STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 04253-07
DCR DOCKET NO. PQ07IE-02596

L.W., A MINOR, BY HIS PARENT AND GUARDIAN, L.G., and L.G. INDIVIDUALLY, Complainants, v. TOMS RIVER REGIONAL SCHOOLS BOARD OF EDUCATION, Respondent.	Administrative Action **FINAL DECISION & ORDER**

APPEARANCES:

James R. Michael, Deputy Attorney General, prosecuting the complaint on behalf of the New Jersey Division on Civil Rights *(Jeffrey S. Chiesa, Attorney General of New Jersey*, attorney).

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

BY THE DIRECTOR:

This matter is before the Director of the New Jersey Division on Civil Rights (DCR) from a remand by the New Jersey Supreme Court in L.W., et al. v. Toms River Reg'l Schs. Bd. of Educ., 189 N.J. 381 (2007). On September 19, 2012, Chief Administrative Law Judge Laura Sanders issued an initial decision (ID) concluding that the Toms River Regional Schools Board of Education (the District) failed to take reasonable actions to remedy a hostile school environment in which students subjected Complainant L.W. to severe and pervasive harassment based on his perceived homosexuality, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. After reviewing the record, the Director adopts the ALJ's decision and writes this determination to address issues raised in the parties' subsequent submissions.

The procedural history of this matter is rather protracted. On March 12, 1999, L.W. filed a verified complaint with the DCR alleging that the District failed to respond appropriately when students repeatedly bullied him because of his perceived homosexuality.[1] DCR investigated the allegations. On July 10, 2000, DCR issued a finding of probable cause and referred the matter to the Office of Administrative Law (OAL) for a hearing.

On April 26, 2004, after a three-day plenary hearing, an administrative law judge (ALJ) issued an initial decision dismissing the complaint. The ALJ found, among other things, that a cause of action against a school district for student-on-student harassment was not cognizable under the LAD. On July 26, 2004, the DCR Director rendered a decision that rejected the ALJ's initial decision and found the District liable for failing to properly address the harassment. The District appealed.

The Appellate Division affirmed the conclusion that the District violated the LAD. See L.W. v. Toms River Reg'l Schs. Bd. of Educ., 381 N.J. Super. 465 (App. Div. 2005). The Appellate Division noted that the "plain language of the LAD" makes it unlawful to deny someone the advantages, facilities, or privileges of a public accommodation on the basis of sexual orientation and that a public school is a place of public accommodation. Id. at 486. Therefore, the Appellate Division reasoned, "a claim against a school district may be brought under the LAD for peer harassment that is based on an individual's affectional or sexual orientation if the harassment rises to the level of a denial of the advantages, facilities or privileges of a public school." Id. at 486 (quotations omitted). The Appellate Division noted that L.W. testified that he was taunted about his perceived sexual orientation "almost on a daily basis" with derogatory references such as "faggot," "homo," and "butt boy." Id. at 475. The Appellate Division wrote:

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[1] The original complaint was filed on behalf of L.W. by his mother, L.G., because he was a minor (in 7th grade) at the time. He has since reached the age of majority. That complaint also included claims on behalf of L.G., individually, which were dismissed by the Appellate Division and are not relevant to this remand. See L.W. v. Toms River Reg'l Schs. Bd. of Educ., 381 N.J. Super. 465, 501 (App. Div. 2005). In this decision, "Complainant" shall refer solely to L.W.

> L.W. asserted that sometime in January 1999 he was in the locker room with a group of students when W. approached him and said, "If you had a pussy I'd fuck you up and down." L.W. testified that he felt "embarrassed, vulnerable, ashamed" and sick to his stomach.

Id. at 476. The Appellate Division noted that in addition to verbal taunts, the child was abused physically, e.g., slapped in the face and hit in the head. Id. at 475-79. The Court then compared a hostile *school* environment with a hostile *work* environment:

> We recognize that in certain respects "schools are unlike the adult workplace and . . . children may regularly interact in a manner that would be unacceptable among adults." . . . Nevertheless, we do not believe that the Legislature intended that students in our schools would be entitled to less protection from bias-based harassment than individuals in the workplace. Such a conclusion would be at variance with our strong public policy requiring school officials to protect children when they attend school.

Id. at 485-86 (citations omitted). Applying substantially the same standards articulated for workplace harassment in Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587 (1993), the Appellate Division found that there was "sufficient credible evidence in the record to support the Director's finding that the measures taken by [the District] were not effective." LW., supra, 31 N.J. Super. at 493. Once again, the District appealed.

The Supreme Court ruled against the District. See L.W., supra, 189 N.J. 381. In so doing, the Court began its opinion by stating, "[W]e must determine whether a school district may be held liable under the [LAD] when students harass another student because of his perceived sexual orientation and, if so, what standard of liability governs such a cause of action." 189 N.J. at 389. Like the Appellate Division, the Court summarized the years of harassment visited upon L.W. Id. at 390-94. For instance, the Court wrote:

> In the fourth grade, classmates began taunting plaintiff L.W. with homosexual epithets such as "gay," "homo," and "fag." The harassment increased in regularity and severity as L.W. advanced through school. In seventh grade, the bullying occurred daily and escalated to physical aggression and molestation. Within days of entering high school, the abuse culminated with a pair of physical attacks. Ultimately, L.W.'s unease prompted him to withdraw from his local high school and enroll elsewhere, at the expense of his school district.

Id. at 389. The Court wrote:

> Almost every single day classmates directed slurs at L.W. loudly in the halls so everyone could hear . . . [O]n entering the seventh grade, the maltreatment was no longer limited to verbal disparagement. In the fall, L.W. discovered a piece of construction paper attached to his locker that read, "You're a dancer, you're gay, you're a faggot, you don't belong in our school, get out."

Id. at 390-91 (quotation omitted). The Court noted that there was no respite for L.W. and that "[e]ven the school play was not free of harassment." Id. at 391. In particular, the Court wrote:

> At every practice, an eighth grade student, R.G., insulted L.W. with derogatory comments. L.W. reported the harassment, and R.G. apologized. Further, as part of a school function, L.W. went to Toms River High School North to watch a dress rehearsal of a school play. There, D.M. mocked L.W. and smacked him on the head with his playbill. L.W. reported the incident. [An assistant principal] counseled D.M., advising him that further inappropriate conduct would result in more significant consequences. D.M.'s mother was advised of the incident. She apologized to L.W.'s mother and insisted that D.M. write a letter apologizing to L.W.

Id. at 391-92. The bullying persisted. L.W. "sought the help of his guidance counselor who urged L.W. to 'toughen up and turn the other cheek.'" Id. at 392. The Court described another incident that occurred at the middle school:

> While standing in the lunch line, M.S., along with two friends, J.A. and C.C., approached L.W., calling him "gay" and "faggot." M.S. then grabbed L.W.'s "private area" and "humped" him, taunting, "Do you like it, do you like it like this?" L.W. escaped, but M.S. followed him and repeated the molestation as classmates watched. L.W. then fled to the school's main office. [An assistant principal] spoke with all three attackers, told them that their conduct was "inappropriate" and that, if repeated, "it would be dealt with more severely." The assaulting students then returned to class.

Id. at 392. Elsewhere, the Court described what occurred when L.W. decided to walk home from school one afternoon "[t]o avoid the derision he encountered on the school bus." Id. at 395:

> A car approached L.W., and three students, L.B., J.F., and M.F., exited. M.F. said, "I heard you have a crush on L.B., and that [his] family doesn't like faggots, [he doesn't] like faggots." J.F. pressed L.W., "Well, are you a faggot?" M.F. chimed in, "We don't like faggots, our whole family doesn't like faggots." L.W. yelled, "It's none of your damn business." M.F. then punched L.W. in the face, knocking him down. L.W. ran away, crying hysterically, but M.F. chased after him threatening, "If I hear that you said anything about this I'm going to knife you." L.W. subsequently missed a day or two of school.

Ibid. The District suspended M.F. for ten days and "advised L.W. to take the bus home in the future." Id. at 395-96. The Court described the "final incident," which occurred in mid-September:

> L.W. went to downtown Toms River for lunch, as many students did. L.T. approached L.W., who was sitting on a curb outside a 7-Eleven convenience store. Unprovoked, L.T. pushed L.W. to the ground and grabbed L.W.'s shirt. L.T. warned L.W. that if he ever heard that L.W. had a crush on him or his friends again that he'd "kick [L.W.'s] a* *." The aggressor then "completely covered" L.W. with dirt. The District suspended L.T. for ten days.

Id. at 396. After the assault outside the 7-Eleven, L.W. "never returned to High School South, but instead withdrew from the District to attend school elsewhere." Ibid.

The Court held that a school district may be found liable for bias-based peer harassment that creates a hostile educational environment "when the school district knew or should have known of the harassment, but failed to take action reasonably calculated to end the harassment." Id. at 407.[2] The Court stated that the reasonableness of a school district's response should be assessed "in light of the totality of the circumstances, that is the 'constellation of surrounding circumstances, expectations and relationships which are not fully captured by a single recitation of the words used or the physical acts performed.'" Id. at 408 (citing Oncale v. Sundowner Offshore Servs, Inc., 523 U.S. 75, 82 (1998)). The Court provided examples of the types of factors to be considered when evaluating whether a district's actions were reasonably calculated to end peer harassment:

> Illustratively, a reasonable response to name-calling among grade-schoolers may be inadequate to address violence among teenagers. The factfinder, therefore, should consider all relevant circumstances, including, but not limited to, the students' ages, developmental and maturity levels; school culture and atmosphere; rareness or frequency of the conduct; duration of the harassment; extent and severity of the conduct; whether violence was involved; history of harassment within the school district, the school, and among individual participants; effectiveness of the school district's response; whether the school district considered alternative responses; and swiftness of the school district's reaction.

Id. at 409. The Court wrote that although the New Jersey Department of Education (DOE) promulgated its Model Policy and Guidance for Prohibiting Harassment, Intimidation and Bullying

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[2] The Court rejected the argument that the LAD's liability standard should mirror Title IX of the federal Education Amendments of 1972, which prohibits recipients of federal funding from discriminating based on gender and imposes liability only when a school district acts in deliberate indifference to known acts of harassment. LW., supra, 189 N.J. at 404-06.

on School Property, School-Sponsored Functions and on School Buses (Model Policy) and related regulations after the events addressed here, "any assessment of the reasonableness of the District's actual response may be informed by what the DOE currently advises school districts to do in such circumstances." Id. at 411. The Court noted that in this case, the District employed progressive discipline for students who harassed L.W.:

> School officials counseled first-time offenders regarding their inappropriate conduct and advised them that more serious consequences would result if the conduct recurred. For a second transgression, the offender earned disciplinary "points." A third offense could result in suspension. By way of comparison, if a student was more than one minute late for class, the student received three "points" and a detention. Overall, the progressive discipline was student-specific, predicated on the offender's prior record, not the victim's identity or history.

Id. at 395. Ultimately, the Court remanded the matter to the OAL to give both parties an opportunity "to supplement the record with evidence of what a reasonable response would have been at the time." Id. at 410-11.

THE ALJ'S DECISION

Because the extent of the harassment and District's responses were established in the Appellate Division and Supreme Court opinions, the only remaining issue on remand was "whether the District's response to a hostile educational environment was reasonable." (ID 2) On August 1, 2012, Chief ALJ Laura Sanders held a hearing that consisted of testimony from two experts: Robert B. Campbell, Ed. D., for Complainant, and Vito A. Gagliardi, Sr., Ed. D., for the District.

Dr. Campbell testified that the District's actions "fell short of a reasonable response." (ID 4) The ALJ summarized Dr. Campbell's testimony regarding the incidents that occurred "in the four-month period ending on April 13, 1999," as follows:

> He noted that . . . [t]he sheer number of incidents would cause an average reasonable person to form awareness that there were an excessive number of issues regarding L.W. While he recognizes that progressive discipline is the fundamental standard for most districts, because it gives children a chance to learn what is unacceptable conduct, Campbell said the District should have tightened the progressive-discipline policy. In the period, a first infraction resulted in a warning. In Campbell's opinion, the sheer number of first offenses was a flag that reprimands were not sufficient deterrence; the chronic and pervasive number of issues involving

> L.W. was an indicator that the policy was not working. Moreover, in his own district, in 1988, bullying incidents resulted in a first-time penalty of detention.
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> Campbell also testified that the number of incidents was an indication that the Board needed to involve everyone in putting an end to the harassment. He said a letter to parents was warranted, as was in-service training of staff on reporting incidents, and potentially a school assembly to at least refresh recollection that this kind of conduct was unacceptable. Campbell said he was aware that the school manual, which included anti-bullying material, was addressed at the beginning of school, but that was insufficient given the events occurring at the school. In his view, the fundamental zero-tolerance policy was acceptable and appropriate, but the actions taken to enforce it fell short. (ID 4-5)

Dr. Gagliardi, on the other hand, testified that the District "took effective and reasonable measures to prevent the continued harassment of L.W. by other students." (ID 7) The ALJ summarized his testimony, in pertinent part, as follows:

> In Gagliardi's opinion, Toms River was operating in uncharted waters at the time that L.W. was going through school, and did better than most schools would have in addressing the problem.
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> Gagliardi testified that the fact that the harassment stopped for a whole year in middle school meant that the measures applied there were effective. Additionally, he said he thought the fact that the District took action against eighteen students in a population of 1,400 indicated a significant level of action, and the fact that only six misbehaved twice meant that the first-infraction reprimand system was reasonable and effective. He was not troubled by the "toughen up" remark, which to his mind was standard and sage advice, having been given him by his own mother. Asked about an assembly to clarify school policy, Gagliardi said he personally would have been more concerned about the potential for triggering copycat behavior because of the likelihood that the rest of the student body would figure out which student had been the target of the behavior that was the reason for the assembly.
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> Gagliardi said repeatedly that viewing the Board's decisions through the lens of current thinking was unfair and inappropriate. In the years 1998 through 2000 and before, most districts did not have policies that addressed sexual orientation specifically, and the Department was providing guidance based on Title IX's indifference standard. (ID 7)

Both experts focused their testimony on the reasonableness of the District's actions beginning in the seventh grade, i.e., from 1998 to 2000, although the Supreme Court opinion recounted incidents of anti-gay harassment of L.W. in the fourth through sixth grades. (ID 2) Based on Dr. Gagliardi's testimony, the ALJ found as fact that most school district anti-harassment

policies did not specifically mention sexual orientation at that time, and that the DOE's guidance to school districts at that time focused on the Title IX "deliberate indifference" standard and was silent on sexual orientation harassment. (ID 8) However, the ALJ noted that at all relevant times, the LAD prohibited discrimination based on sexual orientation.[3] (ID 9)

The ALJ concurred with Dr. Campbell's conclusion that the District's policy of counseling harassers was ineffective. The ALJ wrote:

> The number of incidents in a four-month period, especially given the presence of onlookers, suggests that mere pedagogical words had no deterrent effect on potential future troublemakers. Counseling was particularly ineffective in the one instance where a student humped L.W. twice in front of an audience, as indicated by the fact that when L.W. returned to school two more incidents involving seven students (two repeat offenders) occurred.

(ID 8) Applying the standards set forth by the Supreme Court in Lehmann, supra, and L.W., supra, the ALJ found that the District failed to take reasonable measures to end the harassment. For instance, the ALJ found that the District did not consider alternatives to that "first time, counseling" approach when responding to the harassment of L.W. (ID 8) The ALJ noted the curious incongruity between the District's punishment of students for being more than a minute late for class (i.e., three disciplinary points and a detention) and its seemingly ironclad rule of imposing nothing more than counseling for bullying. (ID 8) ("The contrast between the penalties for tardiness and abusing another human being is stark."). The ALJ also found that the "public and egregious harassment did not slow until the District put some real penalties behind the talk" and "the fact that child after child felt free to harass L.W. was an indication that the District's policy was ineffective." (Ibid.) Noting that the harassment resumed at the beginning of the ninth grade when L.W. entered high school, the ALJ stated that the "speed and severity" of the first physical assault should have put the District on notice that the "harassment had returned, and it had grown, along with the

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[3] The ALJ stated that "it was clear while L.W. was in elementary school that employers could not discriminate on the basis of such orientation." (ID 9) The 1992 LAD amendment made it equally clear that public accommodations could not discriminate based on sexual orientation. N.J.S.A. 10:5-12(l).

students." (Ibid.) The ALJ wrote, "The fact that a second physical assault occurred within a week is, itself, a sign that the District's reactive policy was not effective." (Ibid.) The ALJ compared the District's responses to situations in which students were harassed because of other LAD-protected characteristics, and wrote:

> It is hard to imagine a district imposing this much repeated remonstrance in the face of this level of harassment and assault had it been occurring to a female or minority middle school student. It is equally hard to envision a district telling a female or minority student that she could not exercise privileges other students enjoyed because it was the only way to prevent assaults by other children. This is particularly so in light of the principle stated by the Supreme Court, which is well established in school law, that "[n]o 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." Frugis v. Bracigliano, 177 N.J. 250, 268 (2003).

(ID 9-10). Based on the totality of the circumstances, including the cumulative impact of "nearly constant harassment ranging from name-calling to public humping to physical assault," the ALJ found that the District did not act reasonably in responding to the harassment. (ID 9-10)

DISCUSSION

The factual determinations regarding the harassment inflicted on L.W. and the District's responses were chronicled in the Appellate Division and Supreme Court opinions and are not in dispute.[4] Likewise, the applicable legal standard is no longer in dispute. A school district is not required to eliminate all harassment to avoid liability. However, it must take measures reasonably calculated to end "severe or pervasive" mistreatment and reinforce the "basic principle that student-on-student sexual harassment is unacceptable." L.W., supra, 189 N.J. at 407. Guided by those principles, the Director evaluates the District's written exceptions (RE) to ALJ Sanders' Initial Decision, as well as Complainant's responses (CE) to those exceptions.

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[4] The District notes in its exceptions that the ALJ "may have been misled by the inaccurate testimony of Mr. Campbell" as to the number of incidents that occurred. (RE 3) However, the citations and level of detail provided in the ID show that the ALJ looked to the Supreme Court opinion for facts about the extent of the harassment, rather than rely on the more general testimony of the experts. (See, e.g., ID 5-6, ID 8). Thus, the Director is satisfied that the ALJ based her conclusions on accurate information regarding the nature and extent of the harassment.

The ALJ properly noted that her task was to determine the reasonableness of the District's response based on an assessment of the totality of the circumstances surrounding the harassment. (ID 9). The District takes exception to the ALJ's finding that it did not consider alternative responses to its "first-time, counseling" approach. (RE 2) The District argues that it provided "staff training" and "formulated a special plan to deal with L.W.'s concerns," which included a security guard to address the harassment. (Ibid.) The District's contentions regarding those purported additional remedies are not supported by the record.[5] There was no evidence that the District provided staff training in response to the escalating harassment of L.W. Instead, the only training referenced in the record is pre-planned anti-discrimination training of professional staff pursuant to the District's multi-year equity plan, N.J.A.C. 6A:7-1.4 and 1.6. See 381 N.J. Super. at 496-97. There was no indication that the training even addressed the type of harassment that occurred in this case. Similarly, the security guard did not corroborate the District's claim that he was part of a "special plan" formulated to deal with L.W.'s concerns. The guard "testified that he was assigned to the intermediate school generally and that he was not assigned specifically to monitor L.W." See L.W., supra, 189 N.J. at 394.

The District's exception misreads the point of the ALJ's finding. The ALJ's finding was not intended to provide a laundry list of all remedies that the District attempted. Instead, it was addressing a factor raised by the Court, namely, whether the district ever considered if there were potential alternatives that might more effectively stop the onslaught of harassment directed against L.W. Id. at 395. Although the District's first-time counseling policy did not deter all offenders from repeating their conduct or deter other students from becoming first-time harassers, the District did not waver from that strategy. Perhaps the best that can be said is that the policy was less offensive

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[5] The Director addresses this issue while noting that the Supreme Court opinion identified the scope of remedies taken by the District. See L.W., supra, 189 N.J. at 391-94. Thus, any attempt to expand the list of remedial measures via written exceptions or expert testimony goes beyond the scope of the Court's remand.

than some of the District's other responses, i.e., counseling the child to "toughen up and turn the other cheek," and advising him to stop walking home after he was assaulted on the street by fellow students. LW., supra, 381 N.J. Super. at 477, 495.[6] In any event, because the record supports the conclusion that the District did not consider alternative responses to its "first-time, counseling" approach, there is no basis to disturb the ALJ's finding on the issue.

The District takes exception to the ALJ's finding that its policy of progressive discipline was ineffective, and insists that there are a number of grounds from which to conclude that its responses were reasonably calculated to end the harassment. (RE 3) First, it argues that the remedial measures were effective because after April 13,1999, L.W. was not harassed for the rest of the seventh grade or at any time during eighth grade. (RE 3-4) (arguing, "Simply, if [the District] had failed to act appropriately, the harassment would have continued during the remainder of seventh grade, as well as during eighth grade.") Although there was a decline in the number and severity of incidents after April 1999, the harassment did not stop. The record indicates that the verbal abuse of L.W. continued through the end of seventh grade and continued to a lesser degree sporadically during eighth grade. See L.W., supra, 189 N.J. at 394. The Director is not persuaded that a decrease in the number and severity of incidents after April 1999 is a sufficient basis from which to conclude that the District's overall response to L.W.'s years of harassment was effective or reasonable, particularly given that the bullying resumed and escalated when L.W. began ninth grade, culminating in two physical assaults.

Morever, focusing on events that occurred after April 1999 ignores the fact that L.W. suffered egregious harassment in school from January through April 1999. The Director finds persuasive Dr. Campbell's testimony that the District should have re-evaluated the effectiveness of its protocol and considered non-disciplinary actions such as staff training and student

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[6] As the Appellate Division noted,"The district's remedial measures should have been designed to alter the behavior of the harassers, not the person who was harassed." L.W., supra, 381 N.J. Super. at 495.

assemblies. (TR29-10 to -19; ID 5). Instead, the District left L.W. open to repeated verbal and physical assaults during that four-month period. See Payton v. N.J. Turnpike Auth., 148 N.J. 524, 538 (1997) (stating that a remedial scheme that unnecessarily and unreasonably leaves a victim open to continued hostility is an ineffective remedial scheme).

In further support of its claim that its response was appropriate, the District argues that it gave detention to repeat offenders (RE 3-4) and suspended two of the students who assaulted L.W. in high school. The District questions whether a "more severe discipline could have possibly been legally imposed" on the two students. (RE 5) However, the issue is not whether the District could have disciplined those two students more severely. Instead, the issue is whether the District properly addressed an overall hostile school environment that subjected a child under its care to years of bullying at the hands of more than a dozen students. The District seeks to narrowly focus on its responses to some individual incidents. However, the Supreme Court declared that when evaluating a school district's response, fact-finders must take a broader view. L.W., supra, 189 N.J. at 409 ("[F]act-finders must consider the cumulative effect of all student harassment and all efforts of the school district to curtail the maltreatment.") Indeed, the Court expressly warned against assessing a district's overall response in the manner that the District now prescribes, namely, a "cabined perspective that views incidents of harassment and responses to offensive conduct in isolation." Ibid. Stated differently, "Courts must bear in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the . . . environment created may exceed the sum of the individual episodes." Ibid. (quoting Lehmann, supra, 132 N.J. at 607) (quotations omitted). The Model Policy makes clear that disciplining individual harassers is only one aspect of addressing a hostile environment. It requires districts to address the potential need for remedies beyond individual discipline--at the classroom, school, or district level--to respond to patterns of harassment, to prevent recurrences, and to repair the overall environment. (Ex. P5, p.7-8). Thus, the individual disciplinary actions cited by the

District, when viewed against L.W.'s overall school environment, do not demonstrate an effective remedial plan reasonably calculated to end the child's harassment.

The District argues that "incidents of harassment were not pervasive through the District" and, therefore, its policies and enforcement actions were "effective, as a whole, relative to the 18,000 student District." (RE 4) New Jersey courts have never required a victim of sexual harassment or any other disparate treatment discrimination to show that others have been similarly victimized. Nor have our courts granted a more lenient standard to large employers or large school districts, simply because they can point to a greater number of individuals in their charge or employ who escaped harassment. The Director is satisfied that the ALJ properly relied on the nature, extent, and cumulative impact of the harassment visited on L.W. when concluding that the harassment was severe and pervasive, and when evaluating the District's responses.

Finally, the District argues in its written exceptions that the ALJ did not evaluate its remedial actions in the context of what was reasonable in 1999. (RE 6) The District argues, "[T]he hindsight of a Monday morning quarterback is always twenty-twenty," and maintains that it did no less, and sometimes more, than other school districts in 1999, and more than the DOE required at that time. (Ibid.) The Supreme Court stated that when evaluating a district's response to school bullying, "factfinders may be assisted by expert opinion regarding educational theories and principles, as well as the standards, policies, and procedures employed in the profession by similarly situated educators." L.W., supra, 189 N.J. at 409-10. Here, the experts presented only limited evidence about how reasonable school districts were responding to actual incidents or patterns of bias-based bullying in 1999 to 2000. Both testified that districts had written policies on "harassment and hazing" that employed progressive discipline at that time, but neither testified as to the specific content of those written policies. Dr. Campbell testified that a reasonable school district in 1999 would have escalated progressive disciplinary penalties faster. He also stated that a reasonable school district would have gone beyond the discipline of individual harassers to re-evaluate its

procedures and reinforce its anti-harassment policies through widespread communications with students, staff, and parents. He noted that in his own district at the time, bullying resulted in a first-time penalty of detention.

Dr. Gagliardi testified that DOE did not require districts to do much at that time. He testified that DOE did not mandate any relevant training at all in 1999 and so the District would have exceeded DOE requirements merely by providing a single training. (TR159-11 to -18) ("[I]t's not mandated . . . [the District] had some training, whatever it was, it was above and beyond the standard that was expected of any school district.") He stated that he obtained over 350 district policies on "harassment and hazing" from Strauss Esmay Associates, a consulting firm that prepares and updates policy manuals for a number of school districts in New Jersey. (TR133-8 to -19). He found it significant that those written policies did not explicitly mention sexual orientation harassment in 1999. (TR 134-1 to -4, 135-5 to -8, 137-5 to -9).

Presumably, the District is not claiming that it was unaware that such harassment was inappropriate at the time. Its administrators had long been on notice that sexual orientation harassment was unacceptable, to say nothing of illegal. The LAD was amended in 1992 to prohibit discrimination based on sexual orientation in public accommodations, including public schools. (ID 9, N.J.S.A. 10:5-5; N.J.S.A. 10:5-12f). The District's affirmative action overview, which had been distributed to the District's superintendent, principals, and affirmative action office, specifically listed sexual orientation as a basis for discrimination. (ID 3). In addition, the Supreme Court expressly stated that the decision in this matter may be informed by DOE's current guidance. L.W., supra, 189 N.J. at 411. DOE's current guidance requires school districts to evaluate the need for systemic remedies and implement them where there is a pattern of harassment or the harassment is severe in nature. See N.J.S.A. 18A:37-13 to -17. DOE's Model Policy specifically prohibits harassment and bullying based on "sexual orientation, gender identity and expression" and states

that the appropriate remedial action for offenders may range "from positive behavioral interventions up to and including suspension or expulsion." (Model Policy at 10 & 14)

Although Dr. Gagliardi discussed generally the contents of the policies, he did not determine what those districts were actually doing to enforce those policies. (CE 7). As Complainant notes, the District "fails to appreciate that the problem in this case is not necessarily the words contained in its policy but the actions the district took, or did not take, to back up the words in the policy." (CE 7). And as noted earlier, the District's claim that it provided training to its staff falls short because there was no evidence that any such training was the result of, or had any relationship to, the harassment of L.W., or specifically addressed the type of harassment inflicted on L.W.

After a careful review of the record, the Director is satisfied that the ALJ properly evaluated the nature and extent of the harassment, the totality of circumstances surrounding the District's responses and, adhering to the standards set forth by the Supreme Court as to how a reasonable school district would have handled the situation at the time, reached a well-considered conclusion as to whether the District's remedial actions as a whole were reasonably calculated to end the harassment. The Director concurs that under the circumstances, the District's overall responses to years of bullying--which included constant taunts, physical assaults, molestation, and ultimately led to the child's withdrawal from school--were not reasonably calculated to end the misconduct.

The law does not demand that school districts shelter their students from every single instance of peer harassment. It does, however, require each school district to take reasonable measures to protect those under its watch. In the case of L.W., the District fell short of that requirement.

REMEDIES

The ALJ awarded L.W. the "present day value of $50,000," and imposed a statutory penalty of $10,000. (ID 10) In the order issued on July 26, 2004, the Director awarded $50,000 to L.W. in damages for emotional distress, and imposed a $10,000 statutory penalty. In a September 17,

2004 order, the Director granted a stay of the payment provisions of his July 26, 2004 order, but ordered that post-judgment interest should accrue from September 9, 2004, on both the damage award to L.W. and the statutory penalty.

The Appellate Division affirmed that award on December 7, 2005. 381 N.J. Super. at 499-500. The amount of damages was not an issue before the Supreme Court, and was not part of its limited remand. Neither court took issue with the imposition of post-judgment interest as a condition of the stay pending appeal.

For the reasons stated in the 2004 DCR Director's order, as affirmed by the Appellate Division and endorsed by Chief ALJ Sanders, the Director adopts the award of $50,000 to L.W., plus interest from September 9, 2004, at the rates set by the Rules of Court. Likewise, the Director adopts the assessment of a $10,000 penalty payable to the State Treasury, N.J.S.A. 10:5-14.1a, but will forgo any claim for interest on the statutory penalty.

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, L.W.'s case was prosecuted by the attorney for the DCR, attorney's fees and costs may be assessed against Respondent. N.J.S.A. 10:5-27.1.

The Director's order dated September 17, 2004, fixed the amount of counsel fees due up to that point at $28,175.74, and assessed interest beginning ten days from the date of that order. The attorney's fee award was not modified on appeal, and remains in effect.

The ALJ awarded counsel fees in this case. The Director concurs that it is appropriate to make a supplemental fee award in this case. The record will be left open for 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. Complainant shall file with the DCR 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 L.W. 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.

2. Within 45 days from the date of this order, Respondent shall forward to the DCR a certified check payable to Complainant for the full amount of the pain and humiliation damages awarded in the September 17, 2004 Director's Order, plus post-judgment interest through the date of payment. Post-judgment interest on the $50,000 pain and humiliation award through February 25, 2013, is $18,269.86, and at the rate for 2013, the per diem interest on the $50,000 is $2.73.

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

4. Within 45 from the date of this order, Respondent shall forward to the DCR a certified check payable to "Treasurer, State of New Jersey," for the full amount of the counsel fees awarded in the September 17, 2004 Director's Order, plus interest from September 27, 2004, through the date of payment. Post-judgment interest on the $28,175.74 in counsel fees is $10,242.36 through February 25, 2013, and at the rate for 2013, the per diem interest on the $28,175.74 is $1.54.

5. The penalty and all payments to be made by the Respondent under this order shall be forwarded to Robert Siconolfi, New Jersey Division on Civil Rights, P.O. Box 46001, Newark, New Jersey 07102.

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 DCR.

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 supplemental counsel fees to be awarded. The Director will issue a supplemental order addressing counsel fees.

DATE: Feb. 25, 2013

CRAIG SASHIHARA, DIRECTOR
NJ DIVISION ON CIVIL RIGHTS