



NJPSAFE

— LEGAL ONE —

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

Emerging Issues and Legal Requirements Related to State and Federal Discrimination Law

March 8, 2024

David Nash, Esq.

Director of Legal Education and National Outreach

PCTVS Contact Information

Affirmative Action/Civil Rights Compliance Officer (Title II, VI, IX, etc.)

Jerry Castaneda, Assistant Principal

Tel: 973-389-4142. E-Mail: jcastaneda@pctvs.org Location: Rocco Building

District Title IX Coordinator

Nic Nese, Director of Athletics

Tel: 973-389-4106 E-Mail: nnese@pctvs.org

Location: Athletic Center

District Section 504 Officer

Nick Bucci, Director of Pupil Personnel Services

Tel: 973-389-4106 E-Mail: nbucci@pctvs.org

Location: General Office

STEM Affirmative Action Officers

Scott Cumberbatch, Supervisor

Tel: 973-389-2014 E-Mail: scumberbatch@pctvs.org

Location: STEM Building

PCTI Sexual Harassment Officers

Michele Rizzo, Director of Special Education

Tel: 973-389-4197 E-Mail: mrizzo@pctvs.org

Location: Child Study Team Office

STEM Sexual Harassment Officers

Mohamed Khairulla, Assistant Principal

Tel: 973-389-7202 E-Mail: mkhairullah@pctvs.org

Location: STEM Building

Nick Bucci, Director of Pupil Personnel Services

Tel: 973-389-4106 E-Mail: nbucci@pctvs.org

Location: General Office

Kim Salma, Supervisor

Tel: 973-389-2007 E-Mail: ksalma@pctvs.org

Location: STEM Building

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.



Participants are authorized to use the LEGAL ONE materials provided in this training to offer turnkey training within the respective participant's school district or place of employment, provided that participants provide proper credit to LEGAL ONE for having developed said materials and further provided that such turnkey training is offered at no charge.

Presentation Materials

Today's document(s) can be accessed at

<https://tinyurl.com/LO-PCTI-240308>



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

Please download all files before the link expires.

Key Topics

- Discrimination Law Overview
- Title IX
- Section 504
- HIB
- Sexual Harassment
- Understanding Boundaries
- LGBTQ+
- Discriminatory discipline – AG guidance
- Mental Health/Suicide Prevention
- Staff member rights/responsibilities

EMERGING ISSUES RELATED TO EQUITY

Mental Health as Protected Category

- NJ Law Against Discrimination
- NJ Anti-Bullying Bill of Rights
- IDEA
- Section 504 - includes protection for those perceived to have mental health impairment
- Local District Policy

Chronic Absenteeism on Rise

- The national average rate of chronic absenteeism in K-12 schools has significantly increased in recent years. According to data from the U.S. Department of Education, nearly 14.7 million students, or 29.7 percent of the student population, were chronically absent in the 2021-22 school year.
- Early data from the 2022-23 school year indicates minor improvement, with 27.85 percent of the student population being chronically absent. These data reveal a substantial increase from the pre-pandemic rate of 16 percent in 2019.

Facts (CDC, 2022)

Researchers looked at 9 different data sources from different years, ranging from 2013 to 2019. Some of the main findings were:

- During this period, the most common disorders diagnosed among U.S. children aged 3–17 years were ADHD and anxiety problems, each affecting more than 1 in 11 children:
 - ADHD 9.8%
 - Anxiety 9.4%
- Depression and suicide were a risk for older children and teens:
 - Among adolescents aged 12–17 years, 1 in 5 (20.9%) had ever experienced a major depressive episode.
 - Among high school students in 2019, more than 1 in 3 (36.7%) reported feeling sad or hopeless, and nearly 1 in 5 (18.8%) seriously considered attempting suicide.
 - About 7 in 100,000 children aged 10–19 years died by suicide in 2018 and 2019.
- Mental disorders can begin in early childhood and affect children across a range of sociodemographic characteristics. Some populations are more affected due to social determinants of health such as poverty, access to education, and geographic area, resulting in [health inequities](#).

Extremism on the Rise

- Indicators of [potential for violent extremism](#)
- January 30, 2023 Episode of The LEGAL ONE Podcast – [Violent Extremism: Identification, Prevention, and Response](#)
- NJ Attorney General’s Report – [Exposing White Supremacy in New Jersey](#)
- March 2023 ADL Report – Spike in [Anti-Semitism in K-12 Schools](#)

Israel and Hamas

- See NJDOE Broadcast email on [October 13, 2023](#)
- The Department is alarmed by reports indicating students are facing harassment at schools based on cultural or religious affiliation, including incidents involving racist and derogatory remarks, online bullying, and other harmful or threatening behaviors. Such incidents are deeply concerning and in direct conflict with the core principles of education, which aim to provide a safe and supportive environment for all students...
- Mindful of our state's diverse student body, **it is imperative that proactive steps** are taken to address incidents promptly. Every student deserves to learn and grow in an atmosphere that promotes respect, understanding, and inclusivity.

Political Pressures

- Avoid “controversial issues” in curriculum
- Remove items intended to signal supportive, affirming environment
- Remove access to books from school libraries
- Refusal to affirm gender identity without parental consent
- Engage in increasingly hostile dialogue on social media

Massachusetts Case

Encouraging Suicide via Text / Cell Phone

- Teen encouraged her friend to go through with his suicide.
 - Text Messages / Phone Calls
- Friend ultimately committed suicide
- Teen convicted of Involuntary Manslaughter – June 2017
 - Sentenced to 15 months incarceration and 5 years probation
 - Massachusetts Appellate and Supreme Court upheld Conviction
- US Supreme Court Denied Cert – January 2020
 - Massachusetts Court rulings stand
- Defendant released from custody – January 2020
 - Must serve remainder of sentence – 5 years probation
- New 2022 Netflix Movie about this case...
- Article Link:
<https://www.cbsnews.com/news/michelle-carter-suicide-text-case-boyfriend-conrad-roy-released-from-jail-today-2020-01-23/>

OVERVIEW OF DISCRIMINATION LAW

Laws You Should Be Aware Of

- New Jersey Law against Discrimination – N.J.S.A. 10:5-12
- CROWN Act – Amends NJLAD to address hairstyle discrimination
- New Jersey’s Anti-Bullying Bill of Rights
- New Jersey Conscientious Employee Protection Act (CEPA)
- New Jersey Equal Pay Act
- New Jersey Civil Union Act of 2007
- Title I, II & V of the Americans with Disabilities Act of 1990 (ADA)
- ADA Amendments Act of 2008 (ADAAA)
- Title VI of the 1964 Federal Civil Rights Act
- Title VII of the 1964 Federal Civil Rights Act
- Title IX of the Education Amendments of 1972
- Equal Protection Clause of the 14th Amendment
- The Age Discrimination in Employment Act of 1967 (ADEA)
- The Individuals with Disabilities in Education Improvement Act (IDEIA/IDEA), 20 U.S.C. § 1400 *et seq.*, 2004
- Section 504 of the Rehabilitation Act of 1973
- Pregnant Worker’s Fairness Act (PWFA) – 2014

Duties of Affirmative Action Officer

- Coordinate required professional development for all staff
- Notify all students and staff of discrimination complaint procedure
- Ensure grievance procedure is followed (note that all claims of discrimination must be investigated)

Investigations

- Access to electronic communications, even on personal devices
- Requirement to investigate, even if employee asks that matter not be investigated
- Right to union representative if potential target of investigation
- Cannot interfere with or obstruct investigation, e.g. talking with colleagues about their testimony
- Right to know outcome, challenge decision

Protected Classes

- Employers--including parochial schools and public-school districts--may not discriminate against staff or students based on:
 - Race
 - Creed
 - Color
 - National origin
 - Ancestry
 - Age
 - Genetic information
 - Pregnancy
 - Sex
 - Religion
 - Disability
 - Military service
 - Atypical cellular blood trait
 - Nationality
 - Mental Health
- NJ LAD
 - Marital/domestic partnership/civil union status
 - Affectional or sexual orientation
 - Gender identification or expression
 - Hair

Key Legal Principles In Addressing Equity

- Disparate Treatment – addressing students differently due to protected characteristic
 - (e.g., prohibiting 2 or more Latinx students to gather out of fear of gang activity)
- Disparate Impact – greater negative impact on individuals in one protected class versus others based on facially neutral policy
 - (e.g., discipline students of color at 2x the rate of discipline for other students for being “disrespectful”)

Key Terms - Microaggressions

- Definition - “Brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative...slights and insults.” *See Sue, D. W., Capodilupo, C. M., Torino, G. C., Bucceri, J. M., Holder, A. M. B., Nadal, K. L., & Esquilin, M. E. (2007). Racial Microaggressions in Everyday Life: Implications for Clinical Practice. American Psychologist, 62, 271-286.*
- Stossel on [stereotypes](#)

Examples of Microaggressions

- See [Common Examples of Microaggressions](#)
- Examples:
 - You speak excellent English
 - You are very articulate
 - You are pretty for _____
 - Anyone can succeed if they work hard
 - As a person of color, what do you think we should do?
 - Standing, rather than sitting in the open seat on a subway next to a person of color
 - All lives matter

Response to Staff Microaggressions

- Dismissive or joking about reported incident
- Failure to recognize when incidents must be reported to affirmative action officer
- Failure to investigate allegations of discrimination
- Retaliation against reporter
- Failure to identify, or respond to, larger school climate issues

Review of General Discrimination Law Standards

The Plaintiff bears the initial burden of establishing a ***prima facie*** case of discrimination under the 3 step, burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) by a preponderance of the evidence.

- Preponderance of the evidence means “more likely than not” that the alleged harassment occurred.
- Lesser standard than Criminal Court’s “beyond a reasonable doubt.”
- Discrimination / harassment may be determined to have occurred even if law enforcement chooses not to pursue a criminal investigation

Review of General Discrimination Law Standards

Step 1 – Plaintiff – Staff Member’s First Burden

The Plaintiff must show that:

- S/he is a member of a protected class;
- S/he is qualified for the position;
- S/he suffered an adverse action
 - Examples include termination, denied a raise/promotion, forced to resign/retire, being excluded, etc
- The circumstances surrounding the adverse action gives rise to an inference of discrimination
 - Example – a male employee/student was allowed to do something when a female in the same/similar position was not

Proof of Discrimination

Step 2 – Defendant’s Burden

- If the Plaintiff satisfies the first burden, the burden shifts to the Defendant to rebut the Plaintiff’s claim by “articulating some legitimate, nondiscriminatory reason” for the adverse action.

Review of General Discrimination Law Standards

Step 3 – Plaintiff’s Second Burden

- If the Defendant meets its burden of the McDonnell Douglas test, the Plaintiff must show that the Defendant’s proffered reasons are pretextual, and are not the real motivation for the adverse action.

- To show that the proffered reasons are pretextual, the Plaintiff must present sufficient evidence to allow a reasonable person to either:
 1. Disbelieve the Defendant’s articulated legitimate reasons; or
 2. Believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the Defendant’s actions.

Comprehensive Equity Plan

- Goal to assure access and equity in the district's educational programs
- Rewritten every three years
- Developed and implemented by Affirmative Action Team/Affirmative Action Officer

Inequities in Classroom Practices

- Equal and bias free access to all classes, programs
- Proportionate minority representation in schools and programs
- Use of multiple, bias-free methods for identification of special needs children
- Focus on narrowing achievement gaps
- Reduce underrepresentation in G & T, advanced classes
- Ensure multicultural curriculum, including African American history and history of other cultures, and instruction on Holocaust and other genocides

Subtle Forms of Race Discrimination:

- Curriculum
- Academic counseling/stereotyping
- “Tracking/Leveling”
- Special education overclassification
- Disciplinary practices

Common Problems in Responding to Discrimination Complaints

- Lack of Reporting
- Informal Response
- Failure to Clarify if Claim of Discrimination Exists
- Lack of documentation
- Inconsistent Enforcement
 - Favoritism / Political Interference
 - Implicit Bias
- Piecemeal/Reactive Approach
- Failure to work on dual tracks
 - Responding to improper behavior while ALSO engaging in interactive process, offering reasonable accommodations

When the System Breaks Down

- Students and staff suffer harm that could have been prevented
- Disciplinary action may be required and/or invalidated
- Chilling effect on students, parents, staff coming forward in future
- Larger impact on overall school climate and culture
- May appear that district is indifferent to or, worse yet, condoning, harmful acts
- Liability increases for district

Law Against Retaliation

- Plaintiff must establish that the School District took an adverse action *after or contemporaneous with* a protected activity of the plaintiff; and
- That a causal link between the protected activity and the adverse action exists
- **Note** – The Plaintiff does not need to win the underlying Discrimination Claim to prevail on a claim of Retaliation, as they are separate claims.

Duty to Report

- Suicidal ideation or attempt – Duty of Care toward students
- Suspected Child Abuse/Neglect – N.J.S.A. 9:6-8.10
- Suspected of Being Under the Influence – See N.J.S.A. 18A:40A-12
- Suspected HIB – See N.J.A.C. 6A:16-7.7
- Dating Violence
- Discrimination
- Sexual Offenses
- Situations that present a danger to adults and/or students (**Suicidal Ideation**)
- Situations that create a hostile educational environment for adults and/or students
- Weapons and other criminal activity
- Other code of conduct issues – See N.J.A.C. 6A:16-7.1
- As required under MOA with law enforcement
- As necessary to address IEP or 504 plan – See N.J.A.C. 6A:14
- Other Foreseeable Harm!

Immunity For Reporters



Staff members who report suspected discrimination issues, child abuse, HIB, drug & alcohol use & teen dating violence are immune from legal liability

TITLE IX

SD Obligations Under Title IX

Title IX: “No person shall be excluded, on the basis of sex, from education programs or activities receiving federal assistance.”

School Districts must:

- Have a policy of equity in employment and nondiscrimination
- Disseminate a notice of nondiscrimination;
- Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities to be free of discrimination (Title IX Coordinator); and
- Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.

Jackson v. Birmingham Public Schools, 544 U.S. 167 (2005)

Facts of the Case

- In 1993, Roderick Jackson, a teacher, was hired by the Birmingham SD BOE to serve as a physical education teacher and girls' basketball coach.
- In August of 1999, Mr. Jackson was transferred to Ensley HS, and discovered:
 - “Girls’ team was not receiving equal funding and equal access to athletic equipment and facilities;
 - The lack of adequate funding, equipment, and facilities made it difficult for Mr. Jackson to perform his job as the team’s coach.”
- “In December 2000, Mr. Jackson began complaining to supervisors about the unequal treatment of the girls’ basketball team.” Id. at 171-172

Jackson v. Birmingham Public Schools, 544 U.S. 167 (2005)

Facts of the Case

- According to Mr. Jackson, his complaints were ignored, and the SD failed to fix the situation.
- After Mr. Jackson complained about his perceived problems pertaining to the Girls' Basketball Team, he “began to receive negative work evaluations and ultimately was removed as the girls' coach in May 2001”
- Mr. Jackson continued his employment as a teacher within the SD, “but he no longer receive(d) supplemental pay for coaching.” Id. at 171-172.

Jackson v. Birmingham Public Schools, 544 U.S. 167 (2005)

Facts of the Case

- After the BOE stripped Mr. Jackson of his coaching duties, he filed the Federal Court lawsuit claiming that the SD had violated Title IX by retaliating against him “for protesting the discrimination against the girls’ basketball team.” *Id.* at 172.
- The BOE moved to Dismiss the case claiming that Title IX’s private cause of action does not include claims of Retaliation. (Losing the coaching position and the negative evaluations after he complained...)
- Both the District Court and the 11th Circuit Court of Appeals dismissed Mr. Jackson’s Claims, and this case was appealed to the U.S. Supreme Court.

Law Against Retaliation

- Plaintiff must establish that the School District took an adverse action **after or contemporaneous with** a protected activity of the plaintiff; and
- That a causal link between the protected activity and the adverse action exists
- Note – The Plaintiff does not need to win the underlying Discrimination Claim to prevail on a claim of Retaliation, as they are separate claims.
- Note – after Mr. Jackson alleged discrimination claims about the girls basketball team, he was stripped of his coaching position and received negative reviews...
- Supreme Court held that coach may be protected under Title IX for seeking to protect female students from discrimination
 - Title IX “does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint.” *Id.* at 179.

Additional Discussion of Title IX Provisions

- Defining Sexual Harassment and Sexual Violence:
 - Unwelcome conduct of a sexual nature
 - “Conduct of a sexual nature” includes both physical and verbal conduct, relating to the victim’s gender, sexual orientation or sexual identity
 - Key test – conduct would not have occurred “but for” the victim’s gender or sex
 - Two types of sexual harassment:
 - Quid Pro Quo
 - Hostile Work Environment

Additional Discussion of Title IX Provisions

- Quid Pro Quo
- Hostile Environment (Work/School)
 - Harassment based on sex that is sufficiently severe, persistent or pervasive to limit a person's ability to function in the workplace, or to create a hostile, or abusive, working environment
 - *Compare, for students* – Harassment that is sufficiently severe, persistent or **pervasive to limit a student's ability to participate in, or benefit from, an educational program**

Hostile Environment Claims

- No need to target a particular individual
- Jokes, Comments, Gestures
- Pictures/Posters
- Social Media Posts
- Mass Email

Title IX Resources

- Basic Checklist for Title IX Compliance
 - <https://opi.mt.gov/Portals/182/Page%20Files/Title%20IX/Title%20IX%20Compliance%20Check%20List.pdf?ver=2017-08-25-093416-373>
- Title IX Reference & Guidance Compliance Checklist
 - <https://titleixreference.weebly.com/compliance-checklist.html>
- Anticipate These Changes to your Title IX “To-Do” List – July 2022
 - <https://www.akerman.com/en/perspectives/anticipate-these-changes-to-your-title-ix-to-do-list.html>
- Q & A on Title IX Regulations on Sexual Harassment
 - <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>
 - Original July 2021 – Updated June 28, 2022
 - Remember distinctions noted re: colleges vs. secondary

NJ LAW AGAINST DISCRIMINATION

New Jersey Law Against Discrimination

- More expansive than federal anti-discrimination statutes
- Victims have option of suing in civil court or filing complaint with New Jersey Division of Civil Rights

Landmark NJ Supreme Court Case

- L.W. v. Toms River case – NJ Supreme Court made clear that NJLAD protects students as well as staff. Case involved student bullied over several years as student moved from elementary school, to middle school, to high school, due to perceived sexual orientation. District held liable for failure to take measures **reasonably calculated to end the harassment when it knew or should have known of the harassment.**
- Note that plaintiff does not have to prove INTENTIONAL discrimination or even deliberate indifference.

REASONABLE ACCOMMODATIONS

Affirmative Duty of Accommodation

- Most anti-discrimination law merely prohibits less favorable treatment based on membership in protected class, *but*
- Two categories - religion and disability – require an affirmative duty of accommodation
- Interactive Process is critical

Examples of Religious Accommodations

- Allowing Orthodox Jewish student to wear a yarmulke even if head coverings are otherwise prohibited
- Arranging for Muslim student to pray during the school day
- We will discuss impact of Bremerton case later

Examples of Disability Accommodations

- Seating
- Time on Test
- Transcripts
- Behavior Intervention Plans (BIP)
- Additional Time Between Classes
- First Floor Classes
- Nutrition accommodations (e.g. nut-free table)
- Protocols for Security Drills

Interactive Process Critical

- Taylor v. Phoenixville Sch. Dist., 184 F. 3d 296 (3rd Cir. 1999)
- No need for “magic words” to put employer on notice
- Secretary to Principal served for 20 years, glowing evaluations
- Hospitalized and diagnosed with bipolar disorder
- District sought to terminate employee.
- Brought suit under ADA
- Court reversed summary judgment for district, held district was on notice and had not engaged in meaningful “interactive process”
 - Learn precise nature of disability
 - Discuss potential accommodations

SECTION 504

Student with a Disability

- For 504 eligibility, student must:
- Have a **physical or mental impairment** that substantially limits one or more major life activity; OR
- Have a **record** of such impairment; OR
- Be **regarded** as having such an impairment.
- But there is NO requirement to provide a 504 plan if the student has a record of an impairment or is regarded as having an impairment. **The team makes that decision.**

Physical Impairment

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems.



Examples of Physical Impairments

- Epilepsy
- AIDS and HIV
- Allergies
- Arthritis
- Heart disease
- Tourette syndrome
- Cerebral Palsy
- Visual impairment
- Broken limbs
- Cancer
- Diabetes
- Hemophilia
- Temporary conditions due to accidents or illness

Mental Impairment

Any mental or psychological disorder, such as mental retardation, organic brain disorder, emotional or mental illness, and specific learning disability.

Examples of Mental Impairments

- **ADD/ADHD**
- Reading disability
- Depression
- Eating disorders
- Conduct disorders
- Past drug addiction (But can discipline)
- Alcohol Addiction (But can discipline)
- Social maladjustment

Major Life Activities

FUNCTIONS	GENERAL ACTIVITIES	MAJOR BODILY FUNCTIONS
Caring for Oneself Performing manual tasks Walking Seeing Hearing Speaking Breathing <u>Learning</u> Working	Eating Sleeping Standing Lifting Bending Reading Concentrating Thinking Communicating	Immune System Normal cell growth Digestive Bowel Bladder Neurological Brain Respiratory Circulatory Endocrine Reproductive Functions

Doctor's Note

- Right to verify
- Right to discuss medications to be taken in school and any actions that are expected or needed for child to be in school
- Right to discuss physical manifestations of medications taken outside of school
- Doctor's notes must be considered, but such notes often extend beyond expertise of doctor, may not be necessary to follow recommendations

Scenario: Unjustified Different Treatment

- Ricardo has a peanut allergy. His fourth-grade class is going on a field trip to the local aquarium and Ricardo's father is told that he must chaperone Ricardo on the trip because the teachers will be very busy and cannot ensure that Ricardo will be protected from exposure to peanuts or peanut products while on the trip, especially during the lunch break. Ricardo's father cannot go on the field trip because he has to go to work. As a result the teachers tell Ricardo he cannot attend the field trip. Ricardo's father complains to the principal, noting that no other parent is required to attend the field trip. Should the school have required Ricardo's father to attend the field trip?

STAFF AND STUDENT FIRST AMENDMENT RIGHTS

Staff First Amendment Rights

Staff Speech Issues - “Pickering Balancing Test”

- Did the statement concern a matter of general public concern?
- Was the employee speaking as a private citizen or during the course of his duties?
- Was the statement likely to disrupt a close working relationship?

Staff First Amendment Case Law

- Melnyk - No First Amendment rights for teacher to alter required curriculum
- Czaplinski - Security guard disciplined for comments related to police officer shooting
- O'Brien - First grade teacher terminated based on comments regarding students
- Knox – High school teacher terminated after making negative comments online about homosexuality, linking comments to school environment

Conduct Unbecoming Decisions

Gregory Janicki v. Washington Twshp SD – 8/31/2021

- Conduct Unbecoming Charges & Other Just Cause Charges filed against tenured Music Teacher.
 - Allegations that he skipped training sessions/meetings re: LGBTQ issues, and other unprofessional behavior in relation to the SD's LGBTQ policies. He also engaged in conduct that is “antagonistic and discriminatory towards students and coworkers in the LGBTQ community, causing turmoil with staff members, and putting the SD at risk for violation state/federal anti-discrimination laws and directives.”
 - Progressive Discipline demonstrated – Increment Withholding
 - See also 3/25/21 Prior Arbitration Decision – MTD granted
- Decision: Sustained. Teacher Dismissed.

Donna Coleman v. Borough of Roselle SD – 8/20/21

- Conduct Unbecoming, Insubordination & Other Just Cause Charges filed against 17 year Tenured English Teacher for post on her personal Face Book account during May 2020 re: George Floyd.
 - Post reported to SD. Many responses to the post
 - SD claimed the incident had caused serious, negative and lasting damage to the Roselle School District community environment and that she provided no plausible explanation to justify her actions and her failure to show any remorse for her hurtful behavior.
- Decision: Sustained. Teacher Dismissed.

Religious Expression SCOTUS

- [Kennedy v. Bremerton SD](#) (June 27, 2022)
- Case involved coach who engaged in prayer immediately after games on the 50-yard line
- District determined not to renew coach due to his failure to follow district policy and continuing to engage in religious speech in violation of Establishment Clause
- U.S. Supreme Court determined that district violated rights of coach under First Amendment

Religious Expression (cont'd)

- Court stressed that speech was during time that other staff members were allowed to engage in personal business
- Court stressed there was no evidence of coercion of students
- Court rejected claim that reasonable observable would conclude that prayer amounted to state endorsement of religion

Student First Amendment Rights

- Substantial Disruption/Interference
- Threatening
- HIB
- Lewd, vulgar
- Promoting Illegal Activity
- In School/School Grounds/School Function/School Device v. Outside of School

B.L., a minor, by and through her father Lawrence Levy and her mother Betty Lou Levy v. Mahanoy Area School District, 594 U.S. (2021)

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 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.
- Student challenged the discipline, school district upheld the discipline.
- Student brought action against school district, alleging that suspension based on her social media post, made on a Saturday, 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, 594 U.S. (2021)

U.S. Supreme Court

- Affirmed Decision that the student's Free Speech Rights were violated
- Provided a different rationale than the 3rd Circuit Court of Appeals

B.L., a minor, by and through her father Lawrence Levy and her mother Betty Lou Levy v. Mahanoy Area School District, 594 U.S. (2021)

- 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

Overlapping Jurisdiction

- Affirmative Action
- HIB
- Title IX Student-to Student Sexual Harassment

DISCRIMINATORY DISCIPLINE

Student Discipline

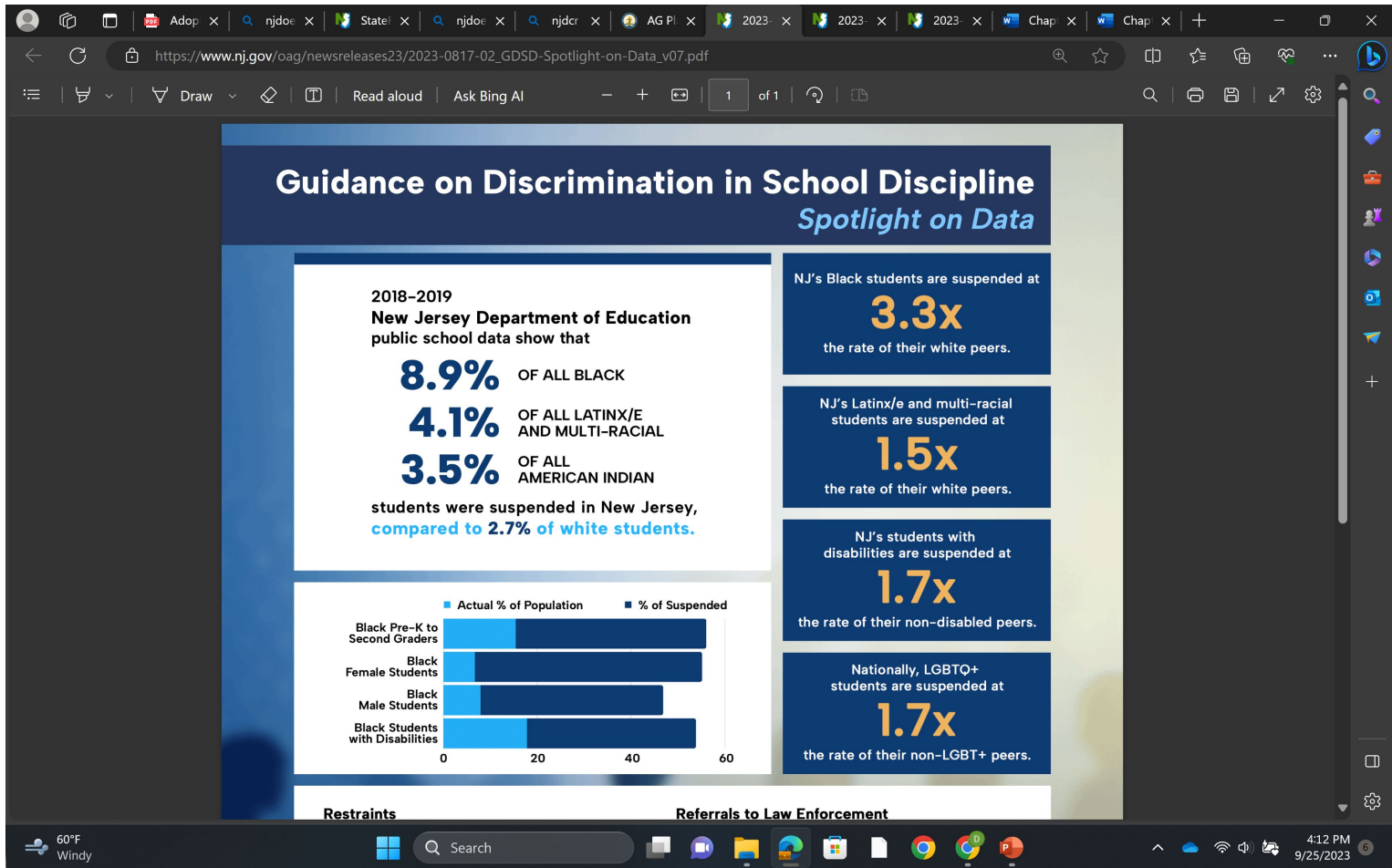
See NJ Division
on Civil Rights
[August 28, 2023
announcement](#)

- See [Discriminatory Discipline Guidance](#)
- See [Compliance Checklist](#)
- See [Administrator's Cheat Sheet](#)

See NJDOE
Broadcast Email
on Improving
Discipline
Practices

- [ImprovingDisciplinePractices.pdf \(nj.gov\)](#)

Data Snapshot



Your Data?

- How does your discipline data compare?
- What other data points may impact equity in student discipline?
 - Teacher referrals
 - Length of discipline for similar behaviors
 - Ability to access due process rights, navigate system (e.g., language proficiency barriers, socio-economic status and related challenges)

LGBTQ+

NJDOE Transgender Student Guidance

- NJDOE Guidance:
 - <https://www.nj.gov/education/safety/sandp/climate/docs/Guidance.pdf>
- Definitions
- Student Gender Identity – Parent consent, court order name change not required; 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

Key Terms

- Gender Identity
- Gender Expression
- Sexual Orientation
- Cisgender
- Transgender
- Queer

Addressing Sensitive Information and Student Concerns

- Consult with student prior to calling parent, determine if student is concerned about sensitive information that may be shared
- Develop game plan for information sharing that considers student concerns
- Examples
 - Sexual Orientation
 - Gender Identity
 - Name, pronouns used in school v. home

BOE Policies Challenging Guidance

- School district adopted policy requiring parental notice
- Attorney General brought complaint against districts, violation of NJLAD
 - See [AG brief](#) in one of those cases
- Preliminary Injunction granted in 4 different school districts, parties still working to resolve issues
- Superior Court ruling on August 18 in 3 cases involving Monmouth County districts – preliminary injunction granted preventing new policies from going into effect, policies would be likely to result in disparate impact, disparate treatment, irreparable harm (decision in Dropbox folder)
- In one district a revised policy adopted by district in question – requiring parental reports in all instances where student is upset.
 - What Impact???

Joint Statement NJDCR & NJDOE

- Excerpts from June 26, 2023 [Joint Statement](#):
- DCR and DOE encourage all New Jersey schools, school boards, and administrators to:
 - continue to develop and implement initiatives to counter bias; to continue to display inclusive markers, flags, and symbols in and around their buildings; to continue to ensure students have access to books representing a diversity of experiences and identities;
 - and to continue to implement and comply with the state’s anti-bias curricula requirements regarding race, gender, LGBTQIA+, disability, and diversity.
- It is consistent with the LAD, for example, for classroom curricula to:
 - intentionally highlight Black history,
 - for a teacher to display a LGBTQIA+ (lesbian, gay, bisexual, transgender, queer, intersex, and asexual) safe zone sticker, or
 - for a school library to include books and other materials that reflect the experiences and identities of children and families of all races, sexual orientations, and gender identities.

RECENT DEVELOPMENTS ON HIB

Revised Law

- P.L. 2021, c.338
- Heightened Scrutiny for Preliminary Determinations
- New 338 Reporting Form for 23-24
 - New form makes clear no anonymous staff reports
- Must include founded HIB complaints in student record for aggressor
- Required Student Intervention Plan after 3rd confirmed offense
 - Note must have plan even if 3 offenses extend beyond 1 school year

Recent Developments

- 12/28/23 [NJDOE Anti-Bullying Task Force Report Released](#)
 - Report includes LEGAL ONE developed tools for assessing Substantial Disruption, making Preliminary Determination
- 7/26/23 - [\\$9.1 Million settlement reached](#) in case involving suicide and alleged failure to address HIB
 - Increased risk of suicidal ideation for students who experience HIB
- NJDOE [7/20/23 Broadcast email – Revised HIB Reporting Form for Staff](#)
 - Revised 338 Form, makes clear no anonymous reporting by staff members

HIB and Student Intervention Plans

- NJDOE guidance indicates that Student Intervention Plan only required for 3 incidents in 1 school year
- HOWEVER, nothing in the HIB statute indicates that the requirement to develop a plan is limited to 3 instances in 1 school year, INSTEAD should develop plan whenever student gets to 3 confirmed incidents while in district

Common HIB Issues

- Less structured times of school day
 - School bus, playground, halls, after school
- Social Media
 - No escape, increases risk
 - Sometimes anonymous
 - Easier to be hurtful
- Reckless Use of Improper Language without Intent to Harm
 - No need to prove intent to harm

Common Claims Against Staff

- Comments/Jokes in Class
- Grades
- Playing Time
- Physical Boundaries
- Disability Status
- Failure to Intervene
- Failure to Report

Staff and HIB

- Unintentional HIB – Webbeh – teacher comments to student with anxiety, panic disorder
- Reduction in pension - Cooke v. Bd. of Trustees TPAF, Aff'd App. Div. 4/14/2020 (2010 had 150 day suspension for using N word, 10 years later had 10% reduction in pension imposed)
- Suspension of certificates
- No First Amendment right to teach what you choose
- Right to necessary information to defend against HIB charge

Common Student to Student Issues

- Comments/actions about race, ethnicity, gender, sexual orientation, weight, appearance
- Social Media – difficult to escape
- Often there is underlying conflict
- Need to assess impact on student – often adults are upset, but students have moved on
- Increase in mental health needs, deterioration of social skills

DUTY TO SUPERVISE

Duty of Care and Student Supervision and Safety

L.E. and P.T. v Plainfield Public School District
456 N.J. Super. 336 (App. Div. Oct. 5, 2018)

- Appellate Division reversed trial court dismissal of student and mother claim against school district and school officials for negligent supervision, alleging that student was sexually assaulted.
- Defendants not entitled to sovereign immunity under the Tort Claims Act; student stated actionable claim that school district and officials breached their duty of supervision; student adequately alleged proximate causation.

Student Supervision and Safety

L.E. and P.T. v Plainfield Public School District 456 N.J. Super. 336 (App. Div. Oct. 5, 2018)

- Last day of student's high school freshman year, June 23, 2011. Students on playground for gym class; boys' and girls' classes combined, no real instruction. No teachers or security guards present on the playground.
- While class was still in session, female student and two boys, whom she knew from classes, left the playground and entered the school; no hall passes notwithstanding school requirement.
- As female student approached girls' bathroom, she was asked to enter the boys' bathroom and she consented. Unwanted sexual encounter occurred.

Student Supervision and Safety

L.E. and P.T. v Plainfield Public School District 456 N.J. Super. 336 (App. Div. Oct. 5, 2018)

- Expert testimony - reasonable measures to prevent student-on-student assault include enforcing a system of hall passes, maintaining supervision of in class and elsewhere, preventing free access into the school building. CCTV system covered the hallway, but no evidence that a staff-person monitored the area, spotted the students or attempted to intervene.
- “School officials have a duty to supervise the children in their care.”
- “Supervisory duty extends to ‘foreseeable dangers... that arise from the careless acts or the intentional transgressions of others.’”
- “School personnel’s supervisory responsibilities may extend to the prevention of unwanted sexual encounters between students.”

Student Supervision and Safety

L.E. and P.T. v Plainfield Public School District 456 N.J. Super. 336 (App. Div. Oct. 5, 2018)

- Jury could find that the presence of teachers would have had a deterrent effect. A teacher exercising reasonable care would not have permitted L.E. and both boys to take a bathroom break at the same time, in the middle of a class period and enter the apparently empty building together.
- If students had been engaged in regular class activities, instead of having a “free day” on the playground during class time, the initial interaction on the playground might have been prevented.
- Had school staff monitored the hallway – personally or through the CCTV system if operational – they may have prevented or quickly responded to L.E.’s entry into the boys bathroom.

RELATED STAFF RIGHTS ISSUES

Lactation Policy

- P.L. 2017, c. 263
- Expands New Jersey Law Against Discrimination to include protections for breastfeeding, expressing milk, related medical conditions
- New Jersey Law Against Discrimination (NJLAD) amended to require, upon request, a nursing mother be allowed reasonable breaks to express milk or breastfeed a child during the workday and given access to a safe, private place near her work area to do so.
- A toilet stall is explicitly inadequate.
- Employers are also prohibited under the NJLAD from terminating an employee for breastfeeding or for taking breaks to express breast milk (“retaliatory termination”).

Expansion of Sick Leave Signed

- P.L. 2023, c. 95 – Governor signs expansion of sick leave
- Revised law identifies 8 different categories of permissible use of sick leave
- Prior definition of sick leave greatly expanded
 - Used to be limited to personal disability or illness, or because of exclusion on account of a contagious disease or being quarantined

MOVING FORWARD

Food for Thought ...

- Focus on your role in creating affirming, inclusive environment
- Immediately report any issues of concern/potential discrimination
- Continue to be open to personal growth
- Honor appropriate boundaries in interactions with students, parents, staff
- Be thoughtful about your social media presence
- Work to ensure that all students feel sense of belonging and connection to school community

Conclusion

- Thank you for choosing professional development with LEGAL ONE!
- Visit our website for more courses that can support your work at <http://www.njpsa.org/legalonenj/>
- Participants are authorized to use the LEGAL ONE materials provided in this training to offer turnkey training within the respective participant's school district or place of employment, provided that participants provide proper credit to LEGAL ONE for having developed said materials and further provided that such turnkey training is offered at no charge.
- If you have any questions about this presentation or suggestions for future seminars, please send an email to legalone@njpsa.org

4 ESSENTIAL PROGRAMS IN SCHOOL LAW EDUCATION



LEGAL ONE (Law, Ethics and Governance for **All Leaders**, including an **Overview of New and Emerging** issues) is the leading provider of education law workshops, online courses, and webinars for school leaders, educators, and other key stakeholders. We can also provide you and your entire team in-district training on any school law matter.



Workshops & Webinars

Live or On-Demand. In-Person or Virtual. Sessions of legal issues in education taught by LEGAL ONE attorneys and subject matter experts.

01



In-District Presentations

Professional learning that is specific to your district with options ranging from comprehensive multi-day series down to a single hour.

02



Online Courses

You have the flexibility to take the course wherever and whenever you choose and to focus more time on the aspects that are most relevant to you.

03



Podcast Episodes

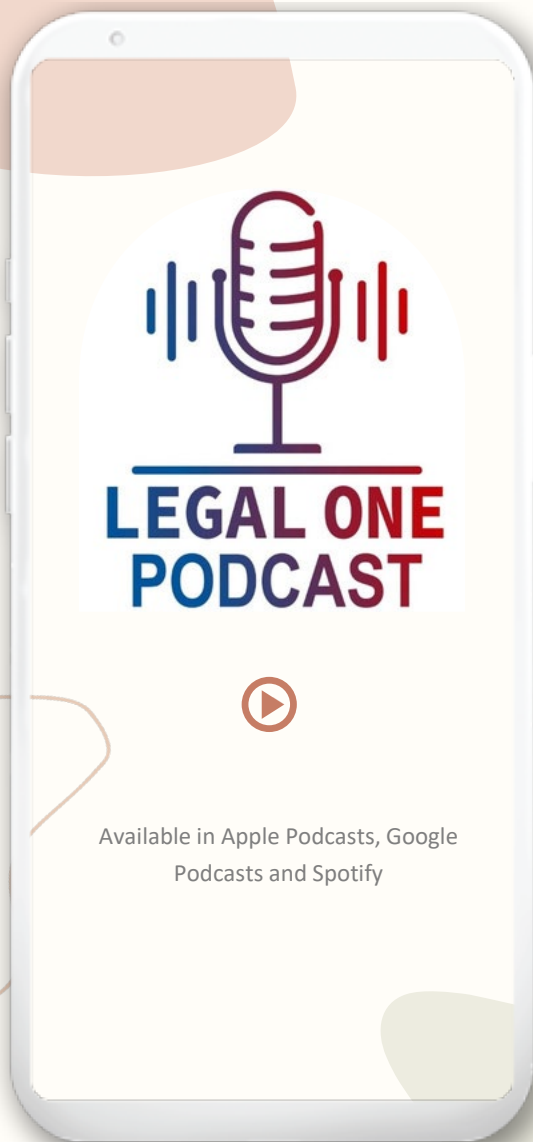
Helping you understand complex legal issues, in brief segments. The format includes legal analysis and commentary and interviews with key stakeholders.

04



609-860-1200

legalone@njpsa.org



ABOUT THE LEGAL ONE PODCAST

As the leading provider of school law training, the LEGAL ONE team of school law experts is pleased to offer the LEGAL ONE Podcast, a weekly podcast that helps you understand complex legal issues. Each episode is hosted by a LEGAL ONE attorney and/or an attorney working in partnership with LEGAL ONE. The format includes legal analysis and commentary and interviews with key stakeholders.

[**LISTEN NOW**](#)



Featured ONLINE COURSE:

AFFIRMATIVE ACTION OFFICER (AAO) ONLINE CERTIFICATE PROGRAM

LEGAL ONE'S AFFIRMATIVE ACTION OFFICER (AAO) ONLINE CERTIFICATE PROGRAM PROVIDES ESSENTIAL KNOWLEDGE, SKILLS, AND TOOLS FOR EVERY AFFIRMATIVE ACTION OFFICER, WHETHER YOU ARE NEWLY APPOINTED OR EXPERIENCED IN THE ROLE. THIS SELF-PACED COURSE COVERS THE EQUIVALENT OF THREE DAYS OF LIVE INSTRUCTION. YOU WILL ALSO HAVE THE BENEFIT OF COMPLETING THE PROGRAM AT YOUR OWN PACE SINCE YOU HAVE ACCESS TO THE ONLINE CONTENT FOR A FULL YEAR. IN ADDITION, YOU WILL HAVE THE OPPORTUNITY TO INTERACT LIVE WITH A LEGAL ONE ATTORNEY FOR A HALF-DAY IN-PERSON SESSION.

REGISTER HERE

FEE: \$500



Certificate & Evaluation

Today's professional development certificate is available to save/download at the end of a **brief** evaluation.

<https://www.surveymonkey.com/r/LO-PCTI-240308>



Please take a few minutes to let us know what you thought of the session!