

New Jersey Commissioner of Education
Final Decision

Eric Fitzke-Grey,

Petitioner,

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 the West Essex Regional School District Board of Education (Board) pursuant to *N.J.A.C. 1:1-18.4*, and petitioner's reply thereto, have been reviewed and considered.

Petitioner, who was employed by the Board as a middle school music and band teacher, appeals the Board's determination that he engaged in harassment, intimidation, and bullying (HIB) against student H.O., who had a disability and a 504 plan. H.O.'s parents complained of three incidents they alleged to be HIB. The first, referred to as the "shoes incident," occurred when petitioner made comments to H.O. about wearing white sneakers to a concert instead of the required black shoes. The second, the "xylophone incident," occurred when petitioner commented that H.O. played a note at the wrong time. The third, the "binder incident," occurred when H.O. came to petitioner's class without his music binder. Petitioner asked H.O. where he

might have left it and, when H.O. could not recall, petitioner asked members of the class if they had H.O.'s binder.

The district's Anti-Bullying Specialist (ABS), Lisa Tamburri, found that the binder incident constituted HIB, but the other two incidents did not. However, the subsequent decisions of Superintendent Damion Macioi and the Board are unclear, as will be discussed below. Nonetheless, the record is clear that the Board found that petitioner committed HIB, and petitioner appealed.

Following a hearing, the Administrative Law Judge (ALJ) reversed the Board's determination, finding that it was unreasonable because Tamburri had based her determination that the binder incident constituted HIB on incorrect facts, Macioi incorrectly found that that all three incidents constituted HIB, and the Board incorrectly affirmed Macioi's finding that all three incidents constituted HIB. The ALJ concluded that: petitioner's words and actions regarding the binder incident were not motivated by any perceived characteristic of H.O.; petitioner did not fail to adhere to H.O.'s 504 Plan; the incident did not substantially interfere with the orderly operation of the school; and petitioner's conduct did not cause H.O. to suffer emotional harm, insult or demean him, or create a hostile educational environment.

In its exceptions, the Board argues that the ALJ incorrectly placed the burden of proof on the Board, when case law provides that a petitioner is required to demonstrate by a preponderance of the evidence that a board of education acted in an arbitrary, capricious, or unreasonable manner. The Board also contends that the ALJ improperly analyzed the statutory criteria for an act of HIB, and that its decision that the binder incident met the statutory criteria is supported by the record. Finally, the Board argues that the inconsistency regarding the number

of incidents found to constitute HIB does not render its decision regarding the binder incident arbitrary, capricious, or unreasonable.

In response, petitioner argues that the ALJ applied the appropriate standard of review and that the Initial Decision was correct and should be adopted.

Upon review, the Commissioner concludes that the difference between what the decision says, and what the Board argues it meant, is so significant that this matter must be remanded to the Board to issue a decision as to whether petitioner committed an act(s) of HIB against H.O. that includes specific findings in accordance with *N.J.S.A. 18A:37-15*.

The Board's decision, which was issued by the Board Secretary, states that "[a]ll three incidents are corroborated by several witnesses." The decision explains that the Board "determined based on the totality of the circumstances recounted by the witnesses, that the victim felt he was targeted because of his disability and that his belief is reasonable." In doing so, the Board specifically identified one of the witness statements as "compelling" – a statement related to the shoes incident. Furthermore, the Board stated that "embarrassing [H.O.] because he forgot his binder, and mocking him because he had the wrong shoes, completely ignored the strategies you were required to utilize under the victim's 504 Plan" (emphasis added). Ex. R-5. Importantly, the letter contains no language that distinguishes the different incidents; there is nothing to indicate that two of the incidents were found not to be HIB.

The Board argues that while the lack of clarity in the letters is "unfortunate," the inconsistency should not undermine the Board's HIB determination regarding the binder incident. In doing so, the Board cites to *S.K. o/b/o K.S. v. Bd. of Educ. of the Twp. of Montgomery*, EDU 10786-24, Initial Decision, at 15 (June 13, 2025), *aff'd*, Commissioner Decision No. 433-25

(Sept. 8, 2025). In *S.K.*, the Commissioner found that inconsistencies in the witness accounts of the location where a student's comments were made did not undermine the Board's findings when the record adequately supported the Board's conclusion that the statements were made. That reasoning is inapplicable here, because the inconsistency is not between various accounts of the events at issue, but rather inherent in the decision itself. Contrary to the Board's assertion, the letter is not merely ambiguous or unclear. Any rational reading of the Board's decision must lead to the conclusion that the Board found all three incidents to be HIB. Accepting the Board's argument that it did not find all three incidents to be HIB, while issuing a decision that said otherwise precludes a meaningful review of the decision on appeal.

The Commissioner notes that the ALJ speculated that Macioci misread Tamburri's report and that, if Macioci had realized that Tamburri only found HIB with regard to the binder incident, Macioci would have focused only on that incident and presented only that information to the Board. The Commissioner disagrees with the ALJ's suggestion that this would have been the appropriate approach. A superintendent may disagree with the ABS' conclusions, and a board of education may disagree with the superintendent and/or the ABS.¹ For this reason, the Commissioner also disagrees with the ALJ and petitioner that the presentation of facts regarding all three incidents to the Board tainted their decision-making process. All three incidents were part of the HIB complaint made by H.O.'s parents, and it was therefore appropriate for the Board to hear about – and make a decision about – all three incidents. It is not the Board's process, but

¹ The Board suggests that petitioner knew, based on Tamburri's report, that the Board only found the binder incident to be HIB. But the ABS' report and the Board's decision are two separate parts of the process, and because they do not have to agree with each other, it does not necessarily follow that the Board's decision can be presumed to be the same as the ABS' conclusion.

rather the content of the Board's decision, and the discrepancies in its positions, that necessitates the issuance of a new decision that clearly expresses the Board's determination.

Accordingly, the Initial Decision is modified as detailed herein² and this matter is remanded to the Board

IT IS SO ORDERED.³



COMMISSIONER OF EDUCATION

Date of Decision: August 24, 2026

Date of Mailing: August 24, 2026

² In light of the fact that this matter is being remanded to the Board, the Commissioner does not find it necessary to reach any of the ALJ's other findings or conclusions, and accordingly not does adopt or reject them.

³ 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 05501-22
AGENCY DKT. NO.: 146-6/22

ERIC FITZKE-GREY,

Petitioners,

v.

**WEST ESSEX REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,
ESSEX COUNTY,**

Respondent.

Alyssa K. Weinstein, Esq., for petitioner (The Busch Law Group, LLC, attorneys)

Ronald J. Ricci, Esq., for respondent (Ricci & Fava, LLC, attorneys)

Record Closed: May 20, 2025

Decided: January 7, 2026

BEFORE: **JOHN P. SCOLLO**, ALJ, Retired and on Recall:

STATEMENT OF THE CASE

Eric Fitzke-Grey, a now-retired music and band teacher at the West Essex Middle School appeals from a determination that he committed an act of HIB against H.O., a student in his class, who had a disability and a 504 Plan.

PROCEDURAL HISTORY

Petitioner, Eric Fitzke-Grey (h/k/a “Fitzke”) filed an appeal following the West Essex Regional School District Board of Education’s (a/k/a the Board or BOE) March 8, 2022 vote. That vote upheld the District’s Superintendent’s January 20, 2022 determination to adopt the Anti-Bullying Specialist’s (Assistant Principal Lisa Tamburri’s h/k/a “Tamburri”) HIB Investigation Report dated January 20, 2022 (R-2 and R-17), which concluded that Fitzke committed an act of HIB against H.O.

Tamburri forwarded the HIB Investigation Report to School Superintendent Damion Macioci on January 20, 2022. On January 20, 2022, Superintendent Macioci, School Principal Dr. Gina Donlevie, and Assistant Principal and ABS Lisa Tamburri signed the HIB Report. The results of the HIB investigation were reported to the Board of Education on January 24, 2022. Macioci wrote to Fitzke on January 31, 2022, saying that he agreed with the conclusions of the HIB Investigation Report. On March 8, 2022, the Board of Education held a hearing at which Fitzke and his attorney set forth their arguments urging the BOE to reject the Superintendent’s determination. Afterwards, the Board voted to affirm Superintendent Macioci’s determination and informed Fitzke of its affirmance in its letter dated March 14, 2022. On June 9, 2022, Fitzke filed an appeal of the BOE’s decision with the Acting Commissioner of the N.J. Department of Education. The Assistant Commissioner referred the matter to the Office of Administrative Law on June 29, 2022 and it was received and filed in the OAL Clerk’s Office on July 5, 2022. On July 11, 2022 the matter was assigned to John P. Scollo, ALJ, who held an Initial Telephone Conference on July 21, 2022 and issued a Pre-Hearing Order dated July 22, 2022.

In accordance with the Pre-Hearing Order, the parties engaged in discovery. They also engaged in motion practice. Conferences were held. The matter was tried before Judge Scollo on October 2, 2024 and on October 8, 2024. Transcripts were ordered and obtained; and the parties submitted their Post-Hearing Briefs on December 31, 2024. The parties submitted Reply Briefs on January 14, 2025. The Tribunal received the last of the exhibits on May 20, 2025 and the record closed.

Judge Scollo obtained extensions of time for issuing his Initial Decision, the most recent extending the due date to January 5, 2026. This writing is Judge Scollo's Initial Decision.

BACKGROUND INFORMATION AND ISSUES

The parties agree that the allegations of HIB were made by H.O.'s father in a January 1, 2022 email. On January 3, 2022 the School's Principal, Mr. Donlevie spoke to Tamburri about M.O.'s (H.O.'s father's) January 1, 2022 email to Lisa Swanick, Supervisor of Fine Performing and Practical Arts and Marie Purcell, Guidance Counsellor with cc's to Gina Donlevie, Ph.D. Middle School Principal and M.O., H.O.'s mother. Tamburri testified that she and Ms. Purcell spoke with, but did not formally "interview" H.O. on Monday, January 3, 2022. The formal HIB investigation started on January 6, 2022. She formally interviewed H.O. and four student witnesses within ten days of the start of the January 6, 2022 HIB Investigation start date. The four student witnesses were people whom H.O. identified as being in Mr. Fitzke's Band Classes. On January 6, 2022 Superintendent of Schools Damion Macioci suspended Fitzke with pay pending the outcome of Tamburri's HIB investigation.

The issue is whether the Respondent proved by a preponderance of the credible evidence that Fitzke committed an act of HIB against H.O.

SUMMARY OF DOCUMENTS AND TESTIMONY

The following is not intended to be a verbatim summary of the documents and testimony presented, rather it is a summary of the information in the documents and testimony which I found important.

Testimony of Lisa Tamburri and Related Documents

The testimony of Lisa Tamburri is summarized here. Lisa Tamburri was an Assistant Principal and was the Middle School's Anti-Bullying Specialist or ABS. On or about January

3, 2022, Gina Donlevie, the Principal of West Essex Middle School requested Lisa Tamburri to initiate a Harassment, Intimidation, and Bullying (“HIB”) investigation in regard to allegations of HIB made against Eric Fitzke-Grey (hereinafter “Fitzke”), the school’s Music and Band Teacher, namely, that he allegedly committed three acts of HIB against H.O., a student who had a 504 Plan. Tamburri testified that within ten days after January 6, 2022, she interviewed H.O., four “student witnesses” (Witness “A” through Witness “D”), and Fitzke regarding the three suspected incidents of HIB referred to during the hearing as the “shoes incident”, the “xylophone incident” and the “binder incident”. Tamburri confirmed that she did not interview either of H.O.’s parents.

Tamburri set forth what she learned about the “binder incident” from H.O., the four witnesses, and Fitzke. She testified that H.O. tardily entered the classroom, when the class was already in session. Fitzke noticed that H.O. did not have his music binder and so he questioned him about it and asked H.O. about where he might have left it. After H.O. could not recall when or where he lost track of his binder, Fitzke asked members of the class to see if they had possession of H.O.’s binder. Tamburri testified that the student witnesses told her that H.O. had previously forgotten to take his music binder to Band Class on several occasions. Tamburri testified that she could not, from the information given to her, precisely state the duration of the “binder incident”. However, her account of what was said and done is enough to convince this Tribunal that the length of time encompassed by the “binder incident” was brief, perhaps a minute or two.

In Tamburri’s HIB Investigation Report and in her testimony, there was nothing obtained from the witnesses that indicated that any of H.O.’s classmates ever suspected that H.O. had a 504 Plan.

At the conclusion of the HIB Investigation, Tamburri issued her “Report of Harassment, Intimidation and/or Bullying” (hereinafter the “HIB Investigation Report” or “HIB Report”) dated January 3, 2022, but signed on January 20, 2022 (Exhibits R-2 and R-17). In the HIB Report, Tamburri reported on her investigation of the “shoes incident”, the “xylophone incident” and the “binder incident”.

Tamburri testified that she did not find the “shoes incident” to be an act of HIB because Fitzke’s statements could not be corroborated. She stated that it could not be determined whether Fitzke’s alleged comments to H.O. about wearing white sneakers to the concert instead of the required black shoes were spoken in public or in private.

In regard to the “xylophone incident”, the text of Tamburri’s report is scant. She wrote that “the alleged offender’s [Fitzke’s] view [is that] this is a non-incident”, explaining that it is someone playing at the wrong time. She wrote about “the victim [H.O.] making noise with the xylophone during band class”, that “two students confirmed the incident”, but did not describe the “incident” beyond a reference to someone playing a xylophone at the wrong time. A third student witness mentioned that “H.O. was pointed out [apparently by Fitzke] for being the source of the percussion section problems many times”. Thus, it appears that the Tamburri Report says that the xylophone incident was indeed corroborated by two witnesses, but not by all witnesses on that particular occasion. In her HIB Report (Exhibit R-2, at Bates stamps 0062 thru 0065) on ps. 0064 and 0065, Tamburri sets forth her reasons why she judged “this incident” [using the singular] to be HIB. By mentioning only the “binder incident” in her reasons and not mentioning the “shoes incident” or “xylophone incident”, Tamburri makes it clear that “this incident” refers only to the “binder incident”. On pages 0064 to 0065 she sets forth all of her reasons which she found to be supportive of her finding of HIB in the “binder incident”. In her testimony at the Hearing, Tamburri clearly stated that no HIB occurred during the “xylophone incident” because there was a lack of corroboration.

In her report and in her court testimony, Tamburri found that the “binder incident” was corroborated. When asked in court about the occasion when Fitzke questioned H.O. about his missing binder and why it should constitute HIB instead of ordinary classroom management, Tamburri responded that it was HIB because H.O. had a Section 504 Individual Accommodation Plan based on medical diagnoses of ADHD and Anxiety, captioned “Attention Deficit-Hyperactivity Disorder, Inattentive type ; Anxiety D/O”.

Tamburri testified that H.O.’s 504 Plan instructed staff to accommodate H.O. by utilizing “non-verbal cues to help with focus and redirection” and by utilizing “positive

feedback/reinforcement as often as possible” (10/2/2024 Transcript at p.59, Lines 3 thru 13) when dealing with instances where H.O. was having difficulty related to his ADHD disability. Tamburri testified that forgetting or misplacing his binder would be such an incident. Tamburri testified that Fitzke did not follow the 504 Plan’s accommodations and strategies during the binder incident. Tamburri testified that non-verbal cues would be things like tapping on a desk to get a student’s attention or giving a written instruction. Tamburri generally indicated that positive feedback/reinforcement would be, for want of better terms, encouragement and affirmation to help the student be successful.

Tamburri testified that, after interviewing H.O., four student witnesses, and Fitzke, she concluded that Fitzke’s questioning of H.O., his alleged comments to H.O., and his asking other students to check their binders in an attempt to locate H.O.’s binder was an act of HIB. She stated it was HIB because of H.O.’s 504 Plan status. H.O. reported that it made him feel uncomfortable. Tamburri believed it singled him out. She also believed it “referred back” to his disability. She used the phrase “referred back” throughout her testimony to express that Fitzke’s words and actions were linked to H.O.’s ADHD disability.

During her direct testimony, Tamburri examined the Primary and Secondary Prongs of the HIB Statute and gave her reasons for her determination that all prongs were satisfied in the “binder incident”. Thus, she decided that the HIB charge against Fitzke in the “binder incident” was “founded”.

Importantly, Tamburri also testified that the only reason why she found that Fitzke committed HIB was his failure to follow the 504 Plan by failing to give non-verbal cues and by failing to offer positive feedback and reinforcement to H.O. During Tamburri’s testimony, she stated clearly that without a violation of the 504 Plan, she would not have found that Fitzke had committed HIB. Tamburri testified that she believed that Fitzke’s failure to follow the 504 Plan was “illegal”. Tamburri explained that she used the word “illegal” because she reasoned that Fitzke’s failure to strictly utilize the accommodations set forth in the 504 Plan plus the belief that Fitzke’s words and actions, in her judgment, were directly connected with (or “related back” to) H.O.’s disability amounted to an illegality, i.e., discrimination

against a disabled student, an act of HIB. (10/24/24 Transcript, p.73, Lines 9 to p.74, Line 1).

On cross-examination, and on re-direct examination, Tamburri conceded that not every failure to follow a student's 504 Plan would necessarily be an act of HIB. However, Tamburri testified that in the binder incident Fitzke committed HIB because he failed to give positive feedback to H.O. as required by his 504 Plan and because, in her opinion, his words "referred back" to H.O.'s disability. In contrast to Tamburri's testimony that Fitzke's words and actions "referred-back" to H.O.'s perceived characteristic (i.e., his ADHD disability), Tamburri later admitted during cross-examination that her investigation report did not contain any facts proving that Fitzke said what he said to H.O. because of a perceived disability or acted as he did because of a perceived disability. (10/2/2024 Transcript, p. 99, Line 17 to p.102, Line 2, notably p. 101, Line 10. See also, p. 104, Lines 11 to 23.)

It came out later in Tamburri's testimony and explained on cross-examination that H.O. was transferred out of Fitzke's Band Class on January 3, 2022, which was three days before the HIB Investigation was even started. Tamburri confirmed that when she started her HIB Investigation on January 6, 2021, she was not aware that H.O. had already been transferred out of Fitzke's Band Class. During cross-examination, Tamburri testified that during the entirety of her HIB investigation, she was unaware that H.O.'s parents had previously (i.e., in November and December, 2021, before the alleged HIB incidents) requested the School's Administration to transfer H.O. out of Band Class and that the Administration denied their request.

During cross-examination, Tamburri admitted that if a student felt embarrassed in school, it was not necessarily due to an act of HIB. (10/2/2024 Transcript, p. 105, Lines 18 to 24). During cross-examination, Tamburri agreed that H.O.'s 504 Plan did not exempt him from arriving at class on time and doing his homework. Tamburri agreed that H.O. was always required to bring his music binder to class. Counsel asked Tamburri if it was a classroom management issue when a teacher reminded his students to bring their music binders to class. Tamburri responded cautiously that it could "possibly" be considered a classroom management issue. Throughout her testimony, Tamburri emphasized and

maintained that she believed Fitzke failed to follow H.O.'s 504 Plan and committed an act of HIB because Fitzke embarrassed H.O. when he questioned him in front of his fellow students about not bringing his binder to class while knowing that H.O. had an ADHD disability. Tamburri testified that Fitzke failed to follow the 504 Plan and committed an act of HIB because, in her judgment, he should have refrained from questioning H.O. about his missing binder in the presence of other people. In a follow-up question, Tamburri was asked if the questions Fitzke asked H.O. and others could have been an effort to locate the binder so that H.O. could participate in the class. Tamburri responded that she did not know the answer to the question. (This Judge's perception was that she appeared reluctant to even acknowledge the possibility that Fitzke was making a sincere effort to make it possible for H.O. to participate in the class.)

Upon further cross-examination, Tamburri testified that H.O. told her during his interview that he suspected that Fitzke was "out to get him" because he wore the school's basketball jersey to Band class. Tamburri offered no other evidence supporting the notion that Fitzke disliked student athletes or H.O. in particular. Upon further cross-examination, Tamburri conceded that H.O. never suggested that Fitzke was "out to get him" because of his ADHD disability. Tamburri admitted that her HIB Report does not contain anything, other than her own judgment that Fitzke was "referring back" to ADHD, suggesting that Fitzke was targeting H.O. because of any perceived characteristic, specifically ADHD. (10/2/2024 Transcript, p. 104, Lines 11 to 23). The Tribunal believes that this is significant.

Analysis of Tamburri's Testimony

Tamburri Determined that Fitzke Violated All Primary and Secondary Prongs

During her direct testimony, Tamburri explained that the "binder incident" constituted HIB because it met the criteria set forth in the Anti-Bullying Statute N.J.S.A. 18A:37-13, et seq. Tamburri testified about the elements of HIB. She testified that the Statute contains three Primary Prongs (N.J.S.A. 18A:37-14 (1), (2) and (3)) and three Secondary Prongs (N.J.S.A. 18A:37-14 (4)).

As set forth in the following two paragraphs, Tamburri determined that Fitzke violated all three Primary Prongs of the HIB Statute.

Tamburri testified that she determined that the First Primary Prong (N.J.S.A. 18A:37-14(1)) was violated because the “binder incident” was motivated by an actual or perceived characteristic. i.e., H.O. “had a 504 plan that indicates ... a specific medical diagnosis and corresponding interventions and teaching strategies”. She determined that Fitzke failed to utilize these interventions and teaching strategies, despite the fact that Fitzke knew that H.O.’s forgetfulness about his binder falls within the confines of H.O.’s disability, ADHD. Tamburri testified that Fitzke’s conduct (i.e., his words and actions) during the binder incident “referred back” to H.O.’s ADHD disability. That is to say, she found that Fitzke’s questioning of H.O. about his missing binder and his request to the other students to look for H.O.’s binder was linked to H.O. being forgetful. She reasoned that H.O.’s forgetfulness is a manifestation of his ADHD disability and that Fitzke thereby wrongfully drew attention to H.O.’s disability and that by doing so Fitzke created H.O.’s reasonable perception that his conduct was motivated by H.O.’s disability.

In regard to the Second Primary Prong, Tamburri easily determined that the alleged “binder incident” occurred on school grounds, thus establishing a violation of the Second Primary Prong. In regard to the Third Primary Prong, Tamburri determined that some instructional time was lost due to Fitzke’s questioning of H.O. and the binder search. According to Tamburri, Fitzke caused a loss of instructional time and thus deprived the students of their education. Her testimony reveals that she considered any disruption or interference with the operation of the school to be significant. Thus, she determined that a violation of the Third Primary Prong was established.

In regard to the Secondary Prongs of the HIB Statute, Tamburri stated that, while the Statute requires that only one such prong needs to be demonstrated, in this matter she determined that all three Secondary Prongs were satisfied.

Tamburri testified that Fitzke had been teaching for 19 years and was therefore familiar with the HIB Statute. He was aware that the First Primary Prong of the HIB Law,

namely its anti-discrimination provisions relating to a student's distinguishing characteristics, would affect whether a recipient of an actor's words or actions would result in a reasonable perception in the mind of a recipient that an actor's words or actions were motivated or not motivated by a distinguishing characteristic of the recipient. Also, Fitzke would be aware of whether particular words or conduct were appropriate in school or during a school-sponsored event and whether or not his words or conduct could interfere with the operation of the school or the rights of students. Likewise, Fitzke was familiar with the three Secondary Prongs of the HIB Law: (a) what a reasonable person should know would have the effect of physically or emotionally harming a student or placing a student in reasonable fear of physical or emotional harm; (b) the prohibition against insulting or demeaning students; and (c) the prohibition against creating a hostile educational environment.

In regard to the three Secondary Prongs, Tamburri made the following determinations.

First Secondary Prong: Tamburri determined that the First Secondary Prong was established because, as a veteran teacher, Fitzke should have known that his conduct (words or actions) would cause emotional harm to H.O. Basically, Tamburri believed that Fitzke should have inherently known that questioning H.O. about his missing binder in front of his fellow students would highlight the difference between the other students' compliance and H.O.'s ADHD-related non-compliance. Tamburri reasoned that this conduct unreasonably focused the class's attention on H.O., causing him embarrassment (emotional harm) and causing him to fear that his classmates would somehow surmise that he had a 504 Plan. Tamburri testified that she only found that Fitzke committed an act of HIB in the "binder incident" because his words and actions "related back" (meaning they were "linked") to H.O.'s disability. Tamburri testified that Fitzke "should have known" that publicly questioning H.O. about his missing binder would "relate back" (i.e., meaning it would be connected to or linked to) to his ADHD disability.

Tamburri did not offer any explanation regarding how or why Fitzke – or any other teacher facing circumstances of a student coming to class without his music binder – should have evaluated or re-evaluated his or her course of conduct in approaching the problem of

the missing binder other than to say that he should have utilized “non-verbal cues to help with focus and re-direction” and to provide “positive reinforcement as often as possible”. Tamburri did not offer any other suggestions about how Fitzke, using only non-verbal cues, during the classroom lesson, could have helped H.O. locate his missing binder so that he could have participated in the day’s lesson.

Second Secondary Prong: H.O. told Tamburri during his interview that he thought that as a result of being questioned about his missing binder, his classmates somehow would figure out or somehow become aware that he had a 504 plan and he feared that rumors would be spread about him. Tamburri also focused on one statement, allegedly made by Fitzke, to the effect that the other students could remember to bring their binders to class, but not H.O. Tamburri reasoned that the statement, allegedly uttered by Fitzke to H.O., “referred back” to H.O.’s disability. Because H.O. told Tamburri that he felt uncomfortable and embarrassed, Tamburri believed that the “binder incident” insulted or demeaned H.O.

Third Secondary Prong: H.O. confided to Tamburri during his interview that he felt embarrassed and was fearful that his 504 Plan would be exposed by Fitzke’s questioning. Because of the questioning and anticipated public exposure of his disability and because H.O. subsequently transferred out of Fitzke’s class, Tamburri determined that the “binder incident” created a hostile educational environment.

Tamburri’s Analysis of the Binder Incident

Tamburri’s analysis of the “binder incident” placed particular emphasis on H.O.’s assertion that the “binder incident” embarrassed him because he thought that Fitzke’s questions might expose his ADHD disability / 504 Plan to his entire class. Tamburri’s testimony and conclusions indicated that she accepted H.O.’s assertions as true, (i.e., both H.O.’s claim that “it’s not his fault to lose things” [10/2/24 Transcript, P.44, Ln 6], and H.O.’s unproven claim that all his classmates now knew that he had a disability and a 504 Plan [10/2/24 Transcript p. 48, Lines. 20-23]). Tamburri’s testimony also indicated that she did not accept Fitzke’s assertions as true (i.e., that Fitzke was simply trying to locate H.O.’s

binder and that Fitzke saw a “teachable moment” to reiterate for the benefit of all students the importance of bringing one’s binder so that everyone will be prepared for class.) Tamburri focused on what she believed was Fitzke’s failure to strictly adhere to the strategies and accommodations listed in the 504 Plan. She testified that, in her opinion, Fitzke did not comply with all the strategies and accommodations listed in H.O.’s 504 Plan. That is to say, as noted previously, Fitzke did not “utilize non-verbal cues to help with focus and re-direction”, such as written instructions and gestures; and that he did not provide H.O. with “positive feedback/re-enforcement as often as possible”. Tamburri indicated that positive feedback/re-enforcement would be, for want of a better term, the offer of encouragement and affirmation to H.O. to help the student succeed.

The Contrast Between the Two Sides’ Positions

In this paragraph, I will state Fitzke’s position to illustrate the contrast between the two sides’ positions. Fitzke’s position is that non-verbal cues such as written instructions and gestures would have been ineffective and thus irrelevant to the binder incident because such a non-verbal cues strategy is mismatched or incongruent with the circumstances of the binder incident. That is to say, there were no non-verbal cues that could have helped H.O. to remember where he last had possession of his binder. Fitzke’s position appears to be that not every strategy or accommodation fits every circumstance and that the strategies and accommodations can only be utilized insofar as they are appropriate to the individual situation. Insofar as the utilization of positive feedback and re-enforcement is concerned, Fitzke’s position is that he did indeed provide positive feedback and re-enforcement when said “I love you” to H.O., by which he meant to reassure H.O. that all was well despite the misplacement of the binder.

The Violation of the 504 Plan Was Especially Significant to Tamburri

As noted previously, Tamburri testified that the only reason why she found HIB was because Fitzke, in her opinion, failed to comply with the 504 Plan. This means that without a violation of a 504 Plan, Tamburri would not have determined that Fitzke committed an act of HIB. During direct examination, the School District’s counsel asked Tamburri the

following question: “Was Mr. Fitzke’s failure to comply with the 504 Plan the only reason that HIB was found?” (The Tribunal takes particular notice of the word “only”.) Tamburri’s answer was an unequivocal, categorical “Yes”. (10/24/2024 Transcript, p. 77, Lines 21-23). The next four paragraphs analyze why Tamburri’s “yes” answer was significant and marked a pivotal point in this matter.

Tamburri’s testimony demonstrates that she regarded each and every word or action that, in her opinion, was out of compliance with a strict adherence to all strategies and accommodations contained in a 504 Plan as “illegal” and an act of HIB. She testified that any non-compliance with a student’s 504 Plan which, in her opinion, “related-back” to a student’s distinguishing characteristic was to be considered an act of HIB. As noted, the Tribunal believes that this was a pivotal point in Tamburri’s testimony. This is because her answer to the question overlooks an important consideration, namely the effectiveness of each strategy and accommodation set forth in the 504 Plan to the uniqueness of a given set of circumstances.

As set forth in this Initial Decision’s Findings of Fact below, Fitzke actually provided positive feedback and re-enforcement in accordance with the 504 Plan’s accommodation number eleven. The Findings of Fact also declare that the 504 Plan’s accommodation number three, the use of non-verbal cues, would be inadequate and inappropriate in the circumstances presented in the binder incident because a verbal cue could not possibly enable H.O. to recall where his binder was located. As will be seen, those Findings of Fact contrast with and undermine the basis for Tamburri’s determinations (a) that Fitzke failed to follow H.O.’s 504 Plan, and (b) that Fitzke committed acts of HIB.

In her “relation back” analysis, Tamburri’s finding of HIB would be correct where the listed accommodation would likely be effective in the circumstances, but her finding of HIB would be incorrect where the teacher either followed the 504 Plan’s accommodations or where the accommodations were irrelevant, i.e., incongruent with the circumstances at hand. In other words, in the circumstances of the binder incident, non-verbal cues could not possibly be capable of effectively addressing the problem that the circumstances presented, namely, assisting H.O. to recall when and where he last had his binder in his possession.

As already noted, consistent with her strict interpretation of the 504 Plan, Tamburri testified that she would not have found HIB in the binder incident but for Fitzke's failure to provide H.O. with non-verbal cues. The Tribunal is wary of an overly-strict application of the 504 Plan because it could result in one (or more) of the Plan's strategies or accommodations being applied in circumstances where it was never intended to be applied. If Tamburri's strict interpretation of the 504 Plan were to be followed, then a teacher, like Fitzke, could be deemed to have failed to follow the 504 Plan and be accused of committing HIB every time he or she did not employ every strategy and accommodation of the 504 Plan in a given set of circumstances, even where the accommodation does not fit the circumstances. It would follow that such a strict interpretation of the 504 Plan could likely result in an unjust accusation against the teacher. In the case at bar, Fitzke stood accused of not offering non-verbal cues. As already noted, there was no possibility that a non-verbal cue could enable H.O. to recall where his binder was located. Yet, Tamburri found that Fitzke committed HIB when he failed to offer H.O. a non-verbal cue to help him locate the binder. Tamburri found Fitzke committed HIB by not offering positive feedback and reinforcement. But, as Fitzke testified, he allowed H.O. to participate in the class without his binder and he told him not to worry. Fitzke testified that by saying, "I love you", to H.O. he was communicating to him that all was well even though he did not have his binder. The question is: Should all the strategies and accommodations set forth in a student's 504 Plan be automatically applied (i.e., required) in every set of circumstances, or should their application be left to the sound discretion of what a reasonable teacher would do in the given set of circumstances? This question will be addressed in the CONCLUSIONS Section.

Summary of School Superintendent Damion Macioci's Testimony and Related Documents

Damion Macioci testified that since 2019 he has served in the position of Superintendent of Schools for the West Essex Regional School District. He holds a B.S. in Exercise Science from William Paterson College and a M.S. in Physical Education from Montclair State University. In addition, he has earned 43 credits in education leadership from Thomas Edison State College and multiple certificates and certifications for teacher of

physical education, for athletic trainer, for school supervisor and for chief school administrator. Besides West Essex, he also worked in the Randolph Township School District, the Livingston Township School District as the Principal of Heritage Middle School, and as a gym teacher and athletic trainer at Chatham High School.

He recalled that during the 2021-2022 school year there was an investigation of HIB regarding a Music and Band teacher named Eric Fitzke-Grey and a seventh grade student by the initials of H.O., who had a disability and a 504 Plan. He recalled that Lisa Tamburri, an Assistant Principal, served as the school's Anti-Bullying Specialist (ABS) and conducted the HIB Investigation and issued the HIB Report dated January 20, 2022 (Exhibits R-2 and R-17). Superintendent Macioci, Middle School Principal Gina Donlevie, Ph.D., and Assistant Principal and ABS Lisa Tamburri conferred and signed the HIB Report (R-2) on January 20, 2022. Macioci confirmed that both he and Tamburri had and continue to receive HIB training as part of their school duties.

Daimon Macioci testified that he sent a letter to Fitzke dated January 31, 2022 informing him that an HIB Investigation of three incidents had been undertaken and informing him of the results thereof.

In Macioci's January 31, 2022 letter to Fitzke, he wrote that the ABS (Tamburri) determined that Fitzke did not adhere to H.O.'s 504 Plan; that he had called out H.O. and criticized his behaviors in front of his peers on occasions when H.O. forgot to take his binder to class; and when H.O. hit the wrong note while playing the xylophone. Macioci wrote that Fitzke's actions created a hostile educational environment and caused him to withdraw from the Band class. Macioci summarized each of the three incidents - the "shoes incident", the "binder incident", and the "xylophone incident" - and noted that Fitzke's words and actions were witnessed and confirmed by four student witnesses. Thereafter, Macioci wrote,

"I have concluded that, based upon the information provided to me by the ABS, that these incidents meet the definition of HIB as set forth in the District's HIB Policy. Specifically, I have found that your actions toward the victim subjected him to harassment, intimidation, and bullying. Most disturbing is that your conduct

violated the victim's 504 Plan, which placed you on notice of the victim's disability and the strategies and accommodations that you were expected to utilize when addressing the very conduct that occurred here. All of this led the victim to withdraw from your class and band altogether, which conclusively demonstrates that your conduct interfered with the victim's rights and had the effect of insulting and demeaning him. Finally, whereas here, the victim's 504 Plan identified the types of behaviors described in the *three (3) incidents reported here*, you should have known that your response to those behaviors would cause emotional harm to the victim." [Italics supplied.]

The letter concluded with information about Fitzke's appeal rights and the associated filing dates.

Macioci testified that he did not take part in investigating the allegations of HIB, nor did he interview any witnesses or review any documents during the course of the investigation. I **FIND** that there is no record of Macioci conducting his own independent investigation or of his receipt of information over and above Tamburri's Investigation Report.

Respondent's counsel asked Macioci on direct examination about how many allegations of HIB had been investigated by Tamburri. He responded that there were three allegations, labelling them as the "shoes incident", the "binder incident" and the "xylophone incident". His attention was directed to the eighth paragraph of his January 31, 2022 letter to Fitzke, which is the last paragraph of the second page of the letter. He was further directed to a part of the first sentence of that paragraph, specifically to the words "... *these incidents* meet the definition of HIB" and was asked, "Which incidents were you referring to when you wrote that?" [Italics supplied.] Macioci responded. "Specifically the second incident which involved the binder." In response to further questioning, Macioci testified that he was aware that Tamburri did not find HIB in the "shoes incident" or in the "xylophone incident", but only in the "binder incident". In response to further questioning, Macioci testified that his decision to affirm Tamburri's HIB finding "was based on the fact that the ABS (Tamburri) made a determination that the student (H.O.) was a victim based on his disability and that disability led to the finding that the case met the additional prongs that are required to have been met for the incident to constitute HIB." (10/2/2024 Transcript at

p. 140, Lns. 7 to 14.)

Macioci identified Exhibit R-4 as a letter dated February 18, 2022 from the BOE's attorney, Steven Fogarty to Petitioner's attorney, Ronald Ricci confirming that the Board was scheduled to hear Fitzke's appeal on March 8, 2022. Macioci confirmed that the hearing took place, that he was present, that Fitzke appeared with his attorney, and that the BOE affirmed his decision upholding Tamburri's finding of HIB.

Macioci identified Exhibit R-5 as a letter dated March 14, 2022 from the BOE's Business Administrator and Board Secretary Melissa Kida to Fitzke. In that letter Ms. Kida summarized the hearing of March, 2022 before the BOE. The content of the letter included summaries of the "shoes incident", the "binder incident" and the "xylophone incident"; a statement that the incidents were confirmed by several witnesses; a statement that the BOE determined that the victim reasonably perceived that Fitzke's comments were motivated by his disability; and informing him that the BOE affirmed Superintendent Macioci's decision that Fitzke engaged in HIB.

Lastly, Macioci's direct testimony concluded with his confirmation that no prior conduct of Fitzke had any bearing on his determination to uphold Tamburri's finding that Fitzke committed HIB in the matter at hand.

On cross-examination, Petitioner's counsel questioned Macioci about whether the BOE's decision found Fitzke guilty of HIB only in the "binder incident" or in all three allegations of HIB - the "shoes incident", the "binder incident" and the "xylophone incident". Macioci responded that the finding of HIB was for the "binder incident" only. Thereupon, counsel directed Macioci to Exhibit R-3 (eighth paragraph) wherein Macioci used the phrase "these incidents" and asked him whether he was referring to only the "binder incident" or to all three incidents ("shoes", "binder" and "xylophone"). Macioci responded that although he wrote "these incidents", he was only referring to the "binder incident". Continuing the cross-examination, counsel asked if the use of the plural rather than the singular was a typographical error. Macioci responded that it was not a typographical error. He further explained that he meant to refer only to the "binder incident", and that his "letter probably

could have been written a little bit more clear to separate out.”

Petitioner’s counsel thereupon moved on to questioning Macioci about Exhibit R-5, the March 14, 2022 letter written by Melissa Kida (BOE’s Business Administrator) to Fitzke. Macioci confirmed that he was cc’d (i.e. copied) on this letter. Counsel pointed out that in her March 14, 2022 letter, Ms. Kida referred to the corroboration of “*all three incidents*”, not just the “binder incident”, but Macioci stated that he did not know why Kida referred to all three incidents. [Italics supplied.] Upon further questioning, Macioci remained steadfast in his assertion that neither he nor the BOE found Fitzke guilty of all three allegations of HIB.

Upon further cross-examination, Macioci testified that he never spoke personally to Fitzke about any HIB incidents and he did not speak to H.O. or to his parents about any HIB incidents.

On Re-Cross examination, Respondent’s counsel asked Macioci if a teacher had the authority to decide which portions of a 504 Plan he would implement. Macioci’s response was that a teacher did not have the authority to decide which portions of a 5054 Plan he would implement. In answer to a follow-up question, he added that a teacher would not be allowed to substitute his own judgment in place of the 504 Plan in deciding what is best for the student who had a 504 Plan.

Analysis of Macioci’s Testimony

There is a dispute between the parties over the significance of the findings. Petitioner-Fitzke’s counsel, Mr. Ricci, contended that Tamburri’s Report sets forth three findings of HIB (in the “shoes incident”, in the “xylophone incident” and in the “binder incident”), and that during her in-court testimony Tamburri said that she did not find acts of HIB in the “shoes incident” and in the “xylophone incident”. However, Tamburri testified that she did find an act of HIB, but it was only contained in the “binder incident”. Ricci’s point is that the findings of HIB in Tamburri’s investigation report differed from the findings of HIB as stated during her testimony. Ricci argued that these differences demonstrate an inconsistency in her findings. Moreover, Ricci pointed out that Superintendent Macioci

found acts of HIB in all three incidents (the “shoes incident”, the “binder incident”, and the “xylophone incident”), which were based on his reading of Tamburri’s investigation report. Ricci noted that the Superintendent found HIB in the “shoes incident” where Tamburri clearly stated there was no HIB. Ricci argued that this indicates that the Superintendent’s decision must have been based on some facts beyond those contained in Tamburri’s investigation report and that it would have been improper for the Superintendent to do. Ricci noted that the Superintendent found HIB in the “shoes incident”, but Tamburri clearly stated that there could be no finding of HIB in the “shoes incident”. Ricci argued that the Superintendent’s findings of HIB in all three incidents demonstrate a serious flaw in the Superintendent’s findings that directly influenced his ultimate determination of the matter. Ricci noted that the Board of Education affirmed the Superintendent’s flawed decision to sustain the charges in all three alleged incidents of HIB against Fitzke. Ricci’s point is that the BOE’s affirmance compounded the error. Ricci therefore urges this Tribunal to reject the Superintendent’s decision and the Board of Education’s vote to affirm the Superintendent’s decision.

Ms. Weinstein retorted, in her Reply Brief, that (1) Tamburri’s investigative report clearly states that she only found acts of HIB in the “binder incident” because only the “binder incident” was supported by corroborative evidence, and (2) Tamburri’s investigative report clearly states that the “shoes incident” was not corroborated because she could not determine if Fitzke’s comments to H.O. were made in public or in private and that the “xylophone incident” was corroborated by two witnesses, but not by all three witnesses.

Citing passages from the depositions of Tamburri, Macioci, and Fitzke himself, Weinstein argued that Tamburri’s investigative report was clear about what actions she found to be HIB and what actions she did not find to be acts of HIB. Weinstein argues that Tamburri’s findings were stated clear enough in her report so that they could not possibly have mis-led Macioci or the BOE (the decision-makers) in any way. Weinstein argues that despite Tamburri agreeing that her report could have been written clearer, it was clear enough and Tamburri’s testimony was clear enough to demonstrate that she only found HIB in the “binder incident”. Weinstein added that case law supports the principle that a BOE’s decision is presumptively valid absent proof that the BOE acted with “no rational basis” or

acted “without consideration and in disregard of circumstances”. Weinstein argues that here Superintendent Macioci had a rational basis for his decision because HIB was demonstrated in the “binder incident” and therefore his decision should stand.

On the issue of the clarity of the HIB Report, neither attorney is entirely correct, as will be explained in the following FINDINGS OF FACT.

On the issue of the clarity of the HIB Report, I **FIND** that the transcript of the in-court testimony and the transcript of Tamburri’s September 16, 2022 deposition demonstrate that Ricci is incorrect because Tamburri’s testimony on both occasions was clear enough to show that she found HIB only in the “binder incident”. I **FIND** that Weinstein is correct that Tamburri’s HIB investigative report, her trial testimony, and her deposition testimony were consistent. I **FIND** that in her HIB Report, her trial testimony, and her deposition testimony Tamburri states that she found that Fitzke violated the HIB Statute only in the “binder incident”. However, I **FIND** that in Macioci’s January 31, 2022 letter, paragraph eight, Macioci’s wording clearly refers to multiple incidents. The clearest indication that Macioci believed that Fitzke committed three acts of HIB is contained in the sentence that reads: “I have concluded that ... *“these incidents* meet the definition of HIB....” [Italics supplied.]

Clearly, Tamburri testified that her HIB Report found that only one HIB violation occurred, the “binder incident”. However, just as clearly, two documents from the Respondent’s side state that there were *three* HIB violations. [Italics supplied.] The two documents are: Macioci’s January 31, 2022 letter to Fitzke (Exhibit R-3) and the letter from the BOE’s Business Administrator, Melissa Kida, to Fitzke dated March 14, 2022 (Exhibit R-5).

Tamburri determined that HIB occurred only during the “binder incident”. Yet, as we shall see, Macioci’s January 31, 2022 letter (Exhibit R-3) and his testimony indicate that he found more than one incident of HIB. The problem to be solved is whether we can reconcile these contrasting issues of fact. This will be analyzed below.

I note that on the presentation of Macioci's direct testimony, Respondent's counsel attempted to elicit an explanation from Macioci which would cure the sharp difference ("three HIB violations" versus "one HIB violation") between Macioci's account and Tamburri's account.

During his direct testimony Macioci tried to explain why Exhibit R-3, his letter to Fitzke dated January 31, 2022 says "[t]hese incidents meet the definition of HIB." [Italics supplied.] The Tribunal notes that the phrase "these incidents" literally refers to more than one incident. Respondent's counsel asked Macioci, "Which incidents were you referring to when you wrote that?" Macioci responded, "Specifically, the second incident, which involved the binder." The questioning went on to confirm Macioci's understanding that Tamburri determined that there was an act of HIB in the "binder incident", but not in the "shoes incident" nor in the "xylophone incident". On cross-examination, Petitioner's counsel, using and quoting from Macioci's January 31st letter (R-3), asked Macioci the following question: "It says, 'I have concluded that based upon the information provided [to] me by the ABS that these incidents, plural meet the definition of HIB as set forth in the district's HIB policy.' Was that a typo?" Macioci denied that it was a typographical error. Instead, he stated twice that he could have written the letter "clearer". I **FIND** that Macioci, a very educated man, certainly knows the difference between the use of the singular and the use of the plural. In reference to the number of incidents for which he found HIB to have occurred, Macioci attempted to explain that when he wrote his January 31, 2022 letter to Fitzke (Exhibit R-3) he used the plural when he really meant to use the singular when setting forth the number of HIB incidents Fitzke committed. In light of Macioci's understanding of the stark difference between the singular and the plural, and the critical difference that using the singular versus using the plural makes in determining the facts of this matter, I **FIND** Macioci's explanation too incredible to be worthy of belief. I also **FIND** that Macioci's denial that he made a typographical error when he wrote "these incidents" (i.e., denoting the use of the plural of the word "incident"), means that he meant to write what he actually wrote in his January 31, 2022 letter. I **FIND** that he wrote and he meant to write "these incidents" signifying more than only the "binder incident". I **FIND** that on the first three paragraphs on the second page of his three-page letter (Macioci's January 31, 2022 letter a/k/a Exhibit R-3), Macioci describes all three incidents and uses language which clearly sets forth the facts of each

incident which form the basis of his belief that Fitzke violated the HIB Statute in all three incidents. I **FIND** that Macioci's use of the phrase "as concerns the most egregious incident...." denotes a comparison of the "binder incident" to the two other "egregious" incidents indicating that he regarded those two incidents acts of HIB. Thereafter, Macioci (in the final paragraph of page two) uses the above-discussed conclusory sentence, "I have concluded that, based upon the information provided to me by the ABS, that *"these incidents* meet the definition of HIB as set forth in the District's HIB Policy." [Italics supplied.] I **FIND** that, despite his attempts while giving testimony to change the literal meaning of what he wrote in his January 31, 2022 letter, Macioci based his affirmance of Tamburri's HIB Report on his finding that there were three incidents of HIB, not only the "binder incident". I **FIND** that Macioci's attempt to convince the Tribunal that that his use of the plural is a plausible way of denoting the singular indicates a disregard of the truth and indicates prejudice on his part and thus seriously impacts his credibility.

In Business Administrator / BOE Secretary Melissa Kida's three-page letter (Exhibit R-5) to Fitzke dated March 14, 2022, she stated that the BOE considered the record of the March 8, 2022 Appeal Hearing, Macioci's findings and decision, Tamburri's HIB Report, and Petitioner's attorney's Brief. Kida's March 14, 2022 letter contains 12 paragraphs. In Paragraphs 6 through 9, Kida cited information about all three incidents (the "shoes", "binder" and "xylophone" incidents) taken from the HIB Report and the statements of the student witnesses. Tamburri's, Macioci's and the BOE's interpretation of said information supported H.O.'s accusations against Fitzke and the conclusion that Fitzke violated the HIB Statute. In the first sentence of Paragraph 7, Kida stated,

"All three incidents are corroborated by several witnesses. While the witnesses have varying recollections of what occurred, the Board determined based on the totality of the circumstances recounted by the witnesses, that the victim felt that he was targeted because of his disability and that his belief is reasonable."

I **FIND** that Kida's March 14, 2022 letter unequivocally states that the BOE's affirmance of Superintendent Macioci's approval of Tamburri's HIB Report mistakenly

assumed, as did Macioci, that the HIB Report found HIB in “[a]ll three incidents” and “the totality of the circumstances” of all three incidents. [Italics supplied.] I **FIND** that the content of Kida’s letter is in direct contrast to Tamburri’s testimony, which was that there was one and only one act of HIB committed by Fitzke – the “binder incident”.

The analysis set forth above provides the answer to the above-stated problem of whether Tamburri’s account versus Macioci’s account can be reconciled. I **FIND** that there is a contradiction between Tamburri’s finding of one act of HIB and Macioci’s finding of three acts of HIB by Fitzke. I **FIND** that the two accounts cannot be reconciled.

I **FIND** that in Macioci’s January 31, 2022 letter, paragraph eight, Macioci’s wording clearly refers to multiple incidents. The clearest indication that Macioci believed that Fitzke committed three acts of HIB is contained in the sentence that reads: “I have concluded that ... *these incidents* meet the definition of HIB....” [Italics supplied.] I **FIND** that Macioci’s January 31, 2022 letter, as written and literally interpreted, differs from his testimony. I **FIND** that the January 31, 2022 letter removes all doubt. Macioci’s belief is that that Fitzke committed multiple (plural) acts of HIB, namely, the “shoes incident”, the “xylophone incident”, and the “binder incident”.

I **FIND** that Macioci’s belief that Fitzke committed three acts of HIB instead of only one act of HIB is significant because it would very likely have had a cumulative effect. If Macioci’s overall assessment of Fitzke was tainted by his belief that Fitzke committed three acts of HIB rather than one act of HIB, then this would likely have affected his judgment and would likely influence the severity of the penalties to be imposed on Fitzke. I **FIND** that Macioci’s overall assessment of Fitzke was tainted and that his judgment was thereby unduly influenced against Fitzke. I **FIND** that the BOE made the same factual mistake that Macioci made.

Summary of Lisa Swanick’s Testimony and Related Documents

Lisa Swanick testified about her educational and professional background as follows. She graduated in 2001 from William Patterson University with a Bachelors Degree in Music

Management and in 2006 with a Post Baccalaureate teaching certification. In 2009 she graduated from Boston University with a master's degree in music education. In 2012 she earned an NJSL supervisor certificate. She worked eight years as a teacher of Music for the West Orange BOE and then moved on to the West Essex BOE. She has served as the Supervisor of Fine Performing and Practical Arts. While in that role she was Fitzke's direct supervisor.

After focusing her attention to the 2021-2022 school year she recalled both Fitzke and H.O. She recalled that in a December 6, 2021 email (R-16) to Guidance Counsellor Carly Cressabenie (with a copy to her) Fitzke recommended that H.O. be transferred out of Band class because he had been in contact with H.O.'s parents. She recalled a December 13, 2021 email (Exhibit P-7) sent by H.O.'s mother to Swanick saying that she likes Mr. Fitzke and he has been working with them regarding their son, but that the class has become too stressful and they want H.O. transferred to another class. Swanick recalled having a telephone conversation with one or both parents about transferring H.O. out of the Band class. Swanick testified that she lacked the authority to do so herself and that that authority lay with the school Principal and the Guidance Department. She testified that the transfer of H.O. did not occur in mid-December.

During cross-examination by Attorney Ricci, Swanick testified that on Thursday, December 16, 2021 she had another telephone conversation with H.O.'s mother about the hoped-for transfer. In a December 20, 2021 email to H.O.'s parents, Swanick informed them that she was looking for options for the second semester.

Swanick recalled receiving an email sent by H.O.'s father to her and Guidance Counsellor Marie Percell (cc: Principal Gina Donlevie and H.O.'s mother) on Saturday, 1/1/2022. The email stated that there was an "ongoing problem with Mr. Fitzke for four weeks now". H.O.'s father mentioned that he and his wife wanted to give the school some time over the holidays to attend to the problem. The email set forth a list of complaints about Fitzke's conduct and their dissatisfaction with H.O. remaining in the Band class. Swanick testified that after the school's receipt of the 1/1/2022 email, H.O. was switched out of Band class days after the 1/1/2022. She did not say who gave the approval for the transfer.

Swanick's direct testimony concluded with her answers to questions about the nature of a 504 Plan and her response to a question in which she agreed that teachers did not have a choice of what sections of a 504 Plan they would implement or for substituting their own judgment for what is written in a 504 Plan.

On cross-examination, Attorney Ricci asked Swanick if H.O.'s parents had reported any incidents of bullying against H.O. by Fitzke during their conversations and emails in December. She responded that she had not received any such information and she agreed that if she had heard any such complaints she would have filed a report.

On cross-examination Swanick agreed that during her June 8, 2023 deposition she stated that a Guidance Counsellor told her in December, 2021 that the request to switch H.O. out of the Band class was "impossible". Swanick confirmed that in mid-December the school denied H.O.'s parents' request for H.O. to be transferred, but that after receiving the 1/1/2022 email from H.O.'s father, the school granted the transfer request.

On further cross-examination, Swanick was shown Exhibit P-8. P-8 contained a 1/3/2022 email which she sent to H.O.'s father (cc: Principal Donlevie, Marie Purcel and H.O.s mother) telling him that H.O. was to report to the Guidance Office on 1/4/2022 to pick up his new schedule. He was being switched from Band class to an Exploratory Cycles. She agreed that the switch was approved on Monday, 1/3/2022 the first school day after her receipt of the 1/1/2022 email. Swanick confirmed that in mid-December the school denied H.O.'s parents' request for H.O. to be transferred, but that after receiving the 1/1/2022 email from H.O.'s father, the school granted the transfer request. Swanick denied having any knowledge of a transfer request from H.O.'s parents in October, 2021.

Analysis of Lisa Swanick's Testimony

Swanick testified that if H.O.'s parents alleged bullying by Fitzke, she would have filed a report. There is no evidence in the record that Swanick filed such a report. Therefore, I **FIND** that H.O.'s parents did not allege to Swanick that Fitzke bullied H.O.

Swanick's testimony confirmed that H.O.'s parents wanted to withdraw H.O. from Band class long before the first of the alleged HIB incidents for which Fitzke was charged. Her testimony confirmed that the parent's reasons for the requested change had less to do with Mr. Fitzke, and more to do with H.O.'s commitment to his basketball team and the scheduling conflicts involved with that and H.O.'s lack of enthusiasm with / enjoyment of the Band class's subject matter and their son's feeling of stress. Their reasons also pertained to a preference for an Exploratory Cycle type of class for H.O. The documents referred-to during Swanick's testimony indicate a contrast between H.O.'s mother's generally favorable view of Fitzke and H.O.'s father's correspondence. One of the father's emails to Fitzke (Exhibit P-4) was apologetic because H.O. had to miss a Band event in favor of his basketball commitment. Another email (Exhibit P-8) was sent by H.O.'s father to Swanick, Purcell, and Principal Donlevie accusing Fitzke of misconduct, but which was based on alleged facts that he clearly did not come by first hand.

Swanick's testimony also provided insight into the school's initial denial of the class change request in early December, 2021 and its sudden reversal in early January, 2022. Her deposition testimony was brought out on cross-examination revealing that the parents' request for the class change was denied outright because the Guidance Office said: "The switch is "impossible". 10/2/2024 Transcript, p.176, Lines 7 to 15 and p. 177, Line 11 thru p. 178, Line 2.) The Petitioner made the point that H.O.'s Father's accusatory 1/1/2022 email resulted in the school reversing its decision and giving its approval of H.O.'s class switch request by January 3, 2022.

Summary of Eric Fitzke-Grey's Testimony and Related Documents

On October 8, 2024, Eric Fitzke-Grey testified at the OAL Hearing. He set forth his educational background, teacher certifications and employment history. He testified that he appealed the BOE's HIB determination because he believed he had not committed HIB and because he wanted to apply for teaching positions in other school districts.

Fitzke testified that he met H.O. at a Summer Band Camp and that H.O. enrolled in his Band class in the Fall of 2021. H.O. enrolled to learn how to play percussion instruments like various types of drums, like snare drums, kettle drums and base drums; keyboard percussion instruments like bells, xylophones, marimbas and vibraphones, and accessory instruments like cymbals, triangles, tambourines, and tom-toms.

Fitzke testified that at the start of the school year he emailed a Band Handbook, which had everything a student needed to fully participate in Band class. Binders enabled all Band class enrollees to know what would be required for the class, such as attendance, bringing one's binder and instrument to class, and class materials. He also created or revised binders tailored for each of the 10 to 30 types of musical instrument in the Band. A binder contained the student's portfolio which included music, instructions telling students how to practice, software used to record homework, a notebook, etcetera. He stated that the binders for percussion instruments were very different from binders for wind instruments.

Fitzke recalled that in the 2021-2022 school year he taught two sections of Band class, one with 35 students and one with 31 students, for a total of 66 students. The big event of the year was the December 16th Concert where the students played in an ensemble, rather than individually. Fitzke testified that the goals of Band class were not only to learn how to play an instrument, but to perform in combination with other musicians, to create music, and to connect socially with others to create a whole that was larger than its parts. Fitzke testified that in the 2021-2022 school year, because of distancing requirements made necessary by Covid restrictions, the Band Class was held in larger quarters, such as an auditorium rather than in a classroom.

Fitzke testified that in 2021-2022 he had seven students in his Band class who had IEPs or 504 Plans. He recalled that H.O. had a 504 Plan and that there were 11 teaching strategies associated with it. He recalled that H.O. needed assistance with organizational skills. His counsellor recommended and he received preferential seating, which meant that he should be seated where the teacher could keep a close watch on him. Because H.O. was a percussionist, he and all percussionists had to be placed in the back row of the band,

but since they were required to stand while playing, Fitzke could easily watch H.O., who was placed in the middle of the percussionists, fulfilling that requirement of his 504 Plan. Fitzke was familiar with the requirement of using non-verbal cues (such as a head nod or pointing) and the requirement for using positive re-enforcement. He stated that he utilized these and the other teaching strategies when needed. Fitzke recalled that he and H.O. worked-out a plan whereby H.O. would place paper messages on his podium to communicate with Fitzke when he needed to do so.

Fitzke testified that he recalled communicating with H.O.'s mother in October, 2021 once on the telephone and several times by email. She was concerned that H.O. was trying to balance the demands of academics (including Band class) and the demands of athletics, especially basketball. She asked about withdrawing H.O. from Band class. Fitzke testified that he had several athletes in his classes; he understood; and he stated that it was entirely up to the student and his parents. He recalled that the school administration initially denied the request to withdraw H.O. from Band class, but subsequently decided in early January, 2022 to allow him to withdraw. Fitzke recalled a December 2, 2021 email in which H.O.'s mother called him "a wonderful teacher".

Fitzke testified about what became known as the "binder incident". He recalled that on Tuesday December 21, 2021, while he was ten minutes into the class, H.O. walked down the steps of the auditorium and onto the stage approaching him. Although Fitzke was busy directing the band's performance of music, H.O. tapped him on the shoulder and started talking to him. Fitzke motioned him to join the percussionists. H.O. sat down in another section and started texting on his cell phone, which was prohibited in class. Subsequently, Fitzke asked H.O. why he was using his cell phone in class and again directed him to join the percussionists. Fitzke noticed that H.O. did not have his binder. He asked H.O. if he knew where his binder was located and asked if perhaps he left it at home or at the high school. H.O. did not know where it was. Fitzke decided to do a "binder check" in order to find out if anyone had H.O.'s binder. While doing so, he asked about eight students to hold up their binders so that he could read the names written on them. Fitzke noticed that, in his words, H.O. looked "a little deflated", so he told H.O. to check for his binder when he went home. He also told H.O., "*We got this. Don't worry about it. I love you.*" [Emphasis supplied

by Fitzke.] When asked about whether he meant “I love you” sarcastically, he denied that he said it sarcastically. Fitzke explained that students missing their binders was a common type of occurrence in Band class and that he had said the same thing to others previously because he didn’t want them to feel shame.

On cross-examination, counsel for the Respondent queried whether Fitzke had undergone any training about the HIB Statute. Fitzke responded in the affirmative. Since he was familiar with the First Primary Prong’s prohibition against acting in a way that could be perceived as being motivated by a person’s distinguishing characteristic, counsel asked whether Fitzke considered putting off the inquiry into the whereabouts of H.O.’s binder until a later time, when it could be done outside the presence of H.O.’s classmates. Fitzke responded that he was trying to locate the binder so that H.O. could immediately participate in the class. Fitzke was asked on cross-examination if he ever considered whether his request to the other students to hold up their binders might make H.O. feel that his disability was being displayed in front of his classmates. Fitzke denied that that was his intent. Counsel then confronted Fitzke with the statements of the student witnesses. They stated that Fitzke tried to embarrass H.O. by having the other students hold up their binders to demonstrate that everyone, except H.O., could remember to bring one’s binder to class. Fitzke responded that one of the witnesses assumed that Fitzke was frustrated with H.O., which was not true. He pointed out that the statements were anonymous and undated. Thus, they could have been conflating the events of December 21st date and other times when H.O.’s binder was missing.

Analysis of Eric Fitzke-Grey’s Testimony

The Respondent-School District’s contention is that Fitzke committed an act of HIB when he ignored H.O.’s 504 Plan and the School District suggests that his ignoring of the 504 Plan is thoroughly intertwined (i.e., “linked”) with the alleged act of HIB, namely the singling-out of H.O. in front of his peers to target him for his distinguishing characteristics and to demean and ridicule him (rather than employ the accommodations set forth in his 504 Plan). It is clear that the 504 Plan existed to provide a real-time way to recognize H.O.’s ADHD disability. In dealing with a student like H.O., whose 504 Plan included a diagnosis

of ADHD, a teacher, like Fitzke, would be called-upon to find ways on a daily basis in real-time to help H.O. address those ADHD-related problems as they manifested themselves during the course of any given day. It is clear that the District focused on the content of some of the witnesses' statements which said that Fitzke polled his entire class in order to make the point to H.O. that only he came to class without his binder. The District maintains that Fitzke's conduct isolated and embarrassed H.O. and that Fitzke's conduct made H.O. believe that his status as a 504 Plan student was being revealed to his peers.

On the other hand, Fitzke's testimony tells us that, in recognizing that H.O. had once again forgotten his binder, Fitzke's way of addressing the situation was twofold. First, Fitzke started a search for H.O.'s binder (believing that the binder may have been in another student's possession). Fitzke did so because H.O.'s lack of a music binder would render him unable to participate in class and therefore H.O.'s lack of a binder could interfere with the operation of the class. Second, Fitzke decided to use the situation as a learning experience by demonstrating to all students that it was important to come to class on time, fully prepared, and fully engaged. Fitzke testified that after the "binder incident" concluded, H.O. walked passed the percussion instrument section to a place where he would not be able to participate in class and that once there he proceeded to use his cell phone instead of attempting to participate in the class. Fitzke emphasized that in telling H.O., "We got this. Don't worry about it. I love you", he was trying to assure H.O. that all was well despite the missing binder.

FINDINGS OF FACT

Having analyzed Tamburri's, Macioci's, Swanick's, and Fitzke's testimony and the documents, indeed, the entire record, I make the following **FINDINGS OF FACT**.

I **FIND** that on the day of the "binder incident" H.O. showed up late for class, which was already in session, and was not in possession of the binder containing the music which would have enabled him to participate in the class. I **FIND** that when Fitzke noticed that H.O. did not have his music binder he questioned him about it and asked H.O. about where he might have left it. I **FIND** that it was a legitimate attempt to help H.O. remember where

his binder might be. I **FIND** that the questions, as composed, lacked any indication of hostility, impatience, or malice.

I **FIND** that Fitzke asked the members of the class to check to see if anyone was in possession of H.O.'s binder. I **FIND** from an examination of the student witnesses' accounts that there was nothing that indicated that it took Fitzke a long time to question H.O. and to ask the students to check to see if anyone had H.O.'s binder. I **FIND** that there is a lack of reliable evidence that proves that Fitzke asked each and every student to hold up his or her binder or that he polled the entire class. I **FIND** from examining the evidence that Fitzke's use of class time to try to locate H.O.'s binder was minimal in duration, perhaps a minute or two. I **FIND** that this amount of time was not significant enough to "interfere" with H.O.'s or anyone else's education. I **FIND** that after the "binder incident" concluded, H.O., instead of following Fitzke's instructions to join the percussionists, walked passed the percussion instrument section to a place where he would not be able to participate in class and that once there he proceeded to use his cell phone instead of attempting to participate in the class.

I **FIND** that the evidence indicates that Fitzke's questions about the whereabouts of the binder were proper under the circumstances as a matter of classroom management (i.e., to facilitate H.O.'s ability to participate in the class). I **FIND** that there is a lack of reliable evidence that proves that Fitzke made any attempt to highlight that H.O. was the only student without a binder. I **FIND** that there is no evidence in the record regarding the "binder incident" from which it could reasonably be inferred that Fitzke did anything that would suggest to anyone that H.O. had a 504 Plan.

I **FIND** that the evidence does not suggest that the nature of the search for the missing binder disrupted the orderly operation of the class. I **FIND** that the evidence does not suggest that the nature of the search for the missing binder could cause physical or emotional harm to any student in the class and thereby tend to create a hostile educational environment. I **FIND** that the evidence demonstrates that the nature of the search for the missing binder was to enable H.O. to participate in the class, and so was a legitimate use of class time. I **FIND** that during the "binder incident" Fitzke did not say or do anything that

was physically or emotionally harmful to anyone. I **FIND** that during the “binder incident” Fitzke did not say or do anything that made the educational environment hostile to anyone.

According to Tamburri’s testimony, in her notes of H.O.’s interview, H.O. himself never stated that Fitzke did not like him as a person. During his interview with Tamburri, H.O. noted that he wore a basketball jersey, and suggested that it was H.O.’s association with the basketball team which Fitzke did not like. I **FIND** that H.O.’s comments to Tamburri about Fitzke not liking him because he wore a basketball jersey was mere speculation. I **FIND** that there is no reliable evidence supporting the notion that Fitzke did not like H.O. as a person; did not like H.O. as a student athlete; and did not like H.O. because he was associated with the basketball team. I **FIND** that there is no factual basis for Tamburri’s conclusion that Fitzke’s words or conduct during the “binder incident” was related to H.O.’s ADHD diagnosis or disability. I **FIND** that Tamburri’s conclusion that Fitzke was motivated by H.O.’s ADHD diagnosis or disability is without reliable factual support and I **FIND** that it is based solely on unsupported speculation. I **FIND** that there is no reliable evidence supporting the notion that Fitzke did not like H.O. as a person; did not like H.O. as a student athlete; and did not like H.O. because he was associated with the basketball team.

I **FIND** that H.O.’s complaint to Tamburri about feeling embarrassed was purely subjective and was not something that was reasonably and objectively attributable to Fitzke’s questions or his search for the binder. I **FIND** that there are no objective, verifiable facts in the record that would even remotely support H.O.’s statement that the “binder incident” could make his whole class suddenly realize that he had a 504 Plan. I **FIND** that H.O.’s suspicion was mere speculation, unsupported by facts. I **FIND** that Tamburri’s agreement with H.O. on this point was also speculation unsupported by facts.

I **FIND** that Tamburri misinterpreted the facts (the content of Fitzke’s words and actions, as well as Fitzke’s intent) when she determined that Fitzke improperly referenced H.O.’s ADHD disability (which would have violated the First Secondary Prong) of the HIB Law and when she determined that Fitzke’s words and actions were insulting or demeaning towards H.O. (which would have violated the Second Secondary Prong) as he questioned him about the whereabouts of his binder and as he engaged the other students to check to

see if anyone else had possession of H.O.'s binder in an attempt to search for it. I **FIND** it significant that the record contains no factual evidence from a witness, from H.O., from Fitzke or from any document that indicates that Fitzke said what he said or did what he did during the "binder incident" because of H.O.'s ADHD disability. I **FIND** it significant that the only substantiation offered by the Respondent to support the idea that Fitzke's words or actions were linked to H.O.'s ADHD disability or "referred back" to H.O.'s ADHD disability is merely the opinion of Tamburri.

I **FIND** that Fitzke's questions were not reasonably capable of causing any emotional or physical "harm" to H.O. (a student with a 504 Plan) or anyone else. I **FIND** that the cross-examination of Fitzke failed to adequately establish an intent to embarrass or ridicule H.O., or to point out H.O.'s disability. I **FIND** that during the "binder incident" neither Fitzke's words nor his actions "referred back" to H.O.'s ADHD disability. I **FIND** that, insofar as the issue of whether Fitzke "referred back" to H.O.'s disability, there is no causative connection, in this instance and under this set of circumstances, between the timing of Fitzke's questions to H.O. and the timing of the "binder check". I **FIND** that the purpose of Fitzke's attempt to locate H.O.'s binder cannot be reasonably construed, by H.O. or anyone else, as an attempt to embarrass H.O. I **FIND** that there is no evidence in the record which indicates that the 504 Plan forbade a teacher from questioning H.O. or which prohibited a teacher from inquiring into why H.O. did not have his binder in his possession or was otherwise not prepared to participate in the class on a given day. I **FIND** that Fitzke told the truth when he stated that H.O. looked "deflated" after being questioned about not having his required binder in his possession, but I also **FIND** that it would be mere speculation on the part of Tamburri to conclude that H.O.'s "deflated" appearance was to any extent caused by Fitzke's conduct (words or actions) or was solely due to some action of Fitzke. I **FIND** that H.O.'s "deflation" could just as easily have been due to his realization of his own lack of preparation and disappointment with himself.

I **FIND** that Fitzke told the truth when he stated that at the end of the "binder incident" he said, "I love you" to H.O. I **FIND** there is insufficient evidence in the record to interpret Fitzke's statement of "I love you" to H.O. as sarcasm. I **FIND** that there is insufficient evidence in the record to indicate that Fitzke's "I love you" statement to H.O. was meant to

embarrass or to ridicule H.O. I **FIND** that there is no causative connection, in this instance or under these circumstances, between the timing of Fitzke's questions and the timing of the "binder check". I **FIND** that during the "binder incident" neither Fitzke's words nor his actions were "linked to" or "referred back" to H.O.'s disability. I **FIND** that the context of the record (Fitzke's use of the moment to underscore to all students, including H.O., that it was important to be fully prepared for class) indicates that when Fitzke said "I love you" to H.O., it was a brief, necessary, and proper use of class time. I **FIND** that Fitzke testified in a manner that was clear, forthright, and coherent and so, I found him to be credible. I **FIND** that the cross-examination of Fitzke failed to adequately establish an intent to embarrass or ridicule H.O. or to point out his disability.

Analysis of the HIB Prongs

In regard to the First Primary Prong and First Secondary Prong, I **FIND** that Fitzke did not say or do anything during the "binder incident" that referenced H.O.'s ADHD disability; or, that he either said or did anything during the "binder incident" that related back to H.O.'s ADHD disability; or that he said or did anything during the "binder incident" that would have the effect of harming a student or placing him or her in fear of harm.

In regard to the Second Primary Prong, I **FIND** that the "binder incident" did indeed occur on school premises.

In regard to the Third Primary Prong, Tamburri's direct testimony indicates that there was only a brief pause in the flow of the class, after which Fitzke quickly resumed the lesson. On cross-examination, Tamburri admitted that she did not know how much time Fitzke spent questioning H.O. about his binder. Given the facts in the record, and given the context, I **FIND** that the amount of time Fitzke spent talking with H.O. when he entered the class late and the amount of time that Fitzke spent searching for H.O.'s binder was brief, perhaps a minute or two. I **FIND** that since the evidence demonstrates that the time spent questioning H.O. and looking for the binder was intended to enable H.O. to participate in the class its purpose was to enhance the operation of the class (school) rather than to disrupt or interfere with the operation of the class (school).

I **FIND** that the conversation between Fitzke and H.O. during the “binder incident” was brief and was necessary for the attempt to locate H.O.’s binder. I **FIND** that the amount of time spent on attempting to locate the binder was inconsequential to the instructional flow of the class. I **FIND** that the contents of the HIB Report and of Tamburri’s testimony contained insufficient evidence about the nature of the aforesaid conversation and binder search that would indicate the infringement of any student’s rights. Thus, I **FIND** that there is insufficient evidence to sustain the determination of a violation of the Third Primary Prong. I **FIND** that there is insufficient evidence of any conduct of Fitzke (either an affirmative statement or an affirmative action or either an omission of any statement or omission of any action) to sustain the determination that during the “binder incident” he disrupted or interfered with the orderly operation of the school, or interfered with the rights of any student. Thus, I **FIND** that there is insufficient evidence to sustain the finding of a violation of the Third Primary Prong.

On the subject of whether Fitzke said or did anything directed at H.O. which a reasonable person should have considered physically or emotionally harmful to H.O. in violation of the First Secondary Prong of the HIB Statute, I **FIND** that there is no evidence or insufficient evidence supporting Tamburri’s determination that Fitzke’s words or his actions were linked to or “referred to” H.O.’s ADHD disability. I **FIND** that Fitzke did not harm H.O. by anything he said or did, either by commission or omission and so, did not violate the First Secondary Prong.

I **FIND** that the conversation between Fitzke and H.O. during the “binder incident” was brief and was necessary for the attempt to locate H.O.’s binder. I **FIND** that the amount of time spent on attempting to locate the binder was inconsequential to the instructional flow of the class. I **FIND** that the aforesaid conversation and binder search did not disrupt or interfere with the ordinary operation of the school or with the Band Class in particular. I **FIND** that the aforesaid conversation and search did not infringe the rights of any student. Tamburri’s direct testimony indicates that there was only a brief pause in the flow of the class, after which Fitzke quickly resumed the lesson. On cross-examination, Tamburri admitted that she did not know how much time Fitzke spent questioning H.O. about his

binder. Given the facts in the record, and given the context, I **FIND** that the amount of time Fitzke spent talking with H.O. when he entered the class late and the amount of time that Fitzke spent searching for H.O.'s binder was brief, perhaps a minute or two.

In regard to the Second Secondary Prong and the Third Secondary Prong, I **FIND** that the questions Fitzke asked H.O. cannot be reasonably construed to have insulted H.O. and the questions cannot be reasonably construed to have demeaned H.O. in violation of the Second Secondary Prong. I **FIND** that these questions were neutral in character and were actually asked to help H.O. find his binder. For the same reasons, I **FIND** that there is insufficient evidence of hostility, impatience, or malice in Fitzke's words or actions which would support Tamburri's determination that Fitzke created a hostile educational environment for H.O. by interfering with his education or by severely or pervasively causing him physical or emotional harm in violation of the Third Secondary Prong.

Lost Education Time

I here address the subject of lost educational time, i.e., a disruption or interference with the orderly operation of the school or the subject of creating a hostile educational environment which allegedly resulted in H.O.'s withdrawal from the Band class.

I have already found that Fitzke's words and actions did not interfere with the orderly operation of the school. I also found that Fitzke's questions to H.O. and his request to the students to search for H.O.'s binder lacked any indication of hostility, impatience, or malice. I have already found that Fitzke's words and actions were directed towards the goal of finding the binder so that H.O. could participate in the class. Tamburri answered a question which sought to ascertain why she believed that H.O. lost educational time because of the binder incident. Tamburri cited H.O.'s withdrawal from Band class as evidence of it being a hostile educational environment. On cross-examination, Tamburri admitted that during her investigation, she did not know that long before the binder incident, H.O.'s parents had, prior to the binder incident, asked the school's administration to transfer H.O. out of Band class. I **FIND** that Tamburri's determination that Fitzke had committed an act of HIB was based on her incorrect assumption that H.O. withdrew from Band class because of Fitzke's

words and or conduct during the binder incident, or was due to some overall dissatisfaction with Fitzke. I **FIND** that the documents and the testimony indicate that H.O. withdrew from Band class because he and his parents preferred that he take a class that was better suited to his educational and athletic goals. This is explained further below.

H.O.'s Withdrawal From the Band class

On the subject of H.O.'s withdrawal from the Band class serving as a basis for establishing the Third Secondary Prong (lost educational time) and serving as a basis for establishing the Third Primary Prong (a disruption or interference with the orderly operation of the school), Tamburri answered questions which sought to ascertain why she believed that H.O. lost educational time on account of the binder incident. Tamburri responded by saying that H.O. withdrew from Band class because of Fitzke's conduct during the "binder incident". I **FIND** that a fair reading of the correspondences, including Exhibits P-4 and P-5 (October, 2021 emails from H.O.'s parents to Fitzke), overwhelmingly demonstrates that H.O.'s parents wanted to transfer him out of Fitzke's band class due to scheduling conflicts between band concerts and his participation in basketball games, as well as H.O.'s disinterest in "marching band", long before the first alleged incident of HIB (the "shoes incident" on December 16, 2021). I **FIND** that both H.O. and H.O.'s parents preferred that some other class or a study period would be of greater value to H.O. than Band class. I **FIND** that a fair reading of the correspondences demonstrates that H.O. and his parents wanted him to further his basketball talents rather than his musical talents. I **FIND** that a fair reading of the correspondences of H.O.'s mother complimented Fitzke and expressed comments favorable to Fitzke. I **FIND** that a fair reading of the correspondence from H.O.'s father could not have been made with personal knowledge of the facts and that he made unsubstantiated accusations against Fitzke. On cross-examination, Tamburri admitted that during her investigation, she did not know that long before the binder incident, H.O.'s parents had asked the school's administration to transfer H.O. out of Band class. I **FIND** that the school administration denied and / or delayed granting H.O.'s and his parents' wishes to transfer H.O. out of Fitzke's Band class and thus kept H.O. in a class in which he did not want to participate. I **FIND** that all the above reveals that when Tamburri found that Fitzke committed an act of HIB, she did so assuming facts which were incomplete or

incorrect, and based on supposition, rather than reliable evidence. I **FIND** that Tamburri was incorrect when she assumed facts rather than seeking to confirm the complete and true set of facts. I **FIND** that Tamburri improperly assumed that H.O. withdrew from the Band class because of Fitzke's alleged act of HIB. I **FIND** that H.O.'s withdrawal or transfer out of Band class was not because of any statement or act attributable to Fitzke. I **FIND** that Tamburri's misunderstanding of the facts, notably those set forth above concerning H.O. withdrawal from the Band class, was significant enough to interfere with her ability to make sound findings of fact and valid conclusions in her HIB findings. I **FIND** that the last line of Tamburri's HIB Report (where she says, "It is founded"), which encapsulates her findings of HIB against Fitzke, she based her findings on incomplete or incorrect facts and on supposition rather than on reliable facts.

From all the above, I **FIND** the evidence to be insufficient to sustain Tamburri's determination that Fitzke created a hostile educational environment by interfering with his education or by severely or pervasively causing him physical or emotional harm, which would be a violation of the Third Secondary Prong of the HIB Law. I **FIND** the evidence to be insufficient to sustain Tamburri's determination that Fitzke interfered with the operation of the school in violation of the Third Primary Prong.

On the subject of whether Fitzke said or did anything directed at H.O. which a reasonable person should have considered physically or emotionally harmful to H.O. in violation of the First Secondary Prong of the HIB Statute, I **FIND** that there is no evidence or insufficient evidence supporting Tamburri's determination that Fitzke's words or his actions were linked to or "referred to" H.O.'s ADHD disability. I **FIND** that Fitzke did not harm H.O. by anything he said or did, either by commission or omission and so, did not violate the First Secondary Prong.

I **FIND** that the evidence offered to sustain a violation of any of the Secondary Prongs (N.J.S.A. 18A:37-14-(4) (a, b, and c) of the HIB Statute is not convincing and does not meet the threshold of a preponderance of the credible evidence.

FURTHER MISCELLANEOUS FINDINGS OF FACT

I **FIND** that in the context of the binder incident non-verbal cues, like written instructions would have been useless for the purpose of locating the missing binder. Moreover, I **FIND** that Fitzke did indeed utilize positive feedback/reinforcement when dealing with the problem of H.O. not bringing his binder to class. At the close of the discussion about the missing binder, Fitzke told H.O. “I love you”, which was most likely than all alternatives, meant to reassure H.O. that all was well despite the fact that he came to class unprepared for the lesson. I **FIND** that Tamburri misinterpreted the facts (Fitzke’s use of the phrase, “I love you”) of the binder incident. In particular, I **FIND** that Tamburri mistook Fitzke’s words to H.O. as sarcasm or ridicule.

I **FIND** that Tamburri misinterpreted Fitzke’s words and actions as being motivated, intentionally or unintentionally, as targeting a protected characteristic of H.O., namely, his ADHD disability, which would, if true, violate the First Primary Prong of the HIB Law. I **FIND** that there is insufficient evidence supporting Tamburri’s finding that Fitzke’s words and actions referred-back to H.O.’s ADHD disability. I **FIND** that Tamburri misinterpreted the facts (the content of Fitzke’s words and actions) when she claimed that Fitzke referenced H.O.’s ADHD disability. She based her finding mainly on H.O.’s statement that he was fearful that his disability might have been revealed to his classmates, a fear that was ultimately proven to be unfounded. I **FIND** that there is insufficient evidence to support Tamburri’s conclusion that Fitzke did something that would reasonably cause H.O. to become fearful that his 504 Plan was going to become known to his fellow students. I **FIND** that Tamburri’s determination that H.O. reasonably feared for the disclosure of his 504 Plan was unsupported by any facts and was illogical. For any “if-then” proposition (i.e., a cause-and-effect proposition) to be valid, the conclusion must be the result of a valid (true) premise. If the premise (cause) does not support the conclusion in all circumstances, then the conclusion is not valid. To attempt to validate the truth of a conclusion without first validating the premise by demonstrating a causative effect in all cases is to improperly affirm the conclusion. That is why this logical fallacy is called “the fallacy of affirming the consequent”. In the matter at hand, it was illogical for Tamburri to conclude (i.e., presume) that Fitzke’s words and actions would necessarily result in the classmates finding out about

H.O.'s 504 plan.

I **FIND** that Tamburri's conclusion that Fitzke violated the Second Secondary Prong of the HIB Law was improvidently based on H.O.'s answer to Tamburri's questioning about how he felt insulted and demeaned and how he became fearful that his ADHD disability would become known to his classmates due to Fitzke's words and actions during the binder incident. Tamburri's conclusion attributed H.O.'s feelings of discomfort, embarrassment or fear as being caused only by Fitzke's inquiry about the missing binder and Fitzke's supposed failure to follow the requirements of H.O.'s 504 Plan. It appears that Tamburri did not give enough consideration to other possible causes. Tamburri did not state whether there was any other possible causes for H.O.'s discomfort, embarrassment or fear, such as H.O.'s realization that he was the cause of his own discomfort, embarrassment and fear since he had not followed the school's rules about being prepared for class. I **FIND** that Tamburri's conclusion was not logical because it failed to consider the possibility of other causes of H.O.'s discomfort, embarrassment or fear. Instead, Tamburri engaged in a logically fallacious "only cause" analysis of the facts, which ignored other, perhaps more tenable, reasons for causing H.O. to feel discomfort, embarrassment or fear. To engage in an "only cause" analysis and to fail to consider other causes, opens up the possibility that the investigator's own prejudicial or pre-conceived notions factored into her consideration of whether or not the accused was guilty of committing HIB. I **FIND** that this would be an unacceptable approach to determining guilt or innocence and I **FIND** that here it reveals a serious flaw in Tamburri's fact-finding and in her determination that Fitzke was guilty of HIB.

During her direct testimony, in answer to a question seeking to ascertain why Tamburri believed that H.O. lost educational time, Tamburri responded by saying that H.O. withdrew from Band class after the binder incident. I **FIND** that Tamburri's conclusion that Fitzke had committed an act of HIB was improvidently based on her assumption that H.O.'s withdrawal from Band class was due to Fitzke's words and / or conduct during the binder incident. On cross-examination, Tamburri admitted that during her investigation, she did not know that long before the binder incident, H.O.'s parents had asked the school's administration to transfer H.O out of Band class. I **FIND** that this reveals that Tamburri made her determination based upon incomplete facts, incorrect facts, supposition, or

misinformation, but certainly not on the actual facts.

I **FIND** that there is insufficient evidence supporting the finding that Fitzke created a hostile educational environment for H.O. by interfering with his education or by severely or pervasively causing him physical or emotional harm.

Having failed to explain what was inappropriate about searching for H.O.'s binder and about the questions that Fitzke asked of H.O. and the other students during the binder incident, I **FIND** that Tamburri did not offer an adequate foundation for her conclusion that Fitzke had insulted and demeaned H.O. in violation of the Second Secondary Prong of the HIB Law; she merely rendered her own unsubstantiated opinion and presumed that Fitzke violated the Law. Tamburri hastily concluded that Fitzke "should have known" that his inquiries were insulting and demeaning to H.O. I **FIND** that Tamburri did not state a reason for her conclusion that Fitzke violated the Second Secondary Prong of the HIB Law; she merely presumed that he had violated it. Tamburri's method for determining guilt or innocence on this point was flawed and therefore I **FIND** that her credibility is in doubt.

I **FIND** that, insofar as the information contained in the record pertaining to the binder incident, it demonstrates there was a brief pause in the flow of the class, after which Fitzke quickly resumed the lesson. I **FIND** that there is no evidence or insufficient evidence supporting Tamburri's finding that Fitzke's words or his actions referred to H.O.'s ADHD disability. On cross-examination, Tamburri admitted that she did not know how much time was spent by Fitzke in questioning H.O. when he entered the class late or how much time was spent on the search for H.O.'s binder. Given the facts in the record, and given the context, I **FIND** that the amount of time spent was brief and I **FIND** that it was inconsequential to the instructional flow of the class and did not disrupt or interfere with the operation of the school.

I **FIND** that in the context of the binder incident non-verbal cues, like written instructions would have been useless for the purpose of locating the missing binder. Moreover, I **FIND** that Fitzke did indeed utilize positive feedback/reinforcement when dealing with the problem of H.O. not bringing his binder to class. At the close of the

discussion about the missing binder, Fitzke told H.O. “I love you”, which was most likely than all alternatives, meant to reassure H.O. that all was well despite the fact that he came to class unprepared for the lesson. I **FIND** that Tamburri misinterpreted the facts (Fitzke’s use of the phrase, “I love you”) of the binder incident. In particular, I **FIND** that Tamburri mistook Fitzke’s words to H.O. as sarcasm or ridicule.

I **FIND** the fact that the Board of Education did not produce either of H.O.’s parents and / or H.O. himself to testify at the Hearing to support its charge of HIB against Fitzke.

I **FIND** that the Board of Education prosecuted its case against Fitzke almost entirely upon hearsay evidence.

ANALYSIS OF THE PARTIES’ RESPECTIVE POSITIONS

The Respondent maintains that the HIB investigation and the conclusion reached by the Anti-Bullying Specialist and the subsequent affirmance by the Superintendent and the BOE’s vote adopting the conclusion of the Anti-Bullying Specialist were conducted in accordance with the procedures set forth in N.J.S.A. 18A:37-14, commonly referred to as “The Anti-Bullying Bill of Rights Act” and were therefore conducted properly. The Respondent’s case is based on the testimony of three witnesses, Tamburri, Macioci, and Swanick and by various documents, including statements from students who were interviewed by the Anti-Bullying specialist. Basically, the Respondent maintains that in this matter, the Petitioner’s failure to follow H.O.’s 504 Plan provided all the proof necessary to prove a violation of the Anti-Bullying Statute.

The Petitioner maintains that the Respondent’s basis for concluding that he bullied H.O. was inappropriate because the District did not muster actual facts to prove that he targeted H.O. due to his disability. Moreover the Respondent is incorrect when it asserts that HIB exists whenever a teacher does not literally follow every point in a 504 Plan in each and every set of circumstances. Petitioner argues that in the circumstances of the “binder incident” he indeed followed the 504 Plan.

APPLICABLE LAW

The HIB Statute

N.J.S.A. 18A:37-14 defines “Harassment, intimidation or bullying” as,

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:

[1] 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,

[2] that takes place on school property, at any school-sponsored function, on a school bus, or takes place off school grounds as provided for in N.J.S.A. 18A:37-15.3,

[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 a student’s property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property; or
- 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.”

Thus, to constitute HIB the gesture or action must contain all three primary (i.e., numerically-listed) elements plus at least one of the three alphabetized (“a”, “b” or “c”) elements.

Board of Education’s HIB Decisions Are Afforded a Presumption of Validity

The decision of a local board of education should not be disturbed absent a finding

that the action below was arbitrary, capricious, or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008), (citing Thomas Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), *aff'd*, 46 N.J. 581 (1966)). In an appeal of a District's finding, with respect to an HIB investigation, the burden of proving "unreasonableness" of Board action is on Petitioners. G.M. v. Roselle Park Borough Bd. of Educ., 95 N.J.A.R.2d (EDU) 107, 109. Courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Env'tl. Prot., 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), *aff'd*, 131 N.J. Super. 37 (App. Div. 1974). "Thus in order to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." T.B.M., see also, W.C.L. and A.L. ex rel L.L. v. Tenafly Bd. of Educ., OAL Dkt. No. EDU 3223-12 (2013).

LEGAL ANALYSIS AND CONCLUSIONS

MISCELLANEOUS CONCLUSIONS

I have found that Fitzke gave consistent, plausible, reasonable, candid, straightforward and otherwise reliable and credible testimony on his own behalf. I found no plausible evidence that Fitzke disliked athletes, particularly basketball players. I found no plausible evidence that Fitzke disliked disabled students, particularly those diagnosed with ADHD, and I found that Tamburri's HIB Investigation Report does not contain any factual evidence that would support the accusation that Fitzke was motivated during the binder incident by H.O.'s disability. Having found no plausible evidence that Fitzke was motivated by any distinguishing characteristic and having found no plausible evidence that Fitzke was motivated by H.O. being associated with athletics, particularly basketball, I therefore **CONCLUDE** that Fitzke's words and actions during the "binder incident" were not motivated by any perceived characteristic of H.O. and that Fitzke's words or actions were not motivated by H.O. being associated with athletics, particularly basketball.

On the subject of Fitzke's adherence with H.O.'s 504 Plan, having found that Fitzke employed the accommodations and strategies of H.O.'s 504 Plan (providing positive feedback and reinforcement) by reassuring H.O. that all was well, I **CONCLUDE** that Fitzke complied with H.O.'s 504 Plan on this point. Having found that providing "non-verbal cues to help with focus and redirection" was a tool or strategy that would not have been useful in the circumstances of the binder incident, I **CONCLUDE** that Fitzke did not fail to adhere to H.O.'s 504 Plan on this point.

I have found that Fitzke followed the accommodations and strategies of the 504 Plan when he offered "positive feedback and reinforcement" to H.O. by verbally reassuring him that despite the absence of his binder, all was well. I have found that in the circumstances of the binder incident, H.O.'s 504 Plan called for teachers to accommodate 504 Plan students by employing "non-verbal cues to help with focus and redirection". The non-verbal cues would include the use of written instructions or helping the student re-focus on the subject matter of the lesson. I have found that non-verbal cues would not have been useful tools in the circumstances of the binder incident. This leads to the conclusion that when Tamburri found that Fitzke committed an act of HIB when he failed to give H.O. "positive feedback and reinforcement", she simply overlooked the positive nature of his "I love you" comment to H.O. It can also be concluded that using "non-verbal cues" would have been pointless during the binder incident since the purpose of a non-verbal cue is to convey a message by non-verbal means such as written instructions, tone of voice and facial expressions in order to clarify, enhance or supplement a previous verbal or written instruction. During the binder incident the issue was simply whether the binder could be located or not. Had H.O. been offered as a witness by the Respondent, the matter could have been further clarified, but Respondent chose not to use H.O. as a witness. Having found that the use of non-verbal cues would not be relevant to or useful in the circumstances of the binder incident. I therefore **CONCLUDE** that Tamburri was incorrect when she determined that Fitzke committed HIB by failing to utilize non-verbal cues during the binder incident. I also **CONCLUDE** that Fitzke did utilize positive reinforcement and therefore Tamburri was incorrect when she determined that Fitzke committed HIB by failing to utilize positive reinforcement.

A 504 Plan Must Be Applied With Professional Discretion and Common Sense

I **CONCLUDE** that the application of the strategies and accommodations set forth in a student's 504 Plan should not be automatically required, and should be left to the sound discretion of the teacher as he or she sees fit under the given set of circumstances and without the fear of being charged with HIB when he or she decides to apply the strategies and accommodations of the 504 Plan as applied with professional discretion and common sense. I **CONCLUDE** that, in accordance with my FINDINGS OF FACT (i.e., that Fitzke actually followed the 504 Plan) Tamburri's factual basis for saying that Fitzke didn't follow the 504 Plan and consequently was guilty of HIB, vanishes, or put another way, it is refuted.

Having found that Fitzke did not refer to H.O.'s ADHD or to his anxiety disorder; having found that Fitzke made no reference to forgetfulness or inattention; having found that Fitzke merely took an opportunity to emphasize the need for all students to come to class prepared for the lesson; having found that Fitzke's search for the missing binder was remedial in nature; and having found that Fitzke actually complied with the 504 Plan by offering positive feedback to H.O., I **CONCLUDE** that Fitzke complied with the 504 Plan's mandate to provide positive feedback and reinforcement. I **CONCLUDE** that I must disagree with the Anti-Bullying Specialist's finding that Fitzke did not provide positive feedback and reinforcement and her finding that Fitzke committed an act of HIB against H.O. I **CONCLUDE** that while the 504 Plan called for the use of "non-verbal cues", such non-verbal cues would have been useless in the circumstances of the "binder incident". The "binder incident" did not call for wordless dialogue; it called for diligent and practical verbal inquiry and a search for the missing binder. Fitzke employed both.

Conclusions Regarding the Prongs of the HIB Statute

Having found that there is no evidence (beyond Tamburri's mere opinion) which links or "refers back" from Fitzke's words or actions to H.O.'s ADHD disability, I **CONCLUDE** that Tamburri's determination that Fitzke "referred back" to H.O.'s ADHD disability is without support in the evidence presented. I **CONCLUDE** that Tamburri's determination that Fitzke "referred back" to H.O.'s ADHD disability is mere speculation on her part. Having found that

there is no credible evidence in the record which proves that Fitzke was motivated by an actual or perceived characteristic, or other distinguishing characteristic of H.O., I **CONCLUDE** that the Respondent did not prove a violation of the First Primary Prong of the HIB statute. Having concluded that Respondent failed to prove a violation of the First Primary Prong, I **CONCLUDE** that Fitzke did not commit an act of HIB.

I **CONCLUDE** that the alleged “binder incident” occurred on school property, which would satisfy the Second Primary Prong of the HIB Statute.

Having found that there is insufficient credible evidence in the record (such as a substantial loss of time from learning) which supports the proposition that the orderly operation of the school (or even the particular Band class) was substantially interrupted or substantially interfered with by any of Fitzke’s words or actions, I **CONCLUDE** that the Respondent did not satisfy the Third Primary Prong of the HIB Statute.

Having found that Fitzke did not refer to H.O.’s ADHD or to his anxiety disorder; having found that Fitzke made no reference to forgetfulness or inattention; having found that Fitzke merely took an opportunity to emphasize the need for all students to come to class prepared for the lesson; having found that Fitzke’s search for the missing binder was remedial in nature; and having found that Fitzke actually complied with the 504 Plan by offering positive feedback to H.O., I **CONCLUDE** that Fitzke complied with the 504 Plan’s mandate to provide positive feedback and reinforcement. I **CONCLUDE** that I must disagree with the Anti-Bullying Specialist’s finding that Fitzke did not provide positive feedback and reinforcement and her finding that Fitzke committed an act of HIB against H.O.

Having found that there was insufficient evidence to support the idea that Fitzke did anything that would reasonably cause H.O. to be in fear of his 504 Plan becoming known to his fellow students, I **CONCLUDE** that Tamburri’s conclusion that Fitzke caused H.O. to suffer emotional harm was logically invalid.

Having found that Tamburri concluded that Fitzke insulted and demeaned H.O. in violation of the Second Secondary Prong of the HIB Law without offering an adequate

foundation for her conclusion, I **CONCLUDE** that the Respondent has not established that Fitzke is guilty of insulting and demeaning H.O.

Having found that Fitzke did not create a hostile educational environment, nor did he interfere with any student's rights, I **CONCLUDE** that Tamburri's determination that Fitzke violated the Third Secondary Prong of the HIB Statute was incorrect and that the Respondent has not established that Fitzke was guilty of an act of HIB.

Tamburri found that Fitzke's use of some class time, pausing to question H.O. about his missing binder and pausing to perform a search for H.O.'s missing binder, was a substantial interruption and / or interference with that operation of the school or was a substantial interference with the rights of students. Having found that Tamburri's finding was not grounded on sufficient facts, nor on sufficient objective standards, but was merely founded on her own subjective opinion of what constitutes a disruption of or interference with the orderly operation of the school, what degree of disruption or interference constitutes a substantial disruption of or interference with the orderly operation of the school, I **CONCLUDE** that neither Tamburri's HIB Report nor her testimony established that Fitzke was responsible for any disruption of or interference with the orderly operation of the school during the "binder incident". Thus, I **CONCLUDE** that the Respondent did not prove that Fitzke violated the Third Primary Prong of the HIB Statute. Having found that Tamburri's did not adequately demonstrate an interference with any student's rights, I **CONCLUDE** that the Respondent did not prove that Fitzke violated the Third Primary Prong of the HIB Statute.

Having found that the record does not provide sufficient factual support for Tamburri's determination that the First Primary Prong and the Third Primary Prong of the HIB Law were violated, and having found that the record does not provide sufficient factual support for Tamburri's determination that any of the Secondary Prongs of the HIB Law were violated, I **CONCLUDE** that Tamburri's finding of HIB was incorrect and cannot be sustained. I must therefore further **CONCLUDE** that Macioci's affirmance of the findings in Tamburri's HIB Report, and the BOE's affirmance of Macioci's action were both in error and cannot be sustained. Therefore, I **CONCLUDE** that the finding of HIB against Fitzke must

be **REVERSED**. Moreover, insofar as the BOE affirmed Macioci's finding of three incidents of HIB, based on his misreading of Tamburri's HIB Report, that the action of the BOE was in error and cannot be sustained. I **CONCLUDE** that the BOE's affirmance of Macioci's finding of three incidents of HIB must be **REVERSED**.

Having found that there is insufficient credible evidence in the record (such as a substantial loss of time from learning) that supports the proposition that the orderly operation of the school (or even of the particular Band class) was substantially disrupted or substantially interfered with by any of Fitzke's words or actions, I **CONCLUDE** that the Respondent did not satisfy the Third Primary Prong of the HIB Statute.

Having found that H.O. was removed from / transferred out of Fitzke's Band class at the longstanding, pre-incident request of his parents, I **CONCLUDE** that no act of HIB attributable to Fitzke caused or contributed to H.O.'s withdrawal from the Band class.

Having found that Tamburri improperly assumed that Fitzke's conduct caused H.O.'s withdrawal from Band class, I **CONCLUDE** that the facts on which she based her determination were incorrect and thus her decision making on the ultimate issue of Fitzke's guilt or innocence of the HIB charge in the "binder incident" was flawed. I **CONCLUDE** that Tamburri's incorrect factual assumptions and her flawed decision making resulted in a flawed HIB Report on which Superintendent Macioci and the BOE relied. The BOE's affirmance should not be disturbed unless there is good cause to find that it acted in an arbitrary, capricious or unreasonable manner. I **CONCLUDE** that under these circumstances, there is good cause to find that the BOE's affirmance was unreasonable because the BOE was led astray by incorrect factual assumptions and flawed decision making in the writing of the HIB Report. I also **CONCLUDE** that the BOE was led astray by Superintendent Macioci's misreading of the HIB Report and his finding that Fitzke had committed three acts of HIB instead of one. I **CONCLUDE** that the BOE's affirmation of Superintendent Macioci's affirmance and acceptance of the HIB Report was in error.

Having found that the purpose of the time Fitzke used to search for the missing binder was so that H.O. could participate in the day's class lesson and not for any purpose

that would be detrimental to the progress of the day's lesson, I **CONCLUDE** that the consumption of time was more likely to enhance the educational process than it was to interfere with it. I **CONCLUDE** that the Respondent has not proved a violation of the First Primary Prong or a violation of the Third Primary Prong, or a violation of any of the three Secondary Prongs of the HIB Law. Having found that the record does not provide sufficient factual support for Tamburri's determination that the First Primary Prong and the Third Primary Prong of the HIB Law were violated, and having found that the record does not provide sufficient factual support for Tamburri's determination that any of the Secondary Prongs of the HIB Law were violated, I **CONCLUDE** that Tamburri's finding of HIB was incorrect and cannot be sustained.

The Petitioner Met His Burden of Proof

Having made findings of facts demonstrating that Tamburri reached her determination of guilt without a reliable factual basis, I **CONCLUDE** that the Petitioner has proved that the determination reached in Tamburri's HIB Report is flawed because it lacks a reliable basis. Reliance on an unreliable HIB Report is unreasonable. Likewise, the Superintendent's and the BOE's reliance on the flawed HIB Report rendered their actions unreasonable. "Unreasonableness" is one of the three characteristics by which the BOE's determination may be overturned. And so, I **CONCLUDE** that the BOE acted "in utter disregard of the [factual] circumstances before it" when it adopted the factually unsupported findings and the flawed reasoning that led to the determination of Fitzke's guilt by the HIB investigator and by the superintendent. Thus, I **CONCLUDE** that the "arbitrary, capricious or unreasonable" criteria for disturbing the decision of the BOE has been met.

Macioci's Use of Incorrect Facts Requires Reversal

Macioci did not read Tamburri's investigative report correctly. If he had done so, he would have realized that Tamburri found that an act of HIB occurred only in the "binder incident". Macioci would then have focused only on the "binder incident". By focusing only on the "binder incident" Macioci would have had a better chance to see the incident in a more neutral manner and perhaps would have come to a different determination. In the

eighth paragraph of his January 31, 2022 letter to Fitzke, Macioci says that Fitzke's actions towards H.O. "... led the victim to withdraw from your class and band altogether, which conclusively demonstrates that your conduct interfered with the victim's rights and had the effect of insulting and demeaning him." Macioci's analysis of the facts did not "conclusively demonstrate" that Fitzke's conduct interfered with H.O.'s rights because Macioci assumed facts that were incorrect. Macioci's use of incorrect and incomplete facts was an error that cannot be understated. Because Macioci's decision was predicated on incorrect facts, I **CONCLUDE** that it is unreliable and should therefore be rejected. Moreover, I **CONCLUDE** that the Board of Education compounded Superintendent Macioci's error when they, using the same incorrect facts as Macioci, voted to affirm Macioci's affirmance of the ABS's finding. Having found that Macioci's affirmance of Tamburri's HIB Report was incongruent with the content of the HIB Report, having found that Macioci was unable to convince this Tribunal that his January 31, 2022 letter found only the "binder incident" to be an act of HIB. Having found that Macioci's January 31, 2022 letter clearly stated that he found three acts of HIB, and having found that the BOE relied on Macioci's flawed affirmance of Tamburri's HIB Report, I **CONCLUDE** that the BOE acted unreasonably when it affirmed Macioci's factually flawed affirmance. When a Board acts unreasonably, its decision is no longer afforded the presumption of validity. Here, the BOE affirmed a decision that was factually flawed and therefore, I **CONCLUDE** that the BOE's action must be and hereby is REVERSED.

I must therefore further **CONCLUDE** that Macioci's affirmance of the findings in Tamburri's HIB Report, and the BOE's affirmance of Macioci's action were both in error and cannot be sustained. Therefore, I **CONCLUDE** that the finding of HIB against Fitzke must be **REVERSED**. Moreover, insofar as the BOE affirmed Macioci's finding of three incidents of HIB, based on his misreading of Tamburri's HIB Report, that the action of the BOE was in error and cannot be sustained. I **CONCLUDE** that the BOE's affirmance of Macioci's finding of three incidents of HIB must be **REVERSED**.

ORDER

In keeping with the **CONCLUSIONS** set forth above, I hereby **ORDER** that the BOE's finding that Eric Fitzke-Grey violated N.J.S.A. 18A:37-14 and thereby committed an act of Harassment, Intimidation, and Bullying against his student, H.O., must be and hereby is **REVERSED**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**. 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.

A handwritten signature in black ink, reading "John P. Scollo", enclosed in a thin yellow rectangular border.

January 7, 2026

DATE

JOHN P. SCOLLO, ALJ, Retired on
recall

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Witnesses

For Petitioner:

Eric Fitzke Grey, Petitioner

For Respondent:

Lisa Tamburri, ABS

Damion Macioci, Superintendent

Lisa Swanick, Director of Performing and Practical Arts

List of Exhibits

For Petitioner:

P-1	H.O. 504 Plan	In evidence
P-2	H.O. Educational Impact & Interventions of Teaching Strategies (Rick Fitzke)	
P-3	9/30/21 Email Fitzke to Marisa O'Keefe	
P-4	10/3/21 Email Micah O'Keefe to Fitzke	
P-5	10/24/21 Email Chain Marisa O'Keefe to Carly Cr	In evidence
P-6	11/12/21 Email Chain O'Keefe to Fitzke	
P-7	Email Chain O'Keefe to Swanick	In evidence
P-8	01/01/22 Email Chain Micah O'Keefe to Swanick and Purcell	In Evidence
P-9	01/10/22 Email Macioci to School	

	Board	
P-10	01/11/22 Interview Notes Fitzke and Tamburi	In evidence
P-11	01/12/22 Letter Fitzke to Tamburi	
P-12	Pennsylvania Verification Form Email Fitzke and Macioci	
P-13	Emails Fitzke to Band Families/Members Dress Attire and Concert Reminders	
P-14	Photo H.O. Sneakers	
P-15	Letters to Fitzke from West Essex Administrators Congratulations for Band Performance	
P-16	Thank You Letters Students to Fitzke	
P-17	Thank You Letters to Fitzke	
P-18	Observation Reports Fitzke 2000-2021	
P-19	Swanick Deposition	In evidence
P-20	12/2/21 Email "Possible Change for Spring"	

For Respondent:

Number	Description	Date	
R-1	Letter, Macioci to Fitzke re: suspended with pay pending outcome of investigation	1/6/2022	
R-2	HIB Investigation Report	1/20/2022	In evidence
R-3	Letter, Macioci to Fitzke re: results of investigation were shared with Board	1/31/2022	In evidence
R-4	Letters, Macioci to Fitzke and Fogarty to Ricci re:	Feb. 2022	In evidence

	Board hearing		
R-5	Letter, Kida to Fitzke re: results of Board hearing	3/14/2022	In evidence
R-6	Petitioner's Retirement Letter	3/21/2022	
R-7	Petitioner's Petition of Appeal	6/9/2022	In evidence
R-8	Respondent's Answer and Affirmative Defenses	6/28/2022	
R-9	Prehearing Order	7/22/2022	
R-10	Petitioner's Interrogatory Responses	8/31/2022	
R-11	Deposition Transcript – Damion Macioci	9/16/2022	In evidence
R-12	Deposition Transcript – Lisa Tamburri	9/16/2022	In evidence
R-13	Deposition Transcript – Petitioner Eric Fitzke Grey	10/17/2022	In evidence
R-14	Prior Inappropriate Conduct (for background purposes only)	1998, 2007, 2016, 2019, 2021	
R-15	Email string between Swanick, Rizzo, Fitzke, and Shroyer re: hold off on communication re: performance	12/10/2021	
R-16	Fitzke email re: suggest moving H.O. from his class	12/6/2021	In evidence
R-17	H.O. Interview	1/6/2022	In evidence
R-18	Fitzke Summary	Undated	In evidence
R-19	Text Messages between Fitzke and Vallone	Jan. 2022 – Aug. 2022	In evidence
R-20	Text Messages between Fitzke and Rizzo	Jan. 2022 – Jan. 2023	In evidence