320-17

E.W. and D.W., on behalf of minor child, A.W., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioners challenged the determination of the respondent Board that their child, A.W., engaged in behavior that constituted an act of Harassment, Intimidation and Bullying (HIB) pursuant to the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 *et seq.* This case stems from an incident in March 2014 between two seventh graders – A.W. and J.S. – during social studies class. Following an investigation by the school's HIB specialist, the Board determined that a statement made by A.W. to J.S., which could be perceived as disparaging of J.S.'s religion, met the definition of HIB. The Board thereafter imposed upon A.W. the penalty of a one-day, in-school suspension and an HIB writing project. Petitioners contested the designation of the incident as an HIB violation, and instead contended that the incident was a conduct violation. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: while there could be diverging opinions as to the final determination in this case, there are no material facts at issue here, and the matter can be decided on summary decision; the Board found that A.W.'s statement could reasonably be perceived as being motivated by J.S.'s religion; it is a long-standing doctrine that Board decisions are entitled to a presumption of correctness and may not be disturbed unless they are found to decisively flawed, *see Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960); and petitioners' arguments challenging the validity of the HIB statute are not appropriately before this tribunal. Accordingly, the ALJ granted the Board's motion for summary decision, and dismissed the petition.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, with modification regarding the threshold requirements for a finding of HIB. The petition was dismissed with prejudice.

October 23, 2017

OAL DKT. NO. EDU 09963-14
AGENCY DKT. NO. 176-7/14

E.W. and D.W., on behalf of minor child, A.W.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
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.

Petitioners challenge the Board's determination that their minor child, A.W., engaged in an act of Harassment, Intimidation, and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act). *See N.J.S.A.* 18A:37-13 *et seq.* In granting summary decision in favor of the Board, the Administrative Law Judge (ALJ) concluded that A.W.'s statement met the definition of HIB and that the Board's determination was proper. The ALJ further found that this tribunal is not the appropriate venue for petitioners' arguments relating to the validity of the Act. Upon comprehensive review of the record in this matter, the Commissioner concurs with the ALJ's findings, as modified herein.

As a preliminary matter, the Commissioner clarifies that HIB does not "only" require "that the student making the comment be reasonably aware of its potential impact and that the recipient reasonably perceive the comment as insulting." *See* Initial Decision, pgs. 2-3. In order for conduct to constitute an act of HIB, there must be present other factors beyond a

reasonable awareness of the impact of one's action and how it will be perceived by the recipient. 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 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.
>
> *N.J.S.A.* 18A:37-14.

Therefore, the threshold requirement is that the conduct be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic, and that such conduct substantially disrupts or interferes with the rights of other students or the orderly operation of the school. In addition to this threshold requirement, one of the three criteria enumerated in the Act must also be satisfied.

In this matter, the Board found that A.W.'s statement could reasonably be perceived as being motivated by J.S.'s religion, interfered with J.S.'s rights, and had the effect of insulting or demeaning him. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless

there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *See Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super*. 288 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[,]" the Commissioner will not substitute her judgment for that of the board. *Bayshore Sewage Co. v. Dep't. of Envtl. Prot.*, 131 *N.J. Super*. 37 (App. Div. 1974). Nothing in the record indicates that the Board – in determining that A.W.'s statement constituted an act of HIB – operated in an arbitrary, capricious or unreasonable manner; therefore, the Commissioner finds no basis to reverse the Board's decision.

Accordingly, the Initial Decision is adopted as modified herein, and the petition is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: October 23, 2017
Date of Mailing: October 25, 2017

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9963-14

AGENCY DKT. NO. 176-7/14

E.W. and D.W., on behalf of minor child,

A.W.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,

Respondent.

_____

E.W. and D.W. on behalf of A.W., petitioners, pro se

Nicholas Celso, Esq., for respondent (Schwartz, Simon, Edelstein, Celso, LLC, attorneys)

Record Closed: August 4, 2017 Decided: September 6, 2017

BEFORE **SOLOMON A. METZGER**, ALJ t/a:

This matter arises out of a determination by the Bridgewater-Raritan Board of Education that a comment by A.W. to a classmate constituted an act of Harassment, Incitement, or Bullying (HIB) under N.J.S.A. 18A:37-13 to – 32.1 and school policy. Petitioners sought review and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. The Board has filed a motion for summary decision, N.J.A.C. 1:1-12.5; Brill v. Guardian Life Ins. Co. of Amer. 142 N.J. 520 (1995)

The incident arose on March 5, 2014, between two seventh graders, A.W. and J.S., during social studies class. The class had earlier been studying a book on the Holocaust. Subsequently, while working on a project together requiring some cutting and pasting, J.S., who is Jewish, reported that A.W. said, ". . . if you throw those scissors at me you are going back to the concentration camps." He then stabbed her water bottle with his scissors and explained later that he did this because he was, ". . . so angry and couldn't think straight." A.W. acknowledged making a statement to this effect. There is a factual dispute as to what J.S. might have said, or done to precipitate A.W.'s comment. In one of her statements A.W. suggests that J.S. was twirling scissors near her in a potentially menacing way. She became frightened and just blurted out the offending comment. Investigation by the HIB specialist on staff led initially to a recommendation that this was a conduct violation, not HIB, but this view was ultimately rejected by the Interim Superintendent and the Board agreed in a 6-3 vote. A one-day in-school suspension and an HIB writing project were imposed. Petitioners do not contest the penalty as a conduct violation; they oppose designation of the incident as an HIB violation. This is the substance of the motion record.

Under Brill, the motion record must be understood in a light most favorable to the non-moving party. Thus, I accept as true that A.W. was reasonably in fear that J.S. would harm her with scissors immediately before her comment. The initial question then is whether this is a relevant consideration needing fact finding. The anti-bullying statute at N.J.S.A. 18A:37-14, requires only that the student making the comment be

reasonably aware of its potential impact and that the recipient reasonably perceive the comment as insulting. There is no debate on this score; the comment was not opaque. A.W. understood her remark; her written statements acknowledge as much and she apologized repeatedly. Neither is there any debate that J.S. had reason to take offense and did take offense. The issue then is whether the Board's decision can stand on this reading of the motion papers. I conclude that it can. One can disagree with the decision, indeed the vote on the Board was 6-3. Nonetheless, a plain reading of the HIB definition suggests that the Board's outcome was not strained. This is so even if it recognized a precipitating event. In that case the Board might have considered the dual wrongs a wash, or disciplined both students; these too would have been exercises of discretion. Petitioners argue that the typical deference owed Board decisions should here be accorded to the investigator who gathered the evidence, but this is without precedent. It is longstanding doctrine that Board decisions may not be disturbed unless decisively flawed, Kopera v. W. Orange Bd. of Educ., 60 N.J. 288 (1960).

The main thrust of petitioners' brief is that the statute is infirm under due process and first amendment principles, citing inter alia, State v. Pomianek, 221 N.J. 66 (2015) and Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). Stated briefly, petitioners believe that the statute cannot create fault without intent and in any case, cannot inhibit A.W.'s comment as it is protected speech. Attacks of this nature are more appropriately addressed on judicial review. Public agencies function to administer statutory policy and are not designed to assume this check and balance. That said it is worth pointing out that Pomianek, involved a criminal law statute, and that schools, having a responsibility to transmit norms of good conduct, enjoy flexibilities respecting speech not available in the public square, see e.g., Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986). I do not venture beyond noting these few contours of debate in the briefs.

Based on the foregoing, the Board's motion for summary decision is **GRANTED** and this petition is **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.

September 6, 2017
DATE

SOLOMON A. METZGER, ALJ t/a

Date Received at Agency:

Date Mailed to Parties:

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