STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
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DATED: JULY 26, 2004

L.W., A MINOR, BY HIS PARENT AND GUARDIAN, L.G., and L.G. INDIVIDUALLY, **Complainants,**	)	
v.	)	
TOMS RIVER REGIONAL SCHOOLS BOARD OF EDUCATION,	)	**ADMINISTRATIVE ACTION FINDINGS, DETERMINATION AND ORDER**
Respondent.	)	

APPEARANCES:

James R. Michael, Deputy Attorney General, prosecuting this matter on behalf of the New Jersey Division on Civil Rights *(Peter C. Harvey, Attorney General of New Jersey*, attorney), for the complainants.

Thomas E. Monahan, Esq., (*Gilmore & Monahan*, attorneys) for the respondent.

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by L.W., a minor, by his parent and guardian, L.G., and L.G. individually (Complainants), alleging that the Toms River Regional Schools Board of Education (Respondent), subjected L.W. to unlawful discrimination in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On April 26, 2004, the Honorable John Schuster III, Administrative Law Judge (ALJ), issued an initial decision[1]

[1]Hereinafter, "ID" shall refer to the written initial decision of the ALJ; "Tr." shall refer to the transcript of the administrative hearing held on March 26, 2003, April 1, 2003 and April 15, 2003; "Ex. J-" shall refer to the joint exhibits admitted into evidence at the administrative hearing; "CE" shall refer to Complainants' exceptions to the initial decision and "RE" shall refer to Respondent's reply to Complainants' exceptions.

dismissing the complaint. Having independently reviewed the record, the Director rejects the ALJ's dismissal of the case, and instead concludes that Respondent subjected Complainants to unlawful discrimination in violation of the LAD.

PROCEDURAL HISTORY

On March 12, 1999, Complainants filed a verified complaint with the Division alleging that

L.W., a minor student then attending school under Respondent's jurisdiction, was repeatedly subjected to harassment, including physical assault, by named and unnamed students based on perceived sexual orientation, and that Respondent took no corrective action in response to repeated complaints from Complainants. On or about August 11, 1999, Respondent filed an answer denying the allegations of unlawful discrimination. The Division commenced an investigation and issued a finding of probable cause on July 10, 2000. After attempts to conciliate this matter failed, on or about November 20, 2001, the Division transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case. The ALJ conducted a hearing on the merits on March 26, 2003 and April 1 and April 15, 2003. The ALJ left the record open for post-hearing briefs from counsel and accepted same. On July 3, 2003, Complainants moved to supplement the record with evidence that did not exist at the time of the hearing; the ALJ did not rule separately on that motion, but incorporated his motion decision into his recommended decision on the merits of the complaint. After requesting three extensions of time, the ALJ issued his initial decision on April 26, 2004. Complainants filed exceptions to the initial decision on May 17, 2004, and Respondent filed a reply on May 24, 2004. The Director was granted one extension of time to issue his final determination in this matter, which is now due on July 26, 2004.

THE ALJ'S DECISION

FACTUAL DETERMINATIONS

The ALJ summarized the testimony he found to be reliable and credible at pages 3 - 12 of the initial decision, set forth the stipulated facts on page 12 of the initial decision, and set forth his own findings of relevant facts at pages 13 -18 of the initial decision.

The ALJ's findings of fact are briefly summarized as follows, and will be addressed in more detail as needed in the Director's discussion below.

While in the sixth grade, L.W. was teased on a number of occasions because of perceived homosexuality; school staff counseled the students involved and the teasing ceased (ID 13). The ALJ described nine incidents that occurred while L.W. was in the seventh grade. On January 21, 1999, a female student called L.W. "fag" and flipped the back of her hand across the back of L.W.'s head in retaliation for L.W. calling the student a "whore." Assistant Principal Irene Benn counseled both students on the inappropriateness of their conduct (ID 13). L.W.'s mother, L.G., reported to Benn that another student, W., was picking on L.W., but L.G. specifically requested that no action be taken about the W. incident at that time (ID at 13-14). Benn next investigated an incident reported by L.G on February 25, 1999, finding that there had been name-calling back and forth between L.W. and a student named D.M., and that they had thrown play programs at each other. Both students were counseled, D.M.'s mother was contacted, D.M. wrote a letter of apology to L.W. and D.M.'s mother verbally apologized to L.G. (ID at 14). On March 3, 1999, L.G. reported to Benn that some students were taunting L.W. in gym class. The offending students were individually counseled. Ibid. On March 8, 1999, L.W reported that M.S. rubbed against him in the lunch line, and M.S. implicated two other students for making insensitive comments. Benn counseled the three offending students regarding inappropriate conduct and prospective penalties. Ibid. On March 16, 1999, three students were heard making comments about L.W. Two of these students were counseled and warned of the consequences of future occurrences. Because the third student had also been involved in the "rubbing" incident, he was given disciplinary points and his parents were contacted and warned that he would be suspended for the next offense (ID at 15). On the same date, some boys in gym class commented that L.W. should use the girls' locker room. Two of the offending students were warned and counseled, and a third was given disciplinary points because he had previously been counseled. Ibid. On March 17, 1999, a student who had previously been counseled made a harassing comment to L.W. That student was given detention points and his parents were contacted and advised that he would be suspended for the next offense. Ibid.

On April 13, 1999, L.W. was struck on the back of the neck with a gold chain by one student and called "faggot" by another student, in retaliation for L.W. touching the buttocks of the sister of one of the offending students. Both offending students were immediately suspended for five days, and to discourage further incidents, L.W.'s locker was moved closer to the office, the locker room was more closely monitored by staff, and Respondent coordinated communication between L.G. and the mother of the girl L.W. touched (ID at 15-16).

Complainants reported no further incidents during the seventh grade, and none during the eighth grade (ID 16). Two incidents occurred in September 2000, at the beginning of L.W.'s freshman year at Toms River High School South (South). In the first incident, L.W. was verbally and physically assaulted based on perceived homosexuality while walking home from school. School officials immediately suspended the assaulter and suggested that L.W. ride the school bus instead of walking (ID 16-17). On September 23, 2000, while L.W. was at a local 7-Eleven store during lunch recess, another student verbally and physically assaulted L.W. based on perceived homosexuality. The offending student was immediately suspended, and Respondent suggested that L.W. remain on the school premises during lunch (ID 17).

As a result of the September 2000 incidents, L.W. withdrew from Toms River High School South, but he takes a school bus from South to Ocean County's Career and Technical Institute (CTI) every day and regularly enters the South building (ID 17). There have been no incidents of harassment reported to Respondent since September 23, 2000, and L.W. has been relaxed and at ease when at South. Ibid.

At the beginning of each school year, students were advised that harassment of other students for any reason, including sex or sexual preference, would not be permitted; students and parents were given handbooks that stated this policy (ID 13). High school students are lectured on Respondent's nonharassment/nondiscrimination policy, which includes sexual harassment, and were advised that they would be subject to discipline for violations of that policy (ID16). The policy imposes progressive discipline, including education as to why prohibited behavior is inappropriate, but has a zero tolerance policy for offenses involving physical altercations and imposes immediate suspension for such conduct. Ibid.

Respondent acted on every reported incident of verbal or physical sexual harassment, applying its progressive discipline policy in a manner appropriate to the circumstances (ID 16).

ANALYSIS AND CONCLUSIONS OF LAW

Noting that the New Jersey courts have yet to expressly address whether the LAD provides a cause of action for a hostile environment claim based on student-on-student harassment, the ALJ concluded as a matter of law that there is no cause of action for such harassment under the LAD. Moreover, the ALJ concluded that even if student-on student harassment were actionable under the LAD, the hostile work environment standards articulated in Lehmann v. Toys 'R Us, Inc., 132 N.J. 587 (1993) would not be applicable (ID 18). Instead, the ALJ concluded that the federal Title IX[2] standards should be applied, citing Davis v. Monroe County Board of Education, 526 U.S. 629 (1999) to hold that student-on-student harassment is actionable when a school has control over the harasser, the harassment is severe and persistent enough to deny the student an educational benefit, and the school shows deliberate indifference (ID 18-19).

Applying the federal standards to the evidence in the record, the ALJ concluded that L.W. was not denied the benefits of education, and that Respondent did not act with deliberate indifference in reaction to the reports of harassment, either in disciplining the offending students or in ensuring that students were aware of its anti-discrimination and anti-harassment policies and procedures (ID 19-20). Based on these conclusions, the ALJ dismissed the complaint (ID 21).

EXCEPTIONS AND REPLIES OF THE PARTIES

COMPLAINANT'S EXCEPTIONS

Complainants take exception to certain factual findings made by the ALJ, the manner in which the ALJ characterized certain conduct, and some of the ALJ's legal conclusions. Starting with the ALJ's factual findings, Complainants take exception to the finding that "teasing" of L.W. in grade school ceased after school staff counseled the students involved (CE 3), and the

[2] Title IX of the Education Amendments of 1972, 20 U.S.C. §1681.

finding that annual lectures as well as the handbooks distributed to students and parents stated that harassment based on sexual preference would not be permitted (CE 3-4). Complainants also take exception to the ALJ's findings that Respondent had never previously been confronted with harassment based on perceived homosexuality, and that Respondent presented Complainants with the option of L.W. taking his core classes at South and performing arts classes at CTI, or made any remedial suggestions other than remaining on school property during lunch and taking the bus home rather than walking (CE 5). Complainants further take exception to the ALJ's finding that L.W. withdrew from South solely as a result of two incidents that occurred in September 2000, and assert that Complainants decided that L.W. should withdraw based on the cumulative effect of all of the harassment he suffered in the Intermediate School and the High School (CE 6).

Complainants also take exception to the ALJ's characterization of the incidents of harassment as "name-calling," "teasing" and "insensitive comments," citing undisputed testimony regarding specific incidents to support their contention that the ALJ's use of such terms minimized and failed to fully depict the gravity, persistence and scope of the harassment (CE 6-8).

In addition, Complainants request that the Director make additional factual findings based on the transcript testimony. Specifically, Complainants request that the Director find as fact that Respondent had no written protocol for administrators to apply in dealing with harassment complaints, and maintained no coordinated records or reports of harassment of particular students within or between schools in Respondent's district (CE 8-9). Complainants also request that the Director find as fact that Respondent never informed Complainants that they could file a formal grievance under Respondent's affirmative action policy (CE 9).

Complainants also take exception to the ALJ's decision to exclude from the evidentiary record pages from L.W.'s brother's 2003 yearbook, arguing that the documents should be admitted because they did not exist at the time of the hearing, are probative of the continued harassing culture in Respondent's school system, and not "hearsay" (CE 9-10).

Addressing the ALJ's legal conclusions, Complainants argue that the ALJ erred in concluding that there is no cause of action against a school district for student-on-student harassment under the LAD (CE 10-13). Complainants further argue that the ALJ erred in concluding that if such a cause of action did exist, the standards for a hostile environment established in Lehmann v. Toys 'R Us , supra, would not apply to student-on-student harassment (CE 13-17). Finally, Complainants argue that, even under the standards for actionable student-on-student harassment under Title IX of the Education Amendments of 1972, the ALJ erred in concluding that Respondent's conduct did constitute deliberate indifference to the harassment of L.W. (CE 17-23).

RESPONDENT'S REPLY

In reply to Complainants' exceptions to the ALJ's factual findings, Respondent states that

Complainants' challenges to those specific factual findings do not undermine the ALJ's legal conclusions (RE 2). Respondent asserts that the ALJ's factual findings accurately depict all of the incidents Complainants reported to Respondent, and that testimony regarding events in elementary school were only relevant as background, rather than as elements of the within complaint. Ibid. Respondent asserts that it first learned of additional 7th and 8th grade incidents from L.W.'s testimony at the hearing, and that if those incidents had been reported, Respondent would have handled them promptly and effectively (RE 3). Respondent asserts that the testimony of Irene Benn shows that it clearly disseminated its anti-sexual harassment policy to students and parents, and that L.W. was the only 7th grade student who reported sexual harassment during the 1998-1999 school year (RE 3-4). After summarizing the reported incidents, Respondent asserts that it took prompt remedial action in response to each reported incident (RE 2-4).

In reply to Complainants' exceptions to the ALJ's legal conclusions, Respondent argues that the ALJ applied the correct legal standards, and that the LAD does not impose liability on a school district for student-on-student harassment (RE 5). Respondent further argues that if the LAD does prohibit student-on-student harassment, inherent differences between school and

workplace administration make it appropriate to apply the Title IX "deliberate indifference" standard rather than the hostile work environment standards developed by the New Jersey courts (RE 5-6). Lastly, Respondent argues that its actions did not violate either the deliberate indifference standard or the LAD standard developed for hostile work environments (RE 6-7).

THE DIRECTOR'S DECISION

THE DIRECTOR'S FACTUAL DETERMINATIONS

The Director adopts the ALJ's factual findings as summarized above, with certain additions and modifications. The Director is mindful that, under the Administrative Procedure Act and Uniform Administrative Procedure Rules, an agency head may not reject or modify any factual finding based on credibility of lay witness testimony without a showing that the ALJ's findings were not supported by sufficient, competent, and credible evidence, or were arbitrary, capricious or unreasonable. N.J.A.C. 1:1-18.6(c); See also, Cavalieri v. Board of Trustees of the Public Employees Retirement System, 368 N.J. Super. 527 (App. Div.), petition for certif. filed (2004). As noted in more detail below, each of the rejected, modified or additional factual findings do not involve the ALJ's credibility determinations.

First addressing issues raised in Complainant's exceptions, the Director finds that the record supports modifying certain aspects of the ALJ's factual determinations. Initially, the Director agrees with Complainant's contention that there is no sufficient, competent or credible evidence to support a finding that, during L.W.'s elementary school years, teasing based on perceived homosexuality ceased after school staff counseled the offending students. While Respondent correctly notes that the ALJ permitted testimony regarding L.W's elementary school experiences as background (RE 2), Respondent does not point to any testimony or evidence supporting the assertion that teasing ceased at any point in elementary school, and the Director's independent review of the hearing transcripts disclosed no testimony to support such a finding. As there was no testimony at all regarding cessation of teasing, this factual finding was not based on a credibility determination. Accordingly, although it may be relevant only as background, the Director rejects as unsupported by the record the ALJ's finding that teasing ceased during L.W.'s elementary school years (ID 13).

The Director finds that the hearing testimony also supports modifying the ALJ's findings that as part of lectures regarding school rules and student responsibilities presented at the beginning of each school year, students were advised that they were not permitted to harass other students for any reason, including harassment based on sex or sexual preference, and that this policy was included in handbooks distributed to students and parents (ID 13). Initially, it appears to be undisputed that the handbooks and other written materials distributed to students and parents failed to state that harassment based on sexual preference was prohibited, as is demonstrated by the documents labeled "Toms River Intermediate West Student-Parent Handbook" (Ex. J-1), "Toms River Intermediate School West Student Rules, Regulations and Policies" (Ex. J-2) and "Toms River High School South Student Parent Handbook 2000-2001" (Ex. J-9) which were admitted into evidence at the hearing. Those documents state that discrimination based on gender or sex is prohibited, but none of those documents state that discrimination or harassment based on "sexual preference" or "sexual orientation" is prohibited. Although Respondent's "Affirmative Action Overview" (Ex. J-3) states that discrimination based on affectional or sexual orientation is prohibited, that document is not distributed to students or parents (ID 12;Tr. 4/1/03, p. 157, 163). A review of the record disclosed no testimony or other evidence to support the finding that any written materials distributed to students or parents included a policy prohibiting discrimination or harassment based on sexual orientation or sexual preference. Thus, based on the undisputed evidence in the record, and without disturbing any credibility determinations, the Director rejects the ALJ's finding that Respondent distributed handbooks to students and parents which stated a policy prohibiting harassment or discrimination based on sexual preference or sexual orientation.

The Director also finds that the testimony does not support the ALJ's finding that Respondent verbally advised students that harassment based on sexual preference would not be permitted. Irene Benn, who was seventh grade assistant principal during L.W.'s seventh grade year, was responsible for presenting the annual lectures to students on rules and responsibilities, including Respondent's anti-discrimination policies. The redirect testimony of Ms. Benn included the following:

Q: Did you explain that sexual harassment – you just couldn't discriminate against anybody based upon sex, correct?

A: That's correct.

Q: There was no fine definition of words sexual harassment, sexual orientation. You simply indicated you don't bother people or harass them based upon their sexual preference.

A. That's correct.

Tr. 4/15/03 p.141.

However, on recross examination, Benn testified as follows:

Q. When you addressed the students at the beginning of the year, did you actually use the term "sexual preference," that students couldn't be discriminated against because of their sexual preferences?

A. I will not say that I used those exact words. We're talking again to seventh and eighth graders. Although their language may allow us to think that they have a great understanding of that topic, it was terms of sexual harassment, inappropriate language related to that is unacceptable in our schools.

Q. So isn't it true that you never actually dealt with sexual orientation issues? You never used the term sexual - - did you ever use the term sexual orientation when addressing the students?

A. Sexual harassment. No.

Q. Okay.

A. Not sexual orientation.

Tr. 4/15/03 p. 143-144.

Thus, while Benn initially agreed with Respondent's counsel's statement that she "indicated" that students would not be permitted to bother or harass people based on sexual preference, she clarified on cross-examination that her lecture addressed sexual harassment rather than sexual orientation, and she never used the phrases sexual orientation or sexual preference. Respondent's reply does not dispute Complainant's exception on this finding, and the Director's review of the hearing transcripts disclosed no other testimony which would support the finding that Respondent's annual lectures to students advised them that discrimination or harassment based on sexual preference, sexual orientation or homosexuality would not be permitted. For this reason, the Director modifies the ALJ's factual finding to state

that at the beginning of each school year, students were advised that harassment of other students for any reason, including on the basis of sex, would not be permitted, and that students and parents were given handbooks that included this policy, but that discrimination based on sexual orientation, sexual preference or homosexuality were not specifically addressed in the lectures or written materials.

The Director also determines that the record supports modifying the ALJ's finding that Respondent had never dealt with harassment based on perceived homosexuality prior to the harassment of L.W. (ID 20). Although Ms. Benn testified that L.W.'s complaints were the only sexual harassment complaints she received or dealt with during the year L.W was in seventh grade (Tr. 4/15/03, p.142), she did not testify about whether she received sexual harassment complaints in prior years. Moreover, the record reflects that two other administrators previously dealt with harassment based on sexual orientation. Lawrence McCauley testified that he had been assistant principal of High School South for two years before L.W.'s freshman year, and that there had been prior incidents of harassment based on "orientation" while he served as assistant principal (Tr. 4/15/03, p. 181, 205). In addition, Respondent's affirmative action officer, Anne Baldi, testified that at about the same time, Respondent applied its progressive discipline plan on behalf of a student at another of its high schools who was harassed because he was a cross-dresser (Tr. 4/1/03, p. 182-184). Based on this undisputed hearing testimony, and without disturbing any of the ALJ's credibility determinations, the Director finds as fact that Respondent's high school administrators dealt with prior and additional complaints of harassment based on sexual orientation, but that Ms. Benn received no complaints that students other than L.W. were sexually harassed during the 1998-1999 school year.

The Director also finds that the record supports modifying the ALJ's factual finding that school officials suggested as another option that L.W. could take his core classes at South and take performing arts classes at CTI on a part-time basis (ID 7). The hearing testimony supports the finding that, in an effort to ensure L.W.'s safety, Respondent suggested that L.W. remain on school grounds during lunch period and ride the school bus instead of walking. However, Assistant Schools Superintendent John Gluck testified that it was Complainant L.G., rather than

Respondent, who suggested that L.W. attend the Red Bank school and subsequently suggested that he transfer to the new vocational school, and that Respondent cooperated in carrying out the transfer arrangements at LG.'s request (Tr. 4/15/03, p. 209, 213-214, 224).

The Director also modifies the ALJ's finding that L.W. withdrew from South because of two assaults that took place in September 2000 (ID 17). L.W. testified that he and his mother decided that he should withdraw from South after two incidents occurred in the first weeks of 9th grade, in part because they had already given the administration "chances" in the seventh grade, and "it didn't work" (Tr. 3/26/03, p. 77-78). He further explained that he withdrew from South because in 7th grade regular comments progressed to physical harassment, and in 9th grade it started with physical acts, and he "had enough of it" (Tr. 3/26/03, p. 166). There is no contradictory testimony to support a finding that the September 2000 incidents alone prompted L.W.'s withdrawal from South. Based on the undisputed testimony, the Director finds that L.W. withdrew from Toms River High School South as a result of the cumulative impact of the harassment that began in 7th grade.

The Director also finds that the ALJ erred in denying Complainants' motion to supplement the record with pages from L.W.'s brother's 2003 school yearbook. N.J.A.C. 1:1-18.5 provides that a motion to reopen the record may be granted based on extraordinary circumstances. The ALJ made no determination as to whether the yearbook pages did or did not meet the "extraordinary circumstances" standard, but excluded the evidence based on his determination that "the notes were inherently unreliable as double hearsay" (ID 2). However, hearsay evidence is admissible in administrative hearings unless the evidence offered is privileged or the ALJ determines that the evidence will necessitate undue consumption of time or will create a substantial danger of undue prejudice or confusion. N.J. A.C. 1:1-15.1, 1:1-15.5.[3] Moreover, even if the hearsay exclusion were applicable to administrative proceedings, the notes would not be excludable as hearsay because they were not offered to support the truth of the statements written on those pages, i.e., they were not offered to prove that the bias-

[3]Although N.J.A.C. 1:1-15.5(b) further provides that some legally competent evidence must exist to support each ultimate factual finding, this "residuum rule" does not limit the admissibility of evidence.

based comments about L.W. were true. Thus, if a proper foundation were presented to support the reliability of the evidence, it would have been admissible at the hearing.

The remaining question is whether there are extraordinary circumstances to support its admission after the close of the hearing. Because this evidence did not exist at the time of the hearing, Complainants could not have presented it earlier. Complainants' motion was filed only about a week after the parties submitted post-hearing briefs, and the ALJ had not yet issued a recommended decision based on the existing record (and in fact would not do so for a year after the final hearing date).

In opposing Complainants' motion to supplement the record, Respondent questions the circumstances under which the writings were made and asserts that it would be prejudicial for the evidence to be admitted without giving Respondent an opportunity to cross-examine witnesses who could lay a proper foundation for the evidence. Had the ALJ made a timely ruling on Complainants' motion, Respondent could have been afforded an opportunity to cross-examine and present rebuttal evidence. See, e.g., King v. Morrisview Nursing Home, 97 N.J.A.R. 2d (CSV) 341 (1996). The Director finds that the excluded evidence is relevant and non-duplicative, and that based on the circumstances in which it was created, it would meet the extraordinary circumstances standard for re-opening the record. However, the Director determines that there is no need to remand this matter for the ALJ to make factual findings based on this evidence, as the record warrants reversal of the ALJ's decision even without consideration of the excluded evidence. For this reason, the Director has not considered the excluded evidence in reaching his decision on the merits of this case, or in assessing the emotional distress damages or statutory penalties imposed against Respondent.

THE LEGAL STANDARDS AND ANALYSIS

The LAD prohibits both direct and indirect discrimination based on sexual orientation in places of public accommodation, including public primary, secondary and high schools. N.J.S.A. 10:5-4; N.J.S.A. 10:5-12(f); N.J.S.A. 10:5-5(l). Sexual orientation includes being perceived or identified by others as homosexual. N.J.S.A. 10:5-5(hh).

The LAD prohibits harassment as well as other forms of differential treatment based on protected characteristics. See, e.g., Lehmann v. Toys 'R Us, Inc., 132 N.J. 587 (1993); Taylor v. Metzger, 152 N.J. 490, 498 (1998). In the employment context, New Jersey courts have recognized that harassment based on characteristics such as sex, race and creed can create a hostile work environment, and have established legal standards for determining whether such harassment constitutes discrimination in violation of the LAD. Harassment will violate the LAD when the complained of conduct would not have occurred but for the employee's protected characteristic and was severe or pervasive enough to make a reasonable person of the same protected class believe that the conditions of employment have been altered and the working environment is hostile or abusive. Ibid.

In the public accommodation context, the New Jersey courts have held that hostile statements about a person's protected characteristics will violate the LAD even when such comments do not deprive the customer of access to the public accommodation, but merely create an atmosphere which discourages the customer from using the facility at that time or in the future. In Franek v. Tomahawk Lake Resort, 333 N.J. Super. 206, 216 (App. Div. 2000), a single statement indicating that the customer was not welcome because of her disability was held to constitute a prima facie basis for a LAD claim, despite the fact that the statement was made to the customer's daughter, and the customer did not hear the comment directly. In Turner v. Wong, 363 N.J. Super. 186, 213 (App. Div. 2003), the court held that a series of racially hostile statements surrounding one transaction in a donut shop would violate the LAD if they were made "with an actual or apparent design to discourage present or future use of the public accommodation by plaintiff on account of her protected status."

There is no reason to conclude that a hostile environment claim would not be recognized as a form of differential treatment which violates the public accommodations provisions of the LAD applicable to the public schools. The purpose of the LAD is "nothing less than the eradication of the cancer of discrimination." Fuchilla v. Layman, 109 N.J. 219, 334 (1998), citing Jackson v. Concord, 54 N.J. 113, 124 (1969). In enacting the LAD, the legislature created a uniform scheme for eradicating discrimination, including a broad range of remedies and

enforcement mechanisms, applicable to both places of employment and public accommodations.[4] The LAD has prohibited discrimination in public schools since its enactment in 1945. It is worth noting that jurisdiction for enforcement of the LAD was originally vested in the Department of Education and remained there until 1963. Thus, the New Jersey legislature has long made it a priority to ensure that the children of this state have equal and unfettered access to a public education, and has taken forceful action to make discrimination in the public schools a violation of civil rights. Based on the clear public policy of the LAD and the caselaw interpreting it, the Director concludes that harassment based on a protected characteristic may violate the LAD when it creates a hostile environment in a public accommodation, including a public school. Such as hostile school environment existed here.

The Director further concludes that it is appropriate to apply standards similar to those established by the New Jersey Supreme Court in Lehmann, supra, and its progeny, to determine whether bias-based harassment of a student violates the LAD. Thus, harassment of a public school student will violate the LAD where the harassment is based on a student's protected characteristic (such as race, national origin, disability, sexual orientation, creed, etc.), and is severe or pervasive enough that a reasonable student of the victim's protected class would find the school environment hostile or abusive. A school district will be liable for such harassment where the school administration or its agents or employees knew or should have known of the harassment and failed to take effective measures to stop it. Lehmann, supra, 132 N.J. at 623; Blakey v. Continental Airlines, Inc., 164 N.J. 38, 62 (2000).[5] When this happens a hostile school environment has been created.

[4]Employment discrimination claims based on forced retirement are an exception to this uniform scheme, as the LAD does not permit a Superior Court action for such claims and limits the remedies to reinstatement with back pay and interest. N.J.S.A. 10:5-12.1.

[5]In workplace harassment cases, the courts have established distinct employer liability standards for harassment committed by co-employees and supervisory employees. For supervisory harassment, employers are strictly liable for equitable damages and relief, while liability for compensatory damages is governed by agency principles, including negligence. Lehmann, supra, 132 N.J. at 636. Employers are not liable for co-worker harassment unless "management-level employees knew, or in the exercise of reasonable care should have known, about the campaign of harassment." Heitzman v. Monmouth County, 321 N.J. Super. 133, 146 (App. Div. 1999); see also, Blakey, supra, 164 N.J. at 62. A school district's liability for bias-based student-on-student harassment should be governed by the standards for co-worker harassment, imposing liability **only** where the school district knew or should have known of the harassment and failed to take action reasonably calculated to end it in light of the known circumstances.

In reaching this conclusion, the Director rejects the ALJ's determination that, if student harassment is actionable under the LAD, such cases should be governed by the standards established by the federal courts for student discrimination cases brought under Title IX of the Education Amendments of 1972. Although Title IX standards were applied in the only reported decision addressing the question of what standards should be applied to a school harassment claim under the LAD, K.P. v. Corsey, 228 F. Supp. 2d 547, 550 (D. N.J. 2002), that case was reversed by the Third Circuit in an unpublished decision. 77 Fed. Appx. 611, 2003 WL 22338566 (3rd Cir. Oct. 14. 2003). In concluding that the District Court should have remanded the student's LAD claim to the state courts to address the novel and complex issue of what standards should be applied, the Third Circuit noted that the general tone of the New Jersey Supreme Court's recent opinion in Frugis v. Bracigliano, 177 N.J. 250 (2003), which articulated standards for school officials' duty of care to students, raised some doubt that the New Jersey Courts would adopt Title IX standards for LAD claims. 77 Fed. Appx. at 613. Thus, application of Title IX standards to state anti-discrimination statutes is by no means automatic, and the question of what standards should be applied is to student harassment claims under the LAD is an issue of first impression.

The ALJ gave two reasons for following Title IX. First, he stated that Complainants "are virtually making a recognized Title IX claim" (ID 18). However, even in the employment discrimination context, where the allegations supporting a LAD claim may be identical to those asserting a Title VII or ADA claim, the New Jersey courts have not hesitated to interpret the LAD to provide broader protections for discrimination victims than are provided by federal law. See, e.g., Hurley v. Atlantic City Police Department, 174 F. 3d 95, 121, n. 19 (3rd Cir. 1999) ("LAD is a remedial statute, in some respects broader and more flexible than Title VII...this is so even though New Jersey often looks to the federal system for interpretive authority.")

For example, under the LAD employers are strictly liable for equitable relief flowing from the harassing acts of their supervisory employees, while there is no such strict liability under federal law. Gaines v. Bellino, 173 N.J. 301, 312 (2002). In addition, under the LAD an employer's anti-harassment policy and its preventative and remedial procedures must meet

more rigorous standards to operate as a defense to a workplace harassment claim. Id. at 314-315. For disability discrimination claims, the LAD has been interpreted as significantly broader than the analogous provisions of the federal ADA, covering employees who would have no protections under the ADA, such as those with temporary disabilities and disabilities which do not substantially limit a major life activity. Viscik v. Fowler Equipment Co. Inc., 173 N.J. 1 , 16 (2002). Accordingly, although the New Jersey courts have not yet articulated a precise legal standard to be applied to bias-based harassment in a school setting, it cannot be automatically assumed that less protective federal standards would be adopted for harassment that violates the LAD in a non-employment setting.

Moreover, fundamental differences between the federal and New Jersey anti-discrimination statutes demonstrate that Title IX standards are inappropriate for student harassment claims under the LAD. While the New Jersey legislature enacted a unified broad-reaching anti-discrimination statute applicable to both employment and public accommodations, including schools, Congress addressed discrimination against students in a much more limited manner than discrimination against employees. Title VII of the Civil Rights Act of 1964 (Title VII) creates a fairly expansive prohibition against employment discrimination, with a broad private right of action, while Title IX establishes a much narrower private cause of action for discrimination against students, prohibiting only recipients of federal educational funds from discriminating against students based on sex.[6] 29 U.S.C.A. 1681(a). Based on the differences between these two federal statutes, the United States Supreme Court has declined to apply Title VII standards to violations of Title IX, and established more restrictive standards for imposing liability against school districts for sexual harassment of students. A discrimination victim may recover under Title IX only where the school district "acts with deliberate indifference to known acts of harassment in its programs or activities." Davis v. Monroe County Board of Education, 526 U.S. 629, 633 (1999). Moreover, to be actionable, the harassment must be "so

[6] Title IX, like Title VII, does not prohibit discrimination based on sexual orientation, although same-sex sexual harassment is prohibited by Title VII. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79-80 (1998).

severe, pervasive, and objectively offensive, that it effectively bars the victim's access to an educational opportunity or benefit." Ibid.

In defining this "actual notice/deliberate indifference" standard, the Court relied on the more limited scope of Title IX as compared to Title VII, as well as the congressional intent evidenced by the language of each statute. While Congress decreed that there should be an outright prohibition on employment discrimination throughout the national economy, in Title IX Congress only prohibited sex discrimination by entities that choose to contract for federal educational funds. Gebser v. Lago Vista Independent School District, 524 U.S. 274, 286 (1998).

More specifically, based on the explicit language of Title VII, an employer can be held vicariously liable for discriminatory acts of its agents. In contrast, the Supreme Court specifically rejected any agency-based or vicarious liability under Title IX. 42 U.S.C. §2000e-2(a); Gebser, supra, 524 U.S. at 283; Davis, supra, 526 U.S. at 642. Under Title IX, where a student has been sexually harassed by a teacher, an employee or another student, the funding recipient can only be held liable for its own conduct, i.e., its own failure to respond to discriminatory acts of such third parties, which occur in a context subject to the funding recipient's control. Davis, supra, 526 U.S. 629, 640-641. In addition, while Title VII employs a negligence standard to impose liability where an employer knew or should have known of discriminatory conduct, a Title IX funding recipient may be held liable only where it had actual, rather than constructive, notice that a student was being sexually harassed.

The broader reach of the public accommodation provisions of the LAD as compared with Title IX further demonstrates that the Title IX standards should not apply to bias-based student harassment claims under the LAD. The LAD is a remedial statute, and is to be liberally construed to effect its purposes, which include an explicit ban on discrimination based on sexual orientation in the schools. N.J.S.A. 10:5-3; N.J.S.A. 10:5-5(l). While the LAD was enacted to enforce the New Jersey Constitution's guarantee of civil rights, N.J.S.A. 10:5-2.1, the United States Supreme Court has interpreted Title IX as legislation enacted pursuant to Congress' spending power, operating akin to a contract in which the funding recipient agrees to

comply with specific conditions in exchange for federal monies. Davis, supra, 526 U.S. at 640. Like a contracting party's liability for breach of a contract, under spending legislation a funding recipient can be held liable only for violating conditions it affirmatively accepted, based on prior clear Congressional notice of its potential liability. Id at 640-641. The Supreme Court has stated that it imposed the high deliberate indifference/actual notice standards to ensure that a school district could not be held liable for independent actions of others rather than its own official decisions. Id. at 642.

The scope of liability under the LAD is significantly broader, specifically prohibiting direct and indirect discriminatory acts of "any owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation." N.J.S.A. 10:5-12(f). Based on similar language in the LAD, the New Jersey Supreme Courts have imposed liability on real estate owners, agents and brokers under agency principles for their employees' discrimination in real estate transactions. N.J.S.A. 10:5-12(g) and 10:5-12(h); Robinson v. Branch Brook Manor Apartments, 101 N.J. Super. 117,120-121(App. Div. 1968) certif. denied 52 N.J. 487; Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 405-406 (1973). In contrast, only the funding recipient itself can be held liable under Title IX. See, e.g., Soper v. Hoben, 195 F. 3d 845,854 (6th Cir. 1999), cert. denied, 530 U.S. 1262 (2000).

Further, the LAD explicitly provides discrimination victims with a choice of two comprehensive enforcement mechanisms, permitting victims to choose either administrative investigation, enforcement and prosecution through the Division or the direct filing of a private action in the Superior Court of New Jersey. In contrast, Congress provided no explicit private right of action in Title IX, leaving it to the courts to determine whether an implied right of action should be available for discrimination against students, and to shape the parameters of such an action. See, e.g., Gebser v. Lago Vista Independent School District, 524 U.S. 274, 281(1998) and cases cited therein.

Thus, the New Jersey Legislature has put student discrimination claims on equal footing with employment discrimination claims under the LAD, establishing the same expansive rights and remedies for both types of discrimination. In contrast, Congress chose not to afford

students the wide-ranging protections provided to employees, relegating its prohibition against discrimination to a condition for receipt of federal funds. For this reason, although Congress has provided a solid basis for applying a stricter liability standard in federal school discrimination cases than is applicable to federal employment discrimination cases, a similar rationale cannot be applied to set a more restrictive liability standard for discrimination against students under the LAD. Moreover, the more expansive reach of the public accommodations provisions of the LAD as compared with Title IX further demonstrate that the reasons for restricting liability under Title IX are not applicable to the LAD's prohibition against bias-based harassment of students in the public schools.

As a second rationale for applying the less protective Title IX standards, the ALJ relied on the Supreme Court's statement in Davis v. Monroe County Board of Education, 526 U.S. 629, 651 (1999) that "Courts...must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults." While there is merit to the observation that the immaturity of children may increase the likelihood that school students will be exposed to hurtful behavior, it is also important to recognize that schools are responsible for teaching children what types of behavior are and are not acceptable. Indeed, the Court in Davis went on to note that, "at least early on, students are still learning to interact with their peers," ibid, and recognized that school officials have more authority and ability to control and influence student behavior than employers may have in the workplace. Id. at 646.

The school's duty includes teaching students what constitutes unlawful discrimination, as distinguished from general immature and "insensitive" behavior which is not bias-based. "Conduct considered normal and non-discriminatory twenty years ago may well be considered discriminatory today." Lehmann, 132 N.J. 587, 602. In past decades, the schools have made great strides in teaching children to reject racial, ethnic and religious biases they may have learned elsewhere in our society. School administrators must undertake the same type of educational efforts when they discover that a student is a possible victim of bias-based harassment or bullying. The LAD was not amended to prohibit discrimination based on sexual

orientation until 1991. This relatively recent legislative recognition that people need and deserve protection from discrimination based on sexual orientation warrants similar educational efforts in our schools, to create a culture of acceptance, and to affirmatively reject the bigotry and biases that still permeate some aspects of our society. Our school districts are in the best position to educate students, in an age-appropriate manner, with the goal of eradicating sexual orientation discrimination from the schools.

Moreover, the schools and their boards of education and administrators, have a duty to protect children from harm. As the New Jersey Supreme Court recently stated in a negligence action alleging that a school principal sexually harassed students,

> The law imposes a duty on children to attend school and on parents to relinquish their supervisory role over their children to teachers and administrators during school hours. While their children are educated during the day, parents transfer to school officials the power to act as the guardians of those young wards. No greater obligation is placed on school officials than to protect the children in their charge from foreseeable dangers, whether those dangers arise from the careless acts or intentional transgressions of others. Although the overarching mission of a board of education is to educate, its first imperative must be to do no harm to the children in its care.

Frugis v. Bracigliano, 177 N.J. 250, 268 (2003). Although Frugis was a common law negligence action rather than a LAD claim, a school district's duty to protect students from foreseeable discrimination is relevant to determining liability standards for LAD claims.

Recognizing that school students may need guidance as to what is and is not discriminatory behavior, although a school may not be expected to protect students from all peer harassment, its duty to protect students includes the duty to take appropriate preventative and remedial action to protect students from foreseeable bias-based harassment. Also, this encourages both victims of bias-based bullying and harassment and others who may observe incidents of such harassment, such as teachers, coaches, bus drivers, and other school staff, to report all such incidents to administrative personnel. This duty of care is crucial for students, since unlike employees who can choose to leave the hostile environment by getting another job, minor children are required by law to attend school, and will usually not have the option of simply leaving school to escape the harassment. The recent enactment of N.J.S.A. 18A:37- 13

to -19,[7] declaring that harassment, intimidation and bullying should not be tolerated, and requiring each school district to adopt and disseminate a policy prohibiting harassment, intimidation or bullying based on protected or other distinguishing characteristics, is further evidence of the legislature's recognition that schools have a duty to protect students from bias-based peer harassment. For these reasons, the Director concludes that although society's behavioral expectations for children in a school setting may differ from expectations for employee conduct in the workplace, such differing expectations do not justify rejecting a Lehmann-type standard in favor of the minimal "deliberate indifference" standard applied to Title IX.

Thus, although the New Jersey courts have not yet had the opportunity to explicitly apply the LAD to bias-based peer harassment of students, based on the solid body of anti-discrimination law that has been developed by the courts of this state, and even recently by the Legislature and the Governor in establishing the new Anti-Bullying Law, the Director concludes that it is necessary and appropriate to hold that such harassment violates the LAD where it was severe or pervasive enough that a reasonable student of the victim's protected class would find the school environment hostile or abusive. Further, a school district will be liable for bias-based peer harassment where it knew or should have known of the harassment and failed to take action reasonably calculated, in light of the known circumstances, to stop it.

Turning to the evidence in the record here, the Director concludes that, applying either a Lehmann-type standard or a deliberate indifference standard, L.W. was subjected to bias-based harassment in violation of the LAD, and Respondent is liable for that harassment. Initially, the Director concludes that, based on the ALJ's factual findings and the undisputed testimony

[7]The New Jersey Anti-Bullying Law was passed by a unanimous vote of both houses of the State Legislature, and signed into law by Governor James E. McGreevey on September 6, 2002. Upon signing the legislation, Governor McGreevey announced that "[o]ur children deserve to receive a quality education in a safe environment, where they are free from threats and harassment...cruel and harmful treatment - - whether at school, on the bus, or at a school function - - will not be tolerated." Governor McGreevey Signs Law Requiring Schools to Develop Anti-Bully Policies, press release dated September 6, 2002, http://www.state.nj.us/cgi-bin/governor/njnewsline/view_article.pl?id=847. Additionally, the legislation's principal Senate sponsor announced that "We can no longer act like bullying is harmless with no long-term effects. Bullying incidents can have a life-long - - and sometimes life-ending - - impact." Ibid.

regarding the physical assaults and verbal harassment of L.W., he was subjected to harassing acts and statements because he was perceived to be homosexual, and the harassment was severe or pervasive enough to make a reasonable student believe that his school environment had become hostile or abusive. The record supports the conclusion that the harassment was based on perceived homosexuality, as L.W.'s undisputed testimony demonstrates that the harassers made some reference to homosexuality, including use of terms such as "faggot," "gay" and "homo," in each incident of verbal and/or physical harassment.

The record also supports the conclusion that the incidents were sufficiently severe or pervasive that a reasonable student would find the school environment hostile or abusive. The complaint in this matter was filed on March 12, 1999, following a series of incidents which took place from January 21, 1999 through March 8, 1999. Additional incidents took place on March 16, 1999, March 17, 1999 and April 13, 1999. All of these incidents were reported to Respondent immediately or soon after they occurred. Thus, within a period of less than four months, L.W. was subjected to at least nine incidents of bias-based harassment, two of which included some form of physical assault, and one included physical touching in the form of a simulated sex act. Some of these incidents were sufficiently severe that his mother felt it appropriate to keep him out of school for one or more days.

In assessing the severity of the harassment, the Director notes that the ALJ's descriptions of the incidents of harassment in his factual findings in large part did not include the content of the statements made to L.W., and thus omitted any reference to the bias-based or anti-homosexual nature of those incidents of harassment. For example, the ALJ found that L.G. complained that a student "had called L.W. names" (ID 13), another student "was picking on L.W.," "there was name-calling back and forth," "some students were making comments and taunting L.W.," students were "making insensitive comments" (ID14) and three other students "were heard making comments about L.W." (ID 15). The undisputed testimony provides the details which support the Director's conclusion that the harassment was bias-based, severe, and pervasive (Tr. 3/26/03, pp. 40, 44, 45, 47, 51-52, 58, 70-71, 75, 163). In looking to that

undisputed testimony to fill in the gaps, the Director is not rejecting any of the ALJ's credibility findings or factual findings based on credibility of witnesses.

Specifically, L.W. testified that he reported the following incidents to Respondent: in the gym locker room, a student named W, accompanied by a group of students unknown to L.W., told L.W. "If you had a pussy I'd fuck you up and down" (Tr. 3/26/03, p. 40); at play practices a student named R.G. called him "fag" and "homo" (Tr. 3/26/03, p.44) and a student named D.M. repeatedly hit him on the head with a play program and called him "faggot" and "homo"(Tr. 3/26/03, p.45); in the school cafeteria lunch line, a student named M.S. called him "gay" and "faggot" and grabbed L.W.'s private area, "humped" him and asked him "Do you like it, do you like it like this?" and then came back and did it again (Tr. 3/26/03, p.47); a student named D.R. slapped L.W. in the face and told him he shouldn't be touching D.R.'s sister because he is a "fag" and a student named W.K. hit him in the neck with a thick neckchain, while they said laughed and said "faggot...get out of here, we don't want you here" (Tr. 3/26/03, p.51-52); a group of boys called him "faggot" and "homo" in gym class (Tr. 3/26/03, p. 58); three students accosted him on his way home from school, one asking him if he was a "faggot" and another telling him that he and his family do not like "faggots" before knocking him down and punching him in the face (Tr. 3/26/03, p.70-71); and at a local 7-11 store during lunch recess, a student named L.T., accompanied by other students, grabbed his shirt, pushed him down and kicked mulch in his face while telling L.W. that if he ever had a crush on him or one of his friends again he'd kick his ass (Tr. 3/26/03, p.75).[8]

In their exceptions, Complainants assert that the ALJ's description of the harassment using terms such as "name-calling" and "insensitive comments" minimizes the severity of the harassment (CE 6). It is unclear whether the ALJ's intent was to portray the harassment as less than severe, or merely to avoid repeating offensive words and phrases. In any event, the anti-homosexual content of the harassing comments made to L.W. are relevant to assessing

[8]These off-campus incidents at lunch recess and before L.W. arrived home from school are subject to school disciplinary procedures. See, e.g., B.J. and L.F. v. Board of Education of Tp. of Teaneck, 93 N.J.A.R. 2d. (EDU) 424, citing R.R. v. Board of Education of Shore Regional Sigh School District, 109 N.J. Super. 337 (Ch. 1970). Respondent has not disputed this issue.

severity here, just as the racially hostile content of comments would be relevant to a racial harassment claim. Based on the ALJ's findings, as well as the undisputed testimony, the Director concludes that L.W. was subjected to severe and pervasive harassment based on perceived homosexuality. The Director further concludes that L.W. did not react to the harassment in a hypersensitive or idiosyncratic manner, and that a reasonable student would find the school environment to be hostile or abusive. As a result, even before the high school assaults, the bias-based harassment of L.W. was severe or pervasive enough to make a reasonable student believe the school environment was hostile or abusive. Looking further to L.W.'s high school experiences, he suffered two severe bias-based physical assaults within the first weeks of school, which any student would find hostile or abusive.

To determine whether Respondent is liable for the student-on–student bias-based harassment, it is appropriate to look to the standards established for imposing liability on an employer for co-worker harassment. Under the LAD, an employer may be held liable for harassment committed by its supervisory employees as well as co-workers of the discrimination victim. See, e.g., Blakey v. Continental Airlines, Inc., 164 N.J. 38, 62 (2000). Such liability may be understood to flow from agency principles, or may be seen as direct liability for the employer's own failure to act.

> When an employer knows or should know of the harassment and fails to take effective measures to stop it, the employer has joined with the harasser in making the working environment hostile. The employer, by failing to take action, sends the harassed employee the message that the harassment is acceptable and that management supports the harasser...."Effective" remedial measures are those reasonably calculated to end the harassment. The "reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment.

Lehmann, supra, 132 N.J. at 623.

The process by which the employer determines the sanctions it imposes on the harasser is one element to be explored in evaluating the effectiveness of its remedial measures. Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 537 (1997). An investigative and remedial scheme that is not undertaken promptly or that "unnecessarily and unreasonably leaves the

employee exposed to continued hostility in the workplace is an ineffective remedial scheme." Id. at 538.

In determining whether an employer is liable for bias-based harassment, "the absence of effective preventative mechanisms will present strong evidence of an employer's negligence." Lehmann, supra, 132 N.J. at 622. An employer's failure "to have in place well-publicized and enforced anti-harassment policies, effective formal and informal complaint structures, training, and/or monitoring mechanisms" will also be evidence of such negligence. Id. at 621.

It is appropriate to apply the same types of criteria in evaluating a school district's liability for bias-based harassment of its students. The New Jersey Supreme Court has itself drawn the comparison between standards for protecting students and the Lehmann standards for workplace harassment, encouraging school districts to promulgate effective training and reporting mechanisms based on their parens patriae role to ensure the safety of students, and also to lessen the likelihood that schools will need to defend against sexual abuse lawsuits. Frugis v. Bracigliano, 177 N.J. 250, 273-274 (2003)(citing Lehmann's holding that employers can be liable for supervisors' sexual harassment if they negligently or recklessly fail to implement explicit anti-harassment policies which include effective procedures for investigating claims and taking remedial action.)

Here, Respondent's preventative measures were extremely limited. Neither Respondent's annual lectures to students nor the written materials distributed to parents or students specified that discrimination or harassment of students based on sexual preference, sexual orientation or actual or perceived homosexuality would not be permitted or tolerated. Respondent's verbal notice of its anti-harassment policy was relegated to part of its annual lecture to students which, in one class period at the beginning of the school year, covered all rules and student activities. The anti-discrimination policy in the student/parent handbook (Ex. J-1, p. 28) states that Respondent is committed to maintaining an instructional environment free from harassment of any kind, including sexual harassment, and defines sexual harassment as "unwelcome and sexual advances, request for sexual favors and other verbal or physical conduct of a sexual nature." While the "humping" incident might fall under this definition of

prohibited conduct, the definition would not put the reader on notice that anti-homosexual harassment would be included. Moreover, although the Rules and Regulations distributed to students includes a listing of minimum penalties for 22 different offenses, including disruptive behavior, profanity and fighting, there is no mention of bias-based harassment of other students either separately or as an example of another offense (Ex. J-2).

Moreover, even after Complainants reported at least nine incidents of bias-based harassment in less than 4 months, perpetrated by at least eighteen different students (ID 13-17; Tr. 4/15/03, p. 23, 55, 84) and including incidents on two consecutive days perpetrated in part by repeat offenders, Respondents took no action to unequivocally put the student body as a whole on notice that anti-homosexual harassment would not be tolerated, to clearly explain what types of conduct constitute such bias-based harassment, to explain the procedures for reporting such harassment, or that such conduct would be punished as a violation of Respondent's anti-discrimination policies. Especially when dealing with children, who by virtue of their inexperience may not have a full or clear understanding of words and phrases used in anti-discrimination policies, the failure to monitor its anti-discrimination policies to ensure that students understand both the conduct prohibited and the procedures for seeking relief from such discrimination further impairs the effectiveness of Respondent's anti-harassment policy. Just as an employer must clearly demonstrate to its employees that its anti-harassment policies are more than just words, Gaines v. Bellino, 173 N.J. 301, 319 (2002), a school district must unequivocally demonstrate to its students that bias-based harassment will not be tolerated, whether by staff or students. Respondent's preventative and remedial measures failed to do so.

Addressing the specific actions Respondent took in response to the Complainants' reports of bias-based harassment, the ALJ evaluated each incident of harassment in isolation and concluded that Respondent investigated and imposed remedial action appropriately in response to each reported incident (ID 16). The ALJ noted that Respondent applied a progressive discipline approach to each offender, counseling first time offenders for verbal harassment and warning them that disciplinary points would be imposed for repeat offenses, but

immediately suspending those students who physically assaulted L.W. Ibid. [9] Initially, the Director notes that, in addressing the individual offenses, while Respondent may have meted out appropriate discipline for the general offense of "hitting" or "taunting," it is not clear that Respondent appropriately addressed the anti-gay bias aspect of each offense.

The Director concludes that even if Respondent dealt appropriately with each individual offender, it failed to act appropriately in addressing the anti-homosexual hostility in the school environment as a whole. As noted by the New Jersey Supreme Court, it is relevant "that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes." Lehmann, supra, 132 N.J. at 607. Even if Respondent's disciplinary actions were appropriate discipline for each individual offender, they did not address Respondent's responsibility to provide L.W. with an education that was not permeated by bias-based hostility. In suggesting that L.W. not exercise his privilege to leave school during lunch break, or his privilege to walk home rather than take the school bus, Respondent treated the harassment as if it were L.W.'s problem, rather than a problem that must be addressed in relation to the student body as a whole. By doing nothing more than responding to each individual act of harassment after it was reported, Respondent unnecessarily and unreasonably left L.W. exposed to continued bias-based hostility. Respondent's failure to establish written procedures for staff to follow in addressing harassment complaints, or to coordinate information sharing and recordkeeping to ensure that it properly responded to the cumulative impact of the harassment

[9] The Director notes that Respondent's Rules and Regulations distributed to students (Ex. J-2) set forth minimum disciplinary penalties for specified offenses, with the goal of providing consistency in discipline and putting students on notice of what will happen when an offense is committed. The penalty for "disruptive behavior" is listed as "Detention and/or 6 pts. or suspension and parent contact." The penalty for "profanity" is listed as "6+ detention or suspension and parent contact." Although the Student/Parent Handbook states that initial action for abuses of common courtesy and school rules will usually be a reprimand and counseling, it also states that violations of particular school rules, including "disruptive behavior" invoke "a prescribed punitive arrangement." (Ex. J-1, p. 15-16) To the extent that individual incidents of harassment constituted disruptive behavior or included profanity, Respondent may not have treated the incidents as seriously as its own policies warranted when it imposed only counseling and a warning for initial offenses.

rather than merely addressing the individual incidents, further supports the conclusion that Respondent is liable for the bias-based harassing environment.

Although it might be a closer call, the record reflects that, even applying the higher liability threshold established for Title IX, Respondent should be held liable for the bias-based harassment inflicted on L.W. As noted above, Title IX imposes liability for harassment that is "so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." Davis, supra, 526 U.S. at 633. A single incident of sexual harassment may be sufficient to impose liability for peer harassment under Title IX. Vance v. Spencer County Public School District, 231 F. 3d 253, 259 (6th Cir. 2000). "Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances." Id. at 261. A school district will be liable where its response to peer harassment "is clearly unreasonable in light of the known circumstances." Davis, supra, 526 U.S. at 648. Federal Dept. of Education Title IX Guidelines provide that a school district must not only investigate and take steps to end harassment, it must also "eliminate a hostile environment if one has been created, and prevent harassment from occurring again." OCR Title IX Guidelines, 62 Fed. Reg. at 12042, cited in Vance, supra, 231 F. 3d at 261, n.5.[10]

The Director concludes that the nine reported incidents during the period of January through April 1999, two of which included some form of physical assault, and one including a simulated sex act were sufficiently severe, pervasive and offensive to deprive L.W. of an educational benefit. Following many of these incidents, L.W. missed time from school because of the harassment, including an absence of about one week following the March 8,1999 "humping" incident (Tr. 4/1/03, p.27; Tr. 3/26/03, p. 209, 214). While Respondent saw fit to enforce its rules to require L.W. to return to classes before it would permit him to attend play practice, it did not otherwise remedy or even address the fact that he was missing class time as

[10]Although a school district's failure to comply with Department of Education guidelines or regulations does not itself constitute a violation of Title IX, Gebser, supra, 524 U.S. at 291-292, such promulgations provide school districts with guidance as to what is proscribed by Title IX. Davis, supra, 526 U.S. at 647-648.

a result of the bias-based harassment. Moreover, after the two physical assaults in September 2000, L.W. missed roughly a month of school while his mother scrambled to research alternate school possibilities and present them to Respondent for approval. Although Respondent cooperated in getting approvals once L.G. was able to come up with suggestions to put her son back in school, and eventually reimbursed her for transportation, there is no evidence that Respondent even attempted to explore with Complainants any alternatives to L.W.'s withdrawal from school, or offered tutoring, home instruction or any other interim measures to ensure that L.W. was not deprived of the educational opportunities afforded to high school students in this state. Respondent provided no training, informational talks or written notices to staff, students or parents to ensure that students knew that anti-homosexual harassment would be treated as a bias-based infraction and would not be tolerated, nor did it even revise the written or verbal information disseminated annually to specify that harassment based on sexual orientation is prohibited by state law or that such harassment would result in discipline as bias-based discrimination. Based on the evidence in the record, the Director concludes that the bias-based harassment of L.W. was sufficiently severe, pervasive and offensive to deprive him of educational opportunities or benefits.

Although Complainants testified that there were additional unreported incidents, the ALJ's factual findings demonstrate that Respondent's administrators knew of the harassment. Respondent's knowledge of the nine 7th grade incidents described on pages 13-16 of the initial decision, plus the two assaults in September 2000, are sufficient to constitute actual notice to Respondent that Complainant was being harassed based on perceived homosexuality.

Further, Respondent's failure to treat the individual offenses any differently than non-bias-based taunting or fighting, its failure to do anything more than progressively counsel, warn and discipline each individual offender, and its failure to review and revise its policies and affirmatively act to clarify and reinforce to the student body as a whole that anti-gay harassment would not be tolerated, demonstrate that Respondent was deliberately indifferent to the reality that L.W.'s educational environment was permeated by anti-gay hostility. See, e.g., Nicole M. v. Martinez Unified School District, 964 F. Supp. 1369, 1386 (N.D. Cal. 1997) (Although applying

pre-Davis Ninth Circuit standards, the court questioned whether suspension of a student who physically touched victim would have a deterrent effect on verbal harassers, and concluded that, given the severity and frequency of the harassment known to school officials, a reasonable official would not have believed that suspension of one student for one day was a step reasonably calculated to end the harassment.) In light of the known circumstances, i.e. different students were implicated each time L.W. reported a new incident of harassment, waiting to discipline each new offender after the fact was not reasonably calculated to end the harassment.

Moreover, Respondent's failure to adequately train staff and students about its policies banning harassment based on sexual orientation, or communicate those policies to staff, students and parents, is evidence relevant to deliberate indifference. In this case, the "training" Respondent provided in its annual informational lectures did not deal at all with sexual orientation harassment, even after prior harassment reports from other student victims, the numerous incidents reported by L.W., and suspension of anti-homosexual harassers who assaulted Complainant. Cf. Flores v. Morgan Hill Unified School District, 324 F. 3d 1130, 1136 (9th Cir. 2003) (In §1983 action applying deliberate indifference standard, where school district was aware of hostility towards homosexual students, and provided only limited training regarding sexual harassment, which did not specifically address sexual orientation, a jury could conclude that the discrimination victims suffered "was a highly predictable consequence" of the failure to provide adequate training.) Here, Continued harassment of L.W. was a "highly predictable consequence" of Respondent's failure to provide appropriate training to staff and students.

Accordingly, applying either the Title IX "deliberate indifference" standard or the LAD Lehmann-type standard, the Director concludes that Respondent is liable for the student-on-student bias-based harassment to which L.W. was subjected.

REMEDIES

Because the ALJ concluded that there is no LAD cause of action for student-on-student harassment, and because he determined that Respondent's reactions to the harassment were appropriate, he made no factual findings or conclusions of law concerning damages. After reviewing the record, including the transcripts of the hearing testimony, the Director determines that the record permits him to make certain factual findings and legal conclusions regarding damages and other relief.

A. Equitable Relief

The LAD provides that the Director may order such affirmative relief necessary to extend full and equal accommodations, advantages, facilities and privileges to all persons, including a requirement for reporting the manner of compliance. N.J.S.A. 10:5-17; Director, Division on Civil Rights v. Slumber, Inc., 166 N.J. Super. 95, 103 (App. Div. 1979) modified on other grounds, 82 N.J. 412 (1980); Jackson v. Concord, 54 N.J. 113, 124-125 (1969). The Director concludes that, to ensure that students are not deprived of full access to educational opportunities because of actual or perceived sexual orientation, Respondent's anti-discrimination policies and procedures must be strengthened. This is the responsibility of the Board of Education which must revise the policies of the Respondent so that the administrators can ensure the policies are being administered correctly.

The Director concludes that Respondent's student/parent handbooks, written rules and regulations and written policies must be revised to explicitly state that discrimination or harassment based on actual or perceived sexual orientation is prohibited, and to include age-appropriate definitions of the terms "harassment" and "sexual orientation." Respondent shall also establish written procedures for teachers, staff and administrators regarding how to address complaints of peer harassment of students based on sexual orientation. The procedures shall be distributed to all staff, as well as school bus drivers, and shall also be prominently posted in student and staff areas of each school in the district, in a large print poster format, at least one per classroom, office and meeting room space. The procedures shall include reporting each incident to Respondent's Affirmative Action Office, involvement of the Affirmative Action Office, and coordinated recordkeeping with the Affirmative Action Office.

To address multiple incidents of anti-homosexual harassment reported in the same school and not perpetrated by the same student, the procedures shall include addressing harassment as a systemic problem by providing supplemental information to that school's student body, either verbally or in writing, explaining what types of behaviors constitute unlawful harassment, the procedures for reporting it, and what disciplinary action will be taken for such harassment. Respondent shall also provide mandatory training for all administrators, Affirmative Action Office staff, counselors, school nurses regarding how to deal with student complaints of peer harassment based on sexual orientation.

As provided by N.J.S.A. 18A:37-15, which, in part, was enacted to ensure students would be protected from unlawful bias under the LAD, if Respondent has not already done so, it shall adopt and disseminate to middle and high school students, parents and staff a policy prohibiting harassment, intimidation or bullying based on protected characteristics including sexual orientation. Respondent shall also implement a bullying prevention training program as recommended by N.J.S.A. 18A:37-17, including age-appropriate components on bullying, intimidation and harassment based on sexual orientation. Participation in this program shall be mandatory for middle school and high school students and staff, and shall be offered to parents. This program shall be provided annually for a minimum of the next six school years.

Copies of Respondent's revised anti-discrimination policy, procedures for filing complaints and its anti-bullying policy shall be distributed to all parents, students, teachers and other staff each quarter or marking period. Respondent's revised anti-harassment policies, procedures and anti-bullying policy shall be posted on Respondent's website, with a clearly marked link from its homepage, labeled "Anti-Discrimination Policies."[11]

The revised documents, reporting procedures and training curriculum shall be submitted to the Division for review by August 31, 2004, and shall be implemented in all of Respondent's schools no later than September 30, 2004. Respondent shall report to the Division by January

[11]Respondent's current nondiscrimination/sexual harassment policy, which does not include sexual orientation, is accessed from its website through a link labeled "News and Notes." It would not be readily evident to the reader that anti-discrimination policies would be located under that heading.

31, 2005 and July 30, 2005 regarding discrimination complaints based on sexual orientation received and remedial action taken, for the periods of September 1, 2004 through December 31, 2004, and January 1, 2005 through June 30, 2005, respectively.

B. Emotional Distress Damages

It is well established that a victim of unlawful discrimination under the LAD is entitled to recover non-economic losses such as mental anguish or emotional distress proximately related to unlawful discrimination. Anderson v. Exxon Co., 89 N.J. 483, 502-503 (1982); Director, Div. on Civil Rights v. Slumber, Inc., 166 N.J. Super. 95 (App. Div. 1979), mod. on other grounds, 82 N.J. 412 (1980); Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973). Such awards are within the Director's discretion because they further the LAD's objective to make the complainant whole. Andersen, supra, 89 N.J. at 502; Goodman, supra, 86 N.J. at 35. As provided in a recent amendment to the LAD,[12] emotional distress damages are available in LAD actions filed with the Division to the same extent as in common law tort actions. N.J.S.A. 10:5-17.

A victim of discrimination is entitled, at a minimum, to a threshold pain and humiliation award for enduring the "indignity" which may be presumed to be the "natural and proximate" result of discrimination. Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 312-313, 317 (Ch. Div. 1970). Thus, pain and humiliation awards are not limited to instances where the complainant sought medical treatment or exhibited severe manifestations. Id. at 318.

Here, L.W.'s own testimony, as well as that of his mother, his aunt and his friend E.C., demonstrate that L.W. suffered emotional distress as a result of the bias-based harassment. L.W. testified that as a result of the harassment, he has learned not to trust people right away, and he felt that it made him miss out on his 7th, 8th and 9th grade years (Tr. 3/26/03, p. 89-90). He testified that he was not able to do normal teenage things, and it was upsetting to have to leave South because his whole family went to school there (Tr. 3/26/03, p. 76-77). He testified

[12] As the LAD is a remedial statute, an amendment to the statutory remedies may be given retrospective effect providing it is applied for redress of a pre-existing actionable wrong. State Dept. of Environmental Protection v. Arlington Warehouse, 203 N.J. Super. 9 (App. Div.1981); In re D'Aconti, 316 N.J. Super. 1(App. Div. 1998).

that he was afraid to ride the school bus because he didn't want to be subjected to comments like "fag,""homo," and "butt boy" anymore (Tr. 3/26/03, p. 70). He testified that after the locker room incident in which one of the harassers said "if you had a pussy, I'd fuck you up and down," he was "embarrassed, vulnerable, ashamed, sick to my stomach" (Tr. 3/26/03, p. 41-42). He testified that after the "humping" incident he was very, very upset and crying, and his mother, L.G., testified that she kept him home from school after that incident because he was "totally embarrassed and humiliated" (Tr. 4/15/03, p. 247; Tr. 3/26/03, p.229-230).

L.G. testified that when L.W. called her to report various incidents that she then reported to Respondent, he was crying, hysterical and on one occasion he was crying so hard that she could not understand what he was saying (Tr. 3/26/03, p.208, p. 239-240). She testified that he had become sullen, withdrawn and angry (Tr. 3/26/03, p. 227).

The testimony shows that L.W. suffered physical as well as emotional pain. He testified that after he was punched in the face on his way home from school, he was hysterically crying, developed a bruise on his face and it hurt to chew (Tr. 3/26/03, p.71). His friend, E.C., testified that after he was attacked during lunch at the 7-11, L.W. was terrified, crying and upset (Tr. 3/26/03, p. 191). L.W. testified that when the harassment resumed in high school, he couldn't take it anymore and he just had to leave (Tr. 3/26/03, p. 89-90).

L.W. testified that as a result of the harassment, he didn't pay as much attention in school, failed to do his homework and it affected his grades (Tr. 3/26/03, p. 49). Both L.W. and L.G. testified that his 7th grade science/math teacher, Ms. Jorman, telephoned L.G. because of the change in L.W.'s school performance, and L.G. testified that Jorman was very concerned because L.W. had become disruptive, his grades were falling, and he did not appear to be the same boy he was in September (Tr. 3/26/03, p. 49; Tr. 3/26/03, p. 227).

L.W. testified that he started seeing a therapist, Robert Misurell, in the middle of 7th grade, and continued in weekly therapy for about a year and a half, until his insurance stopped paying (Tr. 3/26/03, p. 60-66). L.G. testified that she sought professional help for L.W. because of the school incidents as well as because of some court incidents involving his father (Tr. 3/26/03, p. 229).

L.W.'s aunt, Constance Yerks, also corroborated the emotional distress L.W. suffered. She testified that as a result of the seventh grade harassment, he became "frantic," his grades, which had been quite good, dropped, and for the rest of the school year he didn't want to go to school (Tr. 4/1/03, p. 104-105, p. 107).

The Director awards damages for emotional distress based on the extent and duration of emotional suffering experienced by each complainant. Here, the harassment to which L.W. was subjected included several physical assaults and repeated bias-based harassment by a large number of students. He and his mother found the harassment to be severe enough to warrant leaving school to escape the harassment, even before a replacement educational plan could be put in place, which left him floundering for a month with no schooling at all, and with no tutoring or other services even being offered by Respondent to bridge the gap. In light of the emotional stress that can be presumed to be the "natural and proximate" result of repeatedly inflicting such harassment on an impressionable adolescent, after reviewing the applicable portions of the record, the Director concludes that an award of $50,000 in emotional distress damages to L.W. is appropriate in this case.[13]

L.G. is also entitled to an award of emotional distress damages in this case. Initially, L.G has standing to bring her own action under the LAD, as the LAD provides that any person aggrieved by unlawful discrimination may file a complaint with the Division. N.J.S.A. 10:5-13. The LAD prohibits schools from discriminating based on perceived sexual orientation, and she was denied the right to the accommodations, advantages, facilities and privileges generally afforded to parents of school-aged children. Although L.G. was not herself perceived to be homosexual, she was deprived of full advantages of the public schools because her son was a member of a protected class.

Based on liberal standing rules generally applied to the LAD, the Appellate Division has afforded standing to a Caucasian man who was terminated from his employment because of his relationship with an African-American woman, O'Lone v. New Jersey Dept. of Corrections, 313

[13]The Division's records reflect that L.W. is no longer a minor. Accordingly, there is no need to address any issues regarding special procedures for payment of damages to minors.

N.J. Super. 249, 255 (App. Div. 1998), and a Caucasian condominium owner who was denied the opportunity to lease his property to an African-American tenant. Berner v. The Enclave Condominium Assoc., Inc., 322 N.J. Super 229, 234-235 (App. Div. 1999), certif. denied, 621 N.J. 131(1999). Similarly, as a parent who has been deprived of the advantages and facilities of her school district because of the perceived homosexuality of her son, L.G. is an aggrieved person under the LAD and has standing to bring her own LAD claim. Just as the defendant's race discrimination in Berner deprived the plaintiff condominium owner of the opportunity to lease his property to his selected tenant, the bias-based harassment in this case deprived L.G. of her right to have her son educated in the school district in which she resides.

While the Appellate Division has held that per quod damages are not available under the LAD, Catalane v. Gillian Instrument Corp., 271 N.J. Super. 476, 499-500 (App. Div. 1994), certif. denied 136 N.J. 298 (1994), L.G's claim is not for per quod damages based on the injuries suffered by her son, L.W., but is based on adverse action and emotional distress she suffered as a result of Respondent's discriminatory actions. See, e.g., Wolfe v. State Farm Ins. Co., Inc., 224 N.J. Super. 348, 351-352 (App. Div. 1988) certif. denied 111 N.J. 654 (1988)(distinguishing parent's independent claim for emotional distress based on pulling daughter from car and witnessing first aid squad's unsuccessful attempts to revive her, from per quod claim, which would be based on loss of services of a child).

The hearing testimony demonstrates that L.G. suffered emotional distress as a direct result of Respondent's actions. In her first report to Respondent's administration (about the cafeteria incident in which L.W. was hit in the head), L.G. made numerous calls to Ms. Benn, but when Benn finally responded she would tell L.G. nothing more than the students involved had been spoken to (Tr. 3/26/03, p. 209-210). When she went to see Ms. Benn after the "humping" incident, L.G. felt Benn was very uninterested and condescending. L.G. asked Benn whether the administration was waiting for her son to be physically maimed or injured for life before they would do something about the other students in the school, and Benn's only response was that L.G. should do what she felt she needed to do (Tr. 3/26/03, p. 226). After the first high school assault, she testified "I was pretty irate that this had happened...I wasn't going to tolerate it

again...."(Tr. 3/26/03 p. 242). She testified that it was horrible for her to send her "son to school for six hours a day where he's tortured, constantly tortured" and she just had enough(Tr. 4/1/03, p. 88-89). She testified that she spent a month trying to find a way to get her son an education (Tr. 3/26/03, p. 245). L.G.'s sister, Constance Yerks, testified that L.G was very frightened every day and hurting (Tr. 4/1/03, p. 108).

L.G's January 22, 1999 letter to Respondent (Ex. J-5), describing Respondent's delay in dealing with the students who harassed and assaulted L.W. and its failure to respond to her inquiries about what was being done in response to the harassment, further demonstrates the level of frustration she was experiencing because her son was being harassed. A quote from that letter is indicative of her distress and frustration.

> I don't know if my son is gay or not, but, since he is only 13 years old, I don't think he should be obsessed with sexual matters at this time. If my son is gay, my family will love and support him.... I have NO intention of allowing my son to suffer constant sexual harassment while trying to go to school, which he has a right to do like any other child. I am sure your school authorities would not tolerate a child being taunted and tortured because the [sic] were black or because they were crippled.

After reviewing the record, the Director concludes that an award of $10,000 in emotional distress damages to L.G. is appropriate in this case.

C. Penalties

In addition to any other remedies, the LAD provides that the Director shall impose a penalty payable to the State Treasury against any respondent who violates these statutes. N.J.S.A. 10:5-14.1a. The maximum penalty for a first violation of the LAD is $10,000. Ibid. After review of the record, the Director concludes that the maximum penalty of $10,000 is appropriate for Respondent's LAD violation. As punitive damages cannot be awarded in LAD actions filed administratively and can only be awarded in actions before the Superior Court, the $10,000 civil penalty is the only remedy available to serve an admonitory or deterrent purpose in this case.

D. Counsel Fees

A prevailing party in a LAD action may be awarded "a reasonable attorney's fee." N.J.S.A. 10:5-27.1. See, also, Rendine v. Pantzer, 141 N.J. 292 (1995). Where, as here,

Complainants' case was prosecuted by the attorney for the Division, counsel fees and costs may be assessed against Respondent. N.J.S.A. 10:5-27.1. The Director concludes that it is appropriate to make an award of attorney fees in this case. The Director will leave the record open for a total of 30 days to permit the parties to attempt to reach an amicable resolution of the issues relating to counsel fees, or if that is not possible, to submit briefs and/or certifications addressing the fee award. Complainants shall file with the Division and serve on Respondent any submissions within 20 days, and Respondent shall have 10 days to file and serve a reply.

ORDER

Based on all of the above, the Director concludes that Respondent subjected Complainants to unlawful discrimination in violation of the LAD. Therefore, the Director orders as follows:

1. Respondent and its agents, employees and assigns shall cease and desist from doing any act prohibited by the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49. Respondent shall provide the following equitable relief:

a. Respondent shall revise its student/parent handbooks, written rules and regulations and written policies to explicitly state that discrimination or harassment based on actual or perceived sexual orientation is prohibited, and to include age-appropriate definitions of the terms "sexual orientation" and "harassment."

b. As explained in more detail in the Remedies section of this order, Respondent shall establish and disseminate written procedures for teachers, staff and administrators regarding how to address complaints of peer harassment of students based on sexual orientation, and shall post in all classrooms, offices, and meeting rooms the Division poster entitled "Public Accommodation Discrimination."

c. Respondent shall provide mandatory training for all administrators, Affirmative Action Office staff, counselors, school nurses and other necessary staff who deal with student health issues, regarding how to deal with student complaints of peer harassment based on sexual orientation.

d. If Respondent has not already done so pursuant to its obligations under N.J.S.A. 18A:37-15, it shall adopt and disseminate to students, parents and staff a policy prohibiting harassment, intimidation or bullying based on protected characteristics, including sexual orientation.

e. Respondent shall implement a bias-based harassment prevention training program, including age-appropriate components on bias-based bullying, intimidation and harassment based on sexual orientation, as recommended by N.J.S.A. 18A:37-17. Participation in this program shall be mandatory for middle school and high school students and staff, and shall be offered to parents.

f. Copies of Respondent's revised anti-discrimination policies, including procedures for filing complaints and its bias-based bullying components shall be distributed to all parents, students, teachers and other staff each quarter or marking period. Respondent's revised anti-harassment policies, procedures and anti-bullying policy shall be posted on Respondent's website, with a clearly marked link from its homepage, labeled "Anti-Discrimination Policies."

g. The revised documents, reporting procedures and training curriculum shall be submitted to the Division for review by August 31, 2004, and shall be implemented in all of Respondent's schools no later than September 30, 2004. Respondent shall report to the Division by January 31, 2005 and July 30, 2005 regarding discrimination complaints based on sexual orientation received and remedial action taken, for the periods of September 1, 2004 through December 31, 2004, and January 1, 2005 through June 30, 2005, respectively.

2. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to Complainant L.W. in the amount of $50,000 as compensation for his pain and humiliation.

3. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to Complainant L.G. in the amount of $10,000 as compensation for her pain and humiliation.

4. Within 45 days from the date of this order, Respondent shall forward to the Division a certified check payable to "Treasurer, State of New Jersey," in the amount of $10,000 as a statutory penalty.

5. The penalty and all payments to be made by the Respondent under this order shall be forwarded to Richard Salmastrelli, New Jersey Division on Civil Rights, P.O. Box 089, Trenton, New Jersey 08625.

6. Any late payments will be subject to post-judgment interest calculated as prescribed by the Rules Governing the Courts of New Jersey, from the due date until such time payment is received by the Division.

7. The record in this matter shall remain open for 30 days for the limited purpose of permitting the parties to address the amount of counsel fees to be awarded. The Director will issue a supplemental order addressing counsel fees.

DATE: July 26, 2004

J. FRANK VESPA-PAPALEO, ESQ.
DIRECTOR
NEW JERSEY DIVISION ON CIVIL RIGHTS