STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
	)	
MICHAEL S. and ANDREA S., on behalf,	)	
of P.S., a minor,	)	Charge No. **2015CP3418**
Complainants,	)	EEOC No: **N/A**
	)	ALS No. **16-0003**
and	)	
	)	
KOMAREK SCHOOL DISTRICT #94,	)	
Respondent.	)	

NOTICE

This matter has come to be heard on Respondent's exceptions to the Recommended Order and Decision ("ROD") in this case.

Pursuant to the Illinois Human Rights Act ("Act") and the Commission's Procedural Rules, exceptions are due within 30 days of service of a ROD. 775 ILCS 5/8A-103(A); 56 Ill. Admin. Code § 5300.920. In this case, the ROD was served on February 4, 2019 by U.S. mail. Under the Commission's Procedural Rules, that service by mail was deemed complete four days later, on February 8, 2019. 56 Ill. Admin. Code § 5300.30(c). The date on which Respondent purports to have received the ROD, February 12, 2019, is irrelevant. Based on the above calculation, exceptions were due in this matter on March 11, 2019. Thus, Respondent's exceptions filed on March 14, 2019 were untimely.

Be advised that, because the Commission did not receive timely exceptions to the ROD, **the ROD has become the Order and Decision of the Commission** pursuant to the Act and the Commission's Procedural Rules. 775 ILCS 5/8A-103(A); 56 Ill. Admin. Code § 5300.910 (both of which advise that if timely exceptions are not filed, the ROD shall become the order of the Commission *"without further review"*) (emphasis added).

STATE OF ILLINOIS)
)
HUMAN RIGHTS COMMISSION)

Entered this 11th day of September, 2019.

PHILIP DALMAGE
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
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MICHAEL S. and ANDREA E., on behalf of P.S., a minor,	)	
	)	
Complainants,	)	
	)	**Charge No: 2015CP3418**
and	)	**EEOC No.: N/A**
	)	**ALS No.: 16-0003**
KOMAREK SCHOOL DISTRICT 94,	)	
	)	**Judge William J. Borah**
Respondent.	)	

RECOMMENDED LIABILITY DETERMINATION

This matter comes to be heard on Complainant's motion for summary decision. Respondent filed its response and Complainants filed their reply. The matter is ready for decision.

The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

FINDINGS OF FACT

The following material facts were derived from uncontested sections of the record. The findings did not require, and were not the result of, credibility determinations.

1. On January 8, 2016, Complainants, Michael S. and Andrea E., on behalf of P.S., a minor, filed a three count complaint with the Illinois Human Rights Commission.

2. The complaint was filed against Respondent, Komarek School District 94, and cited Article 5, Public Accommodation, of the Illinois Human Rights Act (Act). Complainants Michael S. and Andrea E. alleged on behalf of P.S., a minor, as his protected classes, sexual orientation, as related to gender identity, male, and disability, gender dysphoria. Specifically, in Count One, Complainants alleged that Respondent denied P.S. access to the school's communal boys' restrooms, because of his gender identity, male. Count Two alleged that

Respondent denied P.S. access to its communal boys' restrooms, because of his disability, gender dysphoria. Count Three alleged that Respondent failed to provide P.S. with a reasonable accommodation by denying him access to the school's communal boys' restrooms.

3. Respondent is located in North Riverside, Illinois, and has a student population of approximately 500, who are enrolled in grades Pre-Kindergarten through Eighth Grade.

4. Complainants Michael S. and Andrea E. are the parents of P.S.

5. P.S. is a transgender male.

6. P.S. was born in November 2006.

7. P.S. has been a student at Komarek since Kindergarten, and enrolled as a female.

8. During the 2013-2014 school year, P.S. was in second grade and was seven years old.

9. On or around December 2013, P.S. explained to his mother his preference to be a boy and adopted a male name, and he groomed and dressed as a male.

10. On January 14, 2014, Andrea E. emailed Jamie Kleinschmidt (Kleinschmidt), Respondent's social worker, to explain P.S.'s recent change of appearance at school. Respondent permitted P.S. to dress and groom as a boy. However, P.S. chose to retain his female name and female group affiliation.

11. A year later, on January 14, 2015, Andrea E. emailed Kleinschmidt with P.S.'s request to have Respondent's personnel and students address him by his male name and to use proper masculine pronouns while referring to him. "I just wanted to let you know what was going on gender wise with (P.S.). For over a year now, (P.S.) has been identifying as a boy." Andrea E. further asked the school for assistance and informed Respondent that P.S. will be attending the Ann & Robert H. Lurie Children's Hospital's Gender & Sex Development Program (Lurie's) for testing, treatment, and guidance, and encouraged Respondent to contact Lurie to

obtain the necessary and adequate knowledge to competently assist P.S. Respondent obtained a medical release that allowed the school to directly communicate with Lurie's about P.S.

12. On January 14, 2015, Kleinschmidt acknowledged Andrea E.'s email and recognized that P.S.'s "situation" was "very new to Komarek School..." Kleinschmidt requested "more information, as well as (time) to speak with the administration to see what our policies are for handing this situation, with as much care as possible. When we have more information we will contact you, and would love to have you in for a meeting to discuss everything."

13. In an internal January 14, 2015, school email, Kleinschmidt described P.S. as a "gender non-conforming student." In turn, Superintendent Neil Pellicci internally emailed to 12 personnel about P.S.'s status. "At the bottom of this note is an email received from a mom of a second grade student. This student has been identified by mom and our staff as transgender." On March 11, 2015, Superintendent Pellicci internally emailed to 12 personnel, for at least a second time, a confirmation of Pellicci's knowledge of P.S.'s status. "There is some new news regarding (P.S.) our second grade transgender student."

14. On January 15, 2015, Jennifer Leininger (Leininger), the Program Coordinator for Lurie Children's Hospital's Gender & Sex Development Program, emailed Klienschmidt and introduced herself, "I am reaching out at the request of a family to provide support for your school around gender (identity). When might you be available to touch base?"

15. On January 22, 2015, Kleinschmidt responded to Andrea's E.'s January 14, 2015, email. Kleinschmidt wrote that she talked to Leininger at Lurie's, and that the school has agreed to address P.S. by his male name, including the proper use masculine pronouns. Klienschmidt asked Andrea E. for a meeting.

16. On February 11, 2015, a meeting was held between Andrea E. and Kleinschmidt for the purpose of discussing the public introduction of P.S.'s male gender with students at school. At that meeting, among other topics, Andrea E. asked Kleinschmidt whether P.S. could start using the communal boys' restrooms.

17. Every Pre-Kindergarten through third grade classroom had a unisex restroom. Starting in the fourth grade, the students were limited to using the communal boys' or girls' restrooms.

18. Respondent had no formal written policy in place concerning transgender students.

19. On March 3, 2015, Andrea E. emailed Kleinschmidt, and in part inquired whether a decision had been made permitting P.S.'s access to the boys' restrooms. In response, Kleinschmidt requested a meeting.

20. On March 6, 2015, a meeting was held with Andrea E. and Respondent's superintendent, Neil Pellicci the principal, Thomas Criscione; the vice principal, Lisa Stalla; and Kleinschmidt. There, Pellicci, announced that P.S. would only be permitted to use the designated adult male faculty and staff restroom, but not the school's communal boys' restrooms. [1]

21. On March 9, 2015, Michael S., P.S.'s father, sent an email to Kleinschmidt expressing his disappointment about Respondent's decision denying P.S.'s restroom "accommodation," and encouraged it to reconsider, as well as to work with Lurie's.

22. On March 10, 2015, Pellicci emailed Michael S. In part, he reiterated his decision and explained his reason:

> As a school administrator and a parent, I'm looking at it from the perspective of what's not only good for P..., but for the other Komarek students. I hesitate having P...walk into a boy's bathroom that is occupied by an intermediate or junior high age boy, possibly using the urinal or toilet. Using your scenario, that situation is very possible. P... may feel comfortable doing so, but the young man in the bathroom may not (and neither may his parents.).
> By offering P...a bathroom with a lock on the door, he can use the bathroom without the possibility of intrusion.
> As you know, Mrs. Kleinschmidt has been in touch with Lurie's Children's hospital and has received some valuable information from them. A rep from the hospital will be here on Thursday to talk to all the teachers during our monthly teacher's meeting. ...

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[1] When the term "Banned" is use, it also incorporates P.S.'s mandated restriction to use the adult male faculty and staff restroom, when he is outside the assigned classroom restroom.

23. On March 12, 2015, Respondent held a staff training seminar presented by Leininger from Lurie's regarding "gender diversity."

24. Andrea E. requested to speak before the school board during its regularly scheduled meeting set for April 14, 2015. On April 8, 2015, Christopher Waas, the school board president, emailed Andrea E. and directed her not to address the board about reconsidering the ban: "You are welcome to bring your husband along and tell us about your son, but there will be no discussion about the decision. The School board has made its decision based on legal advice and it will not be reconsidered unless there is a change in state law." After receipt of Waas's email, Andrea E. understood Respondent's decision was "final," and she did not attend the board meeting.

25. From March 6, 2015, through October 27, 2015, no other student enrolled at Respondent was barred from using the restroom of their sexual identity other than P.S.

26. From March 6, 2015, through October 27, 2015, no other student enrolled in Respondent had been required to use the adult faculty/staff restrooms other than P.S.

27. On March 4, 2015, after numerous psychological tests and counselling sessions at Lurie's, P.S was formally diagnosed with "severe degree of early-onset gender dysphoria."

> 28. Dr. Rani Ettner,[2] averred: "The term 'gender identity' is well known concept in medicine, referring to an individual's sense of oneself as male or female. It is an innate and immutable aspect of personality that is firmly established by age four. ... For the gender dysphoric individuals, the sense of self-one's gender identity-differs from the natal, birth assigned sex. Attempts at changing an individual's gender identity have proven unsuccessful, and are now considered unethical. [T]he condition is likely neurodevelopment."

29. Both Complainant and Respondent attached "Encounter Reports" authored by Dr. Chen of Lurie's. There are a number of them dating from February 17, 2015, through

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[2] Dr. Rani Ettner is the chief clinical psychologist with the Chicago Gender Center since 2005, and has an extensive background in evaluating and treating gender dysphoria patients. He advises school districts on the subject, and is an author and speaker on the subject. Dr. Ettner earned his doctorate in psychology from Northwestern University in 1979. He avers that his "opinions ...are reliable and accurate to a reasonable degree of medical certainty." The parties agreed that his affidavit could be referenced in this matter.

October 2016, although the total number in existence was not stated. Each report identifies P.S.'s "Diagnosis" as gender dysphoria.

> 30. On July 20, 2015, Dr. Randi Ettner met with P.S. to "conduct a clinical assessment." The purpose was to determine whether P.S. met the criteria for a diagnosis of "Gender Dysphoria (302.6) in the *Diagnostic and Statistical Manual of Mental Disorders,* fifth edition; (F64.2) in the *International Classifications of Diseases* and whether, and to what extent, denying access to the restroom consistent with P.S.'s male gender identity is harmful to him."
>
> Dr. Rani Ettner concluded: "P.S. meets, and exceeds, the diagnostic criteria for Gender Dysphoria. [P.S.] has a severe degree of early-onset gender dysphoria."
>
> 31. Dr. Ettner averred about the restroom ban:
>
> The social role of transition takes place at home, in the community and in school. If any aspect of social role transition is impeded, however, it undermines the entirety of a person's transition. For a gender dysphoric child to be told that they will be considered a boy in one situation, but not in another, is inconsistent with evidence-based medical practice, and detrimental to the health and well-being of the child. The integration of a consolidated identity into the daily activities of life is the aim of treatment.
> Access to restrooms available to other boys is an undeniable necessity for the female-to-male pre-adolescent. Restrooms, unlike other settings, (e.g. the library), categorize people according to gender. There are two, and only two, such categories; males and females. To deny admission to these facilities, or to insist that one use a separate facility, is to communicate that such a child is "not male" but some undifferentiated "other," and causes undue harm. It's also puts a "target on the back" for potential victimization and stigmatization. When adults-authority figures- deny a child access to the restroom consistent with his affirmed, lived gender, they shame him-negating the legitimacy of his identity and decimating confidence. In effect, they revoke membership from the peer group. ...
>
> For transgender children, the restroom can easily become a source of anxiety. ...
>
> P.S will not be allowed access to the boys' restroom, and will be banished to a separate facility when he needs to use a restroom outside his classroom. The shame of being singled out and stigmatized is a devastating blow to a vulnerable child with documented mental health issues, and places him at risk. P.S is already experiencing considerable anxiety about the bathroom. He relates that he tries not to drinking liquids, and holds his urine. He worries that he will be in an isolated bathroom during a fire drill and will be over looked and abandoned.
>
> 32. On October 26, 2015, Respondent's successor Superintendent Ganan emailed Michael S. and Andrea E. and informed them that Respondent would no longer ban P.S. from using the boys' communal restrooms. It would wait until a final determination from the Department was issued. Later, access was extended until the Commission's final decision.

33. P.S. legally changed his name on or around March 1, 2016. Thereafter, P.S.'s Social Security card and the State of Illinois Identification Card acknowledged his sex as male.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter.

2. Complainants established by direct evidence and by indirect means, sexual related identity discrimination by Respondent, in its ban of P.S. from the boys' communal restroom at its school, a public accommodation.

3. Complainant established by direct evidence and by indirect means, discrimination based on a mental and physical disability, gender dysphoria. Respondent prevented P.S.'s access to the boys' communal restrooms at school, a public accommodation.

4. At the time of the requested accommodation, Complainant was disabled with gender dysphoria, and Respondent was aware of his disability.

5. Complainant's access to the boys' communal restrooms would have been a reasonable accommodation.

6. Respondent stopped interacting with Complainants after the ban was announced.

7. There is no genuine issue of material fact and Complainants are entitled to a recommended order in their favor as a matter of law.

8. A summary decision in Complainants' favor is appropriate in this case.

DISCUSSION

SUMMARY DECISION STANDARD

Under section 8-106.1 of the Human Rights Act, either party to a complaint may move for summary decision. 775 ILCS 5/8-106.1. A summary decision is analogous to a summary judgment in the Circuit Courts. Cano v. Village of Dolton, 250 Ill.App.3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist. 1993).

A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. Fitzpatrick v. Human Rights Comm'n, 267 Ill.App.3d 386, 391, 642 N.E.2d 486, 490 (4th Dist. 1994). All pleadings, affidavits, interrogatories, and admissions must be strictly construed against the movant and liberally construed in favor of the non-moving party. Kolakowski v. Voris, 76 Ill.App.3d 453, 456-57, 395 N.E.2d 6, 9 (1st Dist.1979). Although not required to prove its case as if at a hearing, the non-moving party must provide some factual basis for denying the motion. Birck v. City of Quincy, 241 Ill.App.3d 119, 121, 608 N.E.2d 920, 922 (4th Dist. 1993). Only facts supported by evidence, and not mere conclusions of law, should be considered. Chevrie v. Gruesen, 208 Ill.App.3d 881, 883-84, 567 N.E.2d 629, 630-31 (2d Dist. 1991). Where the party's affidavits stand uncontroverted, the facts contained therein must be accepted as true and, therefore, a party's failure to file counter-affidavits in response is frequently fatal to the case. Rotzoll v. Overhead Door Corp., 289 Ill.App.3d 410, 418, 681 N.E.2d 156, 161 (4th Dist.1997). Inasmuch as summary decision is a drastic means for resolving litigation, the movant's right to a summary decision must be clear and free from doubt. Purtill v. Hess, 111 Ill.2d 229, 240, 489 N.E.2d 867 (1986).

General Statutory Interpretation

"The Illinois Human Rights Act is remedial legislation that must be construed liberally to effectuate its purpose." Nuraoka v. Illinois Human Rights Commission, 252 Ill.App.3d 1039, 625 N.E.2d 251 (1st Dist. 1993) citing, Nielsen Co. v. Public Building Commission of Chicago, 81 Ill.2d 290, 410 N.E.2d 40 (1980).

A primary rule of statutory construction is to give effect to the words selected by the General Assembly and its intent. "No word or paragraph should be interpreted so as to be rendered meaningless." Boaden v. Illinois Department of Law Enforcement, 171 Ill.2d 230, 664 N.E.2d 61 (1996); Sangamon County Sheriff's Department v. Illinois Human Rights Commission et al., 233 Ill.2d 125, 908 N.E.2d 39 (2009), citing Wade v. City of North Chicago Police Pension

Board, 226 Ill.2d 485, 877 N.E2d 1011 (2008). The best indication of the legislature's intent is the language of the statute, which must be given its plain and ordinary meaning. Id., citing Cinkus v. Village of Stickney Municipal Officers Electoral Board, 228 Ill.2d 200, 886 N.E.2d 1011 (2008). "Words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute." Michigan Avenue National Bank, As Special Administrator of the Estate of Cynthia Collins, Deceased v. The County of Cook, et al., 191 Ill.2d 493, 732 N.E. 2d 528 (2000).

The Act's General Definitions

Section 1-102(A) of the Illinois Human Rights Act provides that it is the state's "public policy" to "secure for all individuals within Illinois the freedom from discrimination against any individual, because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, *physical or mental disability*, military status, *sexual orientation*, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations." (Emphasis added.) [3]

Section 1-103 (O) of the Act defines "Sex" as "the status of being male or female."

Section 1-103 (O-1) of the Act defines "Sexual Orientation," in pertinent part, as "gender related identity, whether or not traditionally associated with the person's designated sex at birth."

Article 5, Public Accommodation Discrimination Defined

Section 5-101 (A)(11) of the Act includes an "elementary school," as a "place of public accommodation."

Section 5-102.2 of the Act, referencing Section 5-101(A)(11), forbids "the denial of access to facilities...or services."

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[3] All of the statutory classes were purposely cited, as each are equally protected and enforced under the Act.

Section 5-103 of the Act lists exemptions to Article 5's protections against public accommodation discrimination. In pertinent part: "Nothing in this Article shall apply to... (B) Facilities Distinctly Private. Any facility, as to discrimination based on *sex*, which is distinctly private in nature such as *restrooms*, shower rooms, bath houses, health clubs and other similar facilities for which the Department, in its rules and regulations, may grant exemptions based on bona fide consideration of public policy." (Emphasis Added.)

Statutory Analysis

It has been established that Respondent, as an elementary school, is a statutory public accommodation. As a school, it is a civil rights violation for it to deny a student access to its facilities and services. However, Section 5-103 (B) is an exception to Article 5's protection against unlawful discrimination by allowing a public accommodation to segregate restroom designation based on "sex."

Prior to discussing Section 5-103 (B)'s implication and scope, its enclosed term "sex" is addressed, as it is significant to its overall meaning. Respondent argues that the defined terms of "sex" and "sexual identity" are "separate and distinct," and when a person's gender identity does not correspond to one's birth sex, the Act obligates that person to use the restroom of his/her birth.

Contrary to Respondent's reading, Section 1-103 (O), "Sex," is a related provision within Section 1-103 (O-1), "Sexual Orientation." The legislature could have disassociated the two terms by simply selecting the next sequential letter of the alphabet in the Act's list of general definitions, but it did not, it chose to associate the two by the letter "O." Read together they clarify the relationship between one's birth sex and sexual identity: "[G]ender-related identity, whether or not traditionally associated with the person's designated *sex ('[T]he status of being male or female.')* at birth." (Emphasis added.)

Thus, the plain and ordinary meaning of the integrated definitions confirms that one's birth sex does not diminish one's gender identity, just as it would not diminish the protected

classes of sexual orientation, (being gay or straight, the other categories in O-1), race, age, religion, national origin, citizenship, etc. [4]

Reviewing the statutory definition of Sex, the "status" of "being male or female," begs the question. How and when does a person's "status" of a sex become determinable? [5]

A case by case, common sense, interpretive approach, is most pragmatic when construing "status," despite the legislature's silence with the term. The facts reveal that P.S.'s sexual "status" was male, and it was well known by his parents, Lurie, and Respondent by the time of the ban.

P.S. is not a stranger to Respondent, unlike that of a commercial store's mostly anonymous customer base. In fact, a school has a long held special relationship with its students, described in general legal terms as *in loco parentis,* "in the place of the parents."

By January 2014, Respondent knew that P.S. wanted to be a boy. A year later, Respondent was active in P.S.'s reintroduction to the student body and faculty, even taking on the role of protector with non-cooperating students. Internal emails described P.S. as transgender. Respondent also routinely communicated with P.S., his parents, and Lurie's to assist with him and to advance its own institutional knowledge of sexual identity and transgender youth. [6]

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[4] It also should be noted that there are statutes in Article 5, Public Accommodations, aimed specifically at schools, as exemplified by Section 5-102.2, Jurisdiction Limited, and Article 5A, (Sexual Harassment in) Elementary, Secondary, and Higher Education. The legislature could have excluded or limited students from the protected class of sexual identity, but it did not, nor did it place a threshold age as a prerequisite to being protected. (i.e. The chronical age of 40 must be reached prior to being in the protected class of age. Section1-103(A) of the Act.)

[5] Respondent suggests that "status" should be determined by one's birth sex, or other ideas. However, none of those suggestions were codified by the legislature, and, in any respect, it is not the place for this tribunal to amend, invent, or insert terms that change or contradict the Act.

[6] Respondent did not have a school policy in place about restroom use by a transgender person.

Therefore, P.S.'s sexual "status" is male, and Exception (B) does not ban P.S. from the the boys' restroom, because his sex is male.

Discrimination Standards – Sexual Identity

I turn to whether Respondent discriminated against P.S. based on his sexual identity.

It is not necessary to discuss *prima facie* elements, as this is a rare case where there is no question as to Respondent's knowledge, action, decision and its basis. [7]

Direct Method of Proof

There are two methods for proving discrimination, direct and indirect. Sola v. Illinois Human Rights Commission, 316 Ill.App.3d 528, 736 N.E.2d 1150 (1st Dist. 2000). Under the direct approach, Complainant must present sufficient evidence, direct or circumstantial, without reliance upon inference or presumption, to allow a trier of fact to decide that his sexual related identity was a motivating factor in Respondent's alleged adverse act. Id. Direct evidence requires evidence that demonstrate a linkage between the adverse act and the decision-maker's alleged discriminatory animosity. Temporal proximity to the adverse act is often crucial when establishing a case of discrimination based on direct evidence. Porter and Treasure Island Foods, Inc., IHRC, ALS No. 11593, February 7, 2003.

Analysis

"There is no surer way to find out what the parties meant, than to see what they have done." Eric Sprinkle and Rivers Edge Complex, Inc., IHRC, ALS No. 10565, August 7, 2000, quoting Brooklyn Life Insurance Co. v. Dutcher, 95 U.S. 269, 273 (1877). In this case, the facts are straightforward.

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[7] A *prima facie* case of discriminating concerning a public accommodation may be proven by showing that 1) a complainant is within a protected category (he was); 2) he or she was denied "access" of the respondent's facilities (he was); and 3) that others not within his or her protected class were given "access" of those facilities (yes). Henderson and Steak N Shake, IHRC, ALS No. S-9735, March 24, 1999; and Section 5-102.2 of the Act.

P.S. first discussed being a boy with Andrea E., his mother, in late 2013, when he was seven years old, and in January 2014, Andrea E. contacted the school's social worker. At that time, P.S. began to outwardly manifest his sexual identity at school by dressing and grooming as a boy, while still preserving his female name and birth sex affiliation.

A year later, on January 14, 2015, Andrea E. requested that Respondent use P.S.'s male name along with its corresponding masculine pronouns. Respondent soon agreed, knowing that the issue before it was P.S.'s sexual identity, and not a dress code matter or a student being delusional, as exemplified by the social worker describing P.S. as "gender non-conforming student," and on at least two known occasions the superintendent emailing to numerous personnel about "our second grade transgender student."

P.S. began counselling at Lurie and it contacted Respondent to coordinate their school/hospital assistance. Respondent was permitted by the parents to contact Lurie about P.S.

On February 11, 2015, the desire of P.S. to use the boys' communal restrooms was communicated to the social worker. After some delay, a meeting was called by Respondent for March 6, 2015. Andrea E. and a multitude of administrators attended the meeting, where she was told by the superintendent that P.S. would not be allowed access into the boys' communal restrooms. P.S. was limited to the use adult male faculty and staff restrooms, unless assigned to a classroom with its own unisex restroom. When the parents asked Respondent to reconsider P.S.'s ban, both the superintendent and the school board president, independent of each other, denied their requests. The decision was understood to be "final."

On March 4, 2015, P.S. was formally diagnosed by Lurie with gender dysphoria. The diagnosis did not modify Respondent's ban. No other student, whose sexual identity was male, was banned from the boys' restroom.

The ban began on March 6, 2016, and continued until it was conditionally lifted on October 27, 2016.

Therefore, Complainant has established a *prima facie case* of sexual identity discrimination by direct means (and indirect means.)[8] The facts showed that P.S. is a transgender student, with the sexual identity, male. Respondent knew P.S.'s sexual identity, and decided to ban him from using the boys' restroom. No other student, whose sexual identity was male, was banned from the boys' restroom.

Legitimate Nondiscriminatory Reason

The respondent must articulate a legitimate nondiscriminatory reason for the action taken against the complainant. To succeed in his or her claim, a complainant must then show the articulated reason to be a pretext for discrimination. Henderson and Steak N Shake, Inc., IHRC, ALS No. S-9735, March 24, 1999, citing St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

It is noted that Respondent failed to plead any Affirmative Defenses in its answer, as required by Section 5300.640 (c)(2): "Contents – The answer shall be in writing and signed under oath or affirmation, and shall contain: A statement of any matter constituting a defense against any allegation of the Complaint..." In any respect, what was submitted is addressed:

"Ambiguity" – Respondent knew P.S. was transgender, that he wished access to the boys' restroom, that "male" not was not his birth and school enrollment sex, and on that basis the request was denied. There is no factual ambiguity of P.S.'s status, actions taken, motivating factor, or Respondent's ban.

"Assisted P.S." - Respondent contends it supported P.S. during his transition, but for the ban. However, a "good faith attempt" at compliance with the Act, but for the ban and restriction, must fail. The Illinois Supreme Court held that the Act does not contain a "good faith exemption." Raintree Health Care Center v. The Illinois Human Rights Commission, et al., 173 Ill.2d 469, 672 N.E.2d 1136 (1996).

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[8] The Commission applies the burden shifting method of providing discrimination in public accommodation cases as well as in employment cases. Charisse Davis and Ben Schwartz Food Mart, IHRC, ALS No. 1361(B), January 31, 1986.

"Administrative Judgment" – Respondent also defends its ban and restriction by contending it had "exercised its administrative judgment." Again, Respondent does not cite any authority that incorporates such a doctrinal defense, or any formal position articulated.

Pellicci, as the superintendent and the primary decision maker at the time of the ban, merely speculated about a "comfort" level of a hypothetical intermediate or junior high age boy or his parents, if he met P.S. in the boys' restroom.

However, the prejudices of others are part of what the Act was meant to prevent. Eric Sprinkle and Rivers Edge Complex, Inc., IHRC, ALS No.10565, August 7, 2000, (HIV medical condition and loss of customers); Jack Haynes and City of Springfield, Office of Public Utilities, IHRC, ALS No. 7304 (S), April 3, 1998 (unwillingness to be supervised by a black man). Also, there is no right that insulates a student from coming in contact with others who are different than them or a Bathroom Privacy Act, unless the behavior violates a school policy or is criminal.

Waas, the school board president, emailed about "legal advice" to support the ban, in hopes to silence P.S.'s parents, but no law was cited. "Nowhere does the Human Rights Act state that a good-faith belief that one's discriminatory actions are required by state law is a defense to liability. The statute must be enforced as enacted by the legislature." Raintree, supra.

Brian Ganan, Pellicci's successor, avers that the ban was entered to "avoid disruption to the educational environment," prevent an "intimidating and uncomfortable (environment)," and preserve "safety and privacy interests." However, Ganan's affidavit is little help, as he was not a decision maker at the time of the ban. In any respect, more facts are needed to develop the "disruption" reason, and without more, those phrases are mere conclusionary and speculative positions. "[U]nsupported assertions, opinions, and self-serving or conclusionary statements do

not comply with S.Ct. Rule 191." McBaldwin Financial Comp., et al. v. DeMaggio, Rosario & Varaja, LLC, 364 Ill.App.3d 6, 845 N.E.2d 22, (1st Dist. 2006). [9]

Therefore, the evidence in this case establishes that Respondent's decision forbidding Complainant access to its boys' restroom violated the Act, under both methods of proof. Respondent's motive for its decision was P.S.'s sexual identity, male. Respondent substantially relied on a prohibited factor in its decision to ban P.S. Lalvani v. Illinois Human Rights Commission, 324 Ill.App.3d 774, 755 N.E.2d 51 (1st Dist. 2001).

Disability Discrimination Standard

"Unlawful discrimination" is "discrimination against a person because of his [or her] ...disability... as ...defined in this Section." Section 1-103(Q) of the Act.

The prima face elements of discrimination are the same as for discrimination based on sexual identity, but for the requirement of a disability.

"Disability" is defined under the Act as "a determinable physical or mental characteristic of a person ...which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic... is unrelated to the person's ability to utilize and benefit from a place of public accommodation." Section 1-103(I)(4) of the Act.

Compared to the federal Americans with Disabilities Act [ADA], the Illinois Human Rights Act's definition of "disability" has a "lower standard." Courtney v. Oak Forest Hospital, IHRC, ALS No. 4627, August 12, 1996.

In fact, many disabilities are defined by "common sense." "With many claims of physical handicap, it is relatively easy to identify the cause of the handicapping condition. If someone is deaf, blind, cannot walk or speak, or suffers from a well-known disease such as cancer, asthma, or renal failure, it is apparent that the person so afflicted has a condition which rises to the level

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[9] A number of supposed emails or portions of them, were typed and submitted as true, but none were copies of the original emails. Respondent has failed to adequately lay the proper foundation for a document or properly authenticate it.

of a physical handicap and thus is entitled to protection under the act." Lake Point Tower, Ltd. v. Illinois Human Rights Commission, 291 Ill.App.3d 897, 684 N.E.2d 948 (1st Dist. 1997).

Timing of Diagnosis

Respondent submits that P.S. did not have a disability, until the time it was formally diagnosed.

No formal diagnosis is required prior to being recognized as a statutory disability. "Disability is measured at the time of discrimination." "The respondent can call complainant's illness by whatever name it wants, because it need not be aware of the precise diagnosis in order to violate the Act." White-Day and Peoria Housing Authority, IHRC, ALS No. 2968, June 10, 1991.

As discussed above, whether the academic medical term "gender dysphoria" was used or not, by the date of the ban, Respondent was intimately aware and understood the character of the disability. [10]

Gender Dysphoria as a Disability

The question is whether the physical and mental condition of gender dysphoria qualifies as a protected "disability" under the Act.

It is understood, the term "disability" may have an overly harsh and derisive connotation. There are many people who are in the protected class who do not want to think of themselves as "disabled." Nevertheless, the legal term which is used to define those individuals qualified for protection is "disability." [11]

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[10] Although Lurie's formal diagnosis of P.S. was revealed on March 4, 2015, and the ban began on March 6, 2015, no modification of the ban occurred by Respondent until October 2015.

[11] For example, in the "Encounter Reports," Dr. Chen describes P.S. as "normal." Under the category Strengths, it was consistently written that P.S. is "curious, self-motivated, and physically healthy, ..." Further, "P.S was utilizing and benefiting from school, as he is performing at grade level across classes, no concerns about learning problems, no behavioral/emotional problems noted by teachers."

Dr. Rani Ettner averred that gender dysphoria is a disability and cited a number of medical and psychological reference texts.

Both Complainant and Respondent attached a number of "Encounter Reports," dated February 2015 through October 2015, authored by Dr. Chen of Lurie's, which identifies P.S.'s medical "Diagnosis" as gender dysphoria.

Complainants cite Jess Evans and Illinois Department of Human Rights, et al., IHRC, ALS No. 9937, November 18, 1999. The Commission concluded in that case "transsexualism (the former term for gender dysphoria) does qualify for the protection of the Act as a handicap (the former term for disability)."

Therefore, gender dysphoria is currently considered a disability.

P.S. was diagnosed with Gender Dysphoria

Beginning in February 2015, in its "Encounter Reports," Lurie's Dr. Chen "diagnosed" Complainant with gender dysphoria and later characterized it as "serious." Dr. Rani Ettner concluded: "P.S. meets, and exceeds, the diagnostic criteria for Gender Dysphoria. [P.S.] has a severe degree of early-onset gender dysphoria." Respondent was aware of P.S.'s medical condition.

Therefore, based on Evans, Dr. Chen, and Dr. Ettner, P.S. has shown to have the medical condition of gender dysphoria, as a result from a "condition [that] is congenital and is a combination of determinable physical and mental characteristics," and unrelated to the person's ability to utilize and benefit from his school. Id.

Disability Discrimination

The factual analysis is comparable to the discussion related to sexual identity discussed above and is incorporated here.

Therefore, Respondent knew that P.S. had a disability, gender dysphoria, and denied him access to the boys' restrooms because of it, as it did not conform to his birth sex.

Respondent contends that it did not know the formal diagnosis until March 4, 2015. However, as discussed above, Respondent had enough information through P.S., his parents, and Lurie to identify it. Respondent also contends "Ambiguity," "Administrative Judgment," and "potential for a disruption or safety threat," all addressed above.[12]

Therefore, I find that Respondent's decision to deny Complainant's access to the boys' communal restroom on account of his disability, gender dysphoria, violated the Act as it concerns public accommodation. I further find that the record contains both direct and indirect evidence related to disability discrimination.

Reasonable Accommodation

Is there a duty to grant P.S. a reasonable accommodation? In Ivanka Kojic and Gerald Hagman, et al. IHRC, ALS No. 5999 (A), December 18, 1995, citing R. Kent Jones, et al. and Chicago and North Western Transportation Company, IHRC, ALS No. 3611 & 3970, August 12, 1992, the Commission held that "the same implied duty of reasonable accommodation of a handicap that exist in the Illinois Human Rights Act in the context of employment exists in the context of public accommodation." The Commission continued, "the term 'discrimination' includes the refusal to eliminate barriers to accessibility when the elimination of such barriers will not impose undue financial and administrative burdens. Thus 1-103(I)(4) of the Act presupposes a duty of reasonable accommodations."

Here, Respondent does not contend that the cost of the requested accommodation would be "prohibitively expensive" or that it would "unduly disrupt the school." Owens v. Department of Human Rights, 356 Ill.App.3d 46, 826 N.E.2d 539 (1st Dist. 2005). However, if Respondent would have pled that affirmative defense, then the issue would become whether that disrupted policy complies with the Act. Green v. State of Illinois Department of Corrections, IHRC, ALS No. 7800, November 17, 1997.

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[12] It is unnecessary to reference my February 9, 2017, order, as part of the case's analysis, as the record has enough facts to reach underlying basis of Respondent's ban. However, my order of February 9, 2017, stands and is incorporated by reference.

No policy was submitted as an attempted defense, only two contemporary emails. Pellicci expresses his personal concern about a restroom "scenario," and Wass' email, that cut off all further interaction with the parents, because of some unknown "legal advice." [13]

An individualized determination is required in Illinois. Van Campen v. International Business Machines Corporation, 326 Ill.App.3d 963, 762 N.E.2d 545 (1st Dist. 2001); Raintree, supra; Melvin v. City of West Frankfort, 93 Ill.App.3d 425, 417 N.E. 2d 260 (1981). Respondent's group meeting and subsequent emails from Pellicci and Waas were meant to silence the parents, not to interact, obtain information, or negotiate with them. There is no evidence that Respondent even considered the medical consequences of its decision, despite the vast amount of information available to it.

Dr. Ettner averred in his uncontroverted affidavit, P.S being told he is a boy in name and appearance, but not permitted in the boys' restroom is "detrimental to the health and well-being of the child. It communicates to P. S. that he is neither male nor female, but some sort of other."

The ban and use the adult male restroom further brands and segregates P.S. It publicly invites unnecessary scrutiny and questioning from inquisitive or mean spirited students, further isolating P.S. "The shame of being singled out and stigmatized is a devastating blow to a vulnerable child with documented mental health issues, and places him at risk." Id.

As with the other counts of discrimination discussed above, Respondent only submitted an informal hypothetical "comfort" concern, and its alleged "legal advice."

Therefore, Respondent failed to interact and discuss a reasonable accommodation to P.S. when it banned him from the boys' restroom and restricted him to the adult male restrooms.

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[13] As discussed above, Ganan avers that the ban was decided to "avoid disruption to the educational environment," but he was not a decision maker at the time of the ban, and gives no evidentiary facts to support his conclusion. Without more, his statement is merely conclusionary and speculative.

Damages

Respondent raises the issue of the Tort Immunity Act, and contends that it bars any monetary damages for any discriminatory injury caused by one of its employees. 745 ILCS 10/2-201 and 109.

However, "the Tort Immunity Act is an affirmative defense that will be forfeited if it is not pleaded," Decatur Park District v. City of Decatur, 2016 IL App (4th) 150699, 57 N.E.2d 631, and Respondent did not raise this defense in its answer.

In any respect, for decades statutory monetary damages and other remedies were available to a victim of a civil rights violation, whether performed by private or governmental entities. The legislature made monetary damages statutory, as per Section 8A-104 of the Act: Relief; Penalties (Upon Finding a Civil Rights Violation).

To eliminate the statutory remedies under the Act, will undercut the Legislature, Commission and the Circuit Court, and make discrimination, harassment, and retaliation cases merely a nuance to the violator and fail to make the Complainant whole.

The Tort Immunity Act is inapplicable to the statutory based claims and remedies under the Illinois Human Rights Act. Governmental units remain liable for damages caused by discriminatory acts that violate the Act. Smith v. Cook County Sheriff's Office, IHRC, ALS No. 1077, October 31, 2005.

Respondent submitted Rozavolgyi et al. v. The City of Aurora, 2016 IL App (2d) 150493 (2016), 58 N.E.3d 65 (2nd Dist. 2016). However, that judgment was vacated by the Supreme Court in Rozavolgyi et al. v. The City of Aurora, 2017 IL 121048, --N.E.3d—(2017), and does not need to be discussed here.

Therefore, Respondent school is responsible for the statutory damages P.S. suffered as a result of its discriminatory actions.

RECOMMENDATION

Based upon the foregoing, there are no genuine issues of material fact and Complainant is entitled to a recommended order in his favor as a matter of law.

IT IS HEREBY ORDERED:

1. Complainant's motion for summary decision is granted;

2. A status hearing is set for April 10, 2018, at 2:00 p.m. when a damages hearing date will be set.

HUMAN RIGHTS COMMISSION

BY:
WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: March 15, 2018

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
MICHAEL S. and ANDREA E., on behalf of P.S., a minor,	)	
	)	
	)	
Complainants,	)	**Charge No: 2015CP3418**
	)	**EEOC No.: N/A**
	)	**ALS No.: 16-0003**
KOMAREK SCHOOL DISTRICT #94,	)	
	)	**Judge William J. Borah**
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes before me following a public hearing on damages held on August 28, 2018. Both parties actively participated in the evidentiary proceeding and filed post-hearing briefs. On March 15, 2018, a Recommended Liability Determination (RLD) was entered against Respondent, Komarek School District #94 (Komarek or school), finding it liable for violating the Illinois Human Rights Act (Act), sexual orientation discrimination, related to gender identity, and physical disability discrimination, related to gender dysphoria, when it prohibited its student, Complainant P.S. (P.S.) access to the boys' communal restrooms. The matters of damages, attorneys' fees, and costs, are ready for a decision.

The Illinois Department of Human Rights (IDHR) is an additional statutory agency that has issued state actions in this matter. The IDHR is therefore named herein as an additional party of record.

FINDINGS OF FACT

The following facts are those which were determined to have been proven by a preponderance of the evidence at the public hearing on this matter. Assertions made at the public hearing which are not addressed herein were determined to be unproven or immaterial to the decision.

1. Respondent, Komarek, is an elementary school covering Pre-Kindergarten through Eighth Grade.

2. P.S. was born in November 2006 and has been a student at Komarek since Kindergarten.

3. Michael S. and Andrea E. are the parents of P.S., and have a fifty per cent visitation arrangement with him, which includes alternating weekends.

4. P.S. is a transgender male.

5. On January 14, 2014, P.S. was a first-grade student and seven years of age. On that date, Andrea E. first contacted Jamie Kleinschmidt (Kleinschmidt), the school's on site social worker, concerning P.S.'s male transition.

6. Kleinschmidt was the primary contact person between the Complainant's parents and Respondent. Kleinschmidt and P. S. have had weekly meetings. Kleinschmidt has interacted with P.S. since Kindergarten, and P.S. "likes" her.

7. Kleinschmidt's weekly meetings with P.S. were "consistent," and have become less frequent.

8. In January 2015, P.S. entered Ann & Robert H. Lurie Children's Hospital's Gender & Sex Development Program (Lurie) for testing, treatment, and guidance regarding gender dysphoria. Lurie recommended to Andrea E. that P.S. "should live as a boy in every aspect."

9. Andrea E. testified that she was not certain when the sessions with Lurie's psychologist ceased, but it was sometime prior to August 2017, because by that time the psychologist stated P. S. was "doing well" and was "stable."

10. P. S. also visited with a nurse-practitioner at Lurie every three months to check his "emotional" stability, and he met on a weekly basis with a therapist.

11. Kleinschmidt contacted Lurie in early 2014 to learn how to make P.S.'s "transition as smooth as possible."

12. By March 2015, Respondent granted P.S.'s request to appear at school as a boy, and to be addressed by his male name, including the use of masculine pronouns. Respondent also re-introduced P.S. to his schoolmates, managed any student who expressed confusion or had an inquiry, and protected P.S. against any hostility.

13. On March 6, 2015, during a meeting with Andrea E. and Respondent's administrators, the superintendent announced that P.S. was banned from using the communal boys' restrooms and restricted him to the male staff restroom, when P.S. was outside his classroom. Later, on March 10, 2015, the decision was confirmed and on April 8, 2015, the matter was considered "final" by Respondent.

14. Although the ban was announced on March 6, 2015, Andrea E. postponed revealing it to P.S. for "about four weeks," until on or around April 8, 2015.

15. Respondent had restrooms in the classrooms from Pre-Kindergarten through Third Grade. Beginning in Fourth Grade forward, only communal restrooms were available to the students.

16. During the ban, P.S. often participated in "Specials." "Specials" are school events that occur outside of the classroom and its restroom (e.g. art, library, lunch, physical education, and recesses). P.S. testified, "We still had to be out of the classroom for a multiple times a day for a pretty long time."

17. Prior to the ban, Andrea E. observed that P.S. was "very happy" and "completely integrating with the school..." Kleinschmidt further explained, "When we were utilizing P.S. as his name and then when we also started using male pronouns, I really saw him brighten up. And [he] seem[ed] happy and just, you know – I attribute that to him being able to identify as who he truly was."

18. After being told of the ban, P. S. described his feelings during the public hearing. "I was sad and kind of angry [about the ban]. Why? Because I didn't want the other kids to

think, like, I was different. Because all the other boys got to use the boys' bathroom. All the other boys except for me." "[I was] upset, like sad. Mad [about the ban]."

19. Andrea E. described P. S. as being "surprised." "[He]asked why [he was treated differently] and was "disappointed and quiet."

20. No other students were barred from their respective communal restrooms or required to use a staff restroom.

21. P.S. prepared for "Specials" by monitoring his fluid intake, explaining it was done by "trying not to drink, like, as much water." "When we had to go out of the classroom – offered drinks, I would not go." He would just "hold it."

22. Andrea E. testified that P.S. shared with her his reasons for gauging his fluid intake at school. She said, "Sometimes it was because of the bathroom situation, because he wasn't allowed to use the communal restroom, and then other times he had just general anxiety about being in the single-user [male staff] restroom by himself." The door did not have a lock.

23. On occasion, P.S. did not want to go to school, because of the "restroom situation." Once, the school had to contact Andrea E. and request she pick up P.S., as he was "anxious," "because of the restrooms."

24. P. S.'s distress was great enough that he expressed to Andrea E. his desire to transfer to a different school, "because other students (at Komarek) would possibly notice that [he couldn't use the boy's bathroom]."

25. P.S was also "worried" that other students might see him use the male staff restroom and "pick on him."

26. Throughout the ban, Respondent's internal student support mechanism continued to assist with P.S.'s transition.

27. Kleinschmidt wrote on April 7, 2015, to Andrea E., "I assure you that I will continue to advocate for P.S. and his needs no matter what. I do not want any of these decisions to affect our working relationship."

28. From June 5, 2015, through August 25, 2015, the school was on summer vacation.

29. On August 26, 2015, the school year began with its restroom ban still in effect, and its distresses suffered by P.S.

29. Respondent lifted the ban on October 15, 2015.

30. After the ban was lifted, Andrea E. observed P.S. was "mostly very happy" with the news, but remained "cautious," because it would only remain "until the final decision of the case." P.S. testified that the decision made him "relieved" and "made him feel like one of the boys." Klienschmidt remarked that P. S. "blossomed." She said, "He was very excited."

31. Andrea E. testified that throughout the ban, P.S. remained "smart, especially in math. He is funny. He is very sensitive to others and very caring. He likes to swim and rock climb." The school records show P.S. was and is an "excellent" student, and became one of the organizers of a recycling program. After the ban, Kleinschmidt remarked that "P. S. became a really good advocate for himself."

32. In February 2016, Kleinschmidt wrote to Andrea E., "I just wanted to update you. P. and I have been meeting every week, and I just wanted to let you know that he has been reporting lots of positives, which is great to hear. I also wanted to touch base with you both to see if there is anything in particular you would like me to work on with P, or if check ins are sufficient. During our check in sessions he is given an opportunity to tell me any positives or negatives about his week, and so far, he has had only positives (yeah!), as well as discusses anything else he would like to discuss. I feel that he is really enjoying our time and want to make it as beneficial as possible. I also want to encourage you to let us know if he is reporting anything to you, that he may not be reporting to us at school."

33. In April 2016, after Andrea E. wrote to Kleinschmidt, Kleinschmidt shared with her, her positive observations of P. S.: "That is wonderful to hear! I agree, I have noticed him

playing with many different people, and he seems to have made even more friends. He seems very happy, which is wonderful to see."

34. Complainants retained the Chicago law firms of Schiff Hardin, LLP, Barack Ferrazzano Kirschbaum & Nagelberg, LLP, and Roger Baldwin Foundation of ACLU, Inc. The Complainants represented that Ghirlandi Guidetti (RBF) logged 439.20 hours at $200.00 per hour; John Knight (RBF) logged 248.36 hours at $475.00; Emily Gesmundo (BFKN), 275.06 hours at $375.00; [1] Emily Gesmundo (Schiff) 413.75 hours at $375.00, and Joseph Krasovec, 138.25 hours at $600.00. The amount of fees initially totaled $551,616.00, but Complainants unilaterally lowered the requested amount to $350,000.00.

35. The requested hourly rates for the attorneys are reasonable, but for Mr. Krasovec, whose hourly rate was lowered to $500.00.

36. Certain hours billed are unreasonable, duplicative, and/or excessive. As such, deduction in fees and costs are proper.

36. Complainant has demonstrated that he is entitled to attorneys' fees in the amount of $100,000.00 plus costs in the amount of $3,610.00.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter.

2. The March 15, 2018, RLD is incorporated herein by reference.

3. In accordance with the March 15, 2018, RLD, Respondent is liable for its violations of the Act that prohibit discrimination based on sexual orientation, related to gender identity, in a public accommodation, and disability, gender dysphoria.

4. Complainant P. S. has proven by a preponderance of the evidence that he has suffered emotional distress from the actions of Respondent to the magnitude that he is entitled to an award of emotional distress damages.

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[1] A review of the logged amount charged by Gesmundo with the Chancery action was calculated at $386.00 per hour.

5. A prevailing complainant may recover reasonable attorneys' fees and costs.

DISCUSSION

Introduction

As a result of the March 15, 2018, RLD, there has been a finding of liability against Respondent. Therefore, it is not necessary to analyze the facts with the elements of the underlying causes of action. Based on the evidence, Complainant P.S. sustained actual damages.

Actual Damages

The Act provides for an award of actual damages. Section 5/8A-104(B). Actual damages include "indemnification for inconvenience, mental anguish, humiliation, embarrassment, expenses, and deprivation of Constitutional rights." Ayers and Johnson, IHRC, ALS No. 3375 (K), October 3, 1991, quoting Moorhead v. Lewis, 432 F. Supp. 674 (N.D. Ill. 1977).

Emotional Distress

P.S. suffered mental anguish, humiliation, inconvenience, and embarrassment, caused by Respondent's intentional prevention of his access to and use of the school's communal boys' restrooms, as well as restricting his choice to the use an adult male staff restroom, when P.S. was not in his assigned classroom, solely because of his sexual identity and disability.

The burden for the relief sought by P.S. is proof by a preponderance of the evidence. Village of Bellwood v. Illinois Human Rights Commission, 184 Ill.App.3d 339, 541 N.E.2d 1248 (1st Dist.1989); Schuler and Sears Logistics Services, Inc., IHRC, ALS No. 05-0315, September 21, 2006. The act of violating a person's civil rights, by itself, is insufficient to support an award for emotional distress damages. Garrity and Lockett, IHRC, ALS No. 6389, May 3, 1996.

Two elements of proof are needed to establish a claim for damages: 1) proof of actual harm or injury; and 2) proof that the unlawful conduct caused the harm or injury. Schuler, *supra.*

The probative factors in determining the amount of an emotional distress award in a totality of the circumstances analysis are the *nature* of the violation that caused the injury, its effects, the injury itself, and the *duration* of the suffering experienced by the complainant. (Emphasis added) ISS International v. Illinois Human Rights Commission, 272 Ill.App.3d 969, 651 N.E. 2d 592, (1st Dist. 1995); Gipson and H.P. Mechanical, Inc., and Steve Hathorne, IHRC, ALS No. 06-060C, August 3, 2007.

In Bellwood, *supra*, as here, no medical evidence was adduced during the public hearing. Although helpful, documented medical evidence or expert testimony is not required prior to awarding damages. [2] Id.; Brown and American Highway Technology, IHRC, ALS No. 10805, January 2, 2003. It is possible to suffer demonstrable emotional distress without seeking medical treatment. Clark and Windy City Waste & Recycling, Inc., IHRC, ALS No. 03-0059, May 17, 2005. [3]

Analysis

The testimony of Andrea E. supports the argument that P.S.'s mental distress could not have begun until April 8, 2015, when he first learned of the school's ban, and not March 6, 2015, the date when the decision was conveyed to his mother during a meeting. Until P.S. knew of the prohibition, no credible measure of its effect on P.S. could be established. In fact, Andrea E. intentionally postponed communicating the school's decision with her son as not to undermine his newly developed "confidence." P.S. was "completely integrated with the school and he was becoming so confident, I thought that he wouldn't want to wait for my green light anymore. He was so comfortable [at school] that I thought at some point he would just start walking into the

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[2] The reference to Dr. Ettner, an affiant cited in the RLD, is inadmissible here, as he did not testify at the public hearing.

[3] In this case, P.S had medical attention and guidance for gender dysphoria during the period of the ban, but no healthcare treaters were called to testify at the public hearing. However, no negative inference was inferred.

boys' bathroom. So at his most confident, I had to tell him that he could not use the boys' bathroom..."

Kleinschmidt, Respondent's social worker, had known P.S. since Kindergarten, and took it upon herself during his transition to be Respondent's primary intermediary between it and P.S., his family, and Lurie. Kleinschmidt observed, "When we [Respondent] were utilizing P.S. as his [male] name and then when we also started using male pronouns, I really saw him brighten up. And seem happy, and just, you know – I attributed that to him being able to identify as who he truly was." In other words, P.S. was confident and comfortable just prior to learning of the school's ban, and, as such, that will be the starting point for measuring P.S.'s emotional distress.

Once P.S. was told of the ban, he experienced the embarrassment and humiliation of being publicly treated differently than the entire student body pertaining to a very sensitive and personal matter. He changed from a "happy" child to one suffering from an isolating stigma, anxiety, shame, and worry, as testified by three compelling witnesses: P.S., his mother, and the school's social worker. [4]

P.S testified, "I was sad and kind of angry [about the ban]. Why? Because I didn't want the other kids to think, like, I was different. Because all the other boys got to use the boys' bathroom. All the other boys except for me." "[I was] upset, like sad. Mad [about the ban]."

Besides making P.S. feel "different," he was also humiliated by Respondent's directive to only use the adult male staff restroom when he was outside his classroom. Other seven and

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[4] Michael S. is a caring father of P.S., but he testified that he "did not talk to P. S. about the decision, (his) mom did." Michael S.'s testimony that he noticed "changes" was undercut by further stating that P.S. did not "explicitly" share with him or did Michael S. inquire into the reason for the "mood change." Thus, Michael S. testimony of P.S. being "depressed and morose" is speculative. Emotional distress award must be based on something more than speculation. Zerwekh and Village of Niles Board of Fire and Polic Commissioners, IHRC, ALS No. 4156, August 2, 1996; Rose and Brady Jones, IHRC, ALS No. 10-0360, April 3, 2012.

eight-year-old students had the option of either using the classroom restroom or the communal restroom of their sexual identity.

Andrea E. testified about the distress, "Sometimes it was because of the bathroom situation, because he wasn't allowed to use the communal restroom, and then other times he had just general anxiety about being in the single-user [male staff] restroom by himself." (No lock secured the door.)

The ban also resulted in P.S. believing it was necessary to monitor his daily fluid intake to avoid the "anxiety" of restroom logistics. A way for gauging fluid intake was to "avoid having to go" altogether, by just "holding it" by means of "trying not to drink as much water." P.S. explained, "We still had to be out of the classroom [where a restroom existed] for multiple times a day for a pretty long time." For example, P.S. was expected to participate in daily "Specials." There were many times P.S. had an opportunity to go out of the classroom to have a drink but he would remain there despite being thirsty. Along with the distress of surveilling his fluid intake, P.S. also suffered the physical discomfort of "holding it" and remaining thirsty.

P.S.'s distress rose to such an intensity that he expressed his reluctance to attend school. In one instance, he returned home early, because he was "anxious." P.S. even discussed dropping out of school, and enrolling in a different one, because he was "worried" about other students "picking on him."

On June 5, 2015, the school year ended, and P.S. was released from the ban's accompanied distresses and necessary maneuvers. All in all, the summer of 2015 was active and fun, as P.S. felt free to use any of the public male restrooms during family excursions. Nevertheless, a thread of apprehension persisted throughout the summer, increasing in degree, as the new school year approached.

On August 26, 2015, third grade began for P.S., and with it, the ban, with all its distresses, as discussed above.

Then, on October 15, 2015, Respondent lifted the ban. P.S. said that the decision "made him feel like one of the boys," and "relieved." Kleinschmidt testified that P.S. "blossomed. It was a great year." She testified that "He was very excited."

By the time P.S. entered fourth and fifth grade, counseling with Kleinschmidt lessened, and "P.S. became a really good advocate for himself." P.S.'s grades continued to be excellent, additional friends were made, and he even organized the school's Recycling Rangers with Superintendent Gannon. In February 2016, Kleinschmidt wrote to Andrea E. with her assessment of P.S.: "During our check in sessions he [P.S.] is given an opportunity to tell me any positives or negatives about his week, and so far, he has had only positives (yeah!)..." In April 2016, Kleinschmidt wrote to Andrea E., in part, "He seems very happy, which is wonderful to see."

Emotional Distress Damages

Complainant seeks emotional damages award of $35,000.00. Contrary to the parties' assertions, emotional distress awards are not well suited to ready mathematic calculation. Ultimately, determining the amount of an award is an "act of judgment and discretion." Clark and Windy City Waste & Recycling, Inc., IHRC, ALS No. 03-059, May 17, 2005.

Determining an appropriate award of monetary damages for emotional distress has proven to be difficult when one tries to base the figure solely upon other Commission cases. That is because it is difficult to measure with precision the monetary value of a particular individual's distress versus the distress felt by another individual. Damages for emotional distress are based upon the level of distress felt, not the source of that distress. Kuhlman and The Korner House, IHRC, ALS No. 9696, November 24, 1997. In fact, in a 2015, Windsor Clothing Store v. Illinois Human Rights Commission, et al., 2015 IL App (1st) 142999, 41 N.E.3d 983 (1st Dist.), the Appellate Court rejected citing past cases of the Commission with lower damages to decide excessiveness of the current award. "Although... cites several Commission orders in which lesser amounts were awarded for emotional distress, 'courts in Illinois have

traditionally declined to compare damages awarded in one case to damages awarded in other cases in determining whether a particular award is excessive.'" Windsor, quoting Drakeford v. University of Chicago Hospitals, 2013 IL App (1st) 111366, 62, 994 N.E.2d 119.

Windsor is a case where an employee followed a customer, who was African-American, from one end of the store to the other during the 30 minutes she was shopping. Once home, the customer cried, had difficulty sleeping, and headaches, but did not see a doctor. The ROD issued recommended an amount of $25,000, for this single limited 30 minute event when nothing was said and not access was denied.

In this case, there was a "public incident" that had "embarrassing repercussions," but here the public discriminatory act was continuous over months with multiple repercussions. Unlike other school rules, this policy was exclusively imposed on one young child and enforced by the watchful eyes of Respondent's administration, faculty, and staff.

Furthermore, the ban herein publicly stripped the essence of P.S., "being able to identify as who he truly was." It also compromised the cooperativeness of Respondent's past support with P.S. As P.S. testified, "Because I didn't want the other kids to think, like, I was different, because all the other boys got to use the boys' bathroom." He testified that the policy excluded "All the other boys, except for me."

Being "different" is a terrible fate for any child who is daily obligated to attend a closed societal institution made up of the same people year after year, grade after grade. The level of cumulative anxiety grew to a level that P.S. considered transferring to another school to escape the daily humiliation of being "different" and the physical discomfort of monitoring water intake and "holding it."

On June 5, 2015, a temporary reprieve came with the summer vacation.

On August 26, 2015, with the beginning of the school year, the variety of distresses returned in force, as the ban resumed.

On October 15, 2015, the ban was lifted. A resilient P.S. felt he was "one of the boys." However, by that time he had suffered a culmination of miseries for months. As a result, Respondent is liable for the anguish, anxiety, humiliation, fear, isolation, inconvenience, and embarrassment caused by its exclusive public ban and restriction.

There is no "good faith" affirmative defense to a violation of the Act. Moreover, as discussed in the RLD, the degree of emotional distress caused may be mitigated or aggravated by respondent's behavior.

Here, it is noted that Respondent attempted to remain a caring and supportive place, notwithstanding its intended violation of the Act. It kept a long held special relationship with its student, described in general legal terms as in *loco parentis*, "in the place of the parents." Kleinschmidt had known P.S. from Kindergarten and coordinated his transition from the start, and met with him on a weekly basis. She communicated with his parents, Lurie, and the administration, as well as acted as an internal school advocate for P.S.

It was also Respondent who initially supported P.S, and his "confidence." It permitted P.S. to use his male name, masculine pronouns, and welcomed his change of appearance. It also coordinated the reintroduction of P.S. to the student body and prevented any misunderstanding, confrontation, or mischief by other students. A faculty seminar was even conducted about gender dysphoria. Respondent continued to reassess its ban, which led to its change of position. Even immediately after the ban was in place, Kleinschmidt wrote to Andrea E., "I assure you that I will continue to advocate for P.S. and his needs no matter what. I do not want any of these decisions to affect our working relationship."

Another mitigating factor was that the second and third grade classrooms had their own restrooms, as their primary facilities, compared to the upper grades, where they had to exclusively use the communal restrooms, as there were none in their classrooms.

Finally, the duration of the emotional distress was limited: April 8, 2015, to June 5, 2015, and August 26, 2015, to October 15, 2015, with a thread of worry during the summer.

Nevertheless, the weight of the evidence and the testimony at the hearing concerning the nature and duration of the acts of discrimination support an award for emotional distress greater than what has been requested, but lower than cases with significant more serious and aggravating factors.

Respondent is liable for the cumulative distress P.S. suffered every day, due to Respondent's public and continuous intentional act of discrimination against this child of tender years in a closed societal institution. Therefore, given the evidence that Complainant suffered serious emotional distress, I find an award of $35,000.00 to be inadequate. I find that $55,000.00 for emotional distress damages is fair and reasonable under all of the circumstances presented by this case.

Cease and Desist

Since there has been a finding of liability, it is recommended that Respondent be ordered to cease and desist from violating the Act in the future. See Section 8A-104(A) of the Act.

Public Accommodation Admittance/Services

Considering the finding of liability, it is recommended Respondent, as a Public Accommodation, be ordered to allow Complainant P.S. access to its boys' communal restrooms. See Sections 8A-104(E) and Section 5-102.2(2) of the Act.

Attorneys' fees

Section 8A-104(G) of the Act provides to a prevailing complainant all or a portion of the costs, including reasonable attorneys' fees, incurred in maintaining the action. As the Commission has recognized, the purpose for the Act's provision for an award of attorneys' fees is to facilitate litigation brought by aggrieved parties, who are often penurious, with meritorious claims under the Act. For this reason, the Commission has directed that this provision of the Act is to be liberally construed. Slamar and Roadway Express, IHRC, ALS No. 1472, November 25, 1986.

Just as significant is that excessive, inaccurate, duplicative, or otherwise unwarranted fees must be cut. Bard and Cassidy Tire Company, IHRC, ALS No. 3095, May 4, 1990. "The amount of the award of attorneys' fees depends upon whether the work was reasonably required and necessary for the proper performance of the legal services under the circumstances." Rackow v. Illinois Human Rights Commission, 152 Ill. App. 3d 1046, 504 N.E. 2d 1344 (2d Dist. 1987). To these ends, the Commission has regularly admonished its judges to scrutinize any fee petition to ensure that the amount awarded is fair and reasonable. Walsh and Village of Oak Lawn, IHRC, ALS No. 321, March 25, 1982, rev'd on other grounds sub nom. Village of Oak Lawn v. Illinois Human Rights Commission, 133 Ill. App.3d 221, 478 N.E.2d 1115 (1st Dist. 1985).

The burden is upon the party making the fee request to justify the amount being sought. Id. Complainant has petitioned for attorneys' fees in the amount of $350,000.00, plus costs of $8,013.75.

Hourly Rates

When considering a fee petition before the Commission, the first task is to establish a reasonable hourly rate. Clark.and Champaign National Bank, IHRC, ALS No. 354(J), July 2, 1982. Here, Complainant seeks to recover $475.00 per hour for the time of John Knight and $200.00 per hour for Ghirlandi Guidetti. Both are attorneys at Roger Baldwin Foundation of ACLU, Inc. The amount of $600.00 per hour is requested for attorney Joseph Krasovec of Schiff Hardin, LLP. $375.00 per hour is requested for legal work performed by attorney Emily L. Gesmundo of Barack Ferrazzano Kirschbaum & Nagelberg LLP.

Affidavits of John Knight, Ghirlandi Guidetti, Emily Gesmundo and Joesph Krasovec and other documents have been provided by Complainant to support those requests.

Attorney John Knight is an experienced attorney, while Ghirlandi Guidetti is new to the profession. However, both attorneys concentrate in the area of discrimination law in general,

and specifically in legal matters of the GLBT (Gay, Lesbian, Bi-sexual, Transgender) communities. Their hourly rates are reasonable.

Joseph Krasovec is also an experienced attorney in litigation. He has averred that he was active in this case before the Commission, as well as before the Cook County Circuit Court-Chancery Division. However, Krasovec's affidavit is too vague as to his past practice, authorship, etc. to go beyond the current hourly fee threshold of $500.00 per hour before the Commission.

I find the hourly rates reasonable for the attorneys practicing in the geographical area of Chicago, Illinois, but for Mr. Krasovec, whose hourly rate is decreased to $500.00 per hour.

Therefore, I recommend that the Commission base its award on the attorneys' rates cited above.

Number of Hours for Services Performed by Attorneys

Once the Commission determines an appropriate hourly rate, it must determine the number of hours reasonably devoted to the matter.

Standards for an award of reasonable attorneys' fees are set out in Clark, which allows for an upward or downward adjustment of the fees petitioned. It has even been held that a request for attorney's fees can be completely denied when the claim is "manifestly unreasonable." Clark, citing Brown v. Stackler, 612 F.2d 1057 (7th Cir. 1980).

Analysis

On January 8, 2016, a complaint was filed with the Commission. Discovery before the Commission was limited, as a portion of it was conducted as part of the case before the Circuit Court of Cook County-Chancery Division. [5] However, supplemental discovery was conducted and mutual motions to compel were filed, with corresponding oral arguments. A second motion

[5] The Complainants filed an unsuccessful petition for Temporary Restraining Order and were preparing for a preliminary injunctive hearing by serving discovery requests on Respondent.

to compel was filed by Complainant and was also heard. Later, Respondent unsuccessfully moved to dismiss the case, pursuant to Section 8-105(C), arguing that the matter should have been settled based on its proposed offer. Complainants successfully moved for a summary decision on liability. As a result, a public hearing on damages was held on August 28, 2018, where Complainant called three witnesses and Respondent called two.[6] Post hearing briefs were submitted.

The Complainants represented that Ghirlandi Guidetti (RBF) logged 439.20 hours at $200.00 per hour; John Knight (RBF) logged 248.36 hours at $475.00; Emily Gesmundo (BFKN), 275.06 hours at $375.00; [7] Emily Gesmundo (Schiff) 413.75 hours at $375.00, and Joseph Krasovec, 138.25 hours at $600.00. The total amount of fees petitioned is $551,616.00.

Complainants' Unilateral Decrease of Attorney's Fees

Complainants informed the Commission that they "exercised (their) billing judgement" by reducing the total legal fee from $550,000.00, to the petitioned $350,000.00. Although the reduction is gracious, the make-up of the amount unilaterally struck is unknown. If it is made up of that which should not have been included in the first place, then it is no benevolent act, but an expected conformation. Unfortunately, Complainants do not present any authoritative guidance that their unilateral decrease has any bearing on the evaluative process for the remaining $350,000.00, as required by the cases discussed above.

Complainants' Chancery Action before the Circuit Court

Specifically, Section 8A-104(G) explains the Commission's jurisdictional parameters for granting Attorney's Fees and Costs: "Pay to the complainant all or a portion of the costs of maintaining the action, including reasonable attorney fees and expert witness fees, incurred in maintaining this action before the Department, the Commission and in any judicial review and judicial enforcement of proceedings."

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[6] No Pre-Hearing Memorandum or Motions in Limine were filed by the parties.

[7] A review of the logged amount charged by Gesmundo with the Chancery action was calculated at $386.00 per hour.

All remedies available to the successful complainant are statutory. Here, Complainants petitioned the Commission's judge to recommend payment for attorneys' fees, costs, and expert witness fees expended before the Circuit Court for injunctive relief. However, the circuit court is a tribunal other than the Department or Commission, and the court was not involved in any "judicial review" or a "judicial enforcement proceeding" of an order or decision stemming from the Department or Commission. In addition, the statutory perquisites were not met, as no violation was found, the TRO was denied, and the case was settled and dismissed. Therefore, the Commission does not have jurisdiction to award attorney's fees or costs or expert witness fees related to Complainants' unsuccessful Circuit Court action.

The entries logged and invoiced by Complainants for legal services performed before Circuit Court -Chancery Division were deducted from the total of $350,000.00:

John Knight – 92.7 X $400.00 = $37,080.00;

Ghirlandi Guidetti – 87.3 X $200.00 = $17,460.00;

Emily Gesmundo – 268.75 X $386.00 = $103,737.50;

Joseph Krasovec – 46.8 X $600.00 = $28,080.00.

The total amount petitioned $350,000.00 - $186,357.50 (Legal Fees invoiced for Injunctive Relief before Cook County Circuit Court- Chancery Division) = $163,642.50, the alleged legal services performed before the Department and Commission, which is yet to be assessed. Costs are discussed below.

Final Determination-Attorneys' Fees and Costs

The Clark analysis begins with the content of the billing invoice. It should be specific as to the hourly rate, time spent, amount charged, and a detailed description of the legal services performed. In addition, the Clark standards include: 1) the extent to which the party has prevailed; 2) the nature of the controversy; 3) the amount involved and the result obtained; 4) the novelty and difficulty of the subject matter; 5) the attorney's skill and standing in the legal community; and 6) the adequacy or inadequacy of the representation.

In general, the nature and novelty of the instant case is quite standard for a denial of access to a public facility because of a person's protected class. Here, it was less difficult to meet the burden of proof, because, in the simplest of explanations, P.S. directly asked Respondent if he could use the boys' communal restrooms as part of his transition, and Respondent said no.

Complainant's attorneys averred that their expertise was in the area of discrimination law, specifically LGBT issues. Experience was cited as the primary basis to justify their higher hourly rates. However, the amount of time logged by them runs contrary to that knowledge, especially, as here, where Respondent all but admitted the pled allegations from the start of the case. Discovery issues were not out of the ordinary and were resolved. The successful dispositive motion filed by Complainant resulted in the avoidance of a public hearing on liability, with all its multifaceted preparation and presentation. The only public hearing held was on the narrow issue of damages, litigating only one day with limited witnesses, and no expert witnesses.

Complainants cannot have it both ways. They cannot claim extensive expertise and then bill as if they had little.

For example:

An estimated thirty-seven hours was spent on the subject of "disability;"

An estimated twenty-one hours was needed on "bathroom research;"

An estimated thirty hours was logged for drafting a complaint to be filed at the Commission (The complaint could have been drafted and filed by the Department at no cost, or could have been as simple as stapling the Department's charge onto the Commission's pre-printed form.);

An estimated nine hours on researching the "Statute of Limitations;"

An estimated four hours used to "research" the "filing procedure of the Department;"

An estimated one-hundred and seven hours for the Complainants' dispositive motion filed at the Commission and another fifty-two hours needed for the reply; [8]

An estimated thirty-seven hours for supplemental discovery, separate from the Circuit Court action;

An estimated forty-three hours discussing settlement, separate from the Circuit Court action;

An estimated eighty hours to draft a response to Respondent's Section 8-105 motion;

An estimated one hundred and seventy-five hours for preparation and the public hearing.

In general, "research" was too abundant, much of it seemed for the researcher's own education or edification, rather than for the case litigated, or information that should already be known to an experienced attorney. In addition to the above examples, others topic include, but are not exclusive: "Other district policies," "Bullying," "Hearsay Exception for Transgender Child," "Public records on Pelicci (Former Superintendent)," "Complaint with the Educational Opportunities Section," "Press," "Pro Bono."

In Kuhlman and Korner House, IHRC ALS No. 9696, November 24, 1997, the judge commented, "It is unclear precisely why such research was needed or whether that information was ever used in Complainant's case."

Inter and intra office communication should be an effective and economic tool, saving both time and legal fees. It is not a means to double or triple legal fees. In this case, it seemed that each lead attorney was equally involved in every aspect of the litigation, as frequently used descriptions peppered throughout the invoice are: "attorney team," "updates," "strategizing," "conferences," "emails," "calls," "debriefing calls," "analyzing," "meetings," and "confer," "circulate to team," "prep," and "debriefing call."

Complainants' attorneys' billing invoices are inadequate for the total amount petitioned and charged. The attorneys' billing uses vague terms like "review," "drafting," "revising," "edits,"

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[8] It should be noted that Respondent did not plead any affirmative defenses in its answer.

"reviewing," and "finalize," "strategizing," "research," "emails," "review emails," "revise emails," "analyze," "call with client," "review and edit," "review and draft," "review and revise," "confirm," quite abundantly throughout the invoice print out listings, without describing the content of the activities. In numerous instances, these presumed legal services are grouped together with other actions, including clerical work or travel, to extend or fill in blocks of time. Further, large blocks of time are made up of repeated work. Travel time or time spent organizing files or conferring with a client on the status of the case is clerical or worth less than time spent on trial or in the performance of substantive legal functions. Allen and Aero Services International, Inc., IHRC, ALS No. 3150(R), June 26, 1996; Davenport and Hennessey Forrestal Illinois, Inc., IHRC, ALS No. S-3751(R), November 20, 1998; Booth and Brooks Precision, Inc., IHRC, ALS No. 10886, June 25, 2003.

Complainants' attorneys submitted an abundant time log that reached upwards of an estimated third of a million dollars in fees. I must adjust the petitioned fees downward to a fair figure, more in line with the content of the discrimination case and the expertise claimed. Respondent should not be responsible for disproportional fees.

The decision in Prem T. Lalvani and Cook County Hospital, IHRC, ALS No. 4809, January 30, 1998, stated, "In a situation such as this, where an item-by-item accounting of excessive or non-essential entries would be virtually impossible, the federal courts have adopted the 'arbitrary but essentially fair' method of simply reducing the total number of hours by a percentage that appears to be accurate overall." Id, citing Pachowicz and Aero Testing and Balancing Systems, Inc., IHRC, ALS No. 1412, March 31, 1988, aff'd on appeal sub nom, Aero Testing and Balancing Systems, Inc. v. Illinois Human Rights Commission, 185 Ill.App.3d 956, 541 N.E.2d 1229 (1st Dist. 1989); Cline and Consumers Systems, IHRC, ALS No. 4944R, October 2, 1997.

Complainant's $350,000.00 minus $186,357.50 (Legal Fees invoiced for Injunctive Relief before Cook County Circuit Court- Chancery Division) = $163,642.50, attorneys' fees that are

excessive and unreasonable, and an adjustment is necessary. The resolution is to follow the "arbitrary but essentially fair" method of simply reducing the total amount of attorneys' fees to a level that appears to be accurate, fair and reasonable overall.

Accordingly, I have carefully looked at the amount and have weighted the factors cited in Clark. All doubts in the calculation of attorney's fees must be resolved in favor of Respondent. Lemery and Balmoral Racing Club, Inc., IHRC, ALS No. 11835, February 1, 2006. Complainant should be awarded $100,000.00 in attorneys' fees for the work before the Department and Commission.

Costs

Complainant has also included a request for reimbursement of $8,013.75 for copying, postage, parking, express mail, messager services, travel, including airfare, transcripts, Westlaw, Lyft, filing fees, and taxis, as well as $3,887.50 for Dr. Ettner.

Commission precedents hold that failure to present evidence that copying, postage, and miscellaneous expenses are routinely billed to the clients leads to the presumption that those expenses were incorporated into the attorney's hourly fee. Bordner and Hirsch, IHRC, ALS No. 5664, September 30, 1998. In addition, here the costs for the Circuit Court action are excluded, as best as can be distinguished, from the case before the Department and Commission. Except for the updated records from Lurie Children's Hospital, a copy of Department records, transcripts of August 28, 2018, hearing, and half of the witness fees (the affidavit of Dr. Ettner was used by Complainant as part of their summary decision and stipulated too by the Respondent), and half of the Westlaw research, all requests for costs are denied.

Therefore, it is recommended that Complainant receive a total of $3,610.93 for the allowable costs associated with the matter.

RECOMMENDATION

Based upon the foregoing, it is recommended that the RLD be sustained and that an order be entered awarding Complainants the following relief:

1. Order Respondent to pay Complainant P.S., $55,000.00, as compensation for his emotional distress;

2. Order Respondent to cease and desist from sexual orientation discrimination, sexual identity, in a public accommodation, and disability discrimination, gender dysphoria;

3. Order Respondent to permit Complainant access to its boys' communal restrooms;

4. Order Respondent to pay Complainant $100,000.00, as attorneys' fees for services performed;

5. Order Respondent to pay Complainant $3,610.00 for costs.

HUMAN RIGHTS COMMISSION

BY:

WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINSTRATIVE LAW SECTION

ENTERED: February 4, 2019