183-18

H.C., on behalf of minor child, B.Y.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the determination of the respondent Board that B.Y. committed an act of harassment, intimidation or bullying (HIB) in violation of the New Jersey Anti-Bullying Bill of Rights Act (the Act), *N.J.S.A.* 18A:37-13 *et seq.* Petitioner contended that the Board's determination of HIB was arbitrary, capricious and unreasonable, and asserted that the Board failed to comply with the procedural safeguards set forth in the Act; further, petitioner sought expungement of any reference to the alleged act of HIB from B.Y.'s school record. The respondent Board contended that there were no procedural violations of the Act in this matter, and that the finding of HIB was proper. The petitioner filed a motion for summary decision.

The ALJ found, *inter alia*, that: the motion record herein presented factual disputes that would typically require a hearing; the incident in question occurred during a game of tag October 2016, when B.Y. was in third grade; B.Y. was reported to have said things to a classmate, and behaved toward him in a manner that was understood by investigators and administrators to fall within the parameters of the Act; the school district assigned discipline for the alleged behavior, including a required apology, recess suspension for three days, and attendance at counseling; however, B.Y. transferred to another school without completing the discipline; petitioner requested a review of the HIB findings before the Board, which hearing occurred on December 20, 2016; the Board affirmed the actions of the school administration, finding that B.Y. had engaged in HIB; this determination was conveyed to the petitioner by letter from the Board attorney dated December 21, 2016; and that this letter cannot be considered a written decision in satisfaction of the procedural requirements of the Act. The ALJ concluded that the Board failed to issue a final written decision in this matter, which he deemed an "irreparable" procedural flaw. Accordingly, the ALJ remanded the matter to the Metuchen Board of Education for preparation of a written decision.

Upon review, the Commissioner rejected the Initial Decision and remanded the matter to the OAL for a hearing to resolve factual disputes and to determine whether the Board was arbitrary, capricious or unreasonable in its finding of HIB. In so doing, the Commissioner determined that the Board letter to petitioner explicitly set forth the Board's consideration of this matter and its decision to affirm the superintendent's HIB determination, and does, in fact, constitute a written decision pursuant to *N.J.S.A.* 18A:37-15(b)(6)(e).

June 22, 2018

OAL DKT. NO. EDU 05202-17
AGENCY DKT. NO. 53-3/17

H.C., on behalf of minor child, B.Y.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX 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 by the parties pursuant to *N.J.A.C.* 1:1-18.4. Petitioner alleges that the Board's determination that B.Y. committed an act of harassment, intimidation and bullying ("HIB") is arbitrary, capricious and unreasonable, as the Board failed to comply with the procedural safeguards set forth in the Anti-Bullying Bill of Rights Act ("the Act"). Petitioner further alleges that the Board improperly found B.Y.'s conduct to rise to the level of HIB under the Act, and seeks expungement of any reference to the alleged act of HIB from B.Y.'s school records. Respondent contends that the Board did not violate the procedural requirements under the Act, and that the finding of HIB was proper.

The ALJ found that the Board failed to issue a final decision in this matter, which was an "irreparable" procedural flaw.[1] The ALJ concluded that the proper remedy is to return the matter to the Board, and directed respondent to issue a final decision. The ALJ further noted that the factual disputes and the other procedural violations alleged present questions of fact –

[1] The ALJ found that Board minutes reflecting its vote on the HIB matter, followed by a letter from the Board Attorney advising petitioner of the Board's decision, were insufficient to constitute a *written* decision by the Board.

typically requiring a hearing – and cannot be determined until the matter has concluded at the Board-level.

Petitioner takes exception to the ALJ's recommendation that the matter be returned to the Board. Petitioner argues that there is no provision in the Act which allows for such a remedy. Petitioner further argues that the Board's failure to issue a final decision is the "most substantive violation," which cannot be remedied. Petitioner also notes that the ALJ disregarded the Board's other procedural violations. Petitioner submits that allowing the Board to "fix" its violations of the Act is unfair. Additionally, petitioner argues that the HIB finding is "patently erroneous" as there is no evidence that the incident "substantially disrupted or interfered" with orderly operation of the school or the rights of other students. In response, the Board maintains that it properly found HIB in this matter and that it did not violate the procedural safeguards of the Act. Furthermore, respondent seeks modification of the Initial Decision to reflect that the Board issued a final decision when the Board Attorney sent a letter to petitioner's counsel on December 21, 2016 ("the Letter"), relaying the Board's final determination in the matter.

Upon a comprehensive review of the record, the Commissioner rejects the Initial Decision and remands the matter to the OAL for a hearing to resolve the factual disputes and determine whether the Board was arbitrary, capricious or unreasonable in its finding of HIB.

N.J.S.A. 18A:37-15(b)(6)(e) provides that the board "shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision." Here, respondent argues that the Letter following the Board's review of the matter satisfies the requirements under *N.J.S.A.* 18A:37-15(b)(6)(e). During the course of litigation, respondent also argued that the Board minutes reflecting the vote on the HIB matter was also sufficient to constitute a final written decision of the Board. The Commissioner finds that the Board minutes certainly do not

constitute a *written decision* by the Board in accordance with *N.J.S.A.* 18A:37-15(b)(6)(e).[2] The Letter, however, meets the requirements of *N.J.S.A.* 18A:37-15(b)(6)(e): it *explicitly* sets forth the Board's consideration of the matter and its decision to affirm, reject or modify the superintendent's determination. Furthermore, the Letter was issued on behalf of the Board by an authorized agent – *i.e.*, the Board Attorney – notifying petitioner of the Board's decision on the HIB matter. Therefore, the Board issued a written decision pursuant to *N.J.S.A.* 18A:37-15(b)(6)(e).

With regard to petitioner's allegations that the Board committed other procedural violations, the record before the Commissioner does not support same.[3] Further exploration of the facts may reveal that the alleged procedural violations did occur, but such factual inquiry and subsequent findings are appropriately conducted by the ALJ. Additionally, whether the Board's ultimate HIB determination was arbitrary, capricious or unreasonable, cannot be ascertained without a thorough consideration of the facts, which deliberation the ALJ admittedly did not undertake.

Finally, the Commissioner is unpersuaded that the remedy set forth in *Edward Sadloch, et. al. v. Bd. of Educ. of the Twp. of Cedar Grove, Bergen Cnty,* Commissioner Decision No. 216-15 (June 23, 2015), is proper in determining the possible remedies in this matter. Petitioner argues that like *Sadloch*, the Board failed to follow the procedures under the Act, and the sole remedy under the law is to reverse the HIB determination and to remove any reference of HIB from B.Y.'s records. In a HIB appeal, where the record is sufficient for a fact

[2] The requirement for a *written* decision affirming, rejecting, or modifying the superintendent's decision is clear. As addressed in *J.L., on behalf of minor child, A.L. v. Bd. of Educ. of the Bridgewater-Raritan Reg'l Sch. Dist., Somerset Cnty*, Commissioner Decision No. 416-16 (Dec. 9, 2016), "under no circumstances can any board minutes be substituted for a requirement of a written decision by a board" in a HIB matter.

[3] The record reflects that a HIB investigation was conducted and reported in a timely manner, and petitioner was on notice through the duration of the investigation process. Furthermore, petitioner was notified of the outcome, and was never denied a hearing before the Board. Therefore, at this time – without verification of the facts – the Commissioner is unable to render a finding of deprivation of B.Y.'s due process rights.

finder to determine whether an act of HIB occurred and the procedural violations did not deprive the petitioner of their right to notice and a hearing, such a remedy would curtail the legislative intent behind the Act. In *Sadloch*, reversal was appropriate because the board failed to comply with basic investigatory procedures under the Act. Additionally, the state of the record in that case was such that a fact finder could not properly determine whether an act of HIB occurred. Here, the Board gave petitioner notice of the allegations, conducted an investigation and notified petitioner of the results of the same, and also afforded petitioner with an opportunity to appear before the Board. *See Stephen Gibble v. Bd. of Educ. of the Hunterdon Central Reg'l Sch. Dist., Hunterdon Cnty*, Commission Decision No. 254-16 (July 13, 2016). Significantly, the Board provided petitioner its decision in writing on December 21, 2016. Therefore, the Commissioner finds that the ALJ erroneously ordered that the matter be returned to the Board for issuance of a final decision. The ALJ further erred in not determining whether there were, in fact, other procedural violations, and whether the Board's finding of HIB in this matter was arbitrary, capricious or unreasonable.

Accordingly, the recommended decision of the ALJ is rejected and the matter is remanded to the OAL for a hearing on the remaining issues.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: June 22, 2018
Date of Mailing: June 22, 2018

[4] 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.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5202-17
AGENCY DKT. NO. 53-3/17

H.C., on behalf of minor child, B.Y.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,
Respondent.

Bruce C. Licausi, Esq., and Randall J. Peach, Esq., for petitioner

Jessika Kleen, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: April 30, 2018 Decided: May 8, 2018

BEFORE **SOLOMON A. METZGER**, ALJ (Ret., on recall):

This matter arises out of a decision by the Metuchen Board of Education finding that B.Y., at the time an eight-year-old third grader, committed an act of harassment, intimidation, or bullying (HIB) in violation of N.J.S.A. 18A:37-14. A hearing was sought before the Commissioner of Education, and the matter was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15.

Petitioner has filed a motion for summary decision, N.J.A.C. 1:1-12.5; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

The motion record presents factual disputes that would typically require a hearing; however, the matter turns now on a procedural flaw that is irreparable in the current posture of the case. The incident in question took place on October 28, 2016, during a game of tag. B.Y. was reported to have said some things to a classmate and behaved toward him in a manner that was understood by investigators and administrators to fall within the HIB statute. He was disciplined by way of a required apology, recess suspension for three days, and attendance at counseling. The District's interrogatory answers relate that some of these measures were realized, but that in the meantime B.Y. transferred to another school. Petitioner through counsel sought review of the HIB findings before the Board of Education. At a meeting of December 20, 2016, the Board heard the matter and affirmed the decision of its administrators in a vote that was recorded in its minutes. No written decision was produced. On December 21, 2016, then-counsel for the Board provided then-counsel for petitioner with a letter relaying the Board's action. This is the substance of the motion record.

N.J.S.A. 18A:37-15(b) sets forth the minimum procedural safeguards attendant to HIB cases. Among these is the requirement for a written decision by the Board affirming, modifying, or rejecting the recommendations of school administrators. Board counsel suggests that this was accomplished by recording the vote in minutes and by the follow-up letter of counsel. I disagree. Boards of education commonly pass upon matters by voice vote recorded in minutes. Were that the threshold, the Legislature needn't have spoken further. Nor can the letter from counsel communicating the Board's affirmation serve as a substitute. Written decisions following a proceeding are designed to give interested parties a measure of insight into the tribunal's evaluative process. The Legislature deemed this to be salutary in HIB cases, and we cannot gloss past it.

Petitioner asserts other multiple procedural failures. It is apparent from the motion record, however, that these present fact questions. Petitioner maintains, for example, that she was not given certain relevant information in advance of hearing. The District cites to telephone conferences, e-mails, and in-person meetings where the issues were discussed. Moreover, petitioner was represented by counsel and discovery was exchanged. Petitioner asserts further that the underlying conduct does not rise to the level of HIB. Yet, reading the record in a manner most favorable to the non-moving party, it appears that demeaning references were made about the victim's weight during this game of tag and that B.Y. devised special rules to humble him. The victim subsequently wrote that he was distressed by the interaction. It is entirely plausible that this conduct, if proven, might rise to "substantial" interference with the victim and other students playing, see N.J.S.A. 18A:37-14. That the context was a game of tag does not diminish the statutory concern with HIB. As is evident, a lot can happen during tag.

Finally, petitioner argues that a remand will merely reward the Board's mistakes and undoubtedly result in a writing affirming its "preordained" conclusion. Petitioner relies on Sadloch v. Board of Education of Cedar Grove, EDU 619-14, Initial Decision (March 26, 2015), adopted, Comm'r (June 23, 2015), http://njlaw.rutgers.edu/collections/oal/. There, the administrative law judge (ALJ) found multiple procedural errors, including the absence of a written Board opinion, vague charges, and a generally muddled record. Given the passage of time and the difficulty of recreating the facts, the ALJ determined that reversal and expungement of the HIB record was the preferred course. The instant matter does not share most of these problems; the nature of the offense is known and the evidence is available. Sadloch should be understood as the exception, not the rule. Boards of education enjoy wide latitude in the exercise of discretion, and their decisions may not be disturbed unless arbitrary, Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960). The motion record does not support that conclusion. The parties might do well at this juncture to disengage their legal arguments and weigh the cost-benefit of continuing on this path. That of course is their choice.

Based on the foregoing, the matter is remanded to the Metuchen Board of Education for preparation of a written decision.

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.

May 8, 2018
DATE

SOLOMON A. METZGER, ALJ (Ret., on recall)

Date Received at Agency: May 8, 2018

Date Mailed to Parties: May 8, 2018

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