

New Jersey Commissioner of Education
Final Decision

W.H., on behalf of minor child, Z.A.,

Petitioner,

v.

Board of Education of the City of Beverly,
Burlington County,

Respondent.

Synopsis

Pro se petitioner appealed the finding of the respondent Board that her son – at the time, a fifth grader at Beverly City School – 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.* Petitioner alleged that Z.A. was the victim of HIB when students said mean things to him after his absences from school caused them to lose an attendance contest and miss out on a pizza party. Petitioner also alleged that students made comments about a smell in the cafeteria that Z.A. felt were directed toward him. The Board contended that its actions had complied with the requirements of the Act, and no HIB was found in this case.

The ALJ found, *inter alia*, that: the required investigation into the alleged incidents of HIB was properly carried out by the Superintendent/Principal, who oversees the implementation of the HIB statute for the district, the Anti-Bullying coordinator, and the Anti-Bullying specialist – all of whom have substantial experience in the implementation of the HIB statute; the prompt and thorough investigation was in accordance with *N.J.S.A. 18A:37-14*, and concluded that there was a “back and forth” of unkind words between Z.A. and the other students regarding the effect of his absences on the class’ standing in the March attendance contest; the investigation did not, however, reveal any evidence that Z.A. was targeted due to a distinguishing characteristic about him, his race, his gender, his ethnicity, or any element of the HIB statute; instead, the evidence showed that the incident regarding Z.A.’s attendance represented a conflict between students that did not constitute HIB. The ALJ concluded that the petitioner did not meet her burden of demonstrating that the Board’s determination of HIB was arbitrary, capricious, or unreasonable. Accordingly, the ALJ denied petitioner’s appeal.

Upon a 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 determination as the alleged actions were not motivated by a distinguishing characteristic of Z.A. 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.

267-21
OAL Dkt. No. EDU 08075-19
Agency Dkt. No. 91-5/19

New Jersey Commissioner of Education
Final Decision

W.H., on behalf of minor child, Z.A.,

Petitioner,

v.

Board of Education of the City of Beverly,
Burlington County,

Respondent.

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

In this matter, petitioner alleged that her son was the victim of harassment, intimidation and bullying (HIB) when students said mean things to him after his absences caused them to lose an attendance contest and miss out on a pizza party. Petitioner also alleged that students made comments about a smell in the cafeteria that Z.A. felt were directed toward him. Following an investigation in accordance with the Anti-Bullying Bill of Rights Act, *N.J.S.A. 18A:37-13 et seq.*, the Board found the exchange of comments regarding Z.A.'s absences was a conflict between students that was not motivated by a distinguishing characteristic of Z.A. The Board also found the smell comments were unsubstantiated based on surveillance video and interviews with witnesses.

Following a hearing on the merits, the Administrative Law Judge (ALJ) concluded that the petitioner had not met her burden of demonstrating that the Board's

determination regarding the HIB allegations was arbitrary, capricious, or unreasonable. The ALJ also found that the Board conducted a prompt and thorough investigation in accordance with *N.J.S.A.* 18A:37-14.

Upon review, the Commissioner agrees with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination as the alleged actions were not motivated by a distinguishing characteristic of Z.A.¹ Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.²



ACTING COMMISSIONER OF EDUCATION

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

¹ Although the conduct of the students in this matter did not amount to an act of HIB under the Act, the Board should take steps to ensure that its code of conduct policy is enforced; and all students should be encouraged to interact with each other in a more positive manner.

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

OAL DKT. NO. EDU 08075-19

AGENCY DKT. NO. 91-5/19

W.H. on behalf of minor child, Z.A.,

Petitioner,

v.

CITY OF BEVERLY BOARD

OF EDUCATION, BURLINGTON COUNTY,

Respondent.

W.H. on behalf of minor child, Z.A., petitioner pro se¹

David B. Rubin, Esq., for respondent (David Rubin, P.C., Attorney at Law, attorneys)

Record Closed: June 21, 2021

Decided: July 30 2021

BEFORE JACOB S. GERTSMAN, ALJ t/a:

STATEMENT OF THE CASE

This matter comes before the Office of Administrative Law (OAL) as the result of petitioning parent challenging the conclusion of respondent, City of Beverly Board of Education's (District or Board) investigation that harassment, intimidation, and bullying (HIB) did not occur, pursuant to N.J.S.A. 18A:37-13.2 et seq.

¹ Petitioner was represented by counsel at the outset of the case. Counsel's motion to withdraw from the matter was granted by order dated March 5, 2020, and petitioner determined to proceed pro se.

PROCEDURAL HISTORY

Petitioner was notified by letter dated April 18, 2019, that the Board of Education upheld the Administration's finding that there was no instance of HIB in this matter on April 17, 2019. Petitioner filed her appeal on May 1, 2019, and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on June 13, 2019, for a hearing as a contested case. N.J.S.A. 52:14B-1 to B-15; N.J.S.A. 52:14F-1 to F-13.

The undersigned conducted multiple telephone prehearing conferences, which resulted in the scheduling of hearing dates for January 6 and 8, 2020. Those hearings were adjourned at the request of the parties. Following additional telephone conferences a hearing was scheduled for November 19, 2020, via Zoom Video Communications, Inc. (Zoom). On that date, petitioner failed to log on for the Zoom hearing and at my request, respondent's counsel was able to get petitioner on the phone. W.H. then informed me that she did not have access to a computer and requested an in-person hearing. The matter was then adjourned. On the January 28, 2021 telephone conference, petitioner stated that she was ready to proceed with a Zoom hearing, which was then held on March 29, 2021.

Respondent's post-hearing brief was submitted on June 15, 2021. The record was closed on June 16, 2021, after petitioner informed the undersigned that she would not be submitting a post-hearing brief.

FACTUAL DISCUSSION AND FINDINGS

Testimony for Petitioner

W.H., the mother of Z.A., testified that her son Z.A. came home on March 28, 2019, and informed her that students in his class were upset with him, and were calling him names. She added that the other students said that they did not like him because his absences from school caused them not to have a pizza party. The incident was reported to the school who found that the incident was not bullying.

There was no cross-examination.

Z.A. testified that he felt like he was being bullied on the day of the incident. The incident happened in the library, so he informed the library teacher, Mrs. Butler, who instructed him to tell his homeroom teacher Ms. Best. There were no problems the rest of the day, but he added that that the other students did not seem to like him.

On cross-examination, he remembered being asked to write a statement describing what happened but did not know if the other students were asked to write a statement. His mother also asked him to write a statement.

Testimony for Respondent

Dr. Elizabeth Giacobbe (Giacobbe), has served as the Superintendent of the District for ten years. The District, which consists of one school of approximately 350 pre-kindergartners through eighth graders, is housed in one building. Giacobbe additionally serves as the principal and oversees the implementation of the HIB statute. Her office is located in the school, and she is very acquainted with the students.

The District has adopted a policy that contains a definition of HIB that is consistent with that statute. At time of incident in March 2019, Giacobbe had over seven years of experience applying the definition of HIB. The school had one anti-bullying specialist, the school psychologist, Chelsea Light (Light), and an anti-bullying coordinator, Kerri Lawler (Lawler), the director of curriculum and instruction. By 2019, both had some experience in interpreting and applying the HIB statute in their respective roles.

On March 28, 2019, when picking Z.A. up from school, W.H. provided the school with a note from Z.A. describing the incident that happened that morning between him and several other students. Giacobbe made a photocopy of the written account.

Jodi Gottlieb (Gottlieb), the fifth-grade teacher and who was on duty supervising the children before homeroom began when the incident occurred, emailed Giacobbe on March 29,

2019, describing the incident. (R-1.) Giacobbe had requested that Gottlieb email her account of the incident. Under the District's HIB procedures, an investigation was initiated as a result of the allegations being brought to Giacobbe's attention.

During the investigation, Light and Lawler

[i]dentified the students from Z.'s note and interviewed each one of those students and got their written account of the incident. Z. also in his note made a claim that some of the students that were sitting near him that day in the cafeteria at their lunchtime which would have been after the morning -- the morning lineup that's discussed in the email -- somebody was saying a comment about that something smelled bad.

Then Mrs. Light and Ms. Lawler interviewed -- went back and reviewed the videotape to see who was sitting near Z. at the time in the lunchroom and interviewed those students as well to get the account of what occurred in the cafeteria during lunchtime."

TT 37: 1-16

By way of background, the school sponsors contests throughout the year to combat chronic absenteeism. In this instance, it was a "March Madness" competition, named for the annual NCAA Basketball Tournament. Each classroom was assigned a college or university team and the classes competed against each other based on their attendance rate, until one class became the overall winner of the tournament.

Z.A. was absent twice that week and some of his classmates questioned him when he returned to school, accusing him of causing the class to lose in the tournament. The investigation determined that the children engaged in a "back and forth" where the other students "did admit that they were sort of, you know, questioning him and upset with him, but that Z. also returned, you know, some -- some of the jabs back at the -- the kids verbally." (TT: 40: 17-20.) However, the investigation did not reveal any evidence that Z.A. was being targeted because of any particular distinguishing characteristic about him, his race, his gender, his ethnicity, or anything the HIB statute focuses on.

While the investigation did substantiate the students questioning Z.A. about his absences, it concluded that "since it didn't fall underneath the qualifying characteristic that it was not a harassment, intimidation and bullying case." (TT1 38: 24-25, 39: 1-2.)

That does not mean that the behavior of the students was acceptable and Giacobbe noted that Gottlieb found the behavior to be unacceptable and put a stop to it. (R-1.)

Regarding Z.A.'s assertion that other students were talking about a bad smell at the table in the cafeteria, meaning him, Giacobbe reviewed videotape surveillance footage² of the incident. The footage did not contain any audio. She determined that none of the students that Z.A. claimed to have made the comments were sitting near him. She questioned the students who were sitting at the table with Z.A. and all of them stated that no one made a comment about a smell.

As a part of the investigation, written statements were requested and received from Z.A. (R-6), Student A (R-7), Student B (R-8) and Student C (R-9). The students were also interviewed by Giacobbe, Light and Lawler with W.H. present during the interview with Z.A.

Giacobbe identified other documents related to the investigation including the March 29, 2019, letter to W.H. advising her that the investigation would be commencing and advising her of certain procedural rights (R-2); the April 4, 2019, letter to W.H. letter informing her that the investigation was concluded, and that the District determined that there was no HIB (R-3); the reporting form containing a summary of the allegations and factual findings of the anti-bullying specialist dated April 5, 2019, (R-4);³ and the April 18, 2019, letter from the District's counsel to W.H. confirming that she appeared for a hearing on April 17, 2019, and described the proceedings. (R-5.) W.H. was advised of her right to a hearing, which she exercised. At the hearing, W.H. and Z.A. were present and W.H. presented her version of events.

² Giacobbe testified that these videos are recorded over every month or so, as is the District's standard practice. She added that this video would have been preserved if she thought there would be litigation.

³ This form is not usually provided to parents. W.H. has only been provided with this document as a part of her appeal of the District's investigation.

Giacobbe concluded by stating that to the best of her knowledge, the HIB statute and Board policy procedures were followed.

On cross examination, Giacobbe was asked why she took the word of the other children at the lunch table when they could be covering for each other since if one got in trouble, they all could. She responded that Z.A. accused Y. and S. of making comments about a bad smell in the cafeteria, and the investigation found that they were not sitting near Z.A. Additionally, the investigation was not simply taking the word of Y. and S., as all of the students sitting near Z.A. in the cafeteria were interviewed.

She reiterated that there was no finding of HIB because “[u]nder the New Jersey Anti-Bullying Bill of Rights it does not meet the – their definition of harassment, intimidation and bullying as it was an equal balance of power and there was no distinguishing characteristics called into question.” (TT 65:1-5.)

Kerri Lawler is the Director of Curriculum and Instruction, and the Anti-Bullying Coordinator, for the District. In summarizing her involvement with the investigation, she noted that W.H. brought in the hand-written letter detailing Z.A.’s account of the incidents. The students named in the letter were then interviewed by Lawler, Light and Giacobbe, in order to get their version of the events, with their conclusions drawn from a review of all of the students’ accounts. She additionally viewed the videotape surveillance footage of the alleged incident in the cafeteria. Light assisted Lawler in drawing the conclusions based on the evidence, which they then shared with Giacobbe.

She concluded that the students did not use a distinguishing characteristic when they were talking with Z.A. and described the conflict as unkind things said back and forth between Z.A. and the other students.

There was no cross-examination on the issues germane to the instant matter.

Chelsea Light is the school psychologist and Anti-Bullying specialist for the District. Her responsibilities include conducting investigations when a bullying claim is made and working with the anti-bullying coordinator and superintendent to review her findings.

She has a familiarity with the statutory and policy definitions of HIB, which are not the same as the dictionary definitions.

During the investigation, Light reviewed the written statements and interviewed Z.A. with W.H. present. She then reviewed all of the statements, written testimony and video, and concluded that the incidents were a conflict between students without an imbalance of power, nor a highlighted distinguishing characteristic. Her determination was that the incidents did not constitute HIB.

There was no cross-examination.

FACTUAL DISCUSSION

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In Re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.

[Ibid. at 522.]

See also, Spagnuolo v. Bonnet, 16 N.J. 546, (1954), State v. Taylor, 38 N.J. Super. 6 (App. Div. 1955).

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, a trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or

because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

I deem the testimony of Giacobbe to be credible. Her testimony was calm, clear, and direct. Further, her professionalism and thorough understanding of both the HIB statute and the District's policy implementing the statute were apparent. I further deem the testimony of Lawler and Light to be credible. Their testimony, which corroborated Giacobbe, was professional and both witnesses demonstrated their substantial knowledge of both the HIB statute and the District's policy implementing the statute.

I additionally deem the testimony relevant to the instant matter of both W.H. and Z.A., to be credible. W.H.'s relevant testimony was limited to Z.A. informing her of the incident, her reporting of the incident to the school, and the ultimate finding of the investigation. Z.A.'s testimony focused on the fact that he felt bullied during the incident. It should be noted that W.H. did testify that she disagreed with the conclusion of the District's investigation. As she is a pro se litigant, and did not submit a post-hearing brief, that argument will be addressed in the legal analysis.

After consideration of the testimony and the credibility of the witnesses, I **FIND** as the following **FACTS**. The District has adopted a policy that contains a definition of HIB that is consistent with that statute. On March 28, 2019, W.H. provided the school with a statement from Z.A. detailing an incident between him and other students. (R-6.) That statement alleged that the other students were angry at him since his absences caused the class to lose in the school sponsored March Madness Tournament, which was instituted to combat excessive absences in the District. Z.A. also alleged that in the cafeteria during lunch, other students complained of a smell, which Z.A. took to mean him. (Ibid.)

On March 29, 2019, Gottlieb, the teacher supervising the students at the time of the incident, emailed Giacobbe, at her request, providing her account of the incident. (R-1) Gottlieb also noted that she found the behavior to be unacceptable and put a stop to it. (Ibid.) An investigation was then initiated in accordance with the districts HIB procedures. W.H. was notified of the investigation and advised of her procedural rights by letter dated March 29, 2019. (R-2.)

The investigation was conducted by Giacobbe, the superintendent and principal who oversees the implementation of the HIB statute, Lawlor, the Anti-Bullying coordinator, and Light, the Anti-Bullying specialist. All three have substantial experience in the implementation of the HIB statute.

The investigation included the review of written statements from Z.A. (R-6), Student A (R-7), Student B (R-8), and Student C (R-9). These students were all interviewed by Giacobbe, Lawlor, and Light. Z.A. was interviewed with his mother W.H. present. The video surveillance footage of the alleged incident in the cafeteria was also reviewed by the three investigators.

Light and Lawler drew their conclusions based on the evidence which was then shared with Giacobbe. The investigation did conclude that there was a "back and forth" of unkind words between Z.A. and the other students regarding the effect of his absences on the class' standing in the "March Madness" tournament. However, the investigation did not reveal any evidence that Z.A. was targeted due to a distinguishing characteristic about him, his race, his gender, his ethnicity, or any element of the HIB statute.

The investigation further found that there was no substantiation of Z.A.'s claim that students at his table in the cafeteria were talking about a bad smell, that he took to mean him. The videotape surveillance showed that the students accused by Z.A. were not sitting with him at the time of the incident. Those students, as well as the students who were seated with Z.A., all denied making or hearing these statements.

Accordingly, the conclusion of the investigation was that the incident regarding Z.A.'s attendance represented a conflict between students that did not constitute HIB. Notwithstanding this finding, the District did not find the behavior acceptable and Gottlieb, the teacher supervising the students at the time of the incident, put a stop to it. (R-1.)

On April 4, 2019, W.H. was advised by letter that the investigation had concluded, and that the District determined that there was no HIB. (R-3.) W.H. was advised of her right to a hearing, which she exercised. The hearing took place on April 17, 2019, where W.H. and Z.A. were present, and W.H. presented her version of events and contested the findings of the

investigation. The April 18, 2019, letter to W.H. from the District's counsel described the April 17, 2019, proceedings, notified her that the Board had upheld the findings of the investigation that there was no HIB, and advised her of her right to appeal. (R-5.)

LEGAL ANALYSIS AND CONCLUSIONS

The Anti-Bullying Act is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises." N.J.S.A. 18A:37-13.1(f). Under the act, HIB is defined as:

[A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (c.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

- a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
- b. has the effect of insulting or demeaning any student or group of students; or
- c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

[N.J.S.A. 18A:37-14.]

Each school district must adopt a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident. N.J.S.A. 18A:37-15. Once an alleged HIB incident is

reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A. 18A:37-15(b)(6). The investigation shall be conducted by a school anti-bullying specialist and shall take no longer than ten school days to be completed. Ibid.

The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial action. Ibid. The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." Ibid.

The parents of the students involved in any alleged HIB incident are entitled to receive information about the nature of the investigation and the results of the investigation. Ibid. The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Ibid. Any hearing shall be held in executive session to protect the identity of any students involved. Ibid. The board may hear from the anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents. Ibid.

The board must issue a decision at the first meeting after its receipt of the investigation report. Ibid. The board may affirm, reject, or modify the superintendent's decision. Ibid. The board's decision may be appealed to the Commissioner of Education. Ibid.

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

of Civil Serv., 39 N.J. 556, 562 (1963)], adopted, Comm'r (April 25, 2013) <<http://njlaw.rutgers.edu/collections/oal/>>. Finally, the Commissioner of Education will not disturb the local school board decision unless it was arbitrary, capricious, or unreasonable. Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960); Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966).

Here, petitioner challenges the District's investigation into the incident between Z.A. and the other students which concluded that there was no HIB. The District has adopted a policy that contains a definition of HIB that is consistent with that statute. Consistent with that policy, an investigation was initiated on March 29, 2019, one day after W.H. provided Z.A.'s written statement containing his allegations. The investigation, conducted by Giacobbe, the superintendent and principal who oversees the implementation of the HIB statute, Lawler, the Anti-Bullying coordinator, and Light, the Anti-Bullying specialist, concluded on April 4, 2019, with a finding of no HIB. W.H. was advised of her right to a hearing to contest the determination, which she exercised on April 17, 2019. W.H. presented her version of events and argued in opposition to the findings of the investigation. The Board upheld the findings and notified W.H. of her right to appeal. Accordingly, I **CONCLUDE** that the District's prompt and thorough investigation of Z.A.'s allegation satisfies the requirements set forth in N.J.S.A. 18A:37-15(b)(6).

Turning now to petitioner's challenge to the conclusions of the investigation. Giacobbe, Lawler and Light reviewed the written statements of, and conducted interviews with, the students involved in the incident, and concluded that Z.A. was not targeted based on his membership in one of the legally protected categories or some other "distinguishing characteristic" as set forth in N.J.S.A. 18A:37-14.

Here, the record is devoid of any testimony or documentary evidence to demonstrate that the students engaged in the "back and forth" targeting Z.A. based on a distinguishing characteristic. In fact, petitioner does not make this argument. W.H. testified "[w]hen I reported it to the school they told me he wasn't being bullied. They — they told me that there's certain — you have to be — it's like a list of things that you have to do in order to be considered bullying and I feel like it's — it shouldn't be that way. (TT 15: 25, 16: 1-3.)

W.H., like any parent, is seeking to protect her child from what she believes is bullying. However, not all disputes between students are subject to the HIB statute. M.S. and N.S. o/b/o J.S. v. Board of Education of the Township of Hainesport, OAL Dkt. No. EDU 8878-16, Agency Dkt. No. 151-5/16 (Initial Decision, March 28, 2019), adopted (Comm'r, June 18, 2019). ("It is important here to note that not all disputes between students, not all actions that may involve harassment, intimidation and bullying, necessarily come within the reach of the Act. The motivating element of the matter must be a 'distinguishing characteristic, actual or perceived, such as identified in the Act.") It should be noted that notwithstanding the findings of the investigation, the District does not dispute that the conduct was inappropriate, and the teacher dealt with it promptly. (District Brief at 8.)

With regard to the "smell comment" alleged by Z.A., the record demonstrates that the petitioner has failed to present any testimony or documentary evidence to contravene the findings of the investigation. Giacobbe, Lawler and Light reviewed the videotape surveillance and determined that the students accused by Z.A. were not seated near him at the time of the incident. Those students, as well as the students who actually were seated near Z.A., were subsequently interviewed and all denied making or hearing these statements. W.H. raised the issue of the students covering for each other to avoid getting in trouble for the incident. However, as Giacobbe testified, the investigation did not simply take the word of the students accused by Z.A. All students seated near him were interviewed and the surveillance video demonstrated that there was no opportunity for this incident to have occurred as alleged by Z.A.

Based on the forgoing, I **CONCLUDE** that petitioner has not met her burden to demonstrate that the conclusions of the investigation were made in bad faith. I **FURTHER CONCLUDE** that petitioner has not met her burden to show that the Board's determination, that the incident between Z.A. and the other students on March 28, 2019, was not HIB, was arbitrary, capricious, or unreasonable.

ORDER

It is **ORDERED** that petitioner's appeal of the conclusion of the District's investigation is **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 30, 2021
DATE



JACOB S. GERTSMAN, ALJ t/a

Date Received at Agency:

7/30/2021 emailed

Date Mailed to Parties:

7/30/2021 emailed

JSG/nd

APPENDIX

WITNESSES

For Petitioner:

W.H.

Z.A.

For Respondent:

Dr. Elizabeth Giacobbe

Kerri Lawler

Chelsea Light

EXHIBITS

For Petitioner:

None.

For Respondent:

- R-1 Email from J. Gottlieb to E. Giacobbe, dated March 29, 2019
- R-2 Letter from E. Giacobbe to W.H., dated March 29, 2019
- R-3 Letter from E. Giacobbe to W.H., dated March 18, 2019
- R-4 HIB Reporting Form, dated April 5, 2019
- R-5 Letter from D. Rubin, Esq., to W.H., dated April 18, 2019
- R-6 Statement of Z.A., dated March 28, 2019
- R-7 Statement of Student A, dated March 29, 2019
- R-8 Statement of Student B, dated March 29, 2019
- R-9 Statement of Student C, dated March 29, 2019