375-18

W.D. and J.D, on behalf of minor child, G.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged the determination of the respondent Board that their minor child, G.D., 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 further alleged that the respondent violated the Act by failing to adhere to the procedures mandated therein. The Board contended that the incident in question constituted student conflict and did not meet the definition of HIB pursuant to the Act.

The ALJ found, *inter alia*, that: the Act applies to any gesture, or 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 an actual or perceived characteristic, such as, *inter alia*: race, color, religion, national origin, gender, sexual orientation, or any other distinguishing characteristic; each school district is charged with adopting a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident; an action by a board of education is entitled to a presumption of correctness and will not be overturned unless it can be shown that the decision was arbitrary, capricious or unreasonable; in the instant matter, although the alleged HIB incident involved the reprehensible use of the "N-word," the facts show that the word was used during an on-line exchange among a group of fifth grade friends, in which all five girls used extraordinarily offensive language towards one another; the exchange included a number of egregious words and sexual references, which the girls excused as "pranking" on each other; G.D.'s own testimony confirmed that she viewed the incident in question as one of mutual "pranking" among a group of friends; G.D. appears to have suffered no detrimental effect from the incident; and the HIB investigation conducted by the District determined that the five students had engaged in a conflict among themselves and that there had been no HIB violation. The ALJ concluded that the petitioners failed to sustain their burden of proof to establish that the Board acted in an arbitrary, capricious or unreasonable manner in finding that HIB did not occur. Accordingly, the ALJ recommended that the petition be dismissed.

Upon comprehensive review, the Commissioner – determining that the petitioner's exceptions were without merit – concurred with the findings and conclusion of the ALJ. Accordingly, the Initial Decision was adopted as the final decision in this matter and the petition was dismissed with prejudice.

November 26, 2018

OAL DKT. NO. EDU 10587-17
AGENCY DKT. NO. 160-7/17

W.D. and J.D, on behalf of minor child, G.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and respondent's reply thereto, filed pursuant to *N.J.A.C.* 1:1-18.4, have also been reviewed and considered by the Commissioner.[1]

Petitioners challenge the Board's determination that their minor child, G.D., was not a victim of an act of Harassment, Intimidation, and Bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (the Act), *N.J.S.A.* 18A:37-13 *et seq*. Following a hearing in this matter, the Administrative Law Judge (ALJ) concluded that the Board did not act in an arbitrary, capricious, or unreasonable manner when it determined that an incident of HIB did not occur and that the students were engaged in a conflict. Upon review, the Commissioner is in accord with the ALJ's findings and determination.

Petitioners' exceptions – while reflecting their obvious disagreement with the findings and conclusions contained within the Initial Decision – substantially recast and reiterate the arguments made below. Petitioners argue that use of the "N-word" in and of itself is sufficient to constitute HIB. Petitioners further argue that G.D.'s rights were substantially

[1] Petitioners' sur-reply – submitted on October 9, 2018 – was also reviewed.

violated when another student directed the racial slur at G.D., and that the use of the N-word following an interaction where the students were "pranking" each other does not preclude the incident from being an act of HIB. Petitioners also argue that the ALJ applied the incorrect standard of review and failed to find additional undisputed facts that the Commissioner should consider based on the record.[2] In its reply, respondent argues that declaring the use of the "N-word" *per se* as HIB is improper, and circumstances must be considered when making HIB determinations. Respondent contends that G.D. was not a victim of HIB; rather, she was actively engaged in the incident wherein each one of the five students behaved in a "disgusting" manner.

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.

[2] The Commissioner has reviewed and considered the "additional" facts presented in petitioners' exceptions and concludes that those facts do not impact the outcome of this matter. Additionally, the ALJ's review of the Board's determination under the arbitrary, capricious or unreasonable standard, was proper.

In other words, the threshold requirement is that the conduct – which may take place on school property, at any school-sponsored function, on a school bus, or off school grounds – is reasonably perceived as being motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic, and that such conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. In addition to this requirement, one of the three criteria enumerated in the Act must also be satisfied. Therefore, use of a derogatory word or racial slur does not automatically constitute an act of HIB; the factors set forth above must be met.

In this matter, the Board found that the student's statement could reasonably be perceived as motivated by either an actual or perceived characteristic of G.D., and a reasonable person should know that under the circumstances it would have the effect of emotionally harming G.D., and had the effect of insulting or demeaning G.D. The Board, however, did not find that the student's use of the "N-word" substantially disrupted or interfered with G.D.'s rights. The Commissioner agrees, for the reasons thoroughly set forth in the Initial Decision. The evidence in the record does not support the petitioners' position that G.D.'s rights were substantially disrupted, and the Commissioner is unpersuaded by petitioners' arguments pertaining to same. 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 therefore substitute his 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 the incident was not HIB – operated in an arbitrary, capricious or unreasonable manner; therefore, the Commissioner finds no basis to reverse the Board's decision.[3]

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

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: November 26, 2018
Date of Mailing: November 26, 2018

[3] The Commissioner clarifies that just because this incident did not constitute an act of HIB, does not mean that the student's behavior was appropriate; the use of the N-word directed at a fellow student was reprehensible.

[4] 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).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10587-17
AGENCY REF. NO. 160-7/17

W.D. AND J.D. ON BEHALF
OF MINOR CHILD G.D.,
Petitioners,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF JEFFERSON,
MORRIS COUNTY,
Respondents.

Steven P. Weissman, Esq. and **Sarai K. King**, Esq., for Petitioners (Weissman & Mintz, attorneys)

Elizabeth Farley Murphy, Esq., for Respondent (Busch Law Group, attorneys)

BEFORE **THOMAS R. BETANCOURT**, ALJ:

Record Closed: July 3, 2018 Decided: July 13, 2018

STATEMENT OF THE CASE

Petitioners seek a determination that respondent erred in determining that the minor child, G.D., was not the victim of harassment, intimidation, or bullying (HIB) within

the meaning of the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq.; and, that respondent violated the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq. by failing to adhere to the procedures mandated therein.

PROCEDURAL HISTORY

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on July 26, 2017, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The hearing on the contested matter was held on January 8, 2018. The record remained open to permit the litigants to file post-hearing briefs. Petitioner filed a post-hearing brief on July 2, 2018. Respondent filed a post-hearing brief, dated June 29, 2018, on July 3, 2018. The record closed on July 3, 2018.

ISSUE

Did respondent err in determining that the minor child, G.D., was not the victim of HIB within the meaning of the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq.; and, did respondent vi+olate the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq. by failing to adhere to the procedures mandated therein.

UNDISPUTED FACTS

The parties hereto have submitted the following undisputed facts:

1. Petitioners, W.D. and J.D., are parents of the minor student G.D.

2. Respondent is the Jefferson Township Board of Education (Board).

3. Dr. Patrick Tierney is employed by respondent as Superintendent of Schools.

4. Kevin Lipton is employed by respondent as Principal of Arthur Stanlick Elementary School (Stanlick).

5. Lyndsay LaConti is employed by respondent as Anti-Bullying Specialist.

6. Lisa Young is employed by respondent as a Teacher.

7. During the 2016-2017 school year, G.D. was a fifth-grade student at Stanlick.

8. On Friday, January 27, 2017, G.D. received a group text message, while off school grounds, from a fellow student, J.D.,[5] stating "Fuck ur dad you little niger [sic]." On Saturday, January 28, 2017, G.D.'s mother sent an email to Principal Lipton, Superintendent Patrick Tierney, and Lisa Young, G.D.'s teacher, informing the District about the text. Principal Lipton and petitioner exchanged subsequent related email correspondence. J-1.

9. On Monday, January 30, 2017, Principal Lipton notified the parents of G.D. of the commencement of a harassment, intimidation or bullying (HIB) investigation. J-2.

10. By letter dated February 1, 2017, Principal Lipton notified petitioners that the district did not find evidence that G.D. was the target of an act of harassment, intimidation or bullying. J-3. Petitioner appealed to the Board, which denied their request to overturn the determination that an HIB incident had not occurred. J-4.

[5] Petitioner and the student, J.D., have the same initials. Petitioner will be referred to as "Petitioner" and J.D. the student will be referred to as "J.D."

SUMMARY OF RELEVANT TESTIMONY

Petitioner's case:

J.D., petitioner, testified as follows:

She is the mother of G.D. She is a special education teacher in Prospect Park, New Jersey. G.D. no longer attends Stanlick. She is now in the Jefferson Township middle school.

In November 2016, she contacted Kevin Lipton by email, then principal at Stanlick, to advise that G.D. was called "nigger" while on the school bus by another student. She never heard back from Mr. Lipton about this incident. She again emailed Mr. Lipton on January 28, 2017, about an incident that occurred in a chat room wherein G.D. was referred to again as "nigger." This happened the day before, which was a Friday. Petitioner stated that G.D. did not want to go back to school and informed Mr. Lipton of this in the email. G.D. did attend school on Monday next at the request of Mr. Lipton. That Monday G.D. was taken to school by her grandmother. Petitioner stated that G.D. was sent to class and no one spoke with her or her grandmother.

Mr. Lipton called petitioner on Tuesday, January 31, 2017. She met with Mr. Lipton on Wednesday February 1, 2017, in his office. Mr. Lipton informed her that the incident was not an HIB violation, and that the students involved in the chat room used disgusting language. She replied it was racism and was different. Petitioner further stated that Mr. Lipton told her that G.D. should not speak of the incident, and that if she did she could be charged with a HIB violation. The letter she received from Mr. Lipton dated February 1, 2017, regarding the finding of no HIB violation did not contain any information why this decision was made.

Petitioner met with Dr. Tierney on March 1, 2017, and was told by him to appeal the HIB findings to the Board.

Petitioner stated that Mrs. Young told her that the incident affected G.D.'s grades, and that all the kids were distracted by it. Petitioner admitted to Mrs. Young in an email that she was more upset than G.D.

G.D. testified as follows:

She attends the Jefferson Township middle school. Last year while on a school bus another student, C.J., used the word "nigger." C.J. was mad, fighting, and using foul language. It was then he used the word "nigger." She at first stated the use was random and then stated it was directed toward her as C.J. was looking at her when he used it. She has heard this word before in songs. She was shocked by C.J.'s use of the word as she knew him to be a good person.

In January 2017, two classmates, J.D. and D.A., started a prank in a chat room. The prank was a pretend fight over homework. At one point J.D. used the word "nigger" directed at G.D. G.D. responded that this was racist. She thought J.D. was a good person. She informed her mother, who then notified Mr. Lipton. She did not want to go to school afterwards as she knew she would be pulled out of class, that seats would be changed. It would be "awkward." Seats were changed. She did not speak to J.D. after they returned to school. There was no contact. J.D. and G.D. are friends with the same people. G.D. is really good friends with P.R. At some point after they returned to school, J.D. pulled P.R. away from her. This made G.D. mad.

G.D. reviewed the statement she made during the HIB investigation and stated it was accurate.

G.D. had post-chat room contact with J.D. on a site called Road Blocks. This is a place where you can play games and chat. J.D. was on this site and G.D. unfriended her and blocked her. This occurred after the chat room incident. G.D. has had no other online contact with J.D.

G.D. stated that her mathematics grade went down as a result of the chat room incident. She also stated she could not hang out with her friends as J.D. was there.

Ms. LaConti asked her to write down what happened regarding the chat room incident. She was then sent back to class. Seats were reassigned at the lunch table.

Respondent's case:

Lyndsay LaConti, HIB specialist, testified as follows:

She works for the Jefferson Township Board of Education as a school counselor and HIB specialist. She has performed approximately sixty HIB investigations. She conducted the HIB investigation regarding the chat room incident. She met with G.D. and her grandmother when they arrived at school. She took the statement of G.D. first and then interviewed the other students involved in the chat room conversation.

Ms. LaConti discovered that the five girls involved in the chat room were friends. J.D. and B.A. engaged in a prank by pretending to be in an argument. They used vulgar language such as "cunt," "bitch," and "whore." After G.D. was told she was pranked she said "I love this." Then G.D. and P.R. engaged in a prank using the same vulgar words.

Ms. LaConti conducted the HIB investigation in the instant matter and concluded that there was no HIB. Rather, she determined that this was a conflict between friends. She spoke with Mrs. Young, the girls' teacher, who advised separating the girls. She is trained to be an HIB specialist. She is familiar with Board HIB policy.

On January 30, 2017, Mr. Lipton informed her of the HIB allegation and asked her to do an investigation. She was provided with the email from petitioner to Mr. Lipton. She knew the incident took place after school on Friday, January 27, 2017. She agreed that HIB can take place off school grounds.

Ms. LaConti interviewed the five girls involved and had them write statements. She completed the investigative report after interviewing the girls and submitted it to Mr. Lipton. The report was completed on February 1, 2017. She reviewed her report and

confirmed she checked off the boxes setting forth certain findings. She does not impose any measures related to HIB, but may be involved in counselling. She did counsel J.D. regarding the matter.

Kevin Lipton, Principal, testified as follows:

Mr. Lipton was the principal at Stanlick during the 2016-2017 school year. He is now the principal at the middle school. He has been involved in approximately 150 HIB investigations. He received an email from petitioner and replied thereto, copying Superintendent Tierney and Mrs. Young. He may have also sent it to Ms. LaConti. He received Ms. LaConti's report on the incident and reviewed it. He approved the report and signed it. He agreed there was no HIB incident. He believed it was a conflict between two or more students who were mutually engaged in the behavior.

Mr. Lipton is aware of the school bus incident as he received an email from petitioner. He looked into it and determined it to be a conflict and not HIB. He took handwritten notes on his investigation into this matter. He did not refer it for an HIB investigation as it was clear to him this was a conflict and the students were engaged in mutually inappropriate behavior. He informed Petitioner in person of the finding of no HIB violation. He also hand delivered his letter to her with that determination. He explained to petitioner why this was not an HIB incident.

Mr. Lipton admitted stating that G.D. should not discuss the incident. He did so as to not interfere with the pending investigation. He denied stating that should G.D. speak of the incident she could be considered a bully. He also admitted that he advised petitioner that G.D. would have to get used to mean people. He did this in response to petitioner's request to remove J.D. from G.D.'s class. He issued a cease and desist order to the five girls involved. He told Mrs. Young to keep them separated.

Mr. Lipton spoke to petitioner about Road Blocks and that G.D. made comments to J.D. on this site. He is not sure if he contacted the parents of all the students involved. He did contact the parents of J.D. The mother of M.R. showed Mr. Lipton the entire thread of comments from the chat room incident. He was unable to print the

thread. He did not take into consideration the incident on the school bus in making the decision to concur with Ms. LaConti in her report. He did encourage petitioner to have G.D. attend school after the chat room incident. Had G.D. stayed home it would have been considered in the HIB investigation. The effect on the behavior of G.D. in school would also be considered.

Mr. Lipton sent letters, dated February 1, 2017, to petitioner and the parents of J.D. advising them of the school's findings. The report itself was forwarded to the Superintendent on February 2, 2017. He usually gives the basis for the HIB determination verbally. He does not do so in letter form. The letter is to confirm the decision. The standard for an HIB determination is the same for in school conduct and off-school conduct. If the same exact incident like the chat room occurred in school it would not be HIB. If something interferes with a student's rights it could be HIB. Use of the word "nigger" does interfere with a student's rights, but the use of the word here is part of a much bigger picture. It could be considered counter HIB against G.D. Students cannot be mutually bullied. This becomes a conflict. He did not want G.D. to speak of the matter so as to not interfere with the investigation.

Lisa Young, Teacher, testified as follows:

Ms. Young is the fifth-grade teacher at Stanlick. She has been a teacher for thirty-three years. She was G.D.'s teacher during the 2016-2017 school year. She teaches all subjects. Last year she had twenty-three students. She was aware of the chat room incident from petitioner's email to Mr. Lipton. She responded to petitioner. She was also aware of the HIB investigation and spoke with Mrs. LaConti. She observed G.D. upon her return to school. She appeared fine. She told G.D. if there was a problem to let her know. That week was uneventful. G.D. had no academic problems. Her grades remained the same. G.D. always had a problem with math.

That week (the week of January 30, 2017) G.D. spoke poorly of J.D. twice. She spoke to G.D. about it. G.D. wrote something inappropriate about J.D. on Snapchat. G.D. also said something bad about J.D. Both times Mrs. Young spoke to G.D. and told her words can be hurtful. She did not tell petitioner that G.D.'s math grade suffered as a

result of the chat room incident. She did speak with petitioner regarding the Snapchat matter. She never told petitioner that G.D. was upset by the incident. As a result of the chat room incident, she separated G.D. and J.D. pursuant to Mr. Lipton's instruction. The girls involved sided with G.D. The girls asked to work together. This occurred sometime in February. They were told they needed a letter from their parents. J.D.'s mother supplied a letter. The girls were permitted to work together and got along fine.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see Polk, 90 N.J. 550. Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 46 (1954).

Ms. LaConti, Mr. Lipton, and Mrs. Young were all straightforward and direct in their testimony. They demonstrated themselves to be conscientious and professional in the performance of the positions. They testified as such. I deem them all credible.

I found the testimony of petitioner somewhat different from what the evidence and testimony shows. While I do not believe that petitioner was untruthful in her

testimony, I do believe her recollection is different from that which occurred. I note that petitioner was firm in her statement that G.D.'s grades suffered. This is simply not the case. While I am sure petitioner believes this to be true, it simply is not. The empirical evidence, as shown in G.D.'s report card, demonstrates that her grades did not suffer. Petitioner also was firm in her testimony about how the incident adversely affected G.D. She was again firm in her testimony that G.D. did not want to return to school, implying that it was due to G.D.'s adverse reaction to being subject to HIB. However, G.D. in her testimony stated she did not want to go back to school as she did not want to be called out of class or have her seat changed: what she characterized as awkward. Further, G.D. appeared completely nonplussed by the incident. I had the opportunity to observe her while she testified. I did not observe a young girl upset by the incident. She treated it matter of factly.

It was abundantly clear that petitioner was greatly upset by what occurred. This was evident in her emotional testimony. Again, I do not characterize her testimony as untruthful. However, I do believe, based upon the demeanor of Ms. LaConti, Mr. Lipton, and Mrs. Young, that their testimony rang true and was more in accordance with the actual facts of the matter. Their testimony was unaffected by emotion. They performed their jobs in a professional manner. Petitioner's testimony was shaded by her emotions, which I believe affected her recollection of the facts.

I afford the testimony of Ms. LaConti, Mr. Lipton, and Mrs. Young considerably more weight than the testimony of petitioner.

FINDINGS OF FACT

1. On January 27, 2017, a Friday, after school, five female fifth-grade classmates, all friends, engaged in an exchange of messages within a chat room. Those five students were G.D., J.D., B.A., P.R., and M.R.

2. During the course of the message exchange, J.D. and B.A. engaged in a prank wherein they pretended to engage in an argument over homework.

3. Thereafter, G.D. and P.R. also engaged in a prank.

4. During the course of these pranks, the girls engaged in the use of coarse and obscene language calling each other horrible names.

5. Ultimately, J.D. posted the following, addressed to G.D., "fuck ur dad you little niger [sic]." J-1.

6. G.D. is a student of color. J.D. is not.

7. Petitioner, on January 28, 2017, notified Principal Lipton via email of the incident. She stated in the email she wanted the offending student, J.D., removed from G.D.'s class and was further considering not sending G.D. to school. R-2.

8. Principal Lipton responded by email the next day. He requested petitioner to send G.D. to school the following Monday. R-11.

9. G.D. did attend school on Monday, January 30, 2017, without incident.

10. Ms. LaConti, the school HIB specialist, conducted an investigation and interviewed all five students involved. All five completed handwritten statements as to what transpired in the chat room. R-3.

11. Except for M.A., who stated that, while part of the group, she did not read all of the messages and did not know anything of what happened between G.D. and J.D., the other four students confirmed the messages exchanged.

12. Ms. LaConti concluded that there was no HIB incident. Rather, she concluded that the five students engaged in conflict behavior by mutual consent; and, that the incident did not substantially disrupt or interfere with the orderly

operation of the school. This was not specifically stated in the report. R-1, R-3, R-6.

13. Mr. Lipton concurred with Ms. LaConti and signed the investigation report. R-6.

14. On February 1, 2017, Mr. Lipton met with petitioner and advised her orally of the HIB decision and the reasons for the same. He informed her that it was a conflict situation and not HIB. He also hand delivered his letter to her advising petitioner of the school's determination. R-7.

15. The report was forwarded to Superintendent Tierney on February 2, 2017.

LEGAL ANALYSIS AND CONCLUSION

The Anti-Bullying Bill of Rights Act (Act), N.J.S.A. 18A:37-13 et seq., 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
>
> 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.]

Each school district must adopt a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident. N.J.S.A 18A:37-15. Once an alleged HIB incident is reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A 18A:37-15(b)(6). The investigation shall be conducted by a school anti-bullying specialist, and shall take no longer than ten school days to be completed. The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial action. The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." Ibid.

Pursuant to the Act, the parents of the students involved in any alleged HIB incident are entitled to receive information about the nature of the investigation and the result of the investigation. The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Any hearing shall be held in executive session to protect the identity of any students involved. The board may hear from the anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents. The board must issue a decision at the first meeting after its receipt of the investigation report. The board may affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education.

An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Thus, in order to prevail, those challenging an HIB decision made by a board of education "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. and E.H. ex rel. K.H. v. Bd. of Educ. of the Bor. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014) (citation omitted), <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (April 10, 2014). Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, Comm'r (April 25, 2013), <http://njlaw.rutgers.edu/collections/oal/>.

There are reported cases in which HIB determinations by boards of education have been both affirmed and overturned. In R.G.B. v. Vill. of Ridgewood Bd. of Educ., EDU 14213-12, Initial Decision (May 15, 2013), <http://njlaw.rutgers.edu/collections/oal/>, adopted, Commissioner (June 24, 2013), the ALJ found that the Board did not act in an arbitrary, capricious, or unreasonable manner in determining that a student engaged in HIB when he repeatedly called a female student "fat," "fat ass," and "horse." According to the ALJ, such verbal statements satisfied all of the necessary elements under N.J.S.A. 18A:37-14. And, in G.H., the ALJ also upheld a Board's finding that a white student who repeatedly called a black student "Kool-Aid" engaged in HIB. The ALJ found that the "use of the word 'kool-aid' was directed at [the other student] because of his race; insulted and demeaned [the other student]; and . . . interfered with [the other student's] education" because "[u]pset and embarrassed children are not fully available for learning." However, in J.A.H., the Board's finding that an incident in which one student stuffed a crumbled piece of paper down the shirt of another student constituted an act of bullying was overturned as arbitrary, capricious, and unreasonable because the incident was merely a prank that was part of an ongoing, mutual conflict between the two boys and did not "contain the more serious and aggravating elements either 'expressed or implied' under [N.J.S.A. 18A:37-14.]" The ALJ found that the incident was not improperly motivated by

a distinguishing characteristic and that the facts "only support[ed] a finding of ordinary student conflicts rather than the more serious behavior of bullying."

In the instant matter, on first blush, it seems clear that an HIB incident did occur. The use of the word "nigger" is abhorrent and cannot be tolerated. However, the facts under which the word was used clearly show that the five students involved in the chat room were doing so voluntarily. All were engaged in the use of extraordinarily offensive language towards each other, using words such as "cunt," "bitch," and "whore." They further offended the sensibilities of anyone who may read their remarks by making sexual references towards each other. In short, all five girls were engaged in mutually egregious behavior aimed at the others. Their excuse for the use of such horrible language was that they were "pranking" each other. This is borne out by their own statements submitted during the HIB investigation and by G.D. in her testimony.

Further, G.D. appeared to suffer no detrimental effect. Notwithstanding petitioner's testimony (and G.D.'s testimony) that G.D.'s grades suffered, her report card belies that statement. Her grades were virtually unaffected. Further, G.D., in her testimony appeared entirely nonplussed by the incident. Clearly, petitioner was quite upset, but that is not where I must look in determining whether an HIB incident occurred. It is the effect upon G.D.

Ms. LaConti determined in her HIB investigation that the five students were engaged in a conflict among themselves and that there was no HIB violation. Mr. Lipton agreed with Ms. LaConti's determination. The Board upheld the decision. I concur in that determination. It is supported by the evidence in this matter.

Given the totality of the facts in the instant matter I cannot conclude that the Board acted in an arbitrary, capricious, or unreasonable manner in determining that an HIB incident did not occur and that the students were only engaged in ordinary student conflict. See Thomas, 89 N.J. Super. at 332; R.G.B., EDU 14213-12 and, J.A.H. ex rel. C.H., EDU 10826-12.

Accordingly, I **CONCLUDE** that petitioner has failed to sustain the burden of establishing that the Board acted arbitrarily, capriciously, or unreasonably in finding that HIB did not occur.

Based upon the foregoing, I **CONCLUDE** that the Amended Petition must be dismissed.

ORDER

It is hereby **ORDERED** that petitioner's Amended Petition be **DISMISSED** with prejudice.

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, P.O. 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.

July 13, 2018
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

WITNESSES

For Petitioner:

J.D., Petitioner

G.D.

For Respondent:

Lyndsay LaConti, HIB Specialist

Kevin Lipton, Principal

Lisa Young, Teacher

EXHIBITS

Joint:

J-1 Email string

J-2 Letter from Mr. Lipton to Petitioner dated January 30, 2017

J-3 Letter from Mr. Lipton to Petitioner dated February 1, 2017

J-4 Letter from Patrick Tierney to Petitioner with Guidance for Parents on the Anti-Bullying Bill of Rights Act dated April 17, 2017

For Petitioner:

P-1 Email from Petitioner to Mr. Lipton dated November 4, 2016

P-2 Interview Information Statement Form of G.D. dated January 30, 2017

For Respondent:

R-1 HIB Incident Report Form dated January 30, 2017

R-2 Email from Petitioner dated January 28, 2017

R-3 Interview Information Statement Form dated January 30, 2017

R-4 Letter to Petitioner dated January 30, 2017

R-5 Letter to J.D.'s parents dated January 30, 2017

R-6 Investigation Report dated January 30, 2017

R-7 Letter to Petitioner dated February 1, 2017
R-8 Letter to J.D.'s parents dated February 1, 2017
R-9 Extract from BOE meeting of April 10, 2017
R-10 Petition dated June 17, 2017
R-11 Email from Petitioner dated January 29, 2017
R-12 Not in evidence
R-13 Report card of G.D. for 2016/2017 school year
R-14 Handwritten notes of Mr. Lipton

Pleadings

For Petitioner:
Petition

Amended Petition with Exhibits A-D

For Respondent:
Response to Petition
Response to Amended Petition