

S.A. AND C.A., ON BEHALF OF MINOR CHILD, G.A.,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONERS,		
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	
	:	
RESPONDENT.		
	:	

SYNOPSIS

Pro se petitioners challenged the determination of the respondent Board that G.A. was not the victim of harassment, intimidation or bullying (HIB) under the provisions of the New Jersey Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 to -32.1 (the Act). Petitioners – the parents of G.A., a sixth grade student in respondent’s school district during the 2015-2016 school year – alleged that their daughter had experienced several incidents of HIB at the hands of her special education teacher. G.A. was eligible for special education services based on her Attention Deficit Hyperactivity Disorder (ADHD), and had an Individualized Education Plan (IEP). Petitioners alleged that the teacher, Ms. Levin, repeatedly pulled G.A.’s papers from her hands in view of the class, and sought their daughter out at the end of the period to give her special study guides, which actions embarrassed G.A. and made her uncomfortable. The Board filed a motion for summary decision, contending that Levin’s alleged conduct did not meet the statutory definition of HIB set forth at *N.J.S.A.* 18A:37-14, and that the subject interactions with G.A. were part of her responsibilities as a special education teacher.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; 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 any other distinguishing characteristic; in this case, the allegations involved separate incidents wherein G.A. purportedly experienced HIB at the hands of her special education teacher; G.A. was classified on the basis of her diagnosis of ADHD; her IEP required that she be provided with in-class support in her academic classes, including checks of her work; the IEP did not specify the manner in which teachers were required to deal with any discomfort G.A. felt with having her work checked; as the special education teacher assigned to provide support for G.A., Levin conducted in-class checks of G.A.’s work and test scores; Levin’s performance of her duties caused G.A. discomfort and upset, which was communicated to Levin and other District staff; however, the facts herein – even when viewed in the light most favorable to petitioner – do not lead to the conclusion that Levin was motivated by G.A.’s disability other than their relationship as special education teacher and student, and her actions could not be reasonably perceived as motivated by the student’s disability within the statutory meaning of an HIB violation. Accordingly, the ALJ concluded that the Board did not act in an arbitrary, capricious or unreasonable manner when it determined that no HIB had occurred in this case, and granted summary decision in favor of the respondent.

Upon review, the Commissioner – finding the petitioners’ exceptions to be unpersuasive – concurred with the ALJ’s findings and conclusions. The Initial Decision was adopted as the final decision in this matter, and 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.

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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 petitioners and the Board's reply thereto.

In their exceptions, petitioners argue that the Administrative Law Judge (ALJ) erred in granting summary decision for the Board and finding that G.A. was not the subject of Harassment, Intimidation and Bullying (HIB) because the ALJ relied upon facts that are in dispute. With respect to the ALJ's finding that the alleged conduct was not motivated by G.A.'s Attention Deficit Hyperactivity Disorder (ADHD), petitioners argue the ALJ ignored much of the evidence that was submitted, specifically evidence of what transpired before and after the December 9 and 15, 2015 incidents. Instead, the ALJ put too much weight on G.A.'s Individualized Education Plan (IEP), which is irrelevant to the HIB complaint. Petitioners contend that the conduct of G.A.'s special education teacher, Robin Levin (Levin) – *i.e.*, standing over G.A.'s shoulder, asking to see her test scores, and attempting to move her arm to see her paper – was motivated by the fact that G.A. was a special education student with a disability. Additionally, petitioners challenge the Interim Superintendent's certification submitted by the Board, arguing that she did not have knowledge of the facts and, accordingly, there was no competent evidence submitted to support the ALJ's findings of fact – in violation of the residuum rule, *N.J.A.C.* 1:1-15.5(b).

With regard to the ALJ's conclusion that the alleged conduct did not substantially disrupt or interfere with the orderly operations of the school or rights of other students, petitioners contend that the ALJ ignored evidence of a substantial disruption with the orderly operations of the school – specifically, the many emails and meetings with school officials; the fact that G.A. had to switch to another educational team; and the friction between the case manager and Levin. Further, petitioners maintain that the ALJ should not have deferred to the Board's argument that Levin was simply performing her job duties.

Petitioners also argue that the ALJ was not clear as to which material facts she relied on in determining to grant summary decision to the Board. Additionally, the ALJ failed to address petitioners' argument that the HIB investigation should have been conducted in another school so as to avoid the appearance of impropriety since the investigation was conducted in the school where Levin is employed. Finally, petitioners request that a full hearing be conducted in this matter so that they may testify, along with G.A. and Levin, and have their credibility as witnesses evaluated.

In reply, the Board contends that the ALJ properly found that G.A. was not the victim of HIB. Petitioner has not demonstrated that Levin acted improperly or that any purported mistreatment had any connection to G.A.'s status as a special education student. Instead, the Board maintains that the ALJ appropriately found that Levin's actions in checking G.A.'s work and seeing her test scores was a function of her job duties as the special education teacher assigned to G.A. With respect to petitioner's argument that the Interim Superintendent's certification lacked personal knowledge of the substantive issues, the Board explains that her job duties involve supervising all HIB matters, so she had personal knowledge of the instant HIB investigation.

The Board further argues that G.A.'s dislike for the way that Levin performed her job duties does not rise to the level of a substantial disruption or interference with the orderly operations of the school or the rights of other students. The ALJ correctly relied on *R.C.F. and A.L.F., on behalf of S.N.F. v. Board of Education of the Borough of South Plainfield, Middlesex County*, OAL Dkt. No. EDU-8049-12, decided August 2, 2013, *adopted* Commissioner Decision No. 325-13, September 18, 2013, for the proposition that students do not have the right to be free from instruction or discipline. Although G.A.

may not have wanted Levin to check her work, it was her job to do so. Finally, the Board contends that it was appropriate and in accordance with *N.J.S.A. 18A:37-14* for it to review the HIB complaint internally, even if a member of the staff was involved. As such, the Board urges the Commissioner to adopt the Initial Decision and find that the Board's HIB determination was not arbitrary, capricious, or unreasonable.

Upon a comprehensive review of the record, the Commissioner agrees with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination because the alleged conduct fails to meet the statutory definition of HIB set forth at *N.J.S.A. 18A:37-14*. Specifically, the Commissioner concurs with the ALJ's determination that Levin's conduct was not motivated by G.A.'s status as a special education student. Levin was required as part of her job as a special education teacher to oversee G.A.'s academic progress, which would involve checking her test scores. There is nothing in the record that demonstrates that Levin's actions in doing so were in any way motivated by G.A.'s status as a special education student beyond their teacher-student relationship. As such, the Commissioner agrees with the ALJ that G.A. was not targeted because of her disability. As petitioner fails to meet the first element of HIB, it is unnecessary for the Commissioner to address the remaining elements.

The Commissioner finds petitioners' exceptions to be unpersuasive. The ALJ considered the evidence presented and appropriately found that the matter was ripe for summary decision. The ALJ did not rely on facts that are in dispute, and instead found that the parties agree as to the sequence of the material facts. To the extent that the parties may have different characterizations of certain facts – specifically regarding the December 16, 2015 incident in which petitioners allege that Levin grabbed G.A.'s paper from under her arms – those differences in the facts are not material because even assuming petitioners' characterization to be true, the alleged conduct fails to meet the statutory definition of HIB. Further, despite petitioners' contention, G.A.'s IEP was relevant to the extent that it helped demonstrate that Levin was required to provide G.A. with in-class support as her special education teacher and further explains the student-teacher relationship.

With respect to petitioners' remaining exceptions, the Interim Superintendent's certification was based on her knowledge of the case through her employment, which included supervising HIB matters. Nevertheless, there is additional competent evidence in the record, such as the HIB complaint and investigation forms, that support the factual findings. Additionally, *N.J.S.A.* 18A:37-15 sets forth the procedure by which school districts are required to investigate HIB complaints, and there is no requirement that another school handle investigations involving staff members.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.¹

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 23, 2018

Date of Mailing: April 23, 2018

¹ 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

SUMMARY DECISION

OAL DKT. NO. EDU 09703-16

AGENCY DKT. NO. 161-6/16

**S.A. AND C.A. ON BEHALF
OF MINOR CHILD, G.A.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF MOORESTOWN,
BURLINGTON COUNTY,**

Respondent.

S.A. and C.A., on behalf of **G.A.**, petitioners, pro se

Nikita K. Desai, Esq., and **John Comegno**, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: December 14, 2017

Decided: January 24, 2018

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE

Petitioners, S.A. and C.A. on behalf of their daughter G.A., challenge the action of the Moorestown Township Board of Education's (Moorestown) decision that an HIB (harassment, intimidation or bullying) violation pursuant to N.J.S.A. 18A:37-13 et seq. did not occur where a special education teacher, on several occasions, asked to see G.A.'s work in class. Petitioners allege that G.A., a special education student, had expressed discomfort with showing her work to others.

PROCEDURAL HISTORY

On June 13, 2016, petitioners filed a petition with the Commissioner of Education, challenging Moorestown's finding of "no HIB" in this matter. Respondent filed an answer on June 30, 2016. On that same day, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. Subsequently, respondent filed a motion for summary decision and petitioners filed an opposition to the motion and a cross-motion for summary decision. Respondent then filed a reply, followed by a sur-reply from petitioners. Oral argument was held and petitioners were provided an opportunity to, and did supply further information regarding G.A.'s status as a special education student.

FACTS

During the 2015-2016 school year, G.A., was a sixth-grade student at the Moorestown Upper Elementary School. As a student eligible for special education services based on her Attention Deficit Hyperactivity Disorder (ADHD), G.A. had an Individualized Education Plan (IEP) in place. G.A. was placed with "Team B," on which Robin Levin (Levin) worked as a special education teacher. Alleging that from September 2015 until December 2015, G.A. was "repeatedly harassed, intimidated and bullied by Robin Levin", petitioners filed an HIB complaint with respondent. According to their complaint, Levin repeatedly pulled G.A.'s papers from her hands in front of the entire class and constantly sought G.A. out at the end of class to give her special study guides, "knowing how [G.A.] felt embarrassed and uncomfortable about Ms. Levin's actions."

In response to petitioners' allegations respondent submits that on December 9, 2015, during classroom instruction, Levin asked to view G.A.'s work and that Levin conducted a check of all students' work at this time and did not single out G.A. According to a certification from Moorestown's Director of Curriculum and Instruction, Carole Butler, in response to Levin's instruction, G.A. indicated that she would not show her work. Levin then responded to G.A. that her request was not a question, but rather a direction. G.A. then complied and after class Levin met with G.A. and explained that when a teacher asks to see school work, a student needs to comply, or else the behavior would be written up. G.A. told Levin that she would need to call her mother. On December 11, 2015, Levin called petitioners and spoke directly with her mother, S.A. According to S.A.'s certification, Levin had been told many times before that G.A. does not like to show her test scores to anyone. S.A. attests that, during the conversation on December 11, 2015, she repeated to Levin that G.A. is "afraid and embarrassed" during these interactions.

Respondent acknowledges that on December 16, 2015, Levin again asked to see G.A.'s work during classroom instruction but that G.A., in turn, covered her paper with her arm. Levin asked G.A. to move her arm and G.A. refused and asked Levin whether she had spoken with her mother. According to petitioners, Levin "tried to move G.A.'s arm from the top of the paper and grab the paper from underneath her hands. She pulled it away, threw it on the teacher's desk and stormed out of the classroom."

On the same date of this incident, S.A. filed an HIB form with the school. On the form, S.A. indicated that the alleged conduct was causing a "[s]ubstantial disruption or interference with orderly operation of the school" and causing G.A. "emotional harm." She alleged that Levin was "harassing and embarrassing [G.A.] in the classroom" and "disrupting [G.A.]'s learning experience." S.A. further alleged that Levin "created a hostile learning environment for [G.A.]," causing her frustration and anxiety.

On December 18, 2015, Principal Susan Powell and G.A.'s caseworker, Breanne Swedler, met with S.A. to discuss her concerns and possible adjustments to G.A.'s schedule. On December 22, 2015, the HIB investigation commenced, with investigators interviewing G.A. The investigation concluded on December 23, 2015 with a finding

that the incident did not constitute HIB. Petitioners were verbally notified of the same. Respondent then made modifications to G.A.'s schedule so she would no longer be receiving instruction or special education support from Levin following the school's winter break.

On January 19, 2016, the HIB investigation was presented to the Board during its executive session. By letter dated January 21, 2016, petitioners were informed of its conclusion that no HIB had occurred. The letter also informed petitioners of their right to a hearing before the Board. Petitioners then requested an appeal hearing to challenge the decision that no HIB had occurred. On February 16, 2016, the scheduled hearing was held and continued to March 15, 2016 so that respondent would have the opportunity to hear from HIB Coordinator Michael D'Ascenzo and Principal Powell. On March 15, 2016, D'Ascenzo and Powell presented information regarding the HIB issue.

By letter dated March 21, 2016, Butler informed petitioners of respondent's decision to affirm the recommendation that no HIB had occurred. The letter also informed petitioners of their right to appeal respondent's decision to the Commissioner of Education.

After a review of the certifications filed in support of the parties' motion and cross-motion for summary decision in this matter I **FIND** that G.A. was a special education student classified on the basis of her ADHD. Her IEP does not classify her as emotionally disturbed (ED), nor does it specify the manner in which her teachers were required to deal with any discomfort she might encounter with having her work checked. Her IEP does require that she be provided with in class support in her academic classes including checks of her work. As a special education teacher assigned to provide support for G.A., Levin conducted in class checks of G.A.'s work and test scores. Levin's performance of her duties caused G.A. discomfort and upset which was communicated to Levin and other Moorestown staff.

LEGAL ANALYSIS

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, which govern the conduct of contested cases before the OAL, a party may file a motion

for summary decision on substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion “shall be served with briefs and with or without supporting affidavits.” N.J.A.C. 1:1-12.5(b).

Under this regulation, which is akin to the judiciary’s motion for summary judgment, see R. 4:46-1, “the determination [of] whether there exists a genuine issue with respect to a material fact challenged requires . . . a consideration of whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.” Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995). In making this determination, the analysis is “whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 533-34. Summary decision is also proper when the opposing party “points only to disputed issues of fact that are ‘of an insubstantial nature.’” Id. at 529.

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 or her 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 school 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/>>.

Although petitioners characterize the interactions between G.A. and Levin differently than respondent, there are no genuine issues of material fact in dispute and this matter is appropriate for summary decision. Here, the parties agree as to the sequence of the material facts, although the characterization of these events differ in some ways².

The analysis here must then shift to whether the material facts show a violation of New Jersey's Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13 et seq. That act is designed "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). Under the Act, "harassment, intimidation or bullying" (HIB) is defined as:

[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

². Notably, respondent argues that on December 16, 2015, "Ms. Levin asked G.A. to move her arm" in order to see her paper. Petitioners describe the same event as follows: "Ms. Levin tried to move G.A.'s arm from the top of the paper and grab the paper from underneath her hands. Ms. Levin then pulled the paper away, threw it on the teacher's desk, and stormed out of the classroom." Even accepting petitioners' characterization of this incident as true, respondent arguably is entitled to summary decision as a matter of law because, as described in greater detail within, the alleged conduct fails to meet the statutory definition of HIB.

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.]

Put in a more rudimentary way, a finding of HIB requires that: 1) the conduct is reasonably perceived as being motivated by an actual or perceived characteristic; 2) the conduct takes place on school property (or off school property if certain requirements are met); 3) the conduct substantially disrupts or interferes with the orderly operation of the school or the rights of other students; and 4) the conduct is such that a) a reasonable person should know it will physically or emotionally harm a student or damage her property, or place a student in reasonable fear that such harm or damage will occur, OR b) has the effect of insulting or demeaning the student; OR c) creates a hostile educational environment. For the fourth element to be met, only one of the three described circumstances (a, b, or c) must be satisfied.

In applying the statutory requirements to this matter, it first must be shown that the conduct must be “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.” N.J.S.A. 18A:37-14. Respondent argues that the Petition fails to allege that Levin’s conduct was motivated by an “actual or perceived characteristic” or “any other distinguishing characteristic” possessed by G.A. Respondent contends that “[s]imply alleging that G.A. is a student with a disability, without establishing that Levin treated G.A. a particular way because of her disability, does not cure petitioners’ pleading deficiencies.”

In their opposition papers, petitioners clarify their argument that “G.A. was harassed, intimidated and bullied by Levin due to G.A.’s disability.” However, petitioners have not asserted any specific facts to support this theory. Petitioners mention that Levin only asked the special education students in the class to show their test scores to her. However, Levin was the designated special education teacher in the classroom, supporting another instructor and she had an obligation to specifically oversee the progress of the special education students. Thus, even if Levin only

checked the scores of the special education students, this is not enough to support the theory that G.A. was targeted because of her disability.

Petitioners were provided the opportunity during the course of this matter to supplement their motion papers with information showing what about G.A.'s status as a special education student was the nexus to Levin's conduct in this matter. A review of G.A.'s IEP does not show any reference to her needing special treatment when her work is checked, nor does it list any emotional disorder for which an accommodation is required. The IEP does show that her work was to be checked frequently.

The second requirement in the statutory definition of HIB states that the conduct must take 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)." N.J.S.A. 18A:37-14. Here, there is no dispute that the alleged conduct took place in the classroom and, thus, on school property. Therefore, the second element of the HIB definition is met.

The statutory third requirement is that the conduct must substantially disrupt or interfere with the orderly operation of the school or the rights of other students. In R.C.F. and A.L.F. o/b/o S.N.F., EDU 08049-12, Initial Decision (August 2, 2013), adopted, Comm'r (September 18, 2013), <https://njlaw.rutgers.edu/collections/oal/html/initial/edu8049-12_1.html>, the parents of a student challenged the respondent board's finding of "no HIB" with respect to two incidents involving their daughter and a special education teacher. The incidents involved the teacher 1) sending the student to the principal's office because the student's skirt violated the school's dress code policy and 2) giving the student a "zero" because she was talking during a test. The ALJ determined that the teacher was merely disciplining the student for violations of school rules. Consequently, the ALJ rejected petitioners' position that the Board acted in an arbitrary manner by finding that no HIB had occurred.

Here petitioners allege that Levin is "disrupting [G.A.]'s learning experience." However, respondent argues that Levin was simply performing her job duties and

requirements as an educator. While students have the right to “to be secure and to be let alone,” they do not have the right to be free from instruction or free from discipline when those instructions are not followed. There is no evidence that Levin’s conduct substantially disrupted or interfered with the orderly operation of the school or the rights of G.A. Thus, the third element of the HIB definition is not met.

Fourth, to qualify as HIB, the conduct must be such 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 (emphasis added).]

Petitioners allege that “Ms. Levin knew [G.A.] felt embarrassed and afraid when she pulled her paper out from under her hands.” “She has created a hostile learning environment for [G.A.] which [G.A.] finds it [sic] to be extremely frustrating causing her anxiety.” Petitioner S.A. also noted that other students’ inquiries about the interactions between Levin and G.A. added to “her anxiety and discomfort in the increasingly hostile learning environment.”

Respondent argues that there is no support for petitioners’ allegation that G.A. was afraid of Ms. Levin. Respondent notes that G.A. proactively approached Levin to ask questions about schoolwork, even after the HIB form was filed with the school, thus contradicting the assertion that G.A. feared Ms. Levin. During the investigation, G.A. stated that no classmates were teasing her about her interactions with Ms. Levin. S.A. Cert., Exh. B. G.A. further stated that she felt harassed, but then expressed that she did not know what the word means.

Accepting petitioners' characterization of the facts as true, condition (a) can be met. A reasonable person may not expect that asking to see a student's work would cause that student emotional distress. However, in this case, petitioners allege that Levin had received multiple notices that such actions caused G.A. extreme anxiety. Therefore, a reasonable person should have known, under the circumstances, that continuing to ask G.A. to show her paper could upset her. Thus, viewing the facts in a light most favorable to petitioners, this element of the HIB definition may be satisfied.

CONCLUSION

In this matter, a key issue is whether as petitioners contend, Levin's actions as alleged by petitioners were motivated by G.A.'s disability or other characteristic. The facts here support Moorestown's argument that petitioners have failed to raise a genuine issue of material fact whether Levin's actions could reasonably be perceived as being motivated by G.A.'s disability. G.A. is not classified for special education services on the basis of an emotional disability nor is there evidence in the record showing a connection between her ADHD and her negative response to having her work checked. Yet even if G.A. had been classified with emotional issues, the facts, even when viewed in petitioner's favor, do not lead to the conclusion that her teacher was motivated by her disability other than their relationship as special education teacher and student. Further, the IEP supports Moorestown's argument that Levin was acting within the general scope of her duties when she asked to see G.A.'s test scores. While it can be argued that Levin could have handled G.A.'s recalcitrance in a more sensitive manner, her actions could not be reasonably perceived as being motivated by the student's disability within the statutory meaning of an HIB violation.

In this matter therefore, respondent did not act in an arbitrary, capricious, or unreasonable manner by finding "no HIB." Some elements of the HIB definition are met because the alleged conduct took place on school property and a reasonable person should have known, under the circumstances, that the conduct could have upset G.A. However, the alleged conduct fails to meet every element required for a finding of HIB. Importantly, the conduct cannot reasonably be perceived as being motivated by G.A.'s disability or any other characteristic. Additionally, the alleged conduct did not

substantially disrupt or interfere with the orderly operation of the school or the rights of G.A.

For these reasons, and because there are no material facts in dispute, summary decision should be granted in favor of respondent.

ORDER

Respondent's motion for summary decision is **GRANTED** and petitioners' cross-motion for summary decision is **DENIED**.

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.



January 24, 2018

DATE

PATRICIA M. KERINS, ALJ

Date Received at Agency:

January 24, 2018 (emailed)

Date Mailed to Parties:

/mel