



Maine Human Rights Commission

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INVESTIGATOR'S REPORT

E14-0043 PA13-0746

February 20, 2015

[REDACTED] o/b/o Minor (Windham)

v.

[REDACTED] [REDACTED] [REDACTED]

I. Complainant's Complaint:

Complainant [REDACTED] ("Complainant") and o/b/o Minor alleged that Respondent [REDACTED] [REDACTED] ("Respondent") denied Minor a reasonable accommodation by refusing to schedule Minor for an afternoon dental appointment based on Minor's special health needs.

II. Respondent's Answer:

Respondent stated that Complainant chose not to schedule an appointment for Minor at the times that were offered and sought care from another dentist.

III. Jurisdictional Data:

- 1) Dates of alleged discrimination: June, 2013, through July, 2013.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): December 31, 2013.
- 3) Respondent is an establishment that offers services to the general public and is a "public accommodation" under the Maine Human Rights Act ("MHRA").
- 4) Complainant is represented by [REDACTED] [REDACTED] Respondent is not represented by counsel.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties, a request for additional information to both parties, and a witness interview. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

IV. Development of Facts:

- 1) The parties and issues in this case are as follows:

INVESTIGATOR'S REPORT PA14-0746

- a) Minor has Autism¹ and was a patient of Respondent's from June 2012 through July 2013.
 - b) Respondent is a pediatric dental practice.
- 2) Complainant provided the following in support of her position:
- a) Minor had two dental appointments at Respondent's office while he was a patient. A third appointment was scheduled for June 2013.
 - b) Complainant disclosed information about Minor's disability prior to his first dental appointment with Respondent.
 - c) In April 2013, Minor started at a specialized preschool program. The program ran Monday through Friday from 8:30 a.m. until 2:30 p.m. He received individualized instruction, occupational therapy, and physical therapy throughout the school day. The services were critical to his development and well-being.
 - d) Complainant contacted Respondent to reschedule the June 2013 dental appointment for a time after 2:30 p.m., noting Minor's attendance at his preschool program and the services he would receive during the school day.
 - e) Respondent refused to provide Minor with an afternoon appointment, stating it only served children his age in the morning. Respondent rescheduled the appointment for June 20, 2013 at 7:30 a.m. before school.
 - f) Complainant canceled the appointment because of Minor's disability. A 7:30 a.m. appointment would mean waking up an hour earlier and would greatly impact Minor's behavior for the rest of the day. Minor has significant difficulty adjusting to changes in his routine and with waking up in the morning.
 - g) On or about July 30, 2013, Complainant contacted Respondent and requested an accommodation or modification of services for Minor's appointment. Complainant explained the difficulty of scheduling Minor for a morning appointment because of his disability and the necessity for him to receive services and therapy at school during school hours.
 - h) Respondent refused the requested accommodation stating that it "does not serve children with autism during the afternoon, in addition to young children". The reason given for the refusal was that "children with autism were difficult and the staff would be too tired to deal with him at that point in the day". Respondent again offered Complainant a 7:30 a.m. appointment.
 - i) Complainant again explained the reasons why a 7:30 a.m. appointment would not work for Minor, stating that he needed an afternoon appointment because of his disability and that the disruption of a morning appointment would lead to a negative experience at the dentist. Respondent guaranteed that if Minor was brought in for an afternoon appointment that he would have a bad experience. Complainant inquired about the meaning of the statement and

¹ Complainant provided no documentation regarding Minor's disabilities. It is assumed for the purposes of this investigation that Minor does, in fact, have a disability, since Respondent did not dispute this issue.

was told that the "staff didn't have the energy to deal with kids like [Minor] late in the day". Respondent again stated that they do not see autistic patients in the afternoon because of how much work they are.

- j) Complainant felt that Respondent's proposed accommodation did not provide an effective alternative accommodation and Complainant was unable to schedule Minor for his semi-annual cleaning.
- k) On September 18, 2013, an advocate from the Disability Rights Center ("Advocate") called Respondent on behalf of Complainant and spoke with Respondent's Practice Administrator ("Administrator"). Advocate explained she was calling because Complainant was unsuccessful in scheduling an afternoon appointment for Minor.²
 - i. Administrator indicated that because of Minor's age he was not given a morning appointment. Advocate further explained the need for an accommodation due to Minor's specialized need for autistic services while at school in the morning. Administrator said they definitely could not see Minor in the afternoon and explained their policy that they do not see "autistic, special needs children" in the afternoon.
 - ii. Advocate asked for an accommodation for Minor because of the importance of his morning services. Administrator indicated no accommodations or exceptions were possible, with the reasoning that everyone is "fresher in the morning". Administrator also stated: "[a]ppointments in the afternoon with small children or autistic children just don't go well" and "[i]f we make one exception, we have to make an exception for everyone".
 - iii. Advocate pressed for some accommodation, and Administrator asked if Minor had any vacation days before winter or days he was not receiving services for an appointment. Administrator indicated that Minor could delay his semi-annual cleaning scheduled for June for several more months, and schedule it for a vacation day.
 - iv. Advocate discussed Title III of the Americans with Disabilities Act and the obligation to provide a reasonable accommodation to an individual with a disability. Respondent responded that Minor had equal access because Respondent would treat him, just not in the afternoon.
 - v. Advocate and Administrator discussed Minor's school day schedule. Administrator offered the 7:30 a.m. appointment slot. Advocate explained that afternoon was better for Minor's behavior, as Minor did not do well early in the morning. Administrator recommended they try an early morning appointment because they went well 99.9% of the time. Advocate expressed doubt about Minor's ability to get to school on time with the 7:30 a.m. appointment, and Administrator stated that "maybe he will be five minutes late".

² In an interview, Administrator stated she does not specifically recall making the statements attributed to her during that call. She takes a lot of phone calls and gets the ones that are sort of difficult. Administrator does recall saying that everyone is "fresher in the morning" because this follows their standards of care.

INVESTIGATOR'S REPORT PA14-0746

- vi. Advocate asked if Respondent had evaluated Minor's records to see if he warranted being barred from afternoon appointments. Administrator said no, but then pulled his record immediately to review it. His records reflected a previous morning appointment where Minor had "struggles and tears". The first appointment was problem-free.
- vii. Administrator relayed that "dental appointments are very invasive for children, and make them very nervous".
- viii. Administrator said it is up to Complainant to choose among the options offered by Respondent, the two options being a 7:30 a.m. appointment or waiting for a vacation day. Administrator offered no other accommodations.

1) In August 2014, a parent ("Parent") contacted Respondent to schedule an appointment for her 11 year old autistic child ("Child"). Parent requested an afternoon appointment. She spoke to a woman ("Staff") about the appointment. Staff told Parent that Child could not have an afternoon appointment because he was autistic. Parent explained Child's needs, including that he was better in the afternoon, and Staff again told Parent that they only see kids with special needs in the morning. Parent asked if Respondent saw other children throughout the day and Staff said they did. Parent told Staff she believed "that this is illegal, and that they cannot have a policy of scheduling kids based on their special needs". Staff called Parent back later in the day and offered to make an exception to their policy. Staff said they would try the afternoon appointment, but that if it did not go well they would switch Child back to morning appointment time slots.³

3) Respondent provided the following in response to Complainant's Complaint:

- a) Respondent has had a practice for over 35 years and believes that its special health care needs patients are "entitled to receive oral health care that meets the treatment and ethical principles of our specialty". Pediatric dentists require two additional years of study to focus on a variety of skill and techniques.
- b) Respondent has well trained staff that supports the dentists.
- c) Patient, practitioner, and staff safety is considered at all times. "The child who presents with oral/dental pathology and noncompliance tests the skills of every practitioner. Dental disease usually is not life-threatening and the type and timing of the dental treatment can be deferred in certain circumstances."
- d) Respondent works hard to ensure that new patients and families are comfortable and safe as the new journey of oral health care should be fun and rewarding.

³ Respondent's response to Parent's statement: "This was not an exception. We see children over 5 years old any time of day. This child was 11 years old." During her phone interview, Administrator said she had no knowledge of which of their four front office staff members may have spoken to Parent nor why anyone would tell Parent that Respondent only sees special needs children in the morning. Administrator did recall that one of the doctors ("Doctor") was consulted about the scheduling request for an afternoon appointment.

INVESTIGATOR'S REPORT PA14-0746

- e) Respondent's Answer received March 14, 2014, states: "For younger children (under the age of 5) and children with special health care needs morning appointments are better due to the fact that they will be more rested and the practitioners are more rested, and relaxed."⁴
- i. Only one doctor in the practice sees children under the age of five in the afternoon and that is only for a patient's first visit, not a clinical appointment.
 - ii. If children with special health needs require sedation or surgery then the appointments have to be in the morning as Respondent's partners for surgical privileges require these appointments to be scheduled only in the morning.
- f) Respondent has never denied health care services to anyone because of a disability.
- g) Respondent did not "refuse, discriminate against, withhold, or deny [Minor] fully and equal enjoyment to our accommodations, advantages, facilities, good, services or privileges offered by [Respondent] because of his disability; [Complainant] chose not to make another appointment and told us she was seeking care from another dentist".
- h) All appointments for children five and under are scheduled for the mornings only; this policy applies to all patients five and under.
- i. In Administrator's phone interview she indicated that little children really do better in the morning.
- i) Complainant wanted an afternoon appointment for Minor. Respondent offered several 7:30 a.m. appointments and also appointments when Minor was not in school as an accommodation.
- j) Respondent has not received a request for accommodation based on special health care needs since July, 2013.
- k) On November 7, 2014, Respondent provided a copy of their policy entitled "Accommodations for Special Care Dentistry Clients" effective July, 1976 outlining accommodations for special care dentistry clients.
- i. During Administrator's interview, she stated that the policy came from Doctor. She asked him about the policy after receiving a request for additional information dated November 5, 2014.
 - ii. Administrator indicated this policy comes from the Academy of Pediatric Dentistry in a policy manual.⁵

⁴ Investigator's Note: Respondent's subsequent submissions do not include the language referencing "children with special health care needs".

⁵ A photocopy or print of this policy was requested, along with other Human Resources policy documentation during the December 23, 2014, interview of Administrator. On January 21, 2015, a follow up letter was sent requesting the same documentation. No documents were provided.

iii. Administrator referenced their Human Resources component that they, as an employer, have to accommodate the requests of their clinicians on scheduling. Clinicians are fresher in the morning. It is difficult for Respondent to hire clinicians because of the intensity of the services provided. The clinicians do not want to see children under the age of five in the afternoon.

(1) The clinicians sometimes leave by mid-afternoon. They have nothing left for children who need special care. Teenagers are different because you can provide direction and they have better cooperation.

(2) Administrator expressed safety concerns of clinicians working with children when they are tired (like using sharp instruments).

(3) Administrator said not all special needs patients over the age of five are easy to treat. They use the age of five as a guideline because children are then school age and they receive some instruction in school and typically will have a case manager attend the dentist appointment with the child to provide additional support.

l) Administrator recalls that Respondent has provided reasonable accommodations to their younger patients. If a patient cannot be treated in the office because of behavior management Respondent works with partner hospitals for surgical privileges.

m) During her interview, Administrator stressed that they are one of the only offices that treats all kinds of children. She further provided that there are not many offices that open their doors to children with special needs, and that Respondent has been providing care to all children since 1976.

i. Administrator stated at least Respondent is willing to see "them," these other offices refuse to see "them" at all.⁶ Administrator stated that if patient care does not work for these children at Respondent's office, then there is nowhere else to go.

V. Analysis:

1) The MHRA provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

2) Here, Complainant alleged that Minor was denied full benefits and enjoyment of services based upon his disability and was denied a reasonable accommodation in scheduling dental appointments. Respondent denied the allegations of discrimination and stated that Complainant was offered accommodations for Minor and Minor was not denied full benefits and enjoyment of Respondent's services.

⁶ Administrator used the term "them" to refer to children with special health needs or children covered by MaineCare.

Public Accommodation – Terms and Conditions

3) The MHRA makes it unlawful:

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 directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of race or color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin, any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms or conditions upon which access to accommodation, advantages, facilities, goods, services and privileges may depend.

5 M.R.S. § 4592(1).

- 4) Because this language is similar to that in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a), case law interpreting Title II is helpful in analyzing this claim.
- 5) In order to establish a prima-facie case of public accommodations discrimination, Complainant may show that he or she “(1) is a member of a protected class, (2) attempted to contract for services and afford himself or herself of the full benefits and enjoyment of a public accommodation, (3) was denied the full benefits or enjoyment of a public accommodation, and (4) such services were available to similarly situated persons outside his or her protected class who received full benefits or were treated better.” *Jackson v. Waffle House, Inc.*, 413 F.Supp.2d 1338, 1361 (N.D.Ga. 2006) (Title II).
- 6) With respect to the fourth element, “similarly situated persons” need not be identical, “but there should be a reasonably close resemblance of facts and circumstances. What is key is that they be similar in significant respects.” *Id.* at 1358 (citing *Lizardo v. Denny’s Inc.*, 270 F.3d 94, 101 (2nd Cir. 2001)).
- 7) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse treatment. *Id.* at 1355-56. *See also Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *Maine Human Rights Comm’n v. City of Auburn*, 408 A.2d 1253, 1262 (Me. 1979). After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse action. *See id.* Complainant’s burden may be met either by the strength of Complainant’s evidence of unlawful discriminatory motive or by proof that Respondent’s proffered reason should be rejected. *See Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16; *City of Auburn*, 408 A.2d at 1262, 1267-68. Thus, Complainant can meet her overall burden at this stage by showing that (1) the circumstances underlying the articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the decision. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16.

INVESTIGATOR'S REPORT PA14-0746

- 8) In order to prevail, Complainant must show that she would not have suffered the adverse treatment but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.
- 9) Here, Complainant has established a prima-facie case of public accommodation discrimination. She has shown that Minor has a disability, Complainant attempted to schedule an appointment for Minor during Respondent's normal business hours that met Minor's disability-related needs, Respondent would not schedule an appointment in the afternoon because of Minor's age and special health care needs⁷, and other non-special health care needs patients were not restricted on the time of day of their appointments.
- 10) Respondent has articulated a legitimate, nondiscriminatory reason for its adverse treatment, namely, that Respondent's policy is to treat children under the age of five and children with special health care needs in the morning since "appointments are better due to the fact that they will be more rested, and the practitioners more rested, and relaxed". In addition, Respondent's clinicians make requests on the time of day their treat patients.
- 11) At the final stage of the analysis, Complainant has demonstrated that Respondent's reason was false or irrelevant and that unlawful discrimination occurred, with reasoning as follows:
 - a) Respondent has changed its statement regarding its policy for providing treatment to special health care needs children several times during the course of the investigation. Initially, Respondent indicated that children five and under and children with special health care needs children were only seen in the morning. Respondent's August 2014 submission revised this position statement to only include children five and under. Further, Respondent's staff has indicated as late as August, 2014 that special health care needs children are only seen in the morning. These inconsistent statements could indicate that Respondent's actions are pretextual or irrelevant and ultimately that their actions were discriminatory.
 - b) Here, Minor was four at the time of the alleged discrimination. When he began treating with Respondent he did not attend school. Once he began school where he received specialized services related to his autism his schedule and availability changed. Complainant attempted to schedule an appointment for Minor at a time that was best for him and outside of morning hours based on his disability. Respondent offered limited options for scheduling and refused Complainant's request.
- 12) Discrimination based on disability in public accommodation is found.

Public Accommodation – Reasonable Accommodation

- 13) To establish a denial of reasonable modification by a public accommodation, Complainant must show that:
 - (1) He comes within the protections of the MHRA as a person with a disability;
 - (2) Respondent operates a public accommodation under the MHRA;

⁷ Age is not a protected class for public accommodation discrimination.

- (3) Respondent has in effect a policy, practice, or procedure that, directly or indirectly because of Complainant's disability, results in Complainant's inability to access Respondent's goods, services, facilities, privileges, advantages or accommodations;
- (4) Complainant requested a reasonable modification in that policy, practice, or procedure which, if granted, would have afforded him access to the desired goods, services, facilities, privileges, advantages or accommodations;
- (5) The requested modification—or a modification like it—was necessary to afford that access; and
- (6) The Respondent nonetheless refused to modify the policy, practice, or procedure.

See 5 M.R.S. § 4592(1) & (1)(B); *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 307 (1st Cir. 2003).

- 14) In proving that a modification is "reasonable," Complainant must show that, at least on the face of things, it is feasible for the public accommodation under the circumstances. *See Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001) (employment case).
- 15) Upon such a showing, Respondent must make the modification unless it proves that doing so would alter the fundamental nature of its goods, services, facilities, privileges, advantages or accommodations; would impose an undue financial burden; or that the requested modification poses a direct threat to the health or safety of others. *See* 5 M.R.S. § 4592(1) & (1)(B); *Maine Human Rights Com'n v. City of South Portland*, 508 A.2d 948, 955 (Me. 1986); *Dudley v. Hannaford Bros. Co.*, 333 F.3d at 308; *Halpern v. Wake Forest University Health Sciences*, 669 F.3d 454, 464 (4th Cir. 2012).
- 16) Generally, Respondent is only required to provide a reasonable accommodation if Complainant requests one. *See Reed v. Lepage Bakeries, Inc.*, 244 F.3d at 261.
- 17) Complainant has shown that Minor was denied a reasonable accommodation by Respondent, with reasoning as follows:
 - a) Complainant has shown that Minor has an impairment that substantially limits one or more of his major life activities and/or significantly impairs his physical health, which meets the MHRA definition of disability, 5 M.R.S. § 4553-A(1)(A)(1), (2), and (3).
 - b) Respondent is a public accommodation under the MHRA. Respondent has practices that resulted in Complainant's inability to equally access Respondent's services. Complainant was limited to specific times of day for dental appointments that did not best meet Minor's needs based upon his disability.
 - c) Complainant requested an accommodation based on Minor's disability multiple times. Respondent was unwilling to make any accommodation outside of morning hours for Complainant, despite scheduling appointments for other non-special health care needs patients at any time of day. Respondent provided inconsistent information about its policy for treating special health care needs patients; however, Respondent's staff indicated in August 2014 that special health care needs patients are only seen in the morning.

- d) Respondent acknowledges that the accommodations offered to Complainant were appointments at 7:30 a.m. or on one of Minor's vacation days from school, and that it refused the accommodation of an afternoon appointment. Respondent sees patients throughout the business day, but limited Complainant's ability to access services. Respondent cites clinician request for morning appointments for younger children and alludes to the amount of energy needed by clinicians to work with children with behavior management issues. These sorts of generalizations tend to support Complainant's allegations that Respondent's decision was based on discriminatory bias against individuals with disabilities.
 - e) Respondent believes that morning appointments are better because children and practitioners are more rested and relaxed. It appears that Respondent did not take into account Minor's difficulty with changes to his morning routine on school days in providing him with an accommodation. Respondent refused to make any exceptions to its scheduling policy despite the fact that Respondent is able to see patients throughout the business day.
- 18) Respondent did not grant the accommodation requested by the Complainant and has presented no facts to show that doing so would have altered the fundamental nature of its services.
- 19) Discrimination based on disability in public accommodation is found.

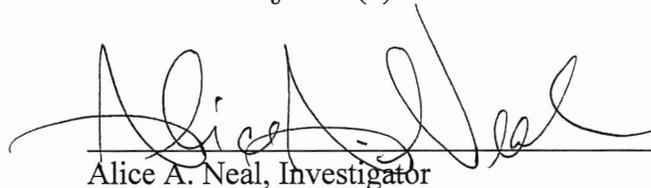
VI. Recommendation:

For the reasons stated above, it is recommended that the Commission issue the following findings:

- 20) There are **Reasonable Grounds** to believe that Falmouth Pediatric Dentistry discriminated against Complainant [REDACTED] due to Minor's disability in the terms and conditions for accessing Respondent's services;
- 21) There are **Reasonable Grounds** to believe that [REDACTED] discriminated against Complainant [REDACTED] due to Minor's disability by denying a reasonable accommodation; and
- 22) Conciliation should be attempted in accordance with 5 M.R.S. § 4612(3).



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Alice A. Neal, Investigator