

New Jersey Commissioner of Education
Final Decision

R.H. and M.H., on behalf of minor child, A.H.,

Petitioners,

v.

Board of Education of the Borough of Sayreville,
Middlesex County,

Respondent.

Synopsis

In this consolidated matter, petitioners appealed two harassment, intimidation and bullying (HIB) findings by the respondent Board involving their daughter, A.H.— an 8th grader at Sayreville Middle School at the time of the incidents discussed here. In the first appeal, petitioners challenged the Board’s determination that AH committed an act of HIB pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A. 18A:37-13 et seq.*, when she created a social media post depicting a friend with a mud mask on her face with the caption, “When he says he’s only into black girls.” In the second appeal, petitioners challenged the Board’s determination that A.H. was not the victim of HIB after incidents in which A.H. alleged that she had been called a racist by other students at school. The Board contended that its actions were proper and aligned with the Act and the school district’s HIB policy.

The ALJ found, *inter alia*, that: the threshold requirement for a finding of HIB is that the conduct is reasonably perceived as motivated by an actual or perceived characteristic enumerated in the Act or another distinguishing characteristic, and that the conduct substantially disrupts or interferes with the rights of other students or the orderly operation of the school; it is well settled that when a Board acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless it is found to be patently arbitrary, without rational basis or induced by improper motives; here, A.H.’s conduct in creating a social media post that any reasonable person should know would have the effect of insulting or demeaning African American students, together with the substantial disruption it created in the operation of the school and the fact that A.H. was aware of the racist nature of the post when she created it, met the criteria for a finding of HIB; regarding A.H.’s claim that her classmates bullied her and called her a racist, the Board’s subsequent HIB investigation found no evidence to support these allegations. Accordingly, the ALJ affirmed the decisions of the Board in both of these consolidated matters and dismissed the petition.

Upon comprehensive review, the Commissioner concurred with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determinations in these consolidated cases. Accordingly, the Initial Decision of the OAL 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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Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the petitioners pursuant to *N.J.A.C. 1:1-18.4*, and the Board's reply thereto.

In this matter, petitioners challenge the Board's determination that their daughter committed an act of harassment, intimidation and bullying (HIB), as well as the Board's determination that their daughter was not a victim of HIB. This case stems from A.H.'s February 11, 2017 social media post of a picture of a friend with a mud mask on her face with the caption, "When he says he's only into black girls."¹ After several students complained to the school, an HIB investigation was conducted, and the Board determined that A.H. had committed an act of HIB; a one-day suspension was imposed, and A.H. was removed from student council. Thereafter, petitioners filed an HIB complaint, claiming that A.H. was being called a racist after an incident in her multicultural class in which she glanced up after students were asked to put

¹ A second picture posted on social media, which was also racial in nature, was posted by a different student. The matters were investigated together because the complaints happened at the same time.

their heads down and raise them if they had witnessed racism in their home. She also alleged that she was teased in math class when she was asked if she “liked chocolate” – a reference to whether A.H. dated black boys. The Board found that these incidents did not constitute HIB. Following a hearing, the Administrative Law Judge (ALJ) found that even though the social media post occurred outside of school, it constituted HIB because the post caused a substantial disruption at school and met the other requirements of the HIB statute. The ALJ also affirmed the Board’s finding that A.H. was not the victim of HIB in the second complaint filed by petitioners.

In their exceptions, petitioners argue that the Board violated A.H.’s first amendment rights to free speech. Petitioners explain that the seminal case involving student speech, *Tinker v. Des Moines Independent Community School District*, 393, U.S. 503, 506 (1969), protects student speech except when it “substantially interferes with the requirements of appropriate discipline in the operation of the school.” Petitioners argue that A.H.’s social media post did not cause a substantial disruption sufficient to overcome her first amendment rights because it only offended students and the school simply had to monitor the cafeteria to make sure there were no physical altercations. Petitioners also discuss a Supreme Court of the United States opinion that came out the day before the Initial Decision, *Mahanoy Area School District v. B.L.*, 594 U.S. ____ (2021), in which the Supreme Court found that a school district violated a student’s first amendment rights when it disciplined her for an off-campus Snapchat post criticizing the school’s cheerleading squad that used vulgar language and gestures. In that case, the Court did not find evidence of a substantial disruption to the school as “the record shows that discussion of the matter took, at most, 5 to 10 minutes of an Algebra class ‘for just a couple of days’ and that some members of the cheerleading team were ‘upset’ about the content of B.L.’s

Snapchats.” *Id.* at 10. Petitioners argue that, similar to *Mahanoy*, the impact of A.H.’s posts on the school did not rise to the level of “substantial disruption.”

Petitioners also contend that A.H.’s posts had no nexus to school as the post was made off-campus, on a weekend, and did not mention any student or employee of the school or any classes or school activities. Petitioners explain that in *Mahanoy*, the Court discussed that three factors distinguish a school’s efforts to regulate off-campus speech from its ability to regulate on-campus speech: (1) a school will rarely encroach on parental responsibility by standing *in loco parentis* (in place of a student’s parents when parents are unable to discipline the student) with off-campus activities; (2) when a school attempts to regulate speech for 24-hours of the day, a student cannot engage in protected speech at all; and (3) schools have an interest in protecting unpopular expression as part of the “marketplace of ideas.” Petitioners argue that, here, the school was not acting *in loco parentis* because the speech occurred outside of school and was unrelated to school. Petitioners also contend that by punishing A.H. instead of educating her about how such speech could be interpreted by others, the school is failing its mission of building a “marketplace of ideas.” Accordingly, petitioners urge the Commissioner to reject the ALJ’s conclusion that A.H. committed an act of HIB.

Petitioners also argue that the ALJ erred in finding that A.H. was not the victim of HIB when classmates targeted her as a racist because the conduct meets the definition of HIB. Petitioners explain that the comment about “chocolate” was motivated by race as it is a reference to African Americans. Petitioners further maintain that the conduct happened in class, violated A.H.’s right to be free from racial discrimination at school, and created a hostile environment for A.H. – so much so that she chose to leave the District. Petitioners, therefore, request that the Commissioner reject the affirmance of the Board’s denial of A.H.’s HIB claim.

In reply, the Board argues that the ALJ properly upheld the Board's HIB determinations. The Board maintains that the photo in "black face" with the caption "When he says he's only into black girls" is offensive and A.H. admitted during the investigation that it was racial in nature. The Board further argues that the social media post caused a substantial interference and disruption to the school environment. The school principal testified that three students who came into the main office were very upset about the racist content in A.H.'s post – as well as a separate racist post by another student – and planned on confronting the students who created the posts. Further, multiple students approached her in the cafeteria in the days following these posts, requiring her to spend a lot of time speaking with them regarding the serious nature of the incident; many teachers also reported that students had come to them expressing concerns about the posts. Additionally, despite the recent *Mahanoy* decision, the Board maintains that its actions passed constitutional muster. With respect to A.H.'s HIB complaint, the Board contends that A.H.'s rights were not violated when she was asked if she "liked chocolate." Additionally, the Board argues that any opinion of A.H. that students may have had was a result of her prior conduct and was not motivated by an actual or perceived characteristic. Accordingly, the Board urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner agrees with the ALJ that, based on the evidence in the record, petitioners did not establish that the Board acted in an arbitrary, capricious, or unreasonable manner in finding that A.H. committed an act of HIB, nor did the finding that A.H. was not a victim of HIB demonstrate arbitrary, capricious or unreasonable action on the part of the Board. The Commissioner will address both of the HIB determinations beginning with the Board's finding that A.H. committed an act of HIB.

The Anti-Bullying Bill of Rights Act (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, a finding of HIB requires three elements. First, the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex County*, Commissioner Decision No. 51-20 (decided February 4, 2020). The statute also requires that the conduct take place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A. 18A:37-15.3*.

Regarding the first element, in defining HIB as an action “that is *reasonably perceived* as being motivated either by any actual or perceived characteristic . . .”, *N.J.S.A.*

18A:37-14 (emphasis added), the statute requires an analysis of how the actor's motivation is perceived and whether that perception is reasonable. It does not require an analysis of the actual motivation of the actor. *Wehbeh, supra*. Here, it was not arbitrary, capricious, or unreasonable for the Board to conclude that a reasonable person would consider A.H.'s social media post depicting a white person in "black face" to be motivated by the distinguishing characteristic of race.

Regarding the second element, there is ample evidence in the record that the social media post caused a substantial disruption to the orderly operation of the school. The school principal testified that three students came into the office very upset about the racist picture posted by A.H., as well as a second offensive post by another student; these students wanted action to be taken immediately and planned to confront those involved in making the posts. The principal further testified that she had concerns that there could be an altercation in a crowded hallway since matters can escalate very quickly with 1,300 students in the building. The principal explained that because of the tension in the school, she had monitored the 8th grade lunch period on that day and for weeks after so that she could prevent matters from erupting in the cafeteria. She testified that multiple students approached her in the cafeteria concerned about racism in the school and wanting to know what was going to happen to the offender. The principal testified that A.H.'s post with the "black face" picture spread through the school, there were murmurings in the hallway, and teachers heard students talking about the matter. The Commissioner finds that – given the social media post spread throughout the school, causing many students to become angry and upset, and resulting in the principal changing her schedule to be present among students to calm the situation and prevent an altercation – the Board was

certainly not arbitrary, capricious or unreasonable in finding a substantial disruption of the ordinary operation of the school.

Regarding the third element, an act of HIB is one that “a reasonable person *should* know, under the circumstances, will have the effect of physically or emotionally harming a student,” “*has the effect* of insulting or demeaning a student,” or “*creates* a hostile educational environment . . .”. *N.J.S.A.* 18A:37-14(a) (emphasis added). There is no doubt here that a reasonable person would know that A.H.’s social media post involving a “black face” photograph would cause emotional harm and insult or demean black students because it is inherently racial in nature, such that the Board was not arbitrary, capricious, or unreasonable in reaching that conclusion.

Finally, regarding where the conduct occurred, the Act sets forth that conduct may be considered HIB when it takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3, and that otherwise satisfies the remaining elements of HIB. *N.J.S.A.* 18A:37-15.3 indicates that HIB policies adopted by boards of education shall include provisions for responses to HIB that occurs off school grounds when a school employee is made aware of such actions. Additionally, *N.J.A.C.* 6A:16-7.5(b) requires that school authorities respond to HIB that occurs off school grounds. Accordingly, the Board is required to investigate HIB complaints even if they occur outside of school. Here, the Board received an HIB complaint involving a social media post that occurred outside of school hours, so it was required to investigate the allegations. As A.H.’s social media post was viewed by many students who attended Sayreville Middle School and caused a disturbance at the school, the Board was not arbitrary, capricious, or unreasonable in

investigating the conduct that occurred off school grounds and finding that it met the definition of HIB.

The Commissioner does not find petitioners' exceptions to be persuasive. Despite their arguments as to why *Mahanoy* prevents the Board from regulating her speech, A.H.'s social media post caused a substantial disruption to the school. While the disruption in Mahanoy only consisted of a short 5 to 10 minute discussion in Algebra class, the social media post at issue here resulted in students becoming very upset and emotional, creating the potential for altercations such that the principal had to monitor lunch hour for weeks to ensure student safety and to curtail the effects of the students talking about the post throughout the school. Additionally, while petitioners argue that the post had no nexus to school, it is clear that the post was made on a platform that enabled many Sayreville Middle School students to see the picture, thus bringing it into the school, where the post caused a substantial disruption. Additionally, the Board was not attempting to stand in loco parentis; rather, the staff was seeking to maintain order in the school following a social media post that caused interference with the school's regular operations. Moreover, the speech involved here is distinct from the type cited in *Mahanoy*, *i.e.*, speech expressing disagreement or criticism; instead, the speech here was a racist photograph and remark which a reasonable person would perceive as offensive to black students. Accordingly, the impact of the social media post on the school violated the HIB statute and is within the school's authority to regulate.

With respect to the second HIB matter in which the Board found that A.H. was not the victim of HIB, the Commissioner finds that the Board was not arbitrary, capricious, or unreasonable in its determination. 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.” *Kopera v. W. Orange Bd. of Educ.*, 60 N.J. Super. 288, 294 (App. Div. 1960). Furthermore, “where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[,]” and the Commissioner will not substitute his judgment for that of the board. *Bayshore Sewerage Co. v. Dep’t. of Env’tl. Prot.*, 122 N.J. Super. 184, 199 (Ch. Div. 1973), *aff’d*, 131 N.J. Super. 37 (App. Div. 1974). Interviews with student witnesses found that other students did not perceive the comment at issue as malicious. While it may have been inappropriate, the comment did not substantially disrupt the school or the rights of A.H. As such, the record contains sufficient credible evidence to support the Board’s decision that the HIB allegation could not be substantiated and therefore did not constitute an HIB violation. The Commissioner does not find petitioners’ exceptions regarding this HIB allegation to be persuasive.

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

IT IS SO ORDERED.²



ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 23, 2021
Date of Mailing: September 23, 2021

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to N.J.S.A. 18A:6-9.1. Under N.J.Ct.R. 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

R.H. and M.H.,
on behalf of minor child, A.H.,
Petitioners,

OAL DKT. NO. EDU 09435-17
and EDU 14833-17
AGENCY DKT. NO. 107-6/17 and 209-9/17

v.

BOROUGH OF SAYREVILLE BOARD
OF EDUCATION, MIDDLESEX COUNTY,
Respondent.

Krista Lynn Haley, Esq., for petitioners (John Rue & Associates, LLC, attorneys)

Marc G. Mucciolo, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: June 2, 2021

Decided: June 24, 2021

BEFORE **SARAH G. CROWLEY, ALJ:**

STATEMENT OF THE CASE

This case involves two harassment intimidation and bullying (HIB) claims involving A.H., who was an eighth grader at the time. The first matter involves a Snapchat post by A.H. of a girl with a mud mask on her face with the following comment, “ when he says he’s only into black girls.” After an investigation, the School District (District) found A.H. violated the HIB statute. This decision was affirmed by the Board of Education (Board). The second matter involved a claim by A.H. that she was bullied by fellow students. This claim was not sustained after an investigation and the Board affirmed the finding of no HIB. A.H. has challenged both findings.

PROCEDURAL HISTORY

An appeal was filed by the parents of A.H. to both of the findings of District which were affirmed by the Board. The decision in the first HIB matter was issued on March 7, 2017, and the second issued on June 13, 2017. A.H.'s parents filed an appeal in both of the matters, and they were transmitted to the Office of Administrative Law as contested matters. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The matters were consolidated with the consent of both parties and were heard via Zoom on January 7, 2021. The record was closed after post-hearing submissions by the parties on June 2, 2021.

STATEMENT OF ISSUES

The facts in the first HIB matter are essentially undisputed. A.H. admitted to posting a girl with a mud mask on with the caption "when he says he only into black girls" on her snapchat account. The first issue is whether such a posting can reasonably be perceived as being motivated either by any actual or perceived characteristic, such as race. The other determinations in the first matter is whether there was a sufficient nexus to the school, and whether the conduct caused a sufficient disruption to the school to satisfy the statute. Any determination by the District will only be disturbed if it is found to be arbitrary, capricious and unreasonable. The District found that the posting constituted HIB, and their finding was affirmed by the Board. The second HIB matter involves a determination of whether A.H. was bullied by other students. A.H. alleged that she was called racist and teased about whether she liked chocolate, meaning did she date black boys. The District investigated the allegations and were unable to substantiate any of the allegations by A.H. and found no HIB. The Board affirmed this decision.

FACTUAL DISCUSSION AND FINDINGS

R.H. is A.H.'s father and testified on her behalf. He testified that his daughter was thirteen years old at the time of the incident. She reposted something that one of her friends had posted on Snapchat. R.H. testified that A.H. had two separate Snapchat accounts and one was her "finsta" account, which had a smaller following. A.H. had approximately 250 followers and many school friends on the account in question. It was her fun account and she did not mean to offend

anyone. R.H. testified that A.H. told him about an incident in her cultural diversity class where the teacher told them to put their heads down on the desk and raise them if they had witnessed racism in their home. After she raised her head a little to see what others were doing, everyone called her a racist. There was another incident in her math class when some students asked her if she liked chocolate, implying did she like black boys.

R.H. testified that A.H. was very happy and doing very well in school before this incident happened. She was on student council and loved school. However, after all this happened, she did not want to go to school anymore, and she was bullied by her classmates. They did not report any problems until after the posting, but the incident in the cultural diversity class happened before the posting. He testified that she had never been in trouble and had a lot of friends. Following the finding of HIB, they suspended her and removed it from the student council. A.H. was unable to attend a student government class trip as a result of the suspension and the removal from the student council. Ultimately, they transferred her to another school because she was so unhappy.

A.H. was sworn with the consent of her parents who were present with her on the Zoom hearing. She is now a senior in high school. She was questioned by her attorney about being under oath, and she testified that she understood that she had to tell truth. She testified that she reposted the Snapchat of a friend in the shower with a mud mask on. A.H. read the caption which stated, "when he says he's only into black girls." She testified that she thought it was funny and reposted it on her own finsta Snapchat account. She did not think it was racist and thought it was funny. A.H. testified that prior to this posting there was an incident in her multicultural class where the teacher asked everyone to put their heads down on the desk and to raise them if they had witnessed racism in their home. She lifted her head a little to see what others were doing and people started calling her a racist. Another incident happened in math class when they had a substitute, and someone asked her if she liked chocolate. She knew this meant does she like or date black boys. She tried to just ignore it, but she was taunted for being a racist. A.H. used to like school, but things got bad, and she did not want to go to school anymore. She was removed from student counsel and could not go on the student counsel trip due to HIB finding related to the posting. A.H. said she had never been in trouble in school before. However, on cross-examination she conceded that she was disciplined in sixth and seventh grade for behavior issues. When she

was questioned about whether she thought the post was racist, she said no. She further testified that sitting here today, she still did not think the post was racist.

Donna Jakubik (Jakubik), was the principal at Sayreville Middle School at the time this incident with the posting occurred. She said that several students came to see her and were very offended by the mud face posting by A.H., and another one by a friend of A.H. who posted someone wearing a Klansman hood. The kids said they were going to confront A.H. about the posting because they were so offended. Ms. Jakubik advised them not to and initiated an investigation. She had to monitor the lunchroom after the posting to make sure there was no trouble following the complaint. She interviewed several students including A.H. in connection with the investigation. She called A.H. to her office to ask her about the posting. A.H. acknowledged that she posted the mud mask with the comment. She said she re-posting of something from her friend had posted with her own comment “HAHAHAHA LOVE HERR” with some emojis. A.H. advised Ms. Jakubik that she had been reluctant to post it because she knew it was racist, but she did anyway. Because there were several students very upset by the post, Ms. Jakubik had to intervene to make sure there was no trouble. Due to the racist nature of the post, she felt the one-day suspension was appropriate. She also felt that removal from the student council was appropriate as they did not feel she was someone who should be representing the student body. Ms. Jakubik testified that this was not the first time A.H. had been in trouble and thought and that she had been disciplined in sixth grade for a fight and in seventh grade for waiving her bra around on the school bus. She also thought that A.H. knew the post was racist and offensive and she did it anyway. She said the one-day suspension and the removal from the student council were an appropriate punishment.

Ms. Jakubik is familiar with the investigative process for HIB allegations. She followed all the proper protocols and interviewed other students and prepared a report. She made her recommendation to the superintendent. There was a hearing before the Board of Education, and they considered all appropriate factors in deciding that it was HIB and what discipline to impose. She indicated that they do not share the results of their investigation with others of what the discipline was. There were several students who wanted to know what was being done, but they did not share any information about the investigation and the resulting discipline.

Ms. Jakubik was also in charge of the other HIB matter, which was filed by A.H.'s parents after the first HIB incident. A.H.'s father reported that A.H. was being bullied after the investigation was commenced into the posting. He claimed that she was being taunted for being a racist and asked if she liked chocolate. He also reported that there was an incident in the multicultural class where the teacher had asked the kids to put their head down on the desk and raised them if anyone in their household made any racist comments. Apparently, A.H. raised her head and was called racist by the other children. Ms. Jakubik interviewed several other students in the class and could not corroborate that she had been called a racist by anyone. She also investigated the other incident in the math class where students kept asking her if she liked chocolate—meaning did she like black boys. None of the allegations of bullying against A.H. were corroborated during her investigation. A report was prepared and the recommendation to the superintendent of a finding of no HIB went to the Board, where it was affirmed.

FINDINGS OF FACT

The resolution of the claims made by the petitioner requires that I make a credibility determination regarding certain facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See, Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story considering its rationality, internal consistency and the way it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone, or in connection with other circumstances in evidence, excite suspicion as to its truth. In re Perrone, 5 N.J. 514. 521-22 (1950). See, D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, and to weigh the evidence before me, it is my view that A.H. was not credible. I found the testimony of Ms. Jakubik credible and consistent with the documentary evidence and other testimony. I specifically found her testimony regarding her conversation with A.H. very credible. She testified and documented that after her initial discussion with A.H. that she acknowledged that she was reluctant to repost the picture due to it being racist. I found that A.H.'s father was sincere and credible regarding his concern for his daughter but had no direct or firsthand knowledge of the facts that were relevant to a finding of HIB on either claim. I found Ms. Jakubik's testimony regarding the investigation of bullying against A.H. and the inability to corroborate any of the allegations to be credible. I found A.H.'s testimony that she did not think the post was racist then or now not be credible.

Accordingly, I **FIND** the following as **FACT**:

1. On February 11, 2017, A.H. posted a picture of a friend with a mud mask on her face with the comment "when he says he is only into black girls" on her Snapchat account.
2. A.H. was aware of the racist nature of the post.
3. Although the post was made on a Saturday, A.H. had many followers, including fellow students at Sayreville Middle School.
4. Several students complained to the school, and a HIB investigation was conducted.
5. An investigation was conducted and a report finding HIB against A.H. was issued. The Board of Education affirmed the finding of HIB.
6. All of the procedural requirements of the anti-bullying statute were followed by the District in both of the investigations.
7. Several students were very offended by the post and wanted to confront A.H.

8. The District had to monitor lunch and keep a close eye on things due to the fear that these students might confront A.H.
9. Although the post was done outside of school, due to the impact on the students at Sayreville Middle School, and the followers of her account from Sayreville, there is sufficient nexus between the post and school.
10. There was a sufficient disruption to the school as a result of the post by A.H.
11. The decision of the Board affirming this decision was not arbitrary, capricious or unreasonable.
12. After the issuance of the HIB finding by the District, R.H. filed an HIB action on behalf of A.H. claiming that she was called a racist and was being bullied at school.
13. An investigation was conducted, and students and staff were interviewed and no substantiation of the claims of HIB against A.H. were found.
14. There is no credible evidence that A.H. was bullied.
15. The decision of the District was supported by the evidence, or rather lack thereof and the affirmance by the Board was not arbitrary, unreasonable or capricious.

LEGAL ANALYSIS AND CONCLUSION

With regard to speech that constitutes harassment, intimidation or bullying, the New Jersey Legislature enacted the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2, et seq., to "strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying" occurring both on and off of school grounds. N.J.S.A. 18A:37-13.1(f). Each school district in New Jersey is required to "adopt a policy prohibiting harassment, intimidation or bullying on school property," which includes notification of the "consequences and appropriate remedial action for a person who commits an act of harassment,

intimidation or bullying,” “a procedure for reporting an act of harassment, intimidation or bullying, including a provision that permits a person to report an act of harassment, intimidation or bullying anonymously,” and “a procedure for prompt investigation of reports of violations.” N.J.S.A. 18A:37-15. “The policy adopted by each school district . . . shall include provisions for appropriate responses to harassment, intimidation, or bullying . . . that occurs off school grounds, in cases in which a school employee is made aware of such actions.” N.J.S.A. 18A:37-15.3.

N.J.S.A. 18A:37-14 defines “harassment, intimidation or bullying” to mean:

[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.

The threshold requirement is that the conduct be reasonably perceived as motivated by actual or perceived enumerated characteristic or other distinguishing characteristic, and that the conduct substantially disrupts or interferes with the right of other students or the orderly operation of school. It is well settled that a Board decision is entitled to a presumption of correctness and may not be disturbed unless they are found to be decisively flawed. Kopera v W. Orange Bd. of

Educ., 60 N.J. Super 228 (App. Div. 1960). When a Board acts “within its discretion authorly, as it did here, 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.” Id. Neither the undersigned nor the Commissioner is permitted to “substitute her judgment for that of the board.” Bayshore Sewar Company v. Dept of Env'tl. Prot., 131 N.J.S. Super 37 (App. Div. 1974).

The petitioner has argued that since the conduct did not occur on school property on school hours that it fails to meet the requirement of HIB. However, our statute specifically recognizes activity that occurs off school property if it causes a substantial disruption at school and meets the other requirements of the statute. The petitioner further argues that this conduct did not cause a substantial disruption to school activities. However, the testimony of Ms. Jakubik, whom I found credible was that many students were very upset and she had to monitor activities in school due to a threat by students that they were going to confront A.H. Finally, the District findings were neither arbitrary, capricious or unreasonable. The allegations of HIB by A.H. were investigation and none of her allegations could but substantiated after a HIB investigation was conducted. The decision of the District and the Board was neither arbitrary, capricious or unreasonable.

Accordingly, I conclude that the Snapchat posting by A.H., which occurred after school hours on a social media account caused a substantial disruption with the operation of school. Many students were upset, they complained, an investigation was conducted, and activities surrounding the student had to be monitored following the event to ensure her safety. I further conclude that not only should a reasonable person know that this post had the effect of insulting or demeaning African American students, I found as fact, that A.H. was aware of the racist nature of the post when she posted it. Accordingly, I conclude that the requirements of N.J.S. A. 18A:37-14 have been satisfied, and the finding of HIB by the District is affirmed. As to the allegations of A.H. that she was called a racist and bullied, the District investigated these claims, and found no one to support these allegations. I have also found no credible evidence to support this claim. Accordingly, giving the deference I am required to give to the District, the decisions of the Board on both claims are hereby affirmed.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the decision of the Board finding HIB in the first claim is **AFFIRMED** and the appeal of A.H. is **DISMISSED**. It is also **ORDERED** that the decision of the Board finding no HIB against A.H. is **AFFIRMED**, and the appeal 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.

June 24, 2021

DATE



SARAH G. CROWLEY, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SGC/nd

APPENDIX

WITNESSES

For Petitioners:

R.H.

A.H.

For Respondent:

Donna Jakubik

EXHIBITS

For Petitioners:

- P-1 Initial Verified Complaint, dated June 5, 2017
- P-2 Second Verified Complaint, dated September 5, 2017
- P-3 Answer to First Complaint, dated June 26, 2017
- P-4 Answer to Second Complaint, dated September 25, 2017
- P-5 First HIB Incident Report, dated February 14, 2017
- P-6 Second HIB Incident Report, dated April 3, 2017
- P-7 Third HIB Incident Report, dated March 30, 2019
- P-8 District's Motion for Summary Decision, dated February
- P-9 Response to Motion for Summary Decision, dated February 16, 2018
- P-10 Discovery Response, June 2018
- P-11 Discovery Response, September 2019
- P-12 Letters from Labbe and Board Minutes
- P-13 Dr. Richard Labbe, Superintendent, Curriculum vitae

For Respondent:

- R-1 Snapchat post

- R-2 Email from D. Jakubik to R. Labbe, "Cyber Bullying Issue," with attachments, dated February 21, 2017
- R-3 Email, "A.H. 8th grade," dated February 23, 2017
- R-4 Email from R. Labbe to D. Jakubik, "Cyber Bullying Issue," dated February 23, 2017
- R-5 Email from R. Labbe to D. Jakubik, "Cyber Bullying Issue," with attachments, dated March 2, 2017
- R-7 Email from D. Jakubik to D. Consulmagno, "Cyber Bullying Issues," with attachments, dated March 2, 2017
- R-8 Letter from Sayreville Middle School, dated March 3, 2017
- R-9 Email from D. Jakubik to D. Fischer, "Take a Look at This," with attachments, dated March 6, 2017
- R-10 Email from D. Jakubik to R. Labbe "Bullying Report," with attachments, dated March 8, 2017
- R-11 Letter from Sayreville Public Schools to the Parents of A.H., dated March 8, 2017
- R-12 Email from R. Labe to D. Jakubik, "SESSAVIN-BusOff," dated March 21, 2017.
- R-13 Sayreville Public Schools Harassment, Intimidation, or Bullying (HIB) form, dated March 22, 2017.
- R-14 Email from D. Consulmagno to D. Jakubik, dated March 29, 2017.