

L.P. and H.P., on behalf of minor child, L.P. :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE : DECISION
 WEST MORRIS REGIONAL HIGH SCHOOL :
 DISTRICT, MORRIS COUNTY, :
 RESPONDENT. :

SYNOPSIS

Pro se petitioners challenged the determination of the respondent Board that L.P. 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 et seq.* (the Act). Petitioners alleged that their daughter, L.P., has suffered HIB and retaliation at the hands of her fencing coach and teammates, as well as her classmates and the administration, numerous times since she joined the fencing team during the 2014-2015 school year. Two separate petitions – consolidated herein – were filed in August 2016, the first alleging that the head coach of the fencing team committed HIB by retaliating against L.P. during the 2015-2016 school year after L.P., in a previously filed complaint, had reported the coach absent from practice when one of the other team members was injured. The second petition alleged that a fellow student had said unkind things to L.P. in March 2016, in violation of the Act. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: no genuine issue of material fact exists in this case, and the matter is ripe for summary decision; the only issue for determination in this consolidated case – after dismissal of other issues raised in the petition – was whether the head coach of the fencing team changed her criteria for strip assignments for the 2015-2016 school year in order to keep L.P. off “A Strip” in retaliation for L.P.’s filing of an HIB complaint against team captain, B.S., and if so, whether this conduct violated the Act; the coach’s sworn affidavit in this matter makes clear that strip assignments are based on a multitude of factors, including, among other things, the skill and experience of individual fencers, the team as a whole, and consideration of the skills of the opposing team; the coach has the discretion to change strip assignments and no specific criteria for strip selection exist; rather, the coach makes strip selections based on each individual competition; imputing a retaliatory motive to any strip assignment that did not place L.P. on the “A Strip” is conjecture; and this case reflects petitioners’ displeasure that L.P. was not assigned to “A Strip” and made captain of the team at the beginning of the 2015-2016 season. The ALJ concluded that the respondent did not retaliate against L.P. in violation of the Act, and accordingly, the Board is entitled to summary decision as a matter of law. The petition was dismissed.

Upon review, the Commissioner concurred with the ALJ’s findings and conclusions, and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

<p>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.</p>

March 29, 2018

L.P. and H.P., on behalf of minor child, L.P., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
WEST MORRIS REGIONAL HIGH SCHOOL :
DISTRICT, MORRIS COUNTY, :
RESPONDENT. :

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions, and respondent's reply thereto, have also been reviewed and considered by the Commissioner.¹

Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that respondent did not retaliate against L.P. in violation of the Anti-Bullying Bill of Rights Act, and the Board is entitled to summary decision.²

Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: March 29, 2018

Date of Mailing: March 29, 2018

¹ The exceptions – while reflecting petitioner's obvious disagreement with the findings and conclusions contained within the Initial Decision – are unpersuasive, and substantially recast and reiterate the arguments made below, which have been exhaustively addressed by the Administrative Law Judge (ALJ) during the course of the case.

² The Commissioner notes his concurrence with the ALJ's interim orders and further clarifies that the interim orders are adopted herein as part of the Commissioner's review of this matter, and in the issuance of a final agency decision.

³ 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. NOS. EDU 14255-16
& EDU 14256-16
AGENCY REF. NO. 236-8/16 &
213-8/16
(CONSOLIDATED)

**L.P. AND H.P. ON BEHALF OF MINOR
CHILD, L.P.,**

Petitioners,

v.

**WEST MORRIS REGIONAL HIGH SCHOOL
DISTRICT BOARD OF EDUCATION, MORRIS
COUNTY,**

Respondent.

L.P. and H.P., petitioners, pro se

Jodi S. Howlett, Esq., for respondent (Cleary, Giacobbe, Alfieri & Jacobs,
attorneys)

Record Closed: February 5, 2018

Decided: February 12, 2018

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

The head coach of the fencing team at West Morris Central High School did not change her criteria for strip assignments for the 2015-16 school year to keep L.P. off “A Strip” because L.P. had filed a complaint for harassment, intimidation, or bullying against the team captain the year before. Is respondent entitled to summary decision? Yes. Under N.J.A.C. 1:1-12.5(b), summary decision may be rendered if no genuine issue of material fact exists and the moving party is entitled to prevail as a matter of law.

PROCEDURAL HISTORY

Petitioners allege that their daughter, L.P., a senior at West Morris Central High School, has been the systematic victim of harassment, intimidation, bullying, and retaliation at the hands of her fencing coach and teammates, as well as her classmates and the administration, numerous times since she began high school at West Morris Central High School and joined the fencing team during the 2014–15 school year.

In the first petition, which petitioners filed with the Department of Education on August 15, 2016, petitioners allege that Gladys Berardi, the head coach of the fencing team, retaliated against L.P. during the 2015–16 school year in violation of the Anti-Bullying Bill of Rights Act (ABRA), N.J.S.A. 18A:37-13 to -37, because L.P. had previously filed a complaint against B.S., the captain of the fencing team, for harassment, intimidation, or bullying under the ABRA, and in that complaint L.P. noted that Berardi had been absent from practice when one of the other fencers was injured, causing Berardi to receive unwarranted attention from her superiors and disruptions to her coaching duties.

Notably, that previous case for harassment, intimidation, or bullying was dismissed by another administrative law judge on June 10, 2016, for failure to state a claim upon which relief could be granted.

In the second petition, which petitioners also filed with the Department of Education on August 15, 2016, petitioners allege that S.M., then a junior at West Morris Central High School, said unkind things to L.P. on three separate occasions in March 2016 in violation of the ABRA, namely, "I hate you; I hate you with a burning passion!"; "[You have no partner because] nobody likes you!"; and "You're disgusting; who would like you?"

On September 19, 2016, the Bureau of Controversies and Disputes transmitted these two cases to the Office of Administrative Law as contested cases under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On December 7, 2016, the parties appeared for a settlement conference but could not reach an agreement; on December 21, 2016, I consolidated the cases for hearing; and on March 9, 2017, respondent filed a motion to dismiss the petitions for failure to state a claim upon which relief can be granted. At the same time, petitioners filed a motion to amend the petitions. On May 25, 2017, I denied the motion to amend the petitions, and on June 28, 2017, I granted in part and denied in part the motion to dismiss the petitions for failure to state a claim upon which relief could be granted. More specifically, I dismissed all the issues in the first petition, except for one, and all the issues in the second petition. As a result, the only issue that remains in this consolidated case is the following:

Whether the head coach of the fencing team, Gladys Berardi, changed her criteria for strip assignments for the 2015–16 school year to keep L.P. off A Strip because L.P. had filed a complaint for harassment, intimidation, or bullying against the team captain, B.S., the year before, and if so, whether this conduct is a violation of the ABRA.

On October 31, 2017, respondent filed this motion for summary decision; on November 20, 2017, petitioners filed their opposition and a cross-motion for summary decision; and on December 1, 2017, respondent filed its response.

On December 6, 2017, petitioners filed a sur-reply, and on January 16, 2018, respondent filed its sur-reply. On January 22, 2018, petitioners moved to strike respondent's sur-reply, which contained a second affidavit from Berardi in response to petitioners' sur-reply, and on February 5, 2018, I denied the motion to strike. As a result, all affidavits, which have been filed, have been considered.

FINDINGS OF FACT

Based on the papers and discovery, which have been filed, together with the affidavits, which have also been filed, and giving petitioners the benefit of all legitimate inferences, as if only respondent had filed a motion for summary decision, I **FIND** the following as **FACT**:

Gladys Berardi

Gladys Berardi is the head coach of the girls' varsity fencing team at West Morris Central High School and has been practicing and competing in fencing for over forty years. Berardi has earned classifications in all three fencing weapons (foil, epee, and sabre), is a lifetime member of the United States Fencing Association (USFA), and has represented New Jersey in domestic and the United States in international competitions. Berardi has also coached fencing at both the collegiate (New Jersey City University, Caldwell University, and Montclair State University) and high-school (Wayne Hills High School, Teaneck High School, and West Morris Central High School) levels.

Berardi helped create the boys' and girls' fencing programs at West Morris Central High School during the 1995–96 school year, was named the head coach of both teams for their inaugural seasons the following school year, and coached the boys'

and girls' fencing teams for their first two seasons. Berardi left West Morris Central High School as the head coach of the boys' and girls' fencing teams after the 1998–99 fencing season, only to return to West Morris Central High School as the head coach of the girls' fencing team before the 2014–15 fencing season. Berardi has remained the head coach of the girls' fencing team ever since.

The 2014–15 fencing season is also when Berardi first met L.P.

Strip Assignments—Part I

As the head coach of the girls' fencing team, Berardi is responsible for, among other things, coordinating and holding practices, teaching skills to the student-athletes, and representing West Morris Central High School at interscholastic competitions.

Berardi is also responsible for deciding which team members compete at which competitions, which team members compete at which events, and which team members compete on which strips—namely “A Strip,” “B Strip,” or “C Strip.”

When making strip assignments, Berardi has no specific formula or quantitative criteria for making them. She considers tangible and intangible factors, such as record in competition and performance in practice, as well as team leadership and experience, but she does not consider USFA membership or classification because she cannot require fencers to join the USFA. Ultimately, Berardi uses her discretion in the best interest of the team—which is why strip assignments are not permanent but subject to change.

In her affidavit dated October 31, 2017, Berardi was explicit about the way she makes strip assignments:

8. When making strip assignments, I do not have a formula or set of quantitative criteria. I consider a multitude of factors that take into account the skills and experience of

the individual fencers, the team as a whole, and the particular opponent. Additionally, I consider a fencer's win-to-loss record, past performance in high school competitions, and performance at practices.

9. I also consider intangible factors such as a fencer's character, ability to perform under pressure, attitude, and ability to recover after being hit or losing a bout. It is important that a fencer does not give up or quit easily.

10. In my experience, fencing is a mental sport as well as a physical one. It is not solely determinative that if one fencer beats another fencer that the victorious fencer will be assigned a more preferable strip.

11. I do not generally consider a fencer's USFA membership or classification when making strip assignments. It is my understanding of the New Jersey State Interscholastic Athletic Association ("NJSIAA") rules and guidelines that I cannot mandate a fencer join the USFA.

12. Thus, I do not believe it fair to base my assigning of strips for high school competitions based upon USFA classifications.

13. As head coach, I am unaware of any obligations that I must consider a particular skill, ranking, or any other factor in making determinations of which fencer competes. I have complete discretion in making decisions in the best interest of the fencing team, including determining strip assignments.

14. I use practices not only to train the student-athletes to become better fencers, but also to make strip assignments. Strip assignments are not permanent and may change for each competition depending on an individual fencer's performance, fencer eligibility, and the opponent, among other factors. As strip assignments may change for each match, I need to be able to consistently evaluate each team member.

[Berardi Affidavit dated October 31, 2017.]

L.P.

L.P. was in ninth grade when Berardi returned as the head coach of the girls' fencing team. During that 2014–15 fencing season, petitioners regularly sent, and Berardi regularly received, communications about how L.P. fared in fencing outside of school in her private fencing program. Berardi was proud of L.P.'s accomplishments in her private fencing program and congratulated L.P. on those accomplishments. Berardi even noted that L.P. appeared to be a more confident fencer when she returned to the school team the following year. But Berardi also noted that L.P. seemed to be less committed to the school team, and wrote in her affidavit dated October 31, 2017, that "L.P. often skipped or left high school practices early to practice with her private fencing program [and] . . . just after the start of the 2015–16 season, [her mother] presented me with a calendar of the high school practices that L.P. was going to miss in favor of attending her private fencing sessions." (Berardi Affidavit dated October 31, 2017.) Although L.P. asserts in her affidavit dated November 19, 2017, that Berardi acknowledged or approved her leaving practices early or skipping practices altogether, the fact remains that L.P. did leave some practices early and did skip some team practices in favor of her private sessions.

HIB Complaint

In November 2015, L.P. filed a complaint against the captain of the school team, B.S., for harassment, intimidation, or bullying. Berardi understood that the complaint was determined to be unfounded, but met with school administrators to develop fencing guidelines so L.P. and B.S. could coexist on the team. Berardi agreed because she wanted both fencers to continue fencing on the team.

Personal Demands—Part I

On December 15, 2015, L.P. demanded that she be assigned to A Strip. In a meeting among Berardi, L.P., and the then-interim athletic director, Jeff DiLollo, Berardi

and DiLollo explained to L.P. that the athletic director does not mandate or dictate to any coach who plays at what position or fences on which strip. As Berardi wrote in her affidavit dated January 1, 2015, “The coaches have the knowledge and experience in the given sport and team dynamics and are in the best position to determine playing assignments.” (Berardi Affidavit dated January 16, 2018.)

Berardi also explained to L.P. that the strip assignment could change match by match, and that L.P. could be assigned to a different strip in the future.

As a result, Berardi chose to assign the team captain, B.S., to A Strip and the underclassman, L.P., to B Strip for the first competition of the season, on December 19, 2015.

In short, Berardi did so because she thought B.S. was the more well-rounded fencer:

26. In my opinion, B.S. a twelfth (12th) grade student and captain of the team, was a more well-rounded fencer and had earned “A strip” for the first competition. In particular, during the previous fencing season, B.S. had won the District Championship and was undefeated in interscholastic competition up until that point in the season.

[Berardi Affidavit dated October 31, 2017.]

After Berardi made the strip assignments, L.P. still demanded that she be assigned to A Strip.

Team Practice

Shortly after the meeting on December 15, 2015, Berardi received notice that L.P. may have been determined ineligible by the NJSIAA to compete in the upcoming competition on December 19, 2015, for having missed approximately two weeks from practice earlier in the season while respondent investigated the HIB complaint L.P. had

filed against B.S. In response, Berardi offered to hold additional practices for L.P. so she could satisfy the NJSIAA rules for competition. Ultimately, Berardi needed to hold only one additional practice for L.P. so she could become compliant with the NJSIAA.

Strip Assignments—Part II

L.P. asserts in her affidavit dated November 19, 2017, that Berardi had awarded strip assignments in the past based upon skill alone, and that Berardi later changed her criteria for strip assignments to keep L.P. off A Strip, but her assertions are belied by Berardi's sworn statements reproduced above, and by Berardi's email message to the assistant principal, Anne Meagher, dated January 8, 2016, reproduced below.

Indeed, a careful reading of Berardi's email to Meagher supports Berardi's explanation that she awarded (and continues to award) strip assignments based upon tangible and intangible factors, and that she did so (and continues to do so) in the best interest of the team—not to keep L.P. off A Strip.

More specifically, in her email to Meagher, Berardi explained that she had not changed her criteria, but that she had adjudged B.S. the better fencer, and that she had not added L.P. as a captain, because L.P. had not yet demonstrated any leadership potential:

1. I have placed the best most experienced WMC high school fencer in the "A" position (strip in fencing terms). [B.S.] is undefeated so far this season, is the reigning District Champion, [and is] the reigning Silver medalist of the Morris County HS Championships. She has also fenced with WMC girls team since her freshman year. L.P.'s contention that she is the highest-rated fencer in the county is based on her United States Fencing Association "C" classification. While I encourage the fencers to become members of the (USFA) (I have been a lifetime member for more than 20 years) it is against NJSIAA regulations to mandate a team member to join.

2. During our discussion on Tuesday, I reiterated to L.P. the same criteria for my placement of team members, the criteria I gave to her several weeks ago when she requested a meeting with AD DiLollo. The criteria was the season record up to our first major tournament. While I applaud L.P.'s USFA participation, accomplishments, and standing, I do not use USFA standings classifications or results as a base for my selection for Team member's placement on the team.

3. In my discussion with L.P., I explained [that] if she felt she was the better fencer, she could still win the county championships fencing from the "B" strip and prove on the HS level [that] she deserved the "A" strip. I pointed out that last year after reviewing the previous year's results, I placed our current A strip Epee fencer in the B spot for our first major tournament last year (Santelli Girls HS Championships). Her record up to that point had been equal to the fencer I placed on A strip. After the first round, based on the fact she won all her bouts on the "B" strip, and A strip fencer had lost all but one of her bouts, I switched their strip assignments for the second round and every major event after that.

4. As far as being Captain, I have the girls select with the assistance of the current captains who will be the next year's captains. It is subject to my approvals as not to be a popularity contest. [REDACTED] and [REDACTED] were captains last season, my first [year] back to coaching at WMC. They assisted in the selection (except [REDACTED], being a current captain, did not vote for her foil captain position.) While there were three captains selected for my approval, Sr. [REDACTED], Sr. [REDACTED], and Jr. [REDACTED], I added Sr. [REDACTED] in whom I saw leadership potential by the way she assisted me during my first year back. L.P. was not in consideration for becoming a Captain.

[L.P. Affidavit dated November 17, 2017, Ex. E.]

In her affidavit dated January 16, 2018, Berardi restates that she has never had any formal criteria for determining strip assignments, that any claim that she has or had formal criteria for strip assignments is patently untrue, and that each match does indeed necessitate a reassessment of the team and the performance of its members.

Personal Demands—Part II

On January 5, 2016, the last practice before the first tournament of the season, the Morris County Championships, Berardi informed the team members of their strip assignments for that competition, and L.P. repeated that she deserved to be assigned to A Strip.

Whether Berardi told L.P. that if she won the tournament from the B Strip she would assign her to A Strip for the next competition does not matter because L.P. quit the team the next day and filed this complaint against Berardi for retaliation later that year—foreclosing any possibility of a change in strip assignments during the remainder of the season.

Berardi wrote in her affidavit dated October 31, 2017, that she was surprised by the response. The inference to be drawn is that she was also disappointed. Another inference to be drawn is that Berardi felt justified in her decision-making, as L.P. proved that she did not have the character to fence on the A Strip. If Berardi made assignments based on “ability to perform under pressure, attitude, and ability to recover after being hit or losing a bout,” then L.P. did not measure up. As Berardi had explained, “It is important that a fencer does not give up or quit easily.”

To be clear, Berardi asserted in her affidavit dated October 31, 2017, in no uncertain terms, that she did not treat L.P. differently than any other member of the team, and that she never changed the way she made strip assignments:

32. Later in 2016, I was notified that L.P. filed a complaint of HIB against me. I was surprised to learn that L.P. claimed that I treated her differently than other members of my team, especially because I went out of my way to ensure L.P. was eligible to compete.

33. I never changed the manner, factors, or criteria that I consider in order to determine strip assignments. Particularly, I did not change how strip assignments were determined. Additionally, as I advised L.P., strip assignments are not permanent and have the ability to change for each competition.

34. Strip assignments are based upon my observations of each individual fencer and in accordance with NJSIAA rules and regulations. As stated above, using USFA membership and classifications when determining strip assignments can be unfair. While I do encourage team members to join the USFA, I cannot solely use that membership or accolades earned as a member to help nor harm.

35. When determining to assign L.P. to the "B strip," I never considered L.P.'s filing of a[n] HIB complaint against B.S. My decision was based solely upon consideration of the tangible factors described above, such as record and performance in practice, as well as intangible factors, such as team leadership and experience.

36. I never treated L.P. differently than any other member of the girls' fencing team.

37. I never retaliated against L.P. in any manner. To the contrary, I considered L.P. to be strong member of the girls' fencing team and wanted her to succeed.

[Berardi Affidavit dated October 31, 2017.]

In fact, Berardi had memorialized the fact that she did not treat L.P. differently than any other member of the team, and that she never changed the way she made strip assignments, in a letter to Meagher dated January 8, 2016, just after L.P. quit the team:

As far as L.P.'s accusations of me being upset with her and holding her complaint of harassment against her, I have not done so. I have never witnessed nor allowed [REDACTED] or anyone else on the team to harass or "pick on" L.P. Nor did I allow other fencers to harass each other on the team.

When I spoke with L.P., I could see she was taken back by not being assigned the A Strip. I explained my criteria which she did not agree with. Being involved with coaching on both the HS and College level, I have seen that before. I relayed to L.P. I thought she was a very good fencer and complimented her on her improvement and advancement. I ended by saying her feelings are real to her as are her opinions. I did not dismiss them. I told her [that] we have to agree to disagree. As a coach, I make the determination based on my criteria—not hers. I shook her hand and she went back into the cafeteria. She turned to me and asked me what my strip selection criteria was. I looked at her and stated, “What I just told you; the same as I told you several weeks ago.” She began entering/typing on her cell phone. Once she was done, she joined in practicing and fencing. She did not appear distressed or very upset. She did not indicate she felt she was being “Robbed” of an opportunity to fence or to be a member of the team.

[L.P. Affidavit dated November 17, 2017, Ex. E.]

Moreover, petitioners were aware during these proceedings that Berardi did not treat LP differently than any other member of the team, and that she never changed the way she made strip assignments, because petitioners were the party who submitted this letter to this tribunal for its consideration.

No Genuine Issue of Material Fact

To remove all doubt, Berardi restates in her affidavit dated January 16, 2018, that she told L.P. in January 2016, just before L.P. quit the team, about the myriad of factors, both tangible and intangible, that she considers in making strip assignments, and that she does so on a match-by-match basis, using her best judgment in the best interest of the team. “I repeated that there is no set formula or criteria in place that I use in determining strip assignments, and that I make such assignments by considering each individual fencer as a whole, including ability, experience, attitude and character.” Moreover, Berardi restates in her affidavit dated January 16, 2018, that she considered these tangible and intangible factors when she assigned L.P. to B strip, and that she

never treated L.P. differently than any other member of the team. Indeed, nothing contained in the other affidavits create a genuine issue of material fact concerning these issues.

As such, no genuine issue of material fact exists whether Berardi awarded strip assignments in the past based upon skill alone, whether Berardi changed her criteria for strip assignments to keep L.P. off A Strip, or whether Berardi did not make L.P. captain of the team in retaliation for the HIB complaint L.P. filed against the captain of the team the year before.

To repeat, Berardi awarded B.S. A Strip because she had adjudged B.S. the better fencer, and she had not added L.P. as a captain because L.P. had not yet demonstrated any leadership potential.

CONCLUSIONS OF LAW

A party may move for summary decision upon any or all substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion for summary decision shall be served with briefs and may be served with supporting affidavits. Ibid. “The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b).

In this case, no genuine issue of any material fact exists and respondent is entitled to prevail as a matter of law because Berardi did not change her criteria for strip assignments for the 2015–16 school year. In her affidavit, Berardi was explicit. She stated that when making strip assignments, she considers a multitude of factors, including “the skill and experience of the individual fencers, the team as a whole, and the particular opponent.” More specifically, Berardi stated that she considers “a fencer’s win-to-loss record, past performance in high school competitions, and performances at

practices.” She also stated that she considers intangible factors such as “a fencer’s character, ability to perform under pressure, attitude, and ability to recover after being hit or losing a bout.” More significantly, Berardi stated that strip assignments are not permanent and may change for each competition and could even change for every match.

Regarding L.P. and the specific allegation that she assigned B.S. to A Strip and L.P. to B Strip for the first competition of the 2015–16 fencing season because L.P. had filed an HIB complaint against B.S., Berardi stated that this allegation was not true and that she assigned B.S. to A Strip and L.P. to B Strip because B.S. was a senior, the captain of the team, and a “more well-rounded” fencer, who, in her opinion, had earned the assignment to A Strip for the first competition. Berardi further explained that B.S. had also won the District Championship and was undefeated in interscholastic competition at that time. Indeed, Berardi asserted that she never considered the filing of the HIB complaint against B.S. as the reason to assign L.P. to B Strip, and that she based her decision solely upon the tangible factors, such as record and performance in practice, as well as the intangible factors, such as team leadership and experience.

Implicit in her explanation is the consideration Berardi gave to the choice L.P. made to practice with her private club instead of the school team when private sessions conflicted with team practices. As Berardi noted, L.P. did skip team practices and did leave team practices early to practice with her private fencing program and even advised Berardi which team practices she was going to miss in favor of attending her private sessions. Indeed, L.P. admits as much. This failure to attend team practices notwithstanding, Berardi offered to hold additional practices so L.P. could satisfy the NJSIAA requirements to compete, and did in fact hold one such practice so L.P. could compete in the first competition. Though not dispositive, this is an indication that Berardi did not engage in any form of retaliation against L.P.

No matter how many times petitioners may swear that Berardi changed her criteria for strip assignments, no genuine issue of material fact exists that Berardi, as

the coach of the team, has the discretion to change strip assignments and is not wedded to any criteria. Strip assignments are fluid, as Berardi attests, and imputing a retaliatory motive to any strip assignment that does not place L.P. on the A strip is pure conjecture. Petitioners are simply upset that L.P. was not assigned to A Strip and made captain of the team at the beginning of the 2015–16 season.

Having found that Berardi did not change her criteria for strip assignments for the 2015–16 school year, and that she did not keep L.P. off A Strip because L.P. had filed a complaint for harassment, intimidation, or bullying against the team captain, B.S., the year before, and having determined that no genuine issue of material fact exists, I **CONCLUDE** that respondent did not retaliate against L.P. during the 2015–16 school year in violation of the ABRA, and that respondent is entitled to summary decision as a matter of law.

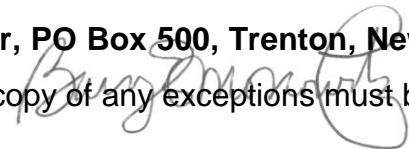
ORDER

Given my findings of fact and conclusions of law, I **ORDER** that respondent's motion for summary decision is **GRANTED**, that petitioners' cross-motion for summary decision is **DENIED**, and that this consolidated case is **DISMISSED** in its entirety.

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.



February 12, 2018
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

February 12, 2018

Date Mailed to Parties:

dr

