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Boonton, NJ 07005
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December 22, 2019

Honorable Jude Tiscornia, ALJ
Office of Administrative Law
33 Washington St
Newark, NJ 07102

OAL Docket No: EDI 10470-2019 N
Agency Reference No: 158-7/19

Dear Judge Tiscornia:

I am in receipt of the memorandum sent by the Respondent Boonton School District which answers the request to provide examples of case law supporting the contention that a student can have committed a HIB for actions not directed at a student.

I object to the conclusions drawn from the cases cited, as well as some of the statements made in the memorandum. I ask the court to consider my responses to the memo.

As to case law examples provided by the Respondent

In ***G.T.S.***, this is not a case of indirect bullying. Also, the case was dismissed, not because the ALJ agreed that her actions amounted to bullying, but rather because of a technicality: G.T.S. sought removal of disciplinary records where there was no disciplinary record. The court's decision had nothing to do with bullying.

In ***J.G.***, it is an example of indirect bullying, but J.G. did not argue the merits of HIB, only a constitutional issue. The Commissioner dismissed her case on jurisdictional grounds. Further, it was the **school**, not the **court**, which asserted indirect bullying, and was not upheld by any court. Further, it is not even clear which of the statements that she used was used against her in the HIB complaint.

In ***Melynk***, this is not a case of indirect bullying. Her case was dismissed because she argued only on constitutional grounds. Further, her record was nevertheless cleared of any wrongdoing, suggesting that the court didn't find that her actions rose to any level of bullying.

In ***Geiger/Jones***, this was a case of conflict, not bullying. They were fired on accusations of unbecoming conduct. No bullying - direct or indirect - was ruled on by a court or the commissioner.

The nature of the appeal was about tenure, and not about anything that might have been overheard. Respondent in J.J. asserts that the kids overheard the inflammatory term and caused a direct impact on the school environment. I disagree; Respondent's argument is post hoc ergo propter hoc: "The kids overheard their conduct so they were fired for their conduct." But nothing suggests that BECAUSE the kids overheard, they were fired. It happens also that there is no evidence yet presented that suggests any students who overheard these two arguing had filed a HIB report against the teachers. By Respondent's logic, that would be reasonable, since all of the HIB statute elements seem to have been met, although arguably their squabble would fall under conflict, not HIB. Also by Respondent's logic, two kids who, for example, get into a fight over a girl and use racially inflammatory words against each other would likely be considered an act of conflict but the bystanders could claim to be bullied?

Other statements in the memorandum

In the memorandum, some statements are made which I also do not agree with. I again vehemently object to any characterization that J.J. said anything offensive. J.J. did **not** use the n-word, nor any of its derivatives, and he did **not** admit to this. J.J.'s statements and actions were of a friendly nature, and completely within the bounds of acceptable behavior and language. Further, his and the other boys' speech was directed to and about themselves, and only themselves.

The sections herein below, address my concerns with the statements made.

Motivation

I assert that the motivation clause alone suggest indirect bullying is not applicable to HIB.

The memo, and the investigative report (attached in the original petition), cites that J.J. was motivated by the complainant's race. The law seems clear on this as well: J.J. would have to be motivated by her race. But nowhere is it described **how** he knew her race. I would like to know what was it about **her** that motivated **him** to say what the Respondent alleges. Even if J.J. did say anything as alleged, there isn't a way for him to be motivated by anything about her. He didn't know her. He didn't know about her. He didn't see her. There's nothing in the investigative report to suggest that any action or statement by J.J. or any of the other boys was motivated in any way by the complainant's race. I submit that anything J.J. did say was motivated by a relationship of friendship he had with the person to whom he was speaking, and not of anyone else around him.

I offer four case law examples about considerations for motivation and requisite knowledge of the victim, or motivation from sources other than the victim.

EXHIBIT A
N.M., o/b/o minor child, H.M., v. Board of Education of the School District of the Chathams, Morris County
OAL DKT. NO. EDU 17732-17
AGENCY DKT. NO. 276-11/17
https://www.nj.gov/education/legal/commissioner/2018/nov/380-18.pdf

In N.M, the petitioner sought to challenge H.M.'s HIB allegation in part by arguing he did not know the victim's status as a special ed student. The court disagreed, saying that H.M. had to have known, given the victim was in spec ed for 9 years, and had routinely been pulled in and out of class, and has a 1:1 aide in class. Therefore, H.M. **had** to have known about the characteristic, and, his words were ultimately found to be motivated by it.

J.J. argues similarly in that he could not have known her race, therefore, he could not have been motivated by it. There is no indication that he had other means to know her race, unlike H.M. who reasonably had knowledge of the victim's spec ed status.

K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 351 (App. Div. 2011)

Note: I do not have access to case details in K.L. This following case quotes K.L.:

> *EXHIBIT B*
> *K.P. o/b/o I.M., petitioner, v. Saddle Brook Board of Education, Bergen County, and Danielle Shanley, Superintendent*
> *OAL DKT. NO. EDU 04624-19*
> *AGENCY DKT. NO. 17-01/19*
> *https://www.nj.gov/education/legal/commissioner/2019/sep/232-19.pdf*

In K.L., according to the case about K.P., the court notes:

> "*Thus, harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation, does not come within the statutory definition of bullying.*"

As J.J. was unaware of the complainant, and didn't know her; nor talk to, toward, or about her; nor about anyone else other than the boys he was with; nor was he being aggressive in any way; I argue that any action or statement J.J. made/did was from a motivation that could only have been because of a relationship of friendship he had with the boys he was talking to, and not about anyone else. As a result, J.J.'s and the boys' conversation and conduct do not constitute HIB.

EXHIBIT C

W.D. and J.D, o/b/o minor child, G.D., V. Board of Education of the Township of Jefferson, Morris County

OAL DKT. NO. EDU 10587-17

AGENCY DKT. NO. 160-7/17

https://www.nj.gov/education/legal/commissioner/2018/nov/375-18.pdf

In W.D. the court notes:

> "*Therefore, use of a derogatory word or racial slur does not automatically constitute an act of HIB; the factors set forth above must be met.*"

W.D. doesn't apply in J.J.'s case, because J.J. did not say anything offensive, and didn't admit to it. But even if he did say something offensive, W.D. suggests it doesn't automatically mean he committed a HIB.

EXHIBIT D

C.K. and M.K., o/b/o minor child, M.K. v. Board of Education of the Township of Voorhees, Camden County

OAL DKT. NO. EDU 20510-10

AGENCY DKT. NO. 353-11/15

https://www.nj.gov/education/legal/commissioner/2017/mar/81-17.pdf

In C.K., the girl accused of being a bully committed an act that was not found to be an act of bullying, because she couldn't have been motivated by any characteristic of the petitioner/victim. As such, knowledge of the victim's characteristic is a requisite to establish motivation.

The "N-word"

The memo suggests substantial rights were violated because the "n-word" was uttered.

First, J.J. categorically denies having said "n-word" or any of its derivatives, or having said anything offensive. Witnesses concur.

But if J.J. or any of the boys he was talking to said anything, then "n-word" [ut prorsus] must be disambiguated. There are times when using "n-word" in its disambiguation can be friendly (eg, "nigga") as I have already indicated in my petition, and gave examples of several journalists indicating that such use isn't necessarily wrong. It is ever-present in pop culture. The Respondent and I agree it is colloquial, and students in the Boonton School District use it all the time without repercussions, and its use is not limited to just black students, but students of all races.

Note also that using "nigger" doesn't automatically rise to HIB, and context is important, per W.D. in Exhibit C, mentioned above. As such, the investigative report did not mention context when it should have.

There is varying interpretation in the investigative report that J.J. "used" the n-word, and the report does not disambiguate the phrase. In it, and in the memo, he's alleged to have "used" the phrase, or "refer to someone using the n-word". As a result, it's impossible to defend against this without knowing what was really said without context, except to say that in any case, J.J. insists he did not use any of these phrases. It should be noted that J.J. and his friends acknowledge that their conversation was friendly and non-offensive, and even the investigative report indicates that J.J.'s actions were deemed accidental and without malice.

Using "n-word", and its disambiguated variants, for example in context with these proceedings is perfectly acceptable, because the context isn't to be insulting.

Calling someone "nigga" is not considered insulting, although some in the black community abhor the this phrase; nevertheless, there seems to be no universal agreement that using it is wholly wrong. Per the investigative report, and the administrators at the 2/12/2019 meeting with the Respondent, and the

BOE executive members at the 4/8/2019 hearing, and my own experiences, and J.J.'s experiences, the phrase "nigga" is commonly used at the school, and is done so without any problems, and as mentioned by the administrators at the 2/12/2019 meeting, few students are ever punished for it. Indeed, when the Respondent directed me to refer to J.J. for details of the incident, I did, and I asked J.J. to confer with his friends, who confirmed that few students are punished for use of "nigga", and that it is ubiquitous. None of J.J.'s friends indicate they were ever suspended for using "nigga" or "nigger".

Calling someone "nigger" can be altogether another matter. It is nearly universally agreed that calling someone this is wrong, no matter the context. It makes one wonder, then, why the BOE would allow the school to keep books like "*To Kill a Mockingbird*", "*Tom Sawyer*", and "*Huckleberry Finn*" on their shelves, with known derogatory references to "nigger" within, all the while acknowledging that districts across the country are removing these books from their shelves, not coincidentally because the books contain patently racist language.

So the Respondent sends mixed signals: it's quite alright to keep these offensive books on the shelves, and even have students read them for class assignment - and even read the passages aloud! - yet it's considered substantially disruptive to a student's right to be free from racially vulgar words when someone simply uses "n-word" in (apparently) any of the contexts I've described. Case law says this isn't necessarily so: other elements of the HIB statute need to apply.

J.J.'s actions, whatever they were, were deemed accidental and without malice. As such, even if J.J. did use "n-word" in any of its derivatives, it then means it wasn't used in an aggressive way, and so, the threshold of HIB definition has not been met.

Right to be Free from Racially Inflammatory Language

Per the investigative report and the memo being responded to here, the Respondent asserts that students have the right to go to school without overhearing racially inflammatory statements by fellow students.

I tend to disagree: students have no such right. They **do** have the right from being bullied using these terms, but they do not necessarily have the right to be free from it in a non-bullying context. Otherwise, the Respondent would be blatantly violating this "right" every single time "*To Kill a Mockingbird*" is read in class, which coincidentally, J.J. and his class were reading at the time of this incident.

Substantial Disruption

As to “substantial disruption”, the Respondent asserts that because the complainant felt that the school was racist, that indicated her rights were substantially interfered with. But the Supreme Court suggests that this by itself is a mere irritant. Substantiality is checked using the Tinker test, from *Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)*. The Court considers these examples in terms of substantial interference:

1. Was there was a lockdown, riot, or protest?
2. Was additional police protection needed?
3. Was an alarm sounded?
4. Was there an evacuation?
5. Was there a flood of angry phone calls?
6. Was a school event cancelled?

Essentially: Was there an interruption in the learning process?

As such, J.J.’s conduct, and that of all the boys he was with, could not be a substantial disruption to the school or the rights of others, because no such event occurred.

Therefore, I assert that rules which prohibit use of “nigga” are constitutionally unsound, and anyway, that phrase is not mentioned in the Code of Conduct. Use of “nigger” isn’t explicitly mentioned either, but I assume it is covered under a broader umbrella of racist language, since it is generally considered racist and vulgar. While the Respondent may assert that “nigga” does also fall under the umbrella of racist language, the student base, pop culture, and apparently, witnesses in the investigative report would disagree with the Respondent.

> Again, context is important: in D.D.K (see EXHIBIT F), the aggressor told D.D.K., “you’re already yellow. . . you’re Asian.”, which the court found to be of a racist nature and determined that this met **one** of the requirements for HIB. But D.D.K.’s response to that was, “fortunately, this was not problematic for my learning experience, but it ticked me off at the time.”, and the court thus determined that because of D.D.K.’s brush-off of the “asian” remark, that his rights were not substantially interfered with, and therefore, the aggressor’s statement did not meet the requirements for HIB.

I assert that “nigga” is not in of itself racist. If it was used, then it was used in a friendly context, and it was received in a friendly context, since there is no indication of any kind of aggression in J.J.’s or the

boys' conversation. Therefore, context has to be considered, which is consistent with W.D., in EXHIBIT C. Using such language should therefore pass 1st amendment muster outside of a bullying context. In order for the school to ban these phrases, it needs to show that there would be evidence of disruption rather than undifferentiated fear: it can't be because of a minor irritant. Using "nigger", I concede that that could be inflammatory and improper and inexcusable. Further, any prohibitions of using these phrases must also pass *Burnside v. Byars (5th Cir.) (1966)* muster. In *Burnside*, the Court ruled that in order for the school to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by

> "*something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. (Burnside v. Byars, supra at 749.)*"

As to New Jersey's thoughts on substantial rights of the student, NJ generally requires the student to miss school. Here are examples of case law supporting this:

EXHIBIT E
A.J., o/b/o minor child, D.J., and W.G., o/b/o minor child, J.M. V. Board of Education of the Pinelands Regional School District, Ocean County
OAL Dkt. No. EDU 07634-15
Agency Dkt. No. 90-4/15
https://www.nj.gov/education/legal/commissioner/2018/dec/392-18.pdf

In A.J. the court noted, "*effects of the bullying were detailed, including changes in demeanor as reported by staff and students, lower grades, isolation and increased absenteeism, verbalized to staff and students as a decreased desire to attend school and the requested removal from L.M.'s placement in GATE*."

EXHIBIT F
D.D.K., o/b/o minor child, D.K., V. Board of Education of the township of Readington, Hunterdon County, and Barbara Sargent
OAL DKT. NO. EDU 07682-15
AGENCY DKT. NO. 86-4/15
https://www.nj.gov/education/legal/commissioner/2016/nov/397-16.pdf

In D.D.K, the court noted the aggressor referred to D.K. (the victim) “you’re already yellow. . . you’re Asian.” does meet one of the elements of the HIB, because it’s reasonable to see the motivation of D.K.’s race; however, it also found that the statement did not substantially disrupt the student’s rights, or the rights of others:

> “*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.*”

Note that in J.J.’s case, the original complainant claimed to not like the school “because it’s racist”. She continued her day in school, having made the report at the end of the day. She was given a single counseling session - hardly a substantial interference; whereas J.J. was given three, without any guidance as to what to cover in the counseling sessions for an act they deemed accidental and without malice. And by the time the BOE hearing occurred 8 weeks later, no mention of school absence was made.

Therefore, I strongly assert that the substantial disruption test has clearly not been met, and therefore, the HIB allegation must be dismissed.

Code of Conduct Violation

The Respondent has made the argument that J.J.’s language amounted to a Code of Conduct violation (see petition and the investigative report that accompanied the petition). The Supreme Court says in *Burnside*:

> “*Regulations which are essential in maintaining order and discipline on school property are reasonable. Thus school rules which assign students to a particular class, forbid unnecessary discussion in the classroom and prohibit the exchange of conversation between students are reasonable even though these regulations infringe on such basic rights as freedom of speech and association, because they are necessary for the orderly presentation of classroom*

activities. Therefore, a reasonable regulation is one which measurably contributes to the maintenance of order and decorum within the educational system."

I generally agree with *Burnside* in that regulations are necessary; but since the alleged incident occurred before school began, and no one was harassing, etc, and that there was no classroom or any kind of learning activity going on, that the Code of Conduct that J.J. is alleged to have violated does not apply. He was simply having a friendly conversation with his friends - well within the bounds of student conduct. And still, J.J. flatly denies having said anything offensive, as do all of the Respondent's witnesses.

Definitions (see Parent's Guide, EXHIBIT G)

J.J. takes strong offense at being labelled a bully. He said and did nothing wrong or offensive, which is corroborated by all of the Respondent's witnesses. And he denies he admitted to it.

Bully – A student or an adult who harasses, intimidates or bullies another person(s), where the behavior is one-sided. (p7, Parent's Guide)

> This definition clearly suggests active aggression, not anything passive or indirect. It is even stated in active voice. The Respondent deemed J.J.'s actions to be accidental and without malice. Therefore, J.J. can't be a bully in this case.

Bullying – Bullying usually involves conduct where one or more students are victims of another person's aggression that has not been caused by the victims and emotionally or physically harms the victims and disrupts the educational process. (p7, Parent's Guide)

> The investigative report states J.J.'s actions to be accidental and without malice, which is inconsistent with aggression.
>
> Further, the Respondent defined nothing that emotionally harmed the complainant, other than that she didn't like the school. However, she continued to go to school, so she didn't miss anything.

Mean or Violent - "Bullying, on the other hand, involves one or several people (the bullies) ***intentionally*** committing a **mean** or violent act against another person(s) or group of people (the victims). When bullying occurs, there is no mutual participation in a disagreement; it is one-sided. Bullying victims have a hard time defending themselves. The victims want the bullying to stop, but the bully continues the behavior." (p11, 5th paragraph, Parent's Guide)

Emphasis is mine. The investigative report indicates J.J.'s actions to be accidental. "*Accidental*" and "*intentional*" are paradoxical. The investigative report also indicates J.J.'s actions to be without malice. "*Without malice*" and "*mean*" are just as paradoxical.

As to "*but the bully continues the behavior*". I concede that bullying can be a single incident; but this nevertheless suggests intent - and there was no (mal)intent in J.J.'s or anyone else's actions or words.

In several ways, the State further clarifies the victim as the "target". See Parent's Guide, Exhibit G.

Page 43, Q3 (emphasis mine): "*Discrimination includes bullying that **targets** a student because of any of the protected characteristics listed above. This is known as "bias-based bullying.*"

Also: "*The LAD requires covered schools to take appropriate action to prevent and remediate harassment, intimidation and bullying that **targets** a student because of his or her actual or perceived race, etc*"

The guide repeats these two statements (p49, Q4; and p19 "Other Reporting Options"), and it makes several other references to the term "target" without defining "target". As such, I assert common definition of target must be used:

www.lexico.com:
"*a person, object, or place selected as the aim of an attack.*"

Oxford:
"*an object, a person or a place that people aim at when attacking*"

Merriam-Webster:
"*an object of ridicule or criticism*"
"*something or someone to be affected by an action or development*"
These terms are used by the State, and these definitions do not allow for "indirect" action as defined.

Indirect Bullying

Besides having no case law to be guided by, except for the one example where the case is currently headed to the federal court on 1st amendment violations, there are serious and chilling considerations in that case, as well as any case that uses it as an example.

Consider J.G. She was accused of bullying by a student who was not even present. That clouds the definition of “incident” with respect to time. Did the incident occur when J.G. made the statement, or when the complainant in that case was told about what J.G. said? Next year, can a student who got wind of what J.G. said a year earlier still be offended? Will she have to worry yet again about being a bully? When would this end for her? Can students across the state claim to be bullied by J.J.’s alleged statement the moment they learned of it? As of 2013, there were some 200,000 black students in NJ public schools. If that number is the same today, will he have to worry about 200,000 claims of bullying? What about next year, or the year after?

So now I wonder if J.J. has to constantly look over his shoulder as news of his alleged infraction gets out into the community, as students - possibly in retaliation over an unrelated thing, like an online game - decide they want to file a HIB complaint against him. This can easily clog the school and court system with unnecessary claims.

Indirect bullying as showcased in J.G. is an absolute perversion of the HIB statutes, and is clearly not what the authors of the statutes intended. Indeed, the “motivated by” clause alone suggests that such indirect bullying cannot occur.

I concede that indirect bullying can occur. But as exampled in the 4 cases presented in the memo, I vehemently object to their reference to guide the court.

Note also that a person must be “selected as the aim of (the bully’s) attack”, per the definition of “Target” (see Definitions, above). As such, a person who is not selected for an attack (“attack” itself is an aggressive action) is not a victim. Without a victim, there is no HIB. This suggests that it is not possible to have indirect bullying in the manner the Respondent asserts.

Conclusion

I implore the allegations against J.J. be dismissed and his records expunged. Clearly, no HIB had occurred. There is no rational reason or case law to subvert clearly defined boundaries for assessing HIB.

Respondent committed irreparable procedural errors defined in NJSA 18A:37-15 (3)(b)(6)(d), and similarly in NJAC 6A:16-7.2, and again when it misled J.J. into defending himself against the wrong accuser, and against the wrong elements in the incident, as expressed in the petition, thus violating his 14th amendment rights to due process as expressed in the petition.

Respondent lied to his parents when it stated that J.J.'s IEP case worker was present. It also relied upon statements extracted from a diagnosed emotionally disturbed minor (see IEP from initial petition), already in a state of emotional disturbance, to extract what it calls a "confession" (see investigative report from initial petition), while at the same time, it referred his parents to the same emotionally disturbed minor for details of the incident in which the Respondent knew J.J. had no recollection of the incident and in which it knew all witnesses corroborate nothing offensive was stated by J.J., a complete violation of his 5th amendment rights to due process, and possibly self-incrimination as expressed in the petition, casting doubt on the Respondent's credibility for its handling of the incident.

In yet another astonishing move by the Respondent, in response to our appeal to the BOE, the board returned a terse "not sufficient information [to overturn the decision]" as a basis for upholding the HIB. This provided absolutely no information with which to form an appeal, or understand why the board upheld the decision. And after I finally received the investigative report, the Respondent twice refused to discuss the case with me, despite encouragement to do so from the Office of the Commissioner, forcing J.J. to have to argue his case yet again, and afresh, to the Commissioner. The BOE's decision was thus clearly arbitrary, capricious, and unreasonable. It based its sole finding of "not sufficient information" on the arguments made by me, the petitioner, which was insufficient only because the Respondent deliberately withheld all details of the investigation until AFTER the BOE appeals hearing. Nevertheless, there is enough information in the investigative report without petitioner's arguments to overturn a determination that a HIB occurred.

I continue to maintain that there was no victim, there was no bully, there was no incident of HIB, there was no violation of Code of Conduct, that J.J. did not say anything offensive, and that J.J. did not admit to anything. Nor did any of J.J.'s friends do or say anything offensive. Anything that was overheard was misapplied to J.J. or misunderstood to be racist.

Sincerely,

A[redacted] J[redacted]

CC: James L. Plosia Jr., Esq.