

## New Jersey Commissioner of Education

### Final Decision

Lisa Cerchio,

Petitioner,

v.

Board of Education of the Scotch Plains-Fanwood  
Regional School District, Union County,

Respondent.

### Synopsis

In this matter, petitioner – a high school gymnastics coach formerly employed by the respondent, Board of Education of the Scotch Plains-Fanwood Regional School District (Board) – challenged the determination of the Board that she had committed an act of harassment, intimidation and bullying (HIB) when – during an awards banquet – petitioner singled out A.J., a tenth-grade member of the gymnastics practice team, for not returning her gymnastics leotard in a timely fashion. The matter was the subject of a contested hearing at the Office of Administrative Law (OAL), after which the Administrative Law Judge (ALJ) made findings of fact and legal conclusions and issued an Initial Decision.

The ALJ found, *inter alia*, that: the statutory elements of a HIB violation are set forth in the Anti-Bullying Bill of Rights Act, at *N.J.S.A.* 18A:37-14; the testimony of Board administration and staff members who conducted the HIB investigation in this matter was based on “hearsay” evidence, to such a degree that the Board’s entire case was built solely on hearsay evidence; hearsay statements collected during the Board’s HIB investigation cannot serve as the basis upon which to decide any “finding of ultimate fact in this matter”; furthermore, the Board’s HIB team asked irrelevant questions and failed to thoroughly interview petitioner about details of how she transferred the leotard to A.J. at the awards banquet; the HIB team should not have considered general derogatory comments from those interviewed about petitioner’s personality, coaching style, and character because those comments were not relevant to the HIB allegation and “tainted the decision-making process”; further, such comments provided “a compelling reason to reverse the substantiation of the HIB charge”; and the undisputed testimony and evidence presented by the petitioner was highly credible. Accordingly, the ALJ held that petitioner’s conduct did not meet the statutory definition of HIB and recommended that the petition of appeal be granted.

Upon review, the Commissioner adopted the Initial Decision of the OAL with modification. The Commissioner, *inter alia*, rejected the ALJ’s criticism of the Board’s HIB investigation, finding that it was thorough and properly included eyewitness accounts of what occurred at the awards banquet. However, because the record is devoid of evidence to establish that petitioner’s conduct substantially disrupted or interfered with the orderly operation of the school or the rights of other students, as required by *N.J.S.A.* 18A:37-14, the Commissioner found that the Board’s HIB determination was arbitrary, capricious, and unreasonable. Accordingly, the Initial Decision was adopted as modified herein, and the petition was granted.

<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>
---

**New Jersey Commissioner of Education**  
**Final Decision**

Lisa Cerchio,

Petitioner,

v.

Board of Education of the Scotch Plains-  
Fanwood Regional School District, Union  
County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by the respondent Board pursuant to *N.J.A.C. 1:1-18.4*, have been reviewed and considered. Petitioner did not file a reply.

This matter involves the Board's determination that petitioner, a high school gymnastics coach formerly employed by the Board, committed an act of harassment, intimidation, or bullying (HIB) when she singled out A.J., a tenth-grade member of the gymnastics practice team, during an awards banquet for not returning her gymnastics leotard in a timely fashion. Initial Decision at 28. Following a contested hearing at the OAL, the Administrative Law Judge (ALJ) rendered findings of fact and legal conclusions. After discrediting both the Board's HIB investigation and the testimony of Board witnesses regarding the investigation, the ALJ held that hearsay statements obtained during the Board's HIB investigation from A.J., petitioner, and

other witnesses could not be used “to decide any finding of ultimate fact in this matter.” *Id.* at 50. Relying solely on testimony and evidence presented by petitioner, the ALJ held that petitioner’s conduct did not meet the statutory definition of HIB and recommended that her petition of appeal be granted. *Id.* at 50-51.

When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was “patently arbitrary, without rational basis or induced by improper motives.” *Kopera v. Bd. of Educ. of W. Orange*, 60 N.J. Super. 288, 294 (App. Div. 1960). Furthermore, “where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[,]” and the Commissioner will not substitute his judgment for that of the board. *Bayshore Sewerage Co. v. Dep’t of Env’t Prot.*, 122 N.J. Super. 184, 199 (Ch. Div. 1973), *aff’d*, 131 N.J. Super. 37 (App. Div. 1974). Regarding HIB determinations, this standard has been explained as requiring a petitioner to “demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it.” *G.H. and E.H. o/b/o K.H. v. Bd. of Educ. of Borough of Franklin Lakes, Bergen Cty.*, EDU 13204-13 (Initial Decision Feb. 24, 2014), *adopted* Commissioner Decision No. 157-14 (Apr. 10, 2014).

In its exceptions, the Board asserts that the ALJ erred when he found that petitioner did not commit an act of HIB because he failed to apply the applicable legal standard for adjudication of HIB matters or even cite the appropriate standard of review in the Initial Decision. Additionally, the Board argues that the ALJ inappropriately applied the hearsay and residuum rules to analyze and discredit the Board’s HIB investigation. The Board maintains

that there is nothing improper about the Board's consideration of hearsay during its HIB investigation. Furthermore, the Board emphasizes that the ALJ substituted his own judgment for that of the Board in contravention of law, as evidenced by his criticism of how the Board conducted its investigation and questioned witnesses.

Upon careful review of the record in its entirety, the Commissioner adopts the Initial Decision, with modification. As will be explained herein, the Commissioner concurs with the Board that the ALJ inappropriately discredited the Board's investigation and the testimony of its witnesses and substituted his judgment for that of the Board. The Commissioner agrees with the Board that there is nothing improper about the Board's consideration of hearsay during its HIB investigation. Nevertheless, the Commissioner holds that it was arbitrary, capricious, and unreasonable for the Board to have concluded that petitioner committed an act of HIB because the evidence in the record fails to establish that petitioner's conduct—even assuming it occurred exactly as determined by the Board—substantially disrupted or interfered with the rights of other students or the orderly operation of the school as is required by *N.J.S.A. 18A:37-14*.<sup>1</sup>

The 16-page HIB Incident Report reflects that during its investigation, the Board interviewed A.J., petitioner, four gymnastics team members, and Assistant Gymnastics Coach Tara Bozetarnik—all of whom witnessed the incident at the awards banquet. A.J. said that petitioner “went on and on about the leos” and how they were supposed to be dropped off at her house and that “one student did not” follow instructions. Exhibit R-1, at 3. Then, according to A.J., petitioner stated: “...that being said, A.J. come get your leo.” *Ibid.* A.J. said that the

---

<sup>1</sup> The ALJ did not address this statutory factor in the Initial Decision.

incident regarding the leotard was “very uncomfortable for [her] and [her teammates]” and that her reaction was, “Oh my god, I can’t believe [petitioner] did that.” *Ibid.* Four other team members confirmed that petitioner “called out” A.J. “in front of everyone” regarding the leotard and agreed that it was an embarrassing moment. *Id.* at 5, 7-9. Bozetarnik said that petitioner took the leotard out “and threw it” at A.J. “in the middle of [petitioner’s] speech.” *Id.* at 11.

A.J. also disclosed to investigators how petitioner reassigned her, and a few other athletes, from the junior varsity team to the practice team that season. *Id.* at 3. A.J. disagreed with her placement on the practice team; petitioner claimed that A.J. had “more to work on” but did not provide her with specifics. *Ibid.* A.J. expressed her belief that petitioner is “rude” and “not nice” and “picks favorites” among the athletes, particularly those who train at a certain private gymnastics facility. *Ibid.* Four other team members, plus Bozetarnik, said that petitioner favored certain gymnasts, including the varsity gymnasts as well as those who trained at a certain private gymnastics facility. *Id.* at 5, 7-11. A.J. acknowledged that during the awards banquet, petitioner gave her a certificate. *Id.* at 4. A.J. added that she “was going to quit [the team] anyway” before the leotard incident because she “didn’t like the team environment.” *Ibid.*

During her interview, petitioner explained that one gymnast, A.J., did not follow protocol regarding the return of the leotards at the end of the season. *Id.* at 12. Petitioner said that A.J. “had over two weeks” to return her leotard to a box on petitioner’s front porch. *Ibid.* From there, petitioner planned to return the leotards to the high school athletic director, who had advised her that he needed them by a certain date. *Ibid.* The day after petitioner had

returned the leotards to the high school, A.J.'s leotard was belatedly dropped off at petitioner's front porch. *Ibid.* Petitioner sent A.J. text messages asking her to pick it up and bring it to the high school herself. *Ibid.* Since A.J. did not retrieve the leotard from her porch, petitioner brought it to the awards banquet. *Ibid.* Per petitioner, at the end of the banquet when everyone was leaving and getting their jackets, she walked over to where A.J. was seated, gave her the leotard, and told her to bring it to the athletic office. *Ibid.*

At the contested case hearing, the following witnesses testified: petitioner; Megan Whitney, an acquaintance of petitioner; Superintendent Dr. Joan Mast; Assistant Principal Brooke Esposito; and Assistant Principal and Athletic Director Ryan Miller.<sup>2</sup>

The ALJ found that petitioner testified credibly. According to the Initial Decision, petitioner explained that Scotch Plains-Fanwood High School has one of the largest high school gymnastics programs in the state. She testified that she, Bozetarnik, and Miller divided the twenty-eight gymnasts into three levels: varsity, junior varsity, and practice teams. They utilized the New Jersey State Interscholastic Athletics Association (NJSIAA) Handbook to compose a rubric of objective criteria to rank each gymnast and considered the points earned by each gymnast during competitions. Petitioner added that gymnasts on the practice team were given multiple opportunities to compete at the junior varsity level during the 2019 season. Per petitioner, A.J. was afforded eight opportunities to compete at the junior varsity level but only availed herself of two of these opportunities.

Regarding the awards banquet, petitioner testified that she called each gymnast up to the front of the room and presented her with a certificate or award. She stated that when she

---

<sup>2</sup> The parties did not provide the Commissioner with transcripts of the hearing testimony.

called A.J. up to receive her certificate, they hugged, and she “praised A.J. for working hard during the season, for doing work with her peers to make them better gymnasts, and for being a good gymnastic dancer.” Initial Decision at 29. Petitioner acknowledged that A.J. was the only person to whom she returned a leotard at the banquet. Whitney, whom the ALJ found to be credible, corroborated petitioner’s version of events. She testified that after petitioner’s remarks had concluded and the guests were getting up to leave, petitioner picked up a leotard and said to one of the gymnasts: “Oh, by the way, you need to return this to the school or to the athletic office.” *Id.* at 31. According to Whitney, petitioner handed the leotard to the gymnast, who was seated.

Mast, Esposito, and Miller testified on behalf of the Board. None of them attended the awards banquet. However, Mast completed the HIB Incident Report upon learning of the HIB allegations from A.J.’s mother, and Esposito and Ryan conducted the interviews during the HIB investigation. Mast testified that when she initially completed the HIB Incident Report, the distinguishing characteristic that motivated the act of HIB was listed as “not determined.” *Id.* at 27. Mast assigned Esposito and Miller to conduct the HIB investigation and ultimately adopted their factual findings and conclusions. She explained that, at the conclusion of their investigation, Esposito and Miller changed the distinguishing characteristic from “not determined” to “lack of athletic ability.” *Ibid.*

During her testimony, Esposito summarized the content of the interviews that she documented in the HIB Incident Report. Miller testified that he agreed with Esposito’s summaries of each interview. He explained that he told petitioner that he needed the leotards returned by a certain date to send them to a vendor for refurbishing. He further testified that

he believed petitioner's conduct regarding the return of the leotard to A.J. at the awards banquet was motivated by A.J.'s "lack of athletic ability." *Id.* at 26. He explained that after conducting the interviews of A.J. and other gymnasts, he "ascertained 'a very strong divide' between who was perceived as better, Varsity, and who was perceived [as] lower, JV and Practice Squad." *Ibid.* He testified that he identified "an issue within the program of treating athletes who had more athletic skill differently than athletes who did not." *Id.* at 26-27.

The ALJ discredited the testimony of Mast, Esposito and Miller regarding the interviews conducted during the HIB investigation as "hearsay" and determined that the Board's "case is built only on hearsay evidence." *Id.* at 36-37, 50. Significantly, the ALJ held that "the hearsay statements" collected during the Board's HIB investigation "cannot be used to decide any finding of ultimate fact in this matter." *Id.* at 50.

On the other hand, the ALJ found petitioner's account of the leotard exchange (corroborated by Whitney) to be credible, i.e., that "after the banquet guests' attention was no longer on [petitioner], she approached A.J. with the leotard in her hand, leaned over a few seated students, told A.J. to . . . bring the leotard to Mr. Miller's office, and handed the leotard to A.J., who took it from [her] hand." *Id.* at 35. The ALJ found as fact that petitioner spoke to A.J. "in a normal conversational voice, not in a raised voice" and that "the manner in which [petitioner] returned the leotard to A.J. was not in a way (in terms of volume or sight) that could have attracted the attention of people who were more than an arm's length distance away." *Ibid.* Citing petitioner's "unrefuted" testimony, the ALJ disagreed that A.J. was "singled out" by petitioner to humiliate or intimidate her. *Id.* at 36. The ALJ further found that petitioner publicly recognized A.J.'s "gymnastic prowess" at the awards banquet, thereby



negating any possibility that petitioner's conduct was motivated by A.J.'s lack of athletic ability. *Ibid.*

Furthermore, the ALJ criticized various aspects of the Board's HIB investigation, finding that Esposito and Miller asked irrelevant questions and failed to thoroughly interview petitioner about the manner of the leotard transfer. *Id.* at 32-39. The ALJ also faulted Esposito and Miller for considering general derogatory comments from those interviewed about petitioner's personality, coaching style, and character because those comments were not relevant to the HIB allegation. *Ibid.* Moreover, the ALJ reasoned that their consideration of these comments "tainted the decision-making process" and provided "a compelling reason to reverse the substantiation of the HIB charge." *Id.* at 48.

In the end, the ALJ concluded that petitioner's conduct did not satisfy the statutory definition of HIB set forth at *N.J.S.A.* 18A:37-14. Specifically, the ALJ determined that the evidence failed to establish that petitioner's conduct: (1) could have been reasonably perceived as being motivated by any distinguishing characteristic possessed by A.J., including an alleged lack of gymnastics ability; or that (2) a reasonable person would have known or should have known that the conduct would have the effect of physically or emotionally harming a student, insulting or demeaning a student, or creating a hostile educational environment for the student. *Id.* at 49-50.

At the outset, the Commissioner holds that the ALJ's discrediting of the Board's investigation, including the witness statements it obtained via interviews, and the testimony of Mast, Esposito, and Ryan based upon hearsay concerns, was erroneous. The Commissioner therefore declines to adopt the ALJ's findings and conclusions in that regard, which appear on

pages 32 through 34, 36 through 39, and 47 through 50 of the Initial Decision. The ALJ improperly substituted his own judgment for that of the Board when he scrutinized the procedures used by district staff during the investigation and discredited relevant evidence presented by the Board.

The Act neither instructs boards how they must question those interviewed during HIB investigations nor defines acceptable sources of information for boards to consider when investigating HIB allegations. Specifically, the Act does not prohibit board reliance upon hearsay evidence. See *L.K. and T.K., on behalf of minor child, A.K. v. Board of Education of the Township of Mansfield, Burlington County*, Commissioner Decision No. 318-21 (Dec. 9, 2021) at 5, *aff'd*, 2023 N.J. Super. Unpub. LEXIS 1788 (App. Div. Oct. 17, 2023). Moreover, the ALJ's finding that the board's investigation was somehow tainted by its consideration of negative comments made by those interviewed about petitioner is speculative and has no basis in law.

In this case, district staff conducted a thorough HIB investigation and interviewed A.J., petitioner, and several eyewitnesses. All individuals interviewed had firsthand knowledge of the leotard incident as they were present at the awards banquet when it occurred. It was entirely reasonable for the Board to consider and evaluate these eyewitness accounts of what happened, alongside the statements from A.J. and petitioner, in rendering a HIB determination. By concluding that the district's investigation was flawed, the ALJ wrote requirements into the Act that the Legislature did not include and erroneously allowed that conclusion to influence the outcome of this matter. For these reasons, the Commissioner rejects the ALJ's finding on page 50 of the Initial Decision that petitioner's testimony and evidence was "unrefuted." See *Hayes v. Gullj*, 175 N.J. Super. 294, 301 (Ch. Div. 1980) (holding that an ALJ's "recommended

findings of fact and conclusions of law must be based upon a complete and fair review of all the relevant evidence”).

That said, because the record is devoid of evidence to establish that petitioner’s conduct—even assuming it occurred exactly as the Board determined it to have occurred—substantially disrupted or interfered with the orderly operation of the school or the rights of other students as is required by *N.J.S.A. 18A:37-14*, the Commissioner holds that the Board’s HIB determination is arbitrary, capricious, and unreasonable. Thus, the Commissioner agrees with the ALJ’s recommendation to grant the petition of appeal, but for reasons other than those expressed in the Initial Decision.

The Act 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.

[N.J.S.A. 18A:37-14.]

In sum, 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. 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 Board made no findings in its HIB Incident Report regarding the second element, i.e., a substantial disruption or interference with the rights of other students or the orderly operation of the school. Yet, in its exceptions, the Board claims that petitioner's actions regarding the leotard at the awards banquet caused A.J. to suffer emotional harm which "substantially interfered with A.J.'s rights to safely and comfortably attend school, focus on learning, and participate in school activities and events with her peers, receiving the educational, social, and emotional benefits offered by the District's programs unobstructed by the emotional impact and distraction of acts of HIB committed by her gymnastics coach." Exceptions, at 13. However, the record fails to support this conclusory assertion.

Even assuming that the first element under the Act is satisfied, the Commissioner finds that nothing in the record indicates that A.J. was unable to comfortably attend school, focus on learning, and participate in school activities and events with her peers following the incident regarding the leotard. While A.J. was understandably embarrassed by what occurred, no

substantial disruption or interference with her rights, the rights of other students, or the orderly operation of the school followed. There is no evidence in the record to suggest that the isolated incident involving the leotard carried over to subsequent school days or team events.

In conclusion, because the record fails to establish that petitioner's conduct as alleged by A.J. substantially disrupted or interfered with the rights of other students or the orderly operation of the school, the second element under the Act is not satisfied. Therefore, the Commissioner holds that petitioner's actions at the awards banquet regarding the leotard—while clearly inappropriate and unprofessional—did not constitute a HIB violation under the Act.<sup>3</sup> Consequently, it is unnecessary to analyze whether one of the three conditions set forth in subsections (a), (b), and (c) of *N.J.S.A. 18A:37-14* was satisfied.

Accordingly, the petition of appeal is hereby granted. The Board is directed to remove any references to the HIB investigation and findings from petitioner's personnel file.<sup>4</sup>

IT IS SO ORDERED.<sup>5</sup>

  
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 15, 2024

Date of Mailing: March 20, 2024

---

<sup>3</sup> The Commissioner in no way condones petitioner's conduct or minimizes A.J.'s feelings regarding the incident. Petitioner demonstrated poor judgment in bringing the leotard to the awards banquet and singling out A.J. to make a point in front of others on an evening meant to celebrate the athletes.

<sup>4</sup> If the incident is included in petitioner's personnel file for other reasons, such as violations of Board policies other than its HIB policy, this decision does not extend to those references. The only issue before the Commissioner is the HIB finding.

<sup>5</sup> 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**

OAL DOCKET NO. EDU 05472-20

AGENCY REF. NO. 111-5/20

**LISA CERCHIO,**

Petitioner,

**v.**

**SCOTCH PLAINS-FANWOOD  
REGIONAL SCHOOL DISTRICT  
BOARD OF EDUCATION,  
UNION COUNTY,**

Respondent.

---

**Richard J. Kaplow, Esq. ,** for petitioner

**Douglas M. Silvestro, Esq.,** for respondent (The Busch Law Group, LLC, a  
attorneys)

Record Closed: December 26, 2023

Decided: December 29, 2023

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

**STATEMENT OF THE CASE**

This matter arises out of allegations brought under N.J.S.A. 18A: 37-14, the “Anti-Bullying Bill of Rights Act” (hereinafter, the “statute”). Appellant, Lisa Cerchio (hereinafter

“Cerchio”), filed for a Fair Hearing seeking to reverse the Scotch Plains-Fanwood Board of Education’s affirmance of the School Superintendent’s determination that Cerchio engaged in an act of HIB on December 16, 2019. The Respondent-BOE seeks an affirmance of the HIB determination.

### **PROCEDURAL HISTORY**

The determination of the HIB investigators and Superintendent Joan Mast, Ph.D. (Dr. Mast) was delivered to the BOE on January 23, 2020. In that determination, Dr. Mast concluded that Lisa Cerchio engaged in a single act of HIB against A.J., a female student athlete, on December 16, 2019 at a school-related athletic Awards Banquet. The BOE held a hearing on February 20, 2020 and on that same date voted to affirm its prior action, i.e., affirming Superintendent Mast’s determination. The Appellant filed her Petition of Appeal to the Commissioner of Education on May 19, 2020. The Commissioner transmitted the matter to the Office of Administrative Law on June 10, 2020, where it was filed on June 17, 2020 as a contested case pursuant to N.J.S.A. 52:14B-1, et seq. and N.J.S.A. 52:14F-1 et seq.

An initial telephone conference was held on August 20, 2020 and a Pre-Hearing Order was issued on August 20, 2020. In that Order the parties were directed to conduct discovery and to engage in telephone status conferences. On April 14, 2021, Attorney Silvestro filed a Motion for Summary Decision in favor of his client, the Scotch Plains-Fanwood Board of Education; and on the same date, Attorney Kaplow filed a Cross-Motion for Summary Decision in favor of his client, Lisa Cerchio. Additional papers were filed on May 4, 2021. The Tribunal denied both motions on September 9, 2021.

In the months following the September 9, 2021 Order Denying Summary Decision, the hearing dates were established and settlement talks took place, specifically following a Tribunal-sponsored Zoom conference on February 7, 2022. On February 7, 2022, the parties agreed to submit new Summary Decision Motions focusing on the following issues: (1) whether “lack of athletic ability” is a distinguishing

characteristic under the Anti-Bullying Statute; (2) whether “[Student’s] lack of ability (or lesser ability to her peers)” is a distinguishing characteristic under the Anti-Bullying Statute; and (3) whether the response “Not Determined” on the initial HIB Incident Report form dated December 18, 2019 is a significant factor in establishing or not establishing the charge of HIB. Appellant Cerchio filed her Motion for Summary Decision on February 7, 2022 and the Respondent BOE filed its Cross-Motion for Summary Decision on the same date. Both sides filed Opposition papers on March 9, 2022. The Respondent filed a Reply on March 14, 2022. The Petitioner did not file a Reply but filed a Sur-Reply on March 16, 2022. On March 18, 2022, the Respondent filed its own Sur-Reply.

Since the parties did not adequately address certain questions posed by the Tribunal in its February 8, 2022 correspondence (regarding the identification of certain documents), the Tribunal subsequently asked both counsel on April 1, 2022 to clarify matters by answering said questions. On April 1 and 4, 2022 both counsel submitted their responses to the Tribunal’s questions.

The Motion and Cross-Motion were supported by Certifications and attachments. Both sides submitted their arguments regarding legal principles in light of the evidence and their interpretations of the existing case law.

The Tribunal asked both counsel to address the following legal issues: (A) whether “lack of athletic ability” is a distinguishing characteristic under the Anti-Bullying Statute; (B) whether “[Student’s] lack of ability (or lesser ability to her peers)” is a distinguishing characteristic under the Anti-Bullying Statute; and (C) whether the response “Not Determined” on a certain document (i.e., (page 2 of the Incident Report Form signed by Dr. Mast on December 18, 2019) was a significant factor in establishing or not establishing the charge of HIB.

The Tribunal asked counsel, for purposes of this set of motions, to refrain from arguing facts and to solely address the legal issues set forth above. While the attorneys did argue their interpretations of existing case law regarding these legal issues, their



arguments involved factual distinctions between the cited cases and the case at bar, and they also argued facts peculiar to the case at bar.

The BOE maintained that the HIB investigation, the determination of the School Superintendent and the subsequent February 20, 2020 BOE hearing were conducted in accordance with the procedures set forth in the statute. Having examined the factual evidence derived from witnesses and documents and having demonstrated that the existing case law encompasses “lack of athletic ability” and “[Student’s] lack of ability (or lesser ability to her peers)” as distinguishing characteristics cognizable under the statute, the BOE reached a determination that Cerchio engaged in an act of HIB. (This argument assumed that the BOE heard all relevant testimony, which presented a fact question.) The BOE maintained that whether the categories of “lack of athletic ability” and “[Student’s] lack of ability (or lesser ability to her peers)” were no longer issues, Cerchio’s only recourse was to bear her burden to somehow demonstrate that the BOE’s decision was arbitrary and capricious.

Cerchio argued that the statute recognizes several traditional suspect classifications as distinguishing characteristics (e.g. race, religion, gender, etcetera) and recognizes that the statute is to be interpreted broadly. Despite the BOE’s citation of C.C. o/b/o S.C. v. Jefferson Twp. Bd. of Educ., EDU-10872-2014, Initial Decision (April 6, 2015), adopted, Comm’r (May 12, 2015), where Judge Jesse Strauss, A.L.J. found “sports proficiency” to be within the meaning of the statute, Cerchio argued that there is no basis for including “lack of athletic ability” or “lesser ability” than one’s peers to be a valid categorization of distinguishing characteristics under the statute. Moreover, Cerchio pointed to what she claimed was a total lack of any evidence that she ever stated or categorized A.J. as a person who was “lacking athletic ability” or as a person who had “less ability” than her peers. (This latter point, of course, was a fact question.)

Cerchio noted that on December 18, 2009 (one day after the first phone call from A.J.’s mother (M.J.) complaining that A.J. was a victim of HIB), in the section of the Incident Report Form where the actual or perceived characteristics were to be identified,

Dr. Mast checked a blank box on the Incident Report Form and wrote “Not Determined”. Cerchio argued that when Dr. Mast checked this box and typed-in the words “Not Determined”, it could only be interpreted as an admission that the School District had no idea of how or why Cerchio could have violated the HIB statute. The BOE’s position was that the entry of “Not Determined” simply reflected that the matter was still under consideration. (This presented questions of fact and of law.) Ryan Miller and Brooke Esposito (the HIB Investigators) amended the Incident Report Form by adding the words “lack of athletic ability” to the category “Other Distinguishing Characteristic”. The final version of the Incident Report Form was signed by Ryan Miller and Brooke Esposito (the HIB Investigator) and by Dr. David Heisey (School Principal) on January 13, 2020. It was signed by Dr. Mast (Superintendent) on January 23, 2020, the date on which she submitted the final version of the Incident Report Form to the BOE.

Cerchio argued that on the day (February 20, 2020) of its vote to affirm Dr. Mast’s January 23, 2020 determination that Cerchio engaged in an act of HIB, the BOE refused to hear the testimony of witnesses who would have testified favorably on her behalf and that this worked against her interests. (This presented fact questions.)

I found that there were unresolved issues of material fact, and therefore, on April 19, 2022, I denied both the motion and the cross-motion for summary decision.

The matter was heard on the following dates: October 7, 12, 13, 14, and 17, 2022.

This writing is the undersigned’s Initial Decision.

### **ANALYSIS OF FACTUAL ISSUES**

The following is not intended to be a verbatim recitation of the content of documents, the testimony of witnesses, or of the arguments presented. Rather it is a summary of the contents of documents which I found particularly relevant, a summary

of the testimony of witnesses, and a summary of allegations and facts used to support arguments, which I found significant and helpful to my understanding of the matter.

**Summary and Analysis of the Exhibits Presented by Respondent and Appellant Respondent's Exhibits**

**R-1**

The following is taken from the summary of the testimony of Dr. Joan Mast, *infra*. and an examination of R-1 itself. The HIB Incident Report Form dated 12/18/2019 contains the initial information reported on December 17, 2019 by M.J. (A.J.'s mother) to Superintendent Dr. Joan Mast. On December 18, 2019, Dr. Mast, as the person who first learned of the alleged incident of HIB from A.J.'s mother (M.J.), wrote an Incident Report Form and submitted it to High School Principal David Heisey on December 19, 2019. There is no indication on the form or in any of the testimony that Dr. Mast verbally reported the alleged December 16, 2019 incident of HIB to the principal on December 17 or 18, 2019. Dr. Mast stated in the Incident Report Form that the perceived characteristic that motivated the act of HIB was "Not Determined". The HIB Incident Report Form was subsequently amended by the HIB investigators, Athletic Director Ryan Miller ("Miller") and Assistant Principal Brooke Esposito (Esposito") on 1/13/2020.

According to her testimony, on December 18, 2019, Dr. Mast spoke with Assistant Principal Brooke Esposito and Athletic Director Ryan Miller and assigned them to conduct an HIB Investigation. According to the Incident Report Form (R-1), on December 19, 2019, Principal Heisey assigned a case number and asked the Anti-Bullying Specialists to start an HIB investigation.

Dr. Mast testified that Mr. Miller and Ms. Esposito decided to interview the following people: A.J. (the alleged victim of HIB); K.P.; K.G.; T.S.; E.G.; Tara Bozetarnik; and Lisa Cerchio. These people were interviewed between December 18, 2019 and December 20, 2019, except for Lisa Cerchio, who was interviewed on January 13, 2020. They did not interview anyone else. The HIB Incident Report Form was subsequently amended by the

HIB investigators, Athletic Director Ryan Miller (“Miller”) and Assistant Principal Brooke Esposito (Esposito”) on January 13, 2020. Besides adding additional information from the interviews, Miller and Esposito, on January 13, 2020, changed the “perceived characteristic” box from “Not Determined” to “lack of athletic ability”.

A summary of each interview conducted by Brooke Esposito and Ryan Miller follows:

Interview of A.J. (a Tenth Grader)

A.J.’s interview consisted of eight paragraphs. A.J. mentions the leotard in the second, third and eighth paragraphs. A.J. claimed that at the Awards Banquet Cerchio “went ‘on and on’ about the leotards”; that “everyone had to return the leotards to Cerchio’s house, but one student did not”; that Cerchio “went on about that”; and that Cerchio said, “That being said, A.J., come get your leotard.” A.J.’s interview contains her statement, “After I took the leotard, I was like, ‘Oh my god, I can’t believe she did that.’” A.J. further stated that her friend, S.K., and S.K.’s mother also said that they couldn’t believe that Cerchio “did that”. (Neither S.K. nor S.K.’s mother were interviewed.) A.J. further stated that Tara Bozetarnik (Assistant Coach) also said that it was inappropriate. A.J. stated that Cerchio gave her the leotard and told her to bring it back to the high school.

In the first paragraph of her interview, A.J. complained that in October, 2018, “some girls” started a rumor about her (i.e., A.J.). A.J. went on to say that Cerchio “didn’t try to quiet it, but instead talked to all of the team members and asked them about it.” A.J. went on to say that Cerchio “didn’t listen to my side of the story”; and “didn’t listen to anything I said”; and that Cerchio “interviewed everyone and then believed the other girl (T.S.).” A.J. stated that because of this incident she “felt very targeted.”

A.J. mentioned the Awards Banquet in the second and seventh paragraphs of her interview. The content of the second paragraph has been set forth above. In the seventh paragraph, A.J. stated that Cerchio called A.J. up to accept a certificate, which was

something that surprised A.J. Then A.J. went on to say that when Cerchio called her up to receive her certificate, Cerchio “didn’t say anything bad about me.”

A.J. stated that Cerchio was “harassing the team captains” because she emailed them saying that “someone” had left a leotard. A.J. noted that the leotard had her name on it and so Cerchio should have known to whom it belonged. A.J. claimed that she was not included on an email sent by Cerchio instructing the team members that if they returned their leotards late, they would have to bring them to Ryan Miller’s office.

In the fourth, fifth and sixth paragraphs of A.J.’s interview, A.J. complained that Cerchio “picks favorites” (i.e., she favors certain members of the team whom she likes) and is mean to those whom she does not like (like team members K.P. and K.G.). A.J. stated that Cerchio likes team members who work-out at a gym called Sergeants and dislikes those who work-out at the YMCA. In the sixth paragraph, apparently in response to a question about Cerchio texting team members, A.J. specifically stated, “It is common for coaches to text individuals” and explained that Cerchio does so because she does not work at the school.

In the fifth paragraph of A.J.’s interview, A.J. complained that Cerchio “never gave me the chance to compete”. A.J. stated that after she was moved down from the Junior Varsity Team to the Practice Team, she met with Cerchio to say that she did not agree with Cerchio’s decision. A.J. recalled that Cerchio’s explanation was “I think you have more to work on”, but A.J.’s statement gave no further specifics about their conversation. A.J. admitted that there were several people besides her who had been moved down from Junior Varsity to the Practice Team. A.J. stated that she suffered a back injury and went on to complain that Cerchio “wasn’t understanding” about it.

#### Interview of K.P. (a Twelfth Grader)

K.P.’s interview consists of four paragraphs. K.P. mentions the banquet, the leotard, and Cerchio’s statements about the return of the leotards in the first paragraph

of her interview; and she briefly mentions her account of reactions to Cerchio's statement in the second paragraph of her interview.

In the first paragraph, K.P. says that Cerchio stated that all but one of the team members returned their leotards. K.P. claims that "she" (presumably she means A.J.) was "called-out" in front of "everyone". K.P. does not state that Cerchio identified A.J. as the person who did not return her leotard. K.P.'s statement also does not reference the timing of Cerchio's statement (during her address to the assembled parents while the banquet was ongoing, or at the end of the banquet while people were getting ready to leave).

In the second paragraph, K.P. immediately stated her own unequivocal dislike of Cerchio. K.P. stated that she did not get along with Cerchio. She gave her opinion that Cerchio is "mean" and that "everything out of her mouth is mean." K.P. re-focused her interview on her own subjective experiences with Cerchio, accusing Cerchio of calling her and K.G. "cancer to the team" and accusing Cerchio of encouraging her and K.G. to quit the team.

In the third paragraph (the longest in the notes of her interview), K.P. says nothing about A.J., the banquet, the return of the leotard, or Cerchio's conduct. Instead, she focuses on Cerchio's supposed unexplainable dislike of K.P. and K.G. (despite K.P.'s claim that they were "two of the best people on the team"). K.P. stated that because she and K.G. did not like Cerchio, they quit the team during their 11<sup>th</sup> grade, but nonetheless returned in their 12th grade. K.P. stated that everyone complained about Cerchio to the Assistant Coach (Tara Bozetarnik), whom she described as "great".

The Fourth paragraph seems to be a quotation, but it is not attributed to anyone. It is simply impossible to understand or interpret.

#### Interview of K.G. (a Twelfth Grader)

K.G.'s interview consists of five paragraphs. K.G. mentioned the Awards Banquet

only in the first and second paragraphs and mentioned the process for returning the leotards only in the second paragraph. The third, fourth and fifth paragraphs contain no information about the dinner or the return of the leotards.

In the first paragraph, K.G. recounted how Cerchio called each team member's name one at a time for each of them to come forward while she recognized each of them for what each girl had brought to the team.

In the second paragraph, K.G. stated her recollection of the return of the leotards. K.G. recalled that, while thanking the parents (apparently at the end of the evening), Cerchio "... said loudly, 'A.J., here is your leotard. I've been waiting for you to come and get it and bring it to Mr. Miller'". K.G. also stated in paragraph two that Cerchio texted the team captains asking them to send a group chat out advising that someone brought her leotard late and needed to get it and bring it (to the school) herself.

In the third paragraph, K.G. described her relationship with Cerchio and her interactions with her since 9<sup>th</sup> grade. In regard to the frequency of competing in meets, K.G. stated that in 9<sup>th</sup> grade and 10<sup>th</sup> grade Cerchio gave her a lot of opportunities to compete. K.G. did not mention how often she competed in 11<sup>th</sup> grade and 12<sup>th</sup> grade, but indicated that because the team had numerous "good" freshman members, she did not compete as much in her 12<sup>th</sup> grade as she did previously.

In the third paragraph, K.G. also spoke about the relationship and interactions that she and her mother had with Cerchio. K.G. plainly stated, "I strongly dislike her (i.e., Cerchio)." She stated that she and her mother avoid Cerchio and only speak with Tara Bozetarnik, the Assistant Coach. K.G. explained that she believes that Cerchio is "condescending" and "thinks that she is above everyone". K.G. stated that in her sophomore year (10<sup>th</sup> grade), "I gave her (Cerchio) attitude and a hard time."

In the fourth paragraph, K.G. spoke about her belief that Cerchio treats people differently based on their level of talent or experience. (This was apparently in response

to a question about favoritism and the creation of three levels of teams, Varsity, Junior Varsity, and Practice.) K.G. stated, “It’s me and K.P. she (Cerchio) doesn’t really like.” K.G. then expressed her opinion that Cerchio treated the Varsity, Junior Varsity, and Practice people “like separate teams” and that Cerchio left the Junior Varsity and Practice team members to be handled by Tara Bozetarnik. In regard to differential treatment by Cerchio of girls who were members of the Sergeants versus the YMCA (two outside gymnastics clubs), K.G. explained, “It’s not true that she (Cerchio) makes them go to Sergeants.” K.G. further explained that girls who attended Sergeants (herself included) had more fun. However, K.G. expressed her opinion that “[t]hey (the girls who attended the YMCA) may have been treated differently, but not as good.”

In the fifth paragraph, K.G. gave her opinion about Assistant Coach, Tara Bozetarnik. K.G. said that she would have quit the team if she were not the Assistant Coach. K.G. described Bozetarnik as “a genuinely nice person” and “a good addition”, who on one occasion “did a compliment circle” during which she and team members recognized girls who don’t usually get recognition. The last statement attributed to K.G. on the interview form concerned her account of an event where the Town’s mayor planned to recognize the gymnastics team. K.G. explained that she heard from two team members that Tara Bozetarnik had told them that Cerchio, before the event, texted her telling her not to attend the event.

#### Interview of T.S. (a Tenth Grader)

The interview of T.S. contains four paragraphs. The first and second paragraphs contain general information, including T.S.’s information about the Awards Banquet and the return of the leotards. The first and third paragraphs contain information from T.S. about her interactions with Cerchio. The fourth paragraph contains T.S.’s opinion about favoritism.

In the first paragraph T.S. stated that she was nervous about what Cerchio was going to say about her at the Awards Banquet. T.S. gives no indication about why she



was anxious. She does not indicate whether she was concerned about being recognized for her good performances or whether she was concerned that Cerchio might say something derogatory about her. Her statement is simply not clear on this point. In the first paragraph, T.S. spoke about “the way things ended” at the close of her freshman year (ninth grade). (Apparently, T.S. was referring either to Cerchio’s investigation of whether A.J. body-shamed T.S. or she was referring to an event when Cerchio counselled her for having performed an unauthorized and dangerous gymnastic move.) In the second paragraph of her interview, T.S. stated that Cerchio was talking to the dinner attendees about the fact that the team members had been given a certain amount of time to return their leotards and mentioned that she (Cerchio) had made telephone calls at night concerning the return of the leotards. T.S. stated that during this portion of her speech, Cerchio asked A.J. to come get her leotard.

In the first and third paragraphs of her interview, T.S. explained more about the unauthorized gymnastic move she had performed, which Cerchio had discouraged her from performing. T.S. also said that she is more comfortable dealing with Tara Bozetarnik than Lia Cerchio. T.S. also said that as a freshman she won the MVP plaque, that she loved gymnastics, and that she loved being with her teammates.

In the fourth paragraph of her interview, T.S. expressed her opinion (apparently in response to a question about favoritism) that there is some favoritism, but she never felt it. Finally, T.S. said that someone named S.\_\_\_ won the MVP. However, T.S. expressed her opinion that another team member named C.\_\_\_ also received votes for the MVP award. When Cerchio announced that S.\_\_\_ had won the MVP award by a unanimous vote, T.S. disagreed and told the interviewer that this was not the truth.

#### Interview of E.G. (a twelfth grader)

The interview of E.G. consists of nine paragraphs. The only information provided by E.G. about the Awards Banquet is in the first paragraph. The only information about Cerchio’s return of the leotard to A.J. is in the second paragraph. Paragraphs three

through nine contain information and opinions not relevant to the issue of the time, place or manner of the return of A.J.'s leotard.

In the first paragraph of her interview, E.G. says that Cerchio called upon each and every girl on the team to come forward to receive recognition and that she said nice things about each of them.

In the second paragraph, E.G. says that when the seniors or the captains were standing, Cerchio reached into her bag and said to A.J., "[T]his is for you", and *threw* the leotard *at* A.J. (apparently in front of everyone at the Awards Banquet). E.G. also said that there had been "bad blood" between Cerchio and A.J. in the past.

In paragraphs three through nine, E.G. mentioned: that Tara Bozetarnik told the team members that Cerchio had told her that she was excluded from a town meeting (apparently the day of the Mayor's recognition of the team); that there was an incident during A.J.'s freshman year (Ninth Grade) involving A.J. and T.S., which E.G. believed was mishandled by Cerchio; that K.P. and K.G. intentionally did things to get Cerchio mad and that Cerchio seemingly retaliated by placing them on the Junior Varsity team when they were seniors; that Cerchio made J.V. and Practice Squad members observe the Varsity practice, but only worked with the Varsity; that Cerchio excluded the Practice Squad from attending non-home (i.e., "away") meets claiming falsely that there was no room for them on the team bus; and, that Cerchio was spiteful to the J.V. and Practice Squad members by giving team tee-shirts only to the Varsity.

#### Interview of Tara Bozetarnik (Assistant Coach)

The interview of Tara Bozetarnik consists of five paragraphs. Tara Bozetarnik mentions the Awards Banquet and the return of the leotard in paragraphs one and three of her interview. In the first paragraph, Bozetarnik said that during the Awards Banquet Cerchio was making a speech about the members of the team, but then shifted to the topic of the return of the leotards. Cerchio asked a rhetorical question to the parents

(banquet guests) about the number of times that she emailed them about the return of the leotards. Bozetarnik then said that Cerchio took the leotard out and *threw* it at A.J. Bozetarnik said that she looked at A.J.'s face after this happened and felt terrible for her. Bozetarnik related how she later called A.J. and offered her kind words. Bozetarnik said that this was Cerchio's personality and offered her opinion that she did not believe that Cerchio did it with any premeditation. In the third paragraph, Bozetarnik stated that Cerchio "put me down at the banquet". She did not specify what Cerchio said or did that constituted "putting her down". Bozetarnik added that she considered that part of her job was "to pick up the underdogs, the kids who were labelled". She did not specify what she meant by "underdogs" or identify which kids had been "labelled" or by whom they had been "labelled". Bozetarnik said that A.J. was "an underdog".

In the second paragraph, Bozetarnik said that Cerchio "told me not to go [to the Town Mayor's recognition]" and "that I didn't need to be there." Bozetarnik stated that team members had texted her asking why she was not present at the Town's Mayor's recognition event and she felt bad because she was not there. Bozetarnik stated that Cerchio referred to the Town recognition event in her speech at the Awards Banquet.

In the fourth and fifth paragraphs, Bozetarnik said that Cerchio "has favorites", namely those athletes who perform well and are "at the top". Bozetarnik stated that Cerchio "parents" (i.e., raises her own children) the same way, saying, "Her kids have to be the best."

#### Interview of Lisa Cerchio (The alleged perpetrator of HIB)

Lisa Cerchio's interview consists of four paragraphs. In paragraphs one, two and three Cerchio mentions the banquet, the process for the return of the leotards, and A.J. In the fourth paragraph, apparently in response to a questions inquiring why she (Cerchio) did not return the leotard to the school, she simply responded that, "It wasn't a matter of "utmost importance" and "[A.J.] did not follow the right protocol for returning [the leotard]".

In paragraphs one, two, and three, Cerchio recounted the evening of the December 16, 2019 Awards Banquet for the interviewers. Apparently in response to the questions she was asked, she focused particularly on the issue of the returning of the leotard. Cerchio explained that Ryan Miller, the Athletic Director, had told her that the leotards had to be returned by a certain date. (During her testimony, Cerchio explained that Miller needed to send the leotards for re-furbishing by a certain upcoming date and needed them soon.) Cerchio stated that her job made it inconvenient for the girls to drop the leotards off at her home after the end of her workday. Cerchio explained that she sent group texts to the team captains for them to tell the team members to drop off their leotards in a box on the porch of her house. She explained that the girls had over two weeks to comply with the drop-off request. In her last group text, she told the girls that 9:00 a.m. on Wednesday was the last time for dropping the leotards to her house and that if the leotards were not there by 9:00 a.m. on Wednesday, then the girls would have to drop the leotards off at the school. Cerchio said that she took the leotards she had and dropped them off at the school at 3:00 p.m. on Wednesday. However, A.J. or her mother returned her leotard after she had already dropped off the leotards at the school. Therefore, Cerchio sent two messages to A.J. instructing her to come to her house, pick up the leotard, and deliver it to Mr. Miller. Since neither A.J. nor her mother picked up the leotard, Cerchio brought it to the banquet. (Cerchio's in-court testimony was that Mr. Miller told her to bring the leotard to the Awards Banquet to give it to A.J.)

In the second paragraph of her interview, Cerchio stated that she brought the leotard to the Awards Banquet. By 6:30 p.m. Cerchio had not seen A.J. Cerchio said that she spoke from 7:00 p.m. to 8:30 p.m. talking about the season and recognizing all the student athletes. She recalled that she spoke the highest she could about anyone on the team. At the end of her speech, Cerchio recalled that she had forgotten to thank the parents. She thanked the parents and apologized to anyone whom she had to text about returning leotards on short notice. She added that the girls had had a lot of notice about returning the leotards. Her speech was finished and the parents were already in the process of getting up to leave. She then remembered that she had the leotard in her

coaching bag. She told the interviewer that she took the leotard out of her coaching bag and walked it over to where A.J. was sitting with fellow team members and told her to bring it to the Athletic Office. (During her testimony, Cerchio stated that the location where she had been speaking to the parents was in the front of the room and was about six to ten feet from where A.J. was sitting with her friends. She testified that there was no raised platform or “stage”. Cerchio testified that when she spoke to the gathering of parents, she had to speak in a higher voice to address the entire room. However, when she walked over to A.J. and told her to bring the leotard to Mr. Miller’s office, she did so in a normal conversational voice, (i.e., a lower volume than when she spoke to the assembled parents) since she was only an arm’s length away from A.J.)

According to the interviewer (Bates Stamp R0012 and R0013) Cerchio said that her intent was to give A.J. the leotard, not to harass her. (During her in-court testimony, Cerchio stated that she leaned-over several students and handed the leotard to A.J. instructing her to bring it to Mr. Miller’s office. She also mentioned that Ryan Miller told her to bring the remaining leotard to the Awards Banquet.)

### R-2 & 3

These are the Interrogatories sent to Cerchio by the Respondent and Cerchio’s answers to same. The notable responses made by Cerchio include the following information:

(1) In response to Interrogatory Questions 3, 4 and 5, Cerchio denied that she ever harassed or otherwise bullied A.J. in any way at any time. Cerchio added that she walked over to A.J., leaned over several seated girls and handed the leotard to A.J. while instructing her to return the leotard to the office of Mr. Ryan Miller (the Athletic Director), who would be expecting it.

(2) In response to Interrogatory Question 6, inquiring about what evidence or facts the BOE failed to investigate or failed to consider during the HIB investigation, Cerchio responded that the BOE did not give certain persons who

were present at the BOE's meeting the opportunity to provide factual information to the BOE, which would have demonstrated that Cerchio was not guilty of an HIB violation.

Moreover, Cerchio claimed that Athletic Director Ryan Miller knew that there were witnesses who were biased against her, yet he hand-picked these witnesses to be interviewed by the HIB investigators. The nature of the bias was that these witnesses had previously been disciplined by Cerchio. Cerchio had disciplined one of these people arising out of a prior incident wherein A.J. had allegedly body-shamed an African-American student. Cerchio claimed that and that the report of same was in Miller's possession, yet he never mentioned the report to the HIB investigators. Cerchio claims that the report would have revealed to the HIB investigators the bias that some of these witnesses had against her. Cerchio explained the counselling of T.S. for performing a dangerous move.

Moreover, Cerchio claimed that the husband of Assistant Coach Tara Bozetarnak told Mr. Cerchio that Tara Bozetarnak claimed that she had been mis-quoted in her statement to the BOE's Investigators and that Tara Bozetarnik wanted to withdraw or correct that statement.

(3) In response to Interrogatory Question 7, inquiring into whether the BOE violated any procedural requirements of the Anti-Bullying Bill of Rights Act, Cerchio responded that she was not formally notified of the HIB allegations (arising out of the December 16, 2019 Awards Banquet) against her until January 7, 2020, which violated the time deadlines provided in the Act.

(4) In response to Interrogatory Question 8, inquiring into what "close relationships" existed between the "HIB accuser" and certain BOE members and / or Administrators, Cerchio responded in several ways. Cerchio stated that during the investigation, while she was being interviewed by Esposito and Miller, she asked about the specific acts of HIB of which she was being accused. Cerchio

stated that Esposito responded with a litany of facts (including allegations that Cerchio threw the leotard at A.J. while they were on a *stage* in front of the parents and that Cerchio continually berated A.J. in front of everyone for not returning her leotard as directed). Cerchio noted that there was no stage and that these facts as recited by Esposito were not true and, more importantly, were not noted in any of the interviews of the witnesses. Cerchio noted that this means that Esposito must have learned of these allegations outside of the investigative process.

Esposito is an Assistant Principal and HIB Specialist (an Investigator of the HIB alleged to have occurred herein). Cerchio alleges that Esposito's secretary is named Jill Rebuth and that Ms. Rebuth is the Aunt and Godmother of A.J. It appears that Cerchio believes that this close working relationship between Esposito and Rebuth may have been an improper source of information, which may have improperly affected the investigation process.

Cerchio alleges that Ryan Miller, should have, but never did reveal to his fellow HIB Investigator that he ordered Cerchio to return the leotard to A.J. at the Awards Banquet.

Cerchio alleges that Tanya Williams was present during the HIB investigation and took part in discussions related to the charge of HIB. Mandy (A.J.'s mother) initiated the HIB charges when she called Principal Joan Mast on December 18, 2019. Cerchio believes that Tanya Williams should have recused herself from any participation in the HIB process because she is a close personal friend of Mandy (A.J.'s mother).

(5) In response to Interrogatory Question 9, inquiring into what contacts Ms. Cerchio, her husband or her attorney had with any witnesses who were interviewed during or after the HIB investigation was conducted, Cerchio responded with the names of people who were present at the Awards Banquet and who saw what transpired at the Awards Banquet, but who were never interviewed by the HIB

Investigators. Cerchio alleges that if these witnesses had been interviewed by the HIB Investigators, each of these witnesses would have exonerated her.

#### R-6

R-6 begins with an email dated December 19, 2019 at 11:06:58 p.m. sent by the Team Parent, Ellen Zimmerman to Lisa Cerchio. The email contains the draft of a letter, which Zimmerman intended to send to Athletic Director Ryan Miller as a testimonial to Lisa Cerchio. Zimmerman later sent the letter to Miller. The details of the letter are discussed in the summary of Lisa Cerchio's testimony, particularly in the discussion of Attorney Silvestro's cross-examination of Lisa Cerchio. The remainder of R-6 is a series of emails transmitting a copy of the December 19, 2019 email among several people on October 12, 2022, on October 13, 2022, and on October 14, 2022.

#### **Petitioner's Exhibits**

#### P-6 & P-7

These are correspondences between counsel. They do not contain information or evidence that is necessary to the outcome of this matter.

#### P-8

This is a cover letter dated February 13, 2020 from Douglas M. Silvestro, Esq., the BOE's attorney, to Cerchio's former attorney, A. John Blake, Esq. enclosing redacted copies of the HIB Investigators' Interviews of seven people.

#### P-9

This is a letter dated February 24, 2020 from Attorney Silvestro to Attorney Blake. It does not contain information or evidence that is necessary to the outcome of this



matter.

P-11

A set of Requests for Admissions propounded by the BOE's attorney with responses made by Petitioner, Lisa Cerchio. These contain only routine information.

P-15

A set of text messages between A.J. and Lisa Cerchio, regarding the return of A.J.'s uniform.

P-17

A five-page set of texts between Lisa Cerchio and four team captains about "clean-up", uniforms, and leotards.

P-20

A list of the 2019 Varsity, J.V. and Practice Squad Gymnastic Team members and a three-page evaluation of Coach Lisa Cerchio.

The December 16, 2019 Awards Banquet Video

The video was not marked and was not used by either party.

Joint Stipulation of Facts

Routine information from the stipulated facts has already been adequately addressed herein.

**Summary and Analysis of the Testimony of the Various Witnesses at the Hearing**  
**Summary of the Testimony of Brooke Esposito**

Assistant Principal Brook Esposito (Esposito) was one of two people chosen by Superintendent Joan Mast on December 18, 2019 to serve as an HIB Investigator in the matter of Lisa Cerchio. She stated that she had conducted approximately 100 HIB investigations before conducting the Cerchio investigation.

Esposito and Athletic Director Ryan Miller conducted interviews of A.J., K.P., K.G. T.S., E.G., Tara Bozetarnik (Assistant Gymnastics Coach) and Lisa Cerchio (Gymnastic Coach and the Target of the HIB Investigation). Each interviewee was questioned separately and Esposito wrote a separate report for each of them. Esposito stated that her method was to pose a general question to the interviewee that did not direct the interviewee's attention to any one topic. Each initial question was something like "Did anything unusual occur during the season?" Esposito stated that as she and Miller questioned the interviewees, she rapidly typed what they stated, trying to obtain their exact responses, but admitted that she had to "go back and clean it up".

The first interview conducted was that of the alleged victim, A.J. Esposito stated that when conducting an HIB investigation, she always starts with an interview of the alleged victim. When asked the initial general question, A.J. immediately started talking about the December 16, 2019 Awards Banquet, particularly focusing on the end of Cerchio's speech to the assembled banquet guests. A.J. focused on Cerchio going 'on and on' about the fact that some girls returned their leotards in a timely manner, but one girl did not. She went on to say that Cerchio then looked at her and said, "A.J., here is your leotard", in front of everyone, which made A.J. feel embarrassed. A.J. went on to tell Esposito that Cerchio "picks favorites" and "didn't give her a chance to compete". Esposito stated that A.J. mentioned a few names of gymnasts, and that she and Miller decided to interview these people.

The second interview was that of K.P. Esposito stated that she wanted to interview K.P. because A.J. indicated that K.P.'s experiences with Cerchio were similar to hers. Starting again with a general question, K.P. responded by saying that Cerchio spoke to the assembled guests at the banquet about how all the team members returned their leotards except one girl. K.P. stated that Cerchio immediately called for A.J. to come forward to receive her leotard. K.P. then offered her personal opinions about Cerchio, which included her statement that she did not get along with Cerchio; that everything that comes out of Cerchio's mouth was mean; that Cerchio continually asked her if she was quitting the team; and that Cerchio called her a "cancer" to the team. Esposito testified that A.J.'s and K.P.'s information was important because it indicated that Cerchio's behavior made these girls feel that they were not part of the team.

The third interview was that of K.G. Esposito stated that K.G. was interviewed because she was mentioned by A.J. and K.P. Starting with the same type of general question, K.G. responded by focusing on Cerchio's texting the team captains regarding the return of the leotards warning that if they were brought to her late the girl would have to return them to the school themselves. K.G. said that at the Awards Banquet Cerchio said in front of everyone in a loud voice to A.J., "Here's your leo. I've been waiting for you to come get it and bring it to Mr. Miller." In response to a question from the BOE's counsel, Mr. Silvestro about whether Esposito thought A.J., K.P. and K.G. were being truthful to her, Esposito responded that she had no reason to suspect that they were being less than honest and she also stated that their accounts of the evening of December 16<sup>th</sup> were the same (i.e., consistent).

Esposito quoted K.G. as saying, "It's me and K.P. she (Cerchio) doesn't like." Esposito also quoted K.G. as saying, "She (Cerchio) doesn't pay attention [to the] J.V. or Practice [teams]" and "She treated us like a separate team." Esposito testified that "it wasn't until this student [K.G.] that I realized that there was such a staunch difference between JV and Varsity." She added, "[T]his student spoke to how there was the group that got all the attention ... but then the JV kids were kind of left to Tara."

The fourth interview was that of T.S. Esposito stated that T.S. was interviewed because A.J. referenced her as the person with whom she had a conflict during the 2018 season. Esposito reasoned that T.S. should be interviewed because she was not one of A.J.'s friends and because A.J. felt that the incident between her and T.S. may have been part of the origins of A.J.'s difficulties with Cerchio.

Starting with the same type of general question, T.S. responded by talking about her attendance at the Awards Banquet. T.S. said that she was nervous about attending the banquet because Cerchio was going to speak. T.S. then shifted her testimony to talk about Cerchio's alleged favoritism towards the girls who attended the gym named Sargent's over those who attended the YMCA. However, T.S. concluded that although there may have been favoritism, she never experienced it.

The fifth interview was that of E.G., a team captain. Esposito stated that she wanted to interview a captain since captains were selected by Cerchio and because she believed that a captain would be unbiased. Starting with the same type of general question (whether there was anything out of the ordinary during the 2019 season) Esposito reported that E.G. went directly to the topic of the return of the leotards and how Cerchio took the leotard out of her bag and threw it at A.J. Esposito followed-up by relating that E.G. said the Cerchio "holds grudges"; that she thinks that Cerchio, as an adult leader, had acted inappropriately; that Cerchio segregated the teams more than necessary; and that at practices Cerchio only paid attention to the Varsity, leaving the J.V. and Practice Team members to think that they didn't belong there.

The sixth interview was that of Tara Bozetarnik. In this interview, Esposito did not start with a general question, but rather questioned Bozetarnik about what she heard and saw at the Awards Banquet. Esposito reported that Bozetarnik responded by saying that Cerchio was talking about individual kids, but then shifted her speech to the subject of the return of the leotards. Esposito reported that Bozetarnik related that a girl returned her leotard late leaving it on her porch; that Cerchio texted the girl several times; and then Cerchio asked the assembled parents, "How many times did I email you?", after

which Cerchio picked up the leotard and threw it at A.J. Bozetarnik told Esposito that A.J. was embarrassed by what Cerchio did and that Bozetarnik, feeling sorry for A.J., told A.J. afterwards that she was “beautiful” and that she “mattered”. Esposito reported that Bozetarnik commented that this event was due to Cerchio’s personality, but she did not think the throwing of the leotard was premeditated. Esposito reported that Bozetarnik also explained that Cerchio’s personality was such that she favors those at the top and that “winning is everything”. Esposito reported that gave an example of favoritism was when Cerchio would let T.S. get away with bad conduct because T.S. was a very good gymnast and was Cerchio’s favorite for a time. Esposito reported that Bozetarnik also volunteered information about how Cerchio raises her children saying, “Her (Cerchio’s) kids have to be the best.” Esposito reported that Bozetarnik claimed that Cerchio “put me down at the banquet” (but did not say what, in particular, Cerchio had said or done to diminish Bozetarnik). Esposito reported that Bozetarnik believed her role with the team was “to pick up the underdogs, the kids who were labelled” and she described A.J. as “an underdog”.

The seventh interview was that of Lisa Cerchio, the person accused of the HIB violation. Esposito’s report starts with Cerchio stating that there was a gymnast who had not returned her leotard for two weeks. Esposito reported that Cerchio explained that Mr. Miller had set a due date for the return of the leotards, which she tried to implement by sending texts to the girls through the captains and by her own efforts. Esposito reported that Cerchio said that when the girl’s mother returned it, she returned it after the deadline. Despite additional texts to the girl, the girl still failed to pick it up and bring it to the Athletic Office. Esposito reported that Cerchio brought the leotard to the Awards Banquet.

Esposito’s report then shifts to Cerchio’s account of the Awards Banquet. She reports that Cerchio described how she spoke to the assembled parents from 7:00 p.m. to 8:30 p.m., calling upon each girl on the team to be recognized and praising the achievements of each girl. Esposito then reported that Cerchio stated that at the end of her speech, as people were getting up from their seats ready to leave, she realized that

she had not thanked the parents for their help during the season., So Cerchio began speaking again giving her thanks to the parents and also apologizing for the fact that she had sent them so many emails about the need to return the leotards. She added that the girls had a lot of notice about the need to return the leotards. Esposito reported that in Cerchio's account of the return of the leotard to A.J., Cerchio said, "I walked over to where the gymnast was sitting and told her to bring it to the Athletic Office" and that Cerchio told her. "My intent was to get her the leotard – not to harass her." In addition, Esposito reported that Cerchio described the circumstances of the venue at the time she transferred the leotard to A.J. as, "People were moving and getting their jackets." The last entry of Esposito's report is where Esposito reported that she asked Cerchio why she did not return the leotard to the high school herself. Esposito reported that Cerchio's response was that the return of the leotard was not of utmost importance and also that A.J. had not followed the right protocol for returning it.

### **Summary of the Testimony of Ryan Miller**

Ryan Miller testified that he is an Assistant Principal and the high school's Athletic Director, and he has supervisory responsibilities over the school's coaches. He testified that he, along with Assistant Principal Brooke Esposito, were assigned by Superintendent Joan Mast to conduct the HIB investigation of Lisa Cerchio regarding the occurrence at the December 16, 2023 Awards Banquet. He testified that neither he nor Ms. Esposito attended the Awards Banquet.

Miller testified that Esposito wrote the Interview Report Summaries for each interviewee and then he reviewed and signed them agreeing with their content. Miller signed them on January 13, 2020 and testified that between January 13, 2020 and the day of his court testimony he did not acquire any knowledge that would change his belief regarding the accuracy of the interviewees' statements.

Among the statements of the interviewees that Miller agreed with were the following:

E.G.'s statement that Cerchio made the teams (Varsity, Junior Varsity and Practice) "more segregated" than they needed to be during practices and concerning bus rides to "away" meets. In regard to the accusation that Cerchio held back the distribution of team tank tops from the J.V. and Practice teams and only gave them to the Varsity, Miller clarified that it was he, not Cerchio, who had ordered fewer tank tops than required. Miller admitted that that he told Cerchio to only distribute the tank tops to the Varsity. He confirmed that afterwards, additional tank tops arrived. When asked if he had any knowledge about whether Cerchio distributed the later-acquired tank tops, he responded that he did not know the answer to that question. On cross-examination, Miller stated that he never discussed the subject of the tank tops with Cerchio when she was interviewed.

Another statement of an interviewees that Miller agreed with was Tara Bozetarnik's statement that Cerchio told her not to attend an event where part of the festivities included recognition of the SP-F High School gymnastics team by the Mayor and Town Council. On cross-examination, Miller stated that he never discussed this accusation with Cerchio.

Miller made another statement wherein he stated that he considered it intimidating for a coach (Cerchio) to ask her team members to return their leotards to her front porch and to later text them, when all leotards had not yet been returned, to return them as requested. Miller admitted that he told Cerchio that he needed the leotards by a certain date in order to send them to a vendor for re-furbishing.

During his direct testimony, Miller testified that he believed that Cerchio's conduct regarding her public return of the leotard to A.J. (which he emphasized was "a single incident") was motivated by A.J.'s "lack of athletic ability". He explained that after hearing the interviewees, he ascertained "a very strong divide between who was perceived as better, Varsity, and who was perceived [as] lower, JV and Practice Squad." He added, "[I]t became very apparent that there was an issue within the program of treating athletes

who had more athletic skill differently than athletes who did not.” Miller admitted that neither he nor Esposito bothered to question Cerchio on the issue of whether A.J. “lacked” athletic ability. They did not question Cerchio about their perception of a “strong divide” among the teams, about favoritism, and about how the division of the team into three levels (which Miller, Bozetarnik and Cerchio all previously agreed was the right thing to do) might have had unintended results.

During his re-cross-examination testimony, Ryan Miller stated that A.J. suggested that K.P. and K.G. had relevant information about the alleged HIB, and so, he and Esposito decided to interview them.

### **Summary of the Testimony of Dr. Joan Mast**

Dr. Joan Mast, Superintendent of Schools, testified as follows. She filled-out an HIB Incident Report Form dated December 18, 2019. It includes the initial information reported to her on December 17, 2019 by M.J. (A.J.’s mother) regarding her allegations of HIB that occurred at the Awards Banquet of December 16, 2019. On December 18, 2019, Dr. Mast, as the person who first learned of the alleged incident of HIB from A.J.’s mother (M.J.), wrote an Incident Report Form and submitted it to High School Principal David Heisey on December 19, 2019. There is no indication on the form or in any of the testimony that Dr. Mast verbally reported the alleged December 16, 2019 incident of HIB to the principal on December 17 or 18, 2019. Dr. Mast stated in the Incident Report Form that the perceived characteristic that motivated the act of HIB was “Not Determined”.

Dr. Mast testified that on December 18, 2019, she spoke with Assistant Principal Brooke Esposito and Athletic Director Ryan Miller and assigned them to conduct an HIB Investigation. According to the Incident Report Form (R-1), on December 19, 2019, Principal Heisey assigned a case number and asked the Anti-Bullying Specialists to start an HIB investigation. The HIB investigators made findings of fact after they interviewed several people and they changed the distinguishing characteristic from “not determined” to “lack of athletic ability”.



Based only upon her reading of the content of the interviews conducted by Mr. Miller and Ms. Esposito, Dr. Mast adopted the factual findings and conclusions made by Mr. Miller and Ms. Esposito. Those findings of fact and conclusions included the following:

- (1) that Cerchio held onto A.J.'s leotard for three weeks and used the opportunity of the banquet to single-out A.J. in front of all the people present to publicly intimidate and humiliate her for not returning her team leotard in a timely fashion;
- (2) that Cerchio "dropped" the leotard "at" A.J.;
- (3) that A.J. reasonably perceived that Cerchio's motivation for doing so was to highlight a distinguishing characteristic of A.J, namely her "lack of athletic ability";
- (4) that Cerchio sent "harassing" texts to A.J.;
- (5) that Cerchio knew or should have known that by publicly calling attention to A.J.'s failure to return her leotard she would emotionally harm (i.e., embarrass) A.J.; and
- (6) that the best description of the HIB behavior was that it was "Intimidating Conduct".

### **Summary of the Testimony of Lisa Cerchio**

During Cerchio's testimony, Cerchio testified that Scotch Plains-Fanwood High School has one of the largest gymnastics programs in New Jersey and that it was one of the first programs to have a Junior Varsity Team in addition to the Varsity team. This contributed to the decision by her, Assistant Coach Boztarnik, and Athletic Director Ryan Miller to break the 28 girls down to three levels, Varsity, Junior Varsity and Practice Teams. Cerchio testified that she and Tara Bozetarnik used the NJSIAA Handbook to come up with objective criteria (and composed a rubric) to rank each girl involved with Gymnastics for the purpose of placing them on the Varsity, Junior Varsity and Practice Teams. The gymnasts themselves filled-out paperwork using the rubric that was based on NJSIAA criteria. The coaches also totalled the points which each girl earned during competitions. The coaches decided the team on which each girl would be placed and

met with each girl to explain the placements. Cerchio testified that A.J. came to her to question why she went down from the Junior Varsity Team to the Practice Team. They discussed the rubric and A.J. said, "Okay". Cerchio testified that during the course of the 2019 season, girls on the Practice Team were given the opportunity to compete on the Junior Varsity level. Cerchio testified that A.J. was afforded eight opportunities to compete on the Junior Varsity level, but A.J. decided to avail herself of only two of these Junior Varsity opportunities.

During her testimony, Cerchio described the events of the Awards Banquet. She called each athlete up to the front of the room where she was standing and she told the guests about each girl's accomplishments during the just-concluded season. Cerchio then presented each girl with a certificate or an award. In response to particular questioning about A.J., Cerchio recalled that when A.J. came forward to the front of the room, they hugged. Cerchio praised A.J. for working hard during the season, for doing work with her peers to make them better gymnasts, and for being a good gymnastic dancer. She then presented A.J. with her certificate.

Cerchio testified that Ryan Miller told her that there was a deadline for return of the leotards because they had to be refurbished. Cerchio discussed with Miller the fact that A.J. had not responded to her communications to come to her house to retrieve her leotard and to bring it to Miller's office herself. Around November 27, 2019, Miller told Cerchio to bring the leotard to the Awards Banquet and to give it to A.J. there. Cerchio testified that she followed Miller's directive to bring the leotard to the banquet. During her testimony, Cerchio agreed that Miller did not tell her to give the leotard to A.J. in front of the banquet guests, but only to return it to her at the banquet.

Cerchio testified that's she received a telephone call from Miller on December 19, during which he generally stated that a parent had called the school complaining about the return of a leotard at the December 16, 2019 Awards Banquet, but he did not say anything about the filing of an HIB complaint or that Cerchio was the target of an HIB complaint. Cerchio testified that when Miller told her that she was entitled to have a union

representative present, she wondered whether an HIB charge might be possible. Cerchio testified that she suspected that the complaint involved A.J. because A.J. was the only person to whom she returned a leotard at the banquet.

Cerchio testified that after speaking with Mr. Miller, she placed a telephone call to the Team Parent, Ellen Zimmerman, asking her if she noticed anything unusual occurring on the evening of the Awards Banquet as it was coming to a close. Cerchio testified that Zimmerman said that she did not notice anything unusual. As they discussed Miller's call, they suspected that M.J. and A.J. might be upset about the return of the leotard at the banquet. Cerchio testified that Ellen Zimmerman drafted a letter to Miller praising Cerchio for the successful gymnastics season and expressing concern that someone was upset about the return of a leotard at the Awards Banquet. Upon Attorney Silvestro's cross-examination, Cerchio, at first, denied that she had seen such a letter. However, during the cross-examination process it was convincingly demonstrated that Ellen Zimmerman sent a draft of the letter to Cerchio late on the evening of December 19, 2019. Cerchio was forced to admit that she had indeed seen the letter, but she explained that she had forgotten that she had seen it.

### **Summary of the Testimony of Megan Whitney**

Attorney Kaplow called Megan Whitney (Whitney) to the stand to testify on behalf of Lisa Cerchio in regard to the HIB charge brought against her. Whitney testified that she is an acquaintance of Lisa Cerchio and that this came about because her daughter was a part of the Scotch Plains-Fanwood High School gymnastics team three years earlier, when she was a freshman. Whitney testified that she attended the December 16, 2019 Awards Banquet at the Darby Road Restaurant and was present throughout the entire event. She received emails from a man named Frank Manilla and also spoke with Cerchio about showing support for her. She learned that bullying charges had been brought against Cerchio arising out of the banquet and, wanting to show support for Cerchio, she attended the February 20, 2020 BOE meeting along with about half a dozen other parents. She recalled that after the definition of HIB was presented to the parents,

a group statement was made from the parents to the BOE which was favorable to Cerchio. At that meeting, she stated that she had not seen any actions by Cerchio that would be considered bullying under the definition.

Whitney testified that on the evening of December 16, 2019, she saw and heard Cerchio speak about the gymnasts individually and saw her make presentations to them for their accomplishments during the season. She testified that Cerchio spoke positively about each girl, that the girls presented her with flowers, and that she did not hear or see anything negative that evening. Specifically, she recalled that after Cerchio's remarks were concluded and the attendees were getting up to leave, she heard and saw Cerchio put down her flowers and picked up a leotard. Cerchio said, "Oh, by the way you need to return this to the school or to the athletic office" to one of the gymnasts. Upon questioning from the judge, Whitney described what she saw and heard in finer detail, saying that she recalled that the girls were taking photographs of themselves, that she was in the process of standing up and that she saw Cerchio lean over and hand the leotard to a girl who was seated. The girl accepted it from Cerchio's hand. Whitney did not know the identity of the girl who received the leotard. Whitney indicated that she was in close enough proximity to see and hear the entire transfer. That was all that Whitney recalled about the subject of leotards. On cross-examination, the only probing question was about whether or not Whitney had ever received formal training on the subject of the HIB Statute, to which she replied that she had not.

### **FINDINGS OF FACT**

A.J.'s statement that "it is common for coaches to text individuals", is in contrast to Brook Esposito's statement that it is against Board Policy for school staff to text individual students. A.J.'s statement indicates, and I so **FIND**, that the Board should have been aware of the fact that it was a common practice for coaches and students to be texting one another about the athletic programs of the school. I **FIND** that the texting by Cerchio (who did not work at the high school aside from her coaching duties) to the team members about the return of the leotards, was in furtherance of the deadline for the return

of the leotards set by Athletic Director Ryan Miller.

In her statement to the interviewers, A.J. complained about (1) how Cerchio “picks favorites” and “likes” the girls who attend the Sergeant’s gym and “dislikes” those who attend the YMCA (i.e., that Cerchio shows favoritism); (2) how Cerchio “never gave me a chance to compete” and (3) that Cerchio unfairly moved her down from the Junior Varsity Team to the Practice Team. Cerchio addressed these accusations during her testimony. I **FIND** that A.J. was afforded eight opportunities during the 2019 season to compete on the Junior Varsity level, but decided to avail herself of only two of these eight opportunities.

In regard to A.J.’s complaint about being treated unfairly by Cerchio in regard to the October, 2018 investigation of the “body-shaming incident between A.J. and T.S., A.J. accused Cerchio of “not listening to her side of the story”, of ultimately “believing the other girl (T.S.)”, and of feeling “very targeted”. Cerchio addressed this during her testimony. During Cerchio’s testimony, Cerchio testified that she investigated a body-shaming incident during which A.J. allegedly targeted the team’s only African-American member, T.S., and that she questioned all team members in order to arrive at the truth about the incident. Cerchio testified that ultimately there were no HIB charges filed against A.J. and that Athletic Director Ryan Miller ended the incident by “sweeping it under the rug.” I **FIND** that the alleged October, 2018 body-shaming incident and investigation of same by Cerchio provides background information about Cerchio’s awareness of, and handling of, possible HIB matters and provides background information indicating that A.J. had a retaliatory motive to accuse Cerchio of an HIB offense. However, I **FIND** that the October, 2018 incident does not directly provide information about whether Cerchio committed an act of HIB on December 16, 2019.

I **FIND** that most of the statements made by A.J. during her interview were general complaints. The only statement made by A.J. during her interview which was relevant to the HIB charge are found in the second paragraph of her interview. In essence, A.J. accused Cerchio of publicly calling upon her to take her leotard and return it to Mr. Miller

in order to embarrass her.

I **FIND** that in K.P.'s interview does not sound like a personal account of what she perceived with her own senses. K.P. report that A.J. was "called out", but does not state by whom, or in what manner; nor does she state any of the words used against A.J. Moreover, K.P.'s statements lack time references. I **FIND** that K.P. gives no information about the transfer of the leotard or about Cerchio's actions at the Awards Banquet that can be useful in determining whether an act of HIB occurred. I **FIND** that most of the content of K.P.'s statement to the interviewers is vitriol against Cerchio.

K.G. stated her feelings about Cerchio when she, in no uncertain terms, told the interviewer, "I really strongly dislike her". K.G. admitted that she intentionally sought to annoy Cerchio starting in the tenth grade saying, "I gave her attitude and a hard time." K.G.'s feelings about Cerchio apparently still persist since she stated to the interviewer in the present tense, "I have a problem respecting someone who doesn't respect me" and that she and her mother only talk to Tara Bozetarnik, not Cerchio. K.G. also accused Cerchio of intentionally excluding Tara Bozetarnik from a Town recognition event based solely on a hearsay accusation whereby Bozetarnick allegedly told E.G. and \_\_\_D. that Cerchio texted Bozetarnik instructing her not to attend the Town recognition event. I **FIND**, aside from her statement that Cerchio threw the leotard at A.J. in front of people, K.G.'s interview did not contain information that is relevant to the inquiry about the pending HIB charges against Cerchio. Instead, K.G.'s interview revealed that she strongly dislikes Cerchio and believes that Cerchio dislikes her and K.P. I **FIND** that the interview of K.G. demonstrated that she is prejudiced against Cerchio and therefore her testimony about Cerchio should have been evaluated in light of that prejudice. However, I **FIND** that Esposito accepted K.G.'s testimony without question and I **FIND** that this biased testimony affected Esposito's determination of an ultimate issue of fact.

I **FIND** that the only statement made by T.S. regarding the time, place and manner of Cerchio's return of the leotard to A.J. is found in the second paragraph, where she states that Cerchio, while speaking to the banquet guests, told A.J. to "come get your

leotard". I **FIND** that all the other information from T.S. refers to topics not at issue in this matter. Her information and / or opinions deal with topics not relevant to the disposition of this matter. The inclusion of such irrelevant matter in the interview is not improper, but I **FIND** that it indicates that Miller and Esposito asked questions about irrelevant topics and I **FIND** that the witness was concerned with expressing her own feelings about general matters rather than with focusing on supplying information relevant to the issue of whether Cerchio bullied A.J. when the leotard was returned.

I **FIND** that Paragraphs three through nine contain no information that is relevant to the time, place, or manner of Cerchio's return of the leotard to A.J.

I **FIND** that E.G.'s information and opinions expressed in paragraphs three to nine are irrelevant to the HIB charge under consideration. The inclusion of such irrelevant matter in the interview is not improper, but I **FIND** that it indicates that Miller and Esposito asked questions about irrelevant topics and I **FIND** that the witness was concerned with expressing her own feelings about general matters rather than with focusing on supplying information relevant to the issue of whether Cerchio bullied A.J. when the leotard was returned.

I **FIND** that Paragraph One is relevant because there, Bozetarnik unequivocally states that Cerchio took the leotard and threw it at A.J. in front of the dinner guests.

I **FIND** that Paragraphs two, four and five contain no information that is relevant to the time, place, or manner of Cerchio's return of the leotard to A.J.

I **FIND** that Bozetarnik's information and opinions expressed in paragraphs two, four, and five are irrelevant to the HIB charge under consideration. The inclusion of such irrelevant matter in the interview is not improper, but I **FIND** it indicates that Miller and Esposito asked questions about irrelevant topics and I **FIND** that the witness was concerned with expressing her own feelings about general matters rather than with focusing on supplying information relevant to the issue of whether Cerchio bullied A.J.

when the leotard was returned.

Even considering the hearsay accounts of the interviewees (as well as Cerchio's testimony), I **FIND** that Cerchio's mentioning of the overall return of the leotards by the team members to the banquet guests was brief and that she did not, as A.J. characterized it, "go on and on". I **FIND** that Mr. Miller had a time limit for returning the leotards (which he had to send for re-furbishing by a certain date) and that he informed Cerchio about the importance of the time limit. I **FIND** that A.J. did not take responsibility for her failure to follow instructions regarding the time limit for returning her leotard. I **FIND** that A.J. did not return Cerchio's phone calls regarding her late return of the leotard. I **FIND** that A.J. knew that her leotard was returned late, but made no effort to retrieve it and take it to the high school Athletic Office (Mr. Miller's Office) herself. I **FIND** that A.J. made a false statement when she accused Cerchio of "harassing the team captains" about the need to return the leotards. I **FIND** that A.J. made a false statement when she accused Cerchio of leaving her name off an email that informed the girls that if their leotards were dropped off at her house late, the girls would have to retrieve them and bring the leotards to the school.

I **FIND** that when Cerchio spoke to the banquet attendees, she spoke in a raised voice (a higher volume than normal, conversations, person-to-person volume). I **FIND** that after Cerchio finished addressing the gathering of banquet attendees, the attendees' attention shifted to their preparations for leaving the event. I **FIND** that after the banquet guests' attention was no longer on Cerchio, she approached A.J. with the leotard in her hand, leaned over a few seated students, told A.J. to give bring the leotard to Mr. Miller's office, and handed the leotard to A.J., who took it from Cerchio's hand. I **FIND** that when Cerchio spoke to A.J., she did so in a normal conversational voice, not in a raised voice. I **FIND** that the manner in which Cerchio returned the leotard to A.J. was not public, but rather was semi-private, that is to say, personally and at arm's length. I **FIND** that the manner in which Cerchio returned the leotard to A.J. was not in a way (in terms of volume or sight) that could have attracted the attention of people who were more than an arm's length distance away. I **FIND**, from the sum total of the statements in the interviews, from



the documents submitted in discovery, and from all of the testimony given at the hearing, that the most complete, consistent and credible evidence demonstrates nothing that leads me to believe that Cerchio publicly “singled-out” A.J. at the Awards Banquet in order to humiliate her or to intimidate her, or to diminish her, or to harm her in any way. I **FIND** that the opposite is true because the unrefuted testimony of Cerchio is that she called A.J. to the front of the room (as she had done with other student gymnasts) to recognize her good work, to praise her, and to give her a certificate; they even hugged. I **FIND** that Cerchio returned the leotard to A.J. after the conclusion of the event in the least public way possible. I **FIND** that Cerchio’s public recognition of A.J.’s gymnastic prowess and her praise for A.J.’s work with less experienced team members demonstrates that Cerchio did not consider A.J. as “lacking in athletic ability” or as “having less athletic ability than her peers”.

I **FIND** that, in ascertaining matters of fact and in making their conclusions, the HIB interviewers (Brooke Esposito and Ryan Miller), and Dr. Mast relied heavily on the unverified, not-subject-to-cross-examination, statements of A.J., K.P., K.G., T.S., E.G., Tara Bozetarnik, (and M.J., to the extent that Dr. Mast received information from A.J.’s mother). None of the BOE’s testifying witnesses, Esposito, Miller, or Mast, were present at the Awards Banquet, where the HIB allegedly took place. The testimony presented to this Tribunal by Esposito, Miller, and Mast regarding the gestures, words, or actions of Cerchio, which supposedly constituted HIB, came not from their own perceptions, but entirely from the accounts related to them by A.J., K.P., K.G., T.S., E.G., Tara Bozetarnik, and Lisa Cerchio. I **FIND** that the testimony of Esposito, Miller, and Mast about the interviewees’ accounts of the process of the return of the leotards before and including the December 16, 2019 Awards Banquet was hearsay. While the testimony of Esposito or Miller, regarding their interviewing of Cerchio, is arguably within the “admission” hearsay exception, I **FIND** that none of the testimony of Esposito or of Miller concerning their interview of Cerchio contains evidence of a violation of the Anti-Bullying Statute by Cerchio in relation to the return of the leotards before or at the December 16, 2019 Awards Banquet. I **FIND** that the testimony of Esposito, Miller, or Mast and the documents received in discovery (i.e., those in evidence) do not contain competent evidence that

could support the hearsay statements offered by the BOE to make findings of ultimate facts. I **FIND** that the BOE's case is built only on hearsay evidence.

I **FIND** that from her interviews of A.J., K.P., and K.G., regarding their personal interactions with Cerchio long before the "leotards issue" arose and long before the 12/16/2019 Awards Banquet took place, Esposito decided as a matter of fact that Cerchio's personality, attitudes, and actions made these girls feel that "they were not part of the team".

I **FIND** that Esposito decided as a matter of fact that Cerchio wrongly "segregated" the athletes and wrongfully paid more attention to some while paying less or no attention to others. I **FIND** that none of the testimony of A.J., K.P., or K.G. regarding "segregating" the team into Varsity, Junior Varsity, or Practice Teams, or whether Cerchio paid more attention or less attention to these teams proves that Cerchio decided that anyone "lacked athletic ability" and bullied anyone on account of a "lack of athletic ability". When Cerchio and her Assistant Coach (Tara Bozetarnik) made decisions to place various girls on the three levels of teams, they did so using standardized criteria, supplemented by information from the girls themselves, and using the girls' point totals earned from prior competitions, I **FIND** that none of the girl's testimonies prove that Cerchio considered anyone as "having less athletic ability than her peers" and then bullied anyone on account of "having less athletic ability than one's peers".

Regarding the issue of whether or not Cerchio violated the Anti-Bullying Statute at or before the December 16, 2019 Awards Banquet, I **FIND** that Brooke Esposito relied heavily on the statements of A.J., K.P., K.G., T.S., E.G., and Tara Bozetarnik and then presented her testimony, which is hearsay, in court.

I **FIND** that when Miller admitted that he was responsible for ordering fewer tank tops, that he told Cerchio to give the tank tops to the Varsity first, and that did not know if Cerchio distributed the later-acquired tank tops to the J.V. and Practice teams, it demonstrated that he was responsible for the distribution of the tank tops and that the

accusation against Cerchio (that she deliberately withheld the tank tops in order to segregate the teams or for some discriminatory motive) was unsupported and false.

I **FIND** that it is contradictory for Miller to urge Cerchio to tell the girls to return their leotards by a certain date and then, after she takes steps to collect the leotards for him, to accuse Cerchio of intimidating the girls when she was carrying-out his request.

Miller and Esposito failed to question Cerchio about statements and accusations made by the interviewees, such as the accusations of discrimination related to the distribution of the tank tops, the accusation that Cerchio intentionally excluded Bozetarnik from the Town Council's recognition event, an accusation stated by several interviewees that that Cerchio treated groups of athletes differently because she considered some athletes as "lacking" in athletic ability, and an accusation that Cerchio showed "favoritism" to certain athletes. Moreover, after hearing K.G. openly state that she "really disliked" Cerchio, Esposito and Miller failed to question Cerchio about whether she had any recollection of problems with K.G. Had they done so, they might have uncovered information that might possibly reveal K.G.'s bias and perhaps lead them to question K.G.'s veracity. Esposito and Miller testified that the issue of whether Cerchio "threw", "tossed" or "handed" the leotard to A.J. was of secondary importance and they therefore did not question Cerchio about it. They testified that the fact that Cerchio transferred the leotard to A.J. publicly was the primary issue. I **FIND** that a thorough interview of Cerchio should have included questions about both the *manner of the transfer* (handing the leotard over, tossing it or throwing it, or throwing it *at* someone) and *whether the transfer was made in public, in semi-public, or in private circumstances*. According to Cerchio's testimony, she walked six to ten feet in A.J.'s direction to where she was sitting and in a normal speaking (i.e., not as one would speak before an audience) told her to bring the leotard to Mr. Miller's office as she handed it to her at close range. I **FIND** that Esposito and Miller would have acquired crucial information about the nature of the transfer, i.e., a friendly hand-off of the leotard versus a rude throwing of the leotard *at* someone). I **FIND** that Esposito and Miller would have acquired crucial information about the public / non-public nature of the transfer and of the manner of the transfer had they properly and

thoroughly questioned Cerchio. I **FIND**, from Miller's own testimony during questioning by the Tribunal, that he admitted that he was speculating about Cerchio being "caught up in the moment" and about the manner of how she transferred the leotard. I also **FIND** that Esposito's and Miller's failure to pose the above-mentioned questions to Cerchio demonstrates that they did not perform their investigation thoroughly. I **FIND** that the failure to question Cerchio about the interviewees' statements and accusations deprived Cerchio of the opportunity to give her side of the story. I also **FIND** that Esposito's and Miller's failure to pose these questions to Cerchio strongly indicates that they, with only partial evidence, formed the belief that Cechio created a hostile environment and that this belief led them to reach a hasty conclusion that Cerchio was guilty of the specific HIB accusation made against her regarding the events leading up to and at the Awards Banquet.

I **FIND** that most of the statements and accusations related by the interviewees to Esposito and Miller were general in nature and did not relate to the specific issue of whether the facts surrounding Cerchio's return of the leotard to A.J. on December 16, 2019 was in any way violative of the Anti-Bullying Statute.

I **FIND** that Attorney Silvestro's cross-examination exposed that Cerchio knew about Zimmerman's letter on December 19, 2019. I **FIND** that Zimmerman, with Cerchio's knowledge and consent, were attempting to engaging in pre-emptive damage control in case M.J.'s and A.J.'s grievance were to develop into something more than an angry telephone call to the school's officials. However, it must be remembered that Miller testified that during his December 19th telephone call to Cerchio, he merely told Cerchio that someone had complained about the return of a leotard at the Awards Banquet; and that during that same phone call, he did not mention anything to Cerchio about the filing of an HIB charge against her or about his selection as a member of the HIB investigation panel. Upon hearing Miller mention her right to consult her union representative, Cerchio wondered whether she might be facing an HIB charge, but I **FIND** that in this regard she only had a mere suspicion and I **FIND** that Miller did not explicitly say to Cerchio that she could be facing an HIB charge. When Zimmerman sent the aforementioned "damage

control letter”, Cerchio was had not been explicitly or formally told that she was facing possible or actual HIB charges, and so, I **FIND** that Cerchio’s knowledge of the contents of the letter does not constitute an explicit or implicit admission of having committed an HIB offense. I also **FIND** that Cerchio’s knowledge of the contents of the letter does not suggest in any way that she was on notice that HIB charges were about to be levelled against her based on Miller’s limited conversation with her about a telephone call to the school about the return of a leotard and based on her own reasoning that, since A.J. was the only person who received a leotard at the dinner, it must have something to do with her. I **FIND** that Attorney Silvestro’s October 14, 2022 impeachment of Cerchio in regard to her knowledge of Ellen Zimmerman’s letter dated December 19, 2019 does not affect the issue of whether Cerchio did or did not commit an act of HIB on December 16, 2019.

I **FIND** that had Miller told Cerchio on December 19, 2019 that he had been selected to take part in an HIB investigation, she would have had the ability to attempt to retrieve the video from the Arby Road Restaurant (which was taped-over every two weeks) to use in her defense.

### **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 (H.I.B.)**

The 2010 law refined the definition of H.I.B. 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 H.I.B. 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.

The twelve required components of a policy prohibiting H.I.B. are:

- (1) a statement prohibiting H.I.B. of a student;

- (2) a definition of H.I.B. 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 H.I.B., including a provision that permits a person to report an act of H.I.B. 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 H.I.B. based on membership in a protected group.][;]
- (7) the range of ways in which a school will respond once an incident of H.I.B. 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 H.I.B. 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 H.I.B.;

(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. [N.J.S.A. 18A:37-15(b).]

#### H.I.B. on School Grounds versus Off School Grounds

In regard to the location of acts of H.I.B. (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 [N.J.A.C. 6A:16-7.5] 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.

(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 H.I.B.

In regard to the reporting of alleged H.I.B. 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 H.I.B. or a witness who reports acts of H.I.B.

N.J.S.A. 18A:37-16 (b) requires that acts of H.I.B. 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 H.I.B. or fails to take sufficient action to minimize or eliminate the HIB may be subject to disciplinary action.

#### H.I.B. 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 H.I.B. 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 H.I.B. policies to its employees and volunteers emphasizing the importance of the definition of H.I.B. 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 H.I.B. 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.

### The Residuum Rule

N.J.A.C. 1:1-15.1 contains the General Rules of Evidence Rules of the OAL. N.J.A.C. 1:1-15.1(c) provides:

All relevant evidence is admissible except as otherwise provided herein. A judge may, at his or her discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either:

- (1) Necessitate undue consumption of time: or
- (2) Create substantial danger of undue prejudice or confusion.

N.J.A.C. 1:1-15.5 governs the use of hearsay evidence and states the OAL's "residuum rule". N.J.A.C. 1:1-15.5(a) allows the admission of hearsay and provides as follows:

Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, *hearsay evidence shall be admissible* in the trial of contested cases. Hearsay evidence which is admitted *shall be accorded whatever weight the judge deems appropriate taking into account* the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, *its reliability*. [Italics supplied.]

N.J.A.C. 1:1-15.5(b) provides, however, that hearsay may not be the sole basis for any ultimate finding of fact. N.J.A.C. 1:1-15.5(b) provides:

Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

The text of N.J.A.C. 1:1-15.5(b) prohibits the judge from making an ultimate finding of fact that is based solely on hearsay evidence. To make an ultimate finding of fact, the

judge must base that finding of fact on “some legally competent evidence”. In the Matter of Tanelli, 194 N.J. Super. 492 (App. Div. 1984), certification denied 99 N.J. 181 (1984). Once some legally competent evidence is presented as the basis for a judge’s ultimate finding of fact, then and only then may hearsay evidence be used to support that ultimate finding of fact. In re Villano, OAL Dkt. No. TYP-11482-08, 2010 N.J. AGEN LEXIS 765, Final Decision,(January 25, 2010) ; In re Pagano, OAL Dkt. No. TYPPE-03404-2006N, 2007 N.J. AGEN LEXIS 83,Final Decision (February 23, 2007) ; N.J. Dep’t of Health & Senior Services v. Turner, OAL Dkt. No. HLT-02091-06, 2006 N.J. AGEN LEXIS 872, Final Decision (September 20, 2006).

### **CONCLUSIONS**

I have found that the October, 2018 body shaming incident does not provide information about whether Cerchio committed an act of HIB on December 16, 2019. To the extent that the HIB investigators relied upon A.J.’s and any other interviewees’ statements and accusations against Cerchio referencing the October, 2018 body-shaming incident in connection with Cerchio’s supposed disparate treatment of A.J. in 2019, I **CONCLUDE** that there should have been no reliance on such statements and accusations because they are irrelevant to the question of whether Cerchio committed an act of HIB on December 16, 2019.

I have found that the testimonies of various interviewees disclosed general, personal accusations against Cerchio. Among such generalized accusations against Cerchio were that Cerchio was “mean”, showed “favoritism”, neglected the J.V. and Practice teams members, excluded Bozetarnik from a Town-sponsored recognition event, and that she demanded high standards of performance from her own children. I have found that these generalized and personal allegations do not indicate whether or not Cerchio committed an act of HIB on December 16, 2019. To the extent that such allegations were entertained by the HIB investigators, and were considered by the HIB investigators in their determination that Cerchio committed an act of HIB on December 16, 2019, I **CONCLUDE** that reliance on such evidence is inherently suspect, is irrelevant

to the question of whether Cerchio committed an act of HIB on December 16, 2019, and should not have been considered in the investigators' and the BOE's sustaining of the HIB charge. I **CONCLUDE** that the HIB investigators should not have utilized any such statements or accusations in their decision-making process regarding the HIB charges brought against Cerchio because they are general derogatory comments about Cerchio's personality, coaching style, and character; because the purpose of these comments is not directed to the gathering of information about the pending HIB charge; and because the comments are not relevant to determining whether there is competent evidence which supports or casts doubt upon the veracity of the HIB charge against Cerchio in the pending case. I further **CONCLUDE**, that based upon the testimony of the BOE's own witnesses, the statements and accusations referenced above were considered by the HIB investigators and did indeed affect their decision-making process. I further **CONCLUDE** that the inclusion of the aforementioned statements and accusations tainted the decision-making process, unduly affected the fairness of the decision-making process, and provides not only good cause, but a compelling reason to reverse the substantiation of the HIB charge.

Having found that A.J. availed herself of only two of eight opportunities to compete on the Junior Varsity level during the 2019 season, I **CONCLUDE** that A.J.'s statement that Cerchio did not give her the chance to compete is not true and I **CONCLUDE** that her statement that Cerchio's decision-making was based on her having "favorites" is also untrue. I **CONCLUDE** that Cerchio and Bozetarnik made their decisions regarding the placement of the girls on the Varsity, Junior Varsity or Practice Team levels were made on the basis of accepted standards and objective criteria. I **CONCLUDE** that A.J. was given a fair opportunity to question her placement on the Practice Team and that Cerchio's response that she needed to do more work reflected a fair evaluation of her skills and was not affected by any bias. I **CONCLUDE** A.J.'s accusation that Cerchio treated her unfairly was unwarranted.

Having found that the manner of Cerchio's transfer of the leotard to A.J. (including the content of the words stated, the normal volume of her voice, and the handing of the

leotard to A.J.) was not public and was not such that it could have attracted undue attention from bystanders, as well as having found many facts that refute the versions of the facts and that refute the accusations presented by the interviewees and the BOE's witnesses, I **CONCLUDE** that the BOE has failed to present a preponderance of evidence that supports its contention that Cerchio singled-out A.J. in public, humiliated A.J., held A.J. up to ridicule and scorn due to her supposed "lack of athletic ability", or committed any other acts of HIB against A.J. I **CONCLUDE** that Cerchio's public recognition of A.J.'s athletic prowess, especially her dancing prowess, absolutely refutes the allegation that Cerchio believed that A.J. was "lacking in athletic ability".

I **CONCLUDE** that there is no evidence in this matter that supports the idea that A.J. lacked athletic ability or that Cerchio believed that A.J. lacked athletic ability. I **CONCLUDE** that Cerchio and her Assistant Coach, Tara Bozetarnick, with the full knowledge of Ryan Miller, ranked all of the gymnasts in an objective way using the standards set forth in the NJSIAA and with information submitted by the gymnasts themselves. I **CONCLUDE** that Cerchio and Bozetarnik believed that certain team members had more or less *developed* athletic ability (as opposed to raw, not-yet developed ability) than others, and fairly assigned them to the Varsity Team, the Junior Varsity Team and the Practice Team. I **CONCLUDE** that there is no evidence that supports the idea that Cerchio, given the results of the ranking system, used it in a way to *improperly* decide that A.J. had less raw athletic ability than her peers or less developed athletic ability than her peers. I **CONCLUDE** that the BOE has failed to present any evidence to demonstrate that the ranking system developed by Cerchio and Bozetarnik was unfair or that it was in any way prejudicial to A.J. I **CONCLUDE** that there is no evidence that the ranking system that Cerchio and Bozetarnik developed was used by anyone in a way that could possibly be violative of the New Jersey Anti-Bullying Bill of Rights Act. I **CONCLUDE** that it is necessary for a coach to fairly assess the talent of his or her athletes and to rank them accordingly based on objective criteria as was done in the matter at hand. I **CONCLUDE** that the facts, as determined by this Tribunal, do not support the proposition that A.J. reasonably perceived Cerchio's words, gestures, verbal or physical acts, were motivated by any distinguishing characteristic possessed by A.J.

Having considered all of the evidence presented in this matter, and weighing it objectively and carefully, I **CONCLUDE** that there was nothing in Cerchio's public speech at the Awards Banquet or in her after-banquet private (or at most semi-public) conversation with A.J. at the table where she was sitting at the time of the transfer of the leotard that a reasonable person knew or should have known would have the effect of physically or emotionally harming a student; or that that conversation could have the effect of insulting or demeaning a student; or that the conversation could create a hostile educational environment.

Having searched for competent evidence to serve as a basis for considering the hearsay statements offered as evidence to support the BOE's case, I have found no such competent evidence and I therefore must **CONCLUDE** that the hearsay statements cannot be used to decide any finding of ultimate fact in this matter. Having found that the testimony of Assistant Principal Brook Esposito, the testimony of Athletic Director Ryan Miller, and the testimony of Superintendent Dr. Joan Mast all rely on hearsay evidence, I **CONCLUDE** that their testimony is insufficient to sustain the substantiation of the HIB charges against Cerchio. Having considered the testimony of Lisa Cerchio and of Megan Whitney as well as the documents submitted in discovery (i.e., those marked in evidence), having found that said testimony has been comprehensive, coherent, and unrefuted and that said evidence is credible, I **CONCLUDE** that the Petitioner, Lisa Cerchio has presented sufficient evidence and compelling reasons for this Tribunal to reverse the substantiation of the HIB charges brought against her.

I **CONCLUDE** that the substantiation of the HIB charge against Lisa Cerchio must be, and hereby is, **REVERSED**.

### **ORDER**

This matter having been considered by the Tribunal, and the Tribunal having considered the testimony of the witnesses, the exhibits in evidence, and having read the

arguments of counsel, and for good cause:

It is on this Twenty-Ninth (29th) day of December, 2023,

**ORDERED** that the substantiation of the HIB charge brought against Lisa Cerchio by the Scotch Plains-Fanwood Board of Education is hereby **REVERSED**. It is further **ORDERED** that any reference to the substantiation of said HIB charge in the records of the Scotch Plains-Fanwood School District shall be stricken. And it is further **ORDERED** that a copy of this Initial Decision shall be immediately sent to the New Jersey Department of Education and to each of the parties herein. And it is further **ORDERED** that upon receipt of this Initial Decision, counsel for the parties shall acknowledge receipt thereof by email to this Tribunal.

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.

A handwritten signature in black ink, reading "John P. Scollo", enclosed within a thin yellow rectangular border.

December 29, 2023

DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

Date Mailed to Parties:

## **APPENDIX**

### **List of Witnesses**

#### **For Petitioner:**

Lisa Cerchio, petitioner

Megan Whitney, Acquaintance of Lisa Cerchio

#### **For Respondent:**

Brooke Esposito, Assistant Principal

Ryan Miller, Athletic Director

Dr. Joan Mast, Superintendent

### **List of Exhibits**

#### **For Petitioner:**

P-6 Correspondences between counsel.

P-7 Correspondences between counsel.

P-8 A cover letter dated February 13, 2020 from Douglas M. Silvestro, Esq., the BOE's attorney, to Cerchio's former attorney, A. John Blake, Esq.

P-9 This is a letter dated February 24, 2020 from Attorney Silvestro to Attorney Blake.

P-11 A set of Requests for Admissions propounded by the BOE's attorney with responses made by Petitioner, Lisa Cerchio.

P-15 A set of text messages between A.J. and Lisa Cerchio.

P-17 A five-page set of texts between Lisa Cerchio and four team captains.

P-20 A list of the 2019 Varsity, J.V. and Practice Squad Gymnastic Team members and a three-page evaluation of Coach Lisa Cerchio.

For Respondent:

- R-1 The HIB Incident Report Form dated 12/18/2019.
- R-2 Interrogatories sent to Cerchio by the Respondent and Cerchio's answers to same.
- R-3 Interrogatories sent to Cerchio by the Respondent and Cerchio's answers to same.
- R-6 Email dated December 19,2019 at 11:06:58 p.m. sent by the Team Parent, Ellen Zimmerman to Lisa Cerchio.