Memo

Date: February 8, 2012

To: Amy Sneirson, Executive Director

From: John Gause, Commission Counsel

Re: ED/PA11-0333,

Respondent argues that this complaint should be administratively dismissed because (1) the education provisions of the Maine Human Rights Act ("MHRA") do not apply to a single-sex school; (2) the public accommodations provisions should be similarly interpreted; and (3) there is insufficient evidence of unlawful discrimination because Complainant had "access to" the public accommodation. A complaint may be administratively dismissed by the Executive Director for lack of jurisdiction and failure to substantiate the complaint of discrimination. *See* 94-348 C.M.R. ch. 2, §2.02(H)(1, 2).

Complainant, an African American former student at , alleges that he was denied the same opportunity to participate in and benefit from the basketball program while he was a student because of his race and color. Specifically, he alleges that, on the basis of his race, he was not allowed to participate in basketball games like other students and, at least on one occasion, was not allowed to participate in a basketball game at all.

The complaint asserts claims under 5 M.R.S.A. §4592(1) (prohibiting "unlawful public accommodations discrimination" on the basis of race) and 5 M.R.S.A. §4602(3)(A) (prohibiting "unlawful educational discrimination" on the basis of race). Subsection 4592(1), in relevant part, makes it unlawful for a public accommodation to "discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of race or color . . . any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation." 5 M.R.S.A. §4592(1). Paragraph 4602(3)(A), in relevant part, makes it "unlawful educational

discrimination" to, on the basis of race, "[e]xclude a person from participation in, deny a person the benefits of, or subject a person to, discrimination in any . . . extracurricular . . . program or activity. . . ." 5 M.R.S.A. §4602(3)(A).

Respondent first argues that subchapter 5-B (paragraph 4602(3) is within subchapter 5-B) does not apply because Respondent is a private school that admits only young men to a postgraduate year of secondary education, and the MHRA defines "educational institution" to only include private schools that admit *both* male and female students. *See* 5 M.R.S.A. §4553(2-A).[1] To support its position, Respondent cites the first section in subchapter 5-B, section 4601, which provides as follows: "The opportunity for an individual at an educational institution to participate in all educational, counseling and vocational guidance programs and all apprenticeship and on-the-job training programs without discrimination because of sex, sexual orientation, a physical or mental disability, national origin or race is recognized and declared to be a civil right." 5 M.R.S.A. §4601 (emphasis added).

Here, however, the applicable provision is paragraph 4602(3)(A), not section 4601. Unlike section 4601, paragraph 4602(3)(A) does not explicitly limit its application to an "educational institution." Rather, it prohibits discrimination in "any academic, extracurricular, research, occupational training or other program or activity" without specifying a type of covered entity. A literal reading of this language would be that it is not limited to discrimination by an "educational institution."[2] In fact, read literally, paragraph 4602(3)(A) is not limited to discrimination by any particular type of entity at all and the terms "academic, extracurricular, research, occupational training or other program or activity" are undefined. The scope of paragraph 4602(3)(A) is thus ambiguous.

[1]Subsection 4553(2-A) defines "educational institution" as follows: "Educational institution" means any public school or educational program, any public post-secondary institution, any private school or educational program approved for tuition purposes if both male and female students are admitted and the governing body of each such school or program. For purposes related to disability-related discrimination, "educational institution" also means any private school or educational program approved for tuition purposes." 5 M.R.S.A. §4553(2-A) (emphasis added).

[2] Other provisions of the MHRA specifically refer to an "educational institution." *See* 5 M.R.S.A. §§4573-A(2), 4601, 4602(2)(B).

Here, in light of this ambiguity, the literal reading of the statute must give way to a contrary legislative purpose. *See State v. Niles*, 585 A.2d 181, 182 (Me.1990) ("A court can even ignore the literal meaning of phrases if that meaning thwarts the clear legislative objective."); *State Development Office v. State Employees Appeals Bd.*, 363 A.2d 688, 690 (Me. 1976) ("The intent of the Legislature, as expressed in the statute, and interpreted in the light of the apparent purpose of the legislation, shall govern, although such intent seemingly be at variance with the imprinted words."). *But see Wells v. Franklin Broadcasting Corp.*, 403 A.2d 771, 773 (Me. 1979) ("The legislative history of the Maine Human Rights Act indicates that it was meant to have very broad coverage.").

The purpose in enacting section 4602 was to prohibit discrimination by an "educational institution." This is apparent from the legislative history. The law that added section 4602 (prohibiting only sex discrimination) included the definition of "educational institution." *See* P.L. 1983, ch. 578. The Statement of Fact accompanying the final bill states that "the intent of this new draft is to codify in the Revised Statutes the provisions of the Federal Education Amendment of 1972, Title IX, in order to provide, at the state level, administrative procedures for arbitrating complaints of discrimination on the basis of sex and enforcing compliance." L.D. 1091, Statement of Fact (111th Legis. 1983). Title IX, the federal law prohibiting sex discrimination under education programs or activities receiving Federal financial assistance, explicitly exempts certain single-sex schools from coverage. 20 U.S.C. §§1681(2, 5). Moreover, with regard to admissions, Title IX does not apply to private secondary or undergraduate schools at all. 20 U.S.C. §1681(a)(1). Accordingly, it does not violate Title IX for a private high school or private undergraduate college to deny admission to an applicant on the basis of sex. If section 4602 were not limited to an "educational institution," it would

prohibit sex discrimination in admissions decisions at single-sex private schools, which would be plainly contrary to the Legislative intent of codifying the requirements of Title IX.

The Commission itself, through its rules prohibiting sex discrimination in education, has interpreted subsection 4602(1) as applying only to discrimination by an "educational institution." *See* 94-348 C.M.R. ch. 4. For example, the Commission's regulations state that "[n]o person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission by any educational institution to which the Act applies," *id.* at §4.04(A) (emphasis added), and "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by an educational institution." *Id.* at §4.11(A) (emphasis added).

The other protected classes (disability, national origin, race, and sexual orientation) were added after section 4602 was enacted. The prohibition of race discrimination in subsection 4602(3) was added in 1991. *See* P.L. 1991, ch. 100. At that time, the Commission testified before the Legislature that the bill was intended to prohibit racial discrimination by "educational institutions." *See* Me. Human Rights Comm'n, Testimony in Support of LD 471 (March 14, 1991) ("The Maine Human Rights Commission submits this bill to prohibit discrimination on account of race in educational institutions covered under the Maine Human Rights Act.").

Of course, if confronted with the issue, the Legislature may readily limit the single-sex school exception in the definition of "educational institution" to discrimination based on sex, and I suggest that we propose such a change.[3] In the meantime, however, we should interpret section 4602 as being

[3] The rationale for exempting single-sex schools in order to achieve federal-state consistency is wholly absent in the context of race and national origin discrimination. Unlike Title IX, Title VI of the Civil Rights Act of 1964 (the comparable federal law that prohibits discrimination on the basis of race and national origin) has no exception for single-sex schools. *See* 42 U.S.C. §2000D; 34 C.F.R. Chapter 1, Part 100. The Legislature has already carved out the exception in the context of disability discrimination. *See* P.L. 1995, ch. 393 (adding to the definition of "educational institution" that "[f]or purposes related to disability-related discrimination, 'educational institution' also means any private school or educational program approved for tuition purposes.").

limited to discrimination by an "educational institution." Because Respondent does not operate an "educational institution," the claim under subchapter 5-B should be administratively dismissed.

Respondent's second argument is that the claim under subchapter 5 (section 4592 is in subchapter 5) should be dismissed for the sake of consistency between subchapters 5 and 5-B. Unlike the ambiguous nature of coverage under subsection 4602(3), however, Respondent's type of school is specifically covered by section 4592. Section 4592 makes it unlawful public accommodations discrimination for "any public accommodation or any person who is the owner, lessor, lessee, proprietor, operator, manager, superintendent, agent or employee of any place of public accommodation" to discriminate on the basis of race. 5 M.R.S.A. §4592(1). A "public accommodation" is defined as "a public or private entity that owns, leases, leases to or operates a place of public accommodation." 5 M.R.S.A. §4553(8-B). A "place of public accommodation" includes "a facility, operated by a public or private entity, whose operations fall within at least one of the following categories: . . . secondary, undergraduate or postgraduate school. . . ." 5 M.R.S.A. §4553(8). There is no statutory exception for a single-sex school.

Granted, without any exception for single-sex schools, section 4592 is inconsistent with Title IX for purposes of sex discrimination. Without such an exception, section 4592 would prohibit a single-sex private school from denying admission to applicants of the opposite sex, while Title IX allows that practice. That issue (sex discrimination) is not presented here, however, and we should leave that for another day. With respect to race discrimination, following the express provisions of the MHRA simply results in protection under one subchapter that does not exist in another. That alone is insufficient to justify reading an exception for single-sex schools into section 4592. *See Fitzpatrick v. Town of Falmouth*, 2005 ME 97, ¶23, 879 A.2d 21, 26 (Me. 2005) (applying section 4592 after

rejecting a claim under 4602(2) on basis of the special education exclusion). This aspect of Respondent's request for dismissal should be denied.

Finally, Respondent argues that the claim under section 4592 should be administratively dismissed because Complainant had "access" to the basketball team (albeit, as Complainant alleges, unequal access). Section 4592 makes it unlawful for a public accommodation to "discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of race or color . . . any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation." 5 M.R.S.A. §4592(1). Complainant's allegation that he was denied equal playing time and the opportunity to play at all during at least one game states a claim under subsection 4592(1).

In sum, the claim under subchapter 5-B (section 4602) should be administratively dismissed, and the request for dismissal of the claim under subchapter 5 (section 4592) should be denied.