#47-12 (OAL Decision: http://lawlibrary.rutgers.edu/collections/oal/html/initial/edu9972-09_1.html)

J.K., on behalf of minor child, P.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought reimbursement for P.B.'s senior year tuition at an out-of-district high school after unilaterally withdrawing her son from the Board's high school just prior to the beginning of the school year in September 2009. Petitioner alleged that the District had failed to address persistent intimidation, harassment and bullying of P.B. during his junior year. The specific allegations involved isolated incidents, one in P.B.'s sophomore year and three in April 2009 – the latter incidents all involving one other boy. The Board filed a motion for summary decision, which was denied. A hearing in the matter was held in June 2011, by which time P.B. had graduated from high school and attained majority. P.B. did not testify at the hearing.

The ALJ found that: pursuant to *N.J.S.A.* 18A:37-13, a board of education has an obligation to provide a safe environment in which a child can learn, and if it cannot provide this environment on its own school grounds, it has a responsibility to educate the student elsewhere; a district also has the responsibility to develop a plan to stop bullying in its schools; although most of the alleged incidents occurred off school property and protections for such incidents were not added to the legislation until November 15, 2010, respondent Board failed to adequately address petitioner's complaints of bullying and did not develop a written plan to stop the harassment until after J.K. removed her son from respondent's high school in September 2009; the plan developed to address J.K.'s concerns did not offer a solution to end the harassment, but rather shifted responsibility to P.B. for keeping himself safe; and the respondent Board's refusal to allow a transfer of P.B. to another school, together with the failure to devise a substantial plan to end the bullying, drove J.K. to remove her son from an unsafe environment. Accordingly, the ALJ concluded that: the actions of the Board to investigate and intervene in this matter were insufficient; the decision of J.K. to unilaterally place P.B. at an out-of-district school was appropriate; and the petitioner should be granted tuition reimbursement. The ALJ ordered that the Board reimburse J.K. – upon presentation of evidence – for the amount of tuition paid on behalf of P.B. for the 2009-2010 school year.

Upon comprehensive review of the record, the Commissioner rejected the Initial Decision, finding that the petitioner failed to sustain her burden to prove that: the alleged bullying actually took place; timely notice of the alleged harassing conduct was provided to the district; the board failed to take actions reasonably calculated to end the conduct; petitioner had exhausted all available administrative remedies with the district and had no alternative but to remove the student from the school environment; and that she in fact did so and enrolled him elsewhere at a specific cost to her. The petition was dismissed.

February 9, 2012

OAL DKT. NO. EDU 09972-09
AGENCY DKT. NO. 219-8/09

J.K., on behalf of minor child, P.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	DECISION
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The Board requested and was granted, over petitioner's objection, an extension of time within which to file exceptions to the Initial Decision. These exceptions were filed in accordance with the extended timelines pursuant to *N.J.A.C.* 1:1-18.4. The petitioner did not file a reply to the Board's exceptions.

In its exceptions, the Board first argues that the Commissioner is without jurisdiction to grant the monetary damages that the petitioner seeks since neither the prior nor current law provides a remedy for reimbursement of tuition in this forum. Title *N.J.S.A.* 18A:37-18 (L.2002, c.83 §6), the applicable law extant at the time of the controversy, does not include the award of damages before the Commissioner; however, it does not limit recourse in this regard to other redress. Indeed, the statute directs an aggrieved person to pursue remedies under other available laws. Similarly, the New Jersey Law Against Discrimination (*NJLAD*) and the Anti-Bullying Act, effective 2010, specifically do not create or alter any tort liability or afford compensation for these

[1] P.B., the then minor child named in this action, submitted a hand-printed, post-hearing statement – signed but not notarized – which was contained in the file when it was returned by the OAL. This document was not considered in this review since P.B. did not appear at the hearing to testify and was, therefore, not subjected to cross-examination or credibility assessment.

damages before the Commissioner. The Division on Civil Rights and Superior Court are the appropriate forums in which to seek monetary relief under these laws or tort theory. Since the Legislature did not explicitly grant him power, the Board argues, the Commissioner is without the authority to award monetary damages. (Board's Exceptions at 8)

The Board next contends that the ALJ should not have relied on the holding in *L.W. v. Toms River Reg'l Schs. Bd. of Educ.*, 189 N.J. 381 (2007) because it is wholly distinguishable from the facts of this matter. Unlike *L.W.*, the petitioner here did not make a claim under *NJLAD* nor has she alleged that any putative bullying against P.B. was the result of his being a member of a protected class or possessing a protected characteristic. Petitioner did not present any facts to support such a claim, and the ALJ did not make any such determination, the Board points out. Additionally, since jurisdiction and the award of monetary damages in matters brought under *NJLAD* rest with the Division on Civil Rights or Superior Court, the Commissioner is without authority to grant such relief. (*Id.* at 10, 11, 12)

Respondent Board also maintains that petitioner's reliance on *M.P. and G.P. v. Delran Board. of Education*, OAL DKT. NO. EDU 3446-85 (Dec. 30, 1985) is misplaced. In *M.P.*, the ALJ – in awarding monetary damages – determined that the Delran school and its administrators had failed in their duty to provide reasonable supervisory care, causing R.P. to be subjected to repeated and pervasive bullying, harassment, and isolation. The Delran school and it administrators did nothing. The ALJ in *M.P., supra*, also determined that the parents had exhausted all administrative remedies available to them, and thus had no choice but to remove the student from the Delran School District. Under the unique circumstances in *M.P.*, the Commissioner awarded monetary damages for only a limited time until the Delran Board of Education created anti-bullying and harassment policies in preparation for R.P.'s immediate return to her regular school in Delran. (Board's Exceptions at 13, 14, 15)

Respondent asserts that in contrast to the Delran school, the Springfield school here maintained a district-wide, well-developed and fully enforced set of anti-bullying policies, which it disseminated to school administrators, staff, parents, and students alike. These policies were also set out on the District's website, and the schools complied with the policy requirements as the need arose. Before April 2009, in P.B.'s sophomore year, the school became aware of only one issue – which had to do with an invitation and attendance at a birthday party – involving P.B. and another student, M. The assistant principal met with both boys, and resolved the misunderstanding. No further conflicts occurred between the boys. In April 2009, late in P.B.'s junior year, school officials learned of the off-school grounds allegations of bullying or vandalism of P.B and his property. Even though – under the law then in effect – the school was not required to take action on conduct occurring off school property, it did so anyway. Upon this notice, appropriate school personnel investigated the complaints, met with the aggressor, R.G., and his parents, and provided an "open door" to no less than five administrative individuals for P.B. to speak with and receive help from if he became upset or harassed. (*Id*. at 17)

Moreover, respondent argues that the officials were proactive in protecting P.B. by developing plans to ensure that nothing untoward occurred at the prom or after he injured his hand or in preparation for his to return to school in senior year. No other incidents of bullying were ever brought to the Board's attention, before that time or thereafter. Furthermore, the Board also asserts that J.K. did not avail herself of the administrative remedies the school offered when she refused to allow P.B. to take part in a supervised meeting with the student he claimed was harassing him or when she refused to at least consider a transfer to the school the superintendent suggested or when she failed to attend a scheduled meeting at the start of his senior year to discuss the plan to safeguard P.B. Instead, the Board charges that J.K. summarily and unilaterally enrolled P.B. into a "higher ranked" school of her choosing for P.B.'s senior year. It insists that school officials and

personnel in Springfield did all that it could do once they became aware of the incidents, and satisfied the very requirements that the Delran school was deemed to lack. (*Id.* at 18)

In further challenging the Initial Decision, the Board asserts that the ALJ erred by employing two specious conclusions in her ruling. First, it claims that the ALJ relieved J.K. from her burden of proof here by concluding – without support of law – that petitioner did not have to prove that the bullying occurred at all; instead, she only had to prove that the Board – once advised of the bullying – failed in its responsibility to provide a "safe and civil environment for her son." The Board objects to this conclusion because without proof of harm, there is no reason to question the Board's concomitant duty to act. Second, the ALJ determined that the evidence of bullying sufficient to displace a student is determined by subjective standards. The Board argues this flawed conclusion is inconsistent with prior and current anti-bullying provisions of Title 18A and with the NJ Supreme Court's guidance in *L.W., supra.* (*Id.* at 20)

The Board posits that the Court in *L.W.* provides an objective, "reasonable person" standard by which to judge a reasonable student's reaction to a perceived harm, and a reasonable board's response to known or anticipated incidents of harassment. The Court did not create a strict liability standard, requiring districts to "purge its schools of all peer harassment in order to avoid liability." Instead that Court held "…school districts will be shielded from liability when their preventative and remedial actions are reasonable in light of the totality of the circumstances." *L.W.*, *supra,* at 407, 412. The Board contends that an objective finding of bullying is necessary to make that assessment. (*Id.* at 21- 22)

The Board next argues that J.K., on behalf of P.B., failed to sustain her burden of proving by a preponderance of the credible evidence that her son endured the alleged harassment, intimidation and bullying. The Board charges that in advancing her claim here, only J.K. and her husband, D.K. – who had no firsthand knowledge – testified. Not one other witness for the

petitioner – not an expert, not the therapist, not a police officer, not a student, not a teacher, not a coach, and – most conspicuous by his absence – not P.B. himself. On cross-examination, it avers that when asked where his step-son was on that day, D.K. replied, "P. had other personal commitments today that would not allow him to be here." (T1 at 112) The Board asserts that without a witness possessing first-hand knowledge of what actually happened, the record is bereft of any competent evidence. It points out that while *N.J.A.C.* 1:1-15.5 allows a modicum of hearsay, there must be some legally competent evidence to support each ultimate finding of fact. As such, it charges the record here does not support the ALJ's findings. Moreover, the Board observes that J.K. and D.K. were able to testify only about their own impressions, about second- and third-hand conversations regarding what happened to and about P.B or what they heard about what happened to him from P.B. himself or others. (*Id.* at 22, 31)

On the other hand, the Board stresses that the officials at the school testified to the facts they actually witnessed first-hand, which the petitioner and her husband were unable to provide. Of significance, the Board's witnesses testified that P.B. was a good student and a member of the school's ice hockey and football teams. They testified that they had no knowledge of any conflict between P.B. and R.G., the *only* alleged bully, until the students' return from Spring break. Over the school recess, two incidents occurred off school property on or about April 8, 2009. Both episodes were reported to the police. When the assistant principal learned of these acts, he called in both boys, discussed the school's position on bullying and warned them not to allow their dislike for each other to spill onto school grounds. No other reported incidents took place in or out of school until April 29th when, after an alleged "look" from R.G., P.B. injured the flat of his hand as he opened a door, shattering the glass pane instead of pushing the wooden frame. A review of the surveillance tape and a thorough investigation revealed nothing untoward. The Board's unrebutted, competent evidence indicates that it was just an accident; P.B. said that he "didn't mean to do that."

(Davino T1 at 218) He "admitted that no one said anything to him or physically threatened him." (Board's Exceptions at 24, 25.)

Preempting any concerns, the Board asserts that school officials made arrangements for P.B.'s comfortable return to class. The vice principal spoke with both R.G. and his parents; R.G. said that he and P.B. were avoiding each other and going their separate ways. (T1 at 149) The school allowed P.B. to leave class early so his hand would not be re-injured. They made sure P.B.'s prom went smoothly. From that point through June, he was invited to sit and talk at any time with the assistant principal, the principal, his guidance counselor, the affirmative action officer or the school superintendent to discuss any problems he was having. There were no other reported incidents on or off school property through the end of the school year. The Board contends that the two offsite incidents and the hand injury during the month of April 2009 do not satisfy the definition of "bullying" required by *N.J.S.A.* 18A:37-18 (L.2002, c.83 §2), the applicable law at the time of these events. (*Id*. at 18)

The Board maintains that J.K. not only failed to state a claim upon which relief could be granted and failed to sustain her burden of proof by a preponderance of the credible evidence, but also failed to meet her burden of establishing her claim for reimbursement. J.K. neglected to provide the ALJ with evidence – by way of testimony, school records or an invoice – to substantiate her claim that P.B. actually attended Governor Livingston School during his senior year. The record is devoid of any proof of the cost of tuition, or that she even paid it. (*Id*. at 29, 35)

Finally, the Board contends that the ALJ did not consider all relevant testimony in the record and that her findings and conclusions of law are not supported by the substantial credible evidence adduced at trial. Further, it maintains, the ALJ relied on uncorroborated hearsay as well as documents not admitted into evidence at the hearing, and further ignored the Board's multiple objections to petitioner's hearsay testimony about facts that she herself did not witness or know

firsthand. Moreover, the ALJ did not require the petitioner to corroborate her testimony of third-party conversations or her perceptions about what P.B. felt or thought. (*Id*. at 34)

Upon consideration and review of the entire record – including a thorough reading of the transcript of the hearing held on June 6, 2011 at the OAL – the Commissioner rejects the Initial Decision.

The Commissioner agrees with the Board that neither *L.W. v. Toms River Reg'l Schools Bd. of Educ*., 189 N.J. 381 (2007), nor *M.P. and G.P., parents of R.P., v. Board of Education of the Township of Delran, Burlington County*, 1985 S.L.D. 1817 is binding precedent in this case. Unlike *L.W.*, this matter was not pled as a New Jersey Law Against Discrimination (NJLAD) case, and there is no competent evidence that the student is a member of a protected class under the NJLAD. *M.P.* is a 1985 Commissioner decision which was not appealed to the State Board or the Appellate Division, and in administrative law the concept of *stare decisis*, i.e., adherence to precedent, is more "subject to the basic notion that experience is a teacher and not a jailer" than in a court. *In re Masiello*, 25 N.J. 590, 598-599 (1958). An agency is not irrevocably committed to its own precedents[2]. Nevertheless, the opinions in those cases provide some guidance on the elements of a cause of action for bullying and harassment. Accordingly, the Commissioner concludes that it was petitioner's burden to prove by a preponderance of the competent and credible evidence that the alleged bullying took place, that timely notice of the harassing conduct was provided to the district, that under all of the circumstances the Board failed to take actions reasonably calculated to remediate and end the conduct, that petitioner exhausted all available administrative remedies with the district and had no alternative but to remove the student from the

[2] The ALJ in *M.P*. analogized that Special Education regulations controlled the extraordinary set of circumstances in that case. The Commissioner does not hear special education matters brought under the IDEA and does not review the final decision of the Office of Administrative Law in those matters. Appeals from these decisions are heard in Federal District Court. Application or extension of IDEA principles in the case at bar would be inappropriate as the Commissioner does not have jurisdiction over those matters, and to the extent *M.P*. can be read to the contrary, it is hereby disapproved.

school environment, and that petitioner did in fact remove the student and educate him elsewhere at a specific cost to petitioner. Petitioner herein proved none of the above with the exception of notice to the Board on or about April 20, 2009 of an April 9, 2009 incident wherein the student's car was vandalized off school grounds and thereafter of a police report that the suspected vandals were following the student, tailgating his car. She also proved notice of an April 29 incident wherein the student's hand was injured when he put it through the glass part of the door after the person identified as the bully allegedly gave him a "look" in the hallway at school.

Unlike the competent evidence offered by respondent, all of petitioner's evidence concerning what her son had said about the alleged bullying is hearsay evidence, and although it is admissible in administrative proceedings, there nonetheless must be some residuum of competent evidence to support each ultimate finding of fact. *N.J.A.C.* 1:1-15.5. Here there is no competent evidence that any of the events alleged occurred, with the exception of the off-campus events memorialized in police reports. Although petitioner testified that she personally observed students harassing her son as he was coming out of school when she was there to pick him up and that the kids would give her the finger and tell her to "go 'f' yourself", no notice concerning that allegation was ever given to the district until the date of the hearing in this matter; petitioner testified that she had mentioned the incidents only to secretaries at the high school. Notwithstanding that the statute requiring districts to address bullying, intimidation and harassment incidents occurring off school grounds was not effective until September 2011 – long after any of the alleged conduct in the within matter – the competent evidence in this matter reveals that the district nevertheless responded promptly after receiving notice of the April 2009 off campus incidents, meeting with the parties involved and counseling against negative interactions within the school environment and school-sponsored activities. Petitioner rejected the district's offer for mediation between the two boys. She rejected their initial offer of a transfer to the choice school in Kenilworth. The fact pattern in

the within matter is nothing like the fact pattern in *M.P., supra.* The Commissioner concludes that respondent's attempts at remediation and prevention were reasonable in light of the totality of the circumstances herein. Even if petitioner had established the other elements of a cause of action, she offered neither one word of testimony nor any documentary evidence concerning payment of tuition or the cost of attendance at Governor Livingston High School. Decisions must be based upon facts in evidence, not speculation, conjecture or surmise.

Accordingly, the Commissioner rejects the recommended Initial Decision of the Office of Administrative Law and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 9, 2012
Date of Mailing: February 9, 2012

[3] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.