265-21

New Jersey Commissioner of Education

Final Decision

P.H. and K.G.H., on behalf of minor child, L.H.,

Petitioner,

v.

Board of Education of the City of Northfield, Atlantic County,

Respondent.

Synopsis

In October 2019, petitioners appealed the finding of the respondent Board that their son – who had attended kindergarten at the Northfield Community School from the commencement of the 2018-2019 school year through March 28, 2019 – was not the victim of harassment, intimidation and bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* Petitioners alleged that the HIB investigation conducted by the Board was procedurally and practically defective because it was conducted months after L.H. had been withdrawn from the school district. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; the within matter was not mooted by the withdrawal of L.H. from the district; the Board acknowledged that as of April 29, 2019, it had received adequate information upon which to begin an HIB investigation; such investigation should have commenced at that time pursuant to the statutory mandates set forth in *N.J.S.A.* 18A:3 7-15b; because it was not initiated until June 5, 2019, the Board was in violation of the Act as well as Board policy regarding the initiation of HIB investigations; however, given the limited information provided to the District by petitioners regarding the nature of their complaint, and given that the District was not permitted to interview the victim of the alleged HIB, the Board's determination in this matter was based on a sufficiently complete investigation and was not arbitrary, capricious, or unreasonable. Accordingly, the ALJ dismissed the petitioners' motion for summary decision and granted summary decision in favor of the Board; in so doing, the ALJ directed the Board to institute corrective action to assure that future HIB investigations are commenced in a timely manner pursuant to the schedule established by the Act and Board policy.

Upon a comprehensive review, the Commissioner concurred with the ALJ that the Board's HIB determination was based on a sufficiently complete investigation and was not arbitrary, capricious, or unreasonable. Further, the Commissioner agreed that the Board did not initiate its HIB investigation in a timely manner. Accordingly, the Commissioner granted the Board's motion for summary decision and dismissed the petition. The Board was directed to be more mindful of statutory time requirements when conducting future HIB investigations.

265-21
OAL Dkt. No. EDU 16082-19
Agency Dkt. No. 275-10/19

New Jersey Commissioner of Education
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Petitioner,

v.

Board of Education of the City of Northfield, Atlantic County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

The Board determined that petitioners' child was not the victim of harassment, intimidation, and bullying (HIB). Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board's determination was based on a sufficiently complete investigation and was not arbitrary, capricious, or unreasonable, for the reasons detailed in the Initial Decision. The Commissioner further agrees with the ALJ that the Board did not initiate its HIB investigation in a timely manner, but that the delay does not render the Board's determination arbitrary, capricious, or unreasonable; however, the Board is directed to be more mindful of the statutory time requirements when conducting future HIB investigations.

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 21, 2021
Date of Mailing: October 21, 2021

[1] 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
OAL DKT. NO. EDU 16082-19
AGENCY DKT. NO. 275-10/19

P.H. and K.G.H., on behalf of minor child, L.H.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF NORTHFIELD, ATLANTIC COUNTY,

Respondent.

Patrick M. Harrington, Esq., for petitioners (Dilworth Paxson, attorneys)

John G. Geppert, Jr., Esq., for respondent (Scarinci & Hollenbeck, LLC, attorneys)

Record Closed: August 9, 2021 Decided: September 22, 2021

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

During the 2018-2019 school year. L.H. was a kindergarten student in the Northfield School District. On March 29, 2019, at a meeting with the District Superintendent, the petitioners advised him that L.H. was expressing depressed behavior at home. This meeting followed a March 20, 2019, meeting between P.H., the principal of

the Northfield Community School and others, including the classroom teacher, Kelli Kern, at which several concerns were discussed. At the March 29, meeting, P.H. advised Superintendent Bretones that L.H. would not be returning to Ms. Kern's classroom and requested that the child be transferred to another classroom. On April 4, 2019, Bretones advised Mr. and Mrs. H. that the District would not agree to transfer L.H. to a different classroom. After March 28, 2019, L.H. never attended school in the District and during the April 4, call, the parents advised Bretones that they were removing their child from the District, effective immediately. L.H. has not attended school in the District since that time.

On April 29, 2019, P.H. attended the Northfield Board Education public meeting and spoke during that session. According to the minutes of that meeting he spoke of his son "enduring emotional distress in Kindergarten," that their experience with the school had been "negative and disappointing." They had requested a classroom change which request was denied and they withdrew their son from the District and were uncertain as to whether they would allow his return for the following year. P.H. also distributed a letter and email to all members of the school board, in which he detailed actions on Ms. Kern's part that "devastated our child and is a completely unacceptable way to treat an enthusiastic, kind child who wants to learn as they begin their school experience."

On May 20, 2019, P.H. again attended a Board meeting. The public minutes note that he again spoke of his son's "situation on campus." He advised that "he has not received any response or information from the school." He was then advised that while the matter concerning a student could not be discussed in a public session, the Superintendent was "working on a written response which will come to him shortly." P.H. asked what the procedure was to "initiate a formal request to transfer a student within a grade" and was told that the school administration would respond.

On May 23, the parents received a letter from Superintendent Bretones. He advised that he had "investigated the allegations about Mrs. Kern" and the investigation "did not support any of the allegations that [P.H.] made."

On June 7, 2019, the Anti-Bullying Coordinator, Maureen Vaccaro, who had been present at the March 20, 2019, meeting, emailed the parents that a Harassment, Intimidation and Bullying (HIB) investigation had been opened on June 5, 2019, and requested to meet with L.H. and his parents. The parents did not respond to this request and did not produce L.H. for any meeting.

On June 21, counsel for the Board advised the parents that a decision on the investigation would be rendered in June. On June 25, they received a letter from Bretones, advising that the investigation "centered on . . . allegations that a pupil committed an act(s) of harassment, intimidation, or bullying" and that Vaccaro had "interviewed L.H." The Board admits that this letter contained incorrect information, as there had been no discussion or any allegation that a pupil had engaged in any such conduct and L.H. had not been interviewed by Vaccaro.

On July 8, 2019, the parents received a revised letter, stating that the "nature of the investigation centered on the allegation that one of your child's teachers committed an act(s) of harassment, intimidation, or bullying to your child." The parents then requested a hearing before the Board. This took place on July 22, 2019. On July 24, the parents received a letter from Superintendent Bretones, advising them that "after due deliberation and consideration following the hearing before the Board on Monday, July 22, 2019, the Board affirmed the finding and determination that the alleged incident involving [L.H.] did not constitute HIB as defined by the State of New Jersey and the District policies."

On October 11, 2019, the parents filed a Petition with the Commissioner of Education, asking that the Commissioner find that "the HIB investigation conducted by the District be [deemed] invalid and deemed inconclusive due the fatal procedural and legal deficiencies and delayed initiation which render the Investigation deficient as a matter of law." The Board filed an Answer and Affirmative Defenses on November 1, 2019. Discovery commenced following transmittal of the contested case to the Office of Administrative Law. The matter was initially assigned to Honorable John S. Kennedy,

ALJ. The parties filed cross-motions for summary decision. Judge Kennedy was appointed to the Superior Court and the matter was re-assigned on July 28 , 2021 to this judge, retired and serving on recall.

The Board's motion for summary decision is based in part on the notion that the matter is moot because L.H. is no longer a student in the Northfield School District and no meaningful relief has been requested. The petitioners' motion is based upon the claim that the Board failed to comply with both State legislation concerning investigations of alleged HIB violations and the District's own policies regarding such investigations. They contend that the HIB investigation begun in June 2019, was commenced far beyond the allowable time frame for the initiation of such investigations and that to the extent an investigation was undertaken, it was flawed because, while faculty members were questioned concerning their son, no students who were actually in L.H.'s classroom with Mrs. Kern were questioned. The Board counters that even if there were "minor" violations of the required time frame for the initiation and conclusion of an HIB investigation, these were of no actual consequence, particularly as the student had been withdrawn from the District and thus even if some HIB violation had been discovered, the student could not have benefited from any relief that might otherwise have been warranted. The parties do not agree as to the date by which any allegation of HIB conduct was first brought to the attention of the district. As such, they disagree as to the date which was applicable in regard to the time frame for the investigation.

Mootness

If a legal matter is moot, there is no basis for any substantive decision to be rendered on the controversy. Here, once L.H. was withdrawn from the District, no relief concerning the child's educational process within the District could be effectuated. It is speculative whether, had there been a determination that Mrs. Kern had acted in a manner regarding L.H. that involved HIB, the parents would have chosen to re-enroll L.H. in the District, either before the end of the 2018-19 term or thereafter. It is also necessary to consider that in their Petition, the parents did not ask that the determination that no HIB

violation(s) had occurred be changed to a finding that such did occur, but instead that the investigation be found to have been procedurally flawed, and therefore in essence set aside and deemed to, in effect, have made no affirmative or negative conclusion, but instead, an inconclusive one. Thus, even in their Petition's request for relief, the parents do not seek a finding that Mrs. Kern committed HIB infractions. In effect, they simply seek to have the Board told that it did not proceed as it should have in investigating an HIB allegation and, as a result, their determination of no HIB conduct having occurred must be set aside and the investigation deemed inconclusive. Given these factors, the Board contends that the matter is moot.

In response to the claim of mootness, the petitioners cite language from decisions that point out that even if a student is disenrolled after an HIB complaint is made, the district is still required to carry out an HIB investigation, D.M. on behalf of minor child K.B. v. Board of Ed. of West Milford, njlaw.rutgers.edu/collections/oal/final/edu.1pdf ("[a]ny allegation of HIB committed against one of its students must be investigated by the school district, regardless of whether the student is disenrolled after the allegation is reported."), and that while the HIB statute does not prescribe specific relief where the child is no longer in the district, the "Board must promptly take all appropriate measures, including the conducting of staff in-service programs, to assure full compliance with the Act", T.R. and T.R. on behalf of E.R. v. Bridgewater-Raritan Regional Board of Education, njlaw.rutgers.edu/collection/oal/html/initial/edu10208-13-2.html, where the ALJ noted a recommendation "that the Commissioner fashion any further relief deemed just and proper." Counsel contends that the Anti-Bullying Bill of Rights has "two areas of focus, the student and the District," pointing to the Commissioner's determination in C.K. and M.K. on behalf of minor child, M.K. V. Board of Ed. of Voorhees, njlaw.rutgers.edu/collections/oal/final/edu20510-15-1.pdf (March 23, 2017), where the Commissioner explicitly determined that the Board had initially failed to investigate and conduct a timely hearing and that when it did investigate, it did not conduct a thorough and complete investigation. Thus, even where the student is no longer enrolled in the district, there is reason to assure that the required HIB investigation is conducted in a timely and complete manner and where the evidence shows that it was not, the

Commissioner has reason to decide that such violations of the requirements of a fully compliant investigation occurred and to fashion such relief as the Commissioner deems proper in such circumstances.

If the withdrawal of a student from a school district automatically resulted in the mootness of any attempt to review how that district carried out an HIB investigation involving alleged HIB actions toward that student, the district would in effect be insulated from any determination that it had failed to properly carry out such a required investigation and to have done so in a legally appropriate manner. If the HIB allegation had substance and the district failed to investigate properly, the district and the person or persons who perpetrated the HIB conduct would then escape any consequence. This may be particularly of concern regarding allegations of staff HIB misconduct. If a district properly investigates and determines that a teacher or other staff member has engaged in such misconduct, the district must then determine how to assure that that person will not continue such improper conduct in the future. Such findings may point to the need for more training, for a nonrenewal of a non-tenured staff member's employment or even to the need to consider tenure charges. While of course not every allegation will be found to be true, nevertheless if the mere fact of the student's withdrawal is enough to moot the Commissioner's review of district action, narrow as that review is (see below), then perhaps withdrawal moots the need for the district to even continue the investigation at district level. Given the fact that the purpose of the legislation is clearly to eliminate HIB conduct in schools, the district has an obligation to complete a proper investigation even if withdrawal occurs. D.M.

I **CONCLUDE** that this matter is not mooted by the student's withdrawal. As the District was required to complete its investigation, so too the Commissioner is permitted to review that action within the limits that case law has established for such a review of a district's actions. The Commissioner and the appellate courts have consistently held that the actions of a local school board acting in regard to a determination made within its regulatory sphere will not be overturned unless demonstrated to have been arbitrary, unreasonable or capricious. Thomas v. Morris Twp. Bd. Of Education, 89 N.J. Super.

327, 332 (App. Div. 1965). Unless the district acted in bad faith or "utter disregard of the circumstances before it," the Commissioner will not interfere. G.H. and E.H. ex rel.K.H v. Bd of Educ. of the Bor. of Franklin Lakes, http://njlaw.rutgers.edu/collections/oal/html.initial/edu13204-13-1.html. That said, withdrawal is not a defense for a district's failure to properly carry out its role in advancing the purposes of Anti-Bullying legislation.

Summary Decision

Summary decision motions are permitted in administrative proceedings by N.J.A.C. 1:1-12.5. The standard for determining such motions is the same as that for summary judgment motions in Superior Court. The New Jersey Supreme Court defined the standard for determining motions for summary decision in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). In this case, the Court elaborated upon the standards first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). Under the Brill standard, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The substantive law governing a dispute determines which facts are material. Only disputes regarding "those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Dungee v. Northeast Foods, Inc., 940 F. Supp 682, 685 (D.N.J. 1996), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, (1986)(Anderson).

In Judson, at 75, the Supreme Court stated that the material facts allegedly in dispute upon which the party opposing the motion relies to defeat the motion must be

something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ," (citations omitted). Brill focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536, quoting Anderson, at 477 U.S. 251-52, 106 S. Ct 2505, 2512, 91 L.Ed 2d 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed material facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied, and a full evidentiary hearing held.

The Investigation

Timeliness

The petitioners argue that the District failed to comply with the established time frames for conducting an HIB investigation. Of course, before a district can begin such a process, it must first be on notice that an allegation of HIB conduct has been made, either by a complaint or by some other factor which makes, or should make it clear to the district that such conduct may have occurred. In order to consider the parties' positions regarding the timeliness of the investigation, we must first determine when the district was put on notice. This requires an understanding of what constitutes HIB conduct.

N,J.S.A. 18A:37-13.2 is the "Anti Bullying Bill of Rights." HIB Conduct is defined at N.J.S.A. 18A:37-14 as

> "Harassment, intimidation or bullying" means any 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.

As the definition states, to constitute actionable HIB conduct, the alleged actions, words, etc. must be "reasonably perceived as motivated either by [an] actual or perceived characteristic." The law provides a listing of the sort of characteristics that it aims to prevent. While many of these track the obvious categories of invidious discrimination such as race, sex, religion, etc., the list also includes "mental, physical or sensory disability," and adds a seeming catch-all, "other distinguishing characteristic." Thus, if a district receives a complaint that a student(s) or staff person(s) have engaged in "any gesture, any written, verbal or physical act, or electronic communication," that targets a student for such actual or perceived characteristic", the district must begin an HIB investigation which must comply with the timelines set out in N.J.S.A. 18A:37-15b.6. The timelines are also stated in the Board's own HIB policy.

The petitioners claim that the District was notified of such an HIB complaint on March 20, 2019, when P.H. met with staff personnel including Anti-Bullying Coordinator Vaccaro. As background, the petitioners note that in February 2019, they were contacted by Mrs. Kern who told them that their child was "significantly behind his peers academically, and had been for some time." Information as to what topics needed to be addressed was provided and the parents worked on these. Although they claim Kern agreed that progress had occurred, nevertheless, in late February Kern emailed them, suggesting that they consider retaining L.H. to repeat kindergarten, despite "acknowledging his academic progress having 'dramatically improved.'" The petitioners state that they found this confusing and reached out to Kern, who did not respond. They then reached out to Elementary School Principal Maureen Vaccaro, who was also the Anti-Bullying Coordinator, although it appears from the Petition that the contact in late February, or perhaps early March, was not then intended to address any complaint regarding alleged HIB conduct. In early March, Kern recommended that L.H. be referred to the Child Study Team.

According to the Petition, at about this time L.H. "began to come home from school distraught, depressed and crying frequently." In their Petition, the parents state that their five-year-old, "disclosed" to them that "Kern was harassing him in the classroom and creating a hostile, abusive environment which caused L.H. emotional distress and resulted in L.H. being made to feel that he was incompetent, incapable of success, and inferior to his peers, including statements that L.H. was not able to color, was not able to read, and was not able to perform work on the board in front of the class." L.H. told his parents that other students ridiculed him, "based upon Kern's hostile conduct and chastising." According to the petitioners, they brought these "concerns" to Vaccaro's attention at a March 14, meeting. Then at the larger group meeting on March 20, with Kern present as well as Vaccaro, P.H. advised them of the "hostile and intimidating environment in the classroom which caused L.H. emotional distress . . . ." He reports that Kern denied knowing what was causing this emotional distress and made inappropriate

comments about how she had seventeen students in the class and was not "paid more" or "getting paid a bonus" to help L.H.

Since the petitioners contend that they brought their concerns about a "hostile and intimidating environment" and "abuse" of L.H. to the attention of representatives of the District, including its Anti-Bullying Coordinator, on either March 14 and/or March 20, it is necessary to see if what they claim to have reported would have been sufficient to have triggered the District's obligation to initiate an HIB investigation. It seems apparent from the context that L.H. may have been struggling in his kindergarten class and that Mrs. Kern had advised the petitioners of this issue. Given this background, the child's alleged comments about being told that he could not perform certain tasks relating to school work can reasonably be understood as statements that might have been made, in one manner or another, to the student by the teacher. However, the language employed by the petitioners in their Petition seems clearly not to be the language spoken to them by the child as the child told them of certain events occurring in the classroom. Statements about being "harassed," about being "Incompetent, incapable of success" and even the term "inferior," strike as unlikely words to have been voiced by the child, although they are clearly words that have meaning in crafting an HIB complaint.[1] Exactly what the interaction between the teacher and student was and what words were actually spoken cannot be determined from this rendition of statutorily-significant language. That the child was upset seems clear enough, but the question is whether the information that the parents shared with representatives of the District actually conveyed that the child was being singled out due to a "mental or sensory disability" or "other distinguishing characteristic." If a teacher tells a student that his or her work is not adequate, or needs improvement, that in and of itself hardly seems to come within the ambit of the type of comment or the types of characteristics that the HIB statute aims to address. And it becomes especially tricky to understand the situation when dealing with a five-year-old, perhaps struggling in his or her first year of regular school. That said, of course a child of that age and grade certainly can be harassed, intimidated or bullied, but that the child

[1] It is noted that petitioner P.H. is an attorney, however, any parent who reads the HIB statute could well have used such words and phrases to place their child's comments into the statutory framework.

may have suffered emotional distress because his teacher may have told him that he did not form his letters properly or color within the lines does not mean that the teacher did so in a way that comes within the sphere of HIB. I **FIND** that the description of P.H.'s discussion with the District personnel on March 20, 2019, is insufficient to clearly demonstrate that as of that date the District was on notice of an allegation of HIB. However, despite the lack of any HIB allegation, in response to the meeting and the request for a transfer to another classroom, Superintendent Bretones properly did discuss the matter and, in his discretion, determined to deny the request.

P.H. spoke during the Board's public session on April 29, 2019. As recorded in the minutes of that meeting, nothing he said would have alerted anyone that the "negative and disappointing" reaction to the parents' experience with the District or the child's "emotional distress" were the result of HIB conduct. As for the April 29, 2019, letter distributed to Board members, the discussion on page two, paragraph two, of that letter relates the child's upset and refers to "the way Mrs. Kern spoke to our son and treated him in the classroom and in front of his peers" and the "profound negative effects on his self esteem and his attitude towards learning." According to the parents, their child spoke of Mrs. Kern being "mad" at him and "listing things that he didn't do well." While it is in no way to be thought that a teacher getting "mad" at a student is appropriate, and it is recognized that a student at any age, but perhaps particularly a very young student, might well be upset and even "devastated" both by criticism and a tone that conveys a negative attitude toward the child, the paragraph does not really convey anything approaching an allegation of HIB conduct. That said, in its answer to an interrogatory, the Board concedes that "the April 29, 2019 comments and letter were the first time P.H. raised allegations of potential abuse that triggered the investigation."

As the Board acknowledges that as of April 29, 2019, it had received adequate information to require it to begin an HIB investigation, then it was required to proceed to investigate and reach a determination on the alleged conduct in accordance with statutory mandates set forth in N.J.S.A. 18A:3 7-15b.

b. A school district shall have local control over the content of the policy, except that the policy shall contain, at a minimum, the following components:

(1) a statement prohibiting harassment, intimidation or bullying of a student;
(2) a definition of harassment, intimidation or bullying no less inclusive than that set forth in section 2 of P.L.2002, c.83 (C.18A:37-14);
(3) a description of the type of behavior expected from each student;
(4) consequences and appropriate remedial action for a person who commits an act of harassment, intimidation or bullying;
(5) 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; however, this shall not be construed to permit formal disciplinary action solely on the basis of an anonymous report.
All acts of harassment, intimidation, or bullying shall be reported verbally to the school principal on the same day when the school employee or contracted service provider witnessed or received reliable information regarding any such incident. The principal shall inform the parents or guardians of all students involved in the alleged incident, and may discuss, as appropriate, the availability of counseling and other intervention services. All acts of harassment, intimidation, or bullying shall be reported in writing to the school principal within two school days of when the school employee or contracted service provider witnessed or received reliable information that a student had been subject to harassment, intimidation, or bullying;

(6) a procedure for prompt investigation of reports of violations and complaints, which procedure shall at a minimum provide that:

(a) the investigation shall be initiated by the principal or the principal's designee within one school day of the report of the incident and shall be conducted by a school anti-bullying specialist. The principal may appoint additional personnel who are not school anti-bullying specialists to assist in the investigation. The investigation shall be completed as soon as possible, but not later than 10 school days from the date of the written report of the incident of harassment, intimidation, or bullying. In the event that there is information relative to the investigation that is anticipated but not yet received by the end of the 10-day period, the school anti-bullying specialist may

amend the original report of the results of the investigation to reflect the information;
(b) the results of the investigation shall be reported to the superintendent of schools within two school days of the completion of the investigation, and in accordance with regulations promulgated by the State Board of Education pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), the superintendent may decide to provide intervention services, establish training programs to reduce harassment, intimidation, or bullying and enhance school climate, impose discipline, order counseling as a result of the findings of the investigation, or take or recommend other appropriate action;
(c) the results of each investigation shall 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;
(d) parents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents;
(e) at the next board of education meeting following its receipt of the report, the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education, in

> accordance with the procedures set forth in law and regulation, no later than 90 days after the issuance of the board's decision;

Additionally, as required by the Anti-Bullying statute, Northfield Board of Education adopted a policy, 5131.1 "Harassment, Intimidation and Bullying." This policy mirrors the definition of HIB conduct found in the statute. This policy requires that

> all investigations shall be thorough and complete, and documented in writing, and shall include, but not be limited to
>
> 1. Taking statements from victims, witnesses and accused;
> 2. Careful examination of the facts;
> . . .
> 6. The investigation shall be initiated by the principal or the principal's designee within one school day of the report of the incident . . . .

In this matter, the Board recognizes that as it concedes that April 29, 2019, was the date when it was put on notice about a complaint of HIB concerning its staff member, it was obligated by this statute and by its own adopted policy to begin its investigation no later than one school day thereafter. It concedes that it did not do so. In fact, as the Board concedes, I **FIND** that the investigation was not initiated until June 5, 2019. And even if the District did not receive an adequate alert of such a complaint until the May 20, 2019, Board meeting, a claim stated in its motion brief but undercut by its response to the interrogatory as set forth above, where it agrees to April 29 as the date when it was placed on notice, the initiation of the investigation on June 5, was still outside of the permitted one day after the notice when the investigation was mandated to commence. As such, based upon the undisputed facts, I **FIND** that the petitioners are correct in their assertion that the Board violated the statute and Board policy regarding the initiation of the investigation. That said, was the Board lax in respect to reaching a decision on the complaint? The record reflects that for some unknown reason the original response to the parents about the investigation was issued on June 21, which advised that an investigation had been concluded about alleged HIB conduct by a pupil. While there is some vague reference in the petitioners' account of the child's discussion with them in March to some ridicule by other pupils, there never was any actual complaint voiced or

written to the District about student HIB conduct, only at most about such conduct by Mrs. Kern. Thus, the District's purported completion of an "investigation" of pupil HIB by June 21 was meaningless. The record does not indicate how or why this letter was produced. Since the District did not indicate it had completed the investigation of the teacher's alleged HIB conduct, giving the District the benefit of the doubt, that investigation of the teacher's conduct was completed on July 8 and the Board heard from the petitioners and decided the matter on July 24, at its next meeting after the completion of the investigation of Mrs. Kern. While the facts about the investigation's progress and focus after June 5 are hazy, for the purposes of these cross-motions, I **FIND** that the District did complete the investigation and the Board did act on it at the first meeting following that completion.

Alleged Inadequacy of Investigation

The petitioners argue that the findings of the investigation should be set aside because the witnesses who were interviewed by the District did not include pupils who were in Mrs. Kern's class, students who the petitioners reasonably contend were presumably in a position to see the interactions which he had with L.H. They note that the various staff members who were interviewed were not present in the classroom, only seeing L.H. either in their own classes or at times of transition from Kern's classroom, but not as she interacted with L.H. during the time he was with Kern. The Board does not dispute that it chose not to interview L.H.'s kindergarten classmates. It points out that there is no "policy, statute or regulation that requires a district to include interviews with classmates when an HIB investigation is directed at a teaching staff member." While it is true that there is no such explicit command, it is also true that if a district is to properly investigate an allegation of HIB conduct, it must reasonably determine the persons who may have information that tends to either support or refute the allegation. Thus, if pupils in a classroom are reasonably thought to be sources for such information relevant to the investigation, the overall need for a complete, thorough and fair investigation, as demanded by the Board's own policy, may demand that they be interviewed, subject of course to such safeguards as may be needed to protect the students and also to the reasonable discretion of the investigators as to exactly who they speak with. No blanket

rule commands that pupils either be interviewed or excluded from interviews. As such, the parents may well question why no students were asked about what they may have seen of the alleged harassing and intimidating conduct of Kern towards L.H. That said, as the Board notes, when it sought to interview L.H., the purported recipient of the HIB conduct and the one person, besides Mrs. Kern, most likely to be cognizant of what actually occurred, the parents chose not to allow such an interview. Thus, while the petitioners complain that the District did not conduct a fully appropriate and comprehensive investigation, they themselves contributed to the lack of a complete picture by not allowing their child to explain to the investigator exactly what L.H. said happened. The Board's policy, requiring a thorough and complete investigation, notes that the investigation "shall include . . . taking of statement from the victim", as well as other witnesses and the accused.

It must be emphasized that I recognize the difficulty presented in investigating any matter in which potentially significant witnesses are of kindergarten age. And I can readily understand that parents of a child who claims to have suffered HIB conduct might not want the child to have to undergo even the most mild and well-conducted interview about the matter. But if here the Board is to be criticized for the lack of any interviews with pupils, it must be noted that the most important of all student witnesses, whose input the investigator did seek, was withheld from them. As such, all that the investigator had that set forth what the alleged HIB conduct was, was what the parents related in the letters they wrote and discussions they had with District personnel. That information was second-hand, was presented in language indicative of likely adult input, lacked any real detail or any significant context, and was not the sort of first-hand information that would be obtained in a properly conducted investigation from the alleged victim. As such, it must be said that if the District did not conduct the full investigation the petitioners claim they wanted and the Board policy required, they contributed to that incompleteness. Perhaps the choice to do so was what was best for the child, but the petitioners must recognize that their choice added to any deficiency they claim in the investigation and may well have affected the result. Overall, given the information that the District had about the alleged misconduct by Mrs. Kern, I cannot criticize it for not choosing to interview

kindergarten students when the most relevant of those students was not permitted to tell the investigators any details of what is claimed to have been the serious misconduct that HIB legislation is meant to address.

I **CONCLUDE** that given the circumstances presented in this record, there is no material dispute of fact concerning the late institution of an HIB investigation by the Board. This conclusion is made despite any concern as to whether the limited information that was presented by the parents about exactly what their child claims occurred actually was even an effective claim of "HIB" type conduct concerning a "distinguishing characteristic" to which the statute speaks, as the limited information does not allow for any understanding of the context of Mrs. Kern's alleged comments about skills for which the child may have shown deficiencies. As the Board chose to conduct an investigation, a decision I do not mean to suggest was not an appropriate choice of how to proceed, and for the purposes herein it is assumed that they had to do so, they acted in an untimely fashion. That said, I do not see any basis to overturn the results of the investigation that was conducted merely because it was delayed. There is no basis for finding that the delay ultimately deprived the parents of their rights under the statute. An investigation was conducted after they decided, really at the outset of the matter and at a time when the record does not support that they had yet made an effective claim of HIB misconduct, to remove the child from the District. Whatever shortcomings the investigative process may have had, the delay did not seem to have contributed to these, and the petitioners do not suggest such.

Finally, I **CONCLUDE** that, given the information with which the District was provided and given that its representative could not interview the alleged victim of the HIB comments and actions, it conducted a sufficiently complete investigation such that the Board's decision to find no violation of the Anti-Bullying legislation cannot be deemed arbitrary, capricious or unreasonable or in bad faith. I **CONCLUDE** that deeming the investigation "inconclusive" under these circumstances would be a rather meaningless gesture, and may well be unfair to the accused teacher, who had no control over who the Board chose to interview and certainly no control or say regarding the lack of any direct

interview of her accuser. The District must nevertheless institute such corrective action to assure that once it is properly aware of an HIB allegation, that the investigation of such must be commenced in a timely fashion commensurate with the schedule established by the statute and the Board's own policy.

The petitioners' motion for summary decision is **DISMISSED**, with the notation of the direction to the Board concerning the need for timeliness in its response to HIB complaints and the investigative steps necessary to investigate such matters. The Board's motion for summary decision is **GRANTED**, with the same caveat. The Petition of 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.

September 22, 2021
DATE

JEFF S. MASIN, ALJ (Ret., on recall)

Date Received at Agency: 9/22/2021

Date Mailed to Parties: 9/22/2021

mph

EXHIBITS

For petitioners:

Exhibit A	Minutes of April 29, 2019 Meeting of Northfield Board of Education
Exhibit B	Letter dated April 29, 2019 to Board of Education
Exhibit C	Minutes of May 20, 2019 Meeting of Northfield Board of Education
Exhibit D	Letter dated May 23, 2019 to P.H. And K.G-H.
Exhibit E	Email dated July 2, 2019 from Maureen Vaccaro
Exhibit F	Letter dated June 21, 2019 to P.H.
Exhibit G	Letter from Pedro P. Bretones, undated
Exhibit H	Letter dated July 8, 2019 from Pedro P. Bretones
Exhibit I	Letter dated July 24, 2019 from Pedro P. Bretones
Exhibit J	Certificate of Service, dated October 11, 2019
Exhibit K	Letter dated April 6, 2020 and Interrogatories
Exhibit L	Emails dated April 6, 2020
Exhibit M	Northfield Board of Education Policy 5131.1 "Harassment, Intimidation and Bullying"
Exhibit N	Response to Interrogatories

For respondent:

Exhibit A	Harassment, Intimidation and Bullying (HIB) Investigation forms and statements of witnesses