

JOSEPH EHRHARD AND ROBERT EHRHARD, :
 PETITIONERS, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE : DECISION
 HUNTERDON CENTRAL REGIONAL HIGH :
 SCHOOL DISTRICT, HUNTERDON COUNTY, :
 RESPONDENT. :

SYNOPSIS

Pro se petitioners filed an appeal with the Commissioner of Education in November 2013, challenging the determination of the respondent Board that Robert Ehrhard (Ehrhard) was not the victim of harassment, intimidation or bullying (HIB) under the provisions of the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 to -32.1 (the Act). Petitioners alleged that Ehrhard – who was a player on the high school baseball team from ninth through twelfth grade – was the victim of HIB at the hands of the head and assistant baseball coaches for the Hunterdon Central Regional High School team during the period from 2009-2013. Petitioners contended, *inter alia*, that Ehrhard and others on the team were the target of HIB by the coaches because they were students, healthy, white male student-athletes, and were perceived to be weak or meek members of the team. The Board asserted that it conducted a comprehensive HIB investigation, including interviews with coaches and 23 students, and that the determination of no HIB was not arbitrary, capricious or unreasonable. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: the Act applies to any gesture, or any written, verbal or physical act, or any electronic communication that is reasonably perceived as being motivated either by an actual or perceived characteristic, such as, *inter alia*: race, color, religion, national origin, gender, sexual orientation, or any other distinguishing characteristic; in this case, the alleged conduct fails to meet the statutory definition of HIB; there are no facts to support that the alleged bullying was motivated by a “distinguishing characteristic” of Ehrhard; status as a student does not qualify as a distinguishing characteristic, as the HIB statute only applies to misconduct against students; and – while being “meek or weak” could qualify as a distinguishing characteristic, petitioners failed to set forth any facts to support this theory. Accordingly, the ALJ granted the Board’s motion for summary decision, denied petitioner’s cross motion, and dismissed the petition.

Upon comprehensive review, the Commissioner concurred with the ALJ that the Board did not act in an arbitrary, capricious or unreasonable manner in rendering its HIB determination, as the alleged conduct fails to meet the statutory definition of HIB. Further, there is no evidence in the record that the alleged actions were motivated by a distinguishing characteristic of Ehrhard, as required by *N.J.S.A.* 18A:37-14. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 00188-14
AGENCY DKT. NO. 298-11/13

JOSEPH EHRHARD AND ROBERT EHRHARD, :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
HUNTERDON CENTRAL REGIONAL HIGH :
SCHOOL DISTRICT, HUNTERDON COUNTY, :
RESPONDENT. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the petitioners and the Board's reply thereto.

In their exceptions, petitioners argue that they have been prejudiced by the three year delay between the time the Board filed its motion to dismiss for untimeliness and the time it was decided. Petitioners argue that they were harmed by the delay because they were forced to wait for a decision, rather than proceeding with discovery, which would have enabled them to show further cause for a finding of HIB. Petitioners further contend that the Administrative Law Judge (ALJ) mischaracterized their argument that all students are protected by the Harassment, Intimidation and Bullying (HIB) law. Petitioners maintain that their argument throughout has been that "healthy white heterosexual male student athletes (who by the Respondent's definition of a protected class are effectively excluded by the HIB law's coverage), are clearly covered by the HIB law if they were singled out for HIB by coaches who perceived them to be weak, meek and or timid; intelligent; and/or anxiety prone." (Petitioners' Exceptions at 11) The ALJ

indicated that petitioners were asserting that Robert Ehrhard's (Ehrhard) distinguishing characteristic was that he was a white, healthy, male student athlete, while petitioners were intending to convey that students without any explicitly enumerated distinguishing characteristics – like Ehrhard – are still protected under the HIB Act.

Petitioners argue that the ALJ further erred in finding that they failed to set forth facts to link the alleged bullying to Ehrhard being a weak or meek member of the team. Petitioners maintain that they made clear in their submissions that Ehrhard was targeted because he was the smallest team member and has always been “quiet, mild mannered and respectful.” (Petitioners’ Exceptions at 13) Petitioners also contend that the Board failed to consider that there had been a pattern of similar misconduct for ten years prior to the time of their complaint. In the HIB investigation, petitioners assert that the anti-bullying specialist was excluded from the investigation and there were conflicts of interest, which demonstrates that the Board selectively enforces its policies and that the HIB determination was therefore arbitrary, capricious and unreasonable.

Petitioners also contend that the ALJ erroneously stated that petitioners failed to assert that the alleged conduct physically or emotionally harmed Ehrhard, insulted or demeaned Ehrhard, or created a hostile environment. Instead, petitioners maintain that the effects of the HIB on Ehrhard had been discussed in previous submissions to the OAL and included heightened anxiety, mood lability, and a loss of confidence in his abilities, which resulted in him leaving baseball despite opportunities to play at the college level. When considering a test of reasonability, petitioners contend that a reasonable adult would agree that name calling, cursing, berating, public humiliation and threats of demotion would result in physical or emotional harm.

As such, petitioners argue that they meet the statutory definition of HIB and the Initial Decision should be rejected.

In reply, the Board argues that the ALJ properly found that the alleged actions do not meet the definition of HIB. The Board contends that petitioners are mischaracterizing the Board's position, creating new facts, and introducing additional allegations that are not supported by the record. The Board maintains that the only issue before the Commissioner is whether the Board's determination that no HIB was committed was arbitrary, capricious, or unreasonable, and that petitioners' discussion of other matters, including their attempt to advocate for other individuals who are not parties in this litigation, are irrelevant. Although petitioners argue that summary decision should not have been granted because further discovery was required, the Board notes that they have provided the complete investigatory file, and, thus, additional discovery is unnecessary. Additionally, the Board points out that petitioners propounded their discovery requests at the same time that they filed their summary decision motion, after the discovery period had ended. With respect to any procedural deficiencies, the Board notes that it conducted a comprehensive HIB investigation, including interviews with coaches and 23 students.

The Board agrees with the ALJ that the alleged behaviors were not motivated by a distinguishing characteristic and can therefore not meet the definition of HIB. Even if Ehrhard does have a distinguishing characteristic, the Board maintains that the alleged actions – i.e., unfair playing time, favoritism, profanity, and being too hard on the players – were not *motivated* by a distinguishing characteristic. Specifically, the Board notes that the ALJ properly found that Ehrhard's status as a student, a power imbalance, or being a healthy white male student athlete are not distinguishing characteristics. Further, the Board contends that the ALJ was correct in

finding that there is no link between the alleged bullying and Ehrhard's status as meek or weak. As such, the Board urges the Commissioner to adopt the Initial Decision and find that the Board's HIB determination was not arbitrary, capricious, or unreasonable.

Upon a comprehensive review of the record, the Commissioner agrees with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination because the alleged conduct fails to meet the statutory definition of HIB. The Commissioner is further in accord with the ALJ that there is no evidence in the record that the alleged actions were motivated by a distinguishing characteristic of Ehrhard. Although petitioners argue that Ehrhard's distinguishing characteristic is that he is a weak or meek member of the team, there is no link between the alleged conduct and the distinguishing characteristic to demonstrate that the alleged actions were *motivated* by said characteristic, as required by *N.J.S.A. 18A:37-14*. As petitioners fail to succeed on the distinguishing characteristic element, the Commissioner need not reach the remaining elements of the HIB definition, such as whether the alleged conduct physically or emotionally harmed Ehrhard, insulted or demeaned Ehrhard, or created a hostile environment.

The Commissioner does not find petitioners' exceptions to be persuasive. At the outset, petitioners were not prejudiced by the length of time of these proceedings. It appears that petitioners failed to propound discovery until the time that they served their summary decision motion and are in possession of the entire investigatory file. Further, any perceived mischaracterization of their arguments by the ALJ are of no moment. The ALJ viewed petitioners' arguments broadly and conducted analysis on whether Ehrhard could demonstrate a distinguishing characteristic under any of the proposed scenarios – as a student, a healthy white

heterosexual male student athlete, or as a weak or meek member of the team – and found that the alleged conduct was not motivated by any of these characteristics. Although petitioners argue that they made clear in submissions that Ehrhard was targeted because he was the smallest team member, quiet, and mild mannered, there is no link in the record to connect this distinguishing characteristic with the alleged conduct. There is simply no evidence that the alleged actions were motivated by Ehrhard’s distinguishing characteristic. Finally, petitioners’ concerns regarding the investigatory process are not convincing. The Board conducted a comprehensive investigation into the HIB complaint, including interviewing 23 student baseball players and several coaches.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.¹

COMMISSIONER OF EDUCATION

Date of Decision: December 21, 2017

Date of Mailing: December 22, 2017

¹ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 188-14

AGENCY DKT. NO. 298-11/13

J.E. AND R.E.,

Petitioners,

v.

HUNTERDON CENTRAL REGIONAL

BOARD OF EDUCATION,

Respondent.

J.E., appearing for petitioners, pro se

Brandon Croker, Esq., appearing for respondent (Comegno Law Group,
attorneys)

Record Closed: September 25, 2017

Decided: September 28, 2017

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

The petitioners, J.E. and R.E., J.E.'s son, appeal the determination of respondent, the Board of Education of the Hunterdon Central Regional School District

("Board"), that head baseball coach Mike Raymond ("Coach Raymond") and assistant baseball coach John Augusta ("Coach Augusta") did not commit acts of "harassment, intimidation or bullying" ("HIB") as defined under the Anti-Bullying Bill of Rights Act ("ABRA"), N.J.S.A. 18A:37-13, et seq., against petitioner R.E., who was a player on the high-school baseball team during the relevant time period.

PROCEDURAL HISTORY

On November 29, 2013, the petitioners filed a Petition of Appeal and Petition for Declaratory Ruling with the Commissioner of Education ("Commissioner"). On December 23, 2013, respondent filed a motion to dismiss, arguing that the petition was filed outside of the required ninety-day period. The matter was transmitted to the Office of Administrative Law ("OAL") on January 7, 2014, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On October 6, 2016, Administrative Law Judge Masin issued an Order denying respondent's motion to dismiss, finding that the petition was timely filed.

On June 16, 2017, petitioners filed a "Motion for Declaratory Ruling on Definition of Protected Class," seeking a ruling that 1) the HIB statute protects all students from acts of HIB, and 2) the students who filed complaints in the instant matter fell within a protected class. On June 19, 2017, respondent moved for summary decision, arguing that any alleged misconduct was not motivated by a "distinguishing characteristic," and, therefore, did not meet the statutory definition of HIB. Petitioners filed a letter on July 14, 2017, which may reasonably be construed as an opposition to respondent's motion, arguing, for the first time, that R.E. and others were targeted because they were perceived as "meek or weak" members of the baseball team. The petitioners filed additional letter briefs on September 20 and 22, 2017. Following a telephone conference on September 25, 2017, the record closed.

FACTUAL DISCUSSION

Petitioner R.E. played baseball for Hunterdon Central Regional High School from his freshman year to his senior year (2009–2013).² (Certification of Brandon R. Croker, Esq., (“Croker Cert.”), Exh. 1.) Coaches Raymond and Augusta served as members of the coaching staff during this time. (Ibid.)

On June 13, 2013, petitioner J.E. sent an email to Hunterdon Central’s anti-bullying coordinator Barbara Manfredi (“ABC Manfredi”) requesting a meeting to discuss Coach Raymond’s and Coach Augusta’s treatment of R.E. (Croker Cert., Exh. 2.) The email included allegations that: 1) Coaches Raymond and Augusta tossed baseballs into a pond, laughed at R.E., and requested that he go into the pond to retrieve the balls; 2) Coach Raymond hassled R.E. over the manner in which he threw a baseball with an injured wrist; 3) Coach Raymond threatened to demote R.E. to the junior-varsity team; 4) Coaches Raymond and Augusta berated R.E. for informing them that he would

² Petitioner R.E. graduated from Hunterdon Central in 2013 and is believed to have graduated from college in 2017. Respondent argues that the case is moot because R.E. is no longer a student in the school district. While this issue need not be reached, the limited case law suggests that such an action can continue even after the alleged perpetrator is out of contact with the alleged victim.

One case that addresses the mootness issue in the HIB context is J.M. v. Board of Education of Tinton Falls, EDU 7871-13, Initial Decision (December 12, 2013), rejected, Comm’r (March 17, 2014), <<http://njlaw.rutgers.edu/collections/oal/>>. In that case, the administrative law judge (ALJ) concluded that an HIB action was moot because the alleged bully, a cheerleading coach, was relieved of her coaching duties during the pendency of the appeal proceedings. However, because the former coach was still employed by the respondent district, the Commissioner found that resolution of the petitioner’s challenge was necessary for the sake of all parties. The Commissioner concluded that, if the ALJ’s fact findings supported the petitioner’s allegations, a finding of HIB should be entered into the former coach’s personnel file and reported to the Department of Education. Additionally, if there was a substantiated finding of HIB, corrective measures would need to be taken so that other students were not exposed to further inappropriate behavior by the former coach.

In M.D.G. ex rel. C.J. v. Board of Education of Atlantic City, EDU 6450-04, Initial Decision (April 27, 2005), adopted, Comm’r (May 26, 2005), <<http://njlaw.rutgers.edu/collections/oal/>>, a school board was found to have violated the HIB statute by failing to properly investigate an incident of bullying. During the appeal, the student was withdrawn from the school and enrolled in another school within the respondent’s district. While the ALJ noted that “there is no immediate remedy readily available to [the bullied student],” he ordered the board to comply with the Act by “conducting staff in-service programs with respect to the requirements of the statute in order to assure that all pupils under the Board’s supervision and control will be protected from harassment, intimidation or bullying in the future.” The Commissioner adopted the ALJ’s decision.

These cases suggest that the HIB appeal is not moot, even though there is no immediate personal remedy available to R.E.

miss baseball practice due to a family vacation and then guilted him into coming to practice by telling R.E. that he was close to becoming a starter; 5) Coach Raymond encouraged the team to applaud for R.E. when he caught the baseball during practice; 6) Coach Raymond intentionally forced R.E. to carry his catchers' equipment although he had no intention of allowing R.E. to participate in the game; and 7) Coach Raymond encouraged one teammate to keep his distance from R.E. (Croker Cert., Exh. 2; Respondent's Brief at 4.)

On the same date, ABC Manfredi prepared an official HIB Report Form, noting that the alleged conduct included: 1) teasing or name-calling; 2) insulting or demeaning comments; and 3) publicly humiliating a pupil. (Croker Cert., Exh. 1.) The HIB Report Form listed the 2013 Hunterdon Central varsity baseball team and teacher/coach Jeff Coates as witnesses to the alleged acts of HIB. (ibid.)

By letter dated June 14, 2013, principal Suzanne Cooley informed R.E.'s parents of a report that their son may have been a target of HIB. (Croker Cert., Exh. 5.) The letter informed R.E.'s parents about the impending investigation and their rights under the HIB statute. (ibid.) Coaches Raymond and Augusta were sent correspondence advising them of the same. (Croker Cert., Exh. 6.)

On June 14, 2013, Principal Cooley and ABC Manfredi interviewed R.E. regarding the alleged acts of HIB. (Croker Cert., Exh. 7.) Between June 14 and June 28, 2013, twenty-three student baseball players from the 2013 varsity baseball team were interviewed. (Croker Cert., Exh. 8.) On June 19, 2013, Principal Cooley and ABC Manfredi interviewed coaches Raymond and Augusta. (ibid.) Interviews of ninth-grade-baseball coach Kevin Cuozzi and junior-varsity-baseball coach Mark Angelo followed on June 20, 2013. (ibid.)

On June 27, 2013, Principal Cooley signed the Hunterdon Central HIB Investigation Form—Staff Accused, finding that coaches Raymond and Augusta did not commit acts of HIB, and submitted the same to superintendent Christina Steffner.

(Croker Cert., Exh. 11.) On June 28, 2013, Principal Cooley informed R.E.'s parents that the investigation had been completed. (Croker Cert., Exh. 12.) The letter explained that the school did not find evidence that R.E. was the target of HIB, but that the allegations of misconduct were being reviewed as a personnel matter. (Ibid.) The parents were informed of their right to request a hearing before the Board of Education. (Ibid.) Principal Cooley also sent letters to coaches Raymond and Augusta advising them of the results of the investigation. (Croker Cert., Exh. 13.)

On July 1, 2013, Principal Cooley and Superintendent Steffner met with R.E.'s parents to explain the results of the investigation. (Croker Cert., Exh. 14.) On July 8, 2013, J.E. sent an email to Principal Cooley, notifying her that he would be appealing the finding before the Board. (Ibid.) On the same date, Superintendent Steffner responded to the email, advising R.E.'s parents of the time and date of the Board's next meeting. (Ibid.)

On July 15, 2013, a hearing was held during the executive session of the Board meeting. (Croker Cert., Exh. 15.) On July 16, 2013, J.E. sent an email to Principal Cooley reiterating his purpose for filing the HIB complaint and including HIB resource material for the Board to consider prior to its vote. (Croker Cert., Exh. 16.) On August 19, 2013, during the regular session of the Board meeting, the Board voted to approve the administration's findings that there was insufficient evidence to confirm that R.E. had been the victim of HIB. (Croker Cert., Exh. 17.) By letter dated August 26, 2013, Superintendent Steffner informed R.E.'s parents that the Board had not found evidence to support the HIB allegations. (Croker Cert., Exh. 18.)

On September 3, 2013, Principal Cooley prepared a document entitled "HIB Summary Report—Baseball," which included the status of five HIB complaints against coaches Raymond and Augusta, including the complaint filed by R.E. (Croker Cert., Exh. 19.) The report indicated that a total of twenty-five baseball players and five coaches were interviewed during the course of the investigation. (Id. at 1.) The report also outlined the questions asked during the interviews and summarized the responses

to these questions. (Id. at 1–6.) Four players indicated that they were the direct recipients of intimidation and/or abuse. (Id. at 3.) The first said that he experienced “in-your-face” confrontations by Coach Augusta, which affected his performance. (Ibid.) The second indicated that he was placed in “timeout” for what the coaches perceived as a lack of hustle. (Ibid.) The third felt that he was ridiculed for attending to an injury. (Ibid.) The last believed that he was led on by continuously being told that he was one play away from becoming a starter and was told to bring his catcher’s equipment despite being moved to a pitching position. (Ibid.) However, the report noted that the allegations documented in J.E.’s initial complaint to the school were “not verified.” (Id. at 2.) For example, it was “not verified” that the coaches targeted players based on personalities or that they preyed on those with anxiety, those who were intelligent, or those who were mild-mannered. (Ibid.)

LEGAL ANALYSIS AND CONCLUSION

Standards for Summary Decision

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, which govern the conduct of contested cases before the OAL, a party may file a motion for summary decision on substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion “shall be served with briefs and with or without supporting affidavits.” N.J.A.C. 1:1-12.5(b).

Under this regulation, which is akin to the judiciary’s motion for summary judgment, see R. 4:46-1, “the determination [of] whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.” Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995). In making this determination, the analysis is “whether the evidence presents a sufficient

disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 533 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). Summary decision is also proper when the opposing party “points only to disputed issues of fact that are ‘of an insubstantial nature.’” Id. at 529.

The issues presented are whether the HIB statute applies to teachers, coaches, and other school staff members, and whether the alleged conduct meets the statutory definition of HIB.

I. The HIB statute applies to teachers, coaches, and other school staff members.

The text of the HIB statute does not explicitly address the applicability of the law to teachers, coaches, and other school staff members. However, guidance issued by the Department of Education has made clear that teachers and other adults can be offenders under the HIB statute. The guidance document notes, “The [ABRA] addresses HIB committed only against students; it does not address HIB committed against adults While the [ABRA] only addresses HIB committed against students, it includes any person who commits an act of HIB against a student.” (New Jersey Dep’t of Educ.’s Guidance for Schs. in Implementing the Anti-Bullying Bill of Rights Act (P.L. 2010, c. 122).³) Thus, the statute covers HIB committed against a student by a teacher, coach, or school staff member.

The HIB statute has been interpreted to give staff members the same procedural rights as an alleged student offender, including the ability to defend themselves at a board hearing. Gibble v. Bd. of Educ. of the Hunterdon Cent. Reg’l Sch. Dist., EDU 02767-15, Initial Decision (April 12, 2016), modified Comm’r (July 13, 2016), <<http://njlaw.rutgers.edu/collections/oal/>>. “While the law provides that ‘parents or guardians of the students who are parties to the investigation’ may request a hearing before the board, this requirement must be held to extend to staff members whose

³ Found at <<http://www.state.nj.us/education/students/safety/behavior/hib/guidance.pdf>>.

conduct is implicated by a bullying allegation.” Ibid. Therefore, the procedural rights afforded under the HIB statute are equally applicable to accused teachers, coaches, and staff members.

II. Does the alleged conduct meet the statutory definition of HIB?

The ABRA is designed “to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises.” N.J.S.A. 18A:37-13.1(f).

Each school district must adopt an HIB policy that meets minimum statutory requirements, but generally has “control over the content of the policy.” N.J.S.A. 18A:37-15(a) and (b). The statutory requirements for an HIB policy include “a procedure for prompt investigation of reports of violations and complaints.” N.J.S.A. 18A:37-15(b)(6).

Under this procedure, “the investigation shall be initiated by the principal or the principal’s designee within one school day of the report of the incident and shall be conducted by a school anti-bullying specialist,” and “[t]he investigation shall be completed as soon as possible, but not later than 10 school days from the date of the written report of the incident of [HIB].” N.J.S.A. 18A:37-15(b)(6)(a). The results of the investigation shall then be quickly reported to the superintendent who, in turn, shall report the results to the board of education “no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent.” N.J.S.A. 18A:37-15(b)(6)(b) and (c).

Within five days of the board’s receipt of the report, the parents of the students involved in any alleged HIB incident are entitled to receive information about the nature

and result of the investigation. N.J.S.A. 18A:37-15(b)(6)(d). Upon receipt of this information, the parents may request a hearing before the board, and the hearing must be held within ten days of the request. Ibid. The board must issue a decision at the first meeting after its receipt of the investigation report. N.J.S.A. 18A:37-15(b)(6)(e). The board may affirm, reject, or modify the superintendent's decision. Ibid. The board's decision may be appealed to the Commissioner. Ibid.

An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Thus, in order to prevail, those challenging an HIB decision made by a board of education "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014), (citation omitted), adopted, Comm'r (April 10, 2014), <www.njlaw.rutgers.edu/collections/oal/>. Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, Comm'r (April 25, 2013), <<http://njlaw.rutgers.edu/collections/oal/>>.

Under the ABRA, "harassment, intimidation or bullying" (HIB) is defined as:

any gesture, any written, verbal or physical act, or any 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, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts

or interferes with the orderly operation of the school or the rights of other students and that:

- a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
- b. has the effect of insulting or demeaning any student or group of students; or
- c. 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.

[N.J.S.A. 18A:37-14 (emphasis added).]

As such, an incident must satisfy four separate elements in order to meet the definition of HIB under the ABRA.

A. Petitioners have failed to assert facts to support that the alleged bullying was motivated by a “distinguishing characteristic.”

First, to satisfy the statutory definition of HIB, the conduct must be “reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic.” N.J.S.A. 18A:37-14 (emphasis added). “The statute has not limited ‘distinguishing characteristic’ to those specifically enumerated, but it has consistently required such a perceived motivation.” K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 351 (App. Div. 2011). “The Legislature in the Anti-Bullying Act intentionally included a very open-ended phrase, ‘any other distinguishing characteristic,’ to signal that the Act would apply to a broad, unlimited range of distinguishing characteristics, so long as the distinguishing characteristic motivated the bully to harass the targeted student.” L.P. and H.P. ex rel. L.P., EDU 04462-16, Initial

Decision (June 10, 2016), adopted, Comm'r (July 25, 2016), <<http://njlaw.rutgers.edu/collections/oal/>>.

The category “any other distinguishing characteristic” has been interpreted to include a variety of traits. For example, both being a vegetarian and having head lice have been found to be “distinguishing characteristics” under the HIB statute. G.C. v. Bd. of Educ. of Montgomery, EDU 12103-15, Initial Decision (March 7, 2016), adopted, Comm'r (April 22, 2016), <<http://njlaw.rutgers.edu/collections/oal/>> (concluding that being a vegetarian constitutes “any other distinguishing characteristic” so as to support a finding of HIB); W.C.L. v. Bd. of Educ. of Tenafly, EDU 3223-12, Initial Decision (November 26, 2012), adopted, Comm'r (January 10, 2013), <<http://njlaw.rutgers.edu/collections/oal/>> (finding that a ten-year-old boy’s statement to another student that a classmate had head lice constituted HIB).

In R.G.B. v. Village of Ridgewood Board of Education, EDU 14213-12, Initial Decision (May 15, 2013), adopted, Comm'r (June 24, 2013), <<http://njlaw.rutgers.edu/collections/oal/>>, a student calling another student a “horse” and a “fat-ass” was reasonably perceived as motivated by the “distinguishing characteristic” of appearance or body-type and was found to constitute HIB. Similarly, in C.C. ex rel. S.C. v. Board of Education of Jefferson, EDU 10872-14, Initial Decision (April 6, 2015), <<http://njlaw.rutgers.edu/collections/oal/>>, adopted, Comm'r (May 12, 2015), <<http://www.nj.gov/education/legal/>>, a student’s comments that another student was “short” and “sucks at basketball” were found to constitute HIB, as the comments were reasonably perceived as motivated by the “distinguishing characteristic[s]” of height and sports proficiency.

However, the Appellate Division has made clear that “harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation, does not come within the statutory definition of bullying.” K.L. v. Evesham, supra, 423 N.J. Super. at 351. For example, in L.B.T. v. Freehold Regional School District Board of

Education, EDU 7894-12, Initial Decision (January 24, 2013), adopted, Comm'r (March 7, 2013), <<http://njlaw.rutgers.edu/collections/oal/>>, the Commissioner found that comments made by a high-school swimmer about her teammate's commitment to the team merely reflected a dispute about their respective roles on the team and did not constitute HIB. Likewise, in L.P. and H.P v. West Morris Regional High School District, EDU 04462-16, Initial Decision (June 10, 2016), adopted, Comm'r (July 25, 2016), <<http://njlaw.rutgers.edu/collections/oal/>>, there was no HIB where there was a clear conflict between two members of a high-school fencing team, but no evidence that the alleged bullying was based on a particular characteristic. Finally, in B.A. v. Board of Education of Hamilton, EDU 10485-15, Initial Decision (May 12, 2016), adopted, Comm'r (June 22, 2016), <<http://njlaw.rutgers.edu/collections/oal/>>, there was no finding of HIB as the result of a relationship breakdown between middle-school girls after one girl attended a party to which the other girls were not invited.

A “distinguishing characteristic” must be the motivation for the alleged bullying, even when the alleged bully is a teacher, coach, or staff member. In M.R. ex rel. M.R. v. Board of Education of the Ramapo Indian Hills Regional School District, EDU 05308-16, Initial Decision (November 7, 2016) modified in part, Comm'r (December 21, 2016), <<http://njlaw.rutgers.edu/collections/oal/>>, a parent filed an HIB report alleging that his daughter and three other cheerleaders were bullied by their cheerleading coach. The report stemmed from an incident in which the cheerleader sent a text message to her coach stating that she would be unable to attend the night's basketball game due to other plans. The report claimed that the coach responded with a “strong bullying tone” and informed her that she and any other cheerleader who missed the game would be off the team. The HIB investigation concluded that the coach did not engage in HIB, and the school board affirmed the findings. Importantly, there was no evidence in the record that the cheerleading coach's alleged actions were motivated by a distinguishing characteristic of the cheerleader.

It is unclear from the instant petition and subsequent motion papers what “distinguishing characteristic” of R.E. made him the target of the alleged bullying

behavior. Approximately three theories can be gleaned from the pleadings. According to petitioners, R.E. and the other victims of the alleged bullying may have been targeted because of their status as: 1) students; 2) “white, healthy male student athletes”; or 3) perceived “meek or weak” members of the team. As set forth in greater detail below, these theories must fail, as there is no evidence to suggest that the alleged conduct was motivated by any of these characteristics.

1. Status as a student is not a sufficient “distinguishing characteristic” to substantiate a finding of HIB against a staff member.

In the Petition of Appeal, petitioners argue that “a clear distinguishing characteristic is Student vs. Staff.” (Petition of Appeal at 1.) According to petitioners, “[o]ne of the defining characteristics of HIB is an imbalance of power. An adult teacher and coach is obviously in this position of power against a minor child, regardless of their race, creed or sexual orientation.” (Petitioners’ Brief at 2.) In other words, petitioners argue that R.E.’s status as a student, alone, qualifies as a “distinguishing characteristic” under the HIB statute.

This reasoning must be rejected. The Department of Education has made clear that the HIB statute only applies to HIB committed against students; it is not meant to address HIB committed against adults. If status as a student, alone, was sufficient to substantiate an HIB finding there would be no reason to include an additional requirement that the misconduct be motivated by a “distinguishing characteristic.” Clearly, something more is needed.

2. There is no evidence that R.E. and others were bullied due to their status as “white, healthy male student athletes.”

Petitioners take issue with ABC Manfredi’s explanation that, in order for the HIB statute to apply, the victim must be a member of a protected class based on race, gender, ethnicity, etc. (Petition of Appeal at 1.) Petitioners are correct in asserting that

the phrase “any other distinguishing characteristic” expands the coverage of the HIB statute to cover traits that are not contemplated in traditional anti-discrimination laws.

The problem with petitioners’ claim, however, is that there is no evidence that R.E. was the victim of the alleged HIB because he was a “white, healthy male student athlete[.]” In order for the HIB statute to apply, the alleged misconduct must be “reasonably perceived as being motivated either by any actual or perceived characteristic.” N.J.S.A. 18A:37-14. Since there is no support that R.E. and the other players were targeted because of their status as “white, healthy male student athletes,” this argument must be rejected.

3. *While a claim of HIB may be based on the “distinguishing characteristic” of being “meek or weak,” the alleged bullying of R.E. cannot reasonably be perceived as being motivated by this trait.*

In his initial email report to Principal Cooley, J.E. alleges that coaches Raymond and Augusta “prey[] on kids with anxiety, those who are intelligent, those who are mild mannered.” (Croker Cert., Exh. 1, at 3.⁴) In petitioners’ letter brief, petitioner J.E. again argues that, “The boys who filed complaints, including my son [R.], are all intelligent, soft spoken, mild mannered kids. This would be perceived by bullies like these two and others as meek or weak.” (Petitioners’ Brief at 2.) J.E. also mentions that R.E. was “under five feet tall and 112 pounds” when he started high school and had a “slight build.” Ibid.

Being perceived as “meek or weak” could qualify as a “distinguishing characteristic” under the HIB statute. Characteristics such as height, intelligence, and sports proficiency have been found to satisfy the “distinguishing characteristic” requirement in previous cases. See C.C. ex rel. S.C., supra, EDU 10872-14, Initial Decision (April 6, 2015), <<http://njlaw.rutgers.edu/collections/oal/>>, adopted, Comm’r (May 12, 2015), <<http://www.nj.gov/education/legal/>>. Appearance and body type have also been considered “distinguishing characteristics” under the HIB statute. See R.G.B., supra, EDU 14213-12, Initial Decision (May 15, 2013), adopted, Comm’r (June 24, 2013), <<http://njlaw.rutgers.edu/collections/oal/>>.

However, petitioners have failed to set forth facts to link the alleged bullying with R.E.’s status as a perceived “meek or weak” member of the team. Contrast, for example, the facts in R.G.B., where calling another student “horse” or “fat-ass” was clearly linked to the victim’s body type or appearance. Similarly, as in C.C., telling someone that they are “short” and “suck[] at basketball” can reasonably be perceived as being motivated by the victim’s height and sports proficiency.

⁴ This allegation was considered during the investigation and is noted in the HIB Summary Report as “not verified.” (Croker Cert., Exh. 19, at 2.)

Here, petitioners have not alleged that coaches Raymond and Augusta ever made comments about R.E.'s demeanor or physical stature. Rather, the reported conduct involves such incidents as instructing R.E. to retrieve balls that had been thrown into a pond, guilting R.E. to miss a family vacation to attend baseball practice, and forcing R.E. to carry his catchers' gear with no intention of letting him play. Without more, these incidents cannot reasonably be perceived as being motivated solely by the perception that R.E. was "meek or weak." In fact, according to J.E., Coach Raymond exhibited bullying conduct to everyone from assistant coaches to members of the grounds crew. (Croker Cert., Exh. 2, at 3.) These actions are more akin to what the Appellate Division called "aggressive conduct without identifiable motivation," conduct that, while inappropriate and undesirable, is not covered by the HIB statute.⁵ See K.L. v. Evesham, supra, 423 N.J. Super. at 351.

B. The conduct took place on school property.

Second, in order to satisfy the statutory definition of HIB, the conduct must take place "on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3)." N.J.S.A. 18A:37-14. There is no dispute that the conduct at issue took place on school baseball fields or at school-sponsored baseball games and practices.

C. The conduct may have interfered with the rights of R.E.

Third, in order to satisfy the statutory definition of HIB, the conduct must substantially disrupt or interfere with the orderly operation of the school or the rights of other students. This provision of the law appears to address free-speech concerns. T.R. and T.R. ex rel. E.R. v. Bridgewater-Raritan Reg'l Bd. of Educ., EDU 10208-13, Initial Decision (September 25, 2014), <<http://njlaw.rutgers.edu/collections/oal/>>, adopted, Comm'r (November 10, 2014), <<http://www.nj.gov/education/legal/>>. In Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513, 89 S. Ct. 733, 740, 21 L. Ed. 2d 731, 741 (1969), the United States Supreme Court explained that

⁵ Presumably, the Board can take whatever other personnel action is appropriate to address such behavior.

“conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.” According to the Court, a school may circumscribe speech that results in the “interference, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone.” Id., 393 U.S. at 508, 89 S. Ct. 737, 740, 21 L. Ed. 2d at 738. Certainly, “schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct.” Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683, 106 S. Ct. 3159, 3164, 92 L. Ed. 2d 549, 558 (1986).

Neither petitioners nor respondent have addressed this element of the HIB claim. Arguably, the alleged conduct interfered with R.E.’s right “to be secure and to be let alone.” Then again, the extent of this right is unclear given R.E.’s voluntary participation in the baseball program. Nevertheless, because there is no evidence that the alleged conduct was motivated by a “distinguishing characteristic,” the HIB definition cannot be satisfied and further analysis of this element is unnecessary.

D. Petitioners have failed to clearly assert that the alleged conduct physically or emotionally harmed R.E., insulted or demeaned R.E., or created a hostile environment.

Fourth, to qualify as HIB, the conduct must be such that:

- a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student’s property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
- b. has the effect of insulting or demeaning any student or group of students; or
- c. 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.

[N.J.S.A. 18A:37-14 (emphasis added).]

The petitioners have not addressed this element of the HIB definition. J.E.'s initial complaint to the school alleges that coaches Raymond and Augusta were involved in “[n]ame calling and intimidation, degrading students,” as well as “[p]hysically intimidating players.” (Croker Cert., Exh. 2.) Indeed, it is alleged that the coaches exhibited such inappropriate behavior to numerous students, as well as adults. However, nowhere in the pleadings is it made clear that R.E. suffered physical or emotional harm or felt insulted or demeaned by the actions of his coaches. The coaches may have been “bullies,” but their conduct did not fall within the statutory definition of bullying with its particular requirements.

CONCLUSION

Although the HIB statute does not explicitly address HIB perpetrated by an adult, guidance issued by the Department of Education has clarified that the law applies to any person who commits an act of HIB against a student. Several cases have applied the statute to teachers, coaches, and staff members. These individuals are granted the same procedural rights under the law as an alleged student-perpetrator.

Here, the alleged conduct fails to meet the statutory definition of HIB. There are no facts to support that the alleged bullying was motivated by a “distinguishing characteristic” of R.E. Petitioners suggest that the alleged conduct may have been motivated by R.E.'s status as 1) a student; 2) a “white, healthy male student athlete[]”; or 3) a perceived “meek or weak” member of the baseball team. Status as a “student” does not qualify as a distinguishing characteristic, as the HIB statute only applies to misconduct against students—the “distinguishing characteristic” must be more specific than this. Additionally, there is no support for the argument that R.E. was targeted because he was a “white, healthy male student athlete[.]” Finally, while being “meek or

weak” could qualify as a “distinguishing characteristic,” petitioners have not set forth any facts to support this theory.

Furthermore, it is uncertain that the alleged conduct would meet the other elements of the HIB definition. Specifically, the pleadings do not make clear that the alleged conduct physically or emotionally harmed R.E., insulted or demeaned R.E., or created a hostile environment. For these reasons, respondent’s motion for summary decision must be granted.

ORDER

I hereby **ORDER** that the respondent’s motion for summary decision is **GRANTED**. The petition is **DISMISSED**. The petitioner’s motion is **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 28, 2017
DATE


SUSAN M. SCAROLA, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SMS/cb

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

Brief and letter briefs

For respondent:

Brief and letter briefs

