

447-24
OAL Dkt. No. 04986-24
Agency Dkt. No. 72-3/24

New Jersey Commissioner of Education
Final Decision

R.M. and J.M., on behalf of minor child, O.M.,

Petitioners,

v.

Board of Education of the Borough of
Mountain Lakes, Morris 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.

This matter concerns a determination by the Mountain Lakes Board of Education (Board) that petitioners' son, O.M., committed an act of harassment, intimidation, and bullying (HIB) when he made a comment towards a Black student that included the n-word. The student (complainant) reported the incident on June 8, 2023. Her HIB reporting form indicated that at approximately 10:00 am on June 8, 2023, "I was walking up the ramp when they called me the n-word from behind. Asked if they had a problem and told them I would knock their teeth out right now. I called my mom and she told me not to." (Complainant's HIB 338 Form). The complainant's reporting form lists O.M. and another student (student #2) as the alleged offenders.

The Board commenced an HIB investigation on June 8, 2023, the day of the alleged incident. According to the HIB Investigation Report, Anti-Bullying Specialists interviewed the alleged offenders that afternoon. O.M. reported that he and student #2 were trying to get into a friend's class. They were walking behind a teacher, Ms. Geveke, and the complainant "was in the middle" so student #2 said "move, move, move," to O.M. so they could avoid being seen by the teacher. (HIB Investigation Report). O.M. also wrote in a witness statement dated June 8, 2023, that student #2 said the words, "move, move, move" while walking behind the complainant and her friend. (O.M.'s Written Statement). O.M. further explained that he and student #2 were confused when the complainant then turned around and said, "What did you say?" and that she would "knock [their] teeth out." (HIB Investigation Report). When questioned, both O.M. and student #2 denied using the n-word during the encounter.

The HIB Investigation Report indicates that investigators tried to speak with the complainant on June 8, 2023; however, she had been picked up from school early. Prior to the complainant leaving school, her mother reported to Vice Principal Lisa Cortese that the complainant was "upset and feeling uncomfortable in school." *Ibid.* Anti-Bullying Specialists interviewed the complainant the following day, on June 9, 2023. The complainant explained that she was walking up a ramp to class the previous morning, and O.M. and student #2 were walking behind her; "[t]hey said something before something nigger and then they said something else." *Ibid.* Following the incident, the complainant went to the bathroom and told her mother over the phone that "someone called me nigger in the hallway." *Ibid.* When asked who did it, the complainant identified OM and another student she did not know. The complainant also reported that Mountain Lakes teacher Linda Aldrich was in a bathroom stall while she was

speaking to her mother and that when Aldrich came out, she told the complainant to come to her room if she had a problem. The complainant noted that she went to Aldrich's room and told her what happened; from there she and Aldrich went to the principal's office to report the incident.

Aldrich recounted, in a written statement dated Thursday, June 8, that she "overheard [the complainant] on the phone with her mother." (Linda Aldrich's Written Statement). Aldrich noted that the complainant "was very upset about what 2 boys had said behind her back in the hallway between classes." *Ibid.* Aldrich states that the complainant later came to her room and reported that "two boys were behind her on the ramp near room 341. She heard them say, 'Go nigger, go.'" *Ibid.*

The investigators concluded that an act of HIB had occurred based on the information collected in the investigation. Further, the investigators found that the victim was targeted based on her race and color and that she feared being verbally harassed by the alleged offenders inside of school. The students were given 3 days of out-of-school suspension, and counseling was provided to the complainant. Superintendent Michael Fetherman affirmed the findings of the investigation. Petitioners appealed this matter to the Board, and a hearing was held on September 19, 2023. Petitioner's counsel and O.M. appeared. O.M. told the Board that he had said, "Move, Nikki, move." The Board vacated the HIB finding and remanded the matter to the administration for further investigation and review given the new evidence provided by O.M. during the hearing.

On September 28, 2023, the District commenced a second investigation. In his interview, O.M. disclosed that *he*, not student #2 was the speaker and that he had said, "Move, Nikki,

move.” (Addendum Report). When reminded that his written statement from the day of the incident states the words, “move, move, move,” O.M. responded, “I am not sure why I said two different things.” He then added, “They are both correct.” *Ibid*. When questioned further about the discrepancy in his statements, O.M. refused to answer, and the interview ended. Student #2 was interviewed that day also and stated that O.M. was the speaker, and said, “Move, Nikki, move.” *Ibid*. During the complainant’s September 28, 2023, interview, she reported that she heard O.M. and student #2 say the n-word but was not “100% sure what else they said, but it was something like walk nigger walk or go nigger go.” *Ibid*.

The second investigation concluded that O.M. committed HIB against the complainant. Fetherman found the complainant to be credible and noted her visceral reaction caught on surveillance camera, indicating her displeasure with the use of the n-word. In contrast, he found that O.M. was not credible and that he and student #2 made up the testimony, “Move, Nikki, move” to avoid responsibility. Further, Fetherman found that O.M. said, “Walk, nigger, walk or Go, nigger, go.” (Notice of Board Decision, 10/19/23). The Board affirmed Fetherman’s decision and petitioners appealed the HIB finding to the Commissioner of Education. Petitioners argue that the HIB investigation was incomplete as the Board failed to interview additional witnesses who they believe were in the hallway during the incident. Petitioners also allege that the investigation did not produce sufficient evidence to support the finding of HIB.

After the matter was transmitted to the OAL, the Board filed a Motion for Summary Decision, and the petitioner filed opposition. The Board then filed its reply. The ALJ granted the Board’s motion for summary decision, concluding that the action that the Board took to determine whether O.M. engaged in HIB conduct was not arbitrary, capricious, or unreasonable.

Specifically, the ALJ concluded that the Board properly conducted the required investigation and that Fetherman's findings supported the Board's determination that O.M. engaged in HIB.

Upon review, the Commissioner concurs with the ALJ's conclusion that the Board's HIB determination was not arbitrary, capricious, or unreasonable. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. Bd. of Educ. of W. Orange*, 60 N.J. Super. 288, 294 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration," and the Commissioner will not substitute his judgment for that of the board. *Bayshore Sewerage Co. v. Dep't of Env't Prot.*, 122 N.J. Super. 184, 199 (Ch. Div. 1973), *aff'd*, 131 N.J. Super. 37 (App. Div. 1974). Regarding HIB determinations, this standard has been explained as requiring a petitioner to "demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." *G.H. and E.H. o/b/o K.H. v. Bd. of Educ. of Borough of Franklin Lakes*, Bergen Cnty., OAL Dkt. No. EDU 13204-13 (Initial Decision, Feb. 24, 2014), adopted, Commissioner Decision No. 157-14 (Apr. 10, 2014).

The Anti-Bullying Bill of Rights defines HIB as follows:

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

the orderly operation of the school or the rights of other students and that:

a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;

b. has the effect of insulting or demeaning any student or group of students; or

c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

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

Here, the record shows that the Board's investigation was sufficiently thorough. The Board commenced an HIB investigation regarding O.M.'s alleged comment on June 8, 2023, the day of the alleged incident. The HIB Investigation Report and Addendum Report indicate the methodology the Board utilized in reaching the HIB determination. The Anti-Bullying Specialists interviewed both alleged offenders hours after the incident, and interviewed the complainant the following day, on June 9, 2023. The investigation also considered the complainant's HIB report form, and written statements from the complainant, Aldrich, O.M. and student #2, that were dated June 8, 2023, the day of the incident. The Board vacated their HIB determination and reopened the investigation after O.M. provided new information. The complainant, student #2, and O.M. were all interviewed again on September 28, 2023, and the investigators inquired into O.M.'s inconsistent testimony. Lastly, video surveillance of the incident was also reviewed during the investigation. Given the written statements, interview notes, remand upon the discovery of new testimony, and the review of video surveillance of the alleged incident, the Commissioner concurs with the ALJ that the Board properly undertook the required investigation.

Petitioners argue that the HIB investigation was not complete or thorough because the Board failed to interview Ms. Geveke and the complainant's friend, both of whom they allege were in the hallway at the time of the incident. In addition, petitioners argue that the Board failed to seek out additional witnesses that were in the vicinity of the incident, which unreasonably turned the investigation into a battle of credibility between the complainant and the alleged offenders. However, the Investigation Report indicates that the Board had already utilized a reasonable methodology in investigating the alleged HIB. For the Commissioner to hold that interviewing other witnesses would have been more reasonable than the investigative steps the Board took would require the Commissioner to substitute his judgment for that of the Board's, which is impermissible.

Furthermore, any testimony indicating that the alleged offenders did not say the n-word would, at most, balance the other evidence on the record from the complainant and Aldrich that O.M. did say the n-word. While evidence may leave room for two opinions regarding whether O.M. said the n-word, it is insufficient to overturn the Board's decision, since it does not demonstrate that the Board's decision was arbitrary, capricious, or unreasonable.

The ALJ correctly concluded that Fetherman's findings, as reported to the Board, supported the Board's determination that O.M. committed HIB. Fetherman's findings are sufficiently supported by the record. In the Addendum Report, Fetherman found the complainant to be credible. He referenced the complainant's emotional phone call with her mother that was overheard by Aldrich, unbeknownst to the complainant. Fetherman also noted that the complainant provided consistent testimony whenever asked about the incident; for instance, the complainant was steadfast in her allegation that the comment included the n-word,

and she consistently identified O.M. as an alleged offender from the beginning. Lastly, Fetherman found that the video surveillance footage showed the complainant's visceral response to the use of the n-word.

In a letter to petitioners, dated October 19, 2023, Fetherman found that O.M. was not credible due to inconsistencies in his testimony throughout the investigation as well as O.M.'s response when confronted with said inconsistencies. The record supports Fetherman's credibility finding regarding O.M. In both his written statement and his interview from June 8, 2023, O.M. reported that student #2 was the speaker, and that he had said, "Move, move, move." At that time, neither O.M. nor student #2 reported that O.M. had said, "Move, Nikki, move." During the remand interview, O.M. could not account for the discrepancy in his testimony, stating that both comments are correct. He then refused to answer further questions. Fetherman concluded in the Addendum Report that O.M.'s reluctance to answer questions regarding his inconsistent testimony contributed to his lack of credibility as he was unwilling to make a case for his innocence in response to the allegations.

Lastly, Fetherman's findings in the October 19, 2023, letter – that O.M. directed a comment with the n-word towards the complainant, who is African-American; that the comment was reasonably perceived to have been motivated by the complainant's race; and that O.M.'s comment interfered with the complainant's rights in violation of the Anti-Bullying Bill of Rights and the Board's HIB policy – are sufficiently supported by the record. As such, the Board's reliance on Fetherman's findings in reaching the HIB decision is not arbitrary, capricious, or unreasonable, nor does it "...demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." *G.H. and E.H. o/b/o K.H. v. Bd. of Educ. of Borough of Franklin*

Lakes, Bergen Cnty., OAL Dkt. No. EDU 13204-13 (Initial Decision Feb. 24, 2014), *adopted*, Commissioner Decision No. 157-14 (Apr. 10, 2014).

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: December 9, 2024
Date of Mailing: December 11, 2024

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 04986-24

AGENCY DKT. NO. 72-3/24

R.M. AND J.M. ON BEHALF OF MINOR

CHILD, O.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH

OF MOUNTAIN LAKES, MORRIS COUNTY,

Respondent.

Joseph J. Bell, Esq., for Petitioners (Bell, Shivas & Bell, P.C., attorneys)

Sean W. Fogarty, Esq. for Respondent (Fogarty and Hara, Esqs., attorneys)

Record Closed: August 16, 2024

Decided: September 30, 2024

BEFORE **R. TALI EPSTEIN**, ALJ:

STATEMENT OF THE CASE

Petitioners challenge a determination that O.M., their minor son, engaged in Harassment, Intimidation, and Bullying (HIB) against an African-American student on June 8, 2023 (the “Incident”), when he made a comment directed at the student that

included the word “nigger.” Should the HIB conclusion stand, even though O.M. claims he did not utter that word during the Incident? Yes. Respondent’s determination is entitled to a presumption of correctness, and petitioners have not established that it is arbitrary, capricious, or unreasonable.

PROCEDURAL HISTORY

On March 19, 2024, R.M. and J.M. (Petitioners) filed a Verified Petition of Appeal (Petition) with the Commissioner of Education (Commissioner) challenging the HIB determination made by the Mountain Lakes Board of Education (Board, or Respondent) against Petitioners’ son, O.M. (Certification of Sean Fogarty, dated July 17, 2024, Ex. A.) The Petition alleges that the HIB investigation was not thorough or complete in that additional witnesses were not interviewed, and the HIB determination was not supported by the record and/or based on disputed findings. (Id., Ex. A, ¶¶ 21-23; 31-33.) The Petition also asserts procedural deficiencies with the Board’s actions. (Id., Ex. A, ¶ 34.) Petitioners seek to set aside the Board’s decision and remove the HIB finding from O.M.’s records on the grounds that the Board’s determination was arbitrary, capricious, and unreasonable. (Id., Ex. A, ¶ 36.)

On April 9, 2024, Respondent answered the Petition denying Petitioners’ allegations of wrongdoing. (Id., Ex. B.) In its Answer and Separate Defenses, Respondent maintains that it followed all required procedures and that its decision met the HIB criteria. (Id., Ex. B.) Respondent demands judgment for relief, ordering that the Petition be dismissed with prejudice and declaring that its finding that O.M. engaged in conduct which constituted HIB was not arbitrary, capricious or unreasonable. (Id., Ex. B, Wherefore Clause).

On June 13, 2024, Respondent served its first set of Interrogatories and Request for Admissions on Petitioners. (Id., Ex. C.) Respondent’s counsel further certifies that Petitioners did not object to the Request for Admissions or provide written discovery responses by the June 28, 2024, deadline, and the matters are deemed admitted pursuant to N.J.A.C. 1:1-10.4(c). (Id., ¶¶ 4-5.) Petitioners purported to serve belated, unsworn and undated responses, which were forwarded by email on July 24, 2024.

The Department of Education (DOE) transmitted this case to the Office of Administrative Law (OAL), where it was filed on April 10, 2024, 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 matter was assigned to me on April 19, 2024. Following a prehearing conference and subsequent communications with the parties, I issued a prehearing order on May 31, 2024, which provided, among other things, a summary decision briefing schedule.

On July 17, 2024, the Board timely filed its motion for a summary decision. Petitioners filed their opposition on August 9, 2024, three days past the ordered deadline. Regardless, the tribunal excuses Petitioners' delinquency and has considered the opposition as if it were timely submitted. On August 16, 2024, the Board timely submitted its reply papers.

FINDINGS OF RELEVANT FACT

Based on the documents submitted in support and opposition to the motion for summary decision, and when viewed in the light most favorable to the non-movants, I **FIND** the following **FACTS**:

It is undisputed that O.M. was a ninth-grade student attending Mountain Lakes High School (Mountain Lakes) at the time of the Incident, on June 8, 2023. The parties also acknowledge that O.M. has a 2023–2024 Individualized Educational Program. There is no claim that O.M.'s eligibility for special education at Mountain Lakes impacted his ability to fully appreciate his conduct or the Board's determination that he engaged in a violation of the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A37-13 to -32 (ABBRA), as adopted by the Board Policy No. 5512.

Regarding the Incident and the ensuing investigation, the following facts are also undisputed:

On or about, June 8, 2023, Mountain Lakes received a report of a HIB allegation that occurred on the same day on “the ramp leaving the new wing” of the high school building. (Certification of Michael Fetherman, dated July 17, 2024, Ex. B.) As described verbatim in the HIB 338 Form (the “reporting form”), the Victim (student S.B.) reported that, at approximately 10:00 am, she “was walking up the ramp when they called me the nword [sic] from behind. Asked if they had a problem and told them I would knock their teeth out right now. I called my mom and she told me not to.” (Id., Ex. B.) The reporting form further identifies O.M. and another student as the alleged offenders. (Id., Ex. B.)

The Victim completed the reporting form after Linda Aldrich (Aldrich), a Mountain Lakes teacher, “overheard [the] Victim on the phone with her mother.” (Id., Ex. D.) In her witness statement, dated June 8, 2023, Aldrich recounted that the Victim “was very upset about what 2 boys had said behind her back in the hallway between classes.” (Id., Ex. D.) Aldrich’s statement further detailed that she told the Victim that she “was available in the art room if [the Victim] needed [her] help.” (Id., Ex. D.) The Victim “came to [Aldrich] and told [her] that two boys were behind [the Victim] on the ramp near room 341.” [The Victim] heard them say, “Go nigger, go.” After listening to the Victim’s account, Aldrich told her that the Incident “needed to be reported and [they] went to see [the principal].” (Id., Ex. D.)

In her witness statement, written the same day in the principal’s office, the Victim wrote that “I was walking in the hallway and I hear nigger from behind me. I turned around and asked if they had a problem. [T]hey said no they were talking about/to someone else. Told them I’ll knock their teeth out and kid said do it. I choose [sic] not to so there wouldn’t be another problem for me.” (Id., Ex. C.) The Victim also filled out the HIB 338 Form.

Mountain Lakes’ Anti-Bullying Specialists/Investigators, Maria Lindsay (Lindsay) and Cara Pelchat (Pelchat), investigated the Incident with the assistance of Vice

Principal Lisa Cortese (Cortese). Their investigation commenced on the day of the Incident.

The HIB Report notes that the investigators tried to interview the Victim on June 8, 2023, but she was picked up from school early. (Id., Ex. E.) The Victim's mom had previously advised Cortese that her daughter might be picked up early by her grandmother because she was "upset and feeling uncomfortable in school." (Id., Ex. E.) The Victim was picked up at 12:05 pm by her grandmother. (Id., Ex. E.)

At 12:23 pm on June 8, 2023, Lindsay and Pelchat spoke with O.M. A case manager also sat in on the discussion. (Id., Ex. E.) As detailed in the HIB Report, O.M. explained that he and another student (Offender 2) were walking behind a teacher (Ms. Geveke), and the Victim "was in the middle," so Offender 2 said "move, move, move" to O.M. "so that they could get out of Ms. Geveke's sight." (Id., Ex. E.) O.M. used the same words ("move, move, move") in the June 8, 2023, witness statement that he wrote, but in the written statement, O.M. does not clarify to whom the words were directed (i.e., to O.M. or to the Victim.) (Id., Ex. F.)

O.M. further reported to the investigators that he and Offender 2 "were confused" when the Victim turned around and said, "What did you say?" and that she would knock their teeth out. (Id., Ex. E.) O.M. said that he was laughing when Offender 2 responded to the Victim and told her to "go ahead." (Id., Ex. E.) When O.M. was questioned if he used the "N-word," he said "no." (Id., Ex. E.)

Offender 2 was questioned after O.M., and he also denied using the "N-word" during the encounter described by O.M. (Id., Ex. E.)

On the following day, June 9, 2023, Lindsay and Pelchat met with the Victim to obtain her statement. The following abbreviated account is taken from the HIB Report: The Victim identified O.M. and Offender 2 and recounted that "[t]hey said something before something nigger and then they said something else and I turned around [and] said do you have a problem and they said no we were talking to someone else, about someone else, but there was no one else in the hallway." (Id., Ex. E.) The Victim also

reported that she turned toward Offender 2 and said she would knock his teeth out because she thought he was the one who responded to her, but instead walked away and called her mother. The Victim told her mother that “someone called me a nigger in the hallway.” (Id., Ex. E.) When her mother asked her who did that, the Victim told her “it was OM and some other kid.” (Id., Ex. E.) This was the conversation that Aldrich overheard in the bathroom.

The Victim then relayed how Aldrich told her to come talk to her if she had a problem, and after hearing what transpired, they went to speak to the principal. When the principal asked the Victim if she knew “who it was,” she responded that “she was pretty sure it was O.M.” (Id., Ex. E.) The Victim also confirmed that she left school early on the day of the Incident because she “didn’t feel comfortable in school” and “you never know what will happen . . . like if [she] was going to be harassed or jumped.” (Id., Ex. E.)

The HIB Report “concluded that the Incident” was an “act of HIB.” (Id., Ex. E.) The conclusion was “[b]ased on the information collected in the investigation,” which supported the finding that the Victim, who is African-American, was “targeted based on her race and color and was in fear of being verbally harassed by the alleged offenders inside of school.” (Id., Ex. E.)

The results of the HIB investigation were reported to Superintendent Michael Fetherman (Fetherman). (Id., ¶ 17.) After reviewing the HIB Report, Fetherman decided to affirm the findings because he “agreed there was evidence which suggested that the alleged HIB behavior was motivated by a distinguishing characteristic of the Victim.” (Id., ¶ 17.) Fetherman then reported the results of the investigation to the Board. (Id., ¶ 17.)

On or about June 16, 2023, Fetherman notified Petitioners of the results of the HIB investigation and their right to request a hearing before the Board. (Id., Ex. G.) Petitioners requested a hearing, which was adjourned to September 19, 2023, to accommodate Petitioners’ schedule.

On September 19, 2023, the Board held a HIB appeal in executive session. Petitioners' counsel presented arguments, and O.M. testified. When O.M. addressed the Board, he reported that he (not Offender 2) said, "Move, Nicki, move." (Id., Ex. I.) The day after the hearing, the Board wrote to Petitioners, advising that their prior determination would be modified by vacating the HIB finding and remanding the matter for further review and investigation. (Id., Ex. I)

Accordingly, the District conducted a further investigation on September 28, 2023, and prepared an Addendum Report. (Id., Ex. J.)

As reflected in the Addendum Report, when O.M. was interviewed for the second time, he admitted that he (not Offender 2) was the speaker and that he said, "Move, Nicki, move." (Id., Ex. J.) When asked why he used the words "move, move, move" in his statement that was written on the same day of the Incident, he replied, "I am not sure why I said two different things" and then added, "They are both correct." (Id., Ex. J.) When further challenged, O.M. stated that he did not want to answer further questions, and the interview ended. (Id., Ex. J.)

During Offender 2's interview on September 28, 2023, he corroborated O.M. new account that O.M. was the speaker and that O.M. said, "Move, Nicki, move." (Id., Ex. J.) Yet, when he was first interviewed on the same date as the Incident, Offender 2 did not identify any specific words that were spoken by O.M. (Id., Ex. E.)

When the Victim was interviewed again on September 28, 2023, she reported that "I heard O.M. and [Offender 2] say nigger." (Id., Ex. J.) She was "not 100%" sure of the words uttered before and after the "N-word" but recalled that "it was something like 'walk, nigger, walk' or 'go, nigger, go.'" (Id., Ex. J.)

Following Fetherman's review of the Addendum Report, he concluded that "O.M. and Offender 2 were not credible and that O.M. said, "Move, nigger, move." (Id., ¶ 26.) Fetherman's findings and the bases upon which they are supported appear in the section of the Addendum Report titled "Superintendent's Findings." (Id., Ex. J.)

The conclusion of the remanded investigation was that O.M. was found to have engaged in a HIB infraction against the Victim. (Id., Ex. J.)

On October 16, 2023, Fetherman reported the results of the remanded investigation to the Board at its regularly scheduled meeting, in executive session. Fetherman provided Petitioners with a copy of his decision on the remanded investigation on October 19, 2023. (Id., Ex. K.)

On November 6, 2023, during its regularly scheduled meeting, the Board deliberated and unanimously voted to affirm Fetherman's decision and the HIB finding against O.M. (Id., Ex. L.)

DISCUSSION AND CONCLUSIONS OF LAW

Under the Uniform Administrative Procedure, N.J.A.C. 1:1-1.1 to -21.6, which governs the conduct of contested cases before the OAL, a party may file a motion for summary decision on substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion "shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b). The Administrative Law Judge presiding over the contested case may grant a party's motion "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Ibid. Accord Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 530 (1995). To overcome an adequately supported motion for summary decision, the non-moving party must submit an affidavit showing that a genuine issue of material fact exists that can only be determined in an evidentiary proceeding. N.J.A.C. 1:1-12.5(b).

Further, as applicable here, 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). Stated otherwise, when a local board of education acts within its discretionary authority, its decision will not be disturbed unless it is demonstrated that the decision was "patently arbitrary, without

rational basis or induced by improper motives.” Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). Thus, to successfully challenge a HIB determination made by a board of education, a party “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). A board’s decision may also 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).

The Legislature designed the ABBRA, N.J.S.A. 18A:37-13 to -37, “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). Each school district must adopt a policy that prohibits HIB and provides “a procedure for prompt investigation of reports of violations and complaints.” N.J.S.A. 18A:37-15(b)(6).

Under the ABBRA, “harassment, intimidation or bullying” 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]

Consistent with the ABBRA, the Board adopted a HIB policy, Board Policy No. 5512, mirroring the statutory language. As applied to the facts here, it is beyond dispute that the conduct at issue met the definition of a HIB.

First, the Incident involved a verbal act. As detailed above, the fact that the utterance included the word “nigger” is sufficiently supported in the record by the Victim’s repeated statements, as corroborated by Aldrich’s witness statement, which was made on the same date of the Incident. From the Victim’s first account of the Incident to her mother and then to Aldrich, followed by the Victim’s statement in the HIB 338 Form, her witness statement, initial interview, and second interview during the remanded investigation, the Victim was consistent and steadfast in her report that the comment made included the word “nigger.”

Second, it is incontrovertible that the utterance of the “N-word” to an African-American student would be reasonably perceived as motivated by an actual or perceived characteristic of that student. Third, the conduct towards the Victim substantially disrupted the Victim and interfered with her rights in violation of the ABBRA and the Board policy. She retreated from the scene of the Incident, texted her mother, and then went to the bathroom so she could call her mother “to calm [her] down.” She expressed that she “didn’t feel comfortable in school” and had her grandmother come to

pick her up early. The Victim also reported a concern that she could possibly be “harassed or jumped” if she had stayed in school.

The final criterion for finding that a HIB act occurred is satisfied by meeting one of the three prongs set forth in the subparts to 18A:37-14. In this case, all three are satisfied. Calling the Victim, an African-American student, the “N-word” has the indisputable effect of “insulting or demeaning a student.” Sufficient evidence in the record also exists to support the District’s finding that the Victim was insulted by the comment and understood it to be directed to her. In addition to the Victim’s report, O.M. and Offender 2 similarly reported that the Victim instantly turned around when she heard the slur to confront them. Her immediate reaction evidenced that she was deeply affected by the demeaning comment. The conduct also met the first and third prongs of N.J.S.A. 18A:37-14. A reasonable person should have known that calling an African-American student the “N-word” would have the effect of emotionally harming the student or placing the student in reasonable fear of physical or emotional harm. Equally clear is the finding that calling a student the “N-word” creates a “hostile educational environment for the student” as defined in the statute.

In short, there is no question that the conduct at issue meets the legal definition of HIB. Indeed, Petitioners do not dispute that such conduct constitutes harassment, intimidation, or bullying within the meaning of the ABBRA. Instead, they argue that O.M. did not engage in that conduct because he did not use the “N-word” in the utterance he made in the hallway on the day of the Incident. Put simply, Petitioners’ position is that the superintendent should have believed O.M., not the Victim. Petitioners, thus, seek to have this tribunal hear testimony regarding the Incident and make its own evaluation of O.M.’s credibility to determine whether he was truthful during the initial and remanded HIB investigation.

To support their argument, Petitioners cite to caselaw that stands for the general proposition that credibility determinations are the province of the factfinder and cannot be adjudicated by summary decision. See Avery v. Arthur Armitage Agency, 242 N.J. Super 293, 307 (App. Div. 1990), citing Judson, 17 N.J. at 75; D’Amato v. D’Amato, 305 N.J. Super. 109, 114 (App. Div. 1997) (cases cited in Petitioners’ Opposition Brief). But

an evidentiary hearing is not required where the documentary record establishes that the Board acted within its discretion to determine whether an act of HIB occurred. In other words, to determine whether the Board's decision was arbitrary, capricious, and unreasonable, I need only decide whether sufficient credible evidence supports the Board's decision. Even if that evidence leaves room for me to form another opinion, it is insufficient ground to overturn the Board's decision, "so long as the Board has not acted dishonestly or in bad faith." R.R. o/b/o minor child, A.R. v. Bd. of Educ. of the Bor. of Ramsey, Bergen County, No. EDU 0378-23, Initial Decision (Jan 29, 2024), adopted, No. 131-24 (Comm'r March 8, 2024).

Based on the undisputed facts set forth above, I **CONCLUDE** that the District properly undertook the required investigation. I further **CONCLUDE** that Fetherman's findings, as reported to the Board, amply supported the Board's determination that O.M. engaged in an act of HIB. Further, Petitioners failed to present any competent evidence, in the form of an opposing affidavit as required by N.J.A.C. 1:1-12.5(b), to overcome summary decision in Respondent's favor. Standing alone, their allegations that the District's investigation was "incomplete" because other potential witnesses could have been interviewed or that the Board "did not hear any other opinions on the issue besides that of the former superintendent Fetherman"¹ do not 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 Franklin Lakes, No. EDU 13204-13, Initial Decision (Feb. 24, 2014) (citation omitted), adopted, Comm'r (Apr. 10, 2014).

The record establishes that the Board's decision to affirm the HIB finding against O.M. is well-supported by the evidence collected by the District, which included, among other things, multiple reports from the Victim who remained steadfast in her account that the offending statement included the "N-word"; a corroborating witness statement from a teacher made on the same day as the Incident; and O.M.'s accounts of the Incident which changed over time to admit that he was the speaker, though denying he used the

¹ See Petitioners' Letter Brief in Opposition to Respondent's Motion for Summary Decision, dated August 9, 2024, p. 9.

“N-word” and refusing to answer additional, follow-up questions during the remanded investigation.²

That the District’s investigators, Fetherman and, thereafter, the Board believed the Victim’s account to be more consistent with the evidence than O.M.’s version of the Incident simply does not render the Board’s decision to affirm the HIB finding arbitrary, capricious, or against the weight of the evidence. See, e.g., R.R. o/b/o minor child, A.R. v. Bd. of Educ. of the Bor. of Ramsey, Bergen County, No. EDU 0378-23 (Initial Decision Jan 29, 2024), adopted, No. 131-24 (Comm’r March 8, 2024) (it is “reasonable and rational” for the District to have found “the victim’s explanation more consistent with the evidence collected during the investigation.”)

Accordingly, on the basis of the undisputed material facts and applicable legal standards, I **CONCLUDE** that the action of the Board in determining that O.M. engaged in conduct that constituted harassment, intimidation, or bullying within the meaning of the ABBRA was not arbitrary, capricious, or unreasonable.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Respondent’s motion for summary decision is **GRANTED** and **DISMISS** the Petitioners’ appeal.

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

This recommended decision may be adopted, modified, or rejected by the **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Acting Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five

² The record also includes surveillance video capturing the Victim’s “visceral reaction” to hearing the “N-word.” (Id., Ex. J.)

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 **ACTING COMMISSIONER OF THE DEPARTMENT OF EDUCATION**. Exceptions may be filed by email to ControversiesDisputesFilings@doe.nj.gov or by mail to Office of Controversies and Disputes, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500. A copy of any exceptions must be sent to the judge and to the other parties.



September 30, 2024
DATE

R. TALI EPSTEIN, ALJ

Date Received at Agency:

September 30, 2024

Date Mailed to Parties:
cc

September 30, 2024

APPENDIX

EXHIBITS IN EVIDENCE

For Petitioner:

P-1 Letter Brief in Opposition to Respondent's Motion for Summary Decision, dated 8/9/24

For Respondent:

R-1 Letter Brief in Support of Respondent's Motion for Summary Decision, dated 7/17/24, with Supporting Certifications and Exhibits

Certification of Michael Fetherman, dated 7/17/24, with Exhibits A–L

Exhibit A	Board Policy No. 5512, revised 4/3/23
Exhibit B	S.B.'s HIB 338 Form, dated 6/8/23
Exhibit C	S.B.'s Written Statement, dated 6/8/23
Exhibit D	Linda Aldrich's Written Statement, dated 6/8/23
Exhibit E	District's HIB Investigation Report #MLHS-0012-22-23
Exhibit F	O.M.'s Written Statement, dated 6/8/23
Exhibit G	Correspondence from Michael Fetherman to Petitioners, dated 6/16/23
Exhibit H	Correspondence from Petitioners' Counsel to Michael Fetherman, dated 7/19/23
Exhibit I	Notice of Initial Board Decision, dated 9/19/23
Exhibit J	Addendum Report, dated 9/28/23
Exhibit K	Notice of Board Decision, dated 10/19/23
Exhibit L	Board Resolution, dated 11/7/23

Certification of Sean W. Fogarty, Esq., dated 7/17/24, with Exhibits A–C

Exhibit A	Verified Petition of Appeal, dated 3/19/24
Exhibit B	Respondent's Answer and Separate Defenses to Petition of Appeal, dated 4/9/24

Exhibit C Respondent's First Set of Interrogatories and Request
for Admissions, dated 6/13/24

Notice of Motion, dated 7/17/24

Proof of Service, dated 7/17/24

Proposed Order, dated 7/17/2024

R-2 Letter Brief Replying to Petitioners' Opposition to Respondent's Motion for
Summary Decision, dated 8/16/24