270-23

New Jersey Commissioner of Education

Final Decision

Do-Yeon Shim,

Petitioner,

v.

Board of Education of the Borough of Ridgefield, Bergen County,

Respondent.

Synopsis

In this matter, petitioner – a tenured teacher employed by the respondent, Board of Education of the Borough of Ridgefield (Board) – challenged the determination of the Board that she had committed an act of harassment, intimidation and bullying (HIB) against a second-grade student. The Board alleged that petitioner committed HIB when she took a photograph of the student's braided hairstyle as he bent down to tie his shoelace, then showed the photograph to the student, and told him that "they could play tic-tac-toe on his head because his hair looked like a tic-tac-toe board." Petitioner asserted that she had taken the picture because she thought the student's hairstyle "was cool" and she wanted to create a bonding moment with him. The school district's HIB investigation determined that petitioner's actions were "reasonably perceived to be motivated on the basis of appearance, race or ethnic origin" and that she had committed an act in violation of the HIB statute, *N.J.S.A.* 18A:37-14. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this matter and the case is ripe for summary decision; the statutory elements of a HIB violation are set forth in the Anti-Bullying Bill of Rights Act, at *N.J.S.A.* 18A:37-14, and require a finding that the petitioner's conduct substantially disrupted or interfered with the orderly operation of the school or the rights of other students; here, the record is devoid of evidence to establish this requirement; no student witnesses, nor the alleged HIB victim himself, reported or reacted in any negative way to the incident in question; the incident was reported by one of two staff members who observed petitioner's interaction with the student. The ALJ determined that petitioner's conduct, while wholly inappropriate and racially insensitive, did not constitute a HIB violation under New Jersey law. Accordingly, the ALJ granted petitioner's motion for summary decision, concluding that the Board's HIB determination in this case was arbitrary, capricious, and unreasonable.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. In so doing, the Commissioner did not condone the petitioner's conduct and poor judgment but agreed with the ALJ's well-reasoned conclusion that the incident did not meet the statutory requirements of an HIB violation. Summary decision was granted to the petitioner.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

270-23
OAL Dkt. No. EDU 02751-23
Agency Dkt. No. 69-3/23

New Jersey Commissioner of Education

Final Decision

Do Yeon Shim,

Petitioner,

v.

Board of Education of the Borough of Ridgefield, Bergen County,

Respondent.

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

This matter involves the Board's determination that petitioner, a teacher, committed an act of harassment, intimidation, or bullying (HIB) when she took a photograph of a second-grade student's braided hairstyle as he bent down to tie his shoelace, showed the photograph to the student, and told him that "they could play tic-tac-toe on his head because his hair looked like a tic-tac-toe board." Initial Decision, at 3. During the HIB investigation, one staff member witness reported that the student seemed "unfazed" by petitioner's conduct. *Ibid*. While another staff member witness said that the student seemed "confused" by petitioner's conduct, she confirmed that "there was no apparent impact on [him] the rest of the day." *Id.* at 4. The student told

administrators that petitioner took the photograph because "she liked [his] hair" and reported that "he liked the picture because his hair looked good." *Id.* at 3.

Petitioner appealed the Board's determination, and the matter was transmitted to the OAL. The parties cross-moved for summary decision. Upon finding that the material facts were not in dispute, the Administrative Law Judge (ALJ) granted petitioner's motion for summary decision and concluded that the Board's HIB determination was arbitrary, capricious, and unreasonable. The ALJ analyzed the statutory elements of a HIB violation as set forth in the Anti-Bullying Bill of Rights Act (the Act) at *N.J.S.A.* 18A:37-14, along with relevant case law, and determined that the record was devoid of evidence to establish that petitioner's conduct substantially disrupted or interfered with the orderly operation of the school or the rights of other students. Consequently, petitioner's conduct—although wholly inappropriate and racially insensitive—did not constitute a HIB violation under New Jersey law.

In their exceptions, the Board argues that petitioner's conduct "substantially interfered with the student's right to be let alone and feel comfortable among his peers." Respondent's Exceptions, at 3. The exceptions focus upon the nature of petitioner's conduct, which was unquestionably offensive, insensitive, and demeaning. *Id.* at 4-5. While the Board concedes that "no students reported the matter" to administrators, it emphasizes that a staff member did. *Id.* at 3-4. In reply, petitioner asks the Commissioner to adopt the ALJ's Initial Decision because the Board had no basis upon which to conclude that a substantial disruption resulted from the interaction between petitioner and the student.

Upon review, the Commissioner adopts the ALJ's thoughtful and well-reasoned Initial Decision as the Final Decision in this matter. While the Commissioner absolutely does not

condone petitioner's conduct and poor judgment, the ALJ correctly determined that it did not meet the statutory requirements of a HIB violation based upon the evidentiary record. The Act defines HIB as:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [*N.J.S.A.* 18A:37-14.]

In sum, a finding of HIB requires three elements under the Act. First, the conduct must be reasonably perceived as being motivated by any actual or perceived characteristic expressly identified in the statute, or by any other distinguishing characteristic.[1] Second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. Third, one of the three conditions set forth in subsections (a), (b), and (c) must be

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

satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex Cnty.*, Commissioner Decision No. 510-20 (Feb. 4, 2020).

Here, it is undisputed that the Board's written HIB determination referenced only the first element of the statute vis-à-vis petitioner's conduct, *i.e.*, that it can be reasonably perceived as being motivated by "appearance, race and ethnic origin." Initial Decision, at 9. The Board made no findings regarding the other requisite statutory elements. Because the ALJ correctly concluded that the record fails to establish that petitioner's conduct substantially disrupted or interfered with the orderly operation of the school or the rights of other students, the Commissioner concurs with the ALJ that petitioner's conduct did not constitute a HIB violation under the Act. Consequently, it is unnecessary to analyze whether one of the three conditions set forth in subsections (a), (b), and (c) of *N.J.S.A.* 18A:37-14 was satisfied.

The Board's reliance in its exceptions upon *T.R. and T.R., on behalf of minor child, E.R. v. Board of Education of the Bridgewater-Raritan Regional School District, Somerset County*, OAL Dkt. No. EDU 10208-13, Initial Decision (Sept. 25, 2014), Commissioner Decision No. 450-14 (Nov. 10, 2014), and *R.H. and M.H., on behalf of minor child, A.H. v. Board of Education of the Borough of Sayreville, Middlesex County*, OAL Dkt. Nos. EDU 09435-17 and EDU 14833-17, Initial Decision (June 24, 2021), Commissioner Decision No. 198-21 (Sept. 23, 2021), is unavailing. The Board cited those matters to illustrate that students have a right to be let alone, and that substantial disruptions have been found to occur under the Act when other students are so affected by the HIB incident that they report it to administrators. Respondent's Exceptions, at 2-3. Here, however, there is no indication that students present in the hallway during the incident noticed what had occurred or were affected in any way by petitioner's conduct. Initial Decision,

at 19. In addition, the Board concedes that no students reported the incident to administrators. Respondent's Exceptions, at 3.

Accordingly, the Commissioner hereby adopts the Initial Decision as the Final Decision in this matter, grants petitioner's motion for summary decision, and denies respondent's cross-motion for summary decision.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 7, 2023
Date of Mailing: September 8, 2023

[2] 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
GRANTING PETITIONER'S MOTION FOR SUMMARY DECISION AND DENYING RESPONDENT'S CROSS-MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 02751-23
AGENCY DKT. NO. 69-3/23

DO YEON SHIM,

Petitioner,

v.

RIDGEFIELD PUBLIC SCHOOLS BOARD OF EDUCATION, BERGEN COUNTY,

Respondent.

Michael J. DeMarco, Esq, for petitioner (Ricci & Fava, P.C., attorneys)

Frances L. Febres, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs, L.L.C, attorneys)

Record Closed: July 24, 2023 Decided: July 26, 2023

BEFORE: **MATTHEW G. MILLER, ALJ**

STATEMENT OF THE CASE

This is a Harassment, Intimidation, and Bullying ("HIB") case arising out of an alleged violation of the New Jersey Anti-Bullying Bill of Rights, N.J.S.A. 18A:37-13, et seq.

Petitioner, Do Yeon Shim, is employed as a teacher in the Ridgefield, New Jersey School District. Following an incident involving a student that occurred on December 15, 2022, the District's HIB Coordinator determined that Ms. Shim had violated the HIB statute in a December 23, 2022 report. The District Superintendent signed off on the report on January 3, 2023 and a determination letter dated January 9, 2023 was sent to petitioner.

Ms. Shim, through counsel, appealed this determination by letter dated January 11, 2023, but the decision was affirmed by the Ridgefield Board of Education ("RBOE"), with the result being forwarded to Ms. Shim by letter dated January 20, 2023

PROCEDURAL HISTORY

On March 13, 2023, Ms. Shim filed a Verified Petition of Appeal. Respondent filed an Answer to the Petition on or about March 21, 2023 and the matter was transmitted to Office of Administrative Law ("OAL") on March 24, 2023 for hearing as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

An initial conference was held on April 14, 2023. Petitioner then filed this Motion for Summary Decision on May 31, 2023. Respondent followed with opposition to the Motion and a Cross-motion for Summary Decision and following the filing of Opposition/Reply Briefs by both parties, the record closed on July 24, 2023.

FINDINGS OF UNDISPUTED FACT

The following **FACTS** of the case are not in dispute:

1. At all times relevant to this matter, petitioner, Do Yeon Shim, was a tenured teacher employed by the Ridgefield, New Jersey School District.

2. On December 15, 2022, while working at the Bergen Boulevard School[1], Ms. Shim was involved in an incident with a student that was witnessed by two other staff members ("SM1" and "SM2"). (Exhibit P-A).

3. More specifically, SM1 was walking the student back from a bathroom break to his classroom. When the student bent over to tie his shoe, Ms. Shim told him to hold that position and then used her phone to take a picture of his hair. (Exhibit R-A).

4. After doing so, Ms. Shim showed the photo to the student and stated that they could play tic-tac-toe on his head because his hair looked like a tic-tac-toe board.

5. SM1 intervened and complimented the student's hairstyle, and they left the area. SM1 further stated that the student seemed "unfazed" by the interaction and was excited to receive stickers on his testing chart.

6. SM1 reported the incident and an investigation commenced on December 16, 2022 that was performed by the District's Anti-Bullying Coordinator, Kara Doviak and signed off on by Dr. Letizia Pantoliano, the District Superintendent.

7. In conjunction with that investigation, the student was interviewed by Ms. Doviak and Dr. Tamika DePass, the District's Affirmative Action Officer. During the interview, the student confirmed the incident and felt that Ms. Shim had taken the picture because "she liked (his) hair". He also expressed that he liked the picture because his hair looked good.

8. SM2 was also interviewed and confirmed the incident, noting that Ms. Shim told the student to stay down because she wanted to take a picture of his head.

[1] This school is attended by 1st and 2nd grade students.

She felt that the student seemed “confused” but admitted that she “could not read him well”. She noted that other students in the hallway were “quiet” and that she was “uncomfortable” with the interaction, although there was no apparent impact on the student the rest of the day.

9. Ms. Shim was also interviewed as part of the investigation and confirmed the basics of the incident, claiming that she took the picture because she thought the student’s hairstyle was cool and she wanted to create a bonding moment with him.

10. The investigation concluded that Ms. Shim’s actions were “reasonably perceived to be motivated on the basis of appearance, race or ethnic origin” and that she had committed an act in violation of the HIB statute.

11. Ms. Shim was advised of the result of the investigation on January 9, 2023 and offered an opportunity to contest the result before the RBOE. (Exhibit P-B).

12. On January 10, 2023, Ms. Shim was further advised that her actions violated RBOE Policy 3280 (Liability for Pupil Welfare) and 3281 (Inappropriate Staff Conduct). (Exhibit R-B).

13. On January 11, 2023, petitioner requested a hearing before the RBOE and on January 19, 2023, the RBOE affirmed the district’s determination that she had committed an act of HIB. (Exhibit P-C and Exhibit R-C).

14. Petitioner was advised of the outcome via a January 20, 2023 letter. (Exhibit P-D).

15. The sole issue in dispute is whether respondent’s affirmation of the district’s determination that petitioner violated N.J.S.A. 18A:37-13, et seq. was arbitrary, capricious and unreasonable.

MOTION

Petitioner filed a Motion for Summary Decision, arguing that;

> Clearly, the determination in this case only addresses the distinguishing characteristic element of the statute and fails to address any other element required.

Petitioner emphasizes that none of the evidence supplied by respondent addresses the other three elements of the statute; that the conduct substantially disrupted the orderly operation of the school, that a reasonable person should have known that the conduct would physically or emotionally harm a student and that it either insulted or demeaned the student or created a hostile educational environment for him. N.J.S.A. 18A:37-14.

Citing to Wehbeh v. Bd. of Educ. of the Twp. of Verona, 2020 N.J. Agen. LEXIS 50 (Comm'r of Ed. February 4, 2020) and N.U. on behalf of minor child, M.U. v. Bd. of Educ. of the Town of Mansfield, Burlington County, 2020 N.J. Agen. LEXIS 244 (Comm'r of Ed. August 2, 2020), petitioner argues that respondent's finding of an HIB violation was arbitrary, capricious and unreasonable and therefore must be reversed.

Respondent opposed the Motion and filed a Cross-Motion for Summary Decision, arguing that with the presumption of correctness and what it considers to be a lack of affirmative showing that its decision was arbitrary, capricious and unreasonable, its decision was clearly correct. Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965).

It was also argued that petitioner's actions met all four prongs of the HIB statute in any event and that respondent's decision was well-supported by the facts of the case;

> The District correctly concluded that Petitioner's actions constituted HIB because they were motivated by appearance, race and/or ethnic origin, the conduct occurred in school, substantially interfered with the student's right to be left alone and to feel secure and comfortable in school and was the type of conduct that a reasonable person would find would cause emotional harm, and which was offensive and demeaning. Those findings were ultimately affirmed by the Board, and which decision was not arbitrary, capricious or unreasonable, as required for its decision to be overturned.

Respondent's brief at 4.

LEGAL POSITIONS

PETITIONER:

Petitioner argues that by the very findings of the HIB investigation, the Board's affirmation of Ms. Shim's guilt of the offense was arbitrary, capricious and unreasonable. Referencing the HIB statute, it was argued that respondent cited to only a single prong of what is a multi-part test to determine whether a violation had occurred and while she disagreed with that finding, in the absence of even a mention of the other prongs made the finding *de jure* unsustainable. Pointing to N.U. o/b/o M.U, petitioner notes;

> In addition to the fact that no specific findings were made addressing all elements of the statute, the allegations themselves likewise do not meet the standard to constitute acts of HIB. Therefore, the determination that petitioner engaged in (an) act of HIB is substantively deficient as well as procedurally deficient and this, is arbitrary, capricious and unreasonable and must be reversed.
>
> Petitioner brief at 7.

Petitioner then goes on to analyze the incident against the specific prongs of the statute and argues that there is nothing about same that violates same in any way. In so doing, counsel points to Wehbeh, Melnyk v. Teaneck Bd. of Educ., 2016 U.S. Dist. LEXIS 161524 (D.N.J. Nov. 22, 2016) and D.D.K. o/b/o D.K. v. Bd. of Educ. of the Tp. of Readington, 2016 N.J. Agen. LEXIS 835, (Initial Decision, October 6, 2016), adopted as modified, 2016 N.J. Agen. LEXIS 1348 (Comm'r of Ed., November 11, 2016).

RESPONDENT:

Respondent argues that Ms. Shim's actions unquestionably constituted a violation of the HIB Act and that its conclusions were not only not arbitrary, capricious or unreasonable, but were clearly correct.

More specifically, it argued that its investigation confirmed that petitioner's actions met all four prongs of the HIB statute and that while petitioner may disagree with the Board's determination, as long as its discretion was "exercised honestly and upon due consideration", it should be upheld. J.B. o/b/o minor child J.B. v. Northern Valley Reg. High Sch. District, 2021 N.J. Agen. LEXIS 571 (March 8, 2021).

It should be noted that respondent's Brief included a section concerning the manner in which the investigation was conducted and how potential administrative errors in same should be overlooked. However, petitioner did not question the technicalities of either the investigation or the manner in which it was affirmed by the Board of Education. Petitioner's only complaint is the finding (and subsequent affirmation) itself.

HIB REPORT:

The HIB report reads in full as follows;

> On December 15, 2022, staff member #1 at BB school reported an incident that took place in the hall way (sic) outside of the bathroom while the class was taking an allotted bathroom break. Staff member #1 stated that she was walking victim back to his classroom teacher and he asked to show his teacher his work. Present were Offender, staff member #2, staff member #3 and victim's classmates. Staff member #1 reports the following: "Victim bent down to tie his shoe. Offender took her phone out and told victim to stand still as offender took a picture. At first I thought offender was taking a picture of victim tying his shoe. Offender then showed victim the picture and stated that they could play tic tac toe on victim's head. Victim looked puzzled, maybe in shock, not sure what offender meant. Offender then further explained that they could play tic tac toe together on his head because his hair looked like a "tic tac toe board." Immediately after staff member #1 told him how much she liked his braids and who helps him with his hair. Then they went back to finish their work in the testing office. Nothing else was said of the incident and victim appeared unfazed as he was excited to receive stickers on his testing chart.

On December 16, 2022, victim was interviewed by myself and Dr. DePass. Though questioning victim confirmed that his teacher took a picture of his head and said it looked like a tic tac toe board. He was asked why he thought she did this and he said, "She liked my hair" Did you like that she took a picture of your hair? Yes. Did you tell your mom? Yes. How did she take the picture? I was tying my shoelaces. Did she show you the picture? Yes. She said I didn't know what the top looks like and said she wanted to play tic tac toe. Did you like the picture? Yes. Why did you like it? Because my hair looks good.

On December 16, 2022, staff member #3 was interviewed as a possible witness. She stated she was not present at the time the picture was taken. She said she was walking down the hall and staff member #1 took victim out for a break. They talked about how proud she was about victim's sentence structure work.

Staff member #2 reports she was in the hallway when victim came to show her his sentences. She confirms that victim bent over to tie his shoes and offender told him to stay down because she wanted to take a picture of his head. She reports victim looking confused. She then said offender took a picture, showed victim the picture and told him that is (sic) looks like a tic tac toe board and that they can play. When asked about victim's reactions she said she couldn't read him well but he looked confused. When asked about victim's reactions she said she couldn't read him well but he looked confused. When asked the reaction of the other students she said they were quiet. When asked how she felt about the incident staff member #2 reported feeling uncomfortable. She was asked if offender did anything further and she said no. When asked how victim was for the rest of the day she said he seemed normal and didn't seem out of sorts.

Interview with Offender on December 19, 2022 with Dr. DePass and Kara Doviak. Dr. DePass verified with offender that she took the photo and asked her why she took it. Offender responded that she thought the pattern was cool and wanted to share it with victim. Offender said she wanted to find bonding moments and thought victim's hair was cool. Victim showed me his writing booklet and I told him I wanted to see the same things from him in class as well and that he can do it. Victim couldn't see the top of his head so I wanted to show him. When asked if she asked for victims' permission before taking the photo she said she did not but let him know she was taking the picture. It was just the top of his head. When you took the pic were there other student reactions?

> No, everyone was occupied while waiting for the bathroom, there was no reactions. It was just myself, staff member #3 and staff member #2.
>
> Summary
>
> Staff member #1 reported that offender told a student to stay in a bent down position so she could take a picture of his head. When showing the victim the picture, offender said they should play tic tac toe on his head. The staff member (offender) and two other staff members substantiated the incident. The student also substantiated that this happened. The finding of this case substantiated a case of HIB based on the fact that the findings can be reasonable perceived as being motivated by either any actual or perceived characteristic such as race, religion, gender, mental…physical or sensory disability or by any other distinguishing characteristic. In this case it has been determined that the staff member's (offender) actions were motivated by appearance, race and ethnic origin. Although the offender reports she did not realize the potential negative impact this incident may have had, it is still a case of HIB based on the Anti-bullying law in New Jersey.
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> (Exhibit P-A)

LAW AND ANALYSIS

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The OAL summary decision rule is essentially the same as the summary judgment rule under the New Jersey Court Rules, which states:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all

> legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [R. 4:46-2(c).]

The New Jersey Supreme Court has modified and clarified the analysis required when considering a motion for summary decision/judgment. In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), the Court adopted the summary judgment standard utilized by federal courts:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." [Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986).] . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of R. 4:46-2. Liberty Lobby, supra, 477 U.S. at 250, 106 S. Ct. at 2511, 91 L. Ed. 2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214, the trial court should not hesitate to grant summary judgment.
>
> [Id. at 540.]

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact, and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). The critical question therefore is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Brill, 142 N.J. at 533 (citation omitted). If the non-moving party's evidence is merely colorable, or is not significantly

probative, summary judgment should not be denied. See, Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

An action by a local board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. 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, those challenging a decision made by a board of education "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of Franklin Lakes, 2014 N.J. AGEN. LEXIS 19 (February 24, 2014) (citation omitted), adopted, 2014 N.J. AGEN. LEXIS 1137 (April 10, 2014). Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., 2013 N.J. AGEN. LEXIS 58 (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, 2013 N.J. AGEN. LEXIS 436 (April 25, 2013).

The Anti-Bullying Act is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises." N.J.S.A. 18A:37-13.1(f). Under the Act, "[h]arassment, intimidation or bullying" is defined 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 reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.

> 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> >
> > b. has the effect of insulting or demeaning any student or group of students; or
> >
> > c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14.]

At this point, it is important to note that the interplay of sections (a), (b) and (c) was addressed by the Commissioner in Wehbeh, 2020 N.J. Agen. LEXIS 50;

> …a finding of HIB requires three elements. First, the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. (Footnote omitted). The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied.
>
> Id. at 3.

The Commissioner explained that "as a matter of standard statutory construction, the term "or" between subsections (b) and (c) also applies to subsection (a), such that a demonstration of any of these three criteria can support a finding of HIB." Id. at n2.

Each school district must adopt a policy that prohibits HIB and provides "a procedure for prompt investigation of reports of violations and complaints." N.J.S.A. 18A:37-15(b)(6). Once an alleged HIB incident is reported to the school principal, the

principal must initiate an investigation within one school day of the report. N.J.S.A. 18A:37-15(b)(6)(a). The investigation shall be conducted by a school anti-bullying specialist, but "[t]he principal may appoint additional personnel who are not school anti-bullying specialists to assist in the investigation." Ibid. The investigation shall be completed within ten-days of the initial HIB complaint. Ibid.

The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial action. N.J.S.A. 18A:37-15(b)(6)(b). In particular, "the superintendent may decide to provide intervention services, establish training programs to reduce [HIB] and enhance school climate, impose discipline, order counseling as a result of the findings of the investigation, or take or recommend other appropriate action." Ibid.

The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." N.J.S.A. 18A:37-15(b)(6)(c).

The parents of the students involved in any alleged HIB incident "shall be entitled to receive information about the investigation, . . . including the nature of the investigation, whether the district found evidence of [HIB], or whether discipline was imposed, or services provided to address the incident of [HIB]." N.J.S.A. 18A:37-15(b)(6)(d). The parents may request a hearing before the board, and the hearing must be held within ten-days of the request. Ibid. Any hearing shall be held in executive session to protect the identity of any students involved. Ibid. And "[a]t the hearing, the board may hear from the school's anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents[.]" Ibid.

A school board must issue a written decision at the first meeting after its receipt of the investigation report. N.J.S.A. 18A:37-15(b)(6)(e). The board may affirm, reject, or modify the superintendent's decision. Ibid. The board's decision may be appealed to the Commissioner of Education. Ibid.

Before determining the outcome of the case, we must analyze the facts for what they are. This is not a case about inferring what impact Ms. Shim's action could potentially have had and it is certainly not a referendum on whether her decision-making was appropriate or whether she should face discipline or not. This case is specifically about whether petitioner's actions that day amounted to an HIB violation.

I **CONCLUDE** that it did not and that respondent's determination that it did was arbitrary, capricious and unreasonable.

Per the HIB statute and its interpretation by the courts, for there to be a valid finding of an HIB violation (in this specific case), these things had to have happened;

1. A reasonable person would perceive that the conduct was based upon a distinguishing characteristic.

AND

2. The conduct took place on school property.[2]

AND

3. The conduct must substantially disrupt or interfere with the orderly operation of the school or the rights of other students.

AND

3a. A reasonable person should know that the conduct would have the effect of…emotionally harming a student.

OR

3b. The conduct has the effect of insulting or demeaning the student.

OR

3c. The conduct created a hostile educational environment for the student by interfering with the

[2] There is no dispute that the conduct took place on school property and while this prong is more inclusive, there is no need, given this location, to delve further into this aspect of the statutory requirements.

> student's education or by severely or pervasively causing emotional harm to the student.

In other words, as will be explored in some detail below, in order for there to be a cognizable finding of a HIB violation, respondent must demonstrate that it met prongs 1, 2 and 3 and then any of 3a, 3b or 3c. Any break in the chain causes the charge to fail.

Here, respondent's reasoning in support of its HIB findings was;

> The finding of this case substantiates a case of HIB based on the fact that the findings can be reasonable perceived as being motivated by either any actual or perceived characteristic such as race, religion, gender, mental…physical or sensory disability or by any other distinguishing characteristic. In this case it has been determined that the staff member's (offender) actions were motivated by appearance, race and ethnic origin. Although the offender reports she did not realize the potential negative impact this incident may have had, it is still a case of HIB based on the Anti-bullying law in New Jersey.

As emphasized by petitioner, respondent did not make any other findings or determinations as to how Ms. Shim's conduct violated the HIB statute.

While why the incident occurred is obviously an important part of any HIB case, in order for there to be a sustainable finding of a statutory violation, a much more detailed analysis must take place, one that was not undertaken by respondent here.

STATUTORY ANALYSIS

PRONG 1 - THE CONDUCT WAS REASONABLY PERCEIVED TO BE BASED UPON A DISTINGUISHING CHARACTERISTIC

Putting aside the obvious "What was she thinking?" aspect of the incident, the first aspect of the statute that must be addressed is the one area where respondent documented its conclusion, that Ms. Shim's conduct could be reasonably perceived as being motived by race or another distinguishing characteristic.

However, it first must be determined whose perception controls. It is the alleged perpetrator, the alleged victim or a "reasonable person"?

One of the first cases to discuss this issue was Melnyk;

> On its face, the HIB Policy requires that several factors must be met before an expression can be found to be harassment. First, the communication must be "reasonably perceived as motivated" by an actual or perceived characteristic. That is to say, the comment must be objectively perceived to a reasonable person as motivated by a characteristic.
>
> Id. at 17-18.

Melynk was cited with approval in R.H. ex rel. A.H. v. Borough of Sayreville Bd. of Educ., 2023 U.S. Dist. LEXIS 83587 (D.N.J. May 12, 2023);

> First, the communication must be "reasonably perceived as being motivated either by any actual or perceived characteristic, such as race . . ." among other things. N.J.S.A. § 18A:37-14. "The 'reasonably perceived' test is an objective one that has withstood constitutional scrutiny," and does not present a vagueness issue. See, Melynk v. Teaneck Bd. of Educ., No. 16-0188, 2016 U.S. Dist. LEXIS 161524, 2016 WL 6892077, at *8 (D.N.J. Nov. 22, 2016)
>
> Id. at 13.

This result is also alluded to in S.A. v. Bd. of Educ. of Moorestown, 2019 N.J. Super. Unpub. LEXIS 2114 (App. Div. October 15, 2019). There, in a case involving a teacher who requested a student's (poor) test papers as part of his job duties, the court concluded that a HIB violation had not occurred, since;

> we do not discern sufficient facts to support a conclusion that any actions by R.L. were motivated by G.A.'s ADHD or other personal characteristics.
>
> Id. at 7.

It further noted that;

> even if we presume R.L. was insensitive or even unkind, there is no evidence R.L. was prompted 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.
>
> Ibid.

This prong was again discussed in L.K. and T.K. ex rel. A.K. v. Mansfield Bd. of Educ., 2019 N.J. Agen. LEXIS 62 (January 22, 2019), Final Decision, 2019 N.J. Agen. LEXIS 345 (Comm'r of Ed. April 22, 2019), reversed and remanded, L.K. and T.K. ex rel. A.K. v. Bd. of Educ. of Mansfield, 2020 N.J. Super. Unpub. LEXIS 2082 (App. Div. November 2, 2020).

In L.K., the ALJ found that "the statute focuses on the impact of (the) conduct on (the alleged victim) and what (the alleged victim) reasonably perceived." However, in that case involving young children and a gender transitioning student, the Court further found;

> There is no requirement that the Board find that A.K.'s conduct was actually motivated by the perceived characteristic, because, as petitioners argue, A.K. most likely does not even know what "gender identity" means. However, even under the actual wording of the statute, the only corroborated finding from the investigation was that A.K. asked questions about why N3 dressed like a girl even though N3 asked her to stop. Therefore, the age of A.K. was relevant to whether A.K.'s conduct was motivated by the perceived characteristic or because a seven-year-old would be curious about why a student she knew as a boy was dressing like a girl. The investigators had the time to find and interview someone in the cafeteria who may have heard A.K. continue the "harassment," but they did not.
>
> L.K. and T.K. ex rel. A.K. v. Mansfield Bd. of Educ., 2019 N.J. Agen. LEXIS 62 at pg. 17-18.

Given the lack of clarity in the statute, there will of course be some confusion. However, that lack of clarity was addressed in Wehbeh v. Bd. of Educ. of the Tp. of Verona, 2020 N.J. Agen. LEXIS 50 (Comm'r of Ed. February 4, 2020), where the

Commissioner found that a "standard reasonableness determination common in many types of adjudications" should be utilized. It was noted that to require an actor to have intentionally committed to offense, the burden concerning motivation would be improperly placed on the alleged victim. Id. at n3.

Ultimately, I **CONCLUDE** that in order to find that the first prong of the statute had been satisfied, an investigating body must view the evidence in its entirety and determine whether a reasonable person could perceive that the conduct could be "motivated by an actual or perceived characteristic". That determination should take into account the totality of the circumstances, including the traits/characteristics of the alleged victim, the age, knowledge and experience of the actor as well as the time, place and location of the act, etc.

Then, if the investigator makes a determination that a reasonable person would conclude that the act was motivated by an actual or perceived characteristic, the investigation will proceed to the next element of the HIB offense. In essence, the consideration of this prong does not focus purely on either the perception of the alleged victim or the expressed intent of the alleged actor, but instead provides an objective standard based on the totality of the circumstances.

In doing so, I **FIND** that a reasonable person could conclude that petitioner's motivation in performing the act was based upon the student's hairstyle, which, per September 2019 Guidance on Race Discrimination Based on Hairstyle published by the New Jersey Division on Civil Rights, is "closely associated with Black people". Id. at 1. (Exhibit R-D)

PRONG 2 – LOCATION OF THE CONDUCT

That the second prong of the HIB statute, concerns the location of the incident, has been met is unchallenged, since the conduct occurred in the school building.

PRONG 3 – THE CONDUCT SUBSTANTIALLY DISRUPTED OR INTERFERED WITH THE ORDERLY OPERATION OF THE SCHOOL OR THE RIGHTS OF OTHER STUDENTS.

Very simply, I **CONCLUDE** that there is no credible evidence that this entire interaction "substantially disrupt(ed) or interfere(d) with the orderly operation of the school or the rights of other students". As much as respondent's counsel tries to massage the finding of the HIB report to meet the verbiage of this prong, he simply cannot. Even the most optimistic and favorable reading of the report demonstrates that the student in question "looked puzzled, maybe in shock" momentarily. However, in the next minute, SM1 stated that the student "appeared unfazed as he was excited to receive stickers on his testing chart".

He also appeared "confused" to SM2, but then she admitted that "she couldn't read him well", although she noted that the student "seemed normal and didn't seem out of sorts" for the rest of the day. Further, while SM2 stated that other children in the area (who were not mentioned by SM1) were "quiet", the report fails to mention if there was even an indication that they had seen the interaction and none of these other students were ever (apparently) identified or interviewed.

Finally, the victim himself literally did not express any discomfort or disruption due to the event. He expressed that he thought Ms. Shim took his picture because she liked his hair and that he liked the picture because his hair looked good.

The case law concerning this prong is clear that the negligible impact that this interaction had on the student and the utter lack of evidence that it had any impact on other students does not satisfy this prong of the HIB statute. As noted by the Commissioner in D.D.K. o/b/o D.K, 2016 N.J. Agen. LEXIS 1348;

> However, the report determined that the incident did not amount to HIB because the comments did not substantially disrupt or interfere with the orderly operation of the school or the rights of other students. In support of this finding, the report noted that D.K. stated in his interview that "fortunately,

> this was not problematic for my learning experience, but it ticked me off at the time." (Exhibit J-I). The student witness observed the alleged aggressor make an "embarrassed laugh" to himself when he realized what he had said had come out wrong, but did not hear anyone else laugh and did not think D.K. was upset as a result of the comment. Ibid. The teachers did not hear any of the alleged comments.
>
> Previously, conduct has been determined to substantially disrupt the orderly operation of the school when students are so upset or embarrassed that they are "not fully available for learning." G.H. and E.H. on behalf of K.H. v. Board of Education of the Borough of Franklin Lakes, Bergen County, OAL Dkt. No. EDU 13204-13, decided February 24, 2014, adopted Commissioner Decision No. 157-14, April 10, 2014. Additionally, when other students are "so affected" by behavior that they report it, the orderly operation of the school may be substantially disrupted. T.R. and T.R. on behalf of E.R. v. Bridgewater-Raritan Regional Board of Education, OAL Dkt. No. EDU 10208-13, decided September 25, 2014, adopted Commissioner Decision No. 450-14, November 10, 2014. Given that D.K. indicated that the comments were not problematic for his learning experience and other students did not appear to be affected by them -- combined with a lack of any other evidence to the contrary -- the Commissioner is constrained to agree that petitioner failed to meet his burden of demonstrating that the comments substantially disrupted or interfered with the orderly operation of the school or the rights of other students.
>
> D.D.K. o/b/o D.K., 2016 N.J. Agen. LEXIS 1348 at 2-3.

The case cited by respondent in support of its position is unhelpful. In R.P. o/b/o A.P. v. Bd. of Educ. of Tp. of Hamilton, 2018 N.J. Agen. LEXIS 83 (Initial Decision, January 2, 2018), adopted, 2018 N.J. Agen. LEXIS 346 (Comm'r of Ed., March 29, 2018). That matter involved a ten-year-old student who was exposed to repeated sexual innuendo and gestures by another student. She wrote a letter to the school "urgently seeking help…due to A.P.'s ongoing inappropriate behavior. Through this letter and confirmed during her interview with (a school official), (the victim) expressed her extreme discomfort and distress over A.P.'s ongoing conduct." A.P., 2018 N.J. Agen. LEXIS 83 at 15. Given the severity of the harassment, the Court found that the student's "extreme discomfort and distress" was sufficient to satisfy the "disruption prong". Ibid.

In the case at bar, there is no evidence that there was anything more than, at best, a negligible, literally momentary disruption to the student's educational process. Further, there is no evidence at all that any other students were even aware of the incident, let alone impacted by it.

With no evidence demonstrating that Prong 3 of the statutory requirements was either met or considered, I **CONCLUDE** that any finding of an HIB violation by Ms. Shim was arbitrary, capricious and unreasonable. This is not a case where reasonable minds can differ as to the conclusion that was reached; rather this is a case where it was literally impossible, by definition, to reach that conclusion.

Given the breaking of the chain with respondent's failure to meet Prong 3, there is no need to analyze the case against the balance of the statutory requirements.

FINDINGS AND CONCLUSIONS

Having reviewed the undisputed facts in this matter and even given the presumption of correctness of respondent's findings, I **CONCLUDE** that petitioner has clearly and convincingly demonstrated that respondent's determination that her actions were violative of the HIB statute was arbitrary, capricious and unreasonable. Thomas, 89 N.J. Super. at 332.

Both the decision of the HIB coordinator/Superintendent and the Board's affirmation of same are quite remarkable. The standards that must be met before a finding of an HIB violation can be made are well-known and the failure of the report to mention anything other than the perceived motivation of the act is highly problematic. In fact, the report even infers that the student was not impacted by Ms. Shim's actions ("the potential negative impact this incident may have had"), but nonetheless concludes that it was "still a case of HIB based on the Anti-bullying law in New Jersey."

No, it is not and when the Board had the opportunity to correct what was an obviously incomplete and erroneous conclusion by the HIB coordinator and Superintendent, it instead ratified it.

As noted above, this case is not about whether Ms. Shim made a poor decision or violated other district policies. Rather, she was accused of violating a specific statute that has specific elements that must be met before a finding of guilt can be made and sustained. Even giving respondent every benefit of the doubt, I **FIND** there is no way that a reasonable respondent could have concluded, based upon this factual scenario, that Ms. Shim's actions violated N.J.S.A. 18A:37-13.2, et seq.

Based on the foregoing, I **CONCLUDE** the Board's decision that petitioner's conduct meets the statutory definition of HIB and that she committed an act of HIB against a student, was arbitrary, capricious and unreasonable.

Accordingly, I **CONCLUDE** that petitioner's Motion for Summary Decision should be **GRANTED,** and I further **CONCLUDE** that respondent's Motion for Summary Decision should be **DENIED**.

ORDER

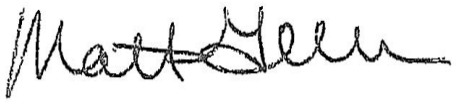
Based on the foregoing, it is hereby **ORDERED** that petitioner's Motion for Summary Decision be and is hereby **GRANTED** and it is further;

ORDERED that respondent's Cross-Motion for Summary Decision be and is hereby **DENIED**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



July 26, 2023
DATE

MATTHEW G. MILLER, ALJ

Date Received at Agency: July 26, 2023

Date Mailed to Parties: July 26, 2023

MGM/sej

APPENDIX

EXHIBITS

FOR PETITIONER:

P-A HIB Summary Report
P-B January 9, 2023 HIB Determination Letter
P-C January 11, 2023 Appeal Letter
P-D January 20, 2023 Post-Appeal HIB Determination Letter

FOR RESPONDENT:

R-A Picture of student taken by petitioner
R-B January 10, 2023 disciplinary letter
R-C January 19, 2023 Ridgefield Board of Education Meeting Minutes
R-D September 2019 Guidance on Race Discrimination Based on Hairstyle published by the New Jersey Division on Civil Rights
R-E Ridgefield District Policy 3280 – Liability for Pupil Welfare
R-F Ridgefield District Policy 3281 – Inappropriate Staff Conduct