

New Jersey Commissioner of Education

Final Decision

J.C. and C.C. on behalf of minor child, J.C.,

Petitioners,

v.

Board of Education of the Ramapo Indian Hills
Regional High School District, Bergen County,

Respondent.

Synopsis

Petitioners appealed the respondent Board's determination that J.C. committed an act of harassment, intimidation and bullying (HIB) in violation of New Jersey's Anti-Bullying Bill of Rights Act (Act), *N.J.S.A. 18A:37-13 et seq.*, when he removed the pants and exposed the buttocks of another boy, J.K., while G.E. held him down. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the core facts in this case are not in dispute, and the matter is ripe for summary decision; the Act defines HIB as any gesture, written, verbal or physical act, or electronic communication 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, and must also substantially disrupt or interfere with the orderly operation of the school; an action by a board of education is entitled to a presumption of correctness and will not be overturned unless it can be shown that the Board's action was arbitrary, capricious or unreasonable; here, there is no dispute that J.C. pulled down the pants of J.K., exposing him, while G.E. held J.K. down; the Board further determined that J.C. also exposed himself during the incident and that J.K. suffered emotional harm that required him to undergo counseling; moreover, the Board determined that the episode disrupted the orderly operation of the school because a photograph of the incident circulated among students, leading to harassment of both J.C. and J.K. by others; and the Board's determination that J.C.'s conduct was motivated by J.K.'s gender was reasonable given that the act of removing another person's pants while that person is restrained, then removing your own pants, is inherently sexual and based on the gender of the victim. The ALJ concluded that the petitioners failed to sustain their burden of proving that the Board acted in an arbitrary, capricious or unreasonable manner in finding that HIB occurred in this matter. Accordingly, the petition was dismissed.

Upon review, the Commissioner concurred that, based on the evidence in the record, petitioners did not establish that the Board acted in an arbitrary, capricious or unreasonable manner in finding that J.C. committed an act of HIB. Accordingly, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. In so doing, the Commissioner noted, *inter alia*, that while *N.J.A.C. 6A:16-7.5(a)* requires a nexus to a student's physical or emotional safety, security, and well-being and a material and substantial interference with the operation of the school in order to impose a consequence for student conduct away from school, the Commissioner does not need to decide whether J.C.'s conduct met this definition as the Board did not impose discipline on J.C. since he is no longer a student in the district.

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.

August 20, 2020

New Jersey Commissioner of Education
Final Decision

J.C. and C.C., on behalf of minor child, J.C.,

Petitioners,

v.

Board of Education of the Ramapo Indian Hills
Regional High School District, Bergen 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 the petitioners pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.¹

In this matter, petitioners challenge the Board's determination that their son committed an act of harassment, intimidation and bullying (HIB). This case stems from an incident that occurred at a student's home in December 2017 or January 2018, in which the Board found J.C. removed the pants and exposed the buttocks of another boy, J.K., while G.E. held him down. The Board also found that J.C. removed his own pants while on top of J.K. A photograph of the incident spread to other students at school in September 2018, when the students were beginning their freshman year.² As a result, the

¹ The Board argues that petitioners' exceptions should not be considered because they were filed electronically eight minutes after the Department's close of business at 4:15 p.m. The Commissioner will exercise his discretion pursuant to *N.J.A.C.* 6A:3-1.16 and *N.J.A.C.* 1:1-1.3 to consider petitioners' exceptions, especially given the closure of the Department's offices during the COVID-19 pandemic.

² Petitioners alerted school officials that J.C. was being threatened and called names after the photograph was distributed; they subsequently filed a HIB complaint against several students. Although a finding of HIB was substantiated against two students, petitioners transferred J.C. to an out-of-state school because of the harassment.

victim's parents filed a HIB complaint against J.C. Following an investigation, the Board found that J.C. committed an act of HIB, specifically finding: (1) the events substantially interfered with the victim's rights and the operation of the school given the number of students involved and the effect on the victim, who subsequently required therapy; (2) a reasonable person would perceive that J.C.'s actions in removing the pants of a person who is held down and exposing his buttocks is motivated by gender; and (3) a reasonable person would know that the actions would have the effect of causing the victim emotional or physical harm. Following motions for summary decision, the Administrative Law Judge (ALJ) found that the Board's HIB determination was not arbitrary, capricious, or unreasonable.

In their exceptions, petitioners argue that the ALJ improperly applied the summary decision standard by failing to recognize numerous disputed issues of material fact. Specifically, petitioners deny that a sexual assault took place. Additionally, petitioners point out that it was J.K. – and not J.C. – who spread the rumors about the incident around the school and set any harassment in motion. Furthermore, according to petitioners, the Board was arbitrary, capricious, and unreasonable in ignoring that G.E. submitted conflicting statements during the HIB investigation. G.E. first said that J.C. “never did anything inappropriate that I saw or remember,” but several days later changed his story and said that he saw J.C. “half-naked with his thing out.” (Petitioner's certification, Exhibits L and M). Petitioner's maintain that these material facts cannot be reconciled on a motion for summary decision.

Petitioners dispute the Board's conclusion that the incident was motivated by gender. Petitioners assert that since the two other students who participated in the same incident were not deemed to be motivated by a distinguishing characteristic, the Board's determination that J.C.'s actions were motivated by gender must be based on the unfounded assumption that J.C. is gay without any evidence of such. While petitioners acknowledge that the conduct may have been inappropriate, the HIB investigation materials do not provide a basis for the conclusion that his actions were motivated by gender.

Petitioners also argue that J.K.'s statement in his interview that he had suffered no emotional distress undermines the Board's finding of HIB. Specifically, J.K. was asked how much the

incident bothered him “in terms of distraction, emotional stress, etc. (10 being extremely, 1 being not at all)” and J.K. answered “1.” (Petitioner’s certification, Exhibit J). Petitioners maintain that J.K.’s statement contradicts his parents’ assertion that he was in therapy, and an essential element of HIB cannot be met.

Finally, petitioners claim that the Board did not have the authority to regulate conduct that occurred in a private home. According to petitioners, in order to regulate off campus conduct, the Board would have to show that there is a nexus to student health or safety and that the behavior materially and substantially interferes with the orderly operation of school. Here, petitioners maintain that the Board exceeded its authority because the conduct did not threaten J.K.’s physical or emotional safety or well-being, as the two remained friends and J.K. filed his HIB complaint nine months later, after J.C. initiated his own complaint. Petitioners further argue that the ALJ erred in finding a substantial disruption to the school because any disruption was the harassment that J.C. suffered – not J.K. – and he should not be blamed for coming forward about being harassed. Accordingly, petitioners urge the Commissioner to reject the Initial Decision.

In reply, the Board contends that there are no genuine disputes of material fact because the only facts necessary to decide this matter are the HIB record and the conclusions the Board drew from it. The Board argues that petitioners cannot relitigate the facts of the incident; instead, the only issue here is whether the Board was arbitrary, capricious, and unreasonable in determining that J.C. committed an act of HIB based on the record before it at the time. Specifically, in response to petitioners’ disputed material facts, the Board maintains that: it did not determine that a sexual assault occurred; regardless of who started the rumor around school, it was J.C.’s conduct that started the chain of events; and the Board was not arbitrary in crediting G.E.’s second statement, which was consistent with J.K.’s statement.

The Board argues that J.C.’s conduct was inherently of a sexual nature, and a reasonable person could conclude that it was motivated by gender. Additionally, the Board reasonably relied on J.K.’s need for therapy for its conclusion that he suffered emotional harm. Finally, the Board maintains that pursuant to *N.J.A.C.* 6A:15-7.5(b), it is required to investigate HIB complaints regardless of whether

they occurred off school grounds. The Board explains that *N.J.A.C. 6A:15-7.5(a)* does not apply because it did not impose any discipline in this matter, so it does not need to demonstrate a nexus to student health or safety. Accordingly, the Board requests that the Commissioner adopt the Initial Decision.

Upon review, the Commissioner agrees with the ALJ that, based on the evidence in the record, petitioners did not establish that the Board acted in an arbitrary, capricious, or unreasonable manner in finding that J.C. committed an act of HIB. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was “patently arbitrary, without rational basis or induced by improper motives.” *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Furthermore, “where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[.]” and the Commissioner will not substitute his judgment for that of the board. *Bayshore Sewerage Co. v. Dep’t. of Envtl. Prot.*, 122 *N.J. Super.* 184, 199 (Ch. Div. 1973), *aff’d*, 131 *N.J. Super.* 37 (App. Div. 1974). The record contains sufficient credible evidence to support the Board’s determination that J.C. removed the pants and exposed the buttocks of J.K. while he was held down, and that J.C. removed his own pants while on top of J.K. – specifically, the victim’s statement recounting the incident and G.E.’s statement that he saw J.C. “half-naked with his thing out.” While petitioners deny that J.C. removed his own pants and point to G.E.’s first statement, where he said that J.C. “never did anything inappropriate,” this does not erase the evidence in the record that the Board relied upon which indicated the opposite. While the evidence may leave room for two opinions, it is not sufficient to overturn the Board’s decision, as it does not demonstrate that the decision was arbitrary, capricious, or unreasonable. To overturn the Board’s decision would require the Commissioner to substitute his judgment for the Board’s, which is impermissible.

The Anti-Bullying Bill of Rights Act (the Act) defines HIB as follows:

[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.

Therefore, a finding of HIB requires three elements. First, the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex County*, Commissioner Decision No. 51-20 (decided February 4, 2020). The statute also requires that the conduct take place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3.

Regarding the first element, in defining HIB as an action “that is *reasonably perceived* as being motivated either by any actual or perceived characteristic . . .”, *N.J.S.A.* 18A:37-14 (emphasis added), the statute requires an analysis of how the actor’s motivation is perceived and whether that perception is reasonable. It does not require an analysis of the actual motivation of the actor. *Wehbeh, supra*. Here, it was not arbitrary, capricious, or unreasonable for the Board to conclude that a reasonable person would consider J.C.’s actions to be of an inherently sexual nature and thus motivated by the gender of the victim.

Regarding the second element, the Board relied upon the number of students involved in the incident and the disturbance that resulted when the photograph was shared among students. The Commissioner finds that – given the incident set in motion a string of events that led to a photograph being circulated around school – the Board was certainly not arbitrary, capricious or unreasonable in finding a substantial interruption of the ordinary operation of the school.

Regarding the third element, an act of HIB is one that “a reasonable person *should* know, under the circumstances, will have the effect of physically or emotionally harming a student,” “*has the effect* of insulting or demeaning a student,” or “*creates* a hostile educational environment . . .”. *N.J.S.A.* 18A:37-14(a) (emphasis added). None of these criteria require the actor to have actual knowledge of the effect that his actions will have, or to specifically intend to bring about that effect. The first requires only that a reasonable person should know there would be a harmful effect, not that the actor knows there would be such an effect. The second two criteria address only the actual effect of the act, without any reference to what either the actor or a reasonable person does or should know. *Wehbeh, supra*. As such, a board of education can find that an individual committed an act of HIB even if the individual did not intend to cause harm. Here, the Board found that J.C.’s actions in removing his own pants and J.K.’s pants while J.K. was held down resulted in emotional harm to the victim, as demonstrated by his need to undergo school-sponsored and private therapy. While petitioners point to the victim’s statement that he was not bothered by the events, evidence in the record supports the Board’s determination. There is no doubt that a reasonable person would know that J.C.’s actions would result in emotional harm, satisfying *N.J.S.A.* 18A:37-14 of the Act, so the Board was not arbitrary, capricious, or unreasonable in reaching that conclusion.

Finally, regarding where the conduct occurred, the Act sets forth that conduct may be considered HIB when it takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3, and otherwise satisfies the remaining elements of HIB. *N.J.S.A.* 18A:37-15.3 indicates that HIB policies adopted by boards of education shall include provisions for responses to HIB that occurs off school grounds when a school employee is made

aware of such actions. Additionally, *N.J.A.C.* 6A:16-7.5(b) requires that school authorities respond to HIB that occurs off school grounds. Accordingly, the Board is required to investigate HIB complaints even if they occur outside of school. Here, the Board received a HIB complaint involving conduct that occurred at a private residence, and the Board investigated the allegations as it is required to do. Although *N.J.A.C.* 6A:16-7.5(a) requires a nexus to a student's physical or emotional safety, security, and well-being and a material and substantial interference with the operation of the school in order to impose a consequence to student conduct away from school, the Commissioner does not need to decide whether J.C.'s conduct met this definition because the Board did not impose discipline on J.C., as he is no longer a student in the district. As such, the Board was not arbitrary, capricious, or unreasonable in investigating conduct that occurred off school grounds and finding that it met the definition of HIB.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.³

INTERIM COMMISSIONER OF EDUCATION

Date of Decision: August 20, 2020

Date of Mailing: August 24, 2020

³ 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

SUMMARY DECISION

OAL DKT. NO. EDU 12064-19

AGENCY DKT. NO. 179-7/19

J.C. AND C.C. ON BEHALF OF J.C.,

Petitioners,

vs.

**BOARD OF EDUCATION OF THE RAMAPO
INDIAN HILLS REGIONAL HIGH SCHOOL
DISTRICT,**

Respondent.

Arla D. Cahill, Esq., for Petitioners (Mandelbaum Salsburg, attorneys)

Stephen R. Fogarty, Esq., for Respondent (Fogarty & Hara, attorneys)

Record Closed: May 15, 2020

Decided: May 20, 2020

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner parents challenges the respondent District's HIB determination.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on August 29, 2019, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A prehearing conference was held on September 17, 2019, and a prehearing Order was entered on September 18, 2019.

Respondent filed a motion for summary decision on December 23, 2019. Petitioners filed a cross motion for summary decision, and their response to respondent's motion, on February 10, 2019. Respondent filed its reply brief on March 6, 2020. Petitioner, with permission from the undersigned, submitted a sur-reply brief on May 15, 2020.

ISSUE

Did Respondent err in determining that J.C. committed an act of HIB within the meaning of the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq.

FACTUAL DISCUSSION

I find the following **FACTS**:

1. In or around September 2018, J.C. was a high school freshman in the District.
2. In or around September 2018, Petitioner's met with Assistant Principal L. Michael Mancino to discuss an incident involving their son, J.C., and other boys, that occurred sometime in December 2017 or January 2018.
3. During that incident J.C. removed the pants of J.K. while another boy, G.E., held down J.K.
4. Petitioners advised Mr. Mancino that due to this incident other students at the High School were threatening J.C. and calling him names.
5. J.C. supplied a written statement regarding the incident.

6. G.E. and J.K. also supplied written statements. G.E. supplied a second written statement as well.
7. A photograph purportedly showing J.C. removing J.K.'s pants was taken during the incident and was distributed to some members of the student body.
8. During the incident J.C. also removed his own pants.
9. The parents of J.K. filed a HIB complaint against J.C. and his sister on or about October 4, 2018.
10. A HIB investigation ensued, conducted by Anti Bullying Specialist Rachel Calabrese.
11. The conclusion of the HIB investigation was that J.C.'s action during the incident constitute HIB because he committed a physical act that was reasonably perceived to be motivated by J.K.'s gender that substantially disrupted or interfered with the orderly operation of the school and a reasonable person should have known, under the circumstances, would have the effect of physically or emotionally harming a student.
12. As a result of the incident J.K. underwent counselling.
13. The incident substantially disrupted and interfered with J.K.'s rights based upon his need to attend counseling, and the harassment he faced from other students.
14. The orderly operation of the school was substantially disrupted due to the incident in that it caused J.C. and J.K. to receive significant harassment from other students, which included substantiated allegations of HIB by other students against J.C.

LEGAL ANALYSIS AND CONCLUSION

Standard for Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported,

the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must “consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is “so one-sided that [the moving party] must prevail as a matter of law.” Id. at 536 (citation omitted).

In the instant matter both parties are requesting relief via summary decision. Petitioners contend that the Board lacked jurisdiction to conduct an HIB investigation as the act occurred off school property. Petitioners further contend that if there is jurisdiction that there are sufficient facts in dispute to deny Respondent’s motion for summary decision.

In support of their position Petitioners submitted Petitioners’ Response to Respondent’s Statement of Undisputed Material Facts and Counter Statement of Material Facts. A careful review of the same reveals much of what is set forth as fact is merely the opinion of the Petitioners. Much of what is fact is not material to the HIB investigation. By way of example, Petitioners focus on a C.P., who they maintain “de-pantsed” J.C. while in 6th grade. Petitioners further maintain that C.P. spread rumors about the incident. While the above may be facts, they are not material to the finding of HIB. What is material to the finding of HIB are the facts pertaining to the incident itself.

Respondent submitted their Response to petitioners’ Counter Statement of Undisputed Material Facts. I found the same extremely persuasive and concur with the same.

Respondent contends that the “core” facts are not in dispute and that those facts lead to a finding of HIB, and that such a finding is not arbitrary, capricious or unreasonable.

I concur with Respondent in this regard. The facts alleged to be disputed by Petitioners are not material to the Board’s determination that J.C. committed an act of HIB.

Accordingly, I find that the matter is ripe for summary decision.

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.”³ 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 actions. 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.

Petitioners raise two issues which need be addressed.

The first issue is regarding a HIB investigation regarding C.P. In their reply brief Petitioners challenge Respondent’s failure to conduct a proper HIB investigation against C.P. As Petitioners did not address the HIB findings regarding C.P. in their Petition, I shall not consider this issue as it is not before me.

The second issue is that the Board did not have jurisdiction to investigate the HIB allegation against J.C. as the incident occurred off campus.

N.J.A.C. 6A:16-7.5 states:

(a) School authorities have the right to impose a consequence on a student for conduct away from school grounds that is consistent with the district board of education's code of student conduct, pursuant to N.J.A.C. 6A:16-7.1.

1. This authority shall be exercised only when it is reasonably necessary for the student's physical or emotional safety, security and well-being or for reasons relating to the safety, security and well-being of other students, staff or school grounds, pursuant to N.J.S.A. 18A:25-2 and 18A:37-2.

2. This authority shall be exercised only when the conduct that is the subject of the proposed consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.

3. The consequence pursuant to (a) above shall be handled in accordance with the district board of education's approved code of student conduct, pursuant to N.J.A.C. 6A:16-7.1, and as appropriate, in accordance with N.J.A.C. 6A:16-7.2, 7.3, or 7.4.

(b) School authorities shall respond to harassment, intimidation, or bullying that occurs off school grounds, pursuant to N.J.S.A. 18A:37-14 and 15.3 and N.J.A.C. 6A:16-1.3, 7.1, and 7.7.

Clearly the Board had jurisdiction to conduct the HIB investigation in this matter. See W.D. ex rel. G.D. v. Board of Education of Jefferson, 2018 WL 3609529 (initial decision Jul 13, 2018), adopted, No. 375-18 (Comm'r Nov. 26, 2018) where the undersigned determined that a HIB investigation regarding an off campus incident, which was adopted by the Commissioner, was not arbitrary, capricious or unreasonable.

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. & 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 (1963), 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, Comm’r (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., supra, 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., supra, 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.”

Given 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 occur. It is not disputed that J.C. pulled down the pants of J.K. exposing him. It is not disputed that this was done while G.E. held down J.K. The Board further determined that J.C. also exposed himself during this incident based upon the statement of J.K. and the second statement of G.E. The Board then determined that J.K. suffered emotional harm as he was required to undergo counseling due to the incident. The Board further determined that the incident disrupted the orderly operation of the school due to the harassment of J.C. and J.K., and that substantiated acts of HIB occurred against J.C. To argue to the contrary does not ring true.

Lastly, the Board determined in its HIB determination that J.C.’s conduct was motivated by J.K.’s gender. Petitioners argue there is no basis for this determination. It is certainly a reasonable conclusion that the act removing another person’s pants while that person is restrained, then removing your pants, is inherently sexual and based upon the gender of the victim. It certainly is not an arbitrary, capricious or unreasonable determination.

While clearly Petitioners disagree with the Board’s HIB decision in this matter, nothing the Board did, either while conducting the HIB investigation or the conclusions reached during that investigation to conclude J.C. committed an act of HIB, were arbitrary, capricious or unreasonably.

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 occur.

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

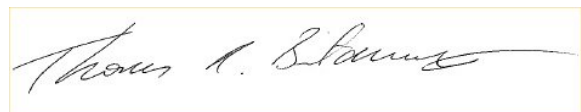
ORDER

It is hereby **ORDERED** that Petitioner's 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, 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 20, 2020
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db

APPENDIX

List of Moving Papers

For Petitioner:

Cross motion for summary decision

Brief in in support of cross motion and in opposition to motion for summary decision

Response to respondent's Statement of Undisputed Material and Counter Statement of Material Fact

Certification of Joseph Corella, Petitioner, with Exhibits A – O

Certification of Arla D. Cahill, Esq., with Exhibits A & B

Sur-reply letter brief

For Respondent:

Motion for summary decision

Brief in support of motion for summary decision

Certification of L. Michael Mancino, Asst. Prin., with Exhibits A - C

Statement of Undisputed Facts

Certification of Beverly Mackay, Superintendent of Schools with Exhibits A - E

Reply brief

Reply certification of L. Michael Mancino

Response to petitioners' Counter Statement of Undisputed Material Facts

Other Pleadings and Filings:

Petition of Appeal

Answer to Petition of Appeal and Separate Defenses