

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO.: PM09WE-02972

S.D., parent/guardian on behalf of
H.D., a minor, and S.D. individually,
and Chinh Q. Le, Director,
New Jersey Division on Civil Rights,

Complainants,

Old Bridge Board of Education,

Respondent.

FINDING OF PROBABLE CAUSE

Consistent with a Verified Complaint filed on November 2, 2006, and an Amendment to the Verified Complaint, the above-named respondent has been charged with unlawful discrimination within the meaning of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., and specifically within the meaning of N.J.S.A. 10:5-4 and 10:5-12(f).

Chinh Q. Le is the Director of the Division on Civil Rights and, in the public interest, has intervened as a complainant in this matter pursuant to N.J.A.C. 13:4-2.2(e).

SUMMARY OF COMPLAINT

The above named Respondent was charged with unlawful discrimination in violation of N.J.S.A. 10:5-4 and 10:5-12 (f) of the New Jersey Law Against Discrimination. Complainant alleged that since May 2005 and continuing until 2007, her son, H.D., a student in Respondent's school system, was subjected to bias-based peer harassment because of his perceived sexual orientation and his creed. Among other things, Complainant alleged that H.D. was called derogatory names such as "fag," "gay," "fruit," and "faggot," had papers stuffed down the front of his pants, and was asked by a staff employee if he was "looking for his purse." Complainant also alleged that H.D. was called a "stupid Jew," and that his food was called "Jew food." Complainant further alleged that despite numerous complaints to Respondent's superintendent, principals and vice principals, Respondent failed to take effective remedial action to end the harassment of H.D.

SUMMARY OF RESPONSE

Respondent denied that it engaged in any unlawful discrimination because of perceived sexual orientation or creed, or that H.D. was exposed to a hostile school environment. Respondent asserted that to the extent that students engaged in any inappropriate conduct or behavior toward H.D., all such incidents, once reported, were immediately investigated by its administrators and appropriate disciplinary action was taken.

BACKGROUND

Respondent, a public school district in Middlesex County, New Jersey, provides educational services to more than 9,600 students served in 12 elementary schools, two middle schools, and one high school.

Complainant, a resident of Old Bridge, Middlesex County, New Jersey, brought this action on behalf of her minor child who attended Respondent's Jonas Salk Middle School.

Chinh Q. Le is the Director of the Division on Civil Rights and, in the public interest, has intervened as a complainant in this matter pursuant to N.J.A.C. 13:4-2.2 (e).

SUMMARY OF INVESTIGATION

This investigation revealed sufficient evidence to support a reasonable suspicion that Complainant's son, H.D., was subjected to a hostile environment based on his perceived sexual orientation and his creed.

The investigation disclosed that H.D. entered Jonas Salk Middle School in Old Bridge, New Jersey, as a sixth-grade student in September 2004. According to Complainant, her son began experiencing various forms of harassment based initially on his perceived sexual orientation and, later, on his creed as well. Complainant also alleged that although she reported the incidents to school officials in a timely manner, no effective corrective action was taken.

Complainant stated that she repeatedly contacted Respondent's building principal by phone and email regarding these issues, but that the harassment continued and was ongoing. On behalf of her son, Complainant created a log documenting incidents of harassment beginning shortly after H.D. entered middle school in September 2004. The log described numerous occasions, beginning in October 2004, wherein her son was taunted by other students calling him "fag," "faggot," "gay," "fruit," and "dumb ass."¹ The log documented that he was subjected to these taunts both in and out of school, on the school bus, and on the internet. In addition to the above mentioned slurs, the log also noted that he was occasionally called "stupid Jew," and that he heard other students saying he ate "Jew food."

During an interview with the Division's investigator, Respondent's then-building principal, Ken Popovich, recalled almost all incidents as outlined in Complainant's log, including the anti-Semitic comments. He also did not challenge Complainant's claim that she began advising him of the incidents as early as October 2004 when they first occurred. Although Mr. Popovich recalled that Complainant contacted him on multiple occasions, by both phone and email, regarding these problems, he was unable to recall specific information regarding what remedial action he may have taken in response to each instance. Mr. Popovich admitted that he did not document the incidents nor did he record any action taken. He stated that to the best of his ability, he responded to the numerous complaints and phone calls made by Complainant; however, he was unable to produce any documentation to show the actions he took.

Mr. Popovich explained that he was reluctant to document discipline unless it rose to a level serious enough to warrant suspension of the offender. For example, during a locker room incident

¹ Although the Verified Complaint alleged that the harassment began in or around May 2005, evidence obtained during the investigation suggests that the alleged harassment actually began shortly after H.D. began attending Jonas Salk Middle School, in or around October 2004.

described in the verified complaint, two boys allegedly shoved papers down H.D.'s pants. Both boys, according to Complainant's log, were suspended. Mr. Popovich explained that it was his style to speak to the individuals involved in these incidents, to counsel them as well as H.D., to whom he also offered advice. During this interview, Mr. Popovich also acknowledged that at one point, he told Complainant's son that he would understand if he (H.D.) resorted to a physical confrontation with the students who bullied him, an option H.D. declined to use. Further, Popovich acknowledged that out of concern for Complainant's son, he suggested to Complainant that H.D. transfer to Respondent's other middle school. He stated that although this action was without precedent and inconsistent with district practices, he felt that Respondent's superintendent would be amenable in this case. Complainant stated that she declined this offer.

According to the verified complaint, H.D. was also subjected to an inappropriate comment by a member of Respondent's staff. Complainant alleged that while her son was looking for a misplaced article in the school's lost and found, a staff member asked him if he was "looking for his purse." In its response to the verified complaint, Respondent denied any knowledge of this incident. However, Mr. Popovich recalled it and stated that he investigated the matter by questioning the identified staff member, who denied making the comment. He also indicated that he questioned other staff members working in the vicinity, none of whom could corroborate Complainant's allegation.

Mr. Popovich retired from his position of school principal on June 30, 2006. On July 1, 2006, David Cittadino assumed the position of building principal at Jonas Salk Middle School. The following month, on August 3, 2006, Mr. Cittadino met with Complainant regarding the ongoing harassment and bullying of her son. According to documentation forwarded by Respondent, Mr. Cittadino informed Complainant that any bullying would be addressed with consequences that would be consistent with Respondent's Code of Conduct.

The investigation revealed that shortly after the start of the new school year, the problems began again. Between September 7, 2006 and January 29, 2007, Complainant alleged she contacted Respondent numerous times to inform it of alleged incidents of harassment. Respondent provided the investigator with administrative reports as well as handwritten incident reports in support of its assertion that when notified, it responded promptly to each incident. Documentation provided by Respondent indicated that it was notified of at least 11 incidents involving 14 different students.

A review of these materials revealed that on one occasion, Respondent was unable to identify the student responsible, and in another, the investigation was inconclusive. However, there were nine remaining incidents, involving 12 other students, wherein Respondent was able to administer discipline. Of these 12 students, one child received a verbal warning regarding his behavior, three were asked to sign "behavior contracts" acknowledging the misdeed, five were given after-school detention, and three were given "AAIP/in-school suspensions." Additionally, the records indicated that the parents of these students were informed about the inappropriate or offensive behavior as well as the discipline. Although most of the incidents involved name calling and taunts, on two occasions Complainant's son was shoved by other students.

Additionally, in a separate log provided to the Division by Complainant, it appeared that some incidents went unreported. Specifically, Complainant alleged that on November 13, 2006, a classmate, A.M., taunted H.D. by calling him a "girl" in class, but H.D. declined to report it because "in this school, everything turns back to me." Between November 20 and December 5, 2006, H.D. told his mother that this particular student, A.M., harassed him four more times, but that he declined to report the problems.

Complainant's son expressed his continued frustration to the investigator. While he appreciated that former administrator Popovich was genuinely concerned for him, the harassment never stopped during his tenure. H.D. stated that even when one student was disciplined, another would soon take his or her place. He acknowledged that at all relevant times, school administrators encouraged him to come forward, but over time, he became more and more reluctant to do so as the situation never improved. At times, reporting the problems seemed to inflame the situation as he was becoming known as a "snitch."

Ultimately, Complainant's son graduated and began attending Respondent's high school. According to H.D., the problems continued for a while, although they reduced in frequency and eventually ceased. When asked what he thought was the reason, he stated that some of the bullies moved out of district, some went to other schools and that others just lost interest.

ANALYSIS

At the conclusion of the investigation, the Division is required to make a determination whether "probable cause" exists to credit a complainant's allegation of discrimination. Probable cause has been described under the New Jersey Law Against Discrimination (LAD) as a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that the matter should proceed to hearing. Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799. A finding of probable cause is not an adjudication on the merits but, rather, an "initial culling-out process" whereby the Division makes a preliminary determination of whether further Division action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978). See also Frank v. Ivy Club, *supra*, 228 N.J. Super. at 56. In making this decision, the Division must consider whether, after applying the applicable legal standard, sufficient evidence exists to support a colorable claim of discrimination under the LAD.

In the instant matter, the investigative findings support Complainant's claim that H.D. was subjected to bias-based peer harassment that was sufficiently severe or pervasive to create a hostile school environment. Conduct is severe or pervasive in this context when "a reasonable student of the same age, maturity level, and protected characteristic would consider the harassment to be sufficiently offensive to create an intimidating, hostile, or offensive school environment." L.W. ex rel. L.G. v. Toms River Regional School Bd. of Educ., 189 N.J. 381, 402-03 (2007). During the years that H.D. was in middle school, he was repeatedly taunted by other students in and out of school and on the school bus. They used words such as "fag," "faggot," "gay," "fruit," and "dumb ass." In one incident, students shoved papers down H.D.'s pants, and on two occasions students pushed H.D. Students also made pointed references to his creed, calling him a "stupid Jew" and saying that he ate "Jew food." The nature and frequency of this conduct constitutes severe or pervasive bias-based harassment.

In the face of a hostile school environment, liability under the LAD attaches when a respondent school district fails to take action "reasonably calculated to end the harassment." Id. at 404, 412 (internal citation and quotation marks omitted). In addressing whether a response to a hostile environment is adequate, the New Jersey Supreme Court has stated that an "investigatory or remedial scheme that unnecessarily and unreasonably leaves the [student] exposed to continued hostility in the [school] is an ineffective remedial scheme." Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 538 (1997). Here, although the investigation disclosed that Respondent had requisite anti-discrimination policies in place and generally took some action to address complaints received from Complainant and H.D., it appears Respondent was ineffective in stopping or reducing the numerous incidents of harassment and bullying that the minor child, H.D., endured.

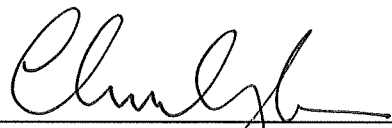
Specifically, the investigation revealed evidence that, if true, would show that the harassment was coming from multiple sources, including possibly at least one of Respondent's staff members. Respondent's own reports indicate that during one stretch, 14 different students were involved in 11 separate incidents of harassment of H.D. While after-the-fact discipline of offenders is a necessary part of a remedial scheme, the conclusion could be reached under the facts of this case that relying upon that approach alone was ineffective to stem the tide of harassment to which H.D. was being subjected. There is no indication that Respondent undertook any affirmative outreach or prevention measures to stop harassment from students other than those already reported as harassing H.D. Indeed, the ineffectiveness of this approach can be seen in H.D. becoming increasingly hesitant to report incidents of harassment, as reporting the incidents was doing little to rid his school environment of harassment.

There were additional flaws in Respondent's remedial scheme. At least initially, Respondent did not consistently document many of the incidents or the actions it took to address them. Despite the lack of recordings by Respondent, the school principal prior to June 30, 2006, Ken Popovich, corroborated that the harassment occurred as Complainant asserted, and that he had been so advised since the time they began to occur. The absence of such recordkeeping is particularly troublesome in this case, since Respondent was relying solely on a system of after-the-fact discipline to address the harassment and because of the turnover in Respondent's administration. While Mr. Popovich's successor, David Cittadino, was more organized in recording and responding to subsequent events, the abusive behavior still continued with little change in frequency or severity, as Cittadino continued with the limited approach of responding to specific complaints without any systematic outreach to the school community or other such affirmative steps taken to end the harassment. As such, there is probable cause to believe that Respondent's efforts were unreasonable and insufficient to end the harassment against H.D.

FINDING OF PROBABLE CAUSE

It is, therefore, determined and found that Probable Cause exists to credit the allegations of the complaint.

07/30/10
Date


Chinh Q. Le, Esq., Director
New Jersey Division on Civil Rights

State of New Jersey
Office of the Attorney General
Department of Law & Public Safety
Division on Civil Rights
DCR Docket No. PM09WE-02972

S.D., parent/guardian on behalf of)	
H.D., a minor, and S.D., individually,)	RECEIVED AND RECORDED BY
)	
Complainants,)	NEW JERSEY DIVISION ON CIVIL RIGHTS
)	DEPARTMENT OF LAW & PUBLIC SAFETY
v.)	
)	DATE: 7/29/2010
Old Bridge Board of Education,)	
)	AMENDMENT TO VERIFIED COMPLAINT
Respondent.)	
)	

I, Chinh Q. Le, Esq., as the Director of the New Jersey Division on Civil Rights, hereby intervene as a Complainant in the above referenced matter pursuant to N.J.A.C. 13:4-2.2(e) and hereby amend the caption of the Verified Complaint, received and filed on November 2, 2006, to read as follows:

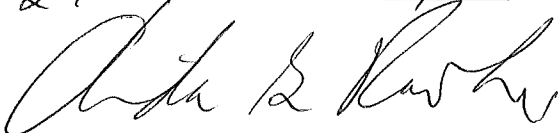
S.D., parent/guardian on behalf of)
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v.)
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)
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CHINH Q. LE, ESQ., DIRECTOR
NEW JERSEY DIVISION ON CIVIL RIGHTS
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY

STATE OF NEW JERSEY)
) SS:
COUNTY OF Essex)

Sworn to and subscribed before me
this 29th day of July 2010,



NOTARY PUBLIC OF NEW JERSEY

AIDA G. RAWLINS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires July 13, 2014