **disabilities**, and religious tolerance;
- (2) **examine** the impact that unconscious bias and economic disparities have at both an individual level and on society as a whole; and
- (3) **encourage** safe, welcoming, and inclusive environments for all students regardless of race or ethnicity, sexual and gender identities, mental and physical disabilities, and religious beliefs.
- c. The Commissioner of Education shall provide school districts with **sample learning activities** and resources designed to promote diversity and inclusion.
- 2. This act shall take effect **immediately**. Approved March 1, 2021

New Legislation – AAPI Instruction

• P.L. 2021, c.416 – Requires boards of education to include instruction on the history and contributions of Asian Americans and Pacific Islanders in an appropriate place in the curriculum grades K-12. Must adopt inclusive instructional materials and seek input from Commission on Asian Heritage. Goes into effect for the **2022-23 school** year.



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CASE LAW/NEWS

B.L., a minor, by and through her father LAWRENCE LEVY and her mother BETTY LOU LEVY v. MAHANOY AREA SCHOOL DISTRICT

FACTS

- A frustrated cheerleader after having only made the JV team posted a picture to "snapchat" with a caption "F**k school f**k softball f**k cheer f**k everything."
- The post circulated at least among her 250 "friends" on her feed.
- Someone then ultimately took a screenshot of the post and circulated it further — eventually making its way to the coaches, who then removed her from the team claiming a violation of a school policy relative to extracurricular activities.
- The student challenged the discipline, which the school upheld
 — so, she sued.
- She claimed the discipline violated her First Amendment rights.

B.L., a minor, by and through her father LAWRENCE LEVY and her mother BETTY LOU LEVY v. MAHANOY AREA SCHOOL DISTRICT,

US Supreme Court Decision – June 23, 2021

- Affirms 3rd Circuit Court Finding that the students' rights were violated
- Provides different rational for Decision

When can a School District discipline for off-campus speech?

- The Supreme Court noted that "the school's regulatory interests remain significant in some off-campus circumstances" including:
- Severe bullying or harassment targeting particular individuals
- Threats aimed at teachers or students
- Failure to follow School District rules re:
 - Lessons
 - Writing Papers
 - Use of Computers
 - Participation in other school activities
 - Breaches of school security devices including material maintained within school computers
 - The Supreme Court clearly stated that its Decision was based on the facts within the <u>Levy</u> case which means that each situation should be analyzed on a case-by-case basis.

New Jersey Anti-Bullying Case Law

R.H. and M.H., o/b/o A.H. v. BOE of the Borough of Sayreville, Commissioner 9/23/21

- Petitioners appealed two BOE HIB determinations. (1) BOE determined that A.H. committed an act of HIB when she created a social media post depicting a friend with a mud mask on her face with the caption, "When he says he's only into black girls." a one-day suspension was imposed, and A.H. was removed from student council. (2) BOE determined that A.H. was not the victim of HIB after incidents in which A.H. alleged that she had been called a racist by other students at school. ALJ affirmed both BOE decisions.
- Threshold requirement for a finding of HIB is that the conduct is <u>reasonably</u> <u>perceived</u> as motivated by an actual or perceived characteristic enumerated in the Act or another distinguishing characteristic, and that the conduct <u>substantially</u> <u>disrupts</u> or interferes with the rights of other students or the orderly operation of the school;

New Jersey Anti-Bullying Case Law

R.H. and M.H., o/b/o A.H. v. BOE of the Borough of Sayreville, Commissioner 9/23/2021

- A.H.'s conduct in creating a social media post that any reasonable person should know would have the effect of insulting or demeaning African American students, together with the substantial disruption it created in the operation of the school and the fact that A.H. was aware of the racist nature of the post when she created it, met the criteria for a finding of HIB;
- Mahanoy analysis. A.H.'s social media post caused a substantial disruption to the school. While the disruption in Mahanoy only consisted of a short 5 to 10 minute discussion in Algebra class, the social media post at issue here resulted in students becoming very upset and emotional, creating the potential for altercations such that the principal had to monitor lunch hour for weeks to ensure student safety and to curtail the effects of the students talking about the post throughout the school. Post was made on a platform that enabled many Sayreville Middle School students to see the picture, thus bringing it into the school, where the post caused a substantial disruption and interfered with the school's regular operations.
- Speech involved here is **distinct from the type cited in Mahanoy**, i.e., speech expressing disagreement or criticism; instead, the speech here was a racist photograph and remark which a reasonable person would perceive as offensive to black students.

New Jersey Anti-Bullying Case Law

U.S. Dist. Ct. N.J., 6/1/2020

- Allegations that BOE, principal and superintendent violated NJLAD, U.S. Civil Rights Act and N.J. Civil Rights Act. Defendants motion to dismiss denied.
- HS basketball game at which it was alleged that spectators made monkey sounds, shouted the "n" word and "monkey" at student during the game. Student allegedly suffered psychological distress, PTSD, anxiety and depression.
- Principal/superintendent's failure to respond to fans and decision to eject student's father may have been so unreasonable so that one could infer that principal/superintendent acted with deliberate indifference.
 BOE/adm allegedly not HIB compliant.

The Road to HIB May be Paved with Good Intentions!

- The Road to HIB may be paved with good intentions!
 (K.C. v. Montgomery Twp. SD, Aug. 11, 2016)
 - Students were concerns about a friend and thought she might have a possible eating disorder
 - When student denied having a problem, her friends then went to her boyfriend
 - Determined that student's friends committed HIB despite their good intentions
 - Future implications?

J.P. o/b/o D.P. v. Bd. Of Ed. of the Gloucester County Vo-Tech School District, Commissioner 3/13/2020

- Commissioner held that board did not act in an arbitrary, capricious, or unreasonable manner when it determined that student committed an act of HIB when he called another student "gay." Student admitted using the language but contended that he used the term in a joking manner and did not intend it to be demeaning. In-school suspension imposed as discipline.
- Record contained sufficient credible evidence to support the Board's decision that commenting on or misstating another student's sexual orientation could reasonably be perceived as being motivated by that characteristic. A board can find an act of HIB even if the individual did not intend to cause harm.
- D.P.'s comments substantially disrupted A.G.'s education, and were insulting or demeaning.

Cases Dealing with LGBTQ+ Status

- Greater likelihood to be target for HIB
- Issue complicated by need to avoid potential "outing" of student to parents, others
- Need to address aggressors who claim <u>First</u>
 <u>Amendment</u> right to express religious views

Taking Into Account the Circumstances of Incident when Contacting Parents

Best Practice

- When applicable, inform parent or guardian that the alleged HIB involves perceived sexual orientation or gender identity/expression, but do not share actual sexual orientation or gender identity/expression as part of HIB notice
- Be aware of other sensitive issues that may arise (interracial relationships, disputes related to religion, etc.)
- Ask the student about any issues in the home that the district should be aware when notifying parents and consider student requests regarding parental notice

Transgender Students and Staff

New Jersey law (NJLAD) applies to students and staff members

- Individuals <u>shall</u> be admitted to sex-restricted dressing rooms and restrooms based on their gender identity or expression. N.J.S.A. 10:5-12(f)(1)
- An employer <u>shall</u> allow an **employee** to appear, groom and dress consistent with the employee's gender identity or expression. N.J.S.A. 10:5-12(p)

DOE Transgender Student Guidance

- NDOE Guidance:
 - https://nj.gov/education/students/safety/sandp/transgender/Transgender%20Guidance%20Resources%202018.pdf
- Definitions
- Student Gender Identity <u>Parent consent, court order name</u> <u>change not required</u>; parent notification
- Name and pronoun use, student ID, student dress
- Safe and Supportive Environment staff training, equal access, HIB, social and emotional learning
- Confidentiality and Privacy
- Student Records gender identity v. birth name
- Student Activities
- Restrooms and locker rooms

Janan Wehbeh v. Bd. Of Ed. of the Township of Verona, Commissioner 2/4/2020

- Tenured chemistry teacher found to have committed an unintentional act of HIB through conversation with student about enrollment in AP Chemistry program.
- Teacher's recommendation was that student not enroll in the course, but left decision up to the student; key factors - course difficulty and student's prior performance in honors chemistry course taught by teacher
- Student diagnosed with anxiety and panic disorder; had 504 plan.

J.B. o/b/o J.B. v. Bd. of Ed. of the No. Valley Reg. H.S. District, Commissioner 4/13/2021

Parent alleged that soccer coach bullied her son because of his commitment to academics. After review of the ABS report which found no HIB violation, the Board concluded that the HIB investigation failed to demonstrate that the student was a protected class member or possessed an actual or perceived distinguishing characteristic which served as motivation for the alleged bullying. Parent asserted that student's commitment to academics and his status as a student were distinguishing characteristics.

J.B. o/b/o J.B. v. Bd. of Ed. of the No. Valley Reg. H.S. District, Commissioner 4/13/2021

- ALJ determined that the facts in this case failed to reveal that the coach targeted the student for his academic commitment; now-former coach's questionable treatment of his players was largely universal; not all aggressive, harmful, or demeaning conduct that constitutes a HIB.
- Student's status as a student alone is not a distinguishing characteristic under ABRA.
- ALJ concluded that the Board did not act in an arbitrary, capricious, or unreasonable manner in finding that no HIB occurred.
 Commissioner agreed and dismissed the petition.

Takeaways from Recent HIB Case Law

- Must meet all three elements of the HIB definition to constitute an act of HIB.
- Intent to harm is not required, only that a reasonable person should know that there would be a harmful effect, not that the actor knows there would be such an effect or intended such an effect.
- Teachers, counselors, coaches and school administrators can commit acts of HIB but cannot be victims.
- Not all aggressive, harmful and demeaning conduct constitutes HIB.
- When incidents occur or are spread on social media, harm is increased

Takeaways from Recent HIB Case Law

- Teachers, counselors, coaches and school administrators can be personally liable if they do not address acts of HIB.
- Teacher and school administrator retirees can see a reduction in pension from HIB violations.
- Deference to board of education decision, ALJ fact determinations,
 Commissioner decision.
- The Anti Bullying Bill of Rights Act does not create an independent cause of action.

Takeaways from Recent HIB Case Law

- Statutory and regulatory framework of the Anti-Bullying Bill of Rights Act for adjudicating allegations of HIB satisfies constitutional **due process** requirements.
- ABRA does not require trial-like adversary due process proceedings; no discovery, no right to confront and cross-examine witnesses, etc.; Legislature could have included such procedures but did not.
- Mere status as a teacher does not create an imbalance of power which could be a perceived characteristic. Power imbalance is not a perceived or actual characteristic as defined in the relevant statutes and regulations.
- Student's **status as a student alone is not a distinguishing characteristic** under ABRA.



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HIB PROCESS/INVESTIGATIONS

Reporting Suspected Bias-Related Acts and the Link to Suspected HIB

- Must report to local law enforcement and bias investigation officer for county prosecutor's office whenever school employees "develop reason to believe a bias-related act has been committed or is about to be committed."
- "Bias-related act" means any act "that is motivated in whole or in part by <u>racial</u>, <u>gender, disability, religious, sexual orientation, or ethnic prejudice</u>."
- Note that the reference to "gender" extends to acts motivated by prejudice related to gender identity or gender expression.
- Does NOT have to rise to level of a crime.
- Includes <u>any</u> allegation of HIB involving one of the above protected classes.
- See N.J.A.C. 6A:16-6.3(e)

Communicating with Parents

- Critical to communicate throughout the process
- Notice that their child may have been involved in incident
- Explanation of investigation process
- Notice when investigation completed, and when the BOE will be advised
- Explanation of due process rights
- Review parental rights to access info from investigation
- HOWEVER, no right to be present for student interviews – Goss v. Lopez (1975)

Sharing HIB Records

- What does the parent have a right to know?
- How about the teacher of the victim? The aggressor?
- Who else has a right to know?
- Key test who has a <u>"legitimate educational</u> interest"?

HIB Case Law – Access to Records

- J.L. v. Bridgewater-Raritan Regional School District, 2018 WL 4997195
- Appellate Division, in an unpublished opinion, determined that a district violated parent rights and directed that parents of student found to have engaged in HIB must be provided with
 - "the full record of the HIB allegations ... including the underlying investigative report, [and] any additional written reports or summaries, and the letter from [the victim's] parents to the superintendent."

HIB Case Law – Access to Records

Letter to Wachter, December 7, 2017

 Pennsylvania school district was advised by the U.S. Department of Education Office of the Chief Privacy Officer that a parent had a right to inspect video footage showing her son's role in an on-campus hazing incident, even though the parents of other students did not consent to disclosure of their child's images in the video.

Investigation Steps



- KNOW YOUR STANDARD OPERATING PROCEDURES!
- HIB complaint filed (Staff must report incident on day it occurs, follow up in writing)
- Principal initiates investigation and responds to Code of Conduct issues (Key Q - Is this an allegation of HIB?)
- ABS leads investigation (10 school days to complete)
- ABS writes HIB Report (within 2 school days of completing investigation)
- Superintendent signs off on HIB response
- Board informed of incident
- Parent/Guardian notified of outcome, right to hearing (within 5 days of school board being informed)
- Hearing occurs if requested
- BOE votes to affirm, reject or modify
- Parent retains rights to appeal, pursue other legal avenues

<u>Anonymous Student Reports</u>

- Must have an option for anonymous reporting in every school
- Students need to be made aware of this option
- May have physical option and/or Apps that allow for anonymous reporting
- Cannot conclude that HIB occurred based solely on anonymous report
- Some anonymous reports may be too vague to pursue
- If a school or district has not received any anonymous reports over an extended time period, may raise questions about whether a viable system exists

Search and Seizure

- Reasonable suspicion for school officials, probable cause for law enforcement (SRO)
- Greater expectation of privacy in electronic devices, should only search as last resort
- Make clear who is authorized to search, including at school functions, field trips, athletic events

Due Process Rights

Parents

- Right to know if their child is alleged victim or aggressor
- Right to know outcome of investigation, but not actual discipline imposed on other party
- NO RIGHT TO PREVENT INTERVIEW OR BE PRESENT See Goss v. Lopez (1975 U.S. Supreme Court case)

Students

- Student with Disability IDEA Protections
- Short-term suspension
 - Right to give your side of story prior to decision
- Long-term suspension
 - Right to a hearing before the board of education

QUESTIONS?



Conclusion

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Anti-Bullying Specialist Certificate Program

100% Online Version

As an Anti-Bullying Specialist or Anti-Bullying Coordinator, you need comprehensive professional learning in order to be ready for this challenging role. There is no better team of anti-bullying experts for this type of training than LEGAL ONE's instructors! We have trained thousands of Anti-Bullying Specialists, administrators and others on every aspect of New Jersey's Anti-Bullying Bill of Rights. But we know it can be difficult at times to attend out-of-district professional learning. That's why we are pleased to offer a fully online version of the Anti-Bullying Specialist Certificate Program!

Program Components

The ABS Online Certificate Program offers 16 hours of continuing education. The program consists of an introduction course, three parts (listed below), and a final assessment exam. All components and assessments must be successfully completed in order to earn a program certificate.

- PART I Bullying Law Update and the Role of the ABS
- PART II How to Investigate HIB Claims
- PART III Bullying Response and Prevention
- Bonus Courses and Webinars

Additionally, there are bonus courses and webinars that are not required to earn your certificate. However, our LEGAL ONE team encourages you to explore these school law learning experiences.

Fee: \$500



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