

New Jersey Commissioner of Education

Final Decision

N.M., on behalf of minor child, E.M.,

Petitioner,

v.

Board of Education of the Township of Voorhees,
Camden County,

Respondent.

Synopsis

Pro se petitioner appealed the finding of the respondent Board that her son – a student at Voorhees Middle School – was not the victim of harassment, intimidation, and bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A. 18A:37-13 et seq.* Petitioner alleged that E.M. was the victim of HIB when a student acted aggressively toward him during a kickball practice. Specifically, when E.M. told the second student, T.B., that he was in the wrong kickball line, T.B. pushed E.M. in the face and called him a “racist.” Petitioner subsequently notified the school about the incident, which triggered an HIB investigation. Petitioner alleged that three days after the kickball confrontation T.B. made a comment about E.M.’s size, calling him “small” for not playing tackle football, which N.M. claimed is a distinguishing characteristic under the HIB statute. The HIB investigation concluded that the incident was not motivated by a distinguishing characteristic and therefore did not constitute HIB. The school took remedial action against T.B. by separating him from E.M. and treating T.B.’s behavior as a code of conduct violation. The Board filed a motion for summary decision, which was opposed by petitioner.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner did not proffer any evidence about E.M.’s size relative to the other student involved, or any of his peers; petitioner failed to prove that T.B.’s conduct in the kickball line was motivated by E.M.’s size or any other distinguishing characteristic; therefore, the conduct did not satisfy the statutory definition of HIB. The ALJ concluded that the Board’s decision was not arbitrary, capricious, or unreasonable. Accordingly, the ALJ granted the Board’s motion for summary decision and dismissed the petition

Upon a comprehensive review, the Commissioner, *inter alia*, concurred with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination as the alleged action was not motivated by a distinguishing characteristic of E.M. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

<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>

305-23

OAL Dkt. No. EDU 10879-22

Agency Dkt. No. 295-11/22

New Jersey Commissioner of Education

Final Decision

N.M., on behalf of minor child, E.M.,

Petitioner,

v.

Board of Education of the Township of
Voorhees, Camden 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.

Petitioner challenges respondent Board's determination that an incident during which another student acted aggressively toward E.M. did not constitute harassment, intimidation, or bullying (HIB). When the other student joined E.M.'s class's kickball line, E.M. asked him why he was in line where he did not belong. Initial Decision, at 2. In response, the other student "pushed" E.M. in the face and called him a "racist." *Ibid.* At the conclusion of the investigation, during which both students were interviewed, the anti-bullying coordinator determined that the incident did not qualify as HIB because the other student's conduct was not motivated by a distinguishing characteristic. The Board agreed.

After this matter was transmitted to the OAL, the Board filed a motion for summary decision. Petitioner opposed the motion but failed to submit a responding affidavit as is required

by *N.J.A.C. 1:1-12.5(b)*. She asserted that, based upon comments the other student allegedly made to E.M. several days after the incident occurred, the other student's conduct toward E.M. in the kickball line was motivated by a distinguishing characteristic—E.M.'s small size—and therefore qualified as HIB.

Ultimately, the Administrative Law Judge (ALJ) determined that the material facts were not in dispute and granted the Board's motion for summary decision. The ALJ concluded that petitioner did not proffer any evidence about E.M.'s size relative to the other student involved, or any of his peers. Consequently, the ALJ held that petitioner failed to prove that the other student's conduct in the kickball line was motivated by E.M.'s size or any other distinguishing characteristic and that, therefore, the conduct did not satisfy the statutory definition of HIB. Thus, the ALJ concluded that the Board's decision was not arbitrary, capricious, or unreasonable.

Upon review, the Commissioner adopts the ALJ's Initial Decision as the Final Decision in this matter. Board action conducted within the ambit of its broad discretionary authority "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). The Commissioner may not substitute their judgment for that of the Board. *Schinck v. Bd. of Educ. of Westwood Consol. Sch. Dist.*, 60 *N.J. Super.* 448, 476 (App. Div. 1960).

As discussed in the ALJ's Initial Decision, the Anti-Bullying Bill of Rights Act (the Act), at *N.J.S.A. 18A:37-14*, defines HIB as:

[A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory

disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;

b. has the effect of insulting or demeaning any student or group of students; or

c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

In summary, a finding of HIB requires three elements under the Act. First, the conduct must be reasonably perceived as being motivated by any actual or perceived characteristic expressly identified in the statute, or by any other distinguishing characteristic.¹ Second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. Third, one of the three conditions set forth in subsections (a), (b), and (c) must be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex Cnty.*, Commissioner Decision No. 510-20 (Feb. 4, 2020).

The Commissioner concurs with the ALJ that the record is devoid of any evidence to satisfy the first statutory element, i.e., that the other student's conduct toward E.M. could be reasonably perceived as being motivated by any distinguishing characteristic, specifically E.M.'s size. Furthermore, the evidence fails to establish that the comments allegedly made to E.M. by the other student three days later regarding his small size were in any way related to the incident in

¹ The parties do not dispute that the conduct at issue took place on school property.

the kickball line. Moreover, the anti-bullying coordinator made findings during the investigation that E.M. “does not stand out as big or small” or “weak or isolated” among his peers. Initial Decision, at 3. Petitioner has failed to refute these findings. While certainly inappropriate, the other student’s conduct toward E.M. in the kickball line does not constitute HIB under the Act.² See *K.L. v. Evesham Twp. Bd. of Educ.*, 423 N.J. Super. 337, 351 (“[A]ggressive conduct without identifiable motivation[] does not come within the statutory definition of bullying.”). Thus, the Commissioner concurs with the ALJ that the Board’s determination declining to find that a HIB incident occurred 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.³


ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2023
Date of Mailing: October 18, 2023

² As noted in the Initial Decision, the Board disciplined the other student for his conduct as it constituted a Code of Conduct violation and ensured that the children were separated.

³ 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 10879-22

AGENCY DKT. NO. 295-11/22

N.M., ON BEHALF OF MINOR

CHILD, E.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF VOORHEES,

CAMDEN COUNTY,

Respondent.

N.M., on behalf of E.M., petitioner, pro se

Alicia D'Anella, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: September 1, 2023

Decided: September 7, 2023

BEFORE **SARAH H. SURGENT, ALJ:**

STATEMENT OF THE CASE

Petitioner N.M., on behalf of her minor child, E.M., contends that the Board of Education of the Township of Voorhees, Camden County (Board) erred in finding that

E.M. was not a victim of harassment, intimidation, or bullying (HIB) by a fellow classmate. N.M. maintains that the Board's decision was arbitrary, capricious, and unreasonable, which the Board denies.

PROCEDURAL HISTORY

N.M.'s petition of appeal was filed with the Commissioner of Education on November 23, 2022. It was transmitted to the Office of Administrative Law (OAL) on December 6, 2022, to be heard as a contested case. On March 1, 2023, the Board filed a motion for summary decision, pursuant to N.J.A.C. 1:1-12.5. On April 18, 2023, N.M. filed her opposition to the motion with exhibits, but with no responding affidavits, contrary to N.J.A.C. 1:1-12.5(b). The Board filed its reply on June 30, 2023. After receiving missing supplemental exhibits, (C-1; C-2), the record closed on September 1, 2023.

FACTUAL DISCUSSION AND FINDINGS

Having reviewed the parties' documents, these salient points are undisputed. I therefore **FIND** the following as **FACT**:

On May 20, 2022, E.M. was a student at Voorhees Middle School (School). E.M. and his classmates were playing kickball outside and were lined up in two lines. T.B., the alleged perpetrator, joined E.M.'s line, where he did not belong. E.M. told T.B., in essence, that he was in the wrong line, and T.B. got upset and pushed, slapped, or "smacked" E.M. in the face and called E.M. a "racist." E.M. reported the incident to his mother, N.M., who then sent the School an email replete with hearsay upon hearsay, (R-A), which launched an HIB investigation into the incident.

On May 23, 2022, the School received N.M.'s complaint, and the School's Anti-Bullying Specialist (ABS), Steve Boianelli (Boianelli), was directed to conduct an investigation. (Boianelli Certif.). Boianelli interviewed both students on May 23, 2022, and they each confirmed that the incident had occurred. (Boianelli Certif.; R-B). It is clear from their statements that there is a history of animosity between the two students. Ibid. During his interview, E.M. also complained that on May 23, 2022, three days after

the playground incident, T.B. called E.M. “small” for not playing tackle football, which N.M. claims is a distinguishing characteristic covered under the HIB statute. However, Boianelli noted that size was not mentioned during the May 20, 2022, incident, and that E.M. “does not stand out as big or small, and is generally well-liked, well socialized, and does not stand out as weak or isolated.” Ibid. No evidence was adduced about the relative sizes of T.B. and E.M. Ibid. Boianelli concluded that E.M. was not singled out during the May 20, 2022, incident and that it was not motivated by a distinguishing characteristic, and was therefore not a HIB incident. (Boianelli Certif.). The School took remedial action against T.B. by separating him from E.M. and treating T.B.’s behavior as a code of conduct violation. (R-1; Donnelly Certif.).

N.M. appealed from Boianelli’s decision to the Board and was heard on July 7, 2022. (C-2). The Board also heard from Boianelli. On August 29, 2022, the Board affirmed the outcome of the investigation that the May 20, 2022, occurrence was not a HIB incident. Ibid.

LEGAL ANALYSIS AND CONCLUSIONS

A summary decision “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). That rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules. See R. 4:46-2; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

In Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

[A] determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The “judge’s function is not . . . to weigh the

evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”

[Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).]

In evaluating the merits of the motion, “[a]ll inferences of doubt are drawn against the movant and in favor of the opponent of the motion.” Judson, 17 N.J. at 75. However, “[w]hen a motion for summary decision 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.” N.J.A.C. 1:1-12.5(b) (emphasis added). N.M. did not submit any responding affidavit.

Having reviewed the parties’ submissions, I **CONCLUDE** that no genuine issues of material fact exist which require a plenary hearing regarding the issue of whether a HIB incident occurred on May 20, 2022. This matter is therefore ripe for summary decision.

The Anti-Bullying Bill of Rights Act (ABRA), N.J.S.A. 18A:37-13.2 et seq., was enacted “to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation and bullying of students that occur in school and off school premises.” N.J.S.A. 18A:37-13.1f. N.J.S.A. 18A:37-15 requires that each New Jersey school district “adopt a policy prohibiting harassment, intimidation or bullying on school property, at a school-sponsored function or on a school bus,” which, at a minimum shall contain itemized components including procedures for reporting and investigating alleged HIB incidents. A school’s HIB policy must also “include provisions for appropriate responses to [HIB] . . . that occurs off school grounds, in cases in which a school employee is made aware of such actions,” and those responses “shall be consistent with the board of education’s code of student conduct and other provisions of the board’s policy on [HIB].” N.J.S.A. 18A:37-15.3.

“Harassment, intimidation or bullying” means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual

orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, 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 . . .

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

In her kitchen-sink brief, through hearsay upon hearsay, N.M. raises a litany of issues not germane to this appeal, and not supported by any competent credible evidence and responding affidavits. She did not adduce any evidence about E.M.'s size relative to any of his classmates, including T.B. In sum, she did not prove that E.M.'s size, which she characterizes as a "distinguishing characteristic," in any way motivated T.B.'s conduct on May 20, 2022. I therefore **CONCLUDE** that T.B.'s conduct did not meet the definition of a HIB incident, and that the Board's decision was not arbitrary, capricious, or unreasonable.

ORDER

It is therefore **ORDERED** that the Board's motion for summary decision is hereby **GRANTED**, and it is further

ORDERED that N.M.'s petition of appeal is hereby **DISMISSED**.

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.

September 7, 2023
DATE


SARAH H. SURGENT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SHS/nn/mph

APPENDIX

EXHIBITS

For the Judge

- C-1 HIBster Report, dated July 5, 2022
- C-2 Letter from Dr. Neely Hackett, Superintendent of Voorhees Schools, to E.M.'s parents, with Board's final decision

For Petitioner

- P-A Email from N.M. to School, dated May 21, 2022
- P-B Statements of E.M. and T.B. to Boianelli, dated May 23, 2022
- P-C Email from N.M. to School, dated May 23, 2022
- P-D School District Policy 3280
- P-E Certification of Boianelli, dated March 31, 2023; Certification of Susan Donnelly, dated March 31, 2023

For Respondent

- R-1 Certification of Boianelli, dated March 31, 2023; Certification of Susan Donnelly, dated March 31, 2023
- R-A Email from N.M. to School, dated May 21, 2022
- R-B Statements of E.M. and T.B. to Boianelli, dated May 23, 2022
- R-C Email from N.M. to School, dated May 23, 2022
- R-D Certification of Susan Donnelly, dated June 29, 2023
- R-DA School's HIB Audit Trail