433-25
OAL Dkt. No. EDU 10786-24
Agency Dkt. No. 207-6/24

New Jersey Commissioner of Education

Final Decision

S.K., on behalf of minor child, K.S.,

Petitioner,

v.

Board of Education of the Township of Montgomery, Somerset County,

Respondent.

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

Petitioner appeals the Board's determination that his child, K.S., committed an act of harassment, intimidation, and bullying (HIB) when he called another student, A.V., "disabled" and "acoustic," a term that students use to mean "autistic." The Administrative Law Judge (ALJ) found that the matter was ripe for summary decision, reviewed each element of the definition of HIB at *N.J.S.A.* 18A:37-14, and concluded that petitioner had not met his burden of demonstrating that the Board's decision was arbitrary, capricious, or unreasonable. The ALJ noted that even if there was room for an alternate conclusion, the Board's determination was supported by the evidence.

In his exceptions, petitioner argues that the record lacked sufficient evidence for the ALJ to conclude that the Board's decision was not arbitrary, capricious, or unreasonable without an evidentiary hearing. Petitioner contends that the ALJ improperly placed the burden on him to show that the Board's decision was arbitrary, capricious, or unreasonable, because the burden on a motion for summary decision falls on the moving party, which was the Board. According to petitioner, whether K.S. actually engaged in the conduct the Board found to be HIB is material, and petitioner contests that the behavior occurred, such that there is a dispute that can only be resolved through an evidentiary hearing. Petitioner also claims that the record is contradictory regarding when and where the alleged incident occurred.[1]

In response, the Board argues that the record is clear that K.S. admitted to calling A.V. "acoustic" and that he "may have" called A.V. "disabled," which is competent evidence supporting the ALJ's findings. The Board further notes that HIB case law provides that even where evidence may leave room for two opinions, it is not sufficient to overturn a Board's decision as arbitrary, capricious, or unreasonable. According to the Board, all the statutory criteria for an act of HIB were met, and the Initial Decision should be adopted.

Upon review, the Commissioner concurs with the ALJ that petitioner failed to satisfy his heavy burden of demonstrating that the Board acted arbitrarily, capriciously, or unreasonably when it determined that K.S. committed an act of HIB. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will

[1] Petitioner also argues that student witness W1 is not credible due to an ongoing conflict he had with A.V. It is unclear why petitioner believes that W1's conflict with A.V. would lead W1 to make statements in support of A.V. If anything, the Commissioner might expect the opposite. Nonetheless, the record does not suggest that the Board's reliance on W1's statement was arbitrary, capricious, or unreasonable.

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).

Here, the Commissioner finds that the record contains substantial credible evidence providing a reasonable basis to support the Board's HIB determination. Substantial evidence has been defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." *In re Pub. Serv. Elec. & Gas Co.*, 35 *N.J.* 358, 376 (1961) (quoting *In re Hackensack Water Co.*, 41 *N.J. Super.* 408, 418 (App. Div. 1956)). The term has also been defined as "evidence furnishing a reasonable basis for the agency's action." *McGowan v. N.J. State Parole Bd.*, 347 *N.J. Super.* 544, 562 (App. Div. 2002). The record reflects that the district's Anti-Bullying Specialist (ABS) conducted an investigation of the HIB allegation that included both K.S.'s version of events and statements from two other student witnesses, one of whom (W3) did not hear the alleged comments and one of whom (W2) heard K.S. say "that's so acoustic" to A.V. but denied that "acoustic" is a word students use to mean "autistic." After reviewing all of the evidence, the ABS

concluded that the statements from A.V. and student witness W1 – in combination with K.S.'s own admission to using the term "acoustic" and the corroborating statement by W2 that K.S. used the term "acoustic" – supported a finding of HIB, as did the Board. While the evidence may leave room for two opinions, that is an insufficient reason for the Commissioner to overturn the Board's decision. Petitioner has not shown that the Board's determination was arbitrary, without rational basis, or induced by improper motives. Nor has petitioner demonstrated that the Board acted in bad faith or in utter disregard of the circumstances before it.

Furthermore, contrary to petitioner's argument, these issues do not require an evidentiary hearing to resolve. K.S. admitted to using the term "acoustic" during a confrontation with A.V. Student witness W2 also reported that K.S. said "that's so acoustic" during the confrontation.[2] This statement alone is sufficient to support the Board's conclusion, and there is no material dispute of fact regarding whether it took place. While K.S. denied that the term "acoustic" means "autistic,"[3] in light of the totality of the circumstances, including a statement from W1 indicating that students use this term to mean "autistic," the Commissioner finds that it was not arbitrary, capricious, or unreasonable for the Board to conclude that A.V. reasonably perceived that K.S.'s comment was motivated by a distinguishing characteristic and that the comment was insulting or demeaning.

[2] Petitioner suggested during the proceedings that it was relevant that K.S. said "that's so acoustic," presumably as opposed to something like "you're so acoustic." The Commissioner finds that this is a distinction without a difference. Even if K.S. was only commenting on what A.V. had said or done, it does not change the fact that it was reasonable for A.V. to perceive K.S.'s comment as being motivated by a distinguishing characteristic and to feel insulted or demeaned by the comment.

[3] K.S.'s and W2's statements that "acoustic" is "just a 'thing' kids call people" or "just something kids called each other" do not bear significant weight.

The Commissioner is not persuaded by petitioner's allegation that inconsistencies in the record about when and where the HIB took place undermine the Board's findings. The record adequately supports the Board's conclusion that K.S. said to W1, while they were walking to the bus, that A.V. is "disabled and acoustic." While petitioner denies that this conversation with W1 occurred, it was not arbitrary, capricious, or unreasonable for the ABS to credit W1's statement and to determine that it did occur. As such, this statement, too, is sufficient to support the Board's conclusion. Furthermore, the record supports a conclusion that K.S. made similar comments on a third occasion, during the robotics competition. [4] The fact that there were three separate incidents in which K.S. used the terms "acoustic" and/or "disabled" supports the Board's conclusion that K.S. did make such comments and that they constituted HIB.

The Commissioner is also in accord with the ALJ's determination that all requisite elements of the statutory definition of HIB, codified at *N.J.S.A.* 18A:37-14, were satisfied in this case. 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.

[4] The Commissioner notes that HIB can occur off school grounds, in cases in which a school employee is made aware of such actions. *N.J.S.A.* 18A:37-15.3. The Board's HIB policy defines HIB to include actions that take place off school grounds in accordance with this provision. As such, K.S.'s comments during the robotics competition, whether it was school-sponsored or not, appear to fall within the ambit of the Board's policy, along with the confrontation in class and the comments made while K.S. and W1 were walking to the bus.

510-20 (Feb. 4, 2020). The Initial Decision thoroughly details the reasons these criteria have been met, and petitioner did not take exception to this portion of the Initial Decision. The Commissioner agrees with the ALJ that these criteria have been met.

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.[5]

COMMISSIONER OF EDUCATION

Date of Decision: September 8, 2025
Date of Mailing: September 8, 2025

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 10786-24
AGENCY DKT. NO. 207-6/24

S.K. ON BEHALF OF MINOR CHILD S.K.,
Petitioners,
v.
DISTRICT BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY,
Respondent.

Maxwell J. Smith, Esq., for petitioners (Han & Smith LLP, attorneys)

Sean W. Fogarty, Esq., for respondent (Fogarty & Hara, Esqs., attorneys)

Record Closed: April 28, 2025 Decided: June 13, 2025

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Petitioner S.K., parent of minor son S.K., appeals from a determination made by respondent Montgomery Township Board of Education ("District" or "Board") that student

S.K. committed an act of harassment, intimidation, or bullying (HIB) in violation of the Anti-Bullying Bill of Rights Act ("Act"), N.J.S.A. 18A:37-13.1 to -32. The Board filed a motion for summary decision.

PROCEDURAL HISTORY

The Department of Education transmitted the matter to the Office of Administrative Law, where, on August 2, 2024, it was filed as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The Board sought leave to file a motion for summary decision. All briefs were filed by April 28, 2025, and the record for the motion closed that day.

FINDINGS OF FACTS

The following facts, taken from the parties' submissions, including certifications and supporting documents, are undisputed.

1. The events at issue here occurred while S.K. was in eighth grade. He and the alleged HIB victim, "A.V.," were in the same global leadership class and participated in a robotics competition during the times relevant to this matter.

2. On January 8, 2025, A.V. reported to his speech language specialist, Ashley Kapinos, that "someone made fun of [his] speech[.]" R-B at 2. During a school robotics competition, a student stated that he should not speak because he has a "disability" and is "autistic." Ibid. A.V. reported that he did not hear the statements but rather a friend told him about them. A.V. reported to Kapinos that these statements made him upset and that he called the other student a "fat ass." Ibid. He later "confronted" the student, who then apologized. Ibid.

3. A.V. also reported to Kapinos that another incident occurred on the bus the prior week. Two other students took his belongings and would not return them. A third student used his phone to record as A.V. "put his hands on one of the students in order to get his belongings back." Ibid. A.V. was

teased and forced to make false statements about himself (that he liked someone and had forty-seven wives). The recordings were shared at school.

4. K.S. was identified as the alleged offender. Three student witnesses were also identified. Id. at 2–3.

5. A.V. completed an incident report on January 8, 2024. He reported that a few days after the competition, his friend ("W1") told him that K.S. called him "disabled." R-C at 1. A.V. approached K.S. and called him "a fat ass." Ibid. K.S. called him "autistic a few days later." Ibid. K.S. apologized a few days after he called A.V. autistic. R-C.

6. A.V. also wrote on the incident report that "[r]ecently, nearly every day [W1] and ["Student 1"] have been taking my stuff and insulting me." Ibid. He wrote that he "played along" a few times, hoping they would stop. Ibid. Students twice recorded him during these incidents, when he stated that he liked someone and had fifty-nine wives. He admitted to resorting to violence to retrieve his belongings and that students recorded him as he was "beating them up." Ibid.

7. A.V. also wrote that the "first case settled down." The "second case" did not; however, "they temporarily stopped taking [his] stuff and [he] stopped hitting them." Ibid. A.V. added that "they keep on insulting me[.]" Ibid.

8. The District opened an HIB investigation, pursuant to the Act and its HIB Policy No. 5512, on or about January 11, 2024, and notified petitioner of the investigation on January 12, 2024. Cert. of Mary McLoughlin ("McLoughlin Cert.") at ¶ 9; R-D; R-A. The investigation was conducted by the school's Anti-Bullying Specialist ("ABS"), Jeanne Fedun. R-D. The HIB Report identified the location of the HIB as "school sponsored activity or event off school property," and the motivation for the HIB was "disability." R-F at 1.

The ABS interviewed A.V., three student witnesses (W1, W2, W3) and K.S. on January 18, 2024. She interviewed Stephanie Lachenauer, the global leadership teacher, on January 22, 2024.

9. In a January 12, 2024, written statement, K.S. reported that, during the robotics competition, W1 expressed upset about the way A.V. spoke to him. When K.S. attempted to "cheer up [W1] about [A.V.,]" he "may have called [A.V.] disabled." R-E. He stated that he "did not recall" if he made the statement. Ibid. He wrote that W1 "conveyed this to [A.V.] later, this sparked [A.V.] to call me a 'fat ass,' after this I used the term acoustic on him." Ibid. He clarified that he "said 'that's acoustic' to his statement." Ibid. He added that A.V. thought he called him "disabled." Ibid.

10. The HIB report recorded that A.V. told his speech language specialist that W1 told him that K.S. said he is "disabled and acoustic." Id. at 2. He thought K.S. said this "because of the way he speaks." Ibid. The report noted that he has a "pronounced stutter that makes him difficult to understand." Ibid. A.V. stated that he replied to W1 that K.S. is a "fat-ass." Ibid. K.S. apologized a few days later, but A.V. did not believe he was sincere.

11. A.V. also stated that, while on the bus, some students say inappropriate things and take others' belongings, but that he is not specifically targeted. Rather, it "is just overall unruly behavior[.]" Ibid.

12. W1 reported that he and K.S. are on the same robotics team, and K.S. thinks A.V. is annoying. K.S. said to W1 that A.V. is "disabled and acoustic." Ibid. This occurred while W1 and K.S. were walking to the bus. W1 said that he believed K.S. meant "autistic" and that students say "acoustic" to avoid getting in trouble. Ibid. W1 noted that K.S. and A.V. were on competing robotics teams and speculated this may have motivated K.S.'s comments. He also thought that perhaps K.S. thought the judges thought A.V. was autistic.

13. K.S. asked the ABS to interview W2. W2 stated that she is in class with K.S. and A.V. She described an encounter with A.V. during which he called her "fat-ass" when he asked her to move her chair, and he tried to move the chair himself. Ibid. K.S. then approached A.V. and said, "That's so acoustic, why would you do that?" Ibid. W2 said that acoustic did not mean autistic. Rather, it was simply a word that students called each other. W2 also stated that A.V. does not speak a lot in class, and she did not know that he had speech difficulties.

14. W3 reported that although she heard A.V. state in class that K.S. called him "disabled," she did not hear it. K.S. responded by denying having called A.V. anything. W3 did not hear K.S. and A.V. exchange "unkind words" or call each other names. Id. at 3.

15. K.S. said that, during the robotics competition, he and his teammates found A.V. to be annoying. He overheard A.V. call W1 a traitor and a "fat-ass." Ibid. During class, A.V. asked K.S. why he called him disabled and called K.S. "fat-ass." Ibid. When K.S. asked why he said this, A.V. replied that he thought K.S. was targeting him. K.S. did not know that A.V. had speech difficulties until the principal told him, as he had never heard A.V. speak in class. He denied that he used "acoustic" to mean "autistic." He explained that "acoustic" is a "'thing' that kids call people." Ibid.

16. Lachenauer, the classroom teacher, was not aware of the reported incident. However, all of the students in the class were aware of A.V.'s apparent speech challenges because he speaks in class.

17. The ABS concluded that S.K.'s actions met the definition of HIB because it was a verbal act on school grounds; it was reasonably perceived as being motivated by a defining characteristic; the comment was perceived by A.V.

and W1 as being insulting or demeaning; and the incident "substantially interfered with the rights of another student." Ibid.

18. K.S. was counseled about "the power of words"; a parent conference was conducted; K.S.'s privileges were suspended, and he served a half-day in-school suspension. Ibid.

19. Superintendent Mary McLoughlin reviewed and affirmed the findings of the HIB investigation. She reported the findings to the Board. McLoughlin Cert. at ¶ 17.

20. On February 28, 2024, McLoughlin advised petitioner of the investigative findings and her concurrence. She advised that the Board would issue a decision affirming, rejecting or modifying her conclusion during its May 19, 2024, meeting. She also advised the petitioner that he could request a hearing before the Board, which would be conducted within ten days of the request. R-G.

21. Petitioner requested a hearing before the Board and was provided a redacted version of the HIB report. R-H.

22. The Board conducted a hearing on March 19, 2024. It affirmed the finding that K.S. committed an act of HIB. R-I.

23. Petitioner filed a complaint with the Department of Education, Somerset County Office ("SCO"), asserting that the District's investigation was not conducted promptly. The SCO reviewed documentation of the initiation of the complaint and the investigation and found that the District complied with Board policies and the Act. R-J at 4.[1]

[1] Petitioner also asserted wrongdoing by the Board with respect to unrelated matters. The SCO did not find error. R-J.

Petitioner asserted the following facts in opposition to the summary decision motion:

1. S.K. and W1 were on the same robotics team. W1 was previously on A.V.'s team but left it to join S.K.'s team. A.V. was upset about the change and came to S.K. and W1's "station on several occasions during the competition to make disparaging remarks to W1[,]" including that he was a "traitor" and not good at robotics. Cert. of S.K. ("S.K. Cert.") at ¶ 4.

2. Because W1 was upset by this, S.K. told him not to listen to A.V. and not to worry about what he said. Id. at ¶ 5.

3. During the ABS's interview of A.V., she recorded that he reported that S.K. called him disabled during the robotics competition. W1 told A.V. about this the following day. P-E at 1.

4. After the robotics competition, A.V. approached S.K. in class; accused S.K. of calling him "disabled"; and called S.K. a "fat ass." In response, S.K. said, "That's so acoustic," which was a reference to A.V.'s insult and did not mean "autistic." Id. at ¶ 7.

5. When S.K. spoke with the principal on January 12, 2024, he told her that he knew A.V.; he did hear him speak in their global leadership class because he did not sit with him; and he never called him disabled or autistic. Id. at ¶ 9.

6. Upon realizing that the principal wanted to discuss the robotics competition, he told her about A.V.'s comments to W1. Id. at ¶ 10. He also told her about what happened during the global leadership class. Id. at ¶ 12.

7. S.K. acknowledged that he wrote in his incident report that he "may have called A.V. 'disabled' at the [robotics] competition but [he] did not recall using

that term." Id. at ¶ 14. However, he "did this because it was clear from [the principal's] accusations that she believed [he] called [A.V.] 'disabled.'" Ibid.

8. S.K. and W1 do not take the same bus and never walk together to the buses at the end of the school day. The ABS did not ask S.K. about walking to the bus with W1 or ask him any questions about it. Id. at ¶ 16.

9. On January 23, 2024, S.K. was advised that he was suspended from all student council activities for one week as a result of the investigation. Id. at ¶ 17.

PARTIES' ARGUMENTS

The Board asserts that the undisputed evidence shows that it conducted an appropriate HIB investigation that found that K.S. engaged in behavior that targeted fellow student A.V. and that this conduct constituted an HIB violation. K.S. acknowledged having called A.V. "acoustic," which the evidence shows meant "autistic." He also acknowledged that he "may have" called A.V. "disabled." Witnesses stated that they heard K.S. use these words when he spoke about A.V. The Board properly relied upon this information to conclude that K.S. violated the Act, and because there is no evidence that it acted in bad faith or disregarded circumstances, there is no basis for reversing its decision.

Petitioner argues that the Board relied exclusively upon W1's unreliable report, which was hearsay and was not verified. Instead, it was contradicted by K.S. and A.V. Although K.S. acknowledged that he made certain comments about A.V., he did not do so while he walked to the bus with W1, which was alleged. Thus, summary decision is inappropriate because there is insufficient evidence of this specific allegation.

LEGAL DISCUSSION

Under N.J.A.C. 1:1-12.5(a), a party may move for summary decision upon all or any of the substantive issues in a contested case prior to a hearing. A motion for summary decision shall be granted where the papers and discovery, together with

affidavits, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). When a motion for summary decision is made and supported, an adverse party, in order to prevail, must, by responding affidavit, set forth specific facts showing that there is a genuine issue that can only be determined in an evidentiary proceeding. Ibid.

An issue is "genuine" if, considering the burden of persuasion at trial, the evidence submitted on the motion and all legitimate inferences could sustain a decision in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 530 (1995). A fact is "material" if it will "affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Significantly, "bare conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." U.S. Pipe & Foundry Co. v. Am. Arb. Ass'n, 67 N.J. Super. 384, 399−400 (App. Div. 1961) (citations omitted).

Here, both parties rely upon the same material facts. To the extent that petitioner seems to challenge respondent's facts as they relate to the underlying charge, they actually do so in the form of a legal argument and conclusion that is based on those facts. Because the facts that are material to the issues presented by the motions are not in dispute, I **CONCLUDE** that summary decision is appropriate.

The issue presented is whether the Board's finding that S.K. committed an act of HIB was arbitrary, capricious, or unreasonable in light of the information that the Board possessed when it made its determination. The Act defines HIB as follows:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in [N.J.S.A. 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 (emphasis added).]

Each school district must adopt a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident. N.J.S.A. 18A:37-15. Once an alleged HIB incident is reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A. 18A:37-15(b)(6)(a). The investigation shall be conducted by a school anti-bullying specialist and shall take no longer than ten school days to be completed. Ibid. The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial action. N.J.S.A. 18A:37-15(b)(6)(b). Remedial action shall take into account the "nature of the behavior; the nature of the student's disability, if any, and to the extent relevant; the developmental age of the student; and the student's history of problem behaviors and performance." N.J.A.C. 6A:16-7.7(a)(2)(v). Remedial action may include a "behavioral assessment or evaluation, including, but not limited to, a referral to the child study team, as appropriate" and "[s]upportive interventions and referral services[.]" Ibid.

The results shall be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." N.J.S.A. 18A:37-15(b)(6)(c).

The parents of the students involved in any alleged HIB incident are entitled to receive information about the nature of the investigation and the result of the investigation. They may request a hearing before the board of education, which shall be held within ten days of the request. N.J.S.A. 18A:37-15(b)(6)(d). The board must issue a decision at the first meeting after its receipt of the investigation report. N.J.S.A. 18A:37-15(b)(6)(e). The board may affirm, reject, or modify the superintendent's decision. Ibid. The board's decision may be appealed to the Commissioner of Education. Ibid.

The Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). "Where 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 Sewerage Co. v. Dep't of Envt'l Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974); See also T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966)), adopted, Comm'r (April 7, 2008), https://njlaw.rutgers.edu/collections/oal/.[2]

> In determining whether agency action is arbitrary, capricious, or unreasonable, a reviewing court must examine:
>
> > (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
>
> [In re Stallworth, 208 N.J. 182, 194 (2011) (citation omitted).]

[2] This decision and other administrative and unpublished court decisions are not binding. They are referenced because they provide relevant guidance.

As stated above, the Act establishes three elements that must be satisfied to find that a student committed an act of HIB. The first is whether the action is reasonably perceived as being motivated by any actual or perceived characteristic. This "requires an analysis of how the actor's motivation is perceived and whether that perception is reasonable." Wehbeh v. Bd. of Educ. of Verona, Essex Cnty., Comm'r Decision No. 51-20 at *5 (February 4, 2020), https://www.nj.gov/education/legal/. This does not require that the victim correctly assess the actor's motivation, "as such a requirement would convert the analysis from one about reasonably perceived motivation to one about actual motivation and would inappropriately place the burden on the alleged victim to divine the intent of the actor." Id. at *5, n.3.

"The statute has not limited 'distinguishing characteristic' to those specifically enumerated[.]" K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 351 (App. Div. 2011).

> By its plain terms, the Legislature made clear that courts and school districts should not limit the scope of the statute to the more classic protected characteristics such as race or religion, and they intended instead that the statute apply whenever the harassment at issue was motivated by any distinguishing characteristic of the targeted student. Instead of providing a longer list, the Legislature in the [Act] intentionally included a very open-ended phrase, "any other distinguishing characteristic," to signal that the Act would apply to a broad, unlimited range of distinguishing characteristics, so long as the distinguishing characteristic motivated the bully to harass the targeted student.
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> [R.A. on behalf of minor child, B.A., v. Bd. of Educ. of Hamilton, Mercer Cnty., EDU 10485-15, Initial Decision (May 12, 2016), adopted, Comm'r (June 22, 2016), https://njlaw.rutgers.edu/collections/oal/.]

For example, in J.M.C. ex rel A.C. v. Board of Education of East Brunswick, EDU 04144-12, Initial Decision (November 27, 2012), adopted, Comm'r (January 9, 2013), https://njlaw.rutgers.edu/collections/oal/, the Commissioner found that a single incident in which a male student was demeaned by a statement that he "danced like a girl" was a violation of the Act because the bullying was based on the distinguishing characteristic of

the perception of the targeted student's dancing. In C.C. ex rel S.C. v. Bd. of Educ. of Jefferson, EDU 10872-14, Initial Decision (April 6, 2015), https://njlaw.rutgers.edu/collections/oal/, adopted, Comm'r Decision No. 153-15 (May 12, 2015), https://www.nj.gov/education/legal/, the Commissioner found that a perception that the targeted student was not a good athlete was sufficient to trigger the protection of the Act. The Commissioner noted that "the HIB statute is intended to drive home the principle that cruel words will not be tolerated in a school environment." Similarly, in W.C.L. & A.L. ex rel L.L. v. Board of Education of Tenafly, EDU 03223-12, Initial Decision (November 26, 2012), adopted, Comm'r (January 10, 2013), https://njlaw.rutgers.edu/collections/oal/, the Commissioner held that even a single and true comment by a student that the targeted student had dyed her hair because she had head lice violated the statute.

When the Department amended its HIB regulations, it added the requirement that district policies include a statement that "bullying is unwanted, aggressive behavior that may involve a real or perceived power imbalance." N.J.A.C. 6A:16-7.7(a)(2)(iii). The Commissioner has addressed the intent of this amendment, writing that it is "to assist school officials in identifying HIB within the context and relative positions of the alleged aggressor and target, rather than focusing *solely* on the real or perceived characteristics." Klapach v. Bd. of Educ. of Fort Lee, Bergen Cnty., 2021 N.J. AGEN LEXIS 89 (April 6, 2021) (quoting 50 N.J.R. 155(b) (2018)). However, an analysis of the power dynamic alone "cannot be the sole basis for a finding of HIB." Ibid. The "distinguishing characteristic" element must be satisfied.

Furthermore, there must be a showing of more than a mere dispute between students, even if unpleasant words or conduct are used. "[H]armful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation, does not come within the statutory definition of bullying." K.L., 423 N.J. Super. at 351; see also L.B.T. ex rel K.T. v. Bd. of Educ. of the Freehold Reg'l Sch. Dist., EDU 07894-12, Initial Decision (January 24, 2013), adopted, Comm'r (March 7, 2013), https://njlaw.rutgers.edu/collections/oal/ (a personal breakdown in the relationship between two students is a mutual, non-power-based conflict that is not about a

characteristic of the targeted student); L.P. v. Bd. of Educ., 2018 N.J. Super. Unpub. LEXIS 1928 (App. Div. August 15, 2018) (alleged HIB act was not motivated by a distinguishing characteristic because it was an interpersonal conflict between athletes on a school sports team).

It is undisputed that A.V. has a significant speech challenge and that the statements at issue related to that disability. While S.K. claimed not to have heard A.V. speak, he acknowledged that he may have called him "disabled," and their teacher reported that A.V. spoke in class and the students were aware of his pronounced speech difficulties. Based upon the evidence presented to the Board, it was not arbitrary, capricious, or unreasonable for it to have concluded that a reasonable person would consider S.K.'s behavior to have been motivated by, at a minimum, his perception of A.V. as having a disability. Accordingly, I **CONCLUDE** that petitioners have not shown by a preponderance of the evidence that the Board's determination concerning the first element is arbitrary, capricious, or unreasonable.

The Commissioner addressed the type of situations that may satisfy the second element of the HIB statute:

> [C]onduct has been determined to substantially disrupt the orderly operation of the school when students are so upset or embarrassed that they are "not fully available for learning." G.H. and E.H. on behalf of K.H. v. Board of Education of the Borough of Franklin Lakes, Bergen County, OAL Dkt. No. EDU 13204-13, decided February 24, 2014, adopted, Commissioner Decision No. 157-14, April 10, 2014. Additionally, when other students are "so affected" by behavior that they report it, the orderly operation of the school may be substantially disrupted. T.R. and T.R. on behalf of E.R. v. Bridgewater-Raritan Regional Board of Education, OAL Dkt. No. EDU 10208-13, decided September 25, 2014, adopted, Commissioner Decision No. 450-14, November 10, 2014.
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> [D.D.K. ex rel. D.K. v. Bd. of Educ. of Readington, Hunterdon Cnty., EDU 07682-15 Initial Decision (October 6, 2016), adopted, Comm'r (November 11, 2016), https://njlaw.rutgers.edu/collections/oal/.]

Here, A.V. reported the offending language to his speech-language specialist, clearly indicating that it disturbed him. Other students were involved to the extent that S.K. told them that he thought A.V. was disabled. Also, at least one teacher and a student confirmed that S.K. conveyed that A.V. was autistic, albeit by using a coded word. For these reasons, I **CONCLUDE** that petitioners have not shown by a preponderance of the evidence that the Board's determination concerning the second element is arbitrary, capricious, or unreasonable.

The third element requires a finding that the act at issue is one that "a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student," "has the effect of insulting or demeaning a student," or "creates a hostile educational environment." Any one of the three criteria satisfies the third element. In Wehbeh, the Commissioner wrote that "none of these criteria require the actor to have actual knowledge of the effect that their actions will have, or to specifically intend to bring about that effect." Comm'r Decision No. 51-20 at *6, https://www.nj.gov/education/legal/.

Here, the Board found that S.K. engaged in verbal behavior that was intended to hurt, intimidate, or harass A.V. As discussed above, this impacted A.V. and had the effect of insulting and demeaning him. At a minimum, a reasonable person should know that such behavior would place a student in reasonable fear of at least emotional harm. I therefore **CONCLUDE** that petitioners have not demonstrated by a preponderance of the evidence that the Board's determination concerning the third element is arbitrary, capricious, or unreasonable.

Nonetheless, petitioner asserts that the Board neglected to consider that W1 said that S.K. made his offending statements while en route to the bus, while S.K. and A.V. asserted that it occurred at the robotics competition. He argues that this inconsistency undermines the Board's findings. As discussed above, the Board's conclusion is reasonably supported by the evidence in the record. Indeed, it found that the HIB occurred during a "school sponsored activity or event off school property." This was based upon the totality of the evidence presented to it, including S.K.'s statement that there was discord between him, W1, and A.V. at the competition and that, after the event,

A.V. asked S.K. why he called A.V. "disabled." Moreover, he conceded that he "may" have called A.V. disabled at the competition.

Petitioner also argues that the Board improperly relies upon W1's hearsay statement. However, the Appellate Division and the Commissioner have held that boards may rely upon such evidence. See L.K. and T.K. obo A.K. v. Bd. of Educ. of the Twp. of Mansfield, Comm'r Decision No. 318-21 (Dec. 9, 2021), aff'd, 2023 N.J. Super. Unpub. LEXIS 1788 (App. Div. Oct. 17, 2023). Similarly, the Commissioner rejected an argument that a board's failure to corroborate a witness's statement rendered the statement unreliable. Rather, the Commissioner wrote that the "Act does not define acceptable sources of information regarding HIB allegations, nor does the Act contain any requirements related to hearsay or corroboration." L.K., Comm'r Decision at 5.

Petitioner's concern for his child and his desire to protect him are understandable and commendable. However, for all of the reasons stated above, I am compelled to **CONCLUDE** that he has not demonstrated by a preponderance of the evidence that the Board's determination was arbitrary, capricious, or unreasonable. Even if there were room for an alternate conclusion, the Board's determination was supported by the evidence, and there is no evidence of improper motivation.

ORDER

I hereby **ORDER** that respondent's motion for summary decision is **GRANTED**.

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

This recommended decision may be adopted, modified, or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Acting 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**. **Exceptions may be filed by email to ControversiesDisputesFilings@doe.nj.gov or by mail to Office of Controversies and Disputes, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**. A copy of any exceptions must be sent to the judge and to the other parties.

June 13, 2025
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: June 13, 2025

Date Mailed to Parties:

APPENDIX

Exhibits

For respondent:

Certification of Mary McLoughlin, with Exhibits

- R-A Board Policy No. 5512
- R-B Redacted HIB 338 Form
- R-C A.V.'s Incident Report
- R-D Letter to petitioner, January 12, 2024
- R-E K.S.'s Incident Report
- R-F HIBster Report
- R-G Letter to petitioner, February 28, 2024
- R-H Emails between petitioner and District personnel
- R-I Letter to petitioner, March 25, 2024
- R-J DOE, Somerset County Office, Complaint Investigation Report

Certification of Sean W. Forgarty, Esq., with pleadings and petitioner's discovery responses.

For petitioners:

Certification of Maxwell J. Smith, Esq., with exhibits:

- P-A Incident Report, January 8, 2024
- P-B Board's discovery responses
- P-C Board's discovery responses
- P-D Board's discovery responses
- P-E Complete interview notes