

D.D.K., ON BEHALF OF MINOR CHILD, D.K., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
OF READINGTON, HUNTERDON COUNTY, :
AND BARBARA SARGENT, :
RESPONDENTS. :

SYNOPSIS

Pro se petitioner challenged the determination of the Board that his son, D.K., was not the subject of acts of harassment, intimidation or bullying (HIB) by several students in violation of the New Jersey Anti-Bullying Act (Act), *N.J.S.A. 18A:37-13 et seq.* This case stems from two separate incidents of alleged HIB against D.K. in May of 2014, when D.K. was in seventh grade. D.K. is now in high school and did not attend or testify at the hearing in this matter. Petitioner D.D.K. testified on his son's behalf. He alleged that the HIB investigation was not properly conducted, and sought an order reversing the "no HIB" determination. The Board asserted that the petitioner failed to show that D.K. was mistreated by the other students based on his race, gender or other distinguishing characteristic; further, petitioner failed to prove that the conduct substantially disrupted or interfered with the orderly operations of the school.

The ALJ found, *inter alia*, that: the Commissioner will not overturn a decision of a local board unless the action is determined to be arbitrary, capricious or unreasonable; petitioner bears the burden of proof to show that the investigation of the alleged incidents of HIB was conducted improperly; the first incident – in which students on the school bus referred to D.K. as a "know it all" – did not rise to the level of HIB, as the investigation found that this was a conflict between students regarding their comparative abilities in math, and was not motivated by an actual or perceived characteristic; D.D.K.'s assertions that D.K. had been called a "smarty pants" and a "dumb ass Asian" on the bus were not substantiated at the hearing; the second incident – in which a student "joked" in homeroom with D.K., who was wearing a yellow shirt, by saying "you're already yellow, you're Asian" – was judged in the investigative report to be motivated by D.K.'s race and color; however, while this substantiated statement had the effect of insulting or demeaning D.K., his response was to say "fortunately, this was not problematic for my learning experience, but it ticked me off at the time"; therefore, this incident did not substantially disrupt or interfere with the orderly operations of the school or the rights of other students. The ALJ concluded that the petitioner did not meet his burden of proof that the Board acted in an arbitrary manner in finding that D.K. was not the target of HIB as defined in the Act. Accordingly, the petition was dismissed.

Upon review, the Commissioner agreed that the school bus incident did not rise to the level of HIB. With respect to the second incident, the Commissioner observed that the Board's HIB report specifically found that comments made to D.K.: could reasonably be perceived as motivated by D.K.'s race; happened on school property; and had the effect of being insulting or demeaning to D.K. However, the Commissioner was constrained to agree with the ALJ that the petitioner failed to meet his burden of demonstrating that these incidents substantially disrupted or interfered with the orderly operation of the school or the rights of other students. Accordingly, the Commissioner adopted the Initial Decision, as modified, as the final decision in this matter.

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

This case involves a challenge by petitioner to the Board’s determination that his son was not the victim of acts of Harassment, Intimidation and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A. 18A:37-13 et seq.* Petitioner alleges that in the first incident, on May 20, 2014, his son was called a “know it all” on the school bus. (Initial Decision at 2) He alleges that another student bumped D.K. with his school bag and said, “I hope you get brain damage.” *Ibid.* In the second incident – on May 21, 2014, in homeroom – petitioner alleges that a student made comments regarding D.K.’s Korean descent, asking him why he was not wearing yellow for spirit day because “you’re already yellow . . . you’re Asian.” *Id.* at 3. Petitioner alleges that the same student also referred to D.K. as a “dumb ass Asian.” *Id.* at 2-3.

The Board determined that the incidents did not amount to HIB. According to the report, the school bus incident was not reasonably perceived as being motivated either by an actual or perceived characteristic, and instead was a conflict between students. (Exhibit J-2) With respect to the second incident, the report indicated that although there was evidence that the comments could reasonably be perceived as being motivated by D.K.’s race and color, and had the effect of being insulting or demeaning

to D.K., it did not substantially disrupt or interfere with the orderly operations of the school or the rights of other students. (Exhibit J-1) The Administrative Law Judge (ALJ) found that the Board's decision in finding no HIB was not arbitrary, capricious, or unreasonable because "it has not been established that the alleged aggressors' actions were motivated either by any actual or perceived characteristic . . . or by any other distinguishing characteristic." (Initial Decision at 10)

Upon a comprehensive review of the record, the Commissioner notes at the outset that petitioner – who did not witness either incident – did not propound discovery despite multiple opportunities to do so, nor did petitioner call any witnesses besides himself at the hearing. It is clear that petitioner had the burden to prove by a preponderance of the evidence that the Board acted in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination. See *T.B.M on behalf of M.M. v. Moorestown Board of Education*, OAL Dkt. No. EDU 12780-07, decided February 6, 2008 (citing *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966)), *adopted* Commissioner Decision No. 157-14, April 7, 2008. The Commissioner agrees with the ALJ that petitioner did not meet his burden.

Specifically, the Commissioner is in accord with the ALJ's determination that the Board's finding of no HIB with respect to the school bus incident was not arbitrary, capricious or unreasonable. With respect to the second incident, the Commissioner agrees with the ALJ's finding that the Board was not arbitrary, capricious or unreasonable, but disagrees with the ALJ as to the reasoning.

The elements of HIB are set forth at *N.J.S.A.* 18A:37-14:

"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, the alleged aggressor admitted to asking D.K. why he was not wearing yellow for spirit day because “you’re always yellow.” (Exhibit J-1) The HIB report specifically found that “[t]here is evidence that Alleged Aggressor’s comments could reasonably be perceived as being motivated by D.K.’s race and color.” *Ibid.* Accordingly, the Commissioner disagrees with the ALJ that such comments were not motivated by any actual or perceived characteristic, as the report found otherwise. The report also found two additional elements of the HIB test were met because (1) the incident happened on school property; and (2) had the effect of being insulting or demeaning to D.K.

However, the report determined that the incident did not amount to HIB because the comments did not substantially disrupt or interfere with the orderly operation of the school or the rights of other students. In support of this finding, the report noted that D.K. stated in his interview that “fortunately, this was not problematic for my learning experience, but it ticked me off at the time.” (Exhibit J-1) The student witness observed the alleged aggressor make an “embarrassed laugh” to himself when he realized what he had said had come out wrong, but did not hear anyone else laugh and did not think D.K. was upset as a result of the comment. *Ibid.* The teachers did not hear any of the alleged comments.

Previously, conduct 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. Given that D.K. indicated that the comments were not problematic for his learning experience and other students did not appear to be affected by them – combined with a lack of any other evidence to the contrary – the Commissioner is constrained to agree that petitioner failed to meet his burden of demonstrating that the comments substantially disrupted or interfered with the orderly operation of the school or the rights of other students. As such, petitioner has not demonstrated that the Board was arbitrary, capricious, and unreasonable in finding no HIB.

Accordingly, the recommended decision of the ALJ is modified as stated above and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 11, 2016

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* 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)*.