

New Jersey Commissioner of Education

Decision

J.B., on behalf of minor child, J.B.,

Petitioner,

v.

Board of Education of the Northern Valley
Regional High School District, Bergen County,

Respondent.

Synopsis

Petitioner alleged that on multiple occasions, the soccer coach for the Northern Valley Regional High School (NVRHS) bullied her son, J.B., because of his commitment to academics, in violation of New Jersey's Anti-Bullying Bill of Rights Act (ABRA), *N.J.S.A.* 18A:37-13 to -37. Upon review of the HIB specialist's report of the incidents in question, the Board concluded that the HIB investigation failed to show that petitioner was a protected class member or possessed an actual or perceived distinguishing characteristic which served as motivation for the alleged bullying. Petitioner asserted that both J.B.'s commitment to academics and his status as a student are distinguishing characteristics. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the petitioner, J.B.'s mother, has standing in this case; petitioner's assertion that the District did not follow the 2016 Annual Report of the New Jersey Anti-Bullying Task Force (ABTF) is without merit, as failing to follow the ABTF does not provide a basis for appeal in this forum, and no evidence supports a finding that the Board's HIB Policy failed to include all required provisions; review of the alleged incidents in this case fail to reveal that the coach targeted J.B. for his academic commitment, as the now-former coach's questionable treatment of his players was largely universal; and J.B.'s status as a student alone is not a distinguishing characteristic under ABRA. The ALJ concluded that the Board did not act in an arbitrary, capricious, or unreasonable manner in finding that no HIB occurred against J.B. Accordingly, the ALJ granted summary decision in favor of the Board and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ findings and conclusion, for the reasons thoroughly detailed in the Initial Decision. Accordingly, the Initial Decision of the OAL was affirmed 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.

April 13, 2021

New Jersey Commissioner of Education
Decision

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Petitioner,

v.

Board of Education of the Northern Valley
Regional High School District, Bergen 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.

Upon review, for the reasons thoroughly detailed in the Initial Decision, the Commissioner concurs with the ALJ that the Board's decision was not arbitrary, capricious, and unreasonable. Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED. ¹

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 13, 2021
Date of Mailing: April 13, 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
SUMMARY DECISION

OAL DKT. NO. EDU 04618-20
AGENCY DKT. NO. 51-2/20

J.B. ON BEHALF OF MINOR CHILD J.B.,

Petitioners,

v.

**BOARD OF EDUCATION OF THE NORTHERN
VALLEY REGIONAL HIGH SCHOOL DISTRICT,
BERGEN COUNTY,**

Respondent.

J.B., parent and power of attorney of J.B., pro se

Isabel Machado, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: January 28, 2021

Decided: March 8, 2021

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

Petitioner, JB, alleges that, on multiple occasions, the Northern Valley Regional High School (NVRHS) soccer coach bullied her son, J.B., because of his commitment to academics in violation of the Anti-Bullying Rights Act (ABRA), N.J.S.A. 18A:37-13 to -37. Yet, none of the coach's actions can be reasonably perceived as motivated by any actual or perceived distinguishing characteristic as required under ABRA. Is respondent entitled to summary decision? Yes. Under N.J.A.C. 1:1-12.5(b), summary decision is appropriate if no genuine issue of material fact exists and the moving party is entitled to prevail as a matter of law.

PROCEDURAL HISTORY

On February 27, 2020, petitioner filed a Verified Petition with the Commissioner of Education (Commissioner) challenging the Northern Valley Regional High School Board of Education's (Board or District) conclusion that no "harassment, intimidation, or bullying" ("HIB") violation occurred against her son, J.B.

The petition maintains that the Board improperly concluded that J.B. was not a protected class member and did not possess an actual or perceived distinguishing characteristic serving as motivation for bullying. Although the Board did not conclude a HIB violation under ABRA occurred, the Board found evidence of the impingement of J.B.'s rights, and a substantial disruption existed.

Specifically, the petition alleges that J.B., a senior in the District, was the systematic victim of verbal harassment, intimidation, and bullying at the hands of his varsity soccer coach, Jeremy Truppi, in violation of the ABRA. Petitioner also alleges that Coach Truppi was in a position of authority over J.B. as a coach and abused that power.

Moreover, petitioner disputes that J.B. has no distinguishing characteristics worthy of protection under ABRA and maintains that the District did not follow ABRA guidelines. Instead, petitioner asserts that both J.B.'s commitment to academics and his student status are distinguishing characteristics.

The petition seeks a finding that:

1. J.B. was the target of HIB.
2. The process that allowed Coach Truppi to remain in his position despite other HIB violations must be changed.
3. The District did not take appropriate measures to address the abuse.

On March 18, 2020, the Board answered the petition, denying any wrongdoing on its part.

Soon after, the New Jersey Department of Education (NJDOE), Bureau of Controversies and Disputes, transmitted this case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -13, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. The OAL filed the case on May 11, 2020.

On June 16, 2020, I held a pre-hearing conference wherein I requested that petitioner further explain the relief sought. The Board also provided documentation requested by the petitioner. The parties attempted to resolve this case but were not successful, and I scheduled hearings on January 19, and 20, 2021.

On November 5, 2020, I conducted a pre-hearing conference, and the Board requested leave to file a motion for a summary decision.

On December 3, 2020, the Board filed its motion.

On December 23, 2020, petitioner filed her opposition, and on January 4, 2021, the Board replied.

Petitioner requested to submit an additional response, and I granted that request.

On January 14, 2021, petitioner responded to the District's reply, and on January 28, 2021, the Board presented its sur-reply.

FINDINGS OF FACT

Based on the documents submitted in support of and in opposition to the motions for summary decision, when viewed in the light most favorable to the non-moving party, I **FIND** the following as **FACT** for purposes of these motions only:

J.B. is a former student of the District. At the time his mother, J.B., filed the petition on his behalf, J.B. was seventeen. J.B. is now eighteen and graduated in June 2020. After turning eighteen, J.B. provided his mother, J.B., with a power of attorney to act on his behalf in this case "conveying all the powers necessary to represent me and my interests" and to act in his name.

On October 8, 2019, the District received a verbal report of an alleged HIB violation against J.B. by Jeremy Truppi, the Varsity soccer coach at NVRHS.

On October 10, 2019, the District received a written complaint against Coach Truppi. Petitioner alleged that her son, then a senior, was "bullied, ostracized and singled out" because of his "bad behavior and commitment to academics." J.B. was enrolled in honors classes. J.B. quit the soccer team in the fall of 2019, in the last month of the soccer season.

The petition supplies instances of alleged bullying against J.B. because of his being intellectual and committed to academics:

- On several occasions, J.B. told Coach Truppi that he had a college-related meeting and would miss practice. In turn, Coach Truppi mocked J.B. and told him school should not be a priority. The Coach often told students that athletics should come first.
- Coach Truppi would blame JB for joining the team huddle last when he clearly wasn't the last one, for showing up to practice late when he had been there, and for being disrespectful when he was only asking questions. When another player got angry and threw a bottle, J.B. told the player to calm down. Coach Truppi told J.B. not to make other players feel bad encouraging poor behavior.
- During a drill, J.B. of running with his group onto the field at the wrong time, Coach Truppi looked at J.B. in anger and walked off the field, and other team members blamed J.B. J.B. texted Coach Truppi an apology, and Coach Truppi responded, "Let's talk tomorrow at 3:15. Bring your uniform." J.B. believed he would be kicked off the team.
- J.B. texted Coach Truppi that he could not attend practice due to a religious holiday and school closure. Coach Truppi texted the entire team that "Any freshman players who want to practice with varsity today, we would be happy to have you." J.B. asserts Coach Truppi repeatedly told the players he would replace them with freshman. J.B. was only permitted to play for thirty seconds in the game on the following day, unlike other games. J.B. felt punished.

The District no longer employs Coach Truppi. However, the District did retain Coach Truppi through at least November 2019 and the championship awards

ceremony. Other allegations regarding another student led to a finding of HIB violations against Coach Truppi in or around October 2019.²

At the time of the complaint, the District operated under an Anti-Bullying Policy (Policy) and had the appropriate personnel conduct HIB investigations to determine whether the alleged acts were a HIB violation.

Upon being notified of petitioner's complaint, Michael O'Malley, the lead counselor and NVRHS's Anti-Bullying Specialist, commenced a HIB investigation. O'Malley met with student witnesses, three coaches and reviewed written statements.

On Friday, October 18, 2019, O'Malley completed his investigation. On Monday, October 21, 2019, O'Malley issued his written report concluding that Coach Truppi's actions did not meet the definition of a HIB. Specifically, interviews and written statements were not "evidence to reasonably substantiate a distinguishing characteristic serving as motivation behind [Coach Truppi's] actions." (emphasis added). Thus, O'Malley noted that a key component to finding a HIB violation against J.B. was missing "despite there being evidence of substantial disruption due to the allegations."

O'Malley summarized the witness interviews as revealing consensus that Coach Truppi is "passionate" about "motivating his players to reach full potential as individuals and a team." However, at times, Coach Truppi was overly emotional, focusing "more on negatives than positives which can, at times, undermine the trust and confidence the players have in Coach Truppi as well as the team environment and culture." Yet, "there was also consensus among witnesses that Coach [Truppi] has not conducted himself in a manner different from the other coaches the players have played for in the past." Further, "there was growth in these areas" [of concern] throughout the three years of Coach [Truppi's] tenure leading up to the present."

² Petitioner maintains the Board sustained one HIB, and for purposes of this motion, I viewed the facts in the light most favorable to petitioner. The Board did not address the nature of or the imposed consequences of other HIB violations and, arguably, cannot do so. See N.J.S.A. 47:1A-1.1 (information regarding grievances filed against a public employee are not public records); see also Family Educational Rights and Privacy Act, 20 U.S.C. 1232g, 34 C.F.R. Part 99 (a school district cannot release a student's personal identifying information absent specific exception). Yet, HIB violations against other students are not relevant to whether Coach Truppi bullied J.B.

The Superintendent prepared a report noting that no HIB occurred against J.B. The Board met and accepted that conclusion.

On October 31, 2019, the Board mailed the “NOT HIB” report to petitioner, noting the findings and identifying no imposition of discipline or penalty.

Petitioner challenged that determination, and on November 26, 2019, she and her son, J.B., appeared and provided testimony. Still, the Board denied the appeal affirming the finding that J.B. was not a target of HIB. However, the Board advised that it took appropriate measures to address the concerns raised.

The 2016 Annual Report of the New Jersey Anti-Bullying Task Force (ABTF)³ recommended, in part, that the NJDOE provide guidance to assist practitioners in understanding the significance of power imbalance between adults and students in HIB. The Legislature established the ABTF to:

1. Provide guidance to school districts on available resources to assist in the implementation of the ABR.
2. Examine the implementation of the ABR.
3. Draft model regulations and submit them to the Commissioner of Education for use in promulgating regulations to implement provisions of the act.
4. Present any recommendations regarding the ABR deemed to be necessary and appropriate.
5. Prepare a report within 180 days of its organizational meeting and annually for the following three years on the effectiveness of the act in addressing bullying in schools.

³ <https://www.nj.gov/education/students/safety/behavior/hib/task.shtml>.

The NJDOE's 2011 Guidance for Parents on ABRA⁴ acknowledges that “students who appear to be intellectual or introverted” may be at greater risk for being bullied.

DISCUSSION AND CONCLUSIONS OF LAW

Summary-Decision Standard

A party may move for summary decision upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion shall be served with briefs, with or without affidavits. When the filed papers and discovery, together with any affidavits, show that no genuine issue of material fact exists and that the moving party is entitled to prevail as a matter of law, the judge may grant the motion. N.J.A.C. 1:1-12.5(b). When such a motion is made and supported, an adverse party, to prevail, must submit an affidavit setting forth specific facts showing that a genuine issue of material fact exists that can only be determined in an evidentiary proceeding. Ibid.

Even though a statute calls for a “hearing,” where a motion for summary decision is made and supported by documentary evidence and where the objector submits no evidence to demonstrate that a genuine issue of material fact exists, the motion procedure constitutes the hearing and no trial-type hearing is necessary. Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120–21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996). Disputes as to the conclusions drawn from the facts, as opposed to disagreements regarding the facts themselves, will not defeat a motion for summary judgment. Lima & Sons, Inc. v. Borough of Ramsey, 269 N.J. Super. 469, 478 (App. Div. 1994)).

To determine whether a genuine issue of material fact exists that precludes summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party,

⁴ <https://www.nj.gov/education/students/safety/behavior/hib/ParentGuide.pdf>

are sufficient to demonstrate that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995).

Moreover, even if the non-movant comes forward with some evidence, the court must grant summary judgment if the evidence is “so one-sided that [the movant] must prevail as a matter of law.” Ibid. at 536 (citation omitted). If the non-moving party’s evidence is “merely colorable or is not significantly probative,” the judge should not deny summary judgment. Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

The questions presented are whether the petitioner has standing, whether the case is moot, and if there is standing and the issue is not moot, whether the Board’s “No HIB’ determination was arbitrary, capricious, or unreasonable. Petitioner also asserts that this tribunal must determine whether the District failed to follow the 2016 ABTF report recommendations. In this case, no genuine issue as to the material facts exists. More pointedly, no genuine issue exists that petitioner is the parent of J.B. and has a power of attorney from J.B., that J.B. is now eighteen years of age, and graduated from NVHRS in June 2020. Moreover, the District no longer employs the coach accused of committing a HIB against J.B., and the District found other HIB violations against Coach Truppi concerning other students. J.B. took honor and A.P. classes while attending NVHRS and pursued college. Since these facts are clear and undisputed, I **CONCLUDE** that this case is ripe for summary decision.

Standing

A party must have standing to have the “ability or entitlement to maintain an action before the court.” In re Baby T., 160 N.J. 332, 340 (N.J.,1999). Standing is “a threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal.” In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super 61, 85 (App. Div. 2004).

New Jersey Courts set a relatively low threshold for standing that is more expansive than in the federal courts. In re Six Month Extension of N.J.A.C. 5:91-1 et seq., 372 N.J. Super. at 85. Standing is even more liberal within the State's administrative system. Steven L. Lefelt, Anthony Miragliotta, & Patricia Prunty, 37 New Jersey Practice, Administrative Law and Practice § 7.4, (rev. 2d ed. 2000); see Osborne v. Township of Lakewood Board of Education, EDU 6348-02, Initial Decision (May 16, 2003), modified, Comm'r. (August 26, 2003), <http://njlaw.rutgers.edu/collections/oal> (finding petitioner demonstrated a sufficient stake in the outcome of the proceedings to confer standing to pursue his claims).

Moreover, ABRA contemplates that a parent or guardian is involved in the HIB investigation process and disputes regarding a HIB determination. Specifically, parents or guardians are entitled to information about the investigation after the school district reports its investigation results to the board. N.J.S.A. 18A:37-15(b)(6)(d). The parent or guardian may then request a hearing before the board. Id. After the board determines whether to affirm, reject, or modify the superintendent's decision, parents or guardians may appeal the board's decision to the Commissioner of Education, under procedures outlined in law and regulation, "no later than 90 days after issuance of the board's decision." N.J.S.A. 18A:37-15(b)(6)(e).

Notably, when petitioner filed the case for J.B., her son was not eighteen years of age and enrolled in NVHRS. Petitioner asserts deficiencies in the investigation process and District's failure to consider her son's distinguishing characteristics in its determination through the "lens [of the] power imbalance" between the coach and her son.

Respondent primarily relies upon A.B. o/b/o/ E.R. v. Paterson Bd. of Educ. and Passaic County Technical Institute, EDS 16337-16, Final Decision (July 10, 2018), <http://njlaw.rutgers.edu/collections/oal/>, to support its position. In concluding that A.B. did not have standing for her eighteen-year-old son, E.R., the ALJ noted that A.B. would not have standing "unless she has in her position (sic) a transfer of those rights to her.

A.B. has submitted no such evidence in response to his (sic) motion or this proceeding. E.R.'s interests, in this case, may very well differ from those of his mother." Here, J.B. testified at the Board hearing disputing the determination that Coach Truppi committed no HIB violation against him and took significant steps to provide his mother J.B. with all powers necessary to litigate this case.

Similarly, respondent relies upon I.C.W. o/b/o J.W. v. Board of Education of The Borough of Mountain Lakes, Morris County, EDU 05838-11, Comm'r Decision 432-11 (October 14, 2014), <http://njlaw.rutgers.edu/collections/oal/>. In I.C.W., the Commissioner concurred that where a parent files a matter for their minor child who turns eighteen before the case concludes, the ALJ can afford the now 18-year-old adult the option to file a Certificate of Substitution or appear before the ALJ. Such an appearance would inform the ALJ that he/she would like his parents to proceed as his agents on his/her behalf. Further, a signed statement by the child was not enough. Here, the District did not challenge standing until the motion for summary decision making those options unavailable to date. Moreover, J.B. presents a notarized power of attorney specific to this case, endeavoring to provide his mother all powers and authority to act in his name. J.B. participated at the Board hearing, evidencing his disagreement with the Board's determination and that his interests are not different from those of his mother. Therefore, I **CONCLUDE** that petitioner, J.B.'s mother, has standing in this case and for purposes of this motion.

Mootness

An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For judicial economy and restraint, it is appropriate to refrain from decision-making when an issue presented is hypothetical, when judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. Anderson v. Sills, 143 N.J. Super 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd, Comm'r (May 3, 1999),; <https://njlaw.rutgers.edu/collections/oal/> S.J. v. Bd. of

Educ. of Mountain Lakes, EDU 07081-03, Initial Decision (October 7, 2003), aff'd, Comm'r (Nov. 17, 2003), aff'd, St. Bd. (Feb. 3, 2004). <https://njlaw.rutgers.edu/collections/oal/>.

In R.S. o/b/o G.M. v. State-Operated School District of the City of Paterson, Comm'r Decision 17-17, (January 13, 2017), <https://njlaw.rutgers.edu/collections/oal/>, the Commissioner determined that a student's graduation from school does not make the issue hypothetical. Petitioner challenged the HIB investigation on behalf of her minor child and sought to reverse the District's finding. Indeed, as here, "the challenge to the District's finding that the alleged conduct did not rise to the level of harassment or bullying" remained. See also, J.M. o/b/o T.M. v. Board of Education of the Town of Tinton Falls, Monmouth County, Comm'r Decision No. 39-14, (January 23, 2014), <https://www.nj.gov/education/legal/commissioner/> (finding that although the district no longer employed the coach accused of HIB conduct, petitioner's request for a determination that the coach committed acts of HIB was not moot).

Similarly, in M.D.G. ex rel. C.J. v. Board of Education of Atlantic City, EDU 6450-04, Initial Decision (April 27, 2005), adopted, Comm'r (May 26, 2005), <https://njlaw.rutgers.edu/collections/oal/>, the ALJ concluded that a school board violated the HIB statute in failing to investigate an incident of bullying properly. During the appeal, the student was withdrawn from the school and enrolled in another school within the same district. While the ALJ noted that "there is no immediate remedy readily available to [the bullied student]," he ordered the board to comply with ABRA by "conducting staff in-service programs" to assure that district's students "will be protected from harassment, intimidation or bullying in the future."

Although the District does not employ Coach Truppi and J.B. graduated for NVRHS, these facts do not make the case moot. Whether petitioner's son has graduated from the District is not relevant to the issue of whether the alleged conduct constituted HIB or whether the District followed NJDOE guidelines for HIB determinations. Therefore, I **CONCLUDE** the issues, in this case, are not moot.

ABRA

The Legislature designed ABRA “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 ABRA, “harassment, intimidation or bullying” (HIB) is defined 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.

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

As such, an incident must satisfy all four separate elements to meet the definition of HIB under the ABRA. ABRA protects against HIBs directed at students regardless if “such conduct emanates from students, teachers, or school administrators.” DeFalco v. Bd. of Educ. of the Twp. of Hamilton, Mercer County, EDU 2365-18, Initial Decision (June 25, 2019), adopted, Comm’r (July 26, 2019).

Each school district must adopt a HIB policy that meets minimum statutory requirements but generally has “control over the content of the policy.” N.J.S.A. 18A:37-15(a) and (b). The statutory requirements for a HIB policy include “a procedure for prompt investigation of reports of violations and complaints.” N.J.S.A. 18A:37-15(b)(6).

Under this procedure, “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,” and “[t]he 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 [HIB].” N.J.S.A. 18A:37-15(b)(6)(a). The school anti-bullying specialist reports the investigation results to the superintendent who, in turn, must reports the results 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.” N.J.S.A. 18A:37-15(b)(6)(b) and (c).

If parents request and participate in a hearing before the board, the board must issue a decision at the first meeting after its receipt of the investigation report. N.J.S.A. 18A:37-15(b)(6)(e). The board may affirm, reject, or modify the superintendent’s

decision. Ibid. A parent or guardian may appeal the board's decision to the Commissioner. Ibid.

Petitioner bears the burden of proof by a preponderance of the credible. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); DYFS v. M.R., 314 N.J. Super. 390, 414 (App. Div. 1998); In re Allegations of Sexual Abuse at E. Park High Sch., 314 N.J. Super. 149, 168 (App. Div. 1998). This tribunal must decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E.&A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

Significantly, 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). The Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). Indeed, the Commissioner will not overturn a local board's decision in the absence of a finding that the action below was arbitrary, capricious, or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/> (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)).

Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Env'tl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973),

aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, to prevail, the petitioner must demonstrate that the Board “acted in bad faith, or utter disregard of the circumstances before it.” G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014), (citation omitted), adopted, Comm’r (April 10, 2014), www.njlaw.rutgers.edu/collections/oal/.

O’Malley, who has no stake in finding HIB, conducted a thorough investigation but concluded that bullying was unsubstantiated against J.B. The superintendent recommended this finding to the Board. J.B. and his parents appealed, and the Board afforded a hearing but affirmed the conclusion that no HIB occurred. Thus, the Board argues that it correctly followed all necessary procedures and determined that the conduct described and investigated did not rise to a HIB.

Initially, to satisfy the statutory definition of HIB, the conduct must be “reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic.” N.J.S.A. 18A:37-14 (emphasis added). Yet, “[t]he statute has not limited ‘distinguishing characteristic’ to those specifically enumerated, but it has consistently required such a perceived motivation.” K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 351 (App. Div. 2011). “The Legislature intentionally included a very open-ended phrase, ‘any other distinguishing characteristic,’ to signal that the Act would apply to a broad, unlimited range of distinguishing characteristics, so long as the distinguishing characteristic motivated the bully to harass the targeted student.” L.P. and H.P. ex rel. L.P., EDU 04462-16, Initial Decision (June 10, 2016), adopted, Comm’r (July 25, 2016), <http://njlaw.rutgers.edu/collections/oal/>.

As the court reiterated in Evesham, the offending conduct must be motivated by a distinguishing characteristic for purposes of HIB. However, the statutory definition of HIB “does not include all violent or aggressive conduct against a student,” but it has

consistently required that the perceived motivation be a distinguishing characteristic. Id. at 350–51. The court also provided a summation of what does not constitute HIB:

Thus, harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation, does not come within the statutory definition of bullying.

[Id. at 351.]

The category “any other distinguishing characteristic” has been interpreted to include a variety of traits. For example, appearance and body type may be “distinguishing characteristics” under the HIB statute. See R.G.B. v. Village of Ridgewood Board of Education, EDU 14213-12, Initial Decision (May 15, 2013), adopted, Comm’r (June 24, 2013), <http://njlaw.rutgers.edu/collections/oal/> (finding a HIB violation occurred when a student called another student a “horse” and a “fat-ass” because it was reasonable to perceive those comments as motivated by the “distinguishing characteristic” of appearance or body-type). Similarly, in C.C. ex rel. S.C. v. Board of Education of Jefferson, EDU 10872-14, Initial Decision (April 6, 2015), <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm’r (May 12, 2015), <http://www.nj.gov/education/legal/>, a student’s comments that another student was “short” and “sucks at basketball” constituted HIB because it was reasonable to perceive those comments as motivated by the “distinguishing characteristic[s]” of height and sports proficiency.

Still, a “distinguishing characteristic” must be the motivation for the alleged bullying, even when the alleged bully is a teacher, coach, or staff member. In M.R. ex rel. M.R. v. Bd. of Educ. of the Ramapo Indian Hills Regional Sch. Distr., EDU 05308-16, Initial Decision (November 7, 2016), modified in part, Comm’r (December 21, 2016), <http://njlaw.rutgers.edu/collections/oal/>, a parent alleged that his daughter and three other cheerleaders were bullied by their cheerleading coach. The alleged HIB stemmed from an incident in which the cheerleader sent a text message to her coach stating that

she would be unable to attend the night's basketball game because she had other plans. In turn, the coach responded with a "strong bullying tone" informing her that she and any other cheerleader who missed the game would be off the team. The HIB investigation concluded that the coach did not engage in HIB against the cheerleader, and the board affirmed the findings. Importantly, no evidence supported that the coach's alleged actions' motivation was a distinguishing characteristic of the cheerleader.

Petitioner maintains that the question here is not whether the Board acted in an arbitrary, capricious, unreasonable manner. Instead, petitioner asserts the central issue is that the District did not follow the 2016 Annual Report of the New Jersey Anti-Bullying Task Force (ABTF). Specifically, petitioner contends that the 2016 ABTF reiterated conclusions of the 2014 ABTF that addressed the broadness of the term "any other distinguishing characteristic" noting,

By adding, 'any other distinguishing characteristic,' the Legislature's intent was clearly not to limit HIB to an incident that takes place because the HIB target has one of the specified characteristics. By viewing alleged HIB incidents through the lens of power differential, practitioners will be better able to identify those distinguishing characteristics that are less obvious and emerge only when considering the relative positions of the aggressor and the target, in terms of popularity, social standing, social awkwardness, or other less tangible characteristics."

[Ibid.]

No statutory amendment incorporated the ABTF recommendations or inclusion of language addressing an "imbalance of power" or similar terms. Indeed, the last revision to ABRA occurred in 2012. See P.L.2012, c.1⁵. The NJDOE published no formal guidance for schools or practitioners relating to the 2016 ABTF recommendation and last issued "Guidance to Schools on Implementing ABRA"⁶ in 2011.

⁵ <https://www.njleg.state.nj.us/2012/Bills/PL12/1>

⁶ <https://www.nj.gov/education/students/safety/behavior/hib/guidance.pdf>

Significantly, the alleged failure to follow recommendations of the ABTF does not provide a separate cause of action or an issue appealable to the Commissioner. Indeed, petitioner cites no Policy provision that is contrary to the law or that the Policy does not include all items required under the ABRA, as enacted. Notably, the Policy includes a HIB definition explaining that “bullying is unwanted, aggressive behavior that may involve a real or perceived power imbalance.” (emphasis added). The Policy also defines HIB mirroring the ABRA as an incident or incidents “reasonably perceived as being motivated either by any actual or perceived characteristic” to include “distinguishing characteristics” not covered by delineated traits. Petitioner suggests the Policy does not have distinct repercussions for those staff members committing HIB violations and the uneven relationship between staff members and students is insufficiently covered. However, the Policy includes all items required under N.J.S.A. 18A:37-15b, and identifies consequences for HIB violations. The Policy also advises staff members that “consequences and remedial action” could entail discipline. Thus, I **CONCLUDE** that failing to follow the ABTF does not provide a basis for appeal in this forum, and no evidence supports that the Policy fails to include required provisions.

Petitioner suggests that the investigator and the Board did not review the alleged HIB incidents “through the lens [of the] power differential.” Further, the investigator was unable to identify those distinguishing characteristics of J.B. Had O’Malley followed the ABTF guidelines requiring him to view the “relative positions of the aggressor and the target,” J.B.’s distinguishing characteristics would be evident.

Yet, O’Malley’s report did not conclude that J.B. was not “committed to academics” or that he did not have a distinguishing characteristic worthy of protection. Instead, there was insufficient evidence that J.B. was the victim of an alleged HIB because he was committed to academics or intellectual. Under ABRA, the misconduct must be “reasonably perceived as being motivated either by any actual or perceived characteristic” to qualify as a HIB violation. N.J.S.A. 18A:37-14. (emphasis added).

A careful review of the incidents does not reveal that Coach Truppi targeted J.B. for his academic commitment. Undeniably, Coach Truppi felt the players should make the team and the team's success their most important responsibility and was aggressive in his tactics to motivate the team. He discouraged any player missing practices, "focused on the negatives," and this "undermine[d] the trust and confidence the players have in Coach Truppi as well as the team environment and culture." In other words, his questionable treatment of the players was largely universal. Still, since the incidents complained of do not support that Coach Truppi targeted J.B. because of his commitment to academics, I **CONCLUDE** that a preponderance of the evidence does not exist that Coach Truppi committed a HIB violation against J.B. Moreover, having determined that Coach Truppi did not commit a HIB against J.B., the Board was not required to impose discipline.

Petitioner also argues that J.B.'s status as a student might be considered a second "distinguishing characteristic" under ABRA. Petitioner suggests that as an adult coach, Coach Truppi was "in a position of power using his authority control to harass, haze, and bully a subordinate student under his care."

Yet, ABRA only applies to HIB committed against students; its intention is not to address HIB committed against adults. If status as a student alone were sufficient to substantiate an HIB finding, the additional requirement that the misconduct be motivated by a "distinguishing characteristic" would be superfluous. Undeniably, ABRA requires something more.

For example, in Elrhard v. Bd. of Educ. of the Hunterdon Central Regional Sch. Dist., EDU 00188-14, Initial Decision (September 28, 2017), adopted, Comm'r (December 21, 2017), <http://njlaw.rutgers.edu/collections/oal/>, the alleged acts by the baseball Coaches included "unfair playing time, favoritism, profanity, and being too hard on the players." Moreover, the Coaches purportedly threatened to demote the player to the junior-varsity team and guilted the player into coming to practice during a family vacation. Yet, there was no link between the alleged conduct and the distinguishing characteristic of weakness or meekness to demonstrate that the actions were motivated

by said characteristic, as required under ABRA. The Commissioner also agreed that the distinguishing characteristic under ABRA must be more specific than merely the imbalance of power that exists by nature of the position of an adult teacher or Coach and the minor child. Indeed, not all aggressive, harmful, or demeaning conduct constitutes a HIB. Evesham, 423 N.J. Super. at 351. Thus, I **CONCLUDE** that J.B.'s status as a student alone is not a distinguishing characteristic under ABRA. Therefore, I **CONCLUDE** that the Board and District did not act in an arbitrary, capricious, or unreasonable manner in finding that no HIB occurred against J.B. and that, as a matter of law, summary judgment is appropriate in their favor.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the District be **GRANTED** summary decision, and that the Petition of Appeal be **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.

March 8, 2021



DATE

NANCI G. STOKES, ALJ

Date Received at Agency:

March 8, 2021

Date Mailed to Parties:

March 8, 2021

ljb