

#278-13 (OAL Decision: Not yet available online)

K.T., ON BEHALF OF MINOR CHILDREN, K.H. and T.D.	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF DEERFIELD, CUMBERLAND COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

SYNOPSIS

The petitioner contended that her daughter, K.H., was the victim of bullying at the hands of her kindergarten teacher in respondent’s school district. Specifically, the petitioner alleged that the teacher forced K.H., who is African-American, to eat a bagel – which had been retrieved from the trash can – in front of the other students in her classroom. Petitioner further contended that the respondent failed to conduct an investigation of the alleged bullying incident. The Board denied that K.H. was subject to bullying, and asserted that the retrieved bagel had never been opened and was still enclosed in its plastic packaging when removed from the trash can. The Board further contended that an independent investigation had been conducted by the Department of Children and Families, Institutional Abuse Investigation Unit (IAIU), and the resulting report found no evidence of neglect or abuse. The Board filed a motion for summary decision. No answer was filed by the petitioner.

The ALJ found, *inter alia*, that: the burden of proof in this matter is on the petitioner; local boards of education have reasonable discretion for various managerial matters; petitioner’s allegations were investigated by the IAIU – an independent agency charged with investigating allegations of child abuse; the IAIU investigation was more independent than an internal investigation conducted by the school district; the IAIU found that the teacher in question committed no abuse or neglect; the Board certified that all of its staff members have been trained in New Jersey’s anti-bullying procedures; the Board’s motion for summary decision was unopposed by the petitioner; and even if the motion had been timely opposed, petitioner’s claims are without merit. The ALJ concluded that the Board exercised reasonable managerial discretion, and petitioner failed to meet her burden of proof as she did not file opposition to the Board’s motion for summary decision. Accordingly, the ALJ granted the Board’s motion and ordered the petition dismissed.

Upon review, the Commissioner rejected the Initial Decision of the OAL, finding, *inter alia*, that: the ALJ was in error when he applied a “default” standard of review to the Board’s motion for summary decision, whereby the unopposed motion was automatically granted; pursuant to New Jersey’s Anti-Bullying Bill of Rights Act, all alleged acts of harassment, intimidation and bullying (HIB) require a mandatory internal investigation by a school anti-bullying specialist; it is unclear from the record whether respondent Board undertook such required internal investigation. Accordingly, the Commissioner remanded this matter to the OAL for further proceedings consistent with this determination.

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.

July 30, 2013

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The Commissioner has reviewed the record of this matter and the Initial Decision of the Office of Administrative Law (OAL) on the Board’s motion for summary decision. The parties did not file exceptions to the Initial Decision.

This matter arises out of a claim by petitioner that her youngest daughter, K.H., an African-American, was the victim of bullying at the hands of her kindergarten teacher in the respondent’s school district. More specifically, petitioner alleges that the teacher forced K.H. to eat a bagel – which had been retrieved from the trash can – in front of the other students in the class. Petitioner further alleges that the respondent failed to conduct an investigation of the alleged bullying incident. By way of relief, petitioner requested that respondent “be ordered and directed as follows:

- 1) To conduct an investigation into the bullying incident by the Kindergarten teacher and to report the results of any such investigation to petitioner;
- 2) To devise an action plan so as to provide to the children of petitioner a safe educational environment with whatever psychological or other services are required,
- 3) Directing that the School District’s attorney and the Chief School Administrator be prohibited from initiating truancy complaints in the Rosenhayn [sic] Municipal court for alleged truancy,
- 4) Ensuring that all teachers receive training with respect to the standards and procedures of New Jersey’s Anti-Bullying Procedures.”

(Initial Decision at 3-4)

Respondent filed a motion for summary decision in which it argued that the petition should be dismissed, since “all of the relief sought by Petitioners has either already been provided by the District or is not appropriately sought in this Court.” (Respondent’s Brief at 3) To that end, respondent argued that: 1) an independent investigation of the incident had already occurred, since the Department of Children and Families, Institutional Abuse Investigation Unit (IAIU) had investigated the incident and issued a report finding no evidence of neglect or abuse; 2) it had already devised an action plan to provide a safe educational environment and psychological services, which was offered to petitioner and rejected without comment; 3) it could not be ordered to ignore its truancy reporting obligations under *N.J.S.A.* 18A:38-27 and *N.J.A.C.* 6A:16-7.8(a)(4)(iii); and, 4) it had already provided district staff with training regarding New Jersey’s anti-bullying procedures. Petitioner did not oppose the motion.

The Administrative Law Judge (ALJ) issued an Initial Decision in which he determined that respondent was entitled to summary decision. Therein, the ALJ concluded that petitioner failed to “meet her burden of proof,” since she did not file opposition to respondent’s motion. (Initial Decision at 5) The ALJ further determined that respondent “exercised its managerial discretion in a reasonable and practical manner” and that there is “no basis in fact or law” to “compel the district to take further action above and beyond that which has already occurred.” (*Id.*)

Upon a comprehensive review of this matter, the Commissioner is compelled to reject the Initial Decision. Initially, the Commissioner finds that the ALJ failed to apply the appropriate standard of review to respondent’s motion for summary decision. In that regard, the ALJ stated: the “motion for summary decision is unopposed and is, therefore, granted.” (Initial Decision at 5) The ALJ further reasoned that petitioner “did not meet her burden of proof,” because she “did not file opposition to the motion for summary decision.” (*Id.*) In effect, the ALJ applied a “default” standard of review, whereby the unopposed motion for summary decision was automatically granted. This is incorrect. Given that the motion was unopposed, the ALJ was entitled to presume the absence of a material *factual* dispute. It does not, however, follow that respondent is entitled to a decision in its favor *as a matter of law*.

Rather,

When considering a motion for summary decision, this tribunal must determine whether pleadings, the answer to interrogatories, and affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to an order as a matter of law. *N.J.A.C.* 1:1-12.5(b); *R.4:46-2*. “It is the movant’s burden to exclude reasonable doubt as to the existence of any genuine issue of material fact.” *Judson Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 74 (1954)

In order for the non-moving party to prevail, a responding affidavit must be offered setting forth specific facts which indicate that there is a genuine issue that can only be determined in an evidentiary proceeding. *N.J.A.C.* 1:1-12.5(b). Should the non-moving party fail to respond, however, an absence of material factual dispute may be presumed and the movant will prevail if the law supports the movant’s position. *37 New Jersey Practice, Administrative Law and Practice Section 194* at 202 (Lefelt) (1988). The relevant inquiry regarding a motion for summary decision is “whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520, 540 (1995).

Here, petitioner alleges that respondent failed to conduct an internal investigation of the allegation that K.H. was bullied by her teacher. Respondent argues that an internal investigation is not required, because IAIU completed an independent investigation and found no evidence of abuse or neglect. Following the grant of summary decision, the ALJ states that summary decision would have been appropriately granted “[e]ven if the district’s motion was timely opposed,” since, in his estimation, respondent’s decision to rely upon the findings of the IAIU, rather than conduct an internal investigation, was a “reasonable and practical” exercise of its “managerial discretion.” (Initial Decision at 5) The Commissioner cannot agree.

In responding to incidents of harassment, intimidation, and bullying (HIB), school districts in the State of New Jersey must comply with the comprehensive protocol prescribed by the Anti-Bullying Bill of Rights Act (P.L.2010, c.122) (the “Act”). Pursuant to the Act, all acts of HIB are to be reported verbally to the school principal on the same day when reliable information regarding any such

incident is received. *N.J.S.A.* 18A:37-15b(5). Thereafter, the incident must be reported in writing to the school principal within two school days. *Id.* Within one school day of the report, the principal or his designee must initiate an investigation to be conducted by a school anti-bullying specialist. *N.J.S.A.* 18A:37-15b(6)(a). Such investigation must be completed no later than 10 school days from the date of the written report of the HIB incident. *Id.* The results of the investigation must be reported to the superintendent of schools within two school days of the completion of the investigation. *N.J.S.A.* 18A:37-15b(6)(b).

Thereafter, pursuant to *N.J.S.A.* 18A:37-15b(6)(c), the superintendent of schools is required to report the results of an HIB investigation to the Board at the next meeting following completion of the investigation, along with information of any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent. Within five (5) school days thereof, the parents or guardians of the students who are parties to the investigation are likewise entitled to receive information about the investigation. *N.J.S.A.* 18A:37-15b(6)(d). At the next board meeting following its receipt of the report, the Board is required to issue a written decision to affirm, reject, or modify the superintendent's decision. *N.J.S.A.* 18A:37-15b(6)(e). The Board's decision may be appealed to the Commissioner. *Id.*

The ALJ's analysis fails to recognize that, per the comprehensive statutory scheme detailed *supra*, completion of an internal HIB investigation is not discretionary. Rather, upon receipt of reliable information regarding an HIB incident, the plain language of *N.J.S.A.* 18A:37-15b(6)(a) dictates that completion of a prompt investigation by a school anti-bullying specialist is mandatory. As such, the conduct of an investigation by IAIU – or any other agency or entity – does not relieve a school district of its obligation to conduct the statutorily-required internal investigation. It is not clear, on this record, whether respondent undertook any internal investigatory actions, or whether any such investigation complied with the requirements of the Act.

Accordingly, for the reasons set forth herein, the Initial Decision of the OAL – dismissing the petition of appeal – is rejected, and this matter is remanded for further proceedings consistent with the Commissioner’s determination above.

IT IS SO ORDERED.¹

COMMISSIONER OF EDUCATION

Date of Decision: July 30, 2013

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¹ 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*).