



Addressing Dangerousness and Mental Health under IDEA and Section 504: An Overview of Key Legal Requirements

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Disclaimer

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



Workshop Materials

All Materials can be accessed at

<https://tinyurl.com/LO-FEA-110119>

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

Legal Overview

- New Instructional Requirement
- Determining Dangerousness
- Expedited Hearings and Emergent Relief
- Review of Scenarios
- Case Law on Dangerousness
- Discipline under IDEA
- Addressing Student Mental Health
- Addressing Absenteeism

Student Mental Health Issues Certificate Program

- Today's workshop is part of the LEGAL ONE Mental Health Issues Certificate program (\$300)
- Also includes:
 - Online Course: *Signs Matter: Early Detection*
 - Webinar (Live on 2/11 or archived): *Developing Support Plans for At-Risk Students*
 - In-Person Workshop (October 9): *Addressing Student Mental Health Issues: Beyond Identification and Referral*

Addressing Student Mental Health

- LEGAL ONE Student Mental Health Issues Certificate Program
 - [February 4 and 5, 2020](#)
- Signs Matter – www.njpsa.org/signsmatter/
- Case Law Trends
 - Need to address social and emotional needs of students, not just academic needs
 - Need to address school phobia
 - May have child find obligation for student who develops a disability because of HIB
 - Need to follow due process to remove student from school environment because of danger

New Instructional Requirement

- **P.L. 2019, c. 222 (8/9/19)** – Requires health curriculum for public school students in grades kindergarten through grade 12 to include instruction on mental health. The instruction in mental health shall be adapted to the age and understanding of the students and shall be incorporated as part of the district's implementation of the New Jersey Student Learning Standards in Comprehensive Health and Physical Education.
- Effective 2020-2021 school year.

Expedited Hearing

- A district may request an expedited hearing before an ALJ and may exclude a student with a disability if maintaining the current placement is “substantially likely to result in injury to the child or others.” See 20 U.S.C. 1415(k)(3). See also N.J.A.C. 6A:14-2.7(n).
- District should also file for Emergent Relief with the NJDOE while awaiting expedited hearing
 - See example of this - <https://njschoollawblog.com/administrative-law-judge-grants-school-districts-request-for-emergent-relief-to-conduct-psychiatric-evaluation-and-place-student-in-an-alternative-interim-setting-2/>

NJDOE August 6, 2019 Memo on Expedited Due Process Hearings

- One of Four Memos
- Addresses expedited due process hearings (hearings concerning discipline issues such as manifestation determination meetings and student exclusion)
- This memorandum reminds parties that sufficiency challenges are not permitted when a request for an expedited due process hearing is filed
- The memorandum also reminds the parties that adjournments may not be requested or granted for an expedited due process hearing, as such hearings must be held and completed within the applicable timeframes in IDEA

LEGAL ONE Summary Memo

- Prepared by John Worthington, Esq., former Director of the Office of Special Education, NJDOE
- Includes reference to federal statutory and code provisions and New Jersey code related to addressing dangerousness
- Outlining procedural requirements
- Includes examples of case law

Case Law –Excluding Student & Addressing Mental Health

- E.Z. o/b/o D.Z. v. Audubon SD and Hampton Academy (NJ Adm. July 13, 2016)
- Student was suspended for 3 days from Hampton Academy for behavior alleged to be dangerous to student and others. District made reentry conditional on student having a psychiatric evaluation by district chosen doctor. Parent refused and student was withdrawn from Academy by district and placed on home instruction. New IEP issued, with online home instruction.
- ALJ held violation of due process rights. Required to hold Manifestation Determination when student was out 10 days. Had no right to unilaterally change placement. District ordered to return student to Academy and provide compensatory services for more than 50 days of removal.

SCENARIOS



Scenario 1 – Child Find, 504, Title IX

Krebs v. New Kensington-Arnold Sch. Dist., 2016 WL 6820402 (W.D. Pa. 2016)

- District Court denied school district motion to dismiss claim involving alleged violations of Section 504, Title II, and IDEA.
- Case involved 14 year old girl who hanged herself after allegedly being bullied from 7th grade to 9th grade.
- Child find obligation may have been violated when district failed to identify student as potentially having a disability where the student was suffering from anxiety, depression and anorexia nervosa, her grades had dropped from A/B to F's, and who had lost more than 30 pounds.
- Impact – Some students may develop disabilities as a result of severe and persistent bullying. District may have affirmative obligation to evaluate even prior to parent request if district should have known about potential disability.

Child Find Obligation under IDEA, Section 504 and ADA

- “School districts have a continuing obligation under the IDEA and Section 504 to identify and evaluate all students who are reasonably suspected of having a disability under the statutes ... This must be done within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability.”
- Court reject school district claim that it only had reason to know the student may have a disability when the parent signed a permission to evaluate form on December 20, 2014.
- Requirement kicked in when district “should have known” that the student likely suffered from a disability.
 - Declining grades, weight loss, self harm, diagnosis of Anxiety and Depression, ongoing harassment, hospitalizations

Deliberate Indifference Under Title IX

- Sexual harassment that was severe and pervasive, plus actual notice of harassment
- Instructed victim to report incidents, but failed to take reasonable steps to prevent harassment
- Failed to address larger school climate issues, professional development

Scenario 2- Posting Videos Online

- [*Clifton Bd. of Educ. v. K.M. o/b/o K.M.*](#), OAK Dkt. No. EDS 18260-15, Agency Dkt. No. 2016-23665, 2015 N.J. AGEN LEXIS 576 (Nov. 23, 2015). K.M. was an eighth grade female student classified as emotionally disturbed eligible for behavior plans, counseling, among other interventions. K.M. exhibited significant behavioral and discipline issues. K.M. had been suspended from school for approximately sixteen days and received three in-school suspensions/detentions during the 2015-2016 school year for behaviors. On October 27, 2015, the school district suspended her for taking videos of other students with her cell phone during class and then posting these videos on the internet. The videos showed K.M. using profanity and ridiculing and harassing other special education students in her class. Thereafter, on November 6, 2015, the school district moved for emergent relief when K.M.'s parents refused consent for a psychiatric evaluation and to change her placement to an alternative educational setting. The application was granted on November 23, 2015.

ALJ Analysis – Danger to Others

- “Without a psychiatric evaluation the district is at a loss as to what to do next for K.M. Without this evaluation the District’s efforts to provide K.M. with FAPE are impaired. The parents’ refusal to consent to the course proposed by the district exacerbates the District’s inability to provide FAPE and K.M.’s inability to obtain a meaningful education. This I FIND is irreparable harm.”
- “I FIND that K.M. is unable to conform to school rules and conduct herself in a manner ... that does not significantly disrupt the operations of the school. I find K.M.’s misbehaviors disrupt other student’s ability to access an education. I FIND K.M. negatively impacts the safety, security and well-being of other students, herself, staff and school property.”

Scenario 3 – Rap Lyrics

- District failed to define “terroristic threat”
- No evidence that student threatened violence or to kill anyone
- Student did not share song with anyone or perform it in front of others, merely wrote it in his journal
- No specific policy prohibiting a student to write a statement referencing shooting a gun
- See N.J.S.A. 2C:12-3 – a person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or to otherwise cause serious public inconvenience, or reckless disregard of the risk of causing such terror or inconvenience. Further, a person is guilty of terroristic threats if he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonable causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out. See, N.J.S.A. 2C:12-3b.

Recent Legislation – Access to Guns

- P.L. 2018, c.34 - Requires firearms seizure when certain health care professional determines patient poses threat of harm to self or others. Duty to warn extends to “[a]ny person who is licensed in the State of New Jersey to practice psychology, psychiatry, medicine, nursing, clinical social work, or marriage and family therapy.”
- P.L. 2018, c. 35 - Authorizes New Jersey courts to issue gun violence protective orders to individuals who pose a significant risk of personal injury to themselves or others by possessing or owning a firearm. The protective orders prohibit the person who the order is filed against from securing or possessing any permit or license allowing firearm possession during the protective-order period. The bill also makes it a fourth-degree crime for a person to purposely or knowingly violate any provision of an extreme risk protective order.

Scenario 4 – Convening 504 Team, Responding to HIB

- **SEE Redding (CA.) Sch. Dist., 69 IDELR 16 (OCRIX, San Francisco, CA 2016)**
- **Office for Civil Rights issued report on March 7, 2016.**
- **District** was found to have discriminated against a student with depression and anxiety by failing to properly investigate reports of disability harassment AND by ***failing to hold a Section 504 team meeting*** to discuss the impact of that harassment on the student's education.
- Generalized response to harassment was insufficient. Not enough to convene assemblies and other generalized measures. Need to investigate and address specific incidents and put in place reasonable measure to prevent recurrence.

Bullying and Special Education

USDOE Dear Colleague Letter from 10/21/14:

- Bullying can impact student's ability to receive FAPE
- Negative impact may occur whether or not bullying was motivated by student's disability
- ***Need to convene IEP Team or 504 Team in all cases where HIB is confirmed and student with disability is the victim***
- Best practice to convene team whether student with disability is victim or aggressor

“FEDS ORDER NJ TO COME UP WITH BETTER WAY TO RESOLVE SPECIAL-ED DISPUTES” – May 2019

- “New Jersey has been given three months to improve its much-criticized process for settling disputes involving students in special education.”
- “New Jersey’s judicial system for resolving special education disputes has itself been long in dispute over arguments that it takes too long, costs too much, is biased toward districts, or is biased toward families.”
- “Now the federal Department of Education has entered the debate, this month ordering the state to come up with a better due-process system within three months. It said the current process involving the Office of Administrative Law has left too many cases unresolved for too long.”
- USDE May 6, 2019 Letter:
 - <https://assets.njspotlight.com/assets/19/0527/2118>
- Article:
 - <https://www.njspotlight.com/stories/19/05/27/feds-order-nj-to-come-up-with-better-way-to-resolve-special-ed-disputes/>

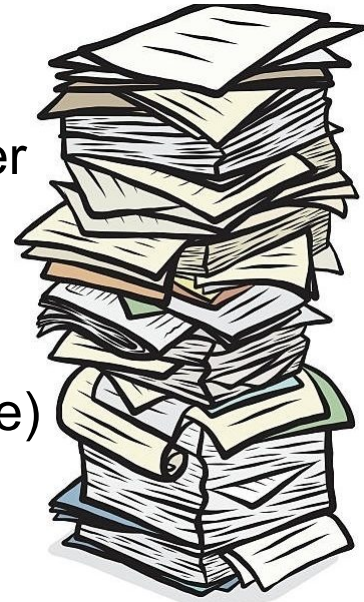
Physical Restraint/Seclusion Legislation

- P.L. 2017, c.291
- Limits use of physical restraint – only in an emergency in which the student is exhibiting behavior that places the student or others in imminent physical danger
- Only restrain in prone position with prior written authorization of primary care doctor
- Staff members using restraint annually trained
- Immediate parental notice with written notice within 48 hours

**What if the District feels
the student is
dangerous?**

Collect Substantial Evidence of Dangerousness

- Incident reports
 - Describe the behavior
 - Document the time and date
 - Frequency and intensity
 - Impact of the behavior on the school, the child, and other students
 - Nurses reports showing harm to self, others, or staff
- Take pictures of property damage the day of the incident
- Gather written accounts by other students (if age appropriate)
 - that day
- Gather written accounts by staff



Unique Circumstances

1. Possessed a weapon at school, on school premises, or at a school function.
2. Knowingly possessed or used illegal drugs while at school, on school premises or at a school function.
3. Inflicted serious bodily injury upon another person while at school, on school premises or at a school function.

Weapons

18 U.S.C. 930(g)(2) states: The term dangerous weapon means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length.

B.P. and R.P. o/b/o M.P v. Washington Twp. Bd. of Educ.
2000 N.J. AGEN LEXIS 910

- 17 yr old, multiply disabled student
- M.P. was placed on home instruction at the high school after behavior problems
- During home instruction M.P. retrieved scissors out of staff's bag and cut aides hair with them
- M.P. also took a shoelace and held it taught between his fingers and approached teacher's throat.
- M.P also swung a telephone receiver near a teacher's head
- The child study team then proposed an iaes at an out-of-district school or home instruction in the home.

Court Held

- “Dangerous weapon” means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury”
- CST determined behavior was not a manifestation of disability
- An IEP meeting was held
- CST determined the need for the alternative placement
- Court determined the items used were capable of causing harm
- Court granted district’s motion to affirm district’s 45 day removal.
- Court ordered parents to cooperate with district in finding potential placements.

Drug Offense

“Illegal Drug” means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional.

What is Serious Bodily Injury?

1. Substantial risk of death
2. Extreme physical pain
3. Protracted and obvious disfigurement
4. Protracted loss or impairment of the function of a bodily member, organ, or mental faculty

Examples:

- A teacher who is in serious condition when admitted to hospital
- Loss of copious amounts of blood
- Severe lacerations which required stitches
- Hospitalized for two days to observe is swelling to the brain
- Laceration where teacher could have bled to death
- Pain so great needed to be given narcotic painkillers
- Scar on the forehead was life-long

Serious Bodily Injury

Serious Bodily Injury is NOT:

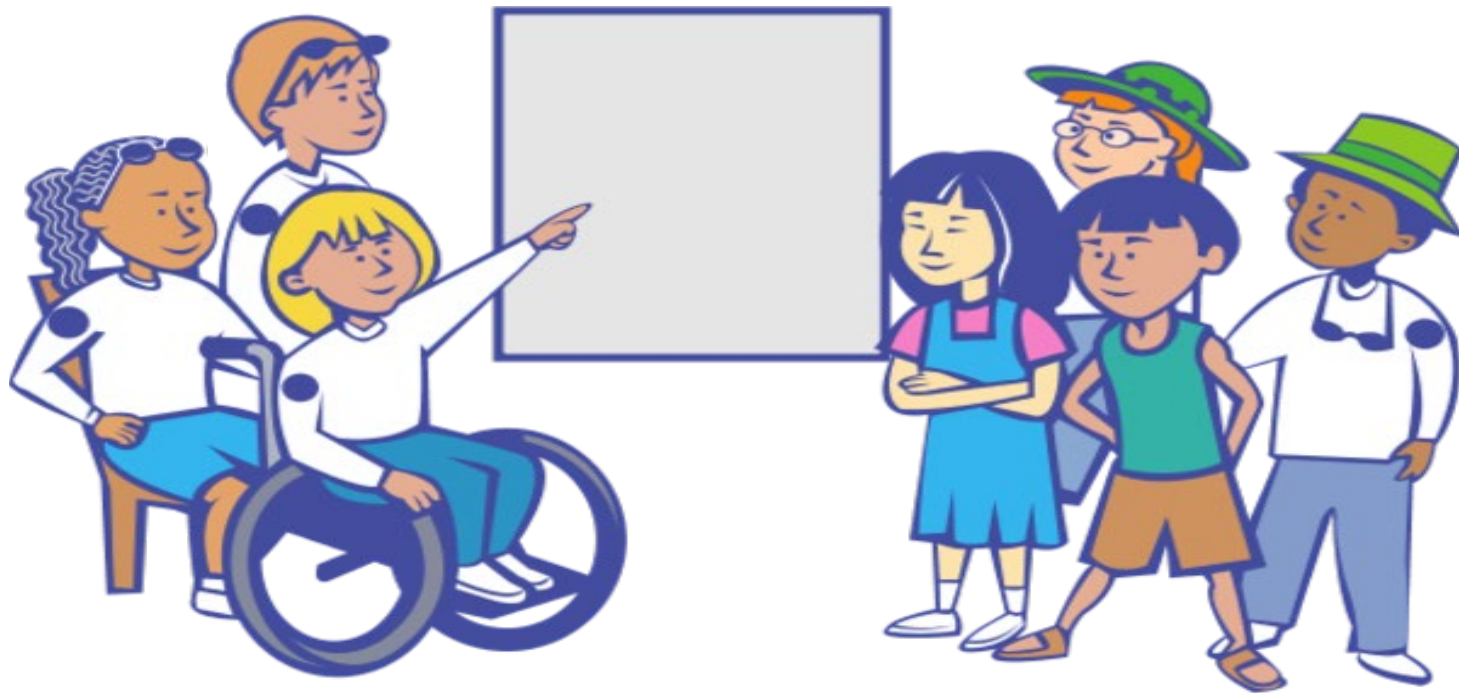
- A cut, abrasion, bruise, or slight burn;
- Mere physical pain;
- Illness;
- Slight impairment of the function of a bodily member, organ, or mental faculty; or
- Any other temporary injury to the body

18 U.S.C. Sec. 1365(h)(4);
34 C.F.R 300.530 (g)(3)

Responding to Biting Incidents in Schools

- See N.J.S.A. 34:6A-25 – Blood Borne Pathogens
 - <https://www.state.nj.us/health/workplacehealthandsafety/peosh/peosh-health-standards/bbp.shtml>
- Special Needs Student in Elizabeth Repeatedly Bitten by Classmate - <https://newyork.cbslocal.com/2019/09/06/special-needs-student-attacked/>
- Iowa City Schools 'failed' to take steps to prevent workplace violence (aide and teachers bitten by students)
 - <https://www.kcrg.com/content/news/OSHA-Iowa-City-Schools-failed-to-take-steps-to-prevent-workplace-violence-510676801.html>
 - teachers, paraeducators, and/or substitutes were injured after they were kicked, punched, pushed, and even bitten in the classroom, playground, and school bus

HIB Considerations



Definition of Harassment, Intimidation, or Bullying

“Harassment, intimidation or bullying” means:

- Any gesture
- Any written, verbal or physical act, or electronic communication
- Whether it be a single incident or a series of incidents
- That is reasonably perceived as being motivated either by any actual or perceived characteristic
- That takes place on school property, at any school-sponsored function, on a school bus, or off school grounds

Definition of Harassment, Intimidation, or Bullying

The HIB must **substantially disrupt or interfere** with the orderly operation of the school or the rights of other students and:

- A reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging a student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
- Has the effect of insulting or demeaning any student or group of students; or
- Creates a **hostile educational environment** for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

Bullying and Special Education

- If behavior would otherwise be HIB, still must classify as HIB even if behavior is manifestation of student's disability
- Need to consider student's disability when determining discipline, remediation or other response to HIB
- Need to work with case manager throughout process, including during initial interview

HIB and Special Education – Case Law

- ***L.B. o/b/o J.B. v. Roselle Board of Education*** 2018 WL 2016647 OAL Dkt. No. EDS 05079-16 (April 13, 2018)
 - Failure to provide FAPE. No evidence of HIB, but district failed to address anxiety and school phobia resulting from student’s perception of HIB.
- ***S.R. and M.R. o/b/o J.R. v. Franklin Township Board of Education*** 2018 WL 2016648, OAL Dkt. No. EDS 9122-17 (April 9, 2018)
 - No evidence of HIB. However, the failure to provide measurable goals and objectives in the area of social skills and social speech to address his disabilities was a failure to provide FAPE. Student to receive a new IEP and compensatory education including weekly social skills and counseling.

Case Law - Student with Disability

F.F. v. Matawan-Aberdeen Reg'l BOE (ALJ July 26, 2012) – Student with emotional disturbance was bullied in middle school and developed situational anxiety.

- School district later implemented Olweus training for staff & students
- ALJ upheld district's recommended placement: half day in high school and half day at home

Harassment and Unilateral Placements Under the IDEA

- Student was subjected to both verbal and physical harassment by other students
- Student became depressed and attempted suicide
- Parents moved the student to a high school in a neighboring school district
- Court concluded that the high school of residence could not provide a FAPE due to harassment

Shore Regional High School v. P.S. (2004)

LGBTQ ISSUES



DOE Transgender Student Guidance

- At-Risk Population for Self-Harm, Suicidal Ideation
- NDOE Guidance Issued on September 27, 2018:
 - <https://nj.gov/education/students/safety/sandp/transgender/Transgender%20Guidance%20Resources%202018.pdf>
- Definitions
- Student Gender Identity – Parent consent, court order name change not required; parent notification
- Name and pronoun use, student ID, student dress
- Safe and Supportive Environment – staff training, equal access, HIB, social and emotional learning
- Confidentiality and Privacy
- Student Records – gender identity v. birth name
- Student Activities
- Restrooms and locker rooms

Suspected Child Abuse/Neglect

- Any staff member who suspects a child is abused, neglected or missing must report immediately to DCP & P. School district must contact law enforcement. See N.J.A.C. 6A:16-11.1.
- 1 in 10 children are estimated to be victims of sexual abuse, according to a 2004 USDOE report
- 1 in 4 girls and 1 in 20 boys self-report having experienced sexual abuse.
- Over a third of sexual abuse is committed by family members; 60% by other known and trusted adults.

Immunity For Reporters



Staff members who report suspected child abuse, HIB, drug & alcohol use, teen dating violence, or suicidal ideation in good faith are immune from legal liability

Student Attendance

- Chronic Absenteeism

- “Showing Up Matters: The State of Chronic Absenteeism in New Jersey” – Enclosure in your Drop Box

- 2015 Analysis by Advocates for Children of NJ – www.acnj.org
 - Provides statistical data re: Absenteeism trends / issues including:

- Race
 - Age / Grade
 - Gender
 - ELL / Language Barrier Issues
 - Homelessness
 - Immigrant / Migrant

- NJ Spotlight Article discussing the analysis is in the Drop Box

- Steps to deal with excessive absenteeism

- NJDOE Website:

- <http://www.nj.gov/education/ece/psguide/attendance.htm>

- (Document in your Drop Box)

Required Action in Response to Unexcused Absence

- Up to 4 cumulative unexcused absences
 - School District must notify student's parents prior to the start of the next school day (reasonable attempt);
 - Identify needed action to encourage attendance.
- Between 5 and 9 cumulative unexcused absences
 - School District must notify student's parents prior to start of next school day (reasonable attempt)
 - Learn the cause; and
 - Develop an action plan to address patterns of unexcused absences

Truancy

- Truancy occurs when a student between the ages of 6 and 16 has 10 or more cumulative unexcused absences
 - Parent/guardian may be charged with a disorderly persons offense
 - 1st Offense – up to \$25 fine
 - Subsequent Offenses – up to \$100 fine
 - Each day of unexcused absence is a separate offense
 - Student may be referred to Family Part of Superior Court
 - District must do case by case review of reasons for absences to determine if referral is necessary
 - Truant student may be found to be a juvenile delinquent if the parent is unable to get the student to attend school

QUESTIONS?



Model Policy on Suicide Prevention

- Consider the model policy developed by AFSP, the American School Counselors Association, the National Association of School Psychologists and the Trevor Project
- Critical means to ensure that you have addressed the many critical issues involved related to suicide prevention
- Provides structured way for addressing any gaps in current policy
- See Model Policy on Suicide Prevention in your packet

RESOURCES

- National Suicide Prevention Hotline – 1-800-273-TALK (8255) or text “START” to 741741
- 2nd Floor Youth Helpline - 888-222-2228
- New Jersey Hopeline - 1-855-654-6735
- National Association of School Psychologists – www.nasponline.org
- American Association of Suicidology – www.suicidology.org
- Suicide Awareness Voices for Education – www.save.org
- American Foundation for Suicide Prevention www.afsp.org
- Rape, Abuse & Incest National Network – www.rainn.org
- **Rutgers University Behavioral Health Care** – <http://ubhc.rutgers.edu/>
- The Need to Know the Warning Signs of Violence – Peter Langham, Ph.D. - <https://www.linkedin.com/pulse/need-know-warning-signs-violence-peter-langman-ph-d->

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All are held 3:30 pm – 4:30pm and cost \$40 each, or [\\$330 for all 11](#) (archived as well as live access)

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1	August 26, 2019	HIB and the Changing Legal Landscape
2	September 17, 2019	Understanding Social Media Boundaries for Students and Staff
3	October 8, 2019	Student Investigations 101 - Getting to the Truth
4	November 19, 2019	Implicit Bias, Disproportionality, Discipline and the Law
5	December 17, 2019	Education and Law Enforcement Working Together
6	January 14, 2020	Hot Issues in School Law
7	February 11, 2020	Developing Support Plans for At-Risk Students
8	March 10, 2020	Bringing It All Together: A Systemic Approach to Student Safety
9	April 14, 2020	Human Resources: New Requirements, Best Practices and the Law
10	May 19, 2020	You Can't Make This \$#!&! Up! School Law Horror Stories and Lessons to be Learned
11	June 9, 2020	Legal Issues in Student Health

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1	October 10, 2019	What's New In School Law? (Fall 2019 Update)
2	November 13, 2019	What's New in HIB Law?
3	December 19, 2019	School Attorney Ethics 101
4	January 16, 2020	What's New in Tenure and Seniority Law?
5	February 12, 2020	What's New in School Employment Law?
6	May 20, 2020	What's New in Student Safety and Student Rights?

Conclusion

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- If you have any questions about this presentation or suggestions for future seminars, please send an email to: dnash@njpsa.org