

A.J., on behalf of minor child, D.J., and	:	
W.G., on behalf of minor child, J.M.,	:	
	:	
Petitioners,	:	Commissioner of Education
V.	:	
	:	Decision
Board of Education of the Pinelands Regional	:	
School District, Ocean County,	:	
	:	
Respondent.	:	

Synopsis

Pro se petitioners challenged the determination of the respondent Board that their sons, D.J. and J.M., committed acts of harassment, intimidation or bullying (HIB) against a middle school classmate, L.M., pursuant to the New Jersey Anti-Bullying Bill of Rights Act (the Act), *N.J.S.A. 18A:37-13 et seq.* Petitioners sought to have the HIB findings against their children removed. The Board contended that its actions were not arbitrary, capricious or unreasonable, and that the HIB investigation was conducted properly. The petition was filed in April 2015 and the Board subsequently filed a motion for summary decision, which was not answered by the petitioners. The OAL adjourned the hearing dates in May 2017 and the case was reassigned in September 2018 to ALJ Masin, who determined that no opposition was ever filed to the Board’s motion for summary decision.

The ALJ found, *inter alia*, that: the evidence in support of the Board’s motion for summary decision stands unopposed by any evidence whatsoever, as petitioners never responded to the motion; the New Jersey Legislature adopted the Act to strengthen the standards and procedures for preventing, reporting, investigating and responding to incidents of harassment, intimidation and bullying that occurs within the school environment; 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 a mental, physical or sensory disability, or any other distinguishing characteristic; the District’s HIB policy mirrors the New Jersey law, and sets forth the process by which complaints are investigated to determine whether an action meets the definition of HIB; in the instant case, an HIB investigation ensued after a complaint from student witnesses that D.J. and J.M. had engaged in conduct towards L.M. that constituted bullying and harassment; petitioners targeted L.M. with derogatory comments and language, including terms such as “dick-sucker, pussy, bitch, asshole, queer, gay, tattletale”; the effects of the alleged bullying included changes in L.M.’s demeanor, lowering of his grades, social isolation, increased absenteeism, and withdrawal from the gifted class that L.M. attended with petitioners. The ALJ concluded that the Board acted within its scope of authority and reached a rational, evidence-based determination of HIB conduct. Accordingly, the Board’s motion for summary decision was granted and 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, for the reasons well expressed therein. 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.
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December 17, 2017

OAL Dkt. No. EDU 07634-15
Agency Dkt. No. 90-4/15

A.J., on behalf of minor child, D.J., and W.G., on behalf of minor child, J.M.,	:	
	:	
Petitioners,	:	Commissioner of Education
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Board of Education of the Pinelands Regional School District, Ocean County,	:	
	:	
Respondent.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon review, the Commissioner agrees with the Administrative Law Judge (ALJ) – for the reasons thoroughly expressed in the Initial Decision – that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its Harassment, Intimidation and Bullying determination in this case. 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 17, 2018

Date of Mailing: December 17, 2018

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

OAL DKT. NO. EDU 7634-15

AGENCY DKT. NO. 90-415

**A.J. on behalf of minor child, D.J.,
and W.G., on behalf of minor child,
J.M.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
PINELANDS REGIONAL SCHOOL
DISTRICT, OCEAN COUNTY,**

Respondent.

A.J. on behalf of D.J., petitioner, pro se

W.G., on behalf of J.M., petitioner, pro se

Casey P. Acker, Esq., for respondent (Lenox, Socey, Formidoni, Giordano,
Cooley, Lang & Casey, attorneys)

Record Closed: September 6, 2018

Decided: November 16, 2018

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

On April 22, 2015, A.J. and W.G., parents of two minor children who at that time attended school in the Pinelands Regional School District, filed a joint petition with the Commissioner of Education, seeking to have HIB (Harassment, Intimidation and Bullying) findings made by the Board against their minor children removed. The Board filed an amended answer on May 22, 2015. On May 27, 2015, the Commissioner transferred the dispute as a contested case to the Office of Administrative Law. On August 13, 2015, the Board moved for summary decision, as permitted by N.J.A.C. 1:1-12.5. On October 18, 2015, during a teleconference, the then assigned administrative law judge instructed the petitioners that if they opposed the Board's motion, they were to file their opposition by January 9, 2016, with the Board to file any reply by February 9, 2016. On March 30, 2017, Board counsel wrote to the judge, noting that no such opposition had ever been filed by the petitioners and seeking to have the judge grant the unopposed motion. Again, on April 20, 2017, Board counsel wrote, explaining that he had been instructed that April 17, 2017 was "the final deadline for petitioners to oppose Pinelands' motion for summary decision." No such opposition was filed and counsel requested that the pending hearing dates be adjourned and the motion be adjudicated. On May 1, 2017, after the OAL had notified Board counsel that the hearing dates were adjourned, counsel wrote to the petitioners of the adjournment pending resolution of the motion for summary decision.

On September 6, 2018, the case was reassigned to this judge, retired on recall. Examination of the file indicates that no opposition was ever filed to the Board's motion for summary decision.

According to the Board's motion, the HIB investigation that led to the action from which these parents appealed on behalf of their minor children, ensued after a complaint by student witnesses that the two minors were engaged in conduct towards a victim, L.M., and that the complaining witnesses had attempted to intervene and had then been subjected to harassment by the offending minors. An HIB investigation was

conducted and the District found evidence of conduct that violated the prohibitions against HIB. The petitioners requested a hearing before the Board of Education, which was held on March 2, 2015. Suspensions for the alleged offenders were held in abeyance pending the hearing. Relevant materials were provided to the petitioners prior to the hearing. The hearing was held and after the presentation of a PowerPoint setting forth information detailing the timeline of events, administrative actions, the detailed HIB actions of the petitioners' children, and confirmation of those actions, and with no denial of the conduct by the minor children, the Board found the minor children to have engaged in HIB conduct towards the victim. As part of the presentation to the Board, the history of involvement of the alleged HIB perpetrators and the alleged victim was explained, along with information regarding the manner in which the conduct between them was initially addressed and interventions taken. This interaction and response had preceded the institution of the complaint alleging HIB conduct and the subsequent initiation of the HIB investigation.

In moving for summary decision, the Board notes that long-established case law provides that when the Commissioner reviews disciplinary action taken by a local board of education, the Commissioner will not substitute his/her judgment for that of the Board, unless the record demonstrates that the action of the Board was arbitrary, capricious or unreasonable.

Local boards of education have been expressly charged with protecting the health, safety and welfare of its students, and ensuring the orderly conduct of the academic process. When a local board has acted within its authority, its actions carry a presumption of validity and will not generally be disturbed, absent an affirmative showing that its judgment was arbitrary, capricious or unreasonable. Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd., 46 N.J. 581 (1966); Quinlan v. North Bergen Bd. of Educ., 73 N.J. Super. 40, 46-7 (App. Div. 1962). The imposition of discipline on students is considered within the discretionary powers of the school board, and the decision of a local board as to the appropriate penalty to be imposed upon a student for a disciplinary infraction should not be disturbed, absent evidence that the board's action was arbitrary,

capricious, or unreasonable. J.D. and E.D. o/b/o B.D. v. Bd. of Ed. of Toms River Reg. Sch. Dist., EDU 6009-97 Initial Decision (December 29, 1997 adopted, Comm'r (July 8, 1998)), <http://njlaw.rutgers.edu/collections/oal/search.html>.

In matters involving the exercise of a local board of education's discretion, the scope of the Commissioner's review is "not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 296 (App. Div. 1960). "Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dept. of Env'tl. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Therefore, petitioner must demonstrate much more than simply a difference of opinion over the action taken by respondent. In order to satisfy the arbitrary and capricious standard, petitioner must prove that respondent acted in either bad faith or in disregard to the circumstances.

Thus, the burden placed upon petitioners appealing from such board action is quite substantial.

N.J.A.C. 1:1-12.5 provides that a party may file a motion for summary decision. This motion, the administrative law equivalent of the judicial motion for summary judgment, provides a means to resolve a case in which the facts material to the legal decision are not in genuine dispute and the law, when applied to these undisputed material facts, supports a judgment for the moving party. The New Jersey Supreme Court defined the standard for determining motions for summary decision in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). In this case, the Court elaborated upon the standards first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). Under the Brill standard, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and

any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of “genuine” disputes of material fact. The substantive law governing a dispute determines which facts are material. Only disputes regarding “those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Dungee v. Northeast Foods, Inc., 940 F. Supp 682, 685 (D.N.J. 1996), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248(1986) (Anderson).

In Judson, at 75, the Supreme Court stated that the material facts allegedly in dispute upon which the party opposing the motion relies to defeat the motion must be something more than “facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ,” (citations omitted). Brill focuses upon the analytical procedure for determining whether a purported dispute of material fact is “genuine” or is simply of an “insubstantial nature.” Brill, at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. “The essence of the inquiry in each is the same: ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.’” Id. at 536, quoting Anderson, 477 U.S. at 251–52. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the “burden of persuasion” which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed material facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that “reasonable minds could differ” as to the material facts, then the motion must be denied, and a full evidentiary hearing held.

The New Jersey Legislature adopted legislation intended to address the significant problem of harassment, intimidation and bullying that occurs within the school environment. In N.J.S.A. 18A:37-13,

The Legislature finds and declares that: a safe and civil environment in school is necessary for students to learn and achieve high academic standards; harassment, intimidation or bullying, like other disruptive or violent behaviors, is conduct that disrupts both a student's ability to learn and a school's ability to educate its students in a safe environment; and since students learn by example, school administrators, faculty, staff, and volunteers should be commended for demonstrating appropriate behavior, treating others with civility and respect, and refusing to tolerate harassment, intimidation or bullying.

N.J.S.A. 18A:37-13.4 defines "Harassment, intimidation or bullying" 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.

Each local school district is responsible for the adoption of a policy “prohibiting harassment, intimidation or bullying on school property, at a school-sponsored function or on a school bus.” The statute also provides for a procedure that must be followed in conducting any investigation of alleged harassment, intimidation or bullying. N.J.S.A. 18:37-15. The nature of this investigation policy is set forth in detail in the provision.

In its motion, Board counsel describes that the alleged perpetrators of what was eventually determined to be conduct that violated the Board’s HIB policy had some history of negative interaction with L.M., the student who was determined to have been the victim of that HIB conduct. Originally, the interaction was managed through intervention and subsequent discipline that involved detentions for D.J. and J.M. According to Exhibit A, a notice sent to Ms. G., on October 16, 2014, J.M. received an in-school suspension for two days due to “Dangerous Behavior.” Ms. J. received a notice dated January 16, 2015, that after-school detention was ordered for D.J. due to “inappropriate language.” Then, following complaints received from student witnesses, an HIB investigation was initiated, which involved the taking of numerous statements from students and teachers. The complaints alleged that J.M. and D.J. were each engaging in HIB conduct toward L.M., and that when students sought to intervene as peers they were also subjected to harassment by the two. While in their petition the two parents contend that the two female students who complained were motivated by the two alleged perpetrators having reported the girls as having cheated on a science test, the Board contends that the HIB investigation had nothing to do with any such alleged “cheating matter.” At the conclusion of the HIB investigation, the parents were each notified by the superintendent that the investigation by the school’s Anti-Bullying Specialist and the principal had determined that “evidence” indicated that the two had “committed the act of harassment, intimidation or bullying.” The findings were to be reported to the Board on February 11, 2015. Each student was to have the following interventions, counseling and/or disciplinary consequences imposed: “Administrative Meeting; ABS Counseling Sessions: Follow up with ABS/or other counseling staff.” Each parent requested a hearing before the Board and was notified by letter dated February 20, 2015, that the hearing would take place during an executive session of the

Board on March 2, 2015. On February 24, 2015, each parent was sent a letter with copies of documents related to the investigation. At the Board meeting on March 2, a PowerPoint presentation was made to the Board, which documented a history between the three boys and the ultimate intervention of school personnel up to January 15, 2015. Then, on January 16, L.M. met with Mr. Pschorr, asking to be removed from the Talented and Gifted (GATE) class due to the conduct of the two perpetrators. On January 21, two other students, apparently the girls, reported that L.M. was receiving continuing bullying. This initiated the HIB investigation by Ms. Thompson, the school's Anti-Bullying Specialist. On February 3, based on the data collected, the HIB conduct was confirmed by Thompson. On February 3, based on the victim's continued request, he was removed from GATE. The PowerPoint detailed the language found to have been used by the perpetrators towards or concerning L.M., including "dick-sucker, pussy, bitch, asshole, queer, gay, 'get big', tattletale" and a reference to "Busty Deb," noted as the "target's mother." Additional episodes of "making fun", including reference to a "relationship with student-teacher (gay)" and "dating his cousin (Poca-hot-ness)" and head-butting, and threatening and insulting text messages were noted as well. Effects of the bullying were detailed, including changes in demeanor as reported by staff and students, lower grades, isolation and increased absenteeism, verbalized to staff and students as a decreased desire to attend school and the requested removal from L.M.'s placement in GATE. The presentation to the Board included reference to the requirements for confirmation of HIB, including "substantial disruption or interference with the orderly operation of the school or a student's rights; an actual or perceived distinguishing characteristics as a motivating factor" and "one of the following: physical or emotional harm to a student . . . or fear of harm to student; effect of insult of demeaning a student or group of students; creation of a 'hostile' educational environment interfering with student's education." The demonstration then discussed the nature of the findings as to how each of the requirements had been met for confirmation of HIB conduct. The Board confirmed the finding of HIB conduct against each student.

In their petition, the petitioning parents describe a series of alleged factors that they contend require that the HIB findings concerning their children be removed. However, allegations made in a petition are not evidence. Here, the Board moves for summary decision, presenting a series of exhibits that demonstrate that an HIB complaint was received, investigated in the normal course, findings were made, a hearing held before the Board at the parents' request where the details of the allegations, investigative findings and rationale for the findings were all presented, and findings confirmed. Despite being given a very long time in which to respond to the motion, and reminded of their opportunity to do so, neither of the petitioning parents ever filed a response. As such, I **FIND** that the evidence in support of the Board's motion stands unopposed by any evidence offered by the parents at all, much less any that suggests that genuine issues of material fact are in dispute. Again, the statement in a petition concerning alleged misconduct, improper investigation and the like is not evidence. The record demonstrates that the school authorities properly conducted an HIB investigation and that the Board had ample reason to confirm the finding of HIB conduct on the part of both D.J. and D.M. Further, as discussed earlier, the test is not whether this judge or the Commissioner would differ with the Board's findings, but whether the action of the Board was arbitrary, capricious or unreasonable. Based upon the undisputed evidence, I **CONCLUDE** that the Board clearly acted within its scope of authority and reached a rational, evidence-based determination of HIB conduct. For that reason, **IT IS HEREBY ORDERED** that the motion for summary decision is **GRANTED** and the joint petition is **DISMISSED**.

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.



November 16, 2018
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: _____

Date Mailed to Parties: _____

mph

LIST OF EXHIBITS:

For petitioners:

None

For respondent:

- Exhibit A Letter dated October 16, 2014 to Ms. W.G. from Thomas P. Denning, Assistant Principal; Discipline Disposition Summary Report for M.J.; Student Incident Report Form, dated January 26, 2015; Letter dated January 16, 2015 to Ms. A.J. from Dr. Kimberly Cark, Assistant Principal; Discipline Disposition Summary Report for J.D.; Student Incident Report Form, dated January 23, 2015
- Exhibit B Numerous investigative materials relating to investigation Report by Anti-Bullying Specialist Melissa S. Thompson
- Exhibit C Letters dated February 2, 2015 to Mrs. A.J. and Mrs. W.G. from Robert L. Blake, Ed.D., Superintendent
- Exhibit D Letters dated February 20, 2015 to Mrs. A.J. and Mrs. W.G. from Robert L. Blake, Ed.D., Superintendent
- Exhibit E Letter dated February 24, 2015 to Mrs. A.J. and Mrs. W.G. from Robert L. Blake, Ed.D., Superintendent, forwarding documentation prior to Board hearing
- Exhibit F PowerPoint presentation
- Exhibit G Joint Petition to Commissioner of Education from A.J. and W.G.