

New Jersey Commissioner of Education

Final Decision

H.P., on behalf of minor child, R.S.,

Petitioner,

v.

Board of Education of the Borough of Tenafly,
Bergen County,

Respondent.

Synopsis

Petitioner appealed the decision of the respondent Board that her son, a freshman at Tenafly High School during the 2022-2023 school year, committed an act of harassment, intimidation, and bullying (HIB), pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A. 18A:37-13 et seq.*, against a fellow classmate. The HIB complaint resulted from anti-semitic comments and threats of physical harm made by R.S. during an exchange on Instagram with a Jewish student in January 2023; this exchange followed text exchanges between R.S. and his classmate which included back-and-forth insults regarding the other's perceived soccer skills. R.S. alleged that the Instagram messages were in response to these sarcastic comments made about his soccer abilities. The Board filed a motion for summary decision, which was opposed by the petitioner, who contended that the Board's determination was procedurally deficient as it did not provide an HIB hearing within ten days as required by the Act; further, petitioner argued that R.S. was also a victim of bullying based on the comments made about her son's soccer skills.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the case is ripe for summary decision; an action by a board of education is entitled to a presumption of correctness and will not be undermined unless it can be shown that the decision was arbitrary, capricious or unreasonable; R.S. and the victim knew each other from physical education and other classes; an HIB investigation was initiated by the Board's anti-bullying specialist after the victim met with her guidance counselor to report R.S.'s anti-semitic comments and threats made through a private message on Instagram; and the resulting HIB report concluded that R.S.'s actions met all of the statutory requirements and did constitute an act of HIB. The ALJ concluded that the action of the Board in determining that R.S.'s conduct constituted HIB was not arbitrary, capricious or against the weight of the evidence; further, even though the Board failed to provide a hearing in this matter within 10 days as required under the Act, this failure does not undermine the Board's substantive HIB determination. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

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

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

144-24
OAL Dkt. No. 07170-23
Agency Dkt. No. 198-7/23

New Jersey Commissioner of Education
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v.

Board of Education of the Borough of
Tenafly, Bergen County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Tenafly Board of Education's (Board) determination that R.S. committed an act of harassment, intimidation, and bullying was not arbitrary, capricious, or unreasonable. The Commissioner further concurs with the ALJ that the Board failed to comply with *N.J.S.A. 18A:37-15(b)(d)* because the hearing requested by petitioner was not held within ten days. The Board is reminded to comply with this provision moving forward. However, the failure to comply is insufficient reason to require the Commissioner to reverse the Board's substantive HIB determination.

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

IT IS SO ORDERED.¹



ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 26, 2024

Date of Mailing: March 27, 2024

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON MOTION
FOR SUMMARY DECISION

OAL DKT. NO. EDU 07170-23

AGENCY DKT. NO. 198-7/23

H.P. ON BEHALF OF MINOR CHILD R.S.,

Petitioner,

v.

**BOROUGH OF TENAFLY BOARD OF
EDUCATION, BERGEN COUNTY**

Respondent.

Joseph R. Donahue, Esq., on behalf of petitioner H.P. o/b/o R.S. (Joseph R. Donahue, attorneys)

Stephen Fogarty, Esq., for respondent Borough of Tenafly Board of Education (Fogarty and Hara, attorneys)

Record Closed: January 8, 2024

Decided: January 24, 2024

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about July 25, 2023, H.P. (petitioner) filed a Petition of Appeal to the decision of the Borough of Tenafly Board of Education (Board) in which she asserted that the District erred in finding that her son (R.S.) had been the perpetrator of an act(s) of

harassment, intimidation or bullying (HIB) in violation of the Anti-Bullying Bill of Rights Act (ABBRA), N.J.S.A. 18A:37-13 et seq., against S.S., a fellow high school student.

The matter was transmitted by the Department of Education to the Office of Administrative Law (OAL), where it was filed on August 8, 2023, for plenary hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was assigned to the undersigned thereafter. Accordingly, a telephonic case management conference was convened with the parties on September 7, 2023, to discuss the potential issues in the case, motion practice, and other case management concerns. Additional status conferences were held on October 18 and November 17, 2023. Initially, evidentiary hearing dates were set for December 2023 but those were adjourned when respondent sought leave to file a summary decision motion. Respondent filed a Motion for Summary Decision on the Appeal on or about November 14, 2023. Extensions of briefing deadlines were generously granted to each party. Those motion submissions having been received, the matter is now ripe for decision.

ISSUE PRESENTED ON THE MOTION

Respondent argues that the Board's determination that the conduct petitioner complained of did not constitute harassment, intimidation, or bullying under N.J.S.A. 18A:37-14 was not arbitrary, capricious or unreasonable and can be decided at this preliminary stage on the basis that there are no genuine issues of material fact and that the undisputed facts warrant upholding the Board decision. Petitioner opposes the motion to dismiss on the basis that the conclusions of the Board were arrived at in a cursory and faulty manner procedurally; and that substantively, her son should have also been viewed as a victim of bullying.

STANDARD OF REVIEW ON THE MOTION

An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Thus, in order to prevail, those challenging a HIB decision made

by a board of education “must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it.” G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of the Bor. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014) (citation omitted) <<http://njlaw.rutgers.edu/collections/oal/>>, adopted, Comm’r (April 10, 2014). Also, a board’s decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) (citing Campbell v. Dep’t of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, Comm’r (April 25, 2013) <<http://njlaw.rutgers.edu/collections/oal/>>.

Under the Uniform Administrative Procedure, N.J.A.C. 1:1-1.1 to -21.6, which govern the conduct of contested cases before the OAL, a party may file a motion for summary decision on substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion “shall be served with briefs and with or without supporting affidavits.” N.J.A.C. 1:1-12.5(b). The Administrative Law Judge presiding over the contested case may grant a party’s motion “if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.” Ibid. Accord Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 530 (1995).

UNDISPUTED MATERIAL FACTS

1. R.S. and S.S. were both freshman in high school during the 2022-2023 school year. Both were attending Tenaflly High School as freshmen that school year. R.S. is a boy from Korea and S.S. is a Jewish girl from Israel. [Brief of Joseph R. Donahue, Esq., at 2.] The two students knew each other from physical education classes, among other school classes and places.

2. On January 9, 2023, the victim came into the Guidance Office to speak with her counselor and reported that R.S. exchanged insulting and threatening comments via Instagram on January 7, 2023. [Certification of James O. Morrison (Morrison Cert.) ¶ 4.] These messages included threats of physical harm. [Morrison Cert. ¶ 4, Exhibit B.]

3. As a result, the District decided to inform a Crisis Team Member who determined R.S. needed a mental health clearance. On January 10, 2023, R.S. was cleared to return back to school as it was determined he was not a danger to himself or others. [Watson Cert. ¶¶ 5-6; Exhibit B.]

4. On or about January 11, 2023, Jessica Lopes, who is the District's Anti-Bullying Specialist, began an investigation to determine the facts and whether an act of HIB had occurred. James Morrison, Principal at the high school, assisted her with parts of the investigation. [Certification of Jessica Lopes (Lopes Cert.) ¶ 5.] Lopes met with the victim to learn more about the Instagram interaction that occurred on January 7, 2023. [Lopes Cert., Ex. B]. The victim reported that R.S. contacted her first through Instagram on January 7, 2023. R.S. messaged, in relevant part, the following to the victim:

"U literally run lik the people from the holocaust getting chased by Germans"

"ur forehead is big as ur life bout getting injected by germans"

"no wonder y hitler ain't liking u only"

"Monday ill kill u"

"I'll fucking disform ur face"

"and I have the rights to beat ur lil ass up"

"u stupid...I'm going to get physical on u...hit ur face with my shoulder...even worse...my elbow...I can break ur calves since u have skinny ones...and u don't fucking work out"

[Morrison Cert. ¶ 8; Ex. C.]

5. Lopes and Morrison also met with R.S. on or about January 11, 2023. R.S. stated that he had seen the victim like one of his Instagram pictures, so he sent a private message to her. R.S. alleged that his messages were in response to sarcastic comments made about him and his soccer skills. [Morrison Cert. ¶ 9; Exhibit B.]

6. On or about January 19, 2023, after investigating the report, Lopes issued her report finding that R.S.'s actions met all the statutory requirements and did constitute an act of HIB. She found that both the victim and R.S. made unfavorable comments to

each other about who was better at soccer; however, R.S. made comments threatening to hurt the victim as well as anti-semitic comments about her religion. Lopes also determined that since the victim said she was "...fearful of her physical/emotional well-being because she felt scared by the subjective comments made about her religion" and "...felt like she was being intimidated, judged and threatened, it created a substantial disruption/interference for her and meets the statutory definition of HIB." [Lopes Cert., Exhibit B.]

7. The Interim Superintendent Bruce Watson reviewed the Investigation Report, his own notes from the interviews, and agreed with Lopes that R.S. was fearful for her emotional and physical wellbeing because of the comments made by R.S., especially the comments made about her religion, and that thus he had violated the HIB policy. He informed R.S.'s parents in writing on January 17, 2023, that after reviewing the interviews and the pertinent evidence obtained by school personnel, R.S. was being charged with violating the HIB policy, and several other district policies. [Watson Cert., Exhibit A; Supplemental Watson Cert., ¶ 5.]

8. R.S. was required to receive counseling and served a very short suspension pending the above-referenced clearance process. [Lopes Cert., Exhibit B.]

9. On February 28, 2023, a second letter was sent to the parents to the same effect. [Certification of Joseph R. Donahue, Esq., (Donahue Cert.), Exhibit B.] Both letters advised petitioner of their procedural rights.

10. On March 3, 2023, petitioner wrote to Watson and requested a hearing on the allegations and charges. [Donahue Cert., Exhibit C.]

11. On March 22, 2023, the District Business Administrator/Board Secretary Victor J. Anaya wrote to petitioner informing them that the Board had affirmed the HIB finding and that petitioner could appeal the decision to the Commissioner of Education. [Donahue Cert., Exhibit D.]

12. On April 5, 2023, counsel for petitioner advised Board counsel in writing of Anaya's notice and also that the Board had failed to provide a hearing consistent with the March 3 request and their rights under ABBRA. [Donahue Cert., Exhibit E.]

13. Within several hours, Board counsel advised that a hearing would be held on April 24, 2023. [Donahue Cert., Exhibit F.]

14. On April 24, 2023, petitioner, her son, and counsel appeared for the hearing. The District did not present witnesses or evidence, but relied upon the investigation report. [Donahue Cert., ¶ 12.]

15. On April 26, 2023, the Board issued its formal notice that the HIB charges were upheld against R.S. [Donahue Cert., Exhibit G.]

16. On July 25, 2023, petitioner filed a Petition of Appeal before the Commissioner of Education. [Watson Cert. ¶ 13.]

17. On August 8, 2023, the Office of Controversies and Disputes transmitted the record to the Office of Administrative Law ("OAL").

Based on these facts presented on the pending motion, and even giving petitioners the benefit of any reasonable inferences that could be drawn from their papers or initial petition, I **FIND** that petitioner cannot prove that the Board's determination was arbitrary, capricious, or unreasonable.

LEGAL DISCUSSION

The issue for resolution is whether the Board's finding of HIB was arbitrary, capricious, or unreasonable, in light of the information that the Board possessed when it made its determination. The ABBRA sets forth:

"Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic

communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students 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.

The Anti-Bullying Act mandates that school personnel report in writing to the school principal "all acts of harassment, intimidation or bullying" within two days of witnessing or receiving reliable information regarding any such incident. N.J.S.A. 18A:37-15(b)(5). The principal or the principal's designee must initiate a prompt investigation of the incident, which must be completed within ten school days of the report to the principal. N.J.S.A. 18A:37-15(b)(6)(a). The results of the investigation must be reported to the superintendent and the board of education. N.J.S.A. 18A:37-15(b)(6)(b) and (c). Within five school days of reporting the results to the board of education, school officials must inform the parents or guardians of students involved about the results of the investigation. N.J.S.A. 18A:37-15(b)(6)(d). The statute does not expressly require disclosure of a written investigative report, notes, or any other designated school records. Rather, the statute provides that the school district must inform parents in writing of "the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of

harassment, intimidation, or bullying.” Ibid. See K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 358 (App. Div. 2011).

At the next meeting following receipt of the HIB report, the board shall issue a decision to affirm, reject, or modify the superintendent’s HIB decision. N.J.S.A. 18A:37-15(b)(6)(e). After receiving the results of an HIB investigation, a parent or guardian may request a hearing before the board of education. N.J.S.A. 18A:37-15(b)(6)(d). Parents of students who are aggrieved by the board of education’s determination are then entitled to appeal the board’s decision to the Commissioner of Education no later than ninety (90) days after the board issued the decision. Id.

I agree with petitioner that the courts have addressed situations where an act is not considered to be bullying motivated by a “distinguishing characteristic.” In L.B.T. ex rel K.T. v. Board of Education of the Freehold Regional School District, EDU 7894-12 (January 24, 2013), adopted, Comm’r (March 7, 2013), <<http://njlaw.rutgers.edu/collections/oal/>>, there was a mutual dispute between two students about their respective roles on the swim team. The judge held that if a victim was targeted because of a dispute between the two people involved - such as a relationship falling apart between former friends, a fight over a piece of property, or some form of personal vendetta of one against another – that conduct would not be based on a “distinguishing characteristic” of the victim and would not be a violation of the statute.

Nevertheless, in this matter there is no question that R.S.’s statements were specifically targeted at the victim’s religion. These messages threatened physical harm on the victim with comparisons to Adolph Hitler and the Holocaust. No reasonable person could conclude that these messages were not inherently based on the victim’s religion even if earlier communications were sports “trash talk.” I **CONCLUDE** that R.S. escalated the “trash talk” exchanges into hate speech through his chosen words. Students need to learn that words have power.

Moreover, S.S.’s earlier statements or retorts is not a defense to an act of HIB. In W.M. o/b/o J.M. v. Bedminster Twp. Bd. of Ed., OAL Dkt. No. EDU 07337-19 Initial Decision (Dec. 15, 2022), adopted, Comm’r (Mar. 7, 2023)

<<http://njlaw.rutgers.edu/collections/oal/>>, a student made negative comments about how much the victim weighed and unkind comments about the size of the victim's shoes, but defended that these comments were merely "trash talk" among a group of classmates. The Board's decision was upheld at both the OAL and the Department as not arbitrary or capricious. The Commissioner set forth that "[i]t is irrelevant to the determination in this matter whether [victim] participated in trash-talking or whether [student] was joking; the HIB definition does not consider the accused's intent." *Id.* at 6. Here, petitioner cannot negate his conduct by belatedly claiming that the victim's retorts subjected him to HIB. He is free to make an independent HIB complaint, but R.S. did not do so. See A.D. o/b/o A.D. v. River Edge Twp. Bd. of Ed., OAL Dkt. No. EDU 04748-23, Initial Decision (Sep. 18, 2023), adopted, Comm'r (Oct. 27, 2023), (stating that if petitioner believed that the student was the target of HIB, they should have filed a complaint) <<http://njlaw.rutgers.edu/collections/oal/>>.

New Jersey courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Env'tl. Prot., 122 N.J. Super. 184, 199 (Ch. Div. 1973), *aff'd o.b.*, 131 N.J. Super. 37 (App. Div. 1974). Likewise, the Commissioner has held that, in order to prevail, petitioner "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of Franklin Lakes, No. EDU 13204-13, Initial Decision (Feb. 24, 2014) (citation omitted), adopted, Comm'r (Apr. 10, 2014) <<http://njlaw.rutgers.edu/collections/oal/>>.

On the basis of the undisputed facts and applicable legal standards, I **CONCLUDE** that the action of the Board in determining that the conduct constituted harassment, intimidation, or bullying within the meaning of the Anti-Bullying Act was not arbitrary, capricious or against the weight of the evidence, even if I or some other district might have decided it differently.

However, I note that the undisputed facts also establish that the Board did fail to hold a timely hearing in accordance with N.J.S.A. 18A:37-15(b)(6)(d), under which "[a] parent or guardian may request a hearing before the board after receiving the information,

and the hearing shall be held within 10 days of the request.” Petitioner asked for a hearing on March 3, 2023, but the Board did not hold a hearing until April 24, 2023, and only after being reminded that they had failed to respond to the earlier request. Therefore, I **CONCLUDE** that the Board failed to hold a hearing within ten days in accordance with ABBRA.

While the ABBRA does not explicitly provide for remedies upon a successful procedural error within a school board’s HIB investigation or decision to the Commissioner, the Commissioner has simply ordered school districts who have violated the ABBRA to comply with the statutory requirements. See, e.g., T.R. & T.R. ex rel. E.R. v. Bd. of Educ. of the Bridgewater-Raritan Reg’l Sch. Dist., EDU 10208-13 Initial Decision (Sept. 25, 2014) adopted, Comm’r (Nov. 10, 2014) (ordering school district that improperly found that a male student who sexually harassed a female student did not commit acts of HIB to also “comply with all reporting and other statutory and regulatory requirements applicable to the substantiation of an incident of HIB”). <http://njlaw.rutgers.edu/collections/oal/>.

Thus, while the Board violated the time requirements for a hearing, the Board should be required to comply prospectively and/or to retrain its staff responsible for implementing the ABBRA. See M.D.G. ex rel. C.J. v. Bd. of Educ. of the City of Atlantic City, EDU 6450-04, Initial Decision (April 27, 2005), adopted, Comm’r (May 26, 2005) (board may be ordered to comply with the Act by “conducting staff in-service programs with respect to the requirements of the statute in order to assure that all pupils under the Board’s supervision and control will be protected from harassment, intimidation or bullying in the future.”) <http://njlaw.rutgers.edu/collections/oal/>. I **CONCLUDE** that it does not undermine the substantive HIB determination.

ORDER

It is **ORDERED** that the motion of respondent Borough of Tenafly Board of Education for a Summary Decision Order on the appeal filed by petitioner H.P. on behalf of R.S. is hereby **GRANTED**. It is further **ORDERED** that the respondent Board must hold timely hearings in accordance with the statute and to document to the Bergen County

Office of Education the timeliness of the next three of its ABBRA hearings. It is further **ORDERED** that the Appeal shall be and the same is hereby dismissed.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



January 24, 2024
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

1/24/24

Date Mailed to Parties:
id

1/24/24