

N.M., ON BEHALF OF MINOR CHILD, H.M., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 :
 : DECISION
 BOARD OF EDUCATION OF THE SCHOOL :
 DISTRICT OF THE CHATHAMS, MORRIS COUNTY, :
 RESPONDENT. :

SYNOPSIS

Petitioner challenged the determination of the respondent Board that H.M. 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), regarding four of five alleged incidents of bullying that occurred between January 2016 and April 2017. Petitioner alleged that the District failed to follow and discharge its obligations to conduct required investigations under the HIB laws and did not consider all relevant evidence in making its determinations. Further, petitioner contended that the District failed to restrain the alleged perpetrators, resulting in physical and emotional harm to H.M., and interfering with her right to a free and appropriate public education. Petitioner sought, *inter alia*, to vacate the District’s determinations and to require appropriate disciplinary, behavioral, and/or personnel interventions to assure that H.M. is not subjected to additional acts of HIB. The Board asserted that it had fully complied with the requirements of the HIB law and acted properly in affirming the Superintendent’s HIB determinations. The Board filed a motion for summary decision, which was opposed by the petitioner.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact here, as the petitioner offered “only generalized subjective accusations rather than specific, objective facts to rebut the finding that there was no HIB,” and the matter is ripe for summary decision; the District’s anti-bullying specialist (ABS) thoroughly investigated each of the alleged incidents of HIB, conducted in-depth interviews with the alleged victim, perpetrators, and witnesses, and reached reasonable decisions on each incident in a timely manner; HIB was substantiated in the fifth alleged incident, but the ABS determined that HIB could not be proven in the other four alleged episodes of HIB. The ALJ concluded, *inter alia*, that: the District’s findings of “No HIB” in regard to incidents one through four were all based on timely and thorough investigations; the District complied fully with the HIB laws, particularly *N.J.S.A. 18A:37-15*; and the resulting determinations were not arbitrary, capricious or unreasonable. Accordingly, the ALJ affirmed the Board’s determinations with respect to H.M.’s HIB allegations and granted summary decision to the District.

Upon review, the Commissioner concurred with the ALJ that the Board’s findings of no HIB in three of the incidents were not arbitrary, capricious or unreasonable. However, the Commissioner determined that an incident on March 7, 2016 – when a student made derogatory comments about H.M.’s deceased father during a video chat and told H.M. “You’re fucking stupid” – does meet the definition of HIB. Given H.M.’s known status as a special education student, she has a distinguishing characteristic under *N.J.S.A. 18A:37-14*; the statement calling H.M. “stupid” was motivated by this characteristic. H.M. was the victim of HIB with respect to the March 7, 2016 incident, wherein she was insulted and demeaned, causing anxiety and depression that resulted in H.M. going on home instruction. The Initial Decision of the OAL was modified accordingly, and summary decision was granted to petitioner with respect to incident number two.

<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>

N.M., ON BEHALF OF MINOR CHILD, H.M., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
SCHOOL DISTRICT OF THE CHATHAMS,
MORRIS COUNTY, :
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 petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board’s reply thereto.

This case involves a challenge by petitioner to the Board’s determination that her daughter was not the victim of acts 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.*, with respect to four of her five allegations of HIB. According to the joint stipulation of facts, petitioner alleged that on January 27, 2016, a student told H.M. “cookies can make you fatter than you are” after she refused to give the student a piece of her cookie. (Joint Facts at ¶4). During the investigation, the Anti-Bullying Specialist (ABS) interviewed H.M., two witnesses, and the accused. *Id.* at ¶6-7. The ABS found that given the discrepancies in the witness descriptions of the event, the HIB claim could not be substantiated due to a lack of clear evidence. *Id.* at ¶8, Exhibit C.

Petitioner reported a second incident of alleged HIB on March 7, 2016, alleging that a student made derogatory comments about H.M.’s deceased father. *Id.* at ¶¶ 10-13. The investigation found that a student asked H.M. on a video chat website why she was upset about her dad, and in a subsequent text message told H.M, “You’re fucking stupid.” *Id.* at ¶14. The ABS found that the comment was out of frustration and a reaction to H.M.’s accusations during the video chat; the comment

was not an attack on H.M.'s intelligence. *Id.* at ¶16, Exhibit D. Further, the comment was not motivated by a distinguishing characteristic, as the accused had no knowledge that H.M. had a learning disability. *Ibid.*

The third alleged incident of HIB occurred on June 19, 2016, when petitioner alleged that while at the Colony Pool, a student yelled for people to “evacuate” because H.M. was there. *Id.* at ¶20. After interviewing H.M., the accused, and five witnesses, the ABS found that the incident did not amount to HIB because there was no distinguishing characteristic at issue, there was no disruption to the orderly operation of the school as H.M. was on home instruction, and there was no disruption to H.M.'s rights as she continued to use the pool. *Id.* at 22.

On April 28, 2017, in the fourth alleged incident of HIB, petitioner alleged that three students followed H.M. on Main Street in Chatham, and one of the students yelled, “What are you chicken, like your father?” *Id.* at ¶26. The statements could not be corroborated in the investigation, so the HIB claim could not be substantiated due to a lack of evidence. *Id.* at ¶29, Exhibit N. The three students were warned to limit any interactions with H.M. *Ibid.*

The fifth and final alleged incident of HIB also occurred on April 28, 2017. Petitioner alleges that a student sent H.M. an electronic message that said, “Your father never loved you.” The ABS found that the incident constituted HIB because it was motivated by the fact that H.M. had lost her father and was devastated by his death.

The Administrative Law Judge (ALJ) found that the Board's determination that there had been no HIB in the first four alleged incidents was not arbitrary, capricious, or unreasonable. The ABS thoroughly investigated each allegation of HIB, conducted interviews, and reached each decision in a timely manner.

In her exceptions to the Initial Decision, petitioner argues that the ALJ failed to recognize H.M.'s status as a special education student as a distinguishing characteristic for the purpose of the HIB allegations. Petitioner points out that H.M.'s special needs have been long recognized in the District, as she has been a classified student for the past nine school years. Her certification establishes that H.M. has

been pulled in and out of her classes for special education services and has a 1:1 aide with her in classes and between classes, so H.M.'s special needs are obvious to the other students. Petitioner argues that the accused students frequently referenced H.M.'s dyslexia, commenting that she "can't even spell" and is "so dumb." (Petitioner's Exceptions at 5). Petitioner maintains that her daughter was harassed and bullied by a group of girls called the "Goon Squad" due to her status as a special education student.

Petitioner also contends that the ALJ erred in finding that petitioner's opposition papers "offered only generalized subjective accusations, rather than specific, objective facts to rebut the finding that there was no HIB; and therefore, I CONCLUDE that there are no unresolved issues of material fact that require submission to a fact-finder." (Initial Decision at 13). Petitioner and H.M. submitted sworn certifications which included specific accusations regarding the alleged HIB, including: comments students made about her learning disability; a student taunting H.M. by telling her that her father ran away; and students showing up at the yogurt shop where H.M. worked. As a result, petitioner indicated that H.M. became anxious and depressed, had to seek medical help, and went on home instruction. Petitioner maintains that the ALJ should have the benefit of testimony regarding the allegations.

In reply, the Board argues that the ALJ properly determined that the Board did not violate the procedural requirements of the HIB statute. The Board timely investigated all alleged incidents of HIB, including interviews of H.M, the accused, and any witnesses. The Board points out that petitioner does not contest the ALJ's finding that the alleged incidents were investigated in accordance with the law, and any effort by petitioner to bring up additional facts and allegations should not be considered as the scope of this matter is limited to the five HIB determinations. The Board clarifies that the ALJ did not find that H.M. lacked a distinguishing characteristic, but instead found that the Board was not arbitrary, capricious, or unreasonable in determining that the conduct was not motivated by that distinguishing characteristic.

Upon a comprehensive review of the record, the Commissioner is in accord with the ALJ that the Board's findings of no HIB in the first, third, and fourth incidents were not arbitrary, capricious or unreasonable. The Board conducted investigations in accordance with the Act. In incidents one and

four, it was unclear from the investigation what the accused said to H.M., so the HIB allegation could not be substantiated due to a lack of evidence. With respect to incident three, telling people to evacuate the pool when H.M. arrived is not motivated by a distinguishing characteristic.

However, with respect to the second alleged incident of HIB, the Commissioner finds that the alleged conduct – specifically the accused sending H.M a text message saying, “You’re fucking stupid” – meets the definition of HIB. The Commissioner agrees with the petitioner that this comment was motivated by H.M’s learning disability. The HIB report found that the accused did not have knowledge that H.M. has a learning disability. The Commissioner notes that knowledge of the distinguishing characteristic is not required, but rather *N.J.S.A.* 18A:37-14 indicates that conduct can constitute HIB if it is motivated by an “actual or perceived” characteristic. Given H.M.’s known status as a special education student, she has a distinguishing characteristic; further, the statement calling H.M. “stupid” was motivated by that characteristic. H.M. certified that she became anxious and depressed and was frightened to enter the school. As a result, she sought anti-depressant and anti-anxiety medications as well as mental health therapy. It is clear that H.M.’s rights were violated and that the actions insulted or demeaned her. As such, H.M. was the victim of HIB with respect to the second alleged incident.

Accordingly, the recommended decision of the ALJ is modified as stated above. The petition is hereby dismissed with respect to incidents one, three, and four. Summary decision is granted to petitioner with respect to incident two.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: November 29, 2018

Date of Mailing: November 29, 2018

* 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 10587-17

AGENCY REF. NO. 160-7/17

**W.D. AND J.D. ON BEHALF
OF MINOR CHILD G.D.,**

Petitioners,

v.

**BOARD OF EDUCATION
OF THE TOWNSHIP OF JEFFERSON,
MORRIS COUNTY,**

Respondents.

Steven P. Weissman, Esq. and Sarai K. King, Esq., for Petitioners (Weissman
& Mintz, attorneys)

Elizabeth Farley Murphy, Esq., for Respondent (Busch Law Group, attorneys)

BEFORE **THOMAS R. BETANCOURT, ALJ:**

Record Closed: July 3, 2018

Decided: July 13, 2018

STATEMENT OF THE CASE

Petitioners seek a determination that respondent erred in determining that the minor child, G.D., was not the victim of harassment, intimidation, or bullying (HIB) within

the meaning of the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq.; and, that respondent violated the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq. by failing to adhere to the procedures mandated therein.

PROCEDURAL HISTORY

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on July 26, 2017, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The hearing on the contested matter was held on January 8, 2018. The record remained open to permit the litigants to file post-hearing briefs. Petitioner filed a post-hearing brief on July 2, 2018. Respondent filed a post-hearing brief, dated June 29, 2018, on July 3, 2018. The record closed on July 3, 2018.

ISSUE

Did respondent err in determining that the minor child, G.D., was not the victim of HIB within the meaning of the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq.; and, did respondent violate the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq. by failing to adhere to the procedures mandated therein.

UNDISPUTED FACTS

The parties hereto have submitted the following undisputed facts:

1. Petitioners, W.D. and J.D., are parents of the minor student G.D.
2. Respondent is the Jefferson Township Board of Education (Board).
3. Dr. Patrick Tierney is employed by respondent as Superintendent of Schools.

4. Kevin Lipton is employed by respondent as Principal of Arthur Stanlick Elementary School (Stanlick).
5. Lyndsay LaConti is employed by respondent as Anti-Bullying Specialist.
6. Lisa Young is employed by respondent as a Teacher.
7. During the 2016-2017 school year, G.D. was a fifth-grade student at Stanlick.
8. On Friday, January 27, 2017, G.D. received a group text message, while off school grounds, from a fellow student, J.D.,² stating “Fuck ur dad you little niger [sic].” On Saturday, January 28, 2017, G.D.’s mother sent an email to Principal Lipton, Superintendent Patrick Tierney, and Lisa Young, G.D.’s teacher, informing the District about the text. Principal Lipton and petitioner exchanged subsequent related email correspondence. J-1.
9. On Monday, January 30, 2017, Principal Lipton notified the parents of G.D. of the commencement of a harassment, intimidation or bullying (HIB) investigation. J-2.
10. By letter dated February 1, 2017, Principal Lipton notified petitioners that the district did not find evidence that G.D. was the target of an act of harassment, intimidation or bullying. J-3. Petitioner appealed to the Board, which denied their request to overturn the determination that an HIB incident had not occurred. J-4.

² Petitioner and the student, J.D., have the same initials. Petitioner will be referred to as “Petitioner” and J.D. the student will be referred to as “J.D.”

SUMMARY OF RELEVANT TESTIMONY

Petitioner's case:

J.D., petitioner, testified as follows:

She is the mother of G.D. She is a special education teacher in Prospect Park, New Jersey. G.D. no longer attends Stanlick. She is now in the Jefferson Township middle school.

In November 2016, she contacted Kevin Lipton by email, then principal at Stanlick, to advise that G.D. was called "nigger" while on the school bus by another student. She never heard back from Mr. Lipton about this incident. She again emailed Mr. Lipton on January 28, 2017, about an incident that occurred in a chat room wherein G.D. was referred to again as "nigger." This happened the day before, which was a Friday. Petitioner stated that G.D. did not want to go back to school and informed Mr. Lipton of this in the email. G.D. did attend school on Monday next at the request of Mr. Lipton. That Monday G.D. was taken to school by her grandmother. Petitioner stated that G.D. was sent to class and no one spoke with her or her grandmother.

Mr. Lipton called petitioner on Tuesday, January 31, 2017. She met with Mr. Lipton on Wednesday February 1, 2017, in his office. Mr. Lipton informed her that the incident was not an HIB violation, and that the students involved in the chat room used disgusting language. She replied it was racism and was different. Petitioner further stated that Mr. Lipton told her that G.D. should not speak of the incident, and that if she did she could be charged with a HIB violation. The letter she received from Mr. Lipton dated February 1, 2017, regarding the finding of no HIB violation did not contain any information why this decision was made.

Petitioner met with Dr. Tierney on March 1, 2017, and was told by him to appeal the HIB findings to the Board.

Petitioner stated that Mrs. Young told her that the incident affected G.D.'s grades, and that all the kids were distracted by it. Petitioner admitted to Mrs. Young in an email that she was more upset than G.D.

G.D. testified as follows:

She attends the Jefferson Township middle school. Last year while on a school bus another student, C.J., used the word "nigger." C.J. was mad, fighting, and using foul language. It was then he used the word "nigger." She at first stated the use was random and then stated it was directed toward her as C.J. was looking at her when he used it. She has heard this word before in songs. She was shocked by C.J.'s use of the word as she knew him to be a good person.

In January 2017, two classmates, J.D. and D.A., started a prank in a chat room. The prank was a pretend fight over homework. At one point J.D. used the word "nigger" directed at G.D. G.D. responded that this was racist. She thought J.D. was a good person. She informed her mother, who then notified Mr. Lipton. She did not want to go to school afterwards as she knew she would be pulled out of class, that seats would be changed. It would be "awkward." Seats were changed. She did not speak to J.D. after they returned to school. There was no contact. J.D. and G.D. are friends with the same people. G.D. is really good friends with P.R. At some point after they returned to school, J.D. pulled P.R. away from her. This made G.D. mad.

G.D. reviewed the statement she made during the HIB investigation and stated it was accurate.

G.D. had post-chat room contact with J.D. on a site called Road Blocks. This is a place where you can play games and chat. J.D. was on this site and G.D. unfriended her and blocked her. This occurred after the chat room incident. G.D. has had no other online contact with J.D.

G.D. stated that her mathematics grade went down as a result of the chat room incident. She also stated she could not hang out with her friends as J.D. was there.

Ms. LaConti asked her to write down what happened regarding the chat room incident. She was then sent back to class. Seats were reassigned at the lunch table.

Respondent's case:

Lyndsay LaConti, HIB specialist, testified as follows:

She works for the Jefferson Township Board of Education as a school counselor and HIB specialist. She has performed approximately sixty HIB investigations. She conducted the HIB investigation regarding the chat room incident. She met with G.D. and her grandmother when they arrived at school. She took the statement of G.D. first and then interviewed the other students involved in the chat room conversation.

Ms. LaConti discovered that the five girls involved in the chat room were friends. J.D. and B.A. engaged in a prank by pretending to be in an argument. They used vulgar language such as "cunt," "bitch," and "whore." After G.D. was told she was pranked she said "I love this." Then G.D. and P.R. engaged in a prank using the same vulgar words.

Ms. LaConti conducted the HIB investigation in the instant matter and concluded that there was no HIB. Rather, she determined that this was a conflict between friends. She spoke with Mrs. Young, the girls' teacher, who advised separating the girls. She is trained to be an HIB specialist. She is familiar with Board HIB policy.

On January 30, 2017, Mr. Lipton informed her of the HIB allegation and asked her to do an investigation. She was provided with the email from petitioner to Mr. Lipton. She knew the incident took place after school on Friday, January 27, 2017. She agreed that HIB can take place off school grounds.

Ms. LaConti interviewed the five girls involved and had them write statements. She completed the investigative report after interviewing the girls and submitted it to Mr. Lipton. The report was completed on February 1, 2017. She reviewed her report and

confirmed she checked off the boxes setting forth certain findings. She does not impose any measures related to HIB, but may be involved in counselling. She did counsel J.D. regarding the matter.

Kevin Lipton, Principal, testified as follows:

Mr. Lipton was the principal at Stanlick during the 2016-2017 school year. He is now the principal at the middle school. He has been involved in approximately 150 HIB investigations. He received an email from petitioner and replied thereto, copying Superintendent Tierney and Mrs. Young. He may have also sent it to Ms. LaConti. He received Ms. LaConti's report on the incident and reviewed it. He approved the report and signed it. He agreed there was no HIB incident. He believed it was a conflict between two or more students who were mutually engaged in the behavior.

Mr. Lipton is aware of the school bus incident as he received an email from petitioner. He looked into it and determined it to be a conflict and not HIB. He took handwritten notes on his investigation into this matter. He did not refer it for an HIB investigation as it was clear to him this was a conflict and the students were engaged in mutually inappropriate behavior. He informed Petitioner in person of the finding of no HIB violation. He also hand delivered his letter to her with that determination. He explained to petitioner why this was not an HIB incident.

Mr. Lipton admitted stating that G.D. should not discuss the incident. He did so as to not interfere with the pending investigation. He denied stating that should G.D. speak of the incident she could be considered a bully. He also admitted that he advised petitioner that G.D. would have to get used to mean people. He did this in response to petitioner's request to remove J.D. from G.D.'s class. He issued a cease and desist order to the five girls involved. He told Mrs. Young to keep them separated.

Mr. Lipton spoke to petitioner about Road Blocks and that G.D. made comments to J.D. on this site. He is not sure if he contacted the parents of all the students involved. He did contact the parents of J.D. The mother of M.R. showed Mr. Lipton the entire thread of comments from the chat room incident. He was unable to print the

thread. He did not take into consideration the incident on the school bus in making the decision to concur with Ms. LaConti in her report. He did encourage petitioner to have G.D. attend school after the chat room incident. Had G.D. stayed home it would have been considered in the HIB investigation. The effect on the behavior of G.D. in school would also be considered.

Mr. Lipton sent letters, dated February 1, 2017, to petitioner and the parents of J.D. advising them of the school's findings. The report itself was forwarded to the Superintendent on February 2, 2017. He usually gives the basis for the HIB determination verbally. He does not do so in letter form. The letter is to confirm the decision. The standard for an HIB determination is the same for in school conduct and off-school conduct. If the same exact incident like the chat room occurred in school it would not be HIB. If something interferes with a student's rights it could be HIB. Use of the word "nigger" does interfere with a student's rights, but the use of the word here is part of a much bigger picture. It could be considered counter HIB against G.D. Students cannot be mutually bullied. This becomes a conflict. He did not want G.D. to speak of the matter so as to not interfere with the investigation.

Lisa Young, Teacher, testified as follows:

Ms. Young is the fifth-grade teacher at Stanlick. She has been a teacher for thirty-three years. She was G.D.'s teacher during the 2016-2017 school year. She teaches all subjects. Last year she had twenty-three students. She was aware of the chat room incident from petitioner's email to Mr. Lipton. She responded to petitioner. She was also aware of the HIB investigation and spoke with Mrs. LaConti. She observed G.D. upon her return to school. She appeared fine. She told G.D. if there was a problem to let her know. That week was uneventful. G.D. had no academic problems. Her grades remained the same. G.D. always had a problem with math.

That week (the week of January 30, 2017) G.D. spoke poorly of J.D. twice. She spoke to G.D. about it. G.D. wrote something inappropriate about J.D. on Snapchat. G.D. also said something bad about J.D. Both times Mrs. Young spoke to G.D. and told her words can be hurtful. She did not tell petitioner that G.D.'s math grade suffered as a

result of the chat room incident. She did speak with petitioner regarding the Snapchat matter. She never told petitioner that G.D. was upset by the incident. As a result of the chat room incident, she separated G.D. and J.D. pursuant to Mr. Lipton's instruction. The girls involved sided with G.D. The girls asked to work together. This occurred sometime in February. They were told they needed a letter from their parents. J.D.'s mother supplied a letter. The girls were permitted to work together and got along fine.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see Polk, 90 N.J. 550. Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 46 (1954).

Ms. LaConti, Mr. Lipton, and Mrs. Young were all straightforward and direct in their testimony. They demonstrated themselves to be conscientious and professional in the performance of the positions. They testified as such. I deem them all credible.

I found the testimony of petitioner somewhat different from what the evidence and testimony shows. While I do not believe that petitioner was untruthful in her

testimony, I do believe her recollection is different from that which occurred. I note that petitioner was firm in her statement that G.D.'s grades suffered. This is simply not the case. While I am sure petitioner believes this to be true, it simply is not. The empirical evidence, as shown in G.D.'s report card, demonstrates that her grades did not suffer. Petitioner also was firm in her testimony about how the incident adversely affected G.D. She was again firm in her testimony that G.D. did not want to return to school, implying that it was due to G.D.'s adverse reaction to being subject to HIB. However, G.D. in her testimony stated she did not want to go back to school as she did not want to be called out of class or have her seat changed: what she characterized as awkward. Further, G.D. appeared completely nonplussed by the incident. I had the opportunity to observe her while she testified. I did not observe a young girl upset by the incident. She treated it matter of factly.

It was abundantly clear that petitioner was greatly upset by what occurred. This was evident in her emotional testimony. Again, I do not characterize her testimony as untruthful. However, I do believe, based upon the demeanor of Ms. LaConti, Mr. Lipton, and Mrs. Young, that their testimony rang true and was more in accordance with the actual facts of the matter. Their testimony was unaffected by emotion. They performed their jobs in a professional manner. Petitioner's testimony was shaded by her emotions, which I believe affected her recollection of the facts.

I afford the testimony of Ms. LaConti, Mr. Lipton, and Mrs. Young considerably more weight than the testimony of petitioner.

FINDINGS OF FACT

1. On January 27, 2017, a Friday, after school, five female fifth-grade classmates, all friends, engaged in an exchange of messages within a chat room. Those five students were G.D., J.D., B.A., P.R., and M.R.
2. During the course of the message exchange, J.D. and B.A. engaged in a prank wherein they pretended to engage in an argument over homework.

3. Thereafter, G.D. and P.R. also engaged in a prank.
4. During the course of these pranks, the girls engaged in the use of coarse and obscene language calling each other horrible names.
5. Ultimately, J.D. posted the following, addressed to G.D., “fuck ur dad you little niger [sic].” J-1.
6. G.D. is a student of color. J.D. is not.
7. Petitioner, on January 28, 2017, notified Principal Lipton via email of the incident. She stated in the email she wanted the offending student, J.D., removed from G.D.’s class and was further considering not sending G.D. to school. R-2.
8. Principal Lipton responded by email the next day. He requested petitioner to send G.D. to school the following Monday. R-11.
9. G.D. did attend school on Monday, January 30, 2017, without incident.
10. Ms. LaConti, the school HIB specialist, conducted an investigation and interviewed all five students involved. All five completed handwritten statements as to what transpired in the chat room. R-3.
11. Except for M.A., who stated that, while part of the group, she did not read all of the messages and did not know anything of what happened between G.D. and J.D., the other four students confirmed the messages exchanged.
12. Ms. LaConti concluded that there was no HIB incident. Rather, she concluded that the five students engaged in conflict behavior by mutual consent; and, that the incident did not substantially disrupt or interfere with the orderly

operation of the school. This was not specifically stated in the report. R-1, R-3, R-6.

13. Mr. Lipton concurred with Ms. LaConti and signed the investigation report. R-6.

14. On February 1, 2017, Mr. Lipton met with petitioner and advised her orally of the HIB decision and the reasons for the same. He informed her that it was a conflict situation and not HIB. He also hand delivered his letter to her advising petitioner of the school's determination. R-7.

15. The report was forwarded to Superintendent Tierney on February 2, 2017.

LEGAL ANALYSIS AND CONCLUSION

The Anti-Bullying Bill of Rights Act (Act), N.J.S.A. 18A:37-13 et seq., is designed “to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises.” N.J.S.A. 18A:37-13.1(f). Under the Act, “harassment, intimidation or bullying” (HIB) is defined as:

[A]ny 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.

[N.J.S.A. 18A:37-14.]

Each school district must adopt a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident. N.J.S.A 18A:37-15. Once an alleged HIB incident is reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A 18A:37-15(b)(6). The investigation shall be conducted by a school anti-bullying specialist, and shall take no longer than ten school days to be completed. The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial action. The results shall also be reported to the board of education “no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent.” Ibid.

Pursuant to the Act, the parents of the students involved in any alleged HIB incident are entitled to receive information about the nature of the investigation and the result of the investigation. The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Any hearing shall be held in executive session to protect the identity of any students involved. The board may hear from the anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents. The board must issue a decision at the first meeting after its receipt of the investigation report. The board may affirm, reject, or modify the superintendent’s decision. The board’s decision may be appealed to the Commissioner of Education.

An action by a board of education “is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable.” Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Thus, in order to prevail, those challenging an HIB decision made by a board of education “must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it.” G.H. and E.H. ex rel. K.H. v. Bd. of Educ. of the Bor. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014) (citation omitted), <<http://njlaw.rutgers.edu/collections/oal/>>, adopted, Comm’r (April 10, 2014). Also, a board’s decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) (citing Campbell v. Dep’t of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, Comm’r (April 25, 2013), <<http://njlaw.rutgers.edu/collections/oal/>>.

There are reported cases in which HIB determinations by boards of education have been both affirmed and overturned. In R.G.B. v. Vill. of Ridgewood Bd. of Educ., EDU 14213-12, Initial Decision (May 15, 2013), <<http://njlaw.rutgers.edu/collections/oal/>>, adopted, Commissioner (June 24, 2013), the ALJ found that the Board did not act in an arbitrary, capricious, or unreasonable manner in determining that a student engaged in HIB when he repeatedly called a female student “fat,” “fat ass,” and “horse.” According to the ALJ, such verbal statements satisfied all of the necessary elements under N.J.S.A. 18A:37-14. And, in G.H., the ALJ also upheld a Board’s finding that a white student who repeatedly called a black student “Kool-Aid” engaged in HIB. The ALJ found that the “use of the word ‘kool-aid’ was directed at [the other student] because of his race; insulted and demeaned [the other student]; and . . . interfered with [the other student’s] education” because “[u]pset and embarrassed children are not fully available for learning.” However, in J.A.H., the Board’s finding that an incident in which one student stuffed a crumbled piece of paper down the shirt of another student constituted an act of bullying was overturned as arbitrary, capricious, and unreasonable because the incident was merely a prank that was part of an ongoing, mutual conflict between the two boys and did not “contain the more serious and aggravating elements either ‘expressed or implied’ under [N.J.S.A. 18A:37-14.]” The ALJ found that the incident was not improperly motivated by

a distinguishing characteristic and that the facts “only support[ed] a finding of ordinary student conflicts rather than the more serious behavior of bullying.”

In the instant matter, on first blush, it seems clear that an HIB incident did occur. The use of the word “nigger” is abhorrent and cannot be tolerated. However, the facts under which the word was used clearly show that the five students involved in the chat room were doing so voluntarily. All were engaged in the use of extraordinarily offensive language towards each other, using words such as “cunt,” “bitch,” and “whore.” They further offended the sensibilities of anyone who may read their remarks by making sexual references towards each other. In short, all five girls were engaged in mutually egregious behavior aimed at the others. Their excuse for the use of such horrible language was that they were “pranking” each other. This is borne out by their own statements submitted during the HIB investigation and by G.D. in her testimony.

Further, G.D. appeared to suffer no detrimental effect. Notwithstanding petitioner’s testimony (and G.D.’s testimony) that G.D.’s grades suffered, her report card belies that statement. Her grades were virtually unaffected. Further, G.D., in her testimony appeared entirely nonplussed by the incident. Clearly, petitioner was quite upset, but that is not where I must look in determining whether an HIB incident occurred. It is the effect upon G.D.

Ms. LaConti determined in her HIB investigation that the five students were engaged in a conflict among themselves and that there was no HIB violation. Mr. Lipton agreed with Ms. LaConti’s determination. The Board upheld the decision. I concur in that determination. It is supported by the evidence in this matter.

Given the totality of the facts in the instant matter I cannot conclude that the Board acted in an arbitrary, capricious, or unreasonable manner in determining that an HIB incident did not occur and that the students were only engaged in ordinary student conflict. See Thomas, 89 N.J. Super. at 332; R.G.B., EDU 14213-12 and, J.A.H. ex rel. C.H., EDU 10826-12.

Accordingly, I **CONCLUDE** that petitioner has failed to sustain the burden of establishing that the Board acted arbitrarily, capriciously, or unreasonably in finding that HIB did not occur.

Based upon the foregoing, I **CONCLUDE** that the Amended Petition must be dismissed.

ORDER

It is hereby **ORDERED** that petitioner's Amended Petition be **DISMISSED** with prejudice.

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, P.O. 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.

A handwritten signature in black ink, enclosed in a thin yellow rectangular border. The signature appears to read "Thomas A. Blawie".

July 13, 2018

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

WITNESSES

For Petitioner:

J.D., Petitioner
G.D.

For Respondent:

Lyndsay LaConti, HIB Specialist
Kevin Lipton, Principal
Lisa Young, Teacher

EXHIBITS

Joint:

- J-1 Email string
- J-2 Letter from Mr. Lipton to Petitioner dated January 30, 2017
- J-3 Letter from Mr. Lipton to Petitioner dated February 1, 2017
- J-4 Letter from Patrick Tierney to Petitioner with Guidance for Parents on the Anti-Bullying Bill of Rights Act dated April 17, 2017

For Petitioner:

- P-1 Email from Petitioner to Mr. Lipton dated November 4, 2016
- P-2 Interview Information Statement Form of G.D. dated January 30, 2017

For Respondent:

- R-1 HIB Incident Report Form dated January 30, 2017
- R-2 Email from Petitioner dated January 28, 2017
- R-3 Interview Information Statement Form dated January 30, 2017
- R-4 Letter to Petitioner dated January 30, 2017
- R-5 Letter to J.D.'s parents dated January 30, 2017
- R-6 Investigation Report dated January 30, 2017

- R-7 Letter to Petitioner dated February 1, 2017
- R-8 Letter to J.D.'s parents dated February 1, 2017
- R-9 Extract from BOE meeting of April 10, 2017
- R-10 Petition dated June 17, 2017
- R-11 Email from Petitioner dated January 29, 2017
- R-12 Not in evidence
- R-13 Report card of G.D. for 2016/2017 school year
- R-14 Handwritten notes of Mr. Lipton

Pleadings

For Petitioner:

Petition

Amended Petition with Exhibits A-D

For Respondent:

Response to Petition

Response to Amended Petition