104-25
OAL Dkt. No. EDU 10052-23
Agency Dkt. No. 214-8/23

New Jersey Commissioner of Education

Final Decision

S.H. and J.H., on behalf of minor child, G.H.,

Petitioners,

v.

Board of Education of the West Essex Regional School District, Essex County,

Respondent.

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

This matter involves petitioners' challenge to the Board's determination that their minor child, G.H., committed an act of harassment, intimidation, or bullying (HIB). The Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*, defines HIB 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.]

In this case, the Board upheld the HIB investigation conducted by the Anti-Bullying Specialist (ABS), who determined that G.H. called the black victim a "monkey" in the hallway outside of a classroom. While petitioners fully acknowledge that G.H. "used a racial epithet" toward the victim, they claim that G.H. did so in response to the victim calling him a "terrorist." The Administrative Law Judge (ALJ) granted the Board's motion for summary decision upon concluding that the material facts were undisputed and the Board's HIB determination was not arbitrary, capricious, or unreasonable.

In their exceptions, petitioners dispute the ALJ's finding that Jane's[1] parents filed a HIB Reporting Form indicating that Jane reported "that 'so many people' call black students 'monkeys'" and "[t]his contributes heavily to [Jane's] view that th[e] school is not a safe space . . . ." They also dispute the ALJ's finding that the ABS interviewed Jane, who identified the victim. They claim that the documents upon which the ALJ relied are hearsay and double hearsay, that

[1] Jane is a pseudonym. She is not the victim of G.H.'s racial epithet.

no evidence or certifications were submitted to establish that the documents fall under a hearsay exception, and that the documents were never authenticated.

Additionally, petitioners dispute the ALJ's finding that the ABS interviewed the victim, who stated that G.H. called her a monkey in the school hallway. According to the report, the victim believed that she was targeted because of her race and felt uncomfortable coming to school because of the names she was called. In addition to arguing that the documents relied upon by the ALJ contain hearsay and double hearsay and were not properly authenticated, petitioners contend that the ALJ erroneously viewed the documents in the light most favorable to the moving party, as opposed to the non-moving party, and inappropriately determined that the information contained therein was credible.[2]

As for the ALJ's legal conclusions, petitioners argue that summary judgment is inappropriate because the absence of written documentation to corroborate G.H.'s admission creates genuine issues of material fact, including whether G.H. acted in response to being called a "terrorist." They maintain that without that context, it is impossible to determine how G.H.'s motivation could be perceived by an objectively reasonable person. They claim that material facts regarding procedural deficiencies and alleged bias in the HIB investigation are also disputed and further demonstrate that the Board acted in disregard of the circumstances. Finally, they argue that the elements of the HIB statute are not satisfied, and that it was arbitrary, capricious,

[2] Petitioners further dispute the ALJ's finding that no one reported a HIB incident in connection with the alleged "terrorist" comment made to G.H. Petitioners claim that the ABS was required by law to initiate a HIB investigation regarding the "terrorist" comment, that neither parents nor children are required to initiate a HIB investigation, and that the Board should not be absolved from responsibility for same.

and unreasonable for the Board to impose strict liability on G.H. without any concern over the racist comments that were first directed at him.

In response, the Board argues that the Commissioner should adopt the ALJ's Initial Decision. It contends that petitioners' exceptions repeat arguments previously considered and properly rejected by the ALJ. It maintains that its 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. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Regarding HIB determinations, this standard of review requires petitioners 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 Cty.*, OAL Dkt. No. EDU 13204-13, Initial Decision (Feb. 24, 2014), *adopted*, Commissioner Decision No. 157-14 (Apr. 10, 2014). The Commissioner may not substitute his judgment for that of the Board. *Schinck v. Bd. of Educ. of Westwood Consol. Sch. Dist.*, 60 *N.J. Super.* 448, 476 (App. Div. 1960).

Upon careful review of the entire record, the Commissioner adopts the Initial Decision of the ALJ as the final decision in this matter. The Commissioner concurs with the ALJ that petitioners failed to satisfy their heavy burden of demonstrating that the Board acted arbitrarily, capriciously, or unreasonably when it determined that G.H. committed an act of HIB as defined at *N.J.S.A.* 18A:37-14. Petitioners have not shown that the Board's HIB determination was arbitrary, without rational basis, or induced by improper motives. Nor have petitioners

demonstrated that the Board acted in bad faith or in utter disregard of the circumstances before it at any point during the HIB investigation.

As explained by the ALJ in the Initial Decision, a finding of HIB requires three elements under the Act.[3] First, the conduct at issue must be reasonably perceived by the victim as being motivated by any actual or perceived characteristic expressly identified in the statute, or by any other distinguishing characteristic. Second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. Third, one of the three conditions set forth in subsections (a), (b), and (c) must be satisfied. *Wehbeh v. Bd. of Educ. of Twp. of Verona*, Commissioner Decision No. 510-20 (Feb. 4, 2020).

The Commissioner agrees with the ALJ that G.H.'s conduct satisfies the statutory definition of HIB. Regarding the first element, the Commissioner finds that it was not arbitrary, capricious, or unreasonable for the Board to conclude that the victim reasonably perceived that G.H.'s conduct was racially motivated. G.H.'s actual intent or motivation is not a necessary component of HIB under the Act. The pertinent statutory inquiry is whether the victim reasonably perceived that G.H.'s conduct toward her was racially motivated. *See Wehbeh*, at 8 ("[T]he statute requires an analysis of how the actor's motivation is perceived and whether that perception is reasonable. It does not require an analysis of the actual motivation of the actor."). The Commissioner finds that it was entirely reasonable for the victim, who is black, to perceive that G.H. calling her a "monkey" was racially motivated — regardless of G.H.'s actual intent. As recognized by the ALJ, "Primate rhetoric has been used to intimidate African Americans throughout our country's history, and monkey imagery has been significant in racial harassment."

[3] The parties do not dispute that the conduct at issue took place on school property.

Initial Decision, at 6 (citing *Green v. Franklin Nat'l Bank of Minneapolis*, 459 *F.3d* 903, 911 (8th Cir. 2006)).

As for the second element, the Commissioner finds that it was not arbitrary, capricious, or unreasonable for the Board to conclude that G.H.'s conduct substantially disrupted or interfered with the rights of other students or the orderly operation of the school. Conduct has been determined to substantially disrupt the orderly operation of the school when students are so upset or embarrassed that they are "not fully available for learning." *G.H.*, *supra*, Initial Decision at 18. Moreover, when other students are "so affected" by the offender's conduct that they report it, the orderly operation of the school may be substantially disrupted. *T.R. and T.R. o/b/o E.R. v. Bridgewater-Raritan Reg'l Bd. of Educ.*, OAL Dkt. No. EDU 10208-13, Initial Decision (Sept. 25, 2014), *adopted*, Commissioner Decision No. 450-14 (Nov. 10, 2014).

Here, the record reflects that the victim was uncomfortable coming to school because of the names she was called. She missed five days of school, including the day after she was interviewed during the HIB investigation. She also had her seat changed and spent time with her guidance counselor on several occasions. Clearly, she was not fully available for learning. Additionally, Jane was so affected by hearing the word "monkey" used toward black students that she believed her school was not a safe space and discussed it with her parents. The Act's preamble provides that "a safe and civil environment in school is necessary for students to learn and achieve high academic standards." *N.J.S.A.* 18A:37-13. All students have the right to attend school in an environment free of offensive and degrading racial comments.

Concerning the third element, the Commissioner finds that it was not arbitrary, capricious, or unreasonable for the Board to conclude that a reasonable person should know,

under the circumstances, that calling a black student a "monkey" has the effect of emotionally harming, insulting, or demeaning that student. "Racial epithets are regarded as especially egregious and capable of engendering a severe impact." *Taylor v. Metzger*, 152 *N.J.* 490, 502 (1998). "[T]he intent of the HIB law is to ensure that such misconduct is properly redirected at an early age. Every action has a reaction; better to learn young and in school that racial epithets are intolerable . . . ." *G.H.*, *supra*, Initial Decision at 18. For these reasons, the Commissioner rejects petitioners' assertion that the requisite elements of the HIB statute were not satisfied.

Turning to petitioners' remaining exceptions, the Commissioner does not find them to be persuasive. Their hearsay objections with respect to information contained in the HIB investigation reports in evidence are unavailing for several reasons.[4] At the outset, the Act neither instructs boards how they must question those interviewed during HIB investigations nor defines acceptable sources of information for boards to consider when investigating HIB allegations. Specifically, the Act does not prohibit board reliance upon hearsay evidence. *See L.K. and T.K. o/b/o A.K. v. Bd. of Educ. of Twp. of Mansfield,* Commissioner Decision No. 318-21 (Dec. 9, 2021) at 5, *aff'd*, 2023 *N.J. Super. Unpub.* LEXIS 1788 (App. Div. Oct. 17, 2023).

Furthermore, petitioners' exceptions overlook the fact that the New Jersey Rules of Evidence are not applicable at OAL proceedings "except as specifically provided" in the New Jersey Administrative Code. *N.J.A.C.* 1:1-15.1(c). Hearsay evidence is admissible at the OAL, subject to the residuum rule, "and shall be accorded whatever weight the judge deems

[4] The HIB investigation reports and related documents in evidence are presumed authentic under OAL rules. *N.J.A.C.* 1:1-15.6. The ALJ found, and the Commissioner agrees, that petitioners provided no legitimate basis for challenging the authenticity of the documents. Therefore, the documents did not need to be formally authenticated to be admitted and considered by the ALJ. Initial Decision, at 6 n.1.

appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability." *N.J.A.C.* 1:1-15.5(a). The residuum rule requires "some legally competent evidence . . . to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." *N.J.A.C.* 1:1-15.5(b).

"Applying the residuum rule requires identifying the 'ultimate finding of fact' that must be supported by a residuum of competent evidence." *In re Tenure Hearing of Cowan*, 224 *N.J. Super.* 737, 750 (App. Div. 1988). In this matter, the "ultimate finding of fact" is whether G.H. engaged in conduct that constitutes HIB under the Act. *R.G.B. v. Village of Ridgewood Bd. of Educ.*, OAL Dkt. No. EDU 14213-12, Initial Decision at 17 (Apr. 1, 2013), *adopted*, Commissioner Decision No. 242-13 (June 24, 2013). A "combined probative force of the relevant hearsay and the relevant competent evidence" is required to sustain the ultimate finding regarding whether HIB took place. *Ibid.*

The ALJ's factual findings disputed by petitioners – *i.e.*, that a HIB report indicated that many people at school call black students "monkeys," that Jane later identified the victim, that the victim reported to the ABS that G.H. called her a monkey in the school hallway, and that no one initiated a HIB report regarding the alleged "terrorist" comment made to G.H. – are not the ultimate finding of fact in this matter. For that reason, each of those individual findings need not be supported by a residuum of competent evidence.[5] The critical evidence in this case is G.H.'s own admission. At no point have petitioners contended that G.H.'s admission was untrue,

[5] In any event, Jane's general concern about the use of the word "monkeys" toward black students and the victim's more specific statements to the ABS regarding G.H.'s conduct were corroborated by G.H. himself.

untrustworthy, or unreliable; G.H.'s admission is competent evidence which supports the ultimate finding of fact that he committed an act of HIB. *See Ruroede v. Borough of Hasbrouck Heights*, 214 *N.J.* 338, 358 (2013) (explaining that an admission is competent evidence).

As for petitioners' contention that summary judgment was inappropriate, the Commissioner disagrees. It is undisputed that G.H. called the black victim a "monkey." The Commissioner finds that any factual disputes concerning whether G.H. acted in response to being called a "terrorist" are immaterial and do not preclude the granting of summary judgment to the Board. Even assuming G.H.'s actions had been prompted by a comment made by the victim, that would not excuse or otherwise mitigate his conduct.[6] *See, e.g., S.P. o/b/o E.P. v. Bd. of Educ. of Twp. of Montgomery*, Commissioner Decision No. 46-25 at 7 (Feb. 7, 2025) (HIB finding upheld despite offender's insistence that his actions were prompted by a pencil poke from the victim).

The Commissioner further finds that petitioners' claims of procedural irregularities and alleged bias during this HIB investigation when compared to an unrelated HIB investigation in which G.H. accused another student of HIB are unfounded and unsupported by the record. Petitioners fail to cite any legal authority that requires HIB investigations involving completely different circumstances to be conducted in an identical manner, or for parents to be present during ABS interviews, or for written victim and/or witness statements to be required. The ALJ properly concluded that the unrelated HIB investigation "was a separate incident that had nothing to do with the victim in this case, and S.H. and J.H. did not appeal that decision." Initial Decision, at 9.

[6] As part of this HIB investigation, the ABS interviewed multiple student witnesses regarding G.H.'s allegation that the victim called him a "terrorist" but ultimately could not substantiate his claim.

Accordingly, the Initial Decision is adopted as the final decision in this matter, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: March 24, 2025
Date of Mailing: March 26, 2025

[7] 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 10052-23

AGENCY DKT. NO. 214-8/23

S.H. AND J.H. ON BEHALF OF MINOR CHILD, G.H.,

Petitioners,

v.

WEST ESSEX REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, ESSEX COUNTY

Respondent.

Eric Magnelli, Esq., for petitioners (Brach Eichler, attorneys)

Raina M. Pitts, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: November 11, 2024 Decided: December 30, 2024

BEFORE **ANDREA PERRY VILLANI,** ALJ:

STATEMENT OF THE CASE

Respondent, the West Essex Board of Education, determined that minor student, G.H., committed harassment, intimidation or bullying (HIB) on the basis that he used a racial epithet toward a black child at school. Must the determination stand? Yes. When the decision of a board of education has a reasonable basis, it is entitled to a

presumption of correctness and must not be upset. Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965).

PROCEDURAL HISTORY

On May 11, 2023, the West Essex Board of Education (Board) found that minor student, G.H., committed harassment, intimidation or bullying (HIB) in violation of the Anti-Bullying Bill of Rights Act (ABRA). (R-9.)

On August 1, 2023, G.H.'s parents, S.H. and J.H., filed a Petition on G.H.'s behalf with the Commissioner of Education appealing the Board's determination that G.H. committed HIB. (R-1.)

On September 27, 2023, the New Jersey Department of Education, Office of Controversies and Disputes, transmitted the matter as a contested case to the Office of Administrative Law (OAL) 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 -23.

Judge Elissa Testa held pre-hearing conferences on October 23, 2023, December 5, 2023, and January 4, 2024. On January 4, 2024, she entered a Pre-hearing Order for completion of discovery by April 5, 2024, and scheduled hearing dates for May 14, 2024, and May 16, 2024.

On March 15, 2024, the case was reassigned to me. On March 29, 2024, counsel for S.H. and J.H. raised several discovery issues via email, and on April 11, 2024, I conducted a pre-hearing conference and granted counsel's request to file a motion for leave to take a deposition. I also adjourned the May hearing dates to July 16, 2024, and July 17, 2024.

On April 26, 2024, counsel for S.H. and J.H. filed a motion for leave to conduct the deposition of Lisa Tamburri, the vice-principal and HIB investigator. On May 13, 2024, the Board filed opposition. On May 31, 2024, I denied the motion.

On July 11, 2024, S.H. and J.H.'s counsel raised another discovery issue and submitted a joint request with opposing counsel to adjourn the July hearing dates.

I held three more pre-hearing conferences on July 18, 2024, July 26, 2024, and August 13, 2024. On August 13, 2024, counsel confirmed they resolved their discovery disputes. The Board's attorney then requested and was granted the opportunity to file a motion for summary decision.

On October 1, 2024, the Board filed its motion for summary decision. On November 1, 2024, S.H. and J.H. filed their opposition. On November 11, 2024, the Board filed its reply, and I closed the record.

FINDINGS OF FACT

Based on the documents submitted by the parties, I **FIND** the following as **FACT** for purposes of this motion only:

The West Essex Regional School District is a regional, public school district serving students in seventh through twelfth grade from municipalities in Essex County, New Jersey. G.H. was a seventh-grade student at West Essex Middle School during the times relevant to this appeal.

In or about January 2023, parents of a West Essex Middle School student filed a HIB Reporting Form, which stated that their child "has explained that 'so many people' call black students 'monkeys' and . . . [t]his contributes heavily to [their child's] view that th[e] school is not a safe space . . . " (R-2.)

On or about January 31, 2023, Lisa Tamburri, the Vice Principal and HIB Investigator for West Essex, interviewed the child, and the child identified the victim. (R-2.)

On or about February 7, 2023, Tamburri interviewed the victim. (R-2.) According to Tamburri's report, the victim, who is black, stated that G.H. called her a monkey in

the hallways. (R-2.) Also, according to the report, the victim stated that she was targeted "because of my race" and "when I come to school, I feel uncomfortable because of the names I'm called." (R-2.)

On February 13, 2023, the school notified S.H. and J.H. that G.H. may have committed HIB. (R-2.) The school likewise informed them that the allegations will be investigated. (R-2.)

Two days later, on February 15, 2023, Tamburri interviewed G.H. (R-2, R-5.) G.H. admitted to calling the victim a monkey in the hallway outside of a classroom. (R-1, R-2.)

Later that same day, February 15, 2023, S.H. and J.H. filed their own HIB Reporting Form alleging that G.H. was a victim of HIB. (R-4.) However, that allegation had nothing to do with this case. G.H. claimed that four or five months prior, a male student called him names like "fat ass," "unathletic," and "ugly" during gym class. (R-8.) After investigating, Tamburri concluded, and the Board agreed, that G.H. was not a victim of HIB. (R-8, R-9.) S.H. and J.H. did not appeal that finding. (R-1.)

With respect to this appeal, S.H. and J.H. admit that their son, G.H., called a black student a monkey. S.H. and J.H.'s petition states that G.H. "used a racial epithet toward her…in the hallway," but "th[e] comment was made directly in response to that student first calling [G.H.] a terrorist." (R-1.) S.H. and J.H. also admitted at the West Essex Board of Education hearing that G.H. called the victim a monkey. (R-9.) Again, they claimed that this was after the victim called G.H. a terrorist. (R-9.) No one – neither G.H., S.H., nor J.H. – reported HIB for the alleged terrorist comment.

CONCLUSIONS OF LAW

Anti-Bullying Bill of Rights Act

The Anti-Bullying Bill of Rights Act (ABRA), N.J.S.A. 18A:37-13 et seq., 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). There are essentially four elements of HIB under ABRA. Regarding the first three elements, the conduct must: (1) be reasonably perceived as motivated by an actual or perceived enumerated characteristic, such as race, or other distinguishing characteristic; (2) take place on school property (or a school-sponsored function, school bus, etc.); and (3) substantially disrupt or interfere with the orderly operation of the school or the rights of other students. N.J.S.A. 18A:37-14. The fourth element, which focuses on the effect of the conduct, may be any one of the following: (a) a reasonable person should know, under the circumstances, the conduct 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) the conduct has the effect of insulting or demeaning any student or group of students; or, (c) the conduct 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. Id.

In this case, all elements of HIB have been met. Regarding the first two elements, G.H. admittedly used a racial slur toward a black student outside of a classroom. Thus, he committed a verbal act reasonably perceived as being motivated by race on school property.

S.H. and J.H. dispute that the slur was "reasonably perceived" as being motivated by race. They argue that a trial is needed to determine the context of G.H.'s comment and "how the alleged victim perceived G.H.'s motivation." Yet, the first element of HIB under ABRA does not ask how the victim perceived the conduct; rather, it asks how it is "reasonably" perceived. Indeed, the Commissioner has expressly rejected a purely subjective standard of reasonableness in favor of "a standard reasonableness determination common in many types of adjudications." Wehbeh v. Bd. of Educ. of the Twp. Of Verona, 2020 N.J. AGEN LEXIS 50, at *5 (February 4, 2020). Under a standard reasonableness determination, the unavoidable conclusion is that the

victim in this case was called a monkey because of her race. Primate rhetoric has been used to intimidate African Americans throughout our country's history, and monkey imagery has been significant in racial harassment. See Green v. Franklin Nat'l Bank of Minneapolis, 459 F.3d 903 (8th Cir. 2006) (citing Morgan v. McDonough, 540 F.2d 527, 531 (1st Cir.1976) (in a school desegregation case, Caucasian students harassed African American students by chanting "assassinate the nigger apes")).

The third element of HIB (the conduct must substantially disrupt or interfere with the orderly operation of the school or the rights of other students) has also been met. Certain kinds of name calling – like racial slurs – will be especially likely to disrupt. Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 264 (3d Cir. 2002). Additionally, when other students are "so affected" by behavior that they report it, the orderly operation of the school may be substantially disrupted. T.R. and T.R. on behalf of E.R. v. Bridgewater-Raritan Reg'l Bd. of Educ., EDU 10208-13, Initial Decision (September 25, 2014), <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (November 10, 2014). In this case, another child was "so affected" by black children being called monkeys that her parents reported it to the school.

S.H. and J.H. argue that the reporting child's statement is hearsay, and she did not necessarily witness G.H. calling a black child a monkey. (In other words, she may have witnessed other students, not G.H. himself, using the word.) However, these arguments are futile given the legal standard, described in more detail below, that is applied in these cases: arbitrary, capricious or unreasonable. Even if the reporting child did not witness G.H. using the word, once G.H. admitted it, the school was not acting arbitrarily when it found that G.H. committed HIB. Furthermore, the reporting child's statement may be considered for non-hearsay purposes insofar as it does not matter whether the statement was true or not. It only matters that the statement was made, and there is no dispute about this: the school indeed received a HIB form alleging "'so many people' call black students 'monkeys.'"[1] (R-2.) Whether the allegation was true

[1] In their brief, petitioners "agree" that the form was submitted and that it included the statement in question. Yet, despite agreeing to this important fact, they raise an objection as to the form's authenticity. The objection is without merit. Petitioners provide no basis whatsoever for challenging the document's authenticity, and under N.J.A.C. 1:1-15.6, the form is presumed authentic. It is only where a genuine question of authenticity is raised that the judge may require some authentication of the questioned document. Again, no genuine question has been presented.

or not, once the report was filed, the school was required to investigate; and, upon investigation, G.H. admitted to calling a black student a monkey. In sum, it was not arbitrary for the school to find disruption when it had received a report from a bystander about the very same offense that G.H. admittedly committed.

Regarding the fourth element, a reasonable person should know that calling a black student a monkey will have the effect of emotionally harming the student. Whether G.H. himself knew it is irrelevant. The Commissioner has confirmed that this last criterion does not require the actor to have actual knowledge of the effect that his actions will have, or to specifically intend to bring about that effect. It "requires only that a reasonable person should know there would be a harmful effect, not that the actor knows there would be such an effect." Wehbeh, 2020 N.J. AGEN LEXIS at *6.

In a similar case, the Commissioner of Education adopted a finding of HIB. 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), <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (April 10, 2014). In that case, an Administrative Law Judge (ALJ) upheld the Board's finding that a white student who repeatedly called a black student "Kool-Aid" engaged in HIB. The ALJ found that the "use of the word 'Kool-Aid' was directed at [the victim] because of his race; insulted and demeaned [the victim]; and . . . interfered with [the victim's] education" because "[u]pset and embarrassed children are not fully available for learning." Id.

In another similar case, the Commissioner adopted a finding of HIB on a motion for summary decision. H.P. obo R.S. v. Borough of Tenafly Bd. of Educ., EDU 07170-23, Initial Decision (January 24, 2024), adopted, Comm'r (March 26, 2024), <http://njlaw.rutgers.edu/collections/oal/>. In that case, a ninth-grade girl, S.S., and a ninth-grade boy, R.S., were messaging each other on Instagram. S.S. made negative comments to R.S. about his soccer skills, and R.S. responded with antisemitic comments. The Board found that R.S. committed HIB. R.S. argued that the exchange was mutual conflict. The ALJ found that the Board's decision was not arbitrary, capricious, or unreasonable and explained: "petitioner cannot negate his conduct by belatedly claiming that the victim's retorts subjected him to HIB. He is free to make an

independent HIB complaint, but [he] did not do so." Id.; see also W.M. obo J.M. v. Bedminster Twp. Bd. of Ed., EDU 07337-19, Initial Decision (Dec. 15, 2022), adopted, Comm'r (Mar. 7, 2023), <http://njlaw.rutgers.edu/collections/oal/> (the Commissioner held, "[i]t is irrelevant to the determination in this matter whether [the victim] participated in trash-talking or whether [the accused] was joking; the HIB definition does not consider the accused's intent").

Likewise, in this case, G.H. cannot negate his conduct by blaming the victim for making an offensive remark. G.H. was free to make his own HIB complaint against the victim, but he did not do so, despite knowing how to file such a complaint. Indeed, on the very day Tamburri interviewed G.H. about calling the victim a monkey, his parents filed a HIB complaint about a totally different student and altercation that happened four or five months prior. G.H. or his parents never filed a HIB complaint against this victim. Thus, he cannot belatedly use her alleged insult to justify his use of a racial epithet toward her. G.H. also cannot use the excuse that he was joking, as the HIB definition does not consider the accused's intent.

Summary Decision

Under N.J.A.C. 1:1-12.5(b), summary decision may be rendered 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 the moving party is entitled to prevail as a matter of law. The standard is substantially the same as that governing a motion under Rule 4:46-2 for summary judgment in civil litigation. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995). The non-moving party must do more than "point to *any* fact in dispute" to defeat summary judgment. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995). As Justice Coleman noted in Brill, if the party opposing summary judgment "offers…only facts which are immaterial or of an insubstantial nature…or merely suspicious," he will not be heard to complain if the court grants summary judgment. Id.

In this case, there is no genuine issue as to any material fact. The material facts are that G.H. called a black student a racial epithet in the hallways of West Essex

Middle School; parents of another student complained of this same behavior happening at the school; and the school determined that HIB occurred. All of these facts are undisputed, and all other facts are immaterial. For instance, it is irrelevant that Tamburri allegedly failed to properly investigate G.H.'s own HIB complaint. That was a separate incident that had nothing to do with the victim in this case, and S.H. and J.H. did not appeal that decision. As such, the allegations raised with respect to G.H.'s HIB complaint are insubstantial or "merely suspicious." See Brill, 142 N.J. at 529.

The motion court considering summary judgment cannot ignore the elements of the cause of action or the evidential standard governing the cause of action. Bhagat v. Bhagat, 217 N.J. 22, 38 (2014). The motion court must analyze the record in light of the substantive standard and burden of proof that a factfinder would apply in the event that the case was tried. Id. at 40. The court's task is to determine whether a rational factfinder could resolve the dispute in favor of the non-moving party. Perez v. Professionally Green, 215 N.J. 388, 405-06 (2013).

In this case, the legal standard is arbitrary, capricious or unreasonable: "When [a board of education] acts within its authority, its decision 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 scope of the Commissioner's review is "not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 296 (App. Div. 1960). "Where 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. Dept. of Envt'l. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973).

Given the undisputed material facts of this case – including and especially G.H.'s use of a racial epithet toward a black child in school – it simply cannot be said that the Board's HIB finding was arbitrary, capricious, or unreasonable. Therefore, I **CONCLUDE** that the Board is entitled to summary decision as a matter of law.

ORDER

Based on the foregoing, I **ORDER** that the Board's motion for summary decision is **GRANTED** and S.H. and J.H.'s petition is dismissed.

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

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this case. 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 becomes a final decision under N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision is 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.

December 30, 2024
DATE

ANDREA PERRY VILLANI, ALJ

Date Received at Agency: December 30, 2024

Date Mailed to Parties: December 30, 2024

sej

APPENDIX

DOCUMENTS RELIED ON:

Respondent's October 1, 2024 Motion for Summary Decision

- Exhibit R-1 S.H. and J.H.'s Petition
- Exhibit R-2 West Essex HIB Report, HIB Reporting Form, Letters to Parents, Interview Information Statement, Offender Questions & Investigation Questions
- Exhibit R-3 Letter, Incident Report & Email re: G.H.'s Suspension
- Exhibit R-4 Email from J.H. with G.H.'s HIB Complaint
- Exhibit R-5 Emails from Lisa Tamburri
- Exhibit R-6 Duplicate of R-4
- Exhibit R-7 Emails re: G.H.'s Suspension
- Exhibit R-8 West Essex HIB Report re: G.H.'s HIB Complaint
- Exhibit R-9 Board's Decisions

Petitioners' November 1, 2024 Opposition to Motion for Summary Decision

Respondent's December 1, 2024 Reply