155-19

New Jersey Commissioner of Education

Final Decision

M.S. and N.S., on behalf of minor child, J.S.,

Petitioners,

v.

Board of Education of the Township of Hainesport, Burlington County,

Respondent,

and

J.M. and D.M., on behalf of minor child, J.M.,

Intervenors.

Synopsis

Petitioners challenged the finding of the respondent Board that their son, J.S., engaged in conduct against a fellow student, J.M., that violated the New Jersey Anti-Bullying Bill of Rights Act (the Act), *N.J.S.A.* 18A:37-13 *et seq*. The Act prohibits harassment, intimidation and bullying (HIB) arising from certain defined motivations. Petitioners sought a determination that the Board's decision was arbitrary, capricious or unreasonable, contending that the conduct at issue was part of a longstanding and ongoing conflict between J.S. and J.M., and did not constitute an instance of bullying within the statutory definition of HIB. The respondent Board filed a motion for summary decision; opposing motions for summary decision were filed by the petitioners and the intervenors.

The ALJ found, *inter alia,* that: there are no material facts in dispute here, and the matter is ripe for summary decision; the record establishes that J.S. and J.M. have had conflicts with each other since the first grade; ongoing unresolved conflict between two students does not necessarily fall within the statutory definition of HIB; however, a backdrop of such ongoing conflict does not insulate the conduct under review from being properly determined to be in violation of the Act; in the instant matter, J.S. admitted that he called J.M. "weak", and student witnesses corroborated that J.S. also referred to J.M. as a "weakling," during an incident in seventh grade wherein J.S. tried to slam down the lid of J.M.'s Chromebook during class; such a comment, especially during a physical confrontation, could reasonably cause embarrassment to the recipient of the remarks. The ALJ concluded that the Board was not arbitrary, capricious or unreasonable in determining that J.S. engaged in conduct that violated the Act, nor were the sanctions imposed upon J.S. for his behavior inappropriate. Accordingly, the ALJ ordered that petitioners' appeal be denied.

Upon review, the Commissioner agreed with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision in this matter. In so doing, the Commissioner emphasized that overturning a Board's finding of HIB presents a high hurdle, requiring clear evidence that the Board acted indiscriminately or in bad faith in reaching its determination. Such was not the case here. The petition was dismissed.

June 18, 2019

OAL Dkt. No. EDU 08878-16
Agency Dkt. No. 151-5/16

New Jersey Commissioner of Education

Final Decision

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Petitioners,

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Board of Education of the Township of Hainesport, Burlington County,

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and

J.M. and D.M., on behalf of minor child, J.M.,

Intervenors.

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.

In this matter, petitioners challenge the Board's determination that their son committed an act 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. This case stems from a complaint made by the parents of J.M. in January 2016, alleging that J.S. slammed J.M's Chromebook, pulled on his earbuds, called him a "weakling," and commented on J.M.'s athletic ability, using the phrase "you suck." Following an HIB investigation, the school district's Anti-Bullying Specialist issued a report substantiating the HIB allegation. The report found that J.S.'s actions constituted HIB because the conduct was: motivated by J.M.'s distinguishing characteristics of being weak and bad at sports; substantially disrupted or interfered with the orderly operation of the school or the

rights of other pupils; and caused J.M. to feel embarrassed. As a result, J.S. was given a one-day, in-school suspension and his schedule was adjusted to limit interaction with J.M. Thereafter, the Board affirmed the HIB findings. Petitioners appealed the Board's determination. Following motions for summary decision, the Administrative Law Judge (ALJ) found that the Board's HIB determination was not arbitrary, capricious, or unreasonable.

As a preliminary matter, in cases where a challenge to the decision of a local board of education is brought before the Commissioner, such challenge is subject to a high standard of review based upon the deference which must be granted to a board's good faith determination of the issues presented by the facts of the case. It is well established that any "action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.,* 60 *N.J. Super.* 288 (App. Div. 1960). In order to prevail, the petitioners must establish that "the Board acted in bad faith, or in utter disregard of the circumstances before it." *G.H. and E.H., on behalf of K.H. v. Bd. of Educ. of the Borough of Franklin Lakes, Bergen County,* EDU 13204-13, Initial Decision (February 24, 2014), *adopted* Commissioner Decision No. 157-14 (April 10, 2014). Furthermore, "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration," such that the Commissioner will not substitute his opinion for that of the board, even if he would have come to a different conclusion. *Bayshore Sewerage Co. Dep't of Envtl. Prot.*, 122 *N.J. Super.* 184 (1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974). In the case at issue here, the ALJ noted: "[w]hile some finder of fact might conclude otherwise, where there is more than one reasonable way to understand a set of facts, it cannot be said that the choice of one reasonable interpretation over the other reasonable interpretation amounts to an unreasonable choice." (Initial Decision at 14)

Based on the foregoing, the Commissioner emphasizes that overturning a board of education's finding of HIB presents a high hurdle, requiring clear evidence that the board acted indiscriminately or in bad faith in reaching its determination. Here, the Commissioner concurs with the ALJ that the Board's determination was carefully considered, and that it was not arbitrary, capricious or unreasonable in finding that J.S.'s conduct constituted HIB. It was reasonable for the Board to conclude, on the evidence presented, that J.M. had the distinguishing characteristic of being weak, and J.S.'s comment that he was a "weakling" was motivated by that characteristic. Likewise, it was not unreasonable for the Board to find that J.M. was embarrassed by the comment.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter – for the reasons thoroughly set forth in the Initial Decision – and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: June 18, 2019
Date of Mailing: June 19, 2019

[1] This decision may be appealed to the Appellate Division of the Superior Court 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 8878-16
AGENCY DKT. NO. 151-5/16

M.S. and N.S. on behalf of minor child,
J.S.,
Petitioners,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF HAINESPORT,
BURLINGTON COUNTY,
Respondent,
And,
J.M. and D.M., on behalf of minor child,
J.M.,
Intervenors.

Seth N. Broder, Esq., for petitioners (Broder Law Group, attorneys)

Sanmathi Dev, Esq., for respondent (Capehart & Scatchard, P.A., attorneys)

Howard S. Mendelson, Esq., for intervenors (Davis & Mendelson, LLC, attorneys)

Record Closed: February 11, 2019 Decided: March 28, 2019

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

This contested case arises from a petition of appeal filed with the Commissioner of Education on May 24, 2016, by M.S. and N.S., the parents of J.S., a minor. The petitioners seek to overturn a determination made by the Hainesport Township Board of Education that their minor child had engaged in conduct against a fellow student, J.M., that violated the Anti-Bullying Bill of Rights, N.J.S.A. 18A:13-2 et seq. (Act), which prohibits harassment, intimidation and bullying (HIB) arising from certain defined motivations. The Commissioner transferred the matter to the Office of Administrative Law (OAL). Counsel for the Board of Education filed a motion to dismiss the petition for failure to name an indispensable party. On August 15, 2018, the day after this judge assumed responsibility for the case originally assigned to a different judge, this judge signed an Order granting intervention to intervening parents, J.M. and D.M., on behalf of their minor child J.M., and denying the Board's motion to dismiss. A Confidentiality Order wsas issued on October 23, 2018, with respect to the disclosure of student records and student information. Counsel for the Board then filed a motion for summary decision, as authorized by N.J.A.C. 1:1-12.5. The petitioner and intervenor have responded to the motion, each also seeking summary decision.

The essence of the petitioners' appeal is that the conduct that the Board found to violate the law was actually part of a longstanding and ongoing unresolved conflict between students J.S. and J.M. and did not constitute an instance of bullying falling within the statutory definition of HIB. It was not, as the statute requires, conduct motivated by a "distinguishing characteristic," actual or perceived. As such, no violation of the Act occurred and the Board's decision must be overturned, as it was arbitrary, capricious and unreasonable. In addition, as the facts underlying the Board's decision are not in dispute, summary decision is an appropriate means of resolving the contested case.

In January 2016, J.S., a seventh-grader, received a Disciplinary Referral based upon a teacher's statement that he had made "comments to another student calling him 'weak' and 'weakling' and made comments about the student's athletic ability." This Referral was the result of an email sent to the Assistant Principal, Christopher Butler, on January 5 by J.M.'s father. In that email, Mr. M. explained that his son had appeared bothered by something and he revealed to his parents that J.S. "was at it again." More specifically, that J.S. had

slammed the lid on J.M.'s Chromebook in Ms. Kraft's class that very day, had kept pulling on J.M.'s earbuds, had prevented J.M. from opening the lid of the Chromebook, pushing it down so that J.M. had to "let it down slowly so it wouldn't break," had called J.M. a "weakling" and "got other kids to do the same thing."[2] Further, J.M. had been telling other children about a football launcher he received for Christmas and J.S. told J.M. to "shut up no one cares, that's how you got your black eye, you can't catch. You suck." In fact, J.M. had the remnants of a black eye that his father said he had gotten accidently when elbowed by his brother. He further reported that J.S. kept making hand gestures at J.M. "and points at him and says 'boooy.'" He imitates J.M. "by acting like he is a person with mental disabilities." Mr. M. noted that while J.M. is trying to show restraint, he is bothered most by J.S's turning "the other kids against him." "This bullying everyday is starting to take a toll. It NEEDS to stop!"

Mr. Butler responded to the email, noting that he needed to investigate the incident to determine if it met the definition of HIB. According to the Board's brief, Mr. M. was "extremely disappointed by this response." He advised Butler that "This has been going on everyday for the past 7 years with this kid! . . . Everyone of the criterial has been met . . . ."

After receipt of the email and issuance of the Referral, a "full Level II" investigation was conducted by the District's Investigating Anti-Bullying Specialist Rose Wenz. According to her "Final Determination & Conclusion of the Level (2) Investigation Report to Superintendent," signed by Wenz, Christopher Butler and Superintendent Joseph Campisi, all on January 20, 2016, J.M. complained that on January 5, 2016, J.S. called J.M. "weak" and "weakling" and made comments about J.M.'s athletic ability, stating, "you suck." J.M. told his father about this and requested that his father call the school to report it. The child stated that he felt "embarrassed" by the comment that he was a "weakling," a comment made in front of other members of his class. The report of the investigation, which accepted that the comments were made, concluded that the comments made by J.S. were about an actual or perceived characteristic or other identifiable characteristic of J.M.; that the comment(s) had "substantially disrupted or interfered with the orderly operation of the school or the rights of other pupils; and that the act(s) had a physical or emotional harm to a pupil or the pupil's property, or had the effect of insulting the student and created a hostile educational

[2]Elsewhere, Ms. Kraft is identified as a substitute teacher.

environment for J.M." Thus, the conduct violated the Act. On January 20, 2016, Mr. Butler advised J.S.'s parents by mail of the substantiation of the charges and the consequence to be imposed. This involved a one-day in-school suspension for J.S. and an adjustment to his academic schedule "to limit interaction."

The petitioners' motion notes that Rose Wenz's Level I investigation concluded that she saw it as "possible" that the conduct being examined was "reasonably perceived as being motivated by either actual or perceived characteristic . . . or other characteristic." The moving papers offer portions of the recorded responses of students interviewed by Wenz and Butler. It notes that at the "first" appeal from the findings, the Board heard in closed session from N.S. of the history of the two students not getting along while at school and that they mutually participated in the ongoing conflict, citing to the Board an example from October 2015. According to the movants, J.M.'s parents were not in attendance at this first appeal. After the closed session, the Board, in open meeting, split 4-4 with 1 member absent, and could not affirm, reject or modify the HIB finding. The matter was then placed on the Board agenda for the next meeting, scheduled for February 25, 2016. Then, on January 30, 2016, Mr. M., parent of J.M., emailed to the then District Superintendent, Joseph Campisi, sharing with him a text from "Mrs. Richmond" from May 23, 2013 (fourth grade) in which she acknowledged that J.S. was causing problems with J.M. The parent, Mr. M., added, "As I have mentioned to you and to Mr. Butler, this harassment by [J.S.] has been going on since first grade."

At the February 25, 2016, Board meeting, J.M.'s parents spoke, as well as Ms. S. and Ms. Wenz. The petitioners assert that J.M.'s parents' statements appeared to have been "coached by someone with a working knowledge of HIB." After Mr. Butler explained the two boys' history of conflict and the various interventions implemented by the schools, N.S. noted that at times the boys have been able to get along. N.S. noted that while the incident had occurred, J.S. had reacted to J.M. searching the term "grandma shoes" on J.M.'s Chromebook to show examples of "grandma shoes" to J.S. The parents of J.M. argued that their child had been the target of ongoing HIB by J.S., with problems going back to first grade. Also, that J.S. had pushed so hard on the notebook lid so as to bend it, causing J.M. to fear that it would break. The Board then voted in open session to affirm the HIB finding by a vote of 5-4, with 2 members who had voted at the first appeal to reject the finding not present at the second appeal.

According to the petitioners, at the time of the alleged conduct, the two students were in seventh grade in the Hainesport Middle School. They had been first graders together at the Hainesport Elementary School, and it was there that they first engaged in a voluntary dispute mediation. Thus, as the petitioners argue, their disruptive interaction began quite early in their educational career. As a result of the mediation, they agreed that they would (1) stop making fun of each other and their clothing; (2) if they accidentally did something to each other, they would say they were sorry, (3) they would talk to each other if either had a problem or a question, and (4) they would agree to disagree, acknowledging that it was "O.K. to like different things." According to a Certification filed on January 24, 2019, as part of their motion for summary decision, M.S. and N.S., on behalf of J.S., contend that J.M. was, at the time of this alleged incident, of a "much larger physical stature and build than J.S." and "J.S. did not perceive, nor was he motivated to make any comments, based on J.M. having the distinguishing characteristics or being weak or bad at sports." They claim that due to the findings of the HIB investigation, J.S. had his student schedule adjusted and was required to meet with a school counselor. His homeroom teacher was changed, and his remaining course schedule was changed. He was also moved away from his peer group for the duration of the school year. After the petitioners requested a hearing before the school board to appeal the HIB determination, J.M. continued to taunt J.S. by staring at him and smirking, and "overall attempting to instigate additional conflicts."

Legal Principles

Before considering the evidence and the arguments, it may be helpful to note the legal context.

The Anti-Bullying Act, N.J.S.A. 18A:37-14 provides that

> "Harassment, intimidation and 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, that

> takes place on school property, . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students . . . .

N.J.S.A. 18A:37-14 identifies the following as necessary for a gesture, act or communication to be deemed prohibited.

> 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.

The Act made local school boards responsible for the supervision of HIB policy within the districts, but required that local policies conform, at a minimum, to all applicable statutes and case law.

It is important here to note that not all disputes between students, not all actions that may involve harassment, intimidation and bullying, necessarily come within the reach of the Act. The motivating element of the matter must be a "distinguishing characteristic, actual or perceived, such as identified in the Act." Some single incidents and long-standing disputes between students may not be based upon such prohibited reasons, and where that is the case, other legal or disciplinary remedies may lie, but the situation is not one that falls within the reach of the Act. L.B.T. ex rel K.T. v. Board of Education of the Freehold Regional School District, OAL Dkt. No. EDU 7894-12 (January 24, 3013), adopted, Comm'r (March 7, 2013). As the court noted in K.L. v. Evesham Township Board of Education, 423 N.J. Super. 337, 351 (App. Div. 2011), for purposes of HIB the offending conduct must be motivated by a distinguishing characteristic. The statutory definition of HIB "does not include all violent or aggressive conduct against a student," but it has consistently required that the perceived motivation be a distinguishing characteristic. 423 N.J. Super. at 350–51. The court also provided a summation of what does not constitute HIB:

> Thus, harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive

> conduct without identifiable motivation, does not come within the statutory definition of bullying.
> [Id. at 351.]

Before further considering the evidence before the Board and the arguments of the parties, it is also necessary to recall the legal standard under which such review takes place. As the petitioners recognize, the Commissioner of Education will not disturb the local school board decision unless it was arbitrary, capricious or unreasonable. Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960).; Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)). Thus, if the overall assessment of the evidence that the Board had before it will support a reasonable outcome that matches the Board's, the Commissioner will affirm the Board's decision, even if the Commissioner might have ruled differently on the same evidence. Of course, the Board's decision must also conform with the standards set in case law for understanding the Act. But to successfully overturn the Board's decision, the petitioners must demonstrate that "the Board acted in bad faith, or in utter disregard, of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. Of Educ. of the Bor. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014) (adopted, Comm'r (April 10, 2014).

Finally, it must be noted that the only determination sustained by the Board was J.S.'s comment to J.M. that J.M. was "weak." "Specifically, the requirements of HIB were met. First, the conduct in question was reasonably perceived as being motivated by an actual or perceived characteristic—the characteristic of being weak." The summary of the Board hearing of February 25, 2016, notes that Mrs. S. admitted that her son called J.M. "a weakling." The summary does not specifically make a determination about any comment about J.M.'s athletic ability. It is the case that during the investigation students reported other comments made by J.S. about J.M., on other occasions. It is also the case that students, including J.S. and even J.M., reported comments made by J.M. about J.S. However, the only HIB complaint made and subsequently investigated by Wenz was about a specific incident involving a Chromebook on January 5, 2016, and the Board's determination was specifically about that event. Thus, while there is much comment in briefs and evidential material about other interactions between the boys, this information can only serve as some historical information, and cannot result in determinations about other possible HIB violations,

or other disciplinary violations. To the extent that the petitioners note the ongoing conflict between the students, that does not seem to be a disputed matter. The case, however, is about what occurred on January 5, and whether that incident, and that incident alone, involved any HIB violation. If other potential HIB events occurred involving these two students, such matters were not the subject of a complaint before the Board, nor are they before the Commissioner or this forum.

Thus, as noted, the thrust of petitioners' argument is that rather than the January 2016 incident having been motivated by some actual or perceived characteristic of J.M., it was simply the latest of a long-standing history of mutual disagreement between the two students. Indeed, the undisputed fact is that J.M. and J.S. have had issues with each other at least as far back as 2010, when they were in first grade. Indeed, Mr. M., in his response to Mr. Butler's stating that he needed to investigate the January incident, referred to what he said had been going on for "7 years with this kid!" According to the petitioners, "[T]he evidence is overwhelming demonstrable that the incidents in the present matter were all part of a longer on-going and unresolved conflict . . . and not instances of bullying that fall within the statutory language of conduct motivated by a distinguishing characteristic. . . . " While admitting that their son made comments about J.M., including "weak" and "weakling," "they were motivated by a longer on-going history of conflict between the students." Indeed, they note that students told the investigators that J.M. called J.S. "small," which they see as "an insult comparable to 'weakling.'" "Thus, J.S. did not perceive J.M. to be a weakling."

Review of the investigative materials supplied by the movant indicates that Rose Wenz discussed the alleged incident with J.M. on January 7, 2016. In a written statement, he said that J.S. "slamed [sic] my chromebook shut and kept pulling out my earbuds. [I.V.] and [A.S.] were doing it as well." He did not tell his teacher, but did tell his father to email Mr. Butler. He was also presented with a form questionnaire, which asked at No. 3., "[W]hen and where did the incident happen? (Please be clear if occurred was once or more than once)." Although the phrasing of the question is certainly unclear, J.M. understood it and wrote "Mrs. Higgins room since first grade at hainesport." As for the description of what "[E]xactly . . . was said or what was specifically done by the person . . . you believed harassed, intimidated, or bullied you," he wrote, "Slaming [sic] of the chromebook. He also called me a 'weakling.'" J.M. reported that he felt "imbarassed [sic] in 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, front of other kids." Asked if the incident harmed his property, he said that "[H]e was bending the chromebook lid." And, as to whether the incident caused him "fear, physical or emotional harm," he repeated that "I felt embarrassed." J.M. also added that "I've been called names by him (gay, girl, weakling, Jewish) He calls me mentally challenged and does a thing with his hands." As to this latter quote, he did not provide any time frame for when these comments were made, other than the reference to "weakling" as the term used in the Chromebook incident of January 5.

Wenz first spoke to J.S. on January 7. He said that he pulled J.M.'s earbuds because "his music was to [sic] loud." He added, "we were messing around about [unclear from written statement] and he took it to [sic] hard. And we never called Jew boy never made fun of him for black eye never heard hitler prototype we picked each other 4 project he called me lil bill and I called him [unclear from written statement]." Also, "Never said anything about his cabability [sic] of playing sports." Wenz also spoke to J.S., on January 12, 2016. He said that he did "not feel like I did anything wrong, and he was bulling me and I fought back and I am not going to let someone bully me." He gave the names of students that he said might be witnesses to the "situation." He admitted that he did call J.M. "weak." He did this "because he told me I have grandma shoes, and trips me so I said things back and stood up for my selfe [sic]." He added, "[J.M.] picks on me and calls me grandma shoes, and trips me." Also, "[J.M.] tells [J.S.] he has grandma shoes he trips him during PE just prior to winter break. J[M.] just said he has grandmom shoes for no reason. He looked up grandmom shoes on his chromebook during math."

These represent the description of the alleged HIB incident from the complainant and the response from the alleged perpetrator. In addition to these, the investigation produced information gathered from other students. Student I.V., identified by J.M. as also involved in the events that day, told Ms. Wenz on January 7 that J.S. "called J.M. Caihou and little bill."[3] He also calls him "Hitler's prototype." [J.S.] and J.H. tried to turn off and take [J.M.]'s

[3] While the reference to "Caihou" is not explained, from personal knowledge, it appears to be to a character in an animated television program for young children, "Caillou." The reference to "little bill" is not explained, but again it appears to be to a character by that name in an animated television program for young children.

earbuds/chromebook. [J.S.] and [J.M.] sometimes throw paper and erasers at each other." He advised that his whole class had witnessed the Chromebook and earbuds incident. The comment about "Caihou" and "little bill", as well as "weakling," were made on "Monday" in math class; the "Hitler" comment in lunch "prior to break." On January 14, he told Wenz that he had never heard J.M. make fun of J.S.'s shoes or say that they were "grandmom" shoes.

D.S. told Wenz on January 11, that he heard both boys make fun of each other; "it isn't just one side." J.S. calls J.M. "weak, not good at sports, and make [sic] fun of him for playing flag football. [J.M.] makes fun of him in general. It is starting to pick up." He reported that this activity occurred "mainly at lunch and gym and homeroom." As for the "Hitler" comment, he had only heard that such a comment was made from someone else. He also noted that "[J.M.] says to [J.S.] 'you are small,' while J.S. 'makes more direct insults.'" He reported that J.S. "talks about [J.M.] to everyone at lunch table," commenting on how J.M. "thinks he's the best at sports but I'm better than him," and making fun of J.M. for wearing Eagles clothing.

J.H. denied seeing anyone touch J.M.'s Chromebook and offered that "during class everyone was turning people's chromebooks on and off." He noted that J.M.'s music was too loud and he was told to lower it. A.D. said J. and D. would pick on J.M. for being bad at volleyball, but he was not specific about when this occurred. Similarly, Ja.M. told Wentz that D. and J.S. told J.M. he was not athletic, but again he did not specify when this occurred.

On January 12, 2016, S.F. told Wenz of an incident in which J.S. told J.M. that he should not play Minecraft, as no one does that anymore. "[J.M.] took it like J.S. was making fun of him." She added, "[J.S.] and [J.M.] have always had problems with fighting." This student does not refer to the type of comments ("weak" "weakling" or such) that are the basis of the finding of a violation of the Act. Her reference appears to be to comments made on January 11, 2016, in Mrs. Hartsough's class, while that teacher was absent. She does report that J.M. "got red in the face" and that J.M. "always says to everyone that J.[S.] makes fun of him."

A number of these and other students confirmed that the two had a longstanding problem. E.F. said, "I know there were problems that occurred in the past," adding, "[J.S.] used to make fun of [J.M.] but didn't mean it, [J.M.] would take it the wrong way and slowly got angrier." D.R. said that the boys "go back and forth ongoing about things said or done in

gym." He quoted words used, such as "very sick" or "shut up." J.S. would say "You suck" and "you aren't athletic." J.M. would say, "Shut up" or "you suck." J.S. made comments about J.M.'s football launcher and "why don't you just have a catch with your dad." In response to the question about when and where "the incident" happened, he wrote "gym, lunch-Hitler's prototype," but he did not specifically state who used these words and Mr. Butler's note indicates that D.R. was not "there" and that others told him about this. He never heard any comment about "grandmom shoes." He also noted "mentally handicapped"— never between [J.S.] and [J.M.]" and that sometimes J.M. mocked J.S. if J.S. messes up in gym— he will say "Yeah, I'm the one who is bad." D.S. also noted that J.S. and J.M. each "make fun of each other" and J.M. tells J.S. that J.S. is "small."

Summary Decision

A party may move for summary decision as a means to resolve a contested case without the necessity of a hearing involving witnesses and testimony. Such a motion is made based upon the contention that the material facts necessary to determine the legal issues in the case are not in genuine dispute, and that the application of the law to those undisputed facts must necessarily result in a decision in favor of the moving party. Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995). As the Brill Court stated, the "essence of the inquiry[,]" is, "whether the evidence presents a sufficient disagreement to require submission to a [fact-finder] or whether it is so one-sided that one party must prevail as a matter of law." Brill, at 536 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). To defeat the motion, the opposing party must demonstrate, by affidavits, the existence of genuine disputes as to the material facts. All reasonable inferences arising from the undisputed evidence must be accorded to the opponent of the motion. If all parties agree on the material facts, and if there are cross-motions for summary decision, then the applicable law determines if any party is entitled to a favorable decision. N.J.A.C. 1:1-12.5;

Discussion

The Board argues that the investigation by Ms. Wenz determined that J.S. had called J.M. "weak" and a "weakling," as well as referring to J.M.'s athletic ability by saying "you suck." "These facts supported the District's finding of an actual or perceived characteristic."

Added to this was the disruption caused by J.M. having to report the remarks to his father who then had to report them to the school district, thereby causing disruption in the orderly operation of the school or in J.M.'s rights and emotionally harming the "embarrassed" student. As for the story told by J.S. in his second interview about J.M. talking about "grandmom" shoes, the Board specifically noted that this claim was unsubstantiated and, while also deciding that it rejected Mrs. S.' argument that the conduct complained of resulted from a "conflict," found instead that the "problems between J.M. and J.S. arose from J.S's conduct." The Board found that the preponderance of the evidence supported that the comments were made by J.S., the motivation was based on the actual or perceived characteristic of J.M. as being "weak," and that they met the definition of HIB.[4] Based upon the evidence, the Board made a decision that was clearly neither arbitrary, capricious or unreasonable. The evidence was that the comments about weakness came in the context of J.S. pushing down on the lid of J.M.'s Chromebook, "while J.M. resisted the physical pressure." This comment about his lack of strength embarrassed J.M. The size difference between the larger J.M. and the smaller J.S. was irrelevant to the analysis of the motivating factor for J.S.'s comments. And the comment was not made in a "conflict" situation, as the claim about the "grandmom" shoes was not substantiated and even if it were made, the comments about "weakness" could not be connected to the use of that phrase or reference by J.M. The Board's decision was entirely within the realm of reasonableness, even if others might reasonably disagree.

In this case, I **FIND** that there is no doubt that the record establishes that J.S. and J.M. have had problems getting along with each other since first grade. It is true that such a long standing, unresolved conflict between two students may be accompanied by the sort of "harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation," identified in K.L. As the court said, this sort of conduct does not fall within the statutory definition of HIB. However, merely because two students have such an ongoing conflict does not mean that there may not be instances in which that conflict includes conduct that crosses the line into prohibited HIB. If particular comments or actions by one of the two against the other are "reasonably perceived as being motivated either by any actual or perceived characteristic, such as . . . a mental, physical or sensory disability, or by any other

[4]Again, it is noted that the Board's summary mentions no finding about a lack of athletic ability.

distinguishing characteristic, . . . ," the fact that such conduct occurs against a background of conflict that may not have historically included conduct reasonably perceived as motivated by such reasons does not insulate the conduct under review from being properly determined to be in violation of the Act. Indeed, even if past history might include such prohibited conduct, it is the specific matter under investigation following an HIB complaint that must be judged to determine if it involved such offensive conduct. And, the existence of evidence of possible past HIB actions by the victim of the conduct at issue does not excuse any current HIB conduct directed at that child. Here, J.S. admitted that he told J.M. that J.M. was weak. Although J.S. did not admit that he was pushing down on the lid of the Chromebook, J.M. explained that J.S was doing that and that J.S. slammed the lid down, while telling J.M. that he was "weak." Student I. confirmed an incident involving the Chromebook. He also heard the "weakling" comment. No one substantiated J.S.'s story about "grandmom" shoes, a story he only told during his second interview, but not during his first discussion with Ms. Wenz. Clearly, if the Board credited J.M.'s version of events, it could decide that during a struggle over the Chromebook, J.S. told J.M. that he was "weak," a "weakling," a comment that might quite reasonably embarrass the recipient of the comment. I **CONCLUDE** that such a comment, especially when made during a physical confrontation, however limited it might have been, could reasonably be seen as motivated by an actual or perceived physical characteristic. There is no basis here for concluding that the incident either did not occur or that the Board's decision to credit J.M.'s version of the facts was unreasonable. Given this, I **CONCLUDE** that it cannot be said that the Board's determination that J.S. violated the prohibition against HIB on January 5, 2016, was arbitrary, capricious or unreasonable. While the petitioners try to deflect from this conclusion by invoking the existence of historical conflict that arguably did not appear to involve such motivation(s), that fact alone does not establish the legal infirmity of the Board's conclusion as to this particular event. Thus the case differs from that in either R.A. o/b/o B.A. v. Board of Education of the Township of Hamilton, http://njlaw.rutgers.edu/collections/oal/html/initial/edu10485-15_1.html; adopted, Comm'r (June 22, 2016), or L.B.T. o/b/o K.T. v. Board of Education of the Freehold Regional School District, OAL Dkt. No. EDU 7894-12 (January 24, 2013), adopted, Comm'r (March 7, 2013), in each of which the Board had determined that the complained of conduct was part of ongoing conflicts and, most significantly, unlike here the comments complained of did not address distinguishing characteristics. The respective administrative law judges and the

Commissioner each deferred to these board determinations of the lack of motivations that fell within the Act's definition of HIB conduct.

While perhaps the petitioners and others might believe that the legislation takes an overbroad approach to the realities of some conflicts and interactions between immature students, the fact remains that the Legislature, seeking to address a pervasive problem of significant concern in the school environment, with additional important societal impacts, created a definition of prohibited conduct and the facts here reasonably support a conclusion that the conduct found to have occurred falls within the definition. While some finder of fact might conclude otherwise, where there is more than one reasonable way to understand a set of facts, it cannot be said that the choice of one reasonable interpretation over the other reasonable interpretation amounts to an unreasonable choice.

ORDER

IT IS HEREBY ORDERED that petitioners' appeal of the Board's decision that J.S. engaged in prohibited conduct in violation of the Anti-Bullying Bill of Rights is **DENIED**. The Board imposed sanctions which resulted in J.S. having his student schedule adjusted, a requirement that he meet with a school counselor, and a change in his homeroom teacher. These all were reasonable approaches to the situation created by J.S.'s conduct, and they are affirmed.

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.

March 28, 2019
DATE

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

Date Received at Agency: _____

Date Mailed to Parties: _____

mph

LIST OF EXHIBITS:

For petitioners:

P-1 Mediation Agreement, March 23, 2010
P-2 Discipline Referral Form, incident date 1-7-16
P-3 Certification of M.S. and N.S., on behalf of J.S., dated January 24, 2019
P-4 HIB document dated 1-18-16, "To the Parents/Guardians of J.S."
P-5 HIB Level (1) Investigation, signed January 8, 2016
P-6 HIB Investigation Form, statement of J.S., dated 1-12-16
P-7 HIB statement of J.M., dated1-7-16
P-8 Student Incident Report, dated 1/7/16
P-9 Statement of I.V, dated 1-7-16
P-10 Statement of D.S., dated 1-11-16
P-11 Statement of S.F, dated 1-12-16
P-12 Statement of E.F., dated 1-14-16
P-13 Statement of D.R., dated1-14-16
P-14 Additional material regarding D.R.'s information
P-15 Final Determination & Conclusion of the Level (2) Investigation to Superintendent, signed 1-20-16
P-16 HIB document and letter to parents of J.S. from Christopher Butler, dated 1-2-16
P-17 Memorandum from Mr. Butler to N.S., dated 1-22-16
P-18 Email chain regarding hearing request by parents of J.S., dated 1-25-16
P-19 Board minutes for executive session held on 1-28-16
P-20 Board minutes for regular meeting held on 1-28-16
P-21 Letter to parents of J.M., dated 1-29-16
P-22 Email re: "requested HIB report"
P-23 Board Minutes for Executive Session held on 2-25-16
P-24 Two-page summary of "HIB hearing involving students J.S. and J.M.", executive session, 2-25-16
P-25 Board minutes for regular session held on 2-25-16

P-26 Letter to parents of J.M., dated 2-26-16

For respondent Board of Education:

A- Letter dated 5-24-16 from Seth N. Broder, Esq. to Commissioner of Education, c/o M. Kathleen Duncan, with attached Petition

B Letter dated 6-13-16 from Sanmathi Dev, Esq. to M. Kathleen Duncan, with attached Notice of Motion to Dismiss Petition of Appeal

C Acknowledgement of Filing, dated 6-16-16

D Letter from parents of J.S. to Honorable Elia A. Pelios, ALJ

E Letter dated 9-9-16 from Sanmathi Dev, Esq. to Judge Pelios

F Letter dated 9-13-16 from Seth N. Broder, Esq. to Judge Pelios

G Order Granting Intervention and Denying Motion to Dismiss, dated 8-15-18

H Letter dated 9-12-18 from Sanmathi Dev, Esq. to Judge Jeff S. Masin

I Letter dated 10-23-18, with attached Confidentiality Order

J Email chain including J.M., father of J.M.'s report of alleged HIB incident dated 1-5-16 and reply

K List of teacher assignments and multiple documents detailing HIB investigation

L Memo to Mrs. S. regarding J.S.'s updated schedule

M Board minutes of regular meeting held 1-28-16

N Letter to parents of J.M., dated 1-29-16

O Email from Dr. Joseph Campisi to "All" re "Memo from HIB hearing (January 28, 2016" with attached memo

P Board minutes of regular meeting held on 2-25-16

Q Email chain starting on 2-26-16 from J.M., father of J.M.

R Email from J.M. and D.M. to Dr. Campisi, 2-26-16

For Intervenors

I-1 Intervenors' Certification, dated 2-4-19, with attached

A: Email from D., mother of J.M. to Ms. S., with handwritten comments

B: Email from J.M., father, to Dr. Campisi, 1-30-16

I-2 Intervenors' Statement of Undisputed Facts with attached exhibits

A: Petition of J.S., a minor child by his parents, M.S. and N.S. v. Hainesport Twp. Bd of Educ., dated 5-24-16

B: Email of J.M. to Christopher Butler, 1-5-16

C: Letter to parents of J.M., dated 1-8-16

D: Memo to Anti-Bullying Specialist to Initiate HIB Complaint and Investigation Process, 1-7-16 and additional HIB investigation materials

E: Additional HIB investigation documents

F: HIB document dated 1-20-16 addressed to parents of J.S.

G: Letter dated 1-29-16 to parents of J.S.

H: Email re: "HIB Notification Letter after Board Meeting, 1-17-16

I: Summary of "HIB Hearing Involving Students J.S. and J.M., Executive Session," 2-25-16

J: Letter to parents of J.M., 2-26-16

K: Email sent 12/22/15 from J.M. father, to Christopher Butler, re: "Lunchbox"