

T.R. and T.R., on behalf of minor child, E.R., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BRIDGEWATER-RARITAN REGIONAL :
SCHOOL DISTRICT, SOMERSET COUNTY, :
RESPONDENT. :

SYNOPSIS

This case involves a challenge by the petitioners to the Board's determination that certain conduct directed at E.R. by another student, P.H., did not constitute Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A. 18A:37-13 et seq.* In an Initial Decision dated August 11, 2014, an Administrative Law Judge (ALJ) found that the Board's determination that P.H.'s conduct did not meet the definition of HIB was arbitrary, capricious and unreasonable, and granted summary decision in favor of the petitioners. This determination was adopted by the Commissioner in a final decision issued November 10, 2014. Subsequent to the issuance of the final decision, the Commissioner granted the Board's motion for reconsideration because an error in mailing had precluded the Board from submitting exceptions to the Initial Decision prior to the issuance of the Commissioner's final decision in the matter.

Upon consideration of the Board's exceptions and a comprehensive review of the record, the Commissioner again concurred with the ALJ's conclusion that the Board's determination that E.R. was not the victim of HIB must be overturned as arbitrary, capricious and unreasonable, finding, *inter alia*, that: all four elements of the definition of HIB were clearly established in this case; the objections advanced in the Board's exceptions were unpersuasive; the Board's arguments as to why the proven conduct did not rise to the level of HIB are contrary to the spirit of the anti-bullying Act; and the Board's own investigation report of P.H.'s alleged conduct alone indicates that his behavior toward E.R. clearly met the definition of HIB. Further, the Commissioner expressly rejected the Board's contention that, since the term "sexual harassment" is not specifically contained in the text of the Act, that acts of sexual harassment cannot form the basis for a finding of HIB within the intentment of *N.J.S.A. 18A:37-14*. Accordingly, the recommended decision of the OAL was adopted as the final decision in this matter, and the Board's determination that E.R. was not the subject of HIB was overturned. The respondent Board was directed to comply with all reporting and other statutory and regulatory requirements applicable to the substantiation of an incident of HIB.

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

OAL DKT. NO. EDU 10208-13
(EDU 0066-13 ON REMAND)
AGENCY DKT. NO. 355-12/12

T.R. and T.R., on behalf of minor child, E.R., :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : AMENDED DECISION
BRIDGEWATER-RARITAN REGIONAL :
SCHOOL DISTRICT, SOMERSET COUNTY, :
RESPONDENT. :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the Board of Education (Board) and the petitioners' reply thereto.¹ This case involves a challenge by the petitioners to the Board's determination that certain conduct directed at E.R. by another student, P.H., did not constitute Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A. 18A:37-13 et seq.* The Administrative Law Judge (ALJ) found that the Board's determination that P.H.'s conduct did not meet the definition of HIB was arbitrary, capricious and unreasonable, and granted summary decision in favor of the petitioners.

In its exceptions the Board contends that the ALJ improperly granted summary decision in favor of the petitioners, and that the Initial Decision is based upon erroneous factual determinations which were unsupported or contradicted by the undisputed facts presented on the motion for summary decision. The Board argues that the ALJ failed to consider several facts

¹ No exceptions were considered in the final decision issued by the Commissioner on November 10, 2014. On February 26, 2015, the Commissioner granted the Board's motion for reconsideration to allow the Board to submit exceptions. It was determined that the OAL sent the Board's copy of the Initial Decision to an incorrect email address, and did not provide the Board with a copy of the decision via the postal service. Therefore, the Board was not originally afforded an opportunity to submit exceptions prior to the issuance of the final decision.

disclosed by the HIB investigation that was conducted by the Board. Additionally, the Board asserts that it conducted an HIB investigation in full compliance with the Act and its decision was entirely reasonable based on the investigation. As such, the Board maintains that its determination was entitled to deference and the ALJ had no authority to modify it by granting summary decision to the petitioners *sua sponte*. Finally, the Board suggests that the ALJ should have applied a *de novo* standard of review instead of using the arbitrary capricious and unreasonable standard. Therefore, the Board maintains that the Initial Decision should be rejected.

As a threshold matter, the Board attempts to argue in its exceptions that this case presents an issue of first impression with respect to the standard of review to be used by an ALJ in evaluating whether a board of education has correctly interpreted the statutory definition of HIB.² It is well established that when a local school board acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. *Thomas v. Bd. of Ed. of Morris Twp.*, 89 N.J. Super. 327, 332 (App. Div. 1965), *aff'd* 46 N.J. 581 (1966). The fact that the substance of this case involves a challenge to the Board's HIB determination and the application of the Act does not impact the customary standard of review.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ's conclusion that the Board's determination that E.R. was not the victim of HIB must be overturned as arbitrary, capricious, and unreasonable. The Commissioner is also in accord with the ALJ's determination – for the reasons thoroughly outlined in the Initial Decision – that all four

² Ironically in the Board's motion for summary decision the Board stated that the appropriate standard of review in this case is the arbitrary, capricious or unreasonable standard. In fact, the Board included the applicable case law to support the fact that its decision should not be overturned unless it was established that the Board acted in an arbitrary, capricious or unreasonable manner.

elements of the definition of HIB were clearly established in this case.³ Moreover, the Commissioner finds the objections advanced in the Board's exceptions to be unpersuasive. The arguments made by the Board as to why the proven conduct did not rise to the level of HIB are contrary to the spirit of the anti-bullying Act. Despite the Board's contention to the contrary, the ALJ was fully authorized to grant summary decision in favor of the petitioners, as it is clear from the Board's own investigation report alone that the conduct of P.H. did in fact meet the definition of HIB.⁴

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter, and the Board's determination that E.R. was not the subject of HIB is hereby overturned. The Board of Education of the Bridgewater-Raritan School District is hereby directed to comply with all reporting and other statutory and regulatory requirements applicable to the substantiation of an incident of HIB.

IT IS SO ORDERED.⁵

COMMISSIONER OF EDUCATION

³ The Commissioner expressly rejects the argument advanced by the Board in its summary decision motion that, since the term "sexual harassment" is not specifically contained in the Act, acts of sexual harassment cannot form the basis for a finding of HIB within the intentment of *N.J.S.A. 18A:37-14*. The Commissioner finds nothing in the language of the statute or in the legislative history of the Act to support the notion that the Legislature intended to exclude acts of sexual harassment from the definition of HIB. To the contrary, the Act was enacted "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*. (emphasis added).

⁴ The Board's investigation report states, "[d]uring the month of April P.H. asked E.R. to do inappropriate things through text and ooVoo. E.R. did not comply with P.H.'s request but he continued to ask her. After being counseled by Mrs. Geogham, P.H. stopped asking E.R. to do inappropriate things through text or ooVoo." Additionally, according to the report, P.H. admitted "that he asked to see [E.R.'s] breast a couple of times." Finally, other students who were interviewed during the investigation indicated that they saw or were aware of other text messages "that mentioned fingering and saying 'you're so sexy' [and where P.H.] asked [E.H.] to make out with him and strip [and] show him her private areas."

⁵ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).

Date of Decision: May 6, 2015

Date of Mailing: May 6, 2015