

**New Jersey Commissioner of Education**  
**Final Decision**

S.P., on behalf of minor child, E.P.,

Petitioner,

v.

Board of Education of the Township of  
Montgomery, Somerset County,

Respondent.

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

This matter involves petitioner's challenge to the Board's determination that his son, E.P., committed an act of harassment, intimidation, or bullying (HIB) against G.P. when they were fifth-grade classmates. The Anti-Bullying Bill of Rights Act (the 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, which determined that E.P. called G.P. a “retard” during class; this upset G.P. because he felt that he was being called stupid. G.P., who receives accommodations through a Section 504 plan, explained during the investigation that he receives help in school that other students do not, and that he was embarrassed to be called “retarded” in front of his classmates. The investigation found that a reasonable person should have known that the conduct at issue would physically or emotionally cause harm to the victim, interfere with the victim’s education, and insult or demean a student or group of students.

The Board rejected petitioner’s argument that E.P. was unaware that calling G.P. “retarded” was offensive and that the HIB report should have included a determination of E.P.’s actual intent. It reasoned that the Act does not require that the actor’s conduct be motivated by a distinguishing characteristic. Instead, the critical question is whether the alleged victim reasonably believed that he was targeted due to a distinguishing characteristic. The Board concluded that, based upon evidence obtained during the investigation, E.P.’s comments were reasonably perceived by G.P. as motivated by G.P.’s disability.

The Administrative Law Judge (ALJ) granted the Board's motion for summary decision. Noting that the material facts were uncontested, the ALJ found that "E.P. called G.P. a retard because E.P. knew that it would upset G.P. G.P. was, in fact, upset about being called a retard because he thought E.P. was calling him stupid. G.P. was embarrassed about being called a retard in front of his classmates." Initial Decision, at 11. The ALJ further found that "G.P. is aware that he receives accommodations that other students do not through his Section 504 plan" and that "E.P.'s comment insulted and demeaned G.P." *Id.* at 4, 11.

In so doing, the ALJ expressly rejected petitioner's contention "that the Board's HIB finding against E.P. must be reversed because E.P. was not motivated by G.P.'s actual or perceived characteristics when E.P. called G.P. a retard and did not intend to harass, intimidate, or bully G.P." *Id.* at 11. The ALJ concluded, citing the Act and relevant case law, that E.P.'s actual motivation during the HIB incident is not a factor in the statutory analysis; instead, the appropriate inquiry is whether G.P. reasonably perceived that E.P.'s actions were motivated by any actual or perceived distinguishing characteristic. *Ibid.*

In his exceptions, petitioner argues that the ALJ erred by concluding that the actual motivation of the actor is not a factor in the statutory analysis. He claims that the following three cases support his position: *C.S., on behalf of minor child, J.S. v. Bd. of Educ. of the Twp. of Lacey, Ocean Cnty.*, EDU 03693-15 (Initial Decision Sept. 5, 2019), *adopted*, Commissioner Decision No. 270-19 (Oct. 16, 2019); *L.P. and H.P., on behalf of minor child, L.P. v. Bd. of Educ. of the West Morris Regional Sch. Dist., Morris Cnty.*, EDU 04462-16 (Initial Decision June 10, 2016), *adopted*, Commissioner Decision No. 277-16 (July 25, 2016); and *R.A., on behalf of minor child, B.A. v. Bd.*

*of Educ. of the Twp. of Hamilton, Mercer Cnty.*, EDU 10485-15 (Initial Decision May 12, 2016), *adopted*, Commissioner Decision No. 223-16 (June 22, 2016).

In response, the Board argues that the ALJ's Initial Decision is well-reasoned, legally sound, and should be adopted by the Commissioner. It contends that the three cases cited by petitioner in his exceptions are inapplicable and distinguishable from the present matter. Specifically, it asserts that *C.S.* and *R.A.* are distinguishable because, in those matters, there was no link between the accused student's conduct and the distinguishing characteristic. It also asserts that *L.P.* is distinguishable because that matter involved conduct motivated by a personal dispute regarding specific roles on a sports team, which did not fall within the statutory definition of HIB.

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

Upon review, the Commissioner adopts the Initial Decision of the ALJ as the final decision in this matter. The Commissioner concurs with the ALJ that petitioner failed to satisfy his heavy burden of demonstrating that the Board acted arbitrarily, capriciously, or unreasonably when it determined that E.P. committed an act of HIB as defined at *N.J.S.A. 18A:37-14*. Petitioner has not shown that the Board's HIB determination was arbitrary, without rational basis, or induced by improper motives. Nor has petitioner demonstrated that the Board acted in bad faith or in utter disregard of the circumstances before it.

As detailed by the ALJ in the Initial Decision, a finding of HIB requires three elements under the Act.<sup>1</sup> 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 the Twp. of Verona, Essex Cnty.*, Commissioner Decision No. 510-20 (Feb. 4, 2020).

The Commissioner agrees with the ALJ that E.P.'s conduct satisfies the statutory definition of HIB. Regarding the first element, the record supports the conclusion that G.P. reasonably perceived that E.P.'s conduct toward him was motivated by his disability, which is a distinguishing characteristic. Contrary to petitioner's arguments, E.P.'s actual intent or actual motivation is not a necessary component of HIB under the Act. The pertinent inquiry is whether G.P. reasonably perceived that E.P.'s conduct toward him was motivated by his disability. *See Wehbeh*, at 8

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<sup>1</sup> The parties do not dispute that the conduct at issue took place on school property.

("[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.").

Petitioner's exceptions are unavailing as the three cases upon which he relies do not offer support for his position that E.P.'s actual intent (or lack thereof) is a necessary component of the HIB statutory analysis. At the outset, each of the three cases cited by petitioner predates the Commissioner's decision in *Wehbeh*. Moreover, as explained in *Wehbeh*, the Act "does not require an analysis of the actual motivation of the actor. Certainly, evidence that the actor was motivated by a distinguishing characteristic would meet the standard . . . but evidence that the actor was not so motivated does not end the analysis." *Wehbeh*, at 8. Given the uncontested facts, it was reasonable for G.P. to perceive that E.P. calling him a "retard" was motivated by G.P.'s disability—regardless of E.P.'s actual intent. The record reflects that during the HIB investigation, G.P. explained that he received extra help in class that other students did not, and that he thought that by calling him a "retard," E.P. was calling him stupid in front of the class, which embarrassed him.

As for the second element, the record supports the conclusion that E.P.'s conduct interfered with G.P.'s right to a safe and civil environment at school. See *N.J.S.A. 18A:37-13* (explaining the purpose of the Act and finding that "a safe and civil environment in school is necessary for students to learn and achieve high academic standards"). G.P. stated during the HIB investigation that the incident with E.P. has distracted him in class. In addition, G.P. requested a seat change at lunch to avoid E.P. Furthermore, the HIB incident, reported by the children's teacher, disturbed the learning environment in the classroom and interfered with the rights of other students.

Concerning the third element, the record supports the conclusion that a reasonable person should know, under the circumstances, that calling another student who receives extra help in class a “retard” has the effect of emotionally harming that student, and that such conduct is insulting and demeaning. Once again, E.P.’s actual intent is not dispositive. *See Wehbeh*, at 8 (“None of these criteria require the actor to have actual knowledge of the effect that her actions will have, or to specifically intend to bring about that effect.”). Additionally, even assuming E.P.’s actions were prompted by a pencil poke or stab in his leg by G.P. and were intended to make other kids laugh, that does not excuse his conduct. As noted by the ALJ, the pencil incident was addressed by the school district pursuant to its code of conduct.

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.<sup>2</sup>

  
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 7, 2025  
Date of Mailing: February 10, 2025

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<sup>2</sup> 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 12772-23

AGENCY DKT. NO. 240-9/23

**S.P., ON BEHALF OF MINOR CHILD,  
E.P.,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE  
TOWNSHIP OF MONTGOMERY,  
SOMERSET COUNTY,**

Respondent.

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**Brian M. Cige, Esq.**, appearing for petitioner (Law Offices of Brian M. Cige,  
attorneys)

**Alexander L. D'Jamoos, Esq.**, appearing for respondent (Flanagan, Barone &  
O'Brien, LLC, attorneys)

Record Closed: October 1, 2024

Decided: November 15, 2024

BEFORE **KIMBERLEY M. WILSON, ALJ**:



### **STATEMENT OF THE CASE**

Petitioner S.P., on behalf of minor child, E.P., appeals the determination by respondent Board of Education of the Township of Montgomery, Somerset County (Board or District), that on May 8, 2023, E.P. committed an act of harassment, intimidation, or bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (“Act”), N.J.S.A. 18A:37-13 to -37.

Petitioner’s primary argument is that the Board’s determination is faulty, because E.P.’s statement that the victim was “retarded” was not intended to harass, intimidate, or bully but was in response to the victim’s initial action towards him. The Board argues that its HIB determination against G.P. was not arbitrary or capricious.

Petitioner and the Board filed cross-motions for summary decision.

### **PROCEDURAL HISTORY**

On or around September 8, 2023, petitioner filed a petition with the Commissioner of the Department of Education, Office of Controversies and Disputes. On November 16, 2023, the Department of Education transmitted this matter to the Office of Administrative Law as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -23.

After a series of status conferences, counsel filed their respective motions for summary decision on May 31, 2024. Oral argument was heard on the motions on October 1, 2024, and the record was closed.

### **FACTUAL DISCUSSION AND FINDINGS**

The parties have stipulated to the following **FACTS**, and so I **FIND**:

1. The District is the public school district for the Township of Montgomery, in Somerset County, with its central offices located at 1014 Route 601, Skillman, New Jersey 08558.

2. The District operates five public schools, including two elementary schools, two middle schools, and one high school. The District services a diverse community and educates more than 4,500 students attending pre-kindergarten through twelfth grade.
3. The Board established District Policy 5512 – Harassment, Intimidation and Bullying in accordance with the Act and updated the same in February 2023.
4. During the 2022–2023 school year, Mary E. McLoughlin (McLoughlin) served as the Superintendent of Schools as appointed by the Board since 2020. She served as the interim superintendent since 2019 and previously as Director of Pupil Services from 2013 to 2018.
5. The Board operates the Lower Middle School, led by Principal Lisa Romano (Romano),<sup>1</sup> who was directly involved with the discipline based on the District’s Code of Conduct and restorative conversations with the students following the May 8, 2023 incident.
6. During the 2022–2023 school year, E.P. was a fifth-grade student at the Lower Middle School.
7. During the 2022–2023 school year, G.P. was a fifth-grade student at Lower Middle School, who was classified and received special services, including in-class instructional support, through Section 504 of the Rehabilitation Act of 1973, a federal civil rights law which defines the rights of people with disabilities to access to public program benefits and services, including public education.
8. On May 8, 2023, Michelle Cernadas (Cernadas), a teacher at Lower Middle School, reported an incident that occurred in her language arts class

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<sup>1</sup> Romano was vice principal at the Lower Middle School when the May 8, 2023 incident occurred.

involving students L.B. and E.P., which targeted G.P. based on his disability (the May 8, 2023 incident).

9. Kevin Armstrong, District anti-bullying specialist and sixth-grade counselor, investigated the May 8, 2023 incident, as the school administration directed.
10. The May 8, 2023 incident occurred while the fifth-grade class was working with their book club groups and discussing the assigned reading. At one point, A.M., a member of G.P.'s group, got up from their seat on the floor to grab a water bottle. E.P. left his group and came to G.P.'s group. G.P. asked E.P. to move several times as that was not his seat. E.P. said "no" and refused to leave.
11. G.P. took a pencil and poked/stabbed E.P. on the left inner thigh. E.P. became upset and then called G.P. a "retard."
12. L.B. came to see what was happening and stood on G.P.'s leg. G.P. was seated on the ground. G.P. shook L.B. off, but L.B. proceeded to stand on G.P.'s leg again.
13. Cernadas came over to investigate the conflict. L.B. got off of G.P.'s leg, began to walk away, and called G.P. a "retard." E.P. also left the situation. When asked what was going on, L.B. told Cernadas that G.P., not E.P., called him a "mother fucker."
14. G.P. alleged that the next day, E.P. cut in line to stand behind G.P. and called him a "retard" again. E.P. denied calling G.P. "retarded" the following day while waiting in line for recess.
15. G.P. was upset at being called a "retard" because he felt he was being called stupid. G.P. is aware that he receives accommodations that other students do not through his Section 504 plan. He was embarrassed to be called "retarded" in front of other students in the classroom.

16. G.P. requested a seat change at lunch to avoid L.B. and E.P. G.P. avoids L.B. and E.P. in hallways and tries to have as little interaction with them as possible to avoid being called names. G.P. sticks to his friends for protection. G.P. has not felt good about this situation and admitted that it has distracted him in class.
17. During E.P.'s interview, E.P. admitted to going to G.P.'s book club group, trying to distract G.P. by sitting in front of him, and continuing to stare at G.P. when asked to leave.
18. E.P. admitted to asking G.P., "Are you retarded?" after being poked/stabbed in the leg with a pencil. E.P. admitted to saying the word "retarded" to make G.P. upset.
19. Two student witnesses heard the word "retarded" being used but were unable to identify who said it.
20. Cernadas stated that she heard both L.B. and E.P. call G.P. "retarded" and tell him that he needed to get help.
21. On May 9, 2023, Romano spoke with E.P. and the student's parent and instructed E.P. to serve a lunch and recess detention on May 10, 2023.
22. On May 12, 2023, Romano met with E.P. and his parents to continue restorative conversations about the student's control of his choices, to reinforce that choices have consequences, and to encourage him to make good choices for himself and not try to impress others for popularity.
23. E.P. had follow-up conversations with Ms. Haas, student guidance counselor for the fifth grade. This was a check-in counseling session with E.P. to ensure that he lives up to his own potential as a good student and a leader.

24. At the conclusion of the investigation, Michael Richards, Lower Middle School principal, found that the May 8, 2023 incident substantially disrupted or interfered with the orderly operation of the school or rights of other students, that the offenders knew that the action would physically or emotionally cause harm to the victim, that the victim felt targeted based on his disability, and that it was reasonably perceived as being motivated by a distinguishing characteristic. These findings were incorporated into a letter to S.P. dated May 11, 2023.
25. L.B. and E.P. were found to have violated the school's anti-bullying policy, and this finding was affirmed by the Board.
26. Pursuant to a letter dated June 2, 2023, petitioner appealed the HIB determination to the Board.
27. The Board scheduled a hearing on June 13, 2023.
28. On June 19, 2023, petitioner received correspondence affirming the appeal of the Board's HIB decision, which concluded that E.P. had violated G.P.'s rights, despite petitioner having argued that the HIB investigation did not establish the criteria necessary under Board Policy 5512, specifically that E.P. did not know referring to G.P. as "retarded" was offensive and that the report should have included a determination of E.P.'s intent. Petitioner further argued that E.P.'s inability to understand or appreciate that calling someone "retarded" is offensive should mitigate his conduct. Petitioner asked the Board to consider the implications of finding that E.P. committed an act of HIB because the finding is a "scarlet letter." Finally, the Board was asked to modify this finding to a Code of Conduct violation, rather than an act of HIB.
29. On June 19, 2023, petitioner received correspondence affirming the appeal of the Board's HIB determination, which concluded that E.P. had violated the rights of G.P.

30. The Board, in its decision, noted that it did consider that E.P. was stabbed or poked with a pencil with enough force to leave a mark on E.P.'s leg, as shown in a photograph petitioner produced. Petitioner argued that it was not given sufficient weight in the determination process. While the alleged victim's conduct was reportedly addressed under the Code of Conduct, petitioner further argues that it did not actually mitigate the consequences of E.P.'s conduct as it should have.
31. When the Board was asked to clarify the permanent nature of this conclusion by letter dated July 5, 2023, on July 20, 2023, the Board responded by letter as follows:

An affirmative finding of harassment, intimidation or bullying [that] results in disciplinary action is required to be contained in a student's record. N.J.S.A. 18A:37-15(b)(5). As a result of the [Board's] decision in this matter, which included a lunch and recess detention, this result is included in E.P.'s record, and will remain in his record while he is enrolled in the [District]. As for the transfer of records, if E.P. transfers to another public school district in New Jersey, the District is required to transfer a student's disciplinary record with the student's academic transcript.

Based on the joint documents counsel submitted, I further **FIND** the following **FACT**:

32. The Board's July 19, 2023 letter to S.P. stated the following:

Please be advised that after considering your testimony and your counsel's arguments in support of your position that [McLoughlin's] decision should be revised, as well as the HIB report, the Board determined that the whole record reasonably substantiates [McLoughlin's] determination that [E.P.]'s comments were reasonably perceived by the alleged victim as discriminatorily motivated based on the alleged victim's disability.

While the Board acknowledges that [E.P.] may not have been aware of the alleged victim's disability or the emotional harm caused to him by calling him a "retard", [the Act] and Board

Policy 5512, which mirrors the [Act], does not require that the act, in this case calling the alleged victim a “retard” be actually motivated by an actual or perceived characteristic. The critical question is whether the evidence shows that the alleged victim felt that [E.P.] targeted him based on the characteristic – in this case, his disability. If the answer to this question is yes, then the question is whether the belief is reasonable.

Here, the alleged victim stated he was aware of what the term ‘retarded’ means. He stated that when he was younger, he heard someone use the word and asked his mother its meaning. The alleged victim stated he was upset being called a ‘retard’ because he felt he was being called stupid. The alleged victim explained that he receives support in school that other students do not to help him, and that he was embarrassed to be called ‘retarded’ in front of the other students in the classroom. The Board found the alleged victim’s statement to the [anti-bullying specialist] to clearly demonstrate that he felt that he was targeted because of his disability and that his belief was reasonable.

Finally, the Board considered that [E.P.] was stabbed or poked with a pencil with enough force to leave a mark. The photograph shown by Mr. Cige clearly demonstrated that fact. While the alleged victim’s conduct was addressed under the student Code of Conduct, and mitigates the consequences of [E.P.’s] act of HIB, it does not negate the finding of HIB, whereas here, all of the requirements of the [Act] and Policy 5512 are met as amply set forth in the HIB report.

## **LEGAL ANALYSIS AND CONCLUSIONS**

### **Summary Decision**

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, “[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). Such motion “shall be served with briefs and with or without supporting affidavits” and “[t]he decision sought 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 that the moving party is entitled to prevail as a matter of law.” N.J.A.C. 1:1-12.5(b). When the motion “is made and supported, an adverse party in order to prevail must by responding affidavit set forth

specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” Ibid. What constitutes a genuine issue of fact is discussed in R. 4:46-2(c), which states, in relevant part:

An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

The parties submitted a joint stipulation of facts and joint exhibits in support of their respective motions for summary decision. Those stipulated facts, as supported by the joint exhibits, demonstrate that no material fact is in dispute. The case is ripe for summary decision.

### The Act

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

“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.]

An HIB finding requires an affirmative finding on the following three elements:

First, the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied.

[Wehbeh v. Bd. of Educ. of the Twp. of Verona, EDU 10981-18, Initial Decision (Dec. 24, 2019), rev'd and remanded, Comm'r Decision No. 51-20, slip op. at 5 (Feb. 4, 2020), [https://njlaw.rutgers.edu/collections/oal/final/edu10981-18\\_2.pdf](https://njlaw.rutgers.edu/collections/oal/final/edu10981-18_2.pdf).]

The standard of review for HIB findings is relatively high. For a successful challenge to a board of education's HIB determination, 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 Borough of Franklin Lakes, EDU 13204-13, Initial Decision (Feb. 24, 2014) (citation omitted), adopted, Comm'r (Apr. 10, 2014), [https://njlaw.rutgers.edu/collections/oal/html/initial/edu13204-13\\_1.html](https://njlaw.rutgers.edu/collections/oal/html/initial/edu13204-13_1.html). A board of education'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 (Mar. 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, Comm'r (Apr. 25, 2013), [https://njlaw.rutgers.edu/collections/oal/html/initial/edu10826-12\\_1.html](https://njlaw.rutgers.edu/collections/oal/html/initial/edu10826-12_1.html). 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 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 Borough of Ramsey, Bergen Cnty., Comm'r Decision No. 131-24, at 5 (Mar. 8, 2024), [https://njlaw.rutgers.edu/collections/oal/final/edu03078-23\\_2.pdf](https://njlaw.rutgers.edu/collections/oal/final/edu03078-23_2.pdf).

Petitioner argues that the Board's HIB finding against E.P. must be reversed because E.P. was not motivated by G.P.'s actual or perceived characteristics when E.P. called G.P. a retard<sup>2</sup> and E.P. did not intend to harass, intimidate, or bully G.P. Pet'r's Br. at 11. G.P.'s statement was a "response to misconduct suffered by him." Ibid. This argument contravenes well-established law regarding the provision of N.J.S.A. 18A:37-14(a), namely that conduct that "a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student."

E.P.'s motivation during the May 8, 2023 incident is not a factor in the HIB analysis. The question is how G.P. perceived E.P.'s statement and/or question about whether G.P. was a retard. See Wehbeh, slip op. at 5–6 (stating "an act of HIB is one that "a reasonable person *should* know, under the circumstances, will have the effect of physically or emotionally harming a student," "*has the effect* of insulting or demeaning a student," or "*creates* a hostile educational environment . . ."). N.J.S.A. 18A:37-14(a) (emphasis added). None of these criteria require the actor to have actual knowledge of the effect that her actions will have, or to specifically intend to bring about that effect. The first 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."). The uncontroverted fact here is that E.P. called G.P. a retard because E.P. knew that it would upset G.P. G.P. was, in fact, upset about being called a retard because he thought that E.P. was calling him stupid. G.P. was embarrassed about being called a retard in front of his classmates. E.P.'s comment insulted and demeaned G.P., falling squarely within the criterion of N.J.S.A. 18A:37-14(a).

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<sup>2</sup> The word "retard" is defined as a "contemptuous term used to refer to a person who is cognitively impaired" or is "stupid, obtuse, or ineffective in some way." See [www.dictionary.com](http://www.dictionary.com) (last visited on November 12, 2024).

Petitioner argues that E.P.'s comment to G.P. during the May 8, 2023 incident was merely in response to G.P.'s action, namely poking/stabbing E.P. in the leg with a pencil. Petitioner does not provide any legal authority, whether statute, regulation, or case law, supporting the theory that an unanticipated event would remove the subsequent conduct from the Act's purview. It is important to note that G.P.'s action, as reported in the HIB investigation, does not appear to implicate the Act, as the poke/stab was not reasonably perceived as being motivated by an actual or perceived characteristic; it was a code of conduct violation, and the District addressed G.P.'s conduct pursuant to its code of conduct.

On the other hand, E.P.'s actions satisfy the criteria for an HIB violation, and there is sufficient, credible evidence in the record supporting the HIB determination against E.P. There is no evidence here that the Board's decision was dishonest or made in bad faith that would support a finding that the Board's decision was arbitrary or capricious. For these reasons, petitioner's motion for summary decision is **DENIED**, and the Board's motion for summary decision is **GRANTED**.

I note that E.P.'s conduct on May 8, 2023, may have long-lasting consequences, as the HIB determination will remain in his disciplinary file as long as he is a public school student in New Jersey. As a parent, I can understand the concern that a single incident may negatively impact E.P.'s future academic opportunities. The Act's statutory framework, however, gives little flexibility on this issue.

### **ORDER**

**I ORDER** that the petitioner's motion for summary decision is hereby **DENIED**. The Board's motion for summary decision is hereby **GRANTED**, and accordingly, the petition is **DISMISSED**.

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

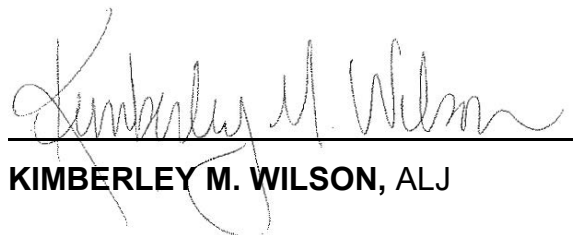
This recommended decision may be adopted, modified, or rejected by the **ACTING**

**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 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](mailto: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.

November 15, 2024

DATE



**KIMBERLEY M. WILSON, ALJ**

Date Received at Agency:

Date Mailed to Parties:

KMW/dw

**APPENDIX**

**Witnesses**

**For Petitioner**

None

**For Respondent**

None

**Exhibits**

**For Petitioner**

Motion papers including notice of motion, Certification of Brian M. Cige, supporting facts and legal brief

**For Respondent**

Motion papers including moving brief, Certification of Counsel and proof of service