

June 5, 2009

Parent of Minor Student o/b/o Minor Student ([REDACTED])

v.

[REDACTED] Superintendent [REDACTED] [REDACTED]
School Department
([REDACTED])



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Executive Director
PATRICIA E. RYAN

Commission Counsel
JOHN P. GAUSE

I. COMPLAINANT'S CHARGE:

Complainant, Parent of Minor Student, alleged that Respondents, [REDACTED] Superintendent [REDACTED] and the [REDACTED] School Department unlawfully discriminated against her child, Minor Student, because of her transgender status when she was denied access to the girls' bathroom.

II. RESPONDENTS' ANSWER:

Respondents, [REDACTED] Superintendent [REDACTED] and [REDACTED] School Department, contend that, having provided her with access to a gender-neutral/unisex bathroom in close proximity to her classroom, it has no further obligation. To the extent that Respondents were required to provide a reasonable accommodation, the school has done what it is required to do; it has undergone an interactive process with the family and put accommodations into place as a result.

III. JURISDICTIONAL DATA:

- 1) Date(s) of alleged discrimination: October 2007 and continuing.
- 2) Date complaint filed with the Maine Human Rights Commission: April 10, 2008; amended May 26, 2009 to clarify parties.
- 3) Respondent [REDACTED] provides joint administrative services to the school administrative units in the towns of [REDACTED] and [REDACTED] including the [REDACTED] School Department; [REDACTED] is the superintendent of [REDACTED] the [REDACTED] School Department is a school administrative unit that operates the [REDACTED] School in [REDACTED]. All are subject to the "public accommodations" provisions of the Maine Human Rights Act.
- 4) Respondents are represented by Melissa Hewey, Esq. Complainant is represented by Eric Mehnert, Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties and an Issues and Resolution conference. This investigation was initiated as a joint investigation with the Department of Education pursuant to the Commission's Procedural Rule: Equal Educational Opportunity § 4-A.07(E), but the Department has not participated in the drafting of this Investigator's Report or the recommendations contained herein.

IV. DEVELOPMENT OF FACTS:

- 1) The parties and issues in this case are as follows:
 - a) The Complainant, Parent of Minor Student, has filed on behalf of her 9-year-old child, Minor Student, a male-to-female transgender student.
 - b) Respondent [REDACTED] provides joint administrative services to the school administrative units in the towns of [REDACTED] and [REDACTED] including the [REDACTED] School Department; [REDACTED] is the superintendent of [REDACTED] the [REDACTED] School Department is a school administrative unit that operates the [REDACTED] School in [REDACTED]
 - c) Important third parties: [REDACTED] Special Ed Teacher, MD; Minor Student's Teacher, SK; School Resource Officer/[REDACTED] Police, AW; Minor Student 2; Guardian of Minor Student 2; Assistant Attorney General, TH; Expert, PR; Maine Gender Resource and Support Service Director, JV; [REDACTED] Guidance Counselor, LE; Special Ed Director, SB; Principal, SO; Middle School Principal, BL; Guidance Counselor, MM.
 - d) Minor Student was denied continued use of the 5th grade girls' bathroom, shared female facilities.
- 2) Complainant asserts that her child identified as female from a very young age and that the school was very supportive. Her wish to use the girls' bathroom was initially granted.
 - a) "Minor Student started to use the girls' bathroom in the first grade, without incident."
 - b) "A problem arose during her 5th grade at [REDACTED] School in [REDACTED] when she was followed into the girls' bathroom, shared female facilities, by a male student, Minor Student 2. Minor Student 2 had previously started to harass her by stalking her and calling her faggot. Minor Student 2 was running around the school yelling, 'I've got a faggot in my class.'"
 - c) "Minor Student 2 used the girls' bathroom twice. The first time, his guardian was contacted, and it became clear that Guardian of Minor Student 2 had learned that Minor Student used the girls' bathroom and had directed Minor Student 2 to use the girls' bathroom as well, in an effort to make a political statement."
 - d) "The second time that Minor Student 2 followed Minor Student into the girls' bathroom, he was suspended and removed from her class. The reason for this disciplinary action was not a result of his actions toward Minor Student, but, rather, because he kicked another child in the genitals on October 10, 2008."
 - e) Minor Student was forced to use the single-stall, unisex faculty bathroom in a hallway, which was on the other end of the building, exacerbating Minor Student's feelings of being different; of feeling ostracized/segregated.

- f) Administration officials told Minor Student's parents that they could not guarantee her safety in the girls' bathroom, and on October 16, 2007, Minor Student was removed from the school by her parents since the school was stating that they could not guarantee her safety.
- 3) Respondent asserts that a 504 Plan was put into place for Minor Student in the spring of 2007:
 - a) In the spring of 2007, Guidance Counselor referred Minor Student for possible special services under section 504 of the Rehabilitation Act of 1973. The 504 meeting was held on March 28, 2007, and attendees were: Special Ed Director, Minor Student's Teacher, Guidance Counselor and Minor Student's parents. Restroom for the 5th grade was discussed: "shared female facilities (unless becomes issue) or use staff which has been used by peers for other reasons. Parents were concerned with reactions from other parents of female students. Minor Student had used female facilities, but in grade 5, they became shared facilities. Recommendation from staff was to continue with shared female bathroom with the 'default' the gender-neutral staff bathroom."
 - 4) Minor Student entered 5th grade in late August, 2007, and as provided in her 504 Plan, staff supported her change of name and use of female pronoun. The School Department provided ongoing staff training on gender issues: Maine Gender Resource and Support Service Director, Expert and Assistant Attorney General provided much of the training, which focused on Middle School staff.
 - 5) In October of 2007, when Minor Student 2 followed her into the shared female bathroom, Minor Student's parents did not want her to be pulled out of the girls' bathroom, but just "went along with it" because they wanted to get her back to school. The issue was not addressed to their satisfaction.
 - a) Anxiety about a media frenzy caused Minor Student's parents to keep her home from school on October 5 and October 9, 2007 because stories had begun to appear in the local newspapers and online. This media frenzy was triggered by the bathroom incident; instigated by Guardian of Minor Student 2, who had contacted a religious organization about the incident, which began to publicize what had occurred on its online newspaper on October 4, 2007. Other press publications picked up the story as well, and, as a result, the issue was the subject of significant public scrutiny in the press for a period of time in early October, 2007. Minor Student was inappropriately referred to as "the transvestite ten-year old" in the October 5, 2007 publication of the religious organization.
 - b) On October 9, 2007, a meeting took place at [REDACTED] School to discuss the situation and to assign Minor Student to the staff gender-neutral/unisex bathroom at the other end of the hall. The school unilaterally terminated Minor Student's rights to use the girls' bathroom, leaving Minor Student to feel that support was no longer there for her.
 - c) Respondent argued that this default was put into place at the 504 Plan meeting which occurred on March 28, 2007, and which Complainant signed.

- d) Complainant states that after the October 9, 2007 meeting Complainant called and spoke with the Special Ed Director, during which meeting she strongly opposed the decision to restrict Minor Student to the faculty bathroom.
 - e) Respondents acknowledge that this conversation took place and that the Special Ed Director explained that she did not think that the group would change this decision. Respondents further explain, however, that Complainant did not indicate after that that she continued to disagree with the decision.
 - f) Complainant states that her disagreement with Respondents' decision and her desire that Minor Student be allowed to use the girls' bathroom was then known to Respondents.
- 6) Respondents offer the following:
- a) Superintendent was interviewed by a reporter for the Portland Press Herald, but simply stated that "appropriate accommodations" had been put into place. Respondents dispute Complainant's view that this comment confirmed that Minor Student was a "special needs" child.
 - b) At the fact finding conference, in response to the question about how other students' safety is protected, Superintendent stated that it's all about context; if Minor Student is using the washroom, there is no supervision there.
 - c) In response to the question at fact finding about how protection is offered to students who are harassed, Superintendent stated that there's a disciplinary code which is progressive, proactive and consistent. He explained that discipline becomes more extensive if the harassment is consistent.

V. ANALYSIS:

- 1) The Maine Human Rights Act 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.A. § 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, Parent of Minor Student, alleged that Respondents, [REDACTED] Superintendent [REDACTED] and the [REDACTED] School Department unlawfully discriminated against her child because of her transgender status when she was denied access to the girls' bathroom.
- 3) Respondents, [REDACTED] Superintendent [REDACTED] and [REDACTED] School Department contend that, having provided her with access to a gender-neutral/unisex bathroom in close proximity to her classroom, it has no further obligation. To the extent that Respondents were required to provide a reasonable accommodation, the school has done what it is required to do; it has undergone an interactive process with the family and put accommodations into place as a result.

4) The Maine Human Rights Act defines unlawful educational discrimination, in part, as “on the basis of sexual orientation, to . . . [e]xclude a person from participation in, deny a person the benefits of or subject a person to discrimination in any academic, extracurricular, research, occupational training or other program or activity.” 5 M.R.S.A. § 4602(4)(A).

5) It is unlawful public accommodations discrimination under the Act:

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 . . . sexual orientation, . . . 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.A. § 4592(1).

6) The Act defines “discriminate” to include, “without limitation, segregate or separate.” 5 M.R.S.A. § 4553(2).

7) The term “sexual orientation” means “a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression.” 5 M.R.S.A. § 4553(9-C).

8) The Maine Human Rights Commission employment regulations (used here for guidance) define the term “gender identity,” in part, as “an individual’s an individual’s gender-related identity, whether or not that identity is different from that traditionally associated with that individual’s assigned sex at birth, including, but not limited to, a gender identity that is transgender.” Me. Hum. Rights Comm’n Reg. § 3.02(C) (2) (September 15, 2007).

9) Respondent contends that the education discrimination provisions do not apply because use of a restroom assigned to a specific sex is not exclusion from an “academic, extracurricular, research, occupational training or other program or activity” within the meaning of 5 M.R.S.A. § 4602(4)(A). That provision is not so narrow. In addition to outright exclusion, section 4602(4)(A) broadly prohibits denying “the benefits of” or subjecting a person to “discrimination in” Respondents’ programs or activities. Although bathrooms may not be academic or other “programs or activities” in and of themselves, they are certainly important ancillary components to Respondents’ programs.¹ As such, discrimination with respect to bathrooms constitutes discrimination in Respondents’ programs or activities. *Cf. Maine Human Rights Commission v. United Paperworkers Intern.*, 383 A.2d 369, 377 -378 (Me. 1978) (Maine Human Rights Act should be construed broadly).

10) With respect to the public accommodations discrimination claim, bathrooms are undoubtedly “facilities” covered by the public accommodations provisions of the Act. *See* 5 M.R.S.A. § 4592(1).

¹ Similarly, it would be discrimination in an academic program for Respondents to deny only students of a particular protected class the use of desks and chairs in the classroom.

- 11) Respondents here have unlawfully discriminated against Minor Student in education and public accommodations by denying her the equal enjoyment of school facilities on account of and on the basis of her gender identity. Minor Student's gender identity is female. She not only identifies herself as a girl, but she dresses as a girl and behaves as a girl. With the exception of Minor Student, the students at the [REDACTED] school are allowed to use common bathrooms that are consistent with their gender identities. Yet Respondents have not allowed Minor Student to use the common bathroom that is consistent with her gender identity. Understandably, Minor Student was very self-conscious when she had to go to the other end of the building to use the bathroom. The consequence of Respondents' refusal was to ostracize a vulnerable child from her peers, amplifying her feelings of being "different."
- 12) Respondents assert that they did not deny Complainant access to the girls' bathroom "because of" her gender identity. Rather, Respondents state that Complainant was treated the same as all students, meaning all biological boys must use the boys' bathroom, and all biological girls must use the girls' bathroom. In essence, Respondents argue that they did not deny Minor Student the use of the girls' bathroom because she is transgender; they denied her access because she is a biological boy. An educational institution may provide separate toilet facilities on the basis of sex. Me. Human Rights Comm'n Reg. § 4.13.
- 13) The Maine Human Rights Act, however, protects more than just actions that are motivated by a person's protected-class status—it protects consequences as well. *Cf. Maine Human Rights Comm'n v. United Paperworkers Int'l Union*, 383 A.2d at 375 (employment case). The Act defines "discriminate" to include, "without limitation, segregate or separate." 5 M.R.S.A. § 4553(2) (emphasis added). *See also* 5 M.R.S.A. § 4592(1) (prohibiting discrimination "directly or indirectly"). The focus is on whether in fact the disputed practice results in unlawful discrimination, not whether respondent intends to discriminate. *Maine Human Rights Comm'n v. United Paperworkers Int'l Union*, 383 A.2d at 375. Here, the result of Respondents' refusal to allow Minor Student to use the girls' bathroom was that she was segregated from her peers and denied the same privilege that other students had to use a bathroom that is consistent with her gender identity.
- 14) Moreover, Respondents had an obligation to provide Complainant with a reasonable accommodation that would enable her equal access and enjoyment of its facilities. Although the Act does not explicitly require the provision of a reasonable accommodation for one's gender identity, it is appropriate to interpret the Act to require one if a student would otherwise be subjected to unequal treatment. The Law Court has previously upheld the Commission's authority to interpret the Act to require employers to accommodate the religious beliefs of employees despite the absence of such an explicit requirement in the Act itself. *See United Paperworkers*, 383 A.2d at 378 ("One of the purposes of [the Commission's regulation] is to breathe flexibility into an otherwise airtight prohibition against religious discrimination, by providing that a reasonable accommodation need not be made if it would amount to undue hardship. We find nothing unreasonable in such an interpretation.")²

² Although this was an employment case, it interpreted the same term, "discriminate," that appears in the public accommodations and education provisions of the Act. *Id.* at 373.

- 15) The fact that the Commission has not adopted a regulation in this context does not prevent the Commission or a court from interpreting the Act to require schools or public accommodations to provide "reasonable accommodations." A valid regulation is simply a permissible interpretation of a statute that attains the force of law. Even in the absence of controlling regulations, several courts have interpreted state human rights laws that are silent on the issue to require the provision of a reasonable accommodation in other contexts. *See Curry v. Allan S. Goodman, Inc.*, 944 A.2d 925, 939 (Conn. 2008) (employment and disability); *Moody-Herrera v. State, Dept. of Natural Resources*, 967 P.2d 79, 87 (Alaska 1998) (employment and disability); *Yeager v. Ohio Civ. Rights Comm.*, 773 N.E.2d 1097, 1101 (Ohio App. 11 Dist. 2002). (public accommodations and religion).
- 16) The Commission has adopted regulations that require reasonable accommodation of gender identity in employment, which offer appropriate guidance on the applicable standards here. The Commission's employment regulation provides, in part, as follows:

It is an unlawful employment practice for an employer, employment agency, or labor organization to fail or refuse to make reasonable accommodations in rules, policies, practices, or services that apply directly or indirectly to gender identity or gender expression, unless the covered entity can demonstrate that the accommodations would impose an undue hardship on the conduct of the business of the covered entity. . . .

[T]he burden of proof on the issue of whether the accommodations would impose an undue hardship is on the employer, employment agency, or labor organization. Resolution of such cases depends on the specific factual circumstances and involves a balancing of the needs of the applicant, employee, or labor organization member with the degree of hardship imposed on the covered entity's business operation.

Me. Human Rights Comm'n Reg. § 3.12(F)(1,3).

- 17) Respondents acknowledge that, if reasonable accommodation is required, they are required to engage in an informal, interactive process to identify appropriate accommodations.³ They argue, however, that they did so here by meeting with Complainant's family and putting in place accommodations as a result. The process of identifying a reasonable accommodation, however, is an ongoing one.
- 18) While it is true that Minor Student's parents signed off on a 504 Plan that described the gender-neutral faculty/staff bathroom at the other end of the building as a default, that contingency plan was in place only in the event that the shared girls' facility didn't "work out" from a general student population vantage point. One of the examples given during the 504 Plan meeting was: this is our fallback plan if other students' parents object to Minor Student using the shared girls' bathroom.
- 19) Following the October 9th meeting, however, Complainant contacted the Special Ed Director and voiced her opposition to Respondents' decision to deny Minor access to the

³ Respondents have not argued or demonstrated that it would constitute an "undue hardship" to allow Minor Student to use the girls' bathroom.

girls' bathroom. Special Ed Director did not take any further action in follow-up to Complainant's concerns. Moreover, throughout the investigation of this complaint, Respondents have known that Minor Student has sought to use the girls' bathroom but they have refused to allow her to do so. In light of Complainant's objection, forcing Minor Student to use the faculty bathroom instead of the bathroom used by her peers was not an appropriate accommodation. Cf. 5 M.R.S.A. § 4592(5) (unlawful to deny facilities to an individual with a disability "in the most integrated setting appropriate to the needs of the individual"). The breakdown in the interactive process is attributable to Respondents, and it is found that Respondents have denied Complainant a reasonable accommodation. See *Curry v. Allan S. Goodman, Inc.*, 944 A.2d at 941 (denial of request, without more, is not engaging in the "interactive process").

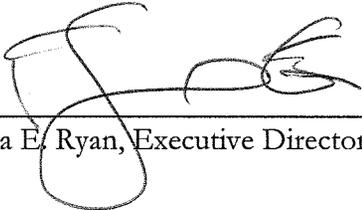
20) Minor Student considers herself to be female, and as such, should be allowed to use the bathroom which is consistent with her gender identity. Although Minor Student was born biologically male, she considers herself fully transitioned to female and consistently presents herself as such. Gender identity includes having an identity that is different from your assigned sex at birth. Unfortunately, Respondents reacted to outside pressure, and in so doing, violated Minor Student's rights. Prior to the media attention, with the exception of Minor Student 2, who had been suspended, Minor Student felt supported by her peers, faculty, staff and the community at large.

VI. RECOMMENDATION:

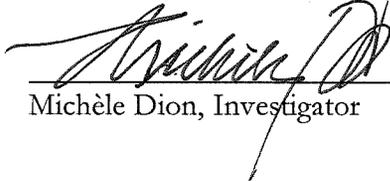
For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1) There are **Reasonable Grounds** to believe Respondents, [REDACTED] Superintendent [REDACTED] and [REDACTED] School Department unlawfully discriminated against Complainant in education and access to a place of public accommodations because of her sexual orientation when she was denied access to the common bathrooms that are consistent with her gender identity.

- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).



Patricia E. Ryan, Executive Director



Michèle Dion, Investigator