

81-17 (OAL Decision: Not yet available online)

C.K. and M.K., on behalf of minor child, M.K. :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
: :
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF VOORHEES, :
CAMDEN COUNTY :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioning parents, C.K. and M.K., appealed the decision of the respondent District that their daughter, M.K., was not the victim of Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A. 18A:37-13 et seq.* Petitioners’ allegations stem from an isolated incident in which a special education student – later identified as I.L. – reached under a partition separating two bathroom stalls in the girls’ restroom, grabbed M.K.’s leg, and said “high five”. The Board contended that this incident did not rise to the level of HIB, and filed a motion for summary decision. The petitioners filed a cross motion for summary decision, contending that the Board failed to: timely investigate and report the incident; timely provide petitioners with information about the investigation; and failed to hold a timely hearing in accordance with *N.J.S.A. 18A:37-15(b)(6)*.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; the Act defines HIB as an act that is reasonably perceived as being motivated by an actual or perceived distinguishing characteristic, including race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity, or mental, physical or sensory disability; in the instant case, I.L. – a special needs student – had a habit of indiscriminately seeking out high fives from classmates; there is no evidence to suggest that I.L. knew who M.K. was when she reached under the partition, grabbed M.K.’s leg, and asked her for a high five; and M.K. was not targeted by I.L. based on any perceived characteristic; the Board did not fail to timely investigate or report the incident between I.L. and M.K., or fail to timely provide petitioners with information about the investigation; but the Board did violate the procedural requirements of the Act by failing to hold a hearing within ten days of petitioners’ June 26, 2015 request for same; however, no action to remedy this failure is necessary because the Camden County Office of Education (CCOE) conducted a complaint investigation of the matter and issued a report in August 2016 directing the Board to take corrective action in regard to its handling of HIB complaints. The ALJ concluded that the alleged conduct here did not meet the statutory definition of HIB under the Act, and therefore the Board properly concluded that I.L. did not commit an act of HIB against M.K. Accordingly, the ALJ granted the Board’s motion for summary decision, and granted the petitioners’ motion for summary decision on the issue of the Board’s violation of the statutory requirement for a timely hearing, corrective action for which was implemented by the CCOE.

The Commissioner adopted the OAL’s Initial Decision with an additional finding that the Board failed to follow its HIB policy when it did not initially investigate this matter in March 2015. However, the remedial measures imposed by the CCOE are appropriate, as the Board’s actions did not deprive petitioners or M.K. of their due process rights under the Act. The petition was dismissed with prejudice.

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.

March 23, 2017

OAL DKT. NO. EDU 20510-10
AGENCY DKT. NO. 353-11/15

C.K. and M.K., on behalf of minor child, M.K.:

PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY	:	DECISION
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 parties, and the replies thereto. In this matter, petitioners allege that the Board acted in an arbitrary, capricious and unreasonable manner when it failed to conduct a proper investigation in compliance with the procedures under the Anti-Bullying Bill of Rights Act (“the Act”) and determined that M.K. was not subject to harassment, intimidation and bullying (“HIB”). Respondent contends that the Board did not violate the procedural requirements of the Act, and that it conducted a proper investigation of the petitioner’s complaint. Respondent further contends that M.K. was not subject to HIB as defined under the Act.

The ALJ found that I.L.’s conduct did not meet the definition of an act of HIB against M.K. Specifically, I.L.’s actions could not reasonably be perceived as being motivated by a distinguishing characteristic of M.K., and that I.L.’s conduct did not have the effect of insulting or demeaning M.K. The ALJ further found that the Board followed all but one procedural requirement of the Act, *i.e.*, the Board failed to hold a hearing within the statutory time period. The ALJ concluded that: the Board properly found that the conduct alleged did not

meet the statutory definition of a HIB violation under the Act; the Board violated the Act's procedural requirement that a Board hearing shall be held within ten days of the petitioner's request; the Board did not violate any other procedural requirements of the Act; and it is not necessary to order the Board to take any other remedial action in this matter because the corrective action directed by the Camden County Office of Education ("CCOE") was appropriate to address the Board's violation.

Petitioners take exception¹ to the ALJ's conclusion that the Board properly found that I.L.'s conduct was not an act of HIB. Petitioners argue that the Anti-Bullying Specialist ("ABS") testified that I.L. was known for touching other students in a similar manner and her conduct was determined to be a violation of the student code of conduct, and therefore, the ALJ erred in concluding that I.L.'s conduct was not an act of HIB. Petitioners also argue that in determining whether there was an act of HIB, the ALJ erred in concluding that only I.L.'s intent and not the impact on M.K., was relevant. Petitioners also take exception to the ALJ's conclusion that the Board violated only one procedural requirement of the Act, and not any other procedural requirements. Specifically, petitioners argue: the HIB complaint was not timely investigated, as commencement and completion were beyond the statutory timeframe; the Board hearing was not timely conducted;² the initial failure of the District to conduct an investigation following the parent's reporting of the incident was a violation of the Act; and the investigation was not thorough and complete, because the ABS did not interview I.L. Finally, petitioners disagree with the ALJ's reasoning that the Board should not be ordered to take further remedial

¹ Petitioners have submitted sixteen numbered exceptions; however, it is clear from the content of the enumerated exceptions that petitioners have repeated the same objections throughout the document, and represented them as separate objections. Therefore, petitioners' exceptions have been appropriately summarized in this decision.

² It is unclear as to why the petitioners included the untimely Board hearing in its exceptions when the ALJ properly found (essentially, agreed with the petitioners) that the Board hearing was held beyond the statutory timeframe.

action because the CCOE already imposed a corrective action plan. Respondent has filed a reply to petitioner's exceptions, arguing that: the ALJ correctly concluded that the Board did not violate any procedural requirements of the Act; the finding of no HIB was proper as I.L.'s conduct did not meet all the factors required of an act of HIB; and the CCOE's directive to the Board serves as an appropriate remedy for any potential future violations.

Respondent has also filed an exception to the ALJ's decision – specifically, that the ALJ erred in finding that the Board failed to hold a timely hearing. Respondent argues that the parties mutually agreed to hold the Board hearing beyond the ten day time period to accommodate the District as the hearing was requested during summer recess. Respondent notes that the parties agreed to this fact at a hearing, dated October 5, 2016.³ Petitioners have – *albeit* untimely – filed a reply to the exception, arguing that the parties did not agree on a hearing date beyond the statutory timeframe.

Upon a comprehensive review of the record, the Commissioner is in accord with the ALJ's decision, as modified herein. Specifically, the Commissioner agrees with the ALJ that the Board properly determined that I.L. did not commit an act of HIB against M.K. The Commissioner further agrees that the Board failed to conduct a timely hearing;⁴ however, the Commissioner also finds that the Board did not follow its HIB policy when the District initially failed to investigate the matter in March 2015. Finally, the Commissioner agrees that the remedial measures imposed by the CCOE are appropriate, as the Board's actions did not deprive petitioners or M.K. of their due process rights under the Act.

³ The Commissioner has not been provided a copy of the transcript of the October 5, 2016 hearing.

⁴ Nothing in the record supports the Board's argument that the parties mutually agreed to extend the time period for the Board hearing. Although, the logistical quagmire of coordinating a Board hearing within ten days of the request – especially during the summer – can be appreciated, without evidence that the petitioners explicitly agreed to extension of the statutory timeframe, respondent's exception in this matter is without merit.

With regard to petitioners' contention that the ALJ erred in concluding that the conduct alleged did not meet the statutory definition of an HIB violation, *N.J.S.A. 18A:37-14* provides in pertinent part:

"Harassment, intimidation or bullying" means 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

(emphasis added).

It appears from petitioners' exceptions that they have completely ignored the threshold requirement outlined in the Act, *i.e.*: the conduct must be "reasonably perceived as being motivated either by any actual or perceived characteristic." In this matter, I.L.'s actions do not satisfy the requirement because there is no evidence in the record that I.L.'s actions – reaching under the bathroom stall and asking M.K. for a "high five" – were motivated by any actual or perceived characteristic of M.K. Notably, I.L. – a special needs student – indiscriminately seeks "high fives" from her peers. I.L.'s actions were certainly not appropriate, but her unfortunate request for a "high five" under the bathroom stall – and any consequential violation of the student code of conduct – simply do not meet the standard for an act of HIB: at minimum, the conduct must be reasonably perceived as motivated by an actual or perceived characteristic. Absence of this factor, alone, is sufficient to render a finding of no HIB. Notwithstanding, the ALJ considered and discussed the remaining factors in her decision and properly concluded that the Board's determination was correct.⁵

⁵ In this regard, petitioners' allegation that the ALJ erroneously concluded "that the intent of the actor (who was not interviewed here) is relevant and not the impact upon the victim as the ALJ makes no analysis as to the impact upon

Petitioners' exceptions to the ALJ's decision regarding the Board's procedural violations requires brief discussion. Petitioners contend that: the HIB complaint was not timely investigated, as the commencement and completion of the investigation were beyond the statutory timeframe; the initial failure of the District to conduct an investigation following the parent's reporting of the incident was a violation of the Act; and the investigation was not thorough and complete because the ABS did not interview I.L. It is clear from the record that the District's initial failure to investigate was a result of its misapplication of the "principal's discretion."⁶ In this matter, the Board's HIB policy does not provide for the principal to exercise his/her discretion, and therefore, the principal erroneously applied "principal's discretion" and failed to adhere to the Board's policy. The District remedied this mistake when it initiated a timely HIB investigation in May, immediately following receipt of the CCOE's report.⁷ During the course of the investigation, however, the ABS neglected to interview I.L.⁸ Generally, such an omission would not constitute a thorough and complete investigation of the matter.⁹ In ordinary circumstances, an appropriate remedy would be to direct the Board to conduct another investigation anew; however, in this case – where the conduct does not meet the standard for HIB – returning the matter to the District for a renewed investigation would not be in the best

minor plaintiff," is simply inaccurate and without merit. The ALJ did not reach such a conclusion or apply an improper standard. The ALJ appropriately utilized the factors outlined in the Act in her analysis of the HIB matter.

⁶ Guidance issued by the Department provides that the principal or his/her designee may exercise his/her discretion in determining whether the allegations meet the threshold definition of HIB *before* initiating an investigation. However, whether a principal or his/her designee will initiate an investigation upon receipt of *all* reports of alleged HIB, or will initiate an investigation *only* in those cases where the allegations meet the criteria in the Act, depends on the HIB policy adopted by the local board of education.

⁷ The District commenced and completed the HIB investigation pursuant to proper statutory timelines from the date that it received the CCOE's directive to conduct an investigation.

⁸ The record reflects that the incident was addressed with I.L., but outside of the HIB investigation process.

⁹ There is cause for concern that a determination was made by the ABS, the Superintendent of Schools, and the Board relating to I.L., without the accused being involved in the HIB investigation process or having an opportunity to be heard. The Board's failure to involve I.L. in the investigation process implicates her due process rights as the alleged perpetrator of the HIB.

interest of the students involved and would be inconsequential, as the outcome would remain the same: I.L.'s conduct was not reasonably perceived as being motivated either by any actual or perceived characteristic.

As such, the corrective action ordered by the CCOE serves as an appropriate remedy to monitor the Board's compliance with the Act and Board policies. Further, going forward, the corrective action ensures that the Board: conducts HIB investigations in accordance with the Board's policy and the Act; initiates and completes investigations in accordance with the provisions of the Act; and safeguards the due process rights of all parties involved.

Accordingly, the recommended decision of the ALJ is adopted – as modified herein – as the final decision, and the petition is hereby dismissed with prejudice.

IT IS SO ORDERED.¹⁰

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 23, 2017

Date of Mailing: March 23, 2017

¹⁰ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.