

New Jersey Commissioner of Education**Decision**

G.C., on behalf of minor child, B.C.,

Petitioner,

v.

Board of Education of the Township of Lacey,
Ocean County,

Respondent.

Synopsis

Petitioner disputed the respondent Board's finding that her son, B.C., committed an act of harassment, intimidation or bullying (HIB) against a fellow student pursuant to New Jersey's Anti-Bullying Bill of Rights Act, *N.J.S.A. 18A:37-13.2 et seq* (the Act). After an investigation by the school's anti-bullying specialist, the Board determined that B.C. had committed an act of HIB against a transgender classmate (T1) when he commented that "girls should not be allowed to use the boys' bathroom" while both he and T1, who was previously known as female and now identifies as male, were in the boys' bathroom. The Board asserted that B.C.'s conduct satisfied all of the elements of the statutory definition of HIB under the Act. The petitioner contended that B.C. was simply stating an opinion, and that the Board's action was arbitrary, capricious, and/or unreasonable. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; an action by a board of education is entitled to a presumption of correctness unless it is proven to be arbitrary, capricious or unreasonable; under the Act, "harassment, intimidation, or bullying" is broadly defined as any gesture, any written, verbal, or physical act, or any electronic communication that is reasonably perceived as motivated by any actual or perceived distinguishing characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical, or sensory disability, that takes place on school property and substantially disrupts the orderly operation of the school; in the instant case, the record reflects that B.C. did not deny making the statement that "girls should not use the boys' bathroom," but characterized his comment as simply stating an opinion. The ALJ concluded B.C.'s comment was reasonably perceived as motivated by T1's gender identity, a protected characteristic under the Anti-Bullying Act; further, the Board's determination that B.C.'s conduct met the statutory definition of HIB, and that B.C. committed an act of HIB against T1, was not arbitrary, capricious, or unreasonable. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination pursuant to the Act. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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.

New Jersey Commissioner of Education

Final Decision

G.C. on behalf of minor child, B.C.,

Petitioner,

v.

Board of Education of the Township of
Lacey, Ocean County,

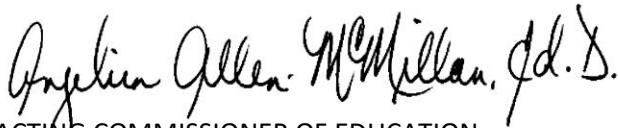
Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Upon review, and for the reasons thoroughly detailed in the Initial Decision, the Commissioner concurs with the Administrative Law Judge that the Board's decision that B.C. committed an act of harassment, intimidation, and bullying was not arbitrary, capricious, or unreasonable.

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.¹


ANGELINA ALLEN McMILLAN, J.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 19, 2022

Date of Mailing: September 19, 2022

¹ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A. 18A:6-9.1*. Under *N.J.Ct.R. 2:4-1(b)*, a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10910-20

AGENCY DKT. NO. 225-10/20

G.C. ON BEHALF OF MINOR

CHILD, B.C.,

Petitioner,

v.

TOWNSHIP OF LACEY, BOARD OF

EDUCATION, OCEAN COUNTY,

Respondent.

Joseph J. Dochney, Esq., for petitioner (Law Offices of Joseph J. Dochney, LLC,
attorneys)

Geoffrey N. Stark, Esq., for respondent (Capehart Scatchard, P.A., attorneys)

Record Closed: June 20, 2022

Decided: August 10, 2022

BEFORE **MARY ANN BOGAN**, ALJ:

STATEMENT OF THE CASE

In this matter, petitioner G.C.,¹ on behalf of her son, B.C., appeals the decision of respondent Board of Education of the Township of Lacey (Board) to the Commissioner of Education that B.C. committed an act of harassment, intimidation, or bullying (HIB) against a transgender classmate in violation of the Anti-Bullying Bill of Rights Act (Anti-Bullying Act), N.J.S.A. 18A:37-13 et seq. Specifically, the Board determined that B.C.'s utterance to the effect that "girls should not be allowed to use the boys' bathroom" while both he and T1, who was born female but identifies as male, were in the boys' bathroom satisfies all of the elements of the statutory definition of HIB under the Anti-Bullying Act. Petitioner contends that the Board's action was arbitrary, capricious, and/or unreasonable.

PROCEDURAL HISTORY

On October 16, 2020, G.C. filed a Petition of Appeal of the Board's HIB determination with the Commissioner of Education. On November 9, 2020, the Board filed an answer, and thereafter the Commissioner transmitted the matter to the Office of Administrative Law (OAL), where it was filed on November 12, 2020, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On March 24, 2022, the Board filed a motion for summary decision upholding the Board's HIB determination and dismissing G.C.'s appeal, and G.C. thereafter filed opposition to the motion. The Board held that B.C. committed HIB by "commenting to the effect that 'girls should not be allowed to use the boys' bathroom' while in the bathroom and in the presence of a transgender individual who identifies as a boy . . . because there is no dispute as to the material facts of the case, and because the Board did not act in an arbitrary, capricious, or unreasonable manner when it found [B.C.'s] admitted actions to be a violation of the [HIB] policy, and thereby constitute a[n] HIB violation." In opposition, G.C. maintains that B.C. did not commit an act of HIB against T1 because, although B.C.

¹ Students and parents will be referred to by initials or pseudonyms.

admits that he said girls should use the girls' bathroom, he was "stating his opinion" and "believed that T1 was a girl and was unaware of any gender transition."

FACTUAL DISCUSSION

Based upon the credible documentation submitted by the parties, I **FIND** the following **FACTS**:

In 2014, the Board adopted Policy #5512—Harassment, Intimidation, and Bullying, which prohibits HIB in accordance with the Anti-Bullying Act. (R-8.) In 2015, the Board adopted Policy #5756—Transgender Students, under which "[a]ll students are entitled to have access to restrooms, locker rooms, and changing facilities in accordance with their gender identity[.]" (R-7.)

On October 16, 2019, Gregory Brandis, the principal of Lacey Township High School, received an HIB complaint via email from the mother of T1, who was then a sophomore at the school. (P-E.) In the email, T1's mother wrote:

Once again I'm emailing to report an incident of harassment [T1] experienced at school today. A group of boys outside the bathroom stall he was in were calling him a girl and saying he should use the girl's bathroom. Naturally he was afraid to come out since there's only one of him, so he waited until they left and doesn't know who they were. I don't know what else to say at this point. It's only two months into the school year and I'm literally exhausted and broken from watching my once happy child become someone who is sad and anxious daily. My heart breaks each morning as I watch him leave for school knowing he's filled with dread, knowing that he isn't going to be safe there.

[bid.]

On October 17, 2019, Principal Brandis spoke with T1's mother about the incident. (P-A.) Because T1's mother could not identify the alleged aggressors, the assistant principal of the high school, Timothy Dowd, reviewed surveillance video, which showed that B.C., who was also then a sophomore, and another student, B.C.'s friend R.C., exited

the boys' bathroom just prior to T1. (P-G.) Principal Brandis directed Craig Cicardo, the high school's anti-bullying specialist, to conduct an HIB investigation. (P-A.) As part of the investigation, Mr. Cicardo interviewed B.C. and R.C. about the alleged incident. (P-H; P-I.) In a written statement, B.C. explained that, while he was in the boys' bathroom, he saw T1 waiting to use a stall. As B.C. went "to use the [urinal] I look back and he [was] already walking into the stall." (P-H) Then, while T1 was in a stall, B.C. "said to MYSELF 'Girls should not be allowed to use the bathroom.'" (Ibid.)

In his written statement, R.C. confirmed B.C.'s version of events. (P-H; P-I.) According to R.C., B.C. "said why is she in here, there's a girl bathroom. I [told] [B.C.] to chill and just leave." (P-I.) R.C. further stated that B.C. "meant to mumble those words," and "I told [B.C.] to knock it off and just to leave the bathroom." (Ibid.) T1 was not interviewed during the course of the investigation. However, Assistant Principal Dowd spoke with B.C.'s father about the incident. (P-A.)

As a result of his investigation, Mr. Cicardo concluded that B.C. committed an act of HIB against T1. (P-A.) In his incident report, Mr. Cicardo listed "Behavioral Observations" as "Embarrassing, Insulting Remarks, Socially Excluding" and listed "Motivational Characteristics" as "Gender Identity and Expression." (Ibid.) Mr. Cicardo determined that B.C.'s statement was "Reasonably perceived as motivated by actual or perceived characteristic" because "(T1) was referred to as 'Girl' and he identifies as a male"; the statement took place on school property; there was "Substantial disruption or interference with orderly operation of school or the rights of other students" because "Law requires those who identify as Transgender must have the right to use the Facilities of Their Gender Identification"; there was "Physical or emotional harm to student or property" and "Reasonable fear of harm to student or property" because "(T1) was emotionally hurt as a result of the incident"; the statement was "Insulting or demeaning to student/group" because "(T1) identifies as male"; and the statement "Created hostile educational environment" because "(T1) reported to his mom that he was afraid to come out of the bathroom stall after the comment(s)." (Ibid.) While Mr. Cicardo concluded that B.C. engaged in HIB, he determined that B.C.'s "HIB behavior" was "unintentional." (Ibid.)

In a letter dated November 25, 2019, Principal Brandis informed B.C.'s parents as follows:

The district found evidence your child committed the following act(s) of [HIB]: The incident was reported by email from T1's mother. T1 was in a boy's bathroom and other students were outside telling T1 he should use the girl's bathroom, not the boy's bathroom.

The investigation results have been reported to the Board of Education.

As a consequence of the incident, B.C. was referred to the school [student assistance coordinator] for understanding the issue of Gender Identity.

[B.C.'s parents could request a hearing before the Board to contest the HIB determination.]

[P-J.]

In a December 20, 2019, letter to Principal Brandis, counsel for B.C.'s parents, Joseph J. Dochney, stated that the parents "are confused" by his November 25, 2019, letter because the principal's letter "does not specify what acts or conduct was done by their son" and "refers to apparent comments by 'other students' to 'T1'." (P-K.) Counsel requested further information about the incident and information concerning "[d]ates and procedures by which the school disseminated information regarding HIB or LGBTQ information and/or policies to the student body" and "[w]hat education was provided to students prior to this incident regarding transgenders and their rights to bathrooms/locker rooms/changing facilities, etc. of their choice." (Ibid.) Counsel stated that "[a]t this point, we are not requesting an appeal," but instead "investigating the incident [because] we are very confused as to what the actual actions were that apparently led someone to any conclusion of impropriety or violation of HIB." (Ibid.)

Subsequently, B.C.'s parents requested a Board hearing, which was ultimately held on July 20, 2020.² Prior to the hearing, the Board provided B.C.'s parents with certain requested information, including the October 16, 2019, email from T1's mother to Principal Brandis; B.C.'s and R.C.'s written statements; and Mr. Cicardo's HIB report. (P-L.) Upon receipt of that information, Mr. Dochney asked the Board's counsel if the Board would provide the other information specifically requested in his December 20, 2019, letter. (Ibid.) In response, the Board's counsel informed Mr. Dochney that "it is our position that you have those documents to which your clients are entitled, namely the HIB investigation report," and that "[t]here is no further discovery to which you are entitled." (P-M.)

By letter dated July 22, 2020, the superintendent of schools of the Lacey Township School District, Vanessa P. Clark, Ph.D., informed B.C.'s parents that, "[a]fter weighing all of the information presented by you and your attorney, as well as the Administration," the Board voted 3-3 to overturn the Administration's finding "that [B.C.'s] comment to a transgender student in the boy's bathroom to the effect that girls should not be allowed to use the boy's bathroom constituted an act of HIB under [the Anti-Bullying Act] and Board Policy 5512," and, therefore, their "appeal of the initial HIB finding is denied, and the decision that a[n] HIB violation occurred is affirmed." (P-N.)

In her letter, Superintendent Clark detailed the procedural history of the matter. She stated that the hearing was held on July 20, 2020, and "took place in executive session and lasted over one hour." While T1's parents "were invited to the Board hearing," they "chose not to attend." However, at the hearing, several people testified in support of B.C.'s "character and reputation in the community" and B.C. testified on his own behalf. B.C. "admitted making the comment regarding the transgender student but claimed it was said only to a friend of his in the bathroom, that he did not mean to hurt the student and that he was sorry." (Ibid.)

² In a letter to B.C.'s parents dated July 22, 2020, Lacey Township School District superintendent Vanessa P. Clark, Ph.D., stated that "the scheduling of your appeal . . . [was] delayed over several months" for various reasons, including the COVID-19 pandemic. (P-N.)

ARGUMENTS OF THE PARTIES

G.C. argues that there were certain procedural defects in the Board's handling of the HIB matter, specifically, that Principal Brandis' November 25, 2019, letter was somewhat vague by not specifically stating what B.C. himself was accused of having done, and instead describing the alleged act of HIB as, "T1 was in a boys' bathroom and other students were outside telling T1 he should use the girls' bathroom."

Further, G.C. argues that none of the papers indicate when or if the superintendent reported the HIB findings to the Board, and that the HIB report confusingly states that the HIB findings "will be affirmed at the 12/16/2019 Board meeting." The HIB report also does not state whether the investigation was completed within ten days of the initial complaint as required by the Anti-Bullying Act.

In her petition of appeal, G.C. alleges that "there is no clear evidence that B.C. had harassed, intimidated or bullied T1" because "[a]ny statements made by [B.C.] were his opinions directed to his friend" and "[h]e never addressed any personal comments to T1, nor did he intend to make T1 uncomfortable in any manner." (Petition of Appeal, ¶ 23.) G.C. further alleges that B.C. "did state his general opinion to his friend as they were leaving the bathroom," but that "[a]t the time, he had no knowledge that the person in the boy's bathroom identified as male, as all previous contact with T1 as a classmate indicated he was a female." (*Ibid.*) In the petition, G.C. takes issue with certain aspects of the school's HIB investigation. She alleges that "[t]here was never any conversation and/or written statements obtained from T1," and that T1's mother indicated that "a group of boys outside the stall had communicated directly with T1," but "B.C. denied any direct comments or name calling to T1" and "the investigation did not indicate if other boys had entered the bathroom after B.C. and his friend left[,] who may have been the actual culprits." (*Id.* at 11.) According to G.C., "neither the petitioner, nor any other boys[,] were ever identified by T1" and "T1 never reported the incident, was never interviewed[,] nor was there any determination that he was harmed." (*Id.* at 12, 21.)

G.C. further claims that "B.C. was not aware that transgender students were allowed to use the bathroom to which they identify," and that the school's "policy

pertaining to transgender students . . . was never properly disseminated to students or families.” (Id. at 21, 22.) However, G.C. admits that she was told that “the policy was included in the student handbook,” and that, although “the handbook was not distributed to the students,” it was “available online.” (Id. at 22.) As relief, G.C. seeks to “overturn the ruling that B.C. was guilty of a[n] HIB violation.” On November 9, 2020, the Board filed an answer to the petition.

In response, the Board states that “due to T1’s withdrawal from the District following this incident it was not possible for Mr. Cicardo to engage T1 or his parents in follow-up conversations.” (Answer at 11.) The Board also states that “in his written statement, B.C. admitted to making the offending comment in the course of speaking to [R.C.]” (Id. at 21, 23.) Finally, the Board states that its “policies regarding HIB (No. 5512) and transgender students (No. 5756) are publicly available on the District’s website,” and that “the policy on Transgender Students was first adopted on August 18, 2015, and later revised on April 15, 2019,” and denies that “the policy was never properly disseminated to students or families.” (Id. at 22.) As such, the Board “requests dismissing the Petition with prejudice.”

According to the Board, there is no dispute that B.C. made the statement about bathroom use by different genders and that he made the statement “in the presence of, and in reference to, a transgender student.” The Board argues that “[t]he fact that B.C. has claimed that he was only stating his opinion, or that he did not intend for T1 to hear the statement, are irrelevant to whether the statement constituted a[n] HIB violation.”

In its brief in support of its motion, the Board quotes the statutory definition of HIB and notes that “under the definition . . . comments, even isolated comments, motivated by a person’s gender identity constitute HIB.” However, in its brief, the Board neglected to address or apply to the facts of this case the several other elements of the statutory definition of HIB under N.J.S.A. 18A:37-14.

In her opposition brief, which is unaccompanied by a supporting affidavit or certification, G.C. reiterates many of the points she made in her petition. She maintains that B.C. did not commit an act of HIB against T1 because, although B.C. admits that he

said girls should use the girls' bathroom, he was "stating his opinion" and "believed that T1 was a girl and was unaware of any gender transition."

G.C. argues that the school's HIB investigation "was incomplete and inadequate," taking issue with the fact that only B.C. and R.C. were interviewed, and T1 was not interviewed. And although B.C. admits that he made a comment about bathroom usage in the presence of T1, G.C. casts doubt on whether B.C. was the student about whom T1's mother complained in her email to Principal Brandis. In particular, G.C. states that "it is noteworthy that no one seems to know the time in which the incident had occurred," and that "the District's understanding . . . that there were only [B.C., R.C., and T1] present in the bathroom at the time of the incident . . . is contradictory to the information provided in the initial e-mail [in which T1's mother wrote that "[a] group of boys outside the bathroom stall [T1] was in were calling him a girl and saying he should use the girl's bathroom"]. It appears that G.C.'s latter point is that two boys—B.C. and R.C.—does not make a "group." G.C. also questions the surveillance video reviewed by Mr. Dowd to identify B.C. and R.C. as the students in the bathroom with T1. According to G.C., she was never given an opportunity to review the video footage because the Board "indicated that it was no longer available[,] as it had been destroyed."³

G.C. also believes certain procedural deficiencies occurred after the district issued its HIB report. She states that the report "was apparently presented to the Board on November 21, 2019," but that it is not clear whether "the report was submitted or received by the Superintendent prior to this date." G.C. also thought the November 25, 2019, letter from Principal Brandis was "a little confusing" because he referred to "other students" when describing the incident and who was involved, and the HIB report "indicate[d] that the HIB violation will be 'affirmed' at the December 16, 2019, Board meeting." G.C. further contends that her husband, who is a teacher employed by the Board, met with Principal Brandis at the Board meeting on November 21, 2019, and the principal "assured him nothing was going to happen that night pertaining to the incident or his son," but that nonetheless "the Board had a closed meeting [that night] in which they determined that

³ Petitioner's counsel was informed by email sent from Board counsel that "the video of the hallway outside the bathroom was recorded over shortly after there was confirmation of the identities of the individuals involved in the incident and long before your request for preservation." (P-C.)

B.C. had violated the HIB policies and would be subject to sanctions.” G.C. also notes that, although B.C. was given a hearing before the Board on July 20, 2020, and was able to present his own testimony and that of others at the hearing, the Board provided “little discovery” in advance of the hearing.

G.C. argues that the Board’s decision was arbitrary, as it “ostensibly was based solely upon the HIB Incident Summary completed by Mr. Cicardo” and “the Incident Summary merely summarizes the law without applying it to the herein circumstances.” She maintains that the facts of this case do not meet the statutory definition of HIB because “[t]here was never any disruption of the orderly operation of school nor was anyone prohibited from using the boys’ room facilities.”

She further argues that B.C.’s statement was not motivated by T1’s gender identity because he was “unaware of any transgender status of T1,” and prior to the incident B.C. never received any information about the school’s bathroom policy for transgender students; that a reasonable person “could not have known under the circumstances that his opinion/remark would have caused any harm either physically or emotionally” because “[i]t was not directed at any specific group or necessarily at any individual” and “there is nothing to indicate that T1 heard any remark by B.C.”; and that “nothing in the investigation indicates that B.C.’s opinion as he was leaving the bathroom had caused the fear that was being expressed by T1” because “the e-mail indicates that the fear experienced by T1 on that day was caused by a ‘group of boys outside the stall’ and not by B.C.”

According to G.C., B.C. was exercising his right to free speech “by expressing an opinion to his friend, R.C., that girls should be using the girls’ bathroom,” and “this incident did not cause a disruption of school activities” or “prohibit the rights of any student, let alone T1.”

In reply, the Board argues that G.C. “attempts to muddy the waters of this case by pointing to alleged factual discrepancies which ultimately have no material bearing on this case.” According to the Board, “[t]here is no doubt B.C. made the offending comment” and “the law is clear: making a derogatory comment about a transgender student,

regardless of whether the commenter intended for the target to hear it, constitutes a violation of the HIB policy.” The Board also counters G.C.’s free-speech argument by stating that “B.C. simply does not have a constitutional right to engage in this type of HIB behavior in the school.”

LEGAL ANALYSIS

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, “[a] party may move for summary decision upon all or any of the substantive issues in a contested case.” N.J.A.C. 1:1-12.5(a). Such motion “shall be served with briefs and with or without supporting affidavits” and “[t]he decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b). When the motion “is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” Ibid.

An action by a local 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 a 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 Franklin Lakes, 2014 N.J. AGEN LEXIS 19 (February 24, 2014) (citation omitted), adopted, 2014 N.J. AGEN LEXIS 1137 (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., 2013 N.J. AGEN LEXIS 58 (March 11, 2013) (citing Campbell v. Dep’t of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, 2013 N.J. AGEN LEXIS 436 (April 25, 2013).

The Anti-Bullying Act 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.”⁴

N.J.S.A. 18A:37-13.1(f). Under the Act, “[h]arassment, intimidation or bullying” is defined as

any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, 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 “a procedure for prompt investigation of reports of violations and complaints.” N.J.S.A. 18A:37-15(b)(6). 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)(a). The investigation shall be conducted by a school anti-bullying

⁴ The Act was recently amended to add several other procedural requirements regarding HIB investigations. L. 2021, c. 338. However, the amendments became effective in 2022, and thus do not apply to this case, the facts of which occurred in 2019 and 2020.

specialist, but “[t]he principal may appoint additional personnel who are not school anti-bullying specialists to assist in the investigation.” Ibid. The investigation shall be completed within ten days of the initial HIB complaint. Ibid.

The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial action. N.J.S.A. 18A:37-15(b)(6)(b). In particular, “the superintendent may decide to provide intervention services, establish training programs to reduce [HIB] and enhance school climate, impose discipline, order counseling as a result of the findings of the investigation, or take or recommend other appropriate action.” Ibid.

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.” N.J.S.A. 18A:37-15(b)(6)(c).

The parents of the students involved in any alleged HIB incident “shall be entitled to receive information about the investigation, . . . including the nature of the investigation, whether the district found evidence of [HIB], or whether discipline was imposed or services provided to address the incident of [HIB].” N.J.S.A. 18A:37-15(b)(6)(d). The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Ibid. Any hearing shall be held in executive session to protect the identity of any students involved. Ibid. And “[a]t the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents[.]” Ibid.

A school board must issue a written decision at the first meeting after its receipt of the investigation report. N.J.S.A. 18A:37-15(b)(6)(e). The board may affirm, reject, or modify the superintendent’s decision. Ibid. The board’s decision may be appealed to the Commissioner of Education. Ibid.

As for G.C.’s arguments regarding certain procedural defects in the Board’s handling of the HIB matter, G.C. is correct that Principal Brandis’ November 25, 2019,

letter was somewhat vague by not specifically stating what B.C. himself was accused of having done, and instead describing the alleged act of HIB as “T1 was in a boys’ bathroom and other students were outside telling T1 he should use the girls’ bathroom.” Principal Brandis should have specifically informed B.C.’s parents that B.C. was the alleged perpetrator of an act of HIB, instead of generally referring to “other students.”

G.C. is also correct that none of the papers indicate when or if the superintendent reported the HIB findings to the Board, and that the HIB report confusingly states that the HIB findings “will be affirmed at the 12/16/2019 Board meeting.” This latter statement is troubling because it indicates that the affirmation of the HIB findings was a *fait accompli* before the Board even reviewed the findings.⁵ The HIB report also does not state whether the investigation was completed within ten days of the initial complaint as required by the Anti-Bullying Act.

While the Board should, in the future, be more precise in its recordkeeping and reporting in HIB matters, these procedural missteps by the Board do not amount to a violation of petitioner’s due-process rights.

It is clear from the record that B.C. and his parents were on notice of the HIB allegation specifically made against B.C., as the Board provided G.C. with a copy of the HIB report prior to B.C.’s hearing before the Board on July 20, 2020. And the fact is that B.C. was given a hearing before the Board to contest the HIB findings, and at that hearing he was represented by counsel and allowed to present his own testimony and the testimony of others in support of him. Thus, whatever procedural irregularities occurred in this matter were cured by the Board hearing on July 20, 2020.

⁵ The Board acknowledges in its motion brief that it “affirmed” the HIB findings at its December 16, 2019, meeting, but provided no documentation reflecting this outcome. It would seem that this should have ended the matter, as the Anti-Bullying Act requires the Board to affirm, reject, or modify HIB findings at its next meeting after receiving the report (November 21, 2019), and B.C.’s parents did not request a hearing to challenge the findings before the Board’s apparent December 16, 2019, vote.

Regardless, it further appears that the Board nonetheless decided to grant B.C. a hearing to challenge the HIB findings, and “re-vote” after B.C. presented his case. Because the Board reached a 3-3 vote after the July 20, 2020, hearing, the Board explained that this “mean[s] that reversal of the decision failed to garner a majority of the Board’s vote, and the finding was affirmed.”

There are two other procedural arguments raised by G.C. that must be addressed. First, G.C. argues that the Board's decision was arbitrary or unreasonable because T1 was never interviewed. However, the Anti-Bullying Act does not require that an alleged victim be interviewed as part of an investigation.⁶ While in certain HIB matters the failure of a school district to interview an alleged victim of HIB during the course of an investigation might be problematic and could result in the overturning of a school board's HIB decision as arbitrary or unreasonable due to the absence of such an interview, that is not the case here. Instead, the email from T1's mother and B.C.'s admissions are sufficient to uphold the Board's HIB decision even without an interview of T1.

Second, G.C. complains that the Board failed to provide her with certain discovery prior to the Board hearing. This complaint also misses the mark. The papers submitted in connection with the Board's motion in this matter indicate that the Board provided G.C. with the school district's HIB report in response to G.C.'s discovery requests ahead of the July 20, 2020, hearing, and that the Board informed G.C. that "no further discovery" would be forthcoming from the Board. In this regard, the Board did not act inappropriately. As the Commissioner has noted in other HIB matters, "[t]he procedures set forth in the Act are sufficient to allow all parties involved adequate notice and due process of law" and "the investigatory process and the HIB determination procedures [are not meant] to mirror discovery and trial-like adversarial proceedings[.]" L.K. & T.K. ex rel. A.K. v. Bd. of Educ. of Mansfield, 2019 N.J. AGEN LEXIS 345, at *5, n.4 (Apr. 22, 2019), aff'd in part and remanded on other grounds, 2020 N.J. Super. Unpub. LEXIS 2082 (App. Div. Nov. 2, 2020). B.C. and his parents got the school-board hearing to which they were entitled under the Anti-Bullying Act, and G.C.'s issue with the "limited discovery" she received before the Board hearing is misguided.

I **CONCLUDE** that the action taken by the District in response to the initial report by T1's mother was in compliance with the above requirements; although it is unclear

⁶ The Board represented that T1 left the school district after this incident, and even if the Board had wanted to interview T1, T1 was unavailable.

whether the Board provided all the information to which B.C. was entitled to prepare his defense before the Board, the mistakes were not prejudicial.

As to the substantive issues, the Commissioner has explained that under N.J.S.A. 18A:37-14, “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 Verona, 2020 N.J. AGEN LEXIS 50 (Feb. 4, 2020), at **7–8.]

In this matter, the Board is entitled to a summary decision upholding its determination that B.C. committed an act of HIB against T1 because there are no genuine issues of material fact with respect to whether B.C.’s conduct satisfies all of the elements of the definition of HIB under N.J.S.A. 18A:37-14.

First, To meet this statutory element, “the statute requires an analysis of how the actor’s motivation is perceived and whether that perception is reasonable.” Wehbeh, 2020 N.J. AGEN LEXIS 50, at *8. To determine whether the perception is reasonable, “the alleged victim [need not] 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.” Ibid., n.3.

Here, T1 could have reasonably perceived that B.C.’s comment was motivated by the fact that T1, who was originally known to B.C. as a female, now identifies as a male. In B.C.’s written statement during the HIB investigation, B.C. admitted that he saw T1 waiting to use a boys’ bathroom stall and then, while T1 was in the stall, B.C. “said to MYSELF ‘Girls should not be allowed to use the bathroom.’” While in her opposition brief, G.C. repeatedly attempts to raise doubts whether B.C. was properly identified as the person about whom T1’s mother complained in her email to Principal Brandis, the

circumstances—including time, place, and, most importantly, B.C.’s own admissions (and the concurring statements of R.C.)—remove all doubt that B.C. was the subject of the HIB complaint made by T1’s mother. Thus, it is clear that T1 heard B.C.’s comment in the bathroom and that T1 reasonably perceived B.C.’s comment as motivated by T1’s gender identity.

That B.C. claims he did not know that T1 identified as a male is inconsequential; the statute only requires that his comment was reasonably perceived as motivated by another person’s protected characteristic. Not only did T1 reasonably perceive B.C.’s statement as motivated by T1’s gender identity, but the papers also suggest that B.C.’s friend, R.C., did as well. R.C.’s written statement reflects that he knew T1 was allowed to be in the boys’ bathroom, telling B.C. after he made the comment “to chill and just leave” and “to knock it off and just to leave the bathroom.” In sum, the first element of the statutory definition of HIB is met because B.C.’s comment was reasonably perceived as motivated by T1’s gender identity.

Second, B.C.’s comment substantially disrupted or interfered with the orderly operation of the school and the rights of T1.⁷ This HIB requirement clearly reflects the free-speech concerns raised by the United States Supreme Court in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), in which the Court explained and held that, while students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” school authorities may circumscribe student speech that “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school” or “collid[es] with the rights of other students to be secure and to be let alone.” Id. at 506, 508, 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). This standard also puts to rest G.C.’s contention that B.C.’s “opinion” about bathroom usage was protected speech. Here, B.C.’s comment substantially interfered with T1’s right to use the boys’ bathroom and his right to be secure and to be let alone. As T1’s mother explained to Principal Brandis, T1 “was afraid to come out” of the bathroom stall after hearing B.C.’s comment.

⁷ It is not disputed that the incident in question took place on school grounds, another requirement under the Anti-Bullying Act.

B.C.'s comment meets the final requirement of the statutory definition of HIB because at least one of the three criteria enumerated in the Act regarding "the effect of the conduct" is satisfied here. With regard to the three statutory criteria for "the effect of the conduct," the Commissioner has explained that:

[A]n 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.

[Wehbeh, 2020 N.J. AGEN LEXIS 50, at **8–9.]

Here, Mr. Cicardo's HIB report, which the Board, in essence, affirmed through its 3-3 vote,⁸ determined that there was "Physical or emotional harm to student or property" and "Reasonable fear of harm to student or property" because "(T1) was emotionally hurt as a result of the incident"; that the statement was "Insulting or demeaning to student/group" because "(T1) identifies as male"; and that the statement "Created hostile educational environment" because "(T1) reported to his mom that he was afraid to come out of the bathroom stall after the comment(s)." Thus, the Board determined that B.C.'s comment met all three criteria for the "effect of the conduct" element of the HIB definition.

⁸ At the Board's July 20, 2020, meeting, a motion was made to "overturn the finding against [B.C.] in the October 2019 [HIB] case." As a result of the Board's 3-3 vote on the motion (one member absent), the motion was defeated and the superintendent's HIB finding was, in effect, affirmed.

Under the Anti-Bullying Act, "the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision," N.J.S.A. 18A:37-15(b)(6)(e). The Board's voting policy lists all actions, which by statute, specifically require a majority vote. The Anti-Bullying Act does not specifically require a majority vote like other education statutes.

These findings were reasonable because (1) a reasonable person should have known that commenting on a person's right to be in a bathroom while the person is actually in the bathroom would have the effect of emotionally harming that person by making the person feel unsafe or unwelcome; (2) B.C.'s comment had the actual effect of insulting or demeaning T1, as T1 reported to his mother; and (3) B.C. created a hostile educational environment for T1 by interfering with T1's education or by severely or pervasively causing physical or emotional harm to T1 because T1 was "afraid" to come out of the bathroom stall after hearing B.C.'s comment.

Based on the foregoing, I **CONCLUDE** that the Board's decision that B.C.'s conduct meets the statutory definition of HIB, and that B.C. committed an act of HIB against T1, was not arbitrary, capricious, or unreasonable.

Accordingly, I **CONCLUDE** that respondent's motion for summary decision should be granted.

ORDER

It is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED**.

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.

August 10, 2022

DATE



MARY ANN BOGAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

MAB/nn

APPENDIX

EXHIBITS

For Petitioner:

- P-A HIB Incident Summary
- P-B Petitioner's response to request for discovery
- P-C Petitioner's second response to discovery
- P-D Respondent's request for discovery
- P-E Email from T1's mother
- P-F Respondent's response to petitioner's request for discovery
- P-G Respondent's response to question 14
- P-H B.C. interview statement
- P-I R.C. interview statement
- P-J Principal's letter, dated November 25, 2019
- P-K Petitioner's attorney letter to Board, dated December 20, 2019
- P-L Petitioner's attorney email confirming receipt of documents, dated July 15, 2020
- P-M Petitioner's attorney email confirming no further discovery, dated July 17, 2020
- P-N Board's letter to B.C.'s parents notifying, dated July 22, 2022

For Respondent:

- R-1 Petition of Appeal filed by Petitioners, October 16, 2020
- R-2 Petitioners' responses to interrogatories, September 21, 2021

- R-3 Respondents' responses to interrogatories, May 5, 2021
- R-4 Petitioners' responses to deficiencies in prior interrogatory responses, November 22, 2021
- R-5 Respondents' responses to deficiencies in prior interrogatory responses, October 25, 2021
- R-6 HIB Report for Incident ID 6424
- R-7 Board Policy 5756 – Transgender Students

R-8 Board Policy 5512 – Harassment, Intimidation, and Bullying

R-9 Board Policy 5512.01 – Harassment, Intimidation, and Bullying