

## New Jersey Commissioner of Education

### Decision

Janan Wehbeh,

Petitioner,

v.

Board of Education of the Township of  
Verona, Essex County,

Respondent.

### Synopsis

Petitioner, a tenured teacher in the respondent Board's school district, appealed the Board's decision to affirm the results of a harassment, intimidation, and bullying (HIB) investigation into petitioner's conduct. The HIB investigation summary determined that the petitioner unintentionally engaged in bullying behavior and had no awareness of the potential negative impact on the student. The Board affirmed the findings of the investigation, which stemmed from a meeting petitioner had with a student to discuss the student's desire to enroll in an advanced placement (AP) chemistry course. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: petitioner's conversation with the student regarding entry into the AP chemistry course concluded with a recommendation that the student not enroll in the course, but left the decision up to the student; petitioner discouraged the student because of the degree of difficulty and the student's prior performance in an honors chemistry course that petitioner taught; the student has been diagnosed with anxiety and panic disorders and has a 504 plan that assists her in meeting her educational goals; the HIB complaint alleged that petitioner made verbal remarks that touched upon the student's disability; and the HIB investigation summary concluded that petitioner had unintentionally engaged in bullying behavior and had no awareness of its potential negative effects upon the classified student. The ALJ concluded, *inter alia*, that: in order to establish an occurrence of HIB, the actor's intent to harm must be demonstrated, and an actor cannot "unintentionally" commit an act of HIB; because the Board determined that petitioner had unintentionally engaged in bullying behavior, the intent required by the Anti-Bullying Bill of Rights Act, *N.J.S.A. 18A:37-13 et seq.*, was lacking. Accordingly, the ALJ granted petitioner's motion for summary decision.

Upon comprehensive review, the Commissioner disagreed with the ALJ's conclusion that an act of HIB cannot be "unintentionally" committed, finding, *inter alia*, that HIB can occur when the victim reasonably perceives that an action was motivated by a desire to do harm. The Commissioner noted that in the Initial Decision, the ALJ stated that there were several disputed issues of material fact in this case, including whether or not petitioner should have known under the circumstances that her words, actions or gestures would have the effect of physically or emotionally harming the student. The Commissioner concluded that these disputed issues of fact must be resolved before reaching a determination regarding whether the Board's decision was arbitrary, capricious or unreasonable. Accordingly, the matter was remanded to the OAL for further proceedings consistent with the Commissioner's decision.

<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>
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February 4, 2020

**New Jersey Commissioner of Education**

**Decision**

Janan Wehbeh,

Petitioner,

v.

Board of Education of the Township of  
Verona, Essex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto have been reviewed.

This matter concerns an alleged act of harassment, intimidation, and bullying (HIB) by petitioner, a high school chemistry teacher. Petitioner met with a student to discuss the student's desire to enroll in an advanced placement (AP) chemistry course. The student, who has been diagnosed with anxiety and panic disorders, filed an HIB complaint regarding comments the student alleges petitioner made during the conversation. Following an investigation, district staff issued an HIB investigation summary that indicated that petitioner had "unintentionally engaged in bullying behavior and had no awareness of the potential negative impact on the victim." The Board later voted to affirm the findings of the investigation, and petitioner appealed.

Following cross motions for summary decision, the ALJ concluded that, in order to establish an occurrence of HIB, the actor's intent to harm must be demonstrated, and an actor

cannot “unintentionally” commit an act of HIB. The ALJ further concluded that, because the Board had determined that petitioner unintentionally engaged in bullying behavior, the intent required by the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A. 18A:37-13 et seq.*, was lacking and the Board’s decision must be reversed. Accordingly, the ALJ granted petitioner’s motion for summary decision.

The ALJ then went on to address an aspect of the case not argued by either party. The ALJ asserted that the superintendent’s letter to petitioner, wherein she was told that the district found evidence of HIB in their investigation, did not address all of the elements required for a determination of an act of HIB. The superintendent only discussed elements of the definition of HIB contained in the statute’s first paragraph. The ALJ concluded that because the letter did not address the definition of HIB in its entirety, the superintendent did not consider the elements of HIB defined in the second paragraph to have been satisfied by the evidence. For this reason, the ALJ determined that the contents of the superintendent’s letter were inadequate to support a finding of HIB. The ALJ further concluded that since the Board’s decision appears to have been based solely on the findings set forth in the superintendent’s letter, it was not based on the full definition of HIB, and thus establishes a second basis for the reversal of the Board’s decision.

In its exceptions, the Board argues that the ALJ’s holding that the Act requires intent on the part of the actor is in error. The Board cites to the Commissioner’s decision in *L.K. and T.K., o/b/o minor child A.K. v. Bd. of Educ. of the Twp. of Mansfield, Burlington Cty.*, Commissioner Decision No. 107-19, decided April 22, 2019, in which the Commissioner affirmed a board’s finding of HIB against a seven-year-old child and stated that the child “should have known” that her actions were harming another student. Accordingly, the Board contends that the Act focuses on the reasonable perception of the victim and whether the actor should have

known that the action would cause harm. The Board provides an example of a teacher dressing in a KKK costume for Halloween, with no intent to cause harm, and suggests that such an act would constitute HIB because the students could reasonably perceive the action to be motivated by race and a reasonable teacher should know that the action would cause harm. The Board argues that the ALJ's holding sets up the untenable situation wherein HIB could never be proven because everyone accused of HIB would simply state that they did not mean to cause harm. The Board also takes issue with the ALJ's comments regarding a December 2012 publication, entitled Guidance for Parents on the Anti-Bullying Bill of Rights Act and available on the Department of Education's website, which the ALJ interpreted as requiring intent. The Board argues that the Commissioner's recent decision in *L.K. and T.K., supra*, not a document on the Department's website, should control.

Finally, the Board argues that the ALJ was incorrect in concluding that the Superintendent's letter of March 14, 2018 to petitioner was insufficient to support a finding of HIB. The Board indicates that its decision was based on findings other than those set forth in the letter and that the letter was not intended as the Board's official findings to the exclusion of all other evidence gathered during the HIB investigation process. According to the Board, neither party disputed or briefed this issue, and the ALJ's *sua sponte* consideration of it is contrary to the record and deprived the Board of the opportunity to provide evidence or testimony to address the question.

In reply, petitioner submits that the Commissioner should adopt the ALJ's analysis in whole. Petitioner distinguishes the holding in *L.K. and T.K., supra*, because the alleged bully in that case was repeatedly asked to stop her behavior, while petitioner had only one allegedly problematic interaction with the student and was never told that her choice of words might cause harm to the student. Petitioner claims that she had no way of knowing that a

conversation she has with her students every year could allegedly cause emotional harm to this particular student. According to petitioner, the statutory language requires “at least” knowledge that one’s actions could cause harm to the alleged target, and a reasonable person in her shoes would have no way of knowing that her actions would constitute HIB. Petitioner indicates that the arbiter of facts must determine how a reasonable person in similar circumstances would reasonably perceive the alleged bully’s actions.

Further, in response to the Board’s example, petitioner agrees that a teacher dressing in a KKK robe for Halloween would constitute HIB, because a reasonable person would know that this action was inappropriate and would cause emotional harm, even if the teacher did not subjectively know that. Petitioner argues that if bullying can be committed unintentionally, teachers would live in fear of developing a rapport with students because their objectively reasonable and unintentional conduct could be deemed bullying. Petitioner also cites to guidance issued by the Department of Education that, according to petitioner, supports a finding that intent is required to commit an act of HIB. Finally, petitioner urges the Commissioner to accept the ALJ’s findings regarding the sufficiency of the March 14, 2018 letter, which petitioner claims demonstrates that not all of the elements of the statute were satisfied.

Upon review, the Commissioner disagrees with the ALJ’s conclusion that an act of HIB cannot be “unintentionally” committed. 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.<sup>1</sup> The third condition is that *one* of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied.<sup>2</sup>

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.<sup>3</sup> It does not require an analysis of the actual motivation of the actor.

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<sup>1</sup> The conduct must also take place on school property, at a school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3. This requirement does not appear to be at issue in this case.

<sup>2</sup> The Initial Decision incorrectly views subsection (a), that a reasonable person should know the act will have a harmful effect, as the third requirement, with an additional fourth requirement being a choice between subsections (b) and (c). As a matter of standard statutory construction, the term “or” between subsections (b) and (c) also applies to subsection (a), such that a demonstration of any of these three criteria can support a finding of HIB.

<sup>3</sup> This conclusion does not make the Act a strict liability statute, as the ALJ opined it would. The statute is clear that the perception must be reasonable. The Commissioner does not interpret the Board’s arguments as suggesting a purely subjective standard in which any perception by an alleged victim is automatically reasonable, as the ALJ did. If the Board was in fact suggesting such an interpretation, the Commissioner rejects it in favor of a standard reasonableness determination common in many types of adjudications. Furthermore, the Commissioner does not agree with the ALJ that, in order to be reasonable, the alleged victim must correctly assess the actor’s motivation, as such a requirement would convert the analysis from one about reasonably perceived motivation to one about actual motivation and would inappropriately place the burden on the alleged victim to divine the intent of the actor.

Certainly, evidence that the actor was motivated by a distinguishing characteristic would meet the standard of this section of the Act, but evidence that the actor was not so motivated does not end the analysis. Moreover, 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 her 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.

While the ALJ found, and petitioner argues, that conduct found to be unintentional cannot reasonably be perceived as being motivated by a distinguishing characteristic, the Commissioner disagrees. Initially, the Commissioner notes that the Board’s decision does not state that the conduct was not motivated by a distinguishing characteristic. The language used in the documents in the record suggest that the lack of intentionality was related to the causing of harm, an element distinct from the motivation. However, even if the Board was indicating that petitioner’s comments were not motivated by the student’s disability, it could have reasonably found that she committed an act of HIB if the student reasonably perceived the comments as being motivated by her disability.

Petitioner also relies, in part, on guidance published by the Department of Education,<sup>4</sup> which states, “Bullying among students is aggressive behavior that is intentional.”

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<sup>4</sup> The Initial Decision indicates that the ALJ did not review the guidance or make any evaluation or factual finding regarding it. The Commissioner nonetheless deems it appropriate to address the guidance, as it has been part of the arguments made by the parties in both the briefs below and the exceptions.

<https://www.nj.gov/education/students/safety/behavior/hib/guidance.pdf> (page 44). The Commissioner first notes that guidance, while intended to be instructive for the public, does not replace the Commissioner’s decisions as the definitive interpretation of the law. Second, the document containing this statement also explicitly states, “[t]he term ‘bullying’ is used to refer to general information on this subject and is not limited to the HIB definition in the [Act].” *Ibid.* at page 5. Therefore, this particular statement defining “bullying” is not useful or applicable in interpreting what constitutes HIB under the Act. Another guidance document describes bullying as “intentionally committing a mean or violent act.” <https://www.nj.gov/education/students/safety/behavior/hib/ParentGuide.pdf> (page 11). However, it goes on to indicate that bullying occurs when the “aggressor’s behavior would lead a person to reasonably believe that the aggressor is motivated by a desire to physically or emotionally hurt someone.” *Ibid.* This language clearly tracks the “reasonably perceived” language of the Act, and concludes, as the Commissioner does herein, that HIB can occur when the victim reasonably perceives that the action was motivated by a desire to do harm.

Petitioner’s reply to the Board’s exceptions appears to misconstrue the Initial Decision and instead agrees, in large part, with the analysis herein. Petitioner acknowledges that the reasonable person test applies when analyzing the actions in question and argues that the ALJ’s conclusion should be affirmed because a reasonable person in her shoes would have no way of knowing that her actions would constitute a HIB violation. But the ALJ did not make that finding and, in fact, listed “whether or not Wehbeh should have known under the prevailing circumstances that her words, actions, or gestures would have the effect of physically or emotionally harming” the student as a disputed issue of material fact. Moreover, even if this issue was resolved in petitioner’s favor with a finding that a reasonable person would not have known that her action would emotionally harm the student, a finding of HIB could still



be supported if either of the other two criteria – that the act had the effect of insulting or demeaning the student or that it created a hostile educational environment for the student – was proven. These questions are also identified in the Initial Decision as disputed issues of material fact. For these reasons, the Commissioner is not able to ascertain whether the petitioner committed an act of HIB. The disputed issues of fact must be resolved before reaching a determination regarding whether the Board’s decision was arbitrary, capricious, or unreasonable.

Regarding the sufficiency of the March 14, 2018 letter from the superintendent to petitioner, the Commissioner disagrees with the ALJ’s conclusion. The decision being appealed in this matter is the Board’s decision of March 28, 2018. The only requirement in the Act regarding the Board’s decision is that it must be in writing and affirm, reject, or modify the superintendent’s decision. *N.J.S.A. 18A:37-15(b)(6)(e)*. The Board satisfied that requirement through its letter of March 28, 2018 affirming the superintendent’s decision. Furthermore, there is no basis in the record for the ALJ’s conclusion that the Board’s decision was based solely on the Superintendent’s letter.

Accordingly, this matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: February 4, 2020  
Date of Mailing: February 4, 2020



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. EDU 10981-18

AGY. REF. NO. 156-6/18

**JANAN WEHBEH,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP**

**OF VERONA, ESSEX COUNTY,**

Respondent.

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**William P. Hannan**, Esq., for Petitioner (Oxfeld Cohen, attorneys)

**Daniel R. Roberts**, Esq., for Respondent (Kenny, Gross, Kovats & Parton,  
attorneys)

Record Closed: September 27, 2019

Decided: December 24, 2019

BEFORE **JOHN P. SCOLLO**, ALJ:

**STATEMENT OF THE CASE**

This is a Harassment, Intimidation, and Bullying (HIB) case arising out of the New Jersey Anti-Bullying Bill of Rights, N.J.S.A. 18A:37-13, et seq. Dr. Janan Wehbeh (Wehbeh) appeals the Verona Board of Education's (respondent's or BOE's) affirmance

of the school district's HIB Investigation. The school district's investigation found that during a meeting with a student named J.G., Wehbeh unintentionally engaged in bullying behavior and had no awareness of the potential negative impact on the victim.

The background of the matter is as follows. Wehbeh is a chemistry teacher at Verona High School. On February 15, 2018, Wehbeh met with a student referred to herein as "J.G." to discuss J.G.'s desire to enroll in an Advanced Placement (AP) chemistry course. Wehbeh recommended to J.G. that she not enroll in the Advanced Placement chemistry course because of its degree of difficulty and because, in Wehbeh's opinion, J.G. was having a difficult time in the honors chemistry course in which she was currently enrolled. J.G. is a student who has been diagnosed with anxiety and panic disorders and has a 504 plan that assists her in meeting her educational goals.

### **PROCEDURAL HISTORY**

On or about February 15, 2018, J.G. and her mother filed an HIB complaint against Wehbeh. They claimed that Wehbeh made verbal remarks about J.G.'s ability to handle the requirements of the AP chemistry course. They claimed that Wehbeh's remarks touched upon J.G.'s disability, which was rooted in an anxiety diagnosis, for which J.G. was categorized as a special education student and given a 504 plan.

On or about February 20, 2018, the school district began its investigation into the HIB allegation. The investigator interviewed two people, Wehbeh and J.G. The investigator, utilizing the definition of HIB found in N.J.S.A. 18A:37-13 et seq., specifically at N.J.S.A. 18A:37-14, concluded and wrote in her HIB Investigation Summary, dated March 14, 2018, that Wehbeh unintentionally bullied J.G. when she made demeaning comments to J.G. in the classroom, which minimized J.G.'s mental disability, interfered with J.G.'s right to access education (opportunities), created a hostile educational environment, and caused J.G. emotional harm. (Petr.'s Ex. B and Resp.'s Ex. C.) On March 27, 2018, the Verona Board of Education voted to affirm the

findings of the investigation and informed Wehbeh of its decision in its letter dated March 28, 2019. (Petr.'s Ex. C and Resp.'s Ex. G.)

On June 26, 2018, Wehbeh's counsel filed a Petition of Appeal with the New Jersey Department of Education, Bureau of Controversies and Disputes. The Verona Board of Education filed its Answer to Petition of Appeal on July 18, 2018. The Bureau of Controversies and Disputes transmitted the matter to the Office of Administrative Law, where it was filed on August 1, 2018, as a contested case.

The matter was assigned to Ernest Bongiovanni, ALJ on August 8, 2018, but he had a conflict of interest. The case was re-assigned to John P. Scollo, ALJ on August 13, 2018. Judge Scollo held an initial telephone conference with counsel for Wehbeh and counsel for the BOE on August 22, 2018, at which time a plan for discovery was put in place and a Pre-Hearing Order was issued on August 23, 2018.

A telephone conference was held on December 13, 2018, to monitor the progress of discovery and to discuss settlement possibilities. Adjournment of hearing dates were granted twice: once for discovery reasons and once to accommodate the judge's vacation plans. On August 20, 2019, counsel for Wehbeh filed a Motion for Summary Decision limited to Count One of Wehbeh's Petition of Appeal ("HIB cannot be unintentional."). On August 23, 2019, counsel for the BOE filed Opposition papers to the motion and filed a Cross-Motion seeking Summary Decision on both Counts of Wehbeh's Petition of Appeal, for which the petitioner filed Opposition papers on September 27, 2019.

### **ISSUES**

- (1) Can an act of HIB be committed unintentionally?
  
- (2) Do the undisputed facts show that Wehbeh unintentionally committed one or more acts of HIB against J.G.?

## FINDINGS OF FACT

Each of the following statements was taken from the exhibits presented by the parties. There is no apparent dispute between the parties about the following facts.

(1) In April, 2013, before J.G. started high school, J.G. was diagnosed with both anxiety and panic disorder by psychologist Thomas Hollenbach. Due to these diagnoses, J.G. was determined to be disabled and thus eligible for a 504 Accommodation Plan. (This refers to Section 504 of the Federal Rehabilitation Act of 1973.) She was given an Individual Accommodation Plan (IAP), which allowed her, among other things, to be granted extended time for taking quizzes and tests. (Resp.'s Ex. A.)

(2) Dr. Janan Wehbeh (Wehbeh) has been a chemistry teacher in the Verona School District since 2011. (Petr.'s Ex. E and Resp.'s Ex. B.)

(3) In the 2017-2018 school year, J.G. was enrolled in honors chemistry, which was taught by Wehbeh. (Petr.'s Ex. E and Resp.'s Ex. F.)

(4) On February 15, 2018, J.G. met with Wehbeh to discuss enrolling in Advanced Placement (AP) chemistry in the 2018-2019 school year. (Petr.'s Ex. E and Resp.'s Ex. F.)

(5) Wehbeh recommended to J.G. that she should not enroll in AP chemistry because J.G. was having difficulty with honors chemistry, but left the decision to enroll or not to enroll in AP chemistry with J.G. All parties agree that the ultimate decision about whether to enroll in the AP chemistry course was J.G.'s. (Petr.'s Ex. E and Resp.'s Ex. C.)

(6) On February 15, 2018, the mother of J.G., Ms. E.D., contacted the principal of Verona High School Joshua Cogdill (Cogdill), and guidance counsellor Jen Gadaleta (Gadaleta), requesting a meeting to discuss the conversation between her

daughter, J.G., and Wehbeh, which took place earlier that day. E.D. complained that Wehbeh bullied her students, including J.G., by emphasizing how difficult the AP chemistry course was and by telling them that the course “will kill you.” E.D. complained that Wehbeh stated to J.G. that everyone who takes chemistry has anxiety and that J.G. would not be allowed extra time to take quizzes and tests every day. E.D. complained that Wehbeh disrespected J.G. by making disparaging remarks, which E.D. saw as mocking J.G.’s anxiety disorder. E.D. complained that Wehbeh’s remarks caused emotional upset to J.G. (Resp.’s Ex. E.)

(7) The school’s principal opened an HIB investigation on February 20, 2018. Anti-bullying Specialist and District Director of Counselling Kimberly Ferulato (Ferulato) was assigned to conduct the investigation. During Ferulato’s investigation, she interviewed only two people: Dr. Wehbeh on February 21, 2018, and J.G. on February 23, 2018. (Resp.’s Ex. B and Ex. D.) According to the Respondent BOE’s answers to Interrogatories, Respondent did not know the date when the HIB investigation ended. (Resp.’s Ex. F, Question 9.)

(8) After conducting the interviews of Wehbeh and J.G., Ferulato concluded that there was evidence supporting the proposition that Wehbeh unintentionally committed an act of HIB against J.G. on February 15, 2018, with J.G.’s anxiety and 504 status being motivating factors. (Petr.’s Ex. A, B, C, D and Resp.’s Ex. C and G.)

(9) An HIB Investigation Summary, dated March 14, 2018, was prepared. (Petr.’s Ex. B and Resp.’s Ex. C.) It was not signed and the author did not affix his or her name. Presumably, it was prepared by the HIB investigator, Ferulato. The HIB Summary contains the *opinions*, but no *findings* of the investigator. The HIB Summary reports that it is the opinion of the investigator that: (i) Dr. Wehbeh uttered “demeaning comments” to J.G. in a classroom; (ii) “unintentionally intimidated and bullied” J.G. by “minimizing” J.G.’s mental disability; (iii) interfered with J.G.’s “right to access education”; (iv) caused emotional harm to J.G.; and (v) created a hostile educational environment. The HIB Investigation Summary, containing the investigator’s opinions,

was submitted to Cogdill and to Dr. Rui Dionisio (Dionisio), the School District Superintendent.

(10) In a letter dated March 14, 2018, which was signed by Ferulato, Cogdill, and Dionisio (referred to herein as the “Superintendent’s letter dated March 14, 2018”), Wehbeh was informed that the investigation results “have been reported to the Board of Education at the March 27, 2018 meeting.”<sup>5</sup> (Petr.’s Ex. A and Resp.’s Ex. G.)

(11) In the Superintendent’s letter dated March 14, 2018, Wehbeh was told that “the district found evidence of the investigated act of [HIB].” (Petr.’s Ex. A and Resp.’s Ex. G.) Using underlining, the letter stated that Wehbeh’s conduct met the following elements of the definition of HIB set forth in N.J.S.A. 18A:37-14:

- (i) [the conduct] “is reasonably perceived as being motivated by any actual or perceived characteristic [such as] mental, physical or sensory disability . . . .”
- (ii) [that] “takes place on school property . . . .”
- (iii) [that] “substantially disrupts or interferes with the orderly operation of . . . the rights of other students.”

(12) The matter was presented to the Verona Board of Education (BOE), which voted at its March 27, 2018 meeting. In a March 28, 2018, letter signed by Ferulato, Cogdill, and Dionisio, they told Wehbeh “The Verona Board of Education voted to affirm the *findings* of the HIB investigation.”

(13) Dr. Wehbeh filed a two-count Petition of Appeal dated June 25, 2018, requesting a hearing, seeking to overturn the BOE’s decision. (Petr.’s Ex. E.)

(14) From the documents submitted with the motion papers, it is clear there are certain statements of material fact which J.G. and Dr. Wehbeh disagree about. Among them are:

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<sup>5</sup> Since March 27 was a date still in the future when this letter was written, it is apparent that the words “and will be considered by the Board of Education” should have been added between the word “Education” and the word “at,” but these words were somehow omitted.

(a) whether or not Wehbeh actually made any of the following statements to J.G. that, if J.G. took the AP Chemistry course, she “would die”; she “would get five zeros in a row”; she would “fail the class”; that “all students [including J.G.] would get anxiety” during the AP Chemistry course; that J.G. would “just have to handle it” (or even if this statement referred to J.G.’s anxiety issues); that J.G. would not be allowed extra time for completion of quizzes and assignments in AP Chemistry; and that J.G. “was in the SPED program” (a derogatory term for referring to students enrolled in a special education program), which allegedly brought J.G. to cry hysterically;

(b) whether Wehbeh and J.G. discussed anything about J.G. enrolling in AP Chemistry against Wehbeh’s advice and whether Wehbeh would in any way retaliate against J.G. for doing so;

(c) whether or not J.G.’s perception of any of Wehbeh’s statements to the class or to her could reasonably be interpreted to have been motivated by an actual or perceived characteristic as listed in N.J.S.A. 18A:37-14;

(d) whether or not Wehbeh should have known under the prevailing circumstances that her words, actions, or gestures would have the effect of physically or emotionally harming J.G. or of placing in J.G. a reasonable fear of physical or emotional harm;

(e) whether or not anything Wehbeh said to J.G. during their meeting was insulting or demeaning on an objective basis;

(f) whether anything Wehbeh said to J.G. during their meeting created a hostile educational environment by interfering with J.G.’s education by severely or pervasively causing her physical harm or emotional harm.

### **FACTUAL DISCUSSION**

As noted above, there are quite a few unresolved issues of fact regarding what Wehbeh said to her class regarding the degree of difficulty of the AP chemistry course; regarding what Wehbeh said to J.G. during their conversation about the AP chemistry course on February 15, 2018; regarding whether Wehbeh said anything to J.G. about



her anxiety issues, her 504 plan, whether or how J.G.'s anxiety issues would affect her performance in AP chemistry; and other questions of fact.

### APPLICABLE LAW

In 2002 the New Jersey Legislature enacted L. 2002, c. 83, this State's first harassment, intimidation and bullying (HIB) law. In 2007 the Legislature amended the law L. 2007, c. 129, to cover cyber-bullying. In 2010 the Legislature enacted the Anti-Bullying Bill of Rights Act, L. 2010, c. 122, which revised and supplemented the prior laws chiefly to cover incidents that occur off school grounds under special circumstances. The legislature also enacted L. 2012, c. 1, which permits a school district to implement bullying prevention and training programs.

#### Definition of Harassment, Intimidation and Bullying (HIB)

The 2010 law refined the definition of HIB to include [bracketed numbers added]:

[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 [1] 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, [2] that takes place on school property, at any school-sponsored function, on a school bus, or takes place off school grounds as provided for in N.J.S.A. 18A:37-15.3, [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 a 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 be severely or pervasively causing physical or emotional harm to the student."

[N.J.S.A. 18A:37-14 (emphasis added).]

Comprehensive regulations promulgated by the Department of Education further assist districts in complying with these statutory requirements. N.J.A.C. 6A:16-7.9.

### Local Control of Policy and Required Contents of HIB Policy

The anti-bullying law provides that "[e]ach school district shall adopt a policy prohibiting harassment, intimidation and bullying on school property, at a school-sponsored function or on a school bus." N.J.S.A. 18A:37-15(a). Pursuant to N.J.S.A. 18A:37-15(b) each school district has "local control over the content of the policy" but the policy must include twelve enumerated components including a definition of harassment, intimidation, and bullying at least as inclusive as the one provided (see above) in N.J.S.A. 18A:37-14. The twelve required components of the policy are set forth in N.J.S.A. 18A:37-15 and are summarized below.

- (1) a statement prohibiting HIB of a student;
- (2) a definition of HIB no less inclusive than that set forth in N.J.S.A. 18A:37-13;
- (3) a description of the type of behavior expected from each student;
- (4) consequences and appropriate remedial action for a person who commits an act of HIB;
- (5) a procedure for reporting an act of HIB, including a provision that permits a person to report an act of HIB anonymously;
- (6) a procedure for prompt investigation of violations and complaints, which procedure shall at a minimum provide that

(a) the investigation be initiated within one school day of the report and be completed within ten days of receipt of the written report,

(b) the results of the investigation be reported to the superintendent within two days of completion,

- (c) the investigation and reports be reported to the board of education no later than the date of the next board of education meeting,
- (d) the parents or guardians of the students who are parties to the investigation be entitled to receive certain information and request a hearing within five days after the results of the investigation are reported to the board,
- (e) the board must issue a written decision affirming, rejecting or modifying the superintendent's decision, which can be appealed to the Commissioner of Education, and
- (f) a complaint can be filed with the Division on Civil Rights within 180 days of an incident of HIB based on membership in a protected group.];]

(7) the range of ways in which a school will respond once an incident of HIB is identified, which shall be defined by the principal in conjunction with the school anti-bullying specialist, but shall include an appropriate combination of services that are available within the district such as counselling, support services, intervention services and other programs, as defined by the commissioner. In the event that the necessary programs and services are not available within the district, the district may apply to the Department of Education for a grant from the "Bullying Prevention Fund" established pursuant to [N.J.S.A. 18A:37-28] to support the provision of out-of-district programs and services;

(8) a statement that prohibits reprisal or retaliation against any person who reports an act of HIB and the consequence and appropriate remedial action for a person who engages in reprisal or retaliation;

(9) consequences and appropriate remedial action for a person found to have falsely accused another as a means of retaliation or as a means of HIB;

(10) a statement of how the policy is to be publicized, including notice that the policy applies to participation in school-sponsored functions;

(11) a requirement that a link to the policy be prominently posted on the home page of the school district's website and distributed annually to parents and guardians who have children enrolled in a school in the school district; and

(12) a requirement that the name, school phone number, school address and school email address of the district anti-bullying coordinator be listed on the home page of the school district's website; and that on the home page of each school's website the name, school phone number, school address and school email address of the school anti-bullying specialist and the district anti-bullying coordinator be listed.

The information concerning the district anti-bullying coordinator and the school anti-bullying specialists shall also be maintained on the department's website.

### HIB on School Grounds versus off School Grounds

In regard to the location of acts of HIB (on school grounds versus off school grounds), the enactment of the Anti-Bullying Bill of Rights Act now requires that each school district's policy "include provisions for appropriate responses to harassment, intimidation or bullying . . . that occurs off school grounds, in cases where a school employee is made aware of such actions." N.J.S.A. 18A:37-15.3. A school district's responses to harassment, Intimidation or bullying occurring off school grounds must "be consistent with the board of education's code of student conduct or other provisions of the board's policy on harassment, intimidation, or bullying." N.J.S.A. 18A:37-15.3. Pursuant to the rules governing a board of education's code of student conduct, N.J.A.C. 6A:16-7.5(a) states:

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 which 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. and (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.

## Reporting of HIB

In regard to the reporting of alleged HIB incidents and the investigation of same, N.J.S.A. 18A:37-16(a) forbids a member of a board of education, a school employee, a student or a volunteer from engaging in acts of reprisal, retaliation, or false accusation against a victim of HIB or a witness who reports acts of HIB.

N.J.S.A. 18A:37-16(b) requires that acts of HIB must be reported and states:

A member of a board of education, school employee, contracted service provider, student or volunteer who has witnessed, or has reliable information that a student has been subject to, harassment, intimidation, or bullying shall report the incident to the appropriate school official designated by the school district's policy, or to any school administrator or safe schools resource officer, who shall immediately initiate the school district's procedures concerning school bullying.

N.J.S.A. 18A:37-16(c) provides that any school official who promptly complies with the reporting requirement of the law is immune from a cause of action for damages arising from any failure to remedy the reported incident.

N.J.S.A. 18A:37-16(d) provides that a school administrator who fails to investigate the allegation of HIB or fails to take sufficient action to minimize or eliminate the HIB may be subject to disciplinary action.

## HIB Prevention

Pursuant to N.J.S.A. 18A:37-17(a) schools and school districts are required to annually assess their HIB prevention programs, or approaches and other initiatives so as to create school-wide conditions to prevent and address HIB. Grants are available from the Department of Education if needed.

N.J.S.A. 18A-37(b) obligates school, districts to provide training related to the district's HIB policies to its employees and volunteers emphasizing the importance of the definition of HIB and of the protected categories found in N.J.S.A. 18A:37-14.

N.J.S.A. 18A-37-17(c) obligates individual schools to include the school district's policies against HIB in its employee training, including full and part-time employees, volunteers and anyone who may have significant contact with students.

Comprehensive regulations promulgated by the Department of Education further assist districts in complying with these statutory requirements. N.J.A.C. 6A:16-7.7.

## **LEGAL ANALYSIS AND CONCLUSIONS**

### **SECTION ONE**

#### **The Tribunal's Ruling on Respondent's Cross-Motion**

In its Cross-Motion, the respondent assumes that certain facts are undisputed. (See page 5 of the Cross-Motion.) In Opposition to the respondent's Cross-Motion, the petitioner argues that respondent's assertion that the facts are undisputed is incorrect and that actually several issues of material fact are present and their presence precludes granting Summary Decision in favor of the respondent.

A review of the documents and certifications convinces me that there are unresolved questions of material fact in this case. They pertain to Wehbeh's statements about the rigors of the AP chemistry course to her class, Wehbeh's version of her conversation with J.G., and J.G.'s version of her conversation with Wehbeh. I **CONCLUDE** that these unresolved fact questions are germane only to the outcome of the respondent's Cross-Motion and must be resolved by an evidentiary hearing. I **CONCLUDE** that these questions are not germane to the petitioner's Motion on Count One of the Petition of Appeal because the issue therein is a purely legal question:

whether there is or is not an element of intent within the subject statute, N.J.S.A. 18A:37-14.

Therefore, I **CONCLUDE** that the respondent is not entitled to an Order granting Summary Decision on its Cross-Motion based on Counts One and Two of the petitioner's Petition of Appeal; and I **CONCLUDE** that the respondent's Cross-Motion must be and hereby is **DENIED**.

## **SECTION TWO**

### **Analysis of the Arguments Presented by the Petitioner and by the Respondent**

An analysis of the petitioner's arguments in favor of her motion for Summary Decision on Count One of the Petition of Appeal are set forth below.

The Petitioner seeks a grant of Summary Decision on only Count One of her Petition of Appeal. Petitioner's arguments in favor of her motion for Summary Decision are as follows. The essence of the petitioner's argument is that N.J.S.A. 18A:37-14 only applies to intentional conduct. Put another way, petitioner argues that an act of bullying is an inherently intentional action. As such, it would be self-contradictory (i.e., under the laws of logic, namely the classical law of non-contradiction) to assert that two contradictory propositions can be true in the same sense at the same time. Thus, to assert that the intentional act of bullying can be committed "unintentionally" is absurd.

The petitioner also asserts that evidence from the Department of Education's website supports petitioner's assertion that bullying is intentional behavior. (The Tribunal has not reviewed this evidence and makes no evaluation or factual finding regarding it.)

The petitioner notes that the statute focuses on an actor's conduct that is motivated by a receiver's distinguishing characteristics. Petitioner argues that it is impossible to discuss the actor's motive for committing an intentional act, when the BOE

admits that there was no intentional act in the first place. In the absence of intent to do harm or to threaten harm, it is meaningless to discuss the actor's motive.

Finally, the petitioner notes that the Superintendent's letter of March 14, 2018, expressly stated that Wehbeh "unintentionally engaged in bullying behavior" and that Wehbeh "had no awareness of the potential negative impact on the victim." The petitioner points to the Superintendent's admissions that Wehbeh's conduct was unintentional and that Wehbeh had no awareness of any potential harm to the student. Therefore, Wehbeh cannot have committed the intentional act of bullying and cannot be said to have intended to harm the student. It follows that Wehbeh is entitled to be exonerated and the decision of the BOE should be reversed.

A summary of the respondent's arguments seeking Summary Decision on Counts One of the petitioner's Petition of Appeal are as follows.

As to Count One, the respondent argues that the statute, N.J.S.A. 18A:37-14, does not differentiate between intentional or unintentional conduct by the actor. Respondent unequivocally stated its position that "the entire focus is on the 'reasonable perception' of the victim." In support of this argument respondent cites an OAL decision, the case of L.K. and T.K. ex rel. A.K. v. Mansfield Board of Education, EDU 7067-16, Initial Decision (January 22, 2019), Final Decision (April 22, 2019), <http://njlaw.rutgers.edu/collections/oal>. In that case, A.K., a girl of only seven years of age, was found by the BOE to have committed an act of bullying. The BOE found that A.K. had asked a second-grade boy several times on the school bus why he was wearing girl's clothing, not understanding [i.e., "not aware" or "not knowledgeable," *wording supplied by this Tribunal*] that the boy was "transitioning to female." The ALJ vacated the BOE's decision, finding it to be against the weight of the evidence. However, in interpreting the statute, the ALJ focused solely on how A.K.'s questions were "reasonably perceived" by N3 (the boy in question) and the impact on him. The ALJ further wrote that there was no requirement that the BOE find that A.K.'s conduct was *actually motivated* by the perceived characteristic. (Here, this Tribunal supplied the italics and I must note that the use of the word "motivated" appears to be synonymous



with the word “intended”.) Respondent notes that the Commissioner of Education reversed the ALJ’s vacation of the BOE’s decision and dismissed A.K.’s appeal, affirming that seven-year-old A.K. is a substantiated bully and did so without disturbing the ALJ’s interpretation of the statute. The Respondent argues that Mansfield is now the ruling case on the interpretation of the HIB statute and that this Tribunal must follow the interpretation of the statute set forth by the ALJ in Mansfield. That interpretation is that the Tribunal must only focus on how the actor’s words have been “reasonably perceived” by the receiver and on the impact to the receiver. I do not agree.

The arguments raised in the appeal of A.K. are different from the arguments raised in the case at bar. Here, the petitioner has pointed to evidence from the Department of Education’s own website to the effect that the Department itself, despite the Commissioner’s decision in Mansfield, may not have finalized its own position on how it interprets the statute. That aside, the facts of the case at bar are vastly different from those in Mansfield. Moreover, the issues and arguments presented in the case at bar are very different from those presented in Mansfield, e.g., the issue of whether intent is an element of the statute. I **CONCLUDE** the holding in Mansfield is not controlling in the case at bar.

The thrust of the respondent’s arguments are, first, the actor’s intent is irrelevant, since the words “intent,” “intends,” or “intentionally” are not expressly stated in the statute and since the element of intent is not referred to in the statute.

The respondent argues, second, (following the Mansfield case) that the Legislature intended that the school investigator’s duty was not to pass judgment upon the reasonableness of the receiver’s perception of the actor’s motivation, but merely to look to whether the receiver felt harmed or threatened (i.e., the impact which the receiver alleges), regardless of the actor’s intent.

I perceive several flaws in the respondent’s arguments. First, while the statute contains the phrase “reasonably perceived,” the respondent simply glosses over the word “reasonably” and merely assumes that J.G.’s perception of Wehbeh’s words was a

reasonable perception. Apparently, the reason for this approach is the respondent's belief that the statute cloaks the complainant-victim with the authority to determine whether his perception is reasonable. This is a subjective standard and, as will be demonstrated below, it is not justified by the wording of the statute.

Second, the statute's second paragraph is introduced by the conjunctive phrase "and that." The statute's second paragraph, referencing an actor's conduct (here, Wehbeh's words) contains the phrase "a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student." The Respondent's argument, as well as the Superintendent's March 14, 2018, letter both ignore the statute's second paragraph. (Resp.'s Ex. G.) The respondent also failed to address the inclusion of the word "know" in the statute and the support that word lends to the petitioner's argument. As will be demonstrated below, the concept of knowledge, referred to in the statute, is linked to the concept of intent.

Third, the respondent's position is that the victim's perception subjectively governs the meaning of the actor's conduct. However, the wording of the statute makes it clear that the Legislature expressly adopted the standard of the reasonable person, which is an objective standard, for determining whether the receiver's perception of the actor's conduct was accurate or inaccurate.

Basically, the Respondent's argument is that the actor's intent is irrelevant and that it is only the impact of the actor's words on the receiver that decides the question of whether an act of HIB has occurred. This interpretation of the statute means that once an actor makes a statement to a student (like Dr. Wehbeh recommending to J.G. that she should not enroll in AP chemistry), then the actor will be strictly liable for the content of her statement and will be found to have committed an act of HIB (i.e., of being a bully with its attendant stigma and consequences) if the student subsequently claims to have been offended or harmed by the actor's statement (the advice not to enroll in the course). Under this interpretation it would not matter at all if the actor's (teacher's) motives or intent were completely free of any degree of malice. Under the respondent's interpretation of the statute (referencing the Mansfield case) "the statute focuses on the

impact of [the actor's] A.K.'s conduct on [the receiver] N3 and what N3 reasonably perceived." If This is so, this means that there is no "reasonable person" test to serve as a check on whether a receiver in N3's position reasonably perceived that he or she was harmed or threatened. Relying on Mansfield, the respondent's interpretation of the statute means that if the student *actually feels* threatened or harmed by the actor's words or other conduct, it is, per se, a reasonable perception, HIB is established. Under the respondent's interpretation, the receiver's perception would be a reasonable perception because the impact on him/her was created by the actor's words regardless of the actor's intent. This means that the statute makes HIB a strict liability offense. I **CONCLUDE** that there is no reasonable indication that the Legislature intended to make HIB a strict liability offense.

#### Analysis of the definition of HIB found in N.J.S.A. 18A:37-14

As noted above, the definition of Harassment, Intimidation and Bullying set forth in N.J.S.A. 18A:37-14 was re-defined in 2010. [In the following recitation (the "Tribunal's recitation") of the definition, I have added bold print, brackets, numbers, and italics for the purpose of making the analysis of the statute's elements easier to comprehend. I have also employed, throughout this writing, the terms "actor" and "receiver" to denote, respectively, the alleged bully and the alleged victim, the one who receives harm from the bullying. The addition of bold print, brackets, numbers, and italics will be referred to in the "One Additional Observation" section of this Initial Decision.] The 2010 law refined the definition of HIB to include:

[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 **[1A]** *reasonably perceived* as being **[1B]** *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*, **[2]** that takes place on school property, at any school-sponsored function, on a school bus, or takes place off school grounds as provided for in N.J.S.A. 18A:37-15.3, **[3A]** that substantially disrupts or

interferes with the orderly operation of the school or **[3B]** the rights of other students **and that**:

- [4]** a. a *reasonable person* should *know*, under the circumstances, will have the *effect* of physically or emotionally harming a student or damaging a student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
- [5]** b. has the effect of insulting or demeaning any student or group of students; or
- [6]** c. creates a hostile educational environment for the student by **[6A]** interfering with a student's education or **[6B]** be severely or pervasively causing physical or emotional harm to the student.

[N.J.S.A. 18A:37-14 (emphasis added).]

The above-mentioned definition of HIB is part of a statute that prohibits and seeks to eradicate the despicable conduct commonly referred-to as "bullying," while not infringing or chilling the rights of people whose conduct (physical acts, gestures and speech) is innocent, legitimate and protected.

N.J.S.A. 18A:37-14 seeks to set forth a prohibition against harmful conduct (whether physical acts, gestures or words) in the educational environment. In doing so, the statute employs a variety of words and phrases in its attempt to identify instances of conduct that are harmful. The statute proscribes gestures, physical acts or words which are

*"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 . . . and that a *"reasonable person" 'should know' . . . will have the effect of physically or emotionally harming a student . . . or placing a student in reasonable fear of physical or emotional harm . . . ."*

These words and phrases will be analyzed below.

## The Concept of Harmful Conduct

Harmful conduct occurs: (i) when the actor's gestures, physical acts or words are motivated by one or more of the receiver's distinguishing characteristics and reasonably perceived by the receiver as harmful and threatening; and (ii) when a reasonable person in the same or similar circumstances in the actor's position should know that his or her gestures, physical acts or words will have the effect of harming a student or placing the student in reasonable fear or physical or emotional harm; and (iii) when the actor's gestures, physical acts or words have the effect of insulting or demeaning a student or group of students; or (iv) when the actor creates a hostile educational environment for a student by interfering with the student's education or by severely or pervasively causing physical or emotional harm to the student.

The mechanism set forth in the statute to differentiate harmful conduct (that which harasses, intimidates or bullies) from innocent conduct is one of cause and effect. If the actor's conduct is demonstrably harmful or threatening, it is the cause; and if the receiver reasonably perceives the harmful conduct as harmful or threatening, it is the effect. When both cause and effect are present, then the statute has been violated. In the absence of one or the other, then the statute has not been violated. The issue of the reasonableness of the perception will be addressed below.

## The Concept of Reasonable Perception

We turn now to an examination of the phrase "reasonably perceived" as it appears in the first paragraph of N.J.S.A. 18A:37-14.

If, in the first paragraph of the statute, the word "perceived" stood alone in the text (i.e., without the adjective "reasonably" present to modify it) the statute would establish a purely subjective standard by which to judge whether the actor's gesture, physical act or words constituted an occurrence of HIB. Under such a subjective standard, any gesture, physical act or words which the receiver perceives to be disparaging or threatening and which has been motivated by his or her distinguishing

characteristics would be all that is needed to establish an occurrence of HIB. Under such a subjective standard, the school authorities, the Board of Education, or the Commissioner would be compelled to conclude that the statute was violated. The argument offered by the respondent would make sense only if the word “perception” stood alone. However, this is not what the Legislature intended because the Legislature used the word “reasonable” to modify the word “perceived.”

The word “perceived” does not stand alone in the text. It is modified by the word “reasonably.” As used here, the word “reasonably” denotes a limitation. The use of the word “reasonably” limits the ability of the receiver to assess the actor’s action (gestures, physical acts or words) on a purely subjective basis. Before an occurrence of HIB can be established, it must be demonstrated that the receiver’s perception of harm or a threat was reasonable.

The use of the word “reasonably” as the modifier of the word “perceived” and the statute’s employment of the term “reasonable person” in its second paragraph (N.J.S.A. 18A:37-14a) make it clear that the standard for assessing the actor’s conduct is an objective standard, not a subjective standard. In other words, the applicable standard is that of the “reasonable person.”

The word “motivated” and the phrase “reasonably perceived” are closely connected in the statute. The receiver’s “reasonable perception” refers to his or her assessment of the actor’s apparent motivation in making the gesture, performing the physical act or saying the words. As already discussed, a plain reading of the statute requires that the receiver’s perception must be a reasonable one. The word “motive” or “motivation,” by definition, refers to what tempts or impels the actor to act. The statute looks to the actor’s motive and sets it against the background of the receiver’s set of distinguishing characteristics.

In order to be sure that a receiver’s perception qualifies as a reasonable perception, a reviewing court must be reasonably certain that the receiver accurately assessed the actor’s motivation. In other words, the Tribunal in an HIB case must be

equipped with some way to verify the receiver's accusation against the actor. The way to test the veracity of the receiver is to resort to the standard of the reasonable person.

### The Statute's Employment of the Reasonable Person Standard

The statute's use of the term "reasonable" in its first paragraph signals that the standard that a court must use to determine the accuracy of the receiver's perceptions is that of the reasonable person. It follows that when receiver's perception comports with how a *reasonable person* would assess the actor's conduct, then his assessment is accurate. If the receiver accurately assesses both the actor's motive and the presence of a real threat or insult to his or her physical or emotional safety, then and only then, is his or her perception a *reasonable* perception of an improper motivation, and a threat of harm, etc.

The concept of the reasonable person has its origins in the law of torts. Cf. William L. Prosser, *The Law of Torts*, West Publishing Co., 4th Ed. (1971) pp. 149-52. In tort law it is useful in determining whether a defendant has acted reasonably. In criminal law it is useful in determining whether self defense is a viable defense. In contract law it is useful in determining contractual intent. In the statute under discussion in this case, the Legislature has expressly incorporated the standard of the reasonable person to determine the reasonableness of the receiver's perception and as a measure of the actor's awareness of the probable consequences of his acts, gestures, or words.

After introducing the standard of the reasonable person in its first paragraph, the statute reiterates its use of the reasonable person standard in its second paragraph. This underscores the Legislature's intention to utilize the reasonable person standard in the interpretation and in the application of this statute. The statute states in its second paragraph that a reasonable person (the actor) should be able to *know* what gestures, physical acts, or words will have the effect of harming a student. The statute's use of the word "know" raises another issue—the meaning of the word. As will be seen below, the discussion of the word "know" and the phrase "should know," inevitably leads to a discussion of the concept of "intent."

The concept of intent is the core of petitioner's Petition of Appeal, Count One. The petitioner's argument is that intent is a necessary element of HIB. The respondent BOE's argument is that intent is not an element of HIB and that HIB can be committed unintentionally.

### The Concepts of Knowledge and Intent

Now that it has been established that the statute employs the standard of the reasonable person, we will move on to an analysis of what the phrase "should know" means, as set forth in the second paragraph of N.J.S.A. 18A:37-14. The second paragraph refers to what a reasonable person "should know" about the likely consequences of his conduct. The text of the statute says that a reasonable person:

should know [that his conduct], under the circumstances, will have the effect of physically or emotionally harming a student . . . or placing a student in reasonable fear of physical or emotional harm to his person . . . .

The first paragraph of the definition of HIB refers to gestures, physical acts, and words that are reasonably perceived as being motivated by the receiver's distinguishing characteristics. In the second paragraph of the definition of HIB it refers to what "a reasonable person [in the position of the actor] should *know*, under the circumstances, *will have the effect* of physically harming a student . . . or placing a student in reasonable fear of physical or emotional harm." The word "know" means "to have knowledge" or "to be aware." See Merriam-Webster Dictionary. As used in the statute, the term "should know" denotes conscious awareness of one's actions because it is linked to the phrase "will have the effect of physically or emotionally harming a student." This means that the actor has the capacity to know what will result from his or her actions and therefore it excludes accidental or unconscious insults or other *unintended* consequences.

This brings us to the issue of whether "intent" is included in the statute. Intent is the state of a person's mind that directs his actions toward a specific object. See The



Random House College Dictionary, Revised Edition. The word “intent” expresses mental action and shows the presence of a person’s will in the act. See Black’s Law Dictionary, West Publishing Company, Revised Fourth Edition. The statute must be read in its entirety. The first two paragraphs of the statute must be read together. A plain reading of the statute shows that the Legislature incorporated the element of intent by using the phrase “should know” and by connecting the phrase “should know” to the phrase “will have the effect.” When the statute requires that the actor must or should “know” that his gestures, physical acts, or words “will have the effect of . . . harming a student,” then the statute is referring to and focusing on the actor’s *intent*. In other words, a plain reading of the statute shows that it contains the requirement that the actor’s intent must be demonstrated in order to establish an occurrence of HIB.

From the foregoing analysis, I **CONCLUDE** that the Legislature, by using the words “reasonable person” in the statute, incorporated the objective, reasonable person standard for distinguishing harmful conduct from innocent conduct.

I **CONCLUDE** that the actor’s intent is an element in the statute.

I **CONCLUDE** that in order to establish an occurrence of HIB, it is necessary that the actor’s intent to harm or to threaten or to disrupt must be demonstrated.

I **CONCLUDE** that an occurrence of HIB cannot occur in the absence of intent.

I **CONCLUDE** that an actor cannot “unintentionally” commit an act of HIB.

I **CONCLUDE** that by linking the phrase “should know” to the phrase “will have the effect” the Legislature meant that before an act of HIB can be established it must be demonstrated that the actor had a reasonable degree of awareness that his or her gestures, physical acts, or words were likely to cause harm to a student or instill a reasonable fear of harm in a student.

I **CONCLUDE** that because the Superintendent's letter dated March 14, 2018, states that Wehbeh "*unintentionally* engaged in bullying behavior" and because Wehbeh "had no awareness of the potential negative impact on the victim," it means that the intent required for a violation of N.J.S.A. 18A-37-14 was lacking. (Petr.'s Ex. A and Resp.'s Ex. G.)

Accordingly, for the aforesaid reasons, the respondent's motion for summary decision is denied and the BOE's determination that Wehbeh violated the HIB statute must be, and hereby is, **REVERSED**.

Accordingly, for the aforesaid reasons, the petitioner's motion for summary decision on Count One of her Petition of Appeal must be, hereby is, **GRANTED**.

#### One Additional Observation

Although it was not directly argued in either side's papers, the Tribunal finds it necessary to address another aspect of this case.

In the Superintendent's letter dated March 14, 2018, Wehbeh was told that "the district found evidence of the investigated act of harassment, intimidation and bullying." (Petr.'s Ex. A and Resp.'s Ex. G.) Using underlining, Superintendent stated that "Wehbeh's conduct met the following *elements* of the definition of HIB set forth in N.J.S.A. 18A:37-14. Specifically, the Superintendent stated:

According to the definition of HIB, the incident met the following: Harassment, Intimidation or bullying means any gesture, any written, verbal or physical act, or any electronic communications, whether it be single or a series of incidents that:

- (i) is reasonably perceived as being motivated by any actual or perceived characteristic [such as] mental, physical or sensory disability . . .
- (ii) [that] "takes place on school property . . .

(iii) [that] “substantially disrupts or interferes with the orderly operation of the school or the rights of other student(s).”

It is noteworthy that the evidence referred to by the Superintendent supported elements contained in the statute’s first paragraph but does not mention whether the evidence supports any of the elements contained in the statute’s second paragraph. Utilizing this writer’s recitation of the statute employing bold print, brackets, and italics, in the section of this Initial Decision titled “Analysis of the statutory definition of HIB found in N.J.S.A. 18A:37-14,” found on pages 18 to 19, we see that that first paragraph of the statute contains elements [1A], [1B], [2], [3A], and [3B]. The second paragraph of the statute contains elements [4], [5], [6], [6A], and [6B]. The underlined portions of the Superintendent’s March 14, 2018, letter, cited above, cover only elements [1A], [1B], [2], [3A], and [3B]. They do not cover elements [4], [5], [6], [6A], and [6B].

Referring again to the Superintendent’s March 14, 2018, letter, it subsequently informs Wehbeh that she “unintentionally engaged in bullying behavior and had no awareness of the potential negative impact on the victim.”

The letter made no other findings. In the same paragraph, immediately following these words, the Superintendent wrote *dicta* (i.e., “[t]hat the effects of HIB can substantially disrupt or interfere with the rights of a student”), which is clearly not a set of findings.

It is noteworthy that the Superintendent’s March 14, 2018, letter does not state that Wehbeh had substantially interrupted or interfered with J.G.’s rights. It did not state that Wehbeh interfered with J.G.’s education. It did not state that Wehbeh had created a hostile educational environment. It did not state that Wehbeh had caused physical or emotional harm to J.G. Indeed, the letter’s *findings* were not as broad as the *opinions* expressed by the investigator in the HIB Summary. (Petr.’s Ex. B and Resp.’s Ex. C).

Had the Superintendent intended to adopt all the investigator's opinions, he would have said so.

The Superintendent did not cite the text of the second paragraph of the statute (elements [4], [5], [6], [6A], and [6B]) and did not underline them as he did with elements [1A], [1B], [2], [3A], and [3B]. If he had done so, then he would have been stating his conclusion that the evidence demonstrated that Wehbeh was aware of (i.e., had knowledge of) the effect of her words. If Wehbeh had been aware of the potential effects of her words, then the Superintendent would not and could not have characterized Wehbeh's conduct as "unintentional." The fact that the Superintendent did not cite and underline elements from the second paragraph of the statute indicates that he did not consider the elements of the second paragraph to have been satisfied by the evidence.

From the foregoing, I **CONCLUDE** that the contents of the March 14, 2018, Superintendent letter are inadequate to support a finding of HIB. Since it appears that the BOE's decision was based only upon the findings set forth in the letter, then the BOE's decision was not based on the entire definition of HIB set forth in the statute and therefore it must be, and hereby is, **REVERSED**.

### **ORDER**

Based upon the foregoing, I hereby **ORDER** that respondent's Cross-Motion for Summary Decision is **DENIED**; and I further **ORDER** that petitioner's Motion for Summary Decision is **GRANTED** and that the BOE's determination that Wehbeh violated the HIB statute is hereby **REVERSED**.

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.



December 24, 2019 \_\_\_\_\_  
DATE

\_\_\_\_\_  
**JOHN P. SCOLLO, ALJ**

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_  
db

## **APPENDIX**

### **List of Moving Papers**

#### **For Petitioner:**

Motion for Summary Decision

Opposition Papers to Cross-Motion

#### **For Respondent:**

Opposition to petitioner's Motion for Summary Decision

Cross-Motion seeking Summary Decision