

R.P., on behalf of minor child, A.P, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF HAMILTON,
ATLANTIC COUNTY, :
RESPONDENT. :

SYNOPSIS

Pro se petitioner challenged the determination of the respondent Board that A.P. committed an act of harassment, intimidation or bullying (HIB) against S.W. – a female classmate – pursuant to the New Jersey Anti-Bullying Bill of Rights Act (the Act), *N.J.S.A. 18A:37-13 et seq.* R.P., the father of A.P. – a fourth grade student in respondent’s school district at the time of the alleged incidents – sought to have the Board’s HIB determination overturned, contending that the school failed to properly investigate the matter; further, petitioner asserted that A.P.’s admitted actions did not constitute HIB as they cannot be perceived to have been motivated by any distinguishing characteristic of the student complainant. The Board argued that its actions in this matter were not arbitrary, capricious or unreasonable, and that the HIB investigation was conducted properly.

The ALJ found, *inter alia*, that: New Jersey enacted the Act to strengthen the standards and procedures for preventing, reporting, investigation and responding to incidents of harassment, intimidation and bullying of students that occur in school and off school premises; the Act applies to any gesture, or any written, verbal or physical act, or any electronic communication that is reasonably perceived as being motivated either by an actual or perceived characteristic, such as, *inter alia*: race, color, religion, national origin, gender, sexual orientation, or a mental, physical or sensory disability, or any other distinguishing characteristic; the District’s HIB policy mirrors the New Jersey law, and sets forth a detailed process by which complaints are investigated to determine whether an action meets the definition of HIB as set forth in the policy and Act; in the instant case, A.P. made comments and gestures on multiple occasions, in front of S.W., that resulted in her submission of an urgent letter of complaint to school officials about A.P.’s conduct; S.W. was upset and made uncomfortable by A.P.’s behavior, which was targeted at her; A.P. admitted the alleged conduct when questioned by school officials; school staff conducted an investigation in accordance with the HIB policy and subsequently took disciplinary action against A.P. in accordance with the school’s disciplinary policy. The ALJ concluded that A.P.’s conduct met the criteria for HIB, and accordingly, the respondent’s determination was appropriate; further, petitioner did not meet his burden to prove that the Board acted in an arbitrary, capricious or unreasonable manner in upholding their determination that A.P.’s behavior constituted HIB. Accordingly, the ALJ ordered the petition dismissed.

Upon review, the Commissioner concurred with the ALJ’s findings and conclusions, and adopted the Initial Decision as the final decision in this matter, for the reasons expressed therein. 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.

OAL DKT. NO. EDU 09436-17
AGENCY DKT. NO. 103-5/17

R.P., on behalf of minor child, A.P, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
TOWNSHIP OF HAMILTON, :
ATLANTIC COUNTY, :
RESPONDENT. :

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board's decision in connection with A.P. was not arbitrary, capricious or unreasonable.

Accordingly, the recommended decision of the ALJ is hereby adopted for the reasons expressed therein, and the petition of appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: March 29, 2018

Date of Mailing: March 29, 2018

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 09436-17

AGENCY DKT. NO. 103-5/17

R.P. ON BEHALF OF MINOR CHILD, A.P.,

Petitioner,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF HAMILTON, ATLANTIC COUNTY.**

Respondent.

R.P., on behalf of minor child, **A.P.**, petitioner, pro se

Eric S. Goldstein, Esq. for respondent (Nehmad Perillo & Davis, attorneys)

Record Closed: January 2, 2018
2018

Decided: February 13,

BEFORE **TAMA B. HUGHES**, ALJ:

STATEMENT OF CASE

R.P. (petitioner) on behalf of A.P. challenges the Board of Education of the Township of Hamilton, Atlantic County's (respondent) determination that A.P. committed an act of harassment, intimidation or bullying ("HIB") pursuant to N.J.S.A. 18A:37-13.2 et seq. R.P. seeks to have respondent's determination overturned on the grounds that the

George Hess Middle School (School) improperly investigated the matter and that A.P.'s actions cannot be perceived to be motivated by a distinguishing characteristic.

PROCEDURAL HISTORY

On May 26, 2017, petitioner, on behalf of minor child, A.P., filed an appeal with the Department of Education, Bureau of Controversies and Disputes, appealing respondent's determination that A.P. had committed an act of HIB. On June 29, 2017, respondent filed an answer. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on July 5, 2017 for determination as a contested case pursuant to N.J.A.C. 6A:3-1 et seq. and N.J.S.A. 52:14B-1 to -15. A prehearing order was entered on August 30, 2017. The matter was heard on December 1, 2017 and upon receipt of the written summations, the record closed on January 2, 2018.

FACTUAL DISCUSSION AND FINDINGS

D.P. (D.P.), A.P.'s mother, testified that she received a call from David Neff (Neff), Vice Principal of the George Hess Middle School (School) where nine-year old A.P. attends. Neff informed D.P. that A.P. had been accused of harassing a ten-year old female, S.W. who was a classmate with A.P. in both school and the afterschool program. S.W. had written a letter to Neff complaining of A.P.'s conduct.¹ (P-1). When A.P. arrived home that night, D.P. questioned her son regarding the alleged conduct. A.P. admitted the conduct however, indicated that the context was very different than that alleged. Specifically, A.P. while admitting to making inappropriate gestures or comments, indicated that his actions were not directed to S.W., rather to a group of kids present, one of which was S.W.

D.P. went on to describe discrepancies in the school's version of events and her son's. As an example, D.P. stated that in speaking to Neff, he informed her that A.P. had made nasty faces to S.W. In reviewing S.W.'s letter, S.W. described A.P. making "weird faces." Upon questioning, A.P. admitted to making "silly" faces which according

¹ Only the underlying letter and not the handwritten notes that were added to the letter have been allowed into evidence.

to A.P. - S.W. laughed at, and asked him to repeat to her female friend. Since that student was never interviewed as part of the school's investigation, the school never understood the context.

Another example of a discrepancy in versions was the allegation that A.P. was whispering nasty comments and curse words. S.W.'s letter stated that he was whispering curse words. Neff 's description was that A.P. was saying nasty comments and curse words. In questioning A.P. on this allegation, he indicated that when he and S.W. met with Neff, S.W. stated that he (A.P.) had called another teacher a "piece of shit" which A.P. denied.

A third example given was an "oral sex" gesture that A.P. had allegedly given to S.W. In questioning A.P. what the gesture was and meant, A.P. showed D.P. the gesture and stated that it meant "go F-Off". According to A.P., he and his friend, M.D., make this gesture all the time to each other. S.W. was present when this occurred. In D.P.'s opinion, the gesture that her son made could not be interpreted as "oral sex" and when she questioned Hackney and Neff how they could interpret it as such, their response was that that was how S.W. described the gesture. According to D.P., the school never questioned A.P. what he meant by the gesture or interviewed the other children that may have been present. It was also alleged that A.P. said "F-you." to S.W. Citing to S.W.'s letter, D.P. stated that S.W. herself was joking with A.P. and M.D. to which A.P. responded by waiving his middle finger. D.P. stated that this was banter and not gender motivated.

The last accusation was A.P. holding his genitals and referring to them as "bananas." D.P. testified that her son was telling a joke that may have been inappropriate and had sexual overtones, but it was a joke that was being told to a group of children and not directed to S.W. because she was a girl. D.P. stated that while S.W. may have been upset by her son's behavior, none of it was directed to S.W. nor was it gender motivated. It was D.P.'s position that the matter was improperly investigated and that neither the school or the school board understood the HIB law.

On cross-examination, D.P. was questioned regarding S.W.'s letter and whether she (S.W.) felt harassed because of A.P.'s behavior. In response, D.P. stated that she was not disagreeing with how ten-year old S.W. felt, rather, her disagreement was with the finding that her son was a bully because he had a motivating factor behind his behavior. While S.W. may have felt uncomfortable and disliked A.P.'s actions, it did not mean that he was targeting her.

On re-direct, D.P. testified that the school failed to separate A.P. and S.W. in school and in the after-school program, even after there was a determination that there was an HIB issue. This was not rectified until D.P. called the school to complain. D.P. did not deny that A.P. did inappropriate things, her objection was how the school made an HIB determination based upon gender.

Laura Hackney (Hackney), a school counsellor at the School testified that she is the anti-bullying specialist for the school and has attended multiple training sessions regarding HIB investigations.

Hackney stated that she became aware of the incident involving A.P. and S.W. due to a letter that S.W. had sent to Neff. Neff initially spoke to the children himself to see how to proceed and after speaking to the children, he referred the matter to her for further investigation. Hackney interviewed A.P. first and went through the letter, asking him about the allegations that were made. A.P. was honest in his answers. In speaking to S.W., Hackney questioned her about the letter and confirmed how she was feeling and whether A.P.'s actions were part of a group; whether she was a bystander or whether the comments were made directly to her. According to Hackney, even if A.P.'s actions were to a group or directed to a specific person, it would still fall within HIB. S.W. informed Hackney that the conduct had occurred multiple times over the school year however, did not give a date range.

Hackney stated that A.P. was questioned whether some of his actions were directed to S.W. to which A.P. stated they were. In Hackney's opinion, even if A.P.'s actions were not directed specifically to S.W., it would not make a difference in an HIB determination. Hackney went on to state that based upon her training and experience,

there is no question that this was an HIB event, despite A.P.'s parent's position that A.P.'s conduct was not directed to S.W. or gender motivated. The basis for this opinion was that the nature of A.P.'s comments and conduct - which was sexual in tenor and how it affected S.W. as a female.

On cross-examination, Hackney was questioned about the allegation that A.P. made an "oral sex" gesture to S.W. Hackney stated that A.P. admitted to her during their meeting that he had made an "oral sex" gesture to S.W. and had told Neff what it meant. Hackney did not question A.P. whether he understood the meaning behind the gesture. A.P. also admitted to saying "F." to S.W.

Hackney further stated that based upon her training and experience, she only speaks to eyewitnesses to an incident if there is insufficient proof. In this case, A.P. admitted to the conduct alleged, therefore there was no reason to speak to others that may have been present.² (P-3). Hackney stated that the school has an HIB policy which is used as a guideline. (R-1). In determining whether A.P.'s conduct fell within the purview of HIB, Hackney stated that they look at the gestures; words and the impact on the recipient. In this case, A.P.'s actions made S.W. feel uncomfortable and upset.

Melanie Lamanteer (Lamanteer), the School Principal testified that she has been with the School district for the past eighteen years and has been the School Principal for the past eight years. In that capacity, she is familiar with the incident involving A.P. and S.W.

According to Lamanteer, the matter came to her attention after a letter came in from S.W. regarding A.P.'s conduct. Neff initially spoke to the children and determined that the matter needed to be referred to Hackney for a HIB investigation. After performing her investigation, Hackney prepared a report and provided the same to Lamanteer who signed off. Disciplinary action is based on the Board of Education's policy and is based on the child's current disciplinary record within the school year.

² Only the underlying HIB Reporting Form and not the handwritten notes that were added to the report have been allowed into evidence.

After review of Hackney's report, Lamanteer agreed with the determination that A.P.'s actions fell under HIB.

On cross-examination, Lamanteer admitted that it is not standard procedure to interview children together and that Neff should have interviewed A.P. and S.W. separately. Having said that, the matter was properly referred to and investigated by Hackney and she (Lamanteer) agreed with Hackney's HIB findings. Once that determination is made, the parties are typically separated however, in this matter, A.P. and S.W. were not immediately separated in the after-school program. This issue was rectified once made known to the school personnel.

Regarding the different policies, Lamanteer explained that there is a School HIB policy and there is a Board of Education Policy. Sometimes they intertwine. Hackney's investigation, which was in conformity with the School policy, determined that there was an HIB violation. The discipline that was imposed by Neff was in conformance with the School's disciplinary policy. In this matter, a two-day internal suspension was imposed.

In evaluating the evidence, a trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility contemplates an overall assessment of a witness's story in light of its rationality, internal consistency, and the "manner in which it hangs together" with other evidence. Carbo v. U.S., 314 F.2d 718, 749 (9th Cir. 1963). A fact finder must base credibility determinations on his or her common sense, intuition, and experience. Barnes v. U.S., 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

Based upon these principles, the testimony of Hackney and Lamanteer was credible and compelling. Both were straightforward and candid in recounting their role in the events and were clear and concise in their testimony. Conversely, while D.P.'s testimony was clear and concise, it understandably lacked objectivity and contained opinions regarding A.P.'s intent behind his actions without support in the record.

Accordingly, after hearing the testimony of the witnesses and reviewing the relevant documents moved into evidence, I **FIND** as **FACT** that on multiple occasions

throughout the school year, A.P. made comments and gestures directly to or in front of S.W. that included saying “F-you”; made hand gestures which denoted “oral sex”; would hold the front of his pants and refer to his genital area as “bananas”; and would waive his middle finger and make faces at S.W. I **FIND** that A.P. admitted to this conduct when questioned by school officials.

I **FIND** that this conduct occurred either in school or on school property. I further **FIND** that S.W., a ten-year old female, wrote a letter to school officials complaining of A.P.’s conduct – urgently requesting immediate help. I **FIND** that S.W. was upset and uncomfortable by A.P.’s conduct which was targeted at her. I **FIND** that the School conducted an investigation in accordance with their HIB policy and thereafter took disciplinary action in accordance with their HIB policy and their disciplinary policy. (R-2).

LEGAL ANALYSIS AND CONCLUSIONS

New Jersey enacted the Anti-Bullying Bill of Rights Act (Act) to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises. N.J.S.A. 18A:37-13.1(f). Definitions relative to adoption of harassment and bullying prevention policies are found in N.J.S.A. 18A:37-14, which states in part:

“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.

Here, respondent's HIB Policy, "Harassment, Intimidation and Bullying," essentially mirrors the New Jersey law. Additionally, the policy also sets forth a detailed process by which complaints are investigated to determine whether an action meets the definition of HIB as set forth in the policy and Act.

Petitioner alleges that the HIB investigation was conducted improperly and was incomplete. Specifically, petitioner while conceding that A.P.'s conduct may not have been appropriate, asserts that the School failed to interview eyewitnesses; failed to properly interview A.P. to determine his motivation and the overall context of his actions; and improperly determined that A.P.'s actions were gender motivated.

I disagree. In W.C.L. and A.L. o/b/o L.L. v. Board of Education of the Borough of Tenafly, EDU 3223-12, Initial Decision (November 26, 2012), aff'd Commissioner (January 10, 2013) a student's comments relating to head lice on another student was perceived as being motivated by a distinguishing characteristic. In R.G.B. v. Village of Ridgewood Bd. Of Ed., EDU 14213-12, 2013 N.J. AGEN LEXIS 130 (May 15, 2013) a student calling another student a "horse" and a "fat-ass" was found to constitute HIB and reasonably perceived as motivated by the distinguishing characteristic of appearance or body-type. In C.C. o/b/o/ S.C. v. Bd. of Ed. Of Twp. Of Jefferson, EDU 10872-14, 2015 N.J. AGEN LEXIS 251 (April 6, 2015) a student's comments that another student "sucks at basketball" was found to constitute HIB because the comments were reasonably perceived as motivated by the distinguishing characteristic of height, intelligence and sports proficiency.

The instant matter came to the attention of School officials when a letter was received from S.W. urgently seeking help from the School Vice Principal due to A.P.'s ongoing inappropriate behavior. Through this letter and confirmed during her interview with Hackney, S.W. expressed her extreme discomfort and distress over A.P.'s ongoing conduct. Investigation into the matter by the School, in accordance with their HIB policy, found that A.P.'s actions had been occurring for a number of months; included hand gestures directed to S.W. denoting "oral sex"; waiving his middle finger at her; saying "F-you" to her; and holding his genitals and calling them "banana's" to S.W. It is not unreasonable to believe that these actions could be perceived to be motivated by S.W.'s gender. While no additional interviews were conducted in this matter, none were needed as almost all of S.W.'s allegations were admitted to by A.P.

The fact that S.W. felt uncomfortable and was upset by A.P.'s actions demonstrates that A.P.'s conduct had an emotional impact on S.W.; was demeaning in nature; and caused a disturbance in her educational rights. In order to constitute HIB, A.P.'s conduct need only satisfy one of the three prongs of the sub-parts of N.J.S.A. 18A:37-14. This is plain from the statute's use of the word "or" as a conjunction. Here, A.P.'s conduct fell under all three prongs. Therefore, I **CONCLUDE** that the School's determination that A.P.'s actions constitute a violation of the HIB policy was appropriate.

Petitioner asserts that the incidents do not fall under the definition of HIB and that neither the School or respondent understand the definition of HIB. Respondent urges this tribunal to conclude that the board's actions were not arbitrary, capricious or unreasonable in its determination and that the HIB investigation was conducted properly and seeks dismissal of the Petition of Appeal.

The Commissioner of Education will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. 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), <<http://njlaw.rutgers.edu/collections/oal/>>. Further, 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). 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, 199–200 (Ch. Div. 1973), *aff’d*, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M., *supra*, EDU 2780-07, Initial Decision (February 6, 2008), <<http://njlaw.rutgers.edu/collections/oal/>>; see W.C.L. and A.L. ex rel L.L. v. Tenafly Bd. of Educ., OAL Dkt. No. EDU 3223-12 (2013) (The petitioner challenged the school board’s decision that a student committed an act of HIB. The administrative law judge, (ALJ) found that the board’s actions were consistent with the letter and spirit of the law and were not taken in bad faith or in disregard of the circumstances. The ALJ concluded that the petitioner failed to establish that the board’s actions were arbitrary, capricious or unreasonable. The Commissioner affirmed the ALJ’s decision to dismiss the petition of appeal.); J.M.C. ex rel A.C. v. E. Brunswick Bd. of Educ., OAL Dkt. No. EDU 4144-12 (2013) (The petitioner challenged the board’s determination that the actions of the petitioner’s son constituted HIB. The board found that the student called another student “gay” and said he “danced like a girl.” The demeaning remarks constituted HIB). In both cases, the petitioners failed to satisfy their burden to show that the board’s actions were arbitrary, capricious or unreasonable.

I have carefully reviewed the record in this matter. Petitioner has presented no credible evidence that respondent acted in an arbitrary, capricious or unreasonable manner. As I have previously concluded, A.P.’s comments and actions can and were reasonably perceived to be motivated by S.W.’s gender. Therefore, I **CONCLUDE** that petitioner has not met his burden of proof that respondent acted in an arbitrary manner in upholding the School’s determination that A.P.’s conduct constituted harassment, intimidation or bullying under the Act.

ORDER

Based on the foregoing, I **ORDER** that the petition of appeal be **DISMISSED**.

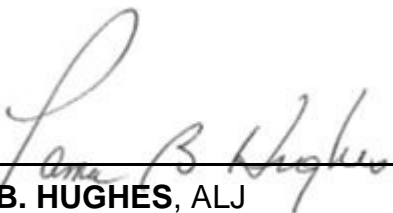
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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.

February 13, 2018

DATE



TAMA B. HUGHES, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____
/vj

APPENDIX

WITNESSES

For petitioner:

D.P.

For respondent:

Laura Hackney

Melanie Lamanteer

EXHIBITS

For petitioner:

P-1 January 1, 2017, Letter to David Neff from S.W. (2 pages)

P-2 Code of Conduct Referral (1 page)

P-3 HIB Reporting Form (3 pages)

P-4 Typed Response Notes (6 pages)

P-5 Email string, dated February 9, 2017 (2 pages)

For respondent:

R-1 Hamilton Township Board of Education HIB Policy (16 pages)

R-2 Hamilton Township Board of Education Disciplinary Policy (5 pages)

Joint Exhibits:

J-1 Petitioner's Petition (9 pages)

J-2 Hamilton Township School District Answer (6 pages)