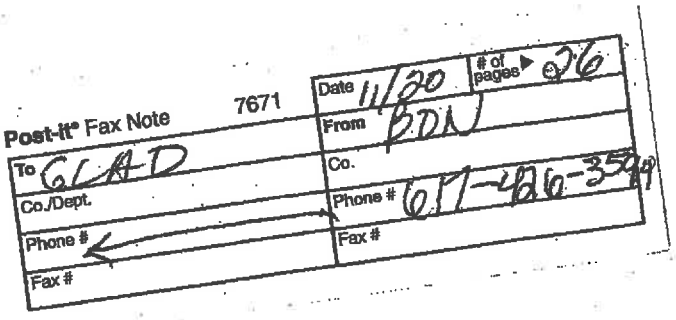


STATE OF MAINE
PENOBSCOT, ss.

JOHN DOE and JANE DOE, as parents
And next friend of SUSAN DOE, *and*

MAINE HUMAN RIGHTS COMMISSION

Plaintiffs,

v.

DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

KELLY CLENCHY, *et al.*

Defendants,

The parties[1] have filed rival motions for summary judgment concerning Count I of the amended complaint, discrimination in education, and Count II,[2] discrimination in public accommodation. In addition, Defendants move for summary judgment on Count IV, discrimination in education based on harassment and the "eyes on" policy, and Count

[1] By stipulation of the parties, only Regional School Unit 26 remains as a named Defendant in this action. All other Defendants have been dismissed pursuant to M.R. Civ. P 41(a).

[2] The parties advance different legal theories in their analysis of the issues raised in Counts I and II of the Plaintiffs' complaint. Part of the confusion arises from their different interpretations of the Court's Order on the earlier motion to dismiss. In that Order, the Court merely ruled that the requirement of making reasonable accommodation applies only to disability discrimination cases and certain workplace discrimination cases, but not to gender or sexual orientation discrimination. In the Maine Human Rights Act, it is clear that proof of a failure to make reasonable accommodation in certain situations is discrimination itself. *See* 5 M.R.S.A. § 4592(1). By ruling that there is no reasonable accommodation requirement in this type of case the Court was only stating that this mode of proof of alleged discrimination was not available to Plaintiffs in this case, but the ruling in no way was dispositive of the issue of whether the Defendant engaged in discrimination in education or public accommodation based on sexual orientation. The Court may have contributed to the possibility of misinterpretation by indicating in the prior order that plaintiffs could still prevail by proving that the Defendant discriminated against Susan by "forcing" her to use a staff restroom, a description that overstates the Plaintiff's burden in proving discrimination in this context.

V, discrimination in public accommodation based on harassment and the "eyes on policy."[3] The Court now decides those motions.

I. BACKGROUND

The Court finds that there is no genuine issue of material fact with regard to the following factual narrative, unless noted specifically in the narrative.

John and Jane Doe are the parents of Susan,[4] who was a student in the Orono public schools. Susan is a transgender youth who is a biological male, but who has always gender identified as a female.[5] Susan attended the Asa Adams School in Orono, Maine, from first grade to fifth grade. Beginning in third grade, Susan began using the girls' single stall restroom and the school permitted her to do this. Throughout grades 1 through 4, the school staff, administration, and student body were supportive of Susan. Susan's parents found the school's guidance counselor and principal to be very helpful, and Susan had a strong support system of friends.

Throughout this period Susan was seeing a counselor because of anxiety. Susan's parents were worried that Susan's educational experience would change as she progressed into the fifth grade, and they met with teachers and administrators of the school to prepare for her upcoming year when it was anticipated that she would begin to be addressed by a female name. The school formed a 504 team and implemented a 504

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[3] Count III, intentional infliction of emotional distress has been dismissed with prejudice by stipulation.

[4] For purposes of confidentiality the transgender student is referred to as Susan throughout this opinion.

[5] "Transgender is an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth. Gender identity refers to a person's internal sense of being male, female, or something else; gender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics." American Psychological Association, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 1 (2011), *available at* http://www.apa.org/topics/sexuality/transgender.aspx.

plan after holding a meeting to be proactive with respect to Susan's diagnosis of gender dysphoria.[6]

At the meeting, Susan's parents provided the school with a letter from Susan's counselor that informed school officials that Susan needed a safe restroom and pointed out that other municipalities provided students such as Susan a gender-neutral restroom. It is undisputed that both the school and Susan's parents understood that it would be unacceptable for Susan to use the boys' restroom, and this alternative was collectively determined to be an inappropriate option. It is also undisputed that Susan would have been unwilling to use the boys' restroom even had the school attempted to mandate such use. (Def.'s S.M.F. ¶ 46.)

The 504 plan established that Susan would start the year using the girls' restroom, but a nearby staff restroom was designated as a default facility. The meeting notes of this meeting state:

> Restroom use for grade 5 – 2 options – shared female facilities (unless becomes an issue) or use staff, which has been used by peers for other reasons. Parents were concerned w[ith] the reactions from other parents of female students. [Susan] has used female facilities but grade 5 they become a shared facility. Recommendations from staff was [sic] to continue with female restroom with the "default" the gender neutral staff restroom.

(Def.'s Doc. No. 19-20.)

The parties do not agree on what type of issue would have been required to trigger the default. Plaintiffs insist that the team agreed that Susan would use the girls' restroom

[6] A 504 team consists of a student's parents and school officials who meet to try to agree on accommodations that may be necessary for a disabled student. Though not identifying Susan's sexual dysphoria as a disability, the team was nonetheless formed to provide Susan with the benefits of its counsel. Plaintiffs have not raised disability discrimination claims in this action.

unless it became evident that Susan was uncomfortable doing so, or other female students expressed concern. The Defendants indicate that the type of issue was not specified.

Prior to September 28, 2007, Susan used the girls' restroom without issue. However, on September 28, 2007, a male student, JM, entered the girls' restroom while Susan and her friends were washing their hands. JM used the restroom and then began washing his hands, prompting some girls to run from the restroom screaming. A teacher came into the restroom to remove him. JM objected, stating that he "was a girl using the girls' restroom," and told the teacher that his grandfather had told him that if Susan could go into the girls' restroom, so could he. He was subsequently sent to the principal's office, where he was spoken to and expressed remorse for his actions. It quickly became apparent that JM's grandfather, guardian, Paul Mehaffey, had indeed instructed him to enter the girls' restroom after becoming aware of Susan's use of the girls' restroom, an obvious attempt to register a protest and express his view of Susan's use of the girls' restroom. The parties disagree as to whether JM called Susan a "fag" while he was in the restroom with her.[7] (Def.'s S.M.F. ¶ 66.) Susan described how she felt about the incident as follows:

> I was shocked. I was – it was a whole lot to take in at once. I was uncomfortable. I was disturbed. I felt like – it's hard to explain. It's not anger. It's not fear. It's a lot of just what's going on kind of feeling. And you're shocked. You don't know why this person is in the restroom. You just know that you are probably being insulted a little bit.

(Def.'s S.M.F. ¶ 63.)

[7] While Susan herself does not remember being called a "fag," Plaintiffs offer an expert who will opine that Susan forgot that she was called a "fag" due to a "psychological phenomenon known as 'dissociation.'" (Def.'s S.M.F. ¶ 66.) The school Counselor also made a log entry indicating that Susan had told her that she had been called a "fag" by JM. (Pl.'s S.M.F. ¶ 5.)

On October 3, 2007, JM again followed Susan into the girls' restroom on instructions from his grandfather. The principal spoke to JM again about this incident, and also spoke to his grandparents to let them know that his behavior was unacceptable. The school resource officer and the police also went to speak to JM's grandfather, who informed them that he believed that his grandson had the same right to use the girls' restroom as Susan did. The grandfather agreed to stop sending JM into the girls' restroom if Susan used the staff restroom. The grandfather then contacted the Christian Civic League and significant press coverage began, resulting in Susan's parents keeping her home from school for a few days. Upon her return, Susan's parents attended a meeting with school personnel. Ultimately, the school decided to adopt the default position and in mid October of 2007, over the objection of Susan and her parents, asked Susan to stop using the girls' restroom and begin using the staff restroom, located next to the girls' restroom, during her school day.

Susan complied for a brief period, but eventually decided to resume use of the girls' restroom. The school did not prevent her from doing so. On one such occasion, Susan noticed JM giving her a "creepy look" as she entered the restroom, and Susan's [redacted] watching Susan.[8] For instance, Mrs. Mallory noticed JM observing Susan while she was in the hall and noted:

> [redacted] continued down the hall toward the boys' room. He stood outside the boys' room and continued to watch her as she stood in the hall with some of her friends near the girls' room door . . . [JM] continued to stand and watch [Susan] as she walked down the hall, and did not go into the restroom himself until [Susan] had neared the area of the unisex restroom .

[8] Plaintiffs' expert also opines that Susan forgot about the other instances of JM starring at her because of dissociation. (Pl.'s Resp. to Def.'s S.M.F. ¶ 91.)

> . . . [when JM] left the restroom, he immediately looked up and down the hall until he saw where [Susan] was, who at that point was retrieving her lunch and returning to the classroom. He didn't take his eyes off her until she returned to the room.

(Pl.'s S.M.F. ¶ 57-60.) On another occasion, JM chased Susan down the hall during an after-school event.

Further, JM would often recite things during class that his "grandfather said," including his grandfather's views on "the restroom issue," within earshot of Susan. The parties agree that the tension created by the situation between JM and Susan was not conducive to a good learning environment. Due to the conflict, JM was removed from Susan's class in April of that year, which appeared to make Susan's school experience better. The parties disagree as to whether additional incidents occurred and to what extent [redacted] removed from Susan's class, things went better for Susan.

Susan's 504 team met again on December 6, 2007, to discuss her upcoming transition to the Middle School. At the request of the parents, two experts attended the meeting to discuss transgender issues. It was decided by the school, again over the objection of her parents, that Susan would use a single stall staff restroom at the Middle School and High School.[9] To facilitate this plan, the school refurbished a restroom near Susan's homeroom. It was suitable for one person's use, could be locked, and was labeled unisex. Susan used the unisex restroom usually, but at times would also unilaterally use the girls' restroom. This prompted JM to follow her into the restroom once more on March 10, 2008.

[9] Later in the summer before Susan's sixth grade year, her counselor wrote to school officials, emphasizing that the school provide a safe restroom for Susan to use.

The team met again in June of 2008, at which time Susan's mother proposed that the school assign someone to watch Susan in the hallways to ensure that she was not bothered. An incident at a public pool over the summer prompted Susan's mother to call the school concerning her concerns about Susan's safety at the Middle School, and in response the school offered to hire a so called "eyes on" staff person to keep watch over Susan during transition times in school. Susan's mother consented to "eyes on" as a temporary plan (2 months) to help in the transition and ensure Susan's safety. (Jane Doe Dep. 82.); (Def.'s S.M.F. ¶ 107.) The "eyes on" Ed Tech was instructed to be close enough to Susan to discern when she was uncomfortable, but not within arms length. When the time came to end the "eyes on" program, Susan's mother decided to leave the plan in place in the interest of safety for Susan. (Def.'s S.M.F. ¶ 111.); (Jane Doe Dep. 88.) Susan's mother stated: "We didn't [want the eyes on program], but we realized that something had to be done." (Jane Doe Dep. 87.) She believed that the plan needed to be in place until the "school fix[ed] the problem they created." (Jane Doe Dep. 87.) Mrs. ~~Doe believed that the problem was JM. (Jane Doe Dep. 85.)~~

During after school hours in the sixth grade, Susan was confronted by a group of girls in the library who asked her if she was a girl or a boy. The principal spoke to these girls and Susan never had a problem with them again. Toward the middle of the school

[redacted]

apologize. Susan also complained once that a girl called her a lesbian at school. Similarly, Susan was confronted by a group of girls while she was going into the girls' restroom on one occasion who told her that she could not use the restroom because she was not a girl. Susan's response was to "act screw you," and to use the restroom anyway.

At the end of Susan's sixth grade year, her family moved from the Orono area to place her in another school district.

II. DISCUSSION

A. Standard of Review

In Maine, summary judgment is appropriate when a review of the parties' statements of material facts and the record evidence to which the statements refer, considered in a light most favorable to the non-moving party, demonstrates that there is "no genuine issue of material fact [] in dispute," thereby meriting judgment as a matter of law for the moving party. *Lougee Conservancy v. CitiMortgage, Inc.*, 2012 ME 103, ¶ 12, 2012 Me. LEXIS 103, *11 (Aug. 2, 2012); *Dyer v. Dep't of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821. A contested fact is *material* if it is "one that can affect the outcome of the case," and a fact issue is *genuine* "when there is sufficient evidence for a fact-finder to choose between competing versions of the fact." *Lougee Conservancy,* 2012 ME 103, ¶ 12, 2012 ME. LEXIS at *11 (Aug. 2, 2012). In assessing ambiguities regarding the existence of a genuine issue of material fact, the Court views the summary judgment record in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Cookson v. Brewer Sch. Dep't*, 2009 ME 57, ¶¶ 11-12, 974 A.2d 276.

A plaintiff seeking summary judgment has the burden to demonstrate that there are no genuine issues of material fact within the record as to each element of its claim. *North Star Capital Acquisition, LLC v. Victor*, 2009 ME 129, ¶ 8, 984 A.2d 1278, 1280; *Deutsche bank Nat'l Trust Co. v. Raggiani*, 2009 ME 120, ¶¶6-7, 985 A.2d 1, 3; *Pierce v. Goodman*, 665 A.2d 1004, 1005 (Me. 1995). When cross-motions for summary judgment

are filed, the Court views the record in a light most favorable to the objecting party with respect to each summary judgment issue. *Blue Star Corp. v. CKF Properties LLC*, 2009 ME 101, ¶ 23, 980 A.2d 1270, 1276.

B. Discrimination by Prohibiting Girls' Restroom Use

Plaintiffs first contend that the school's conduct in prohibiting Susan's use of the girls' restroom violated the Maine Human Rights Act by discriminating in both public accommodations and education under 5 M.R.S. § 4592(1) and 4602(4)(A), respectively. Section 4592(1) states in pertinent part:

> It is unlawful public accommodations discrimination,[10] in violation of this Act . . . [f]or any [covered entity] to directly or indirectly . . . discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of . . . sex [or] 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 . . . terms or conditions upon which access to accommodation advantages, facilities, goods, services and privileges may depend.

Additionally, the Act proscribes unlawful educational discrimination, providing that it is:

> [U]nlawful on the basis of sex or sexual orientation to exclude a person from participation in, deny a person the benefits of, or subject a person to discrimination in any academic, extracurricular, research, occupational or other program or activity.

5 M.R.S.A. § 4602(4)(A).

1. Applicability of the Statute

a. School Restrooms Fall Under Section 4592(1)

There is no question that the regulation of restroom usage in a public school is subject to the section 4592(1) prohibitions against public accommodation discrimination because a school is a place of public accommodation and a restroom is a facility. Thus,

[10] The Act defines "discriminate" to include, "without limitation, segregate, or separate." 5 M.R.S.A. § 4553(2).

based on the plain meaning of the statute, it is unlawful to separate or segregate persons in restroom usage by sex or sexual orientation in a school. There is also no question that as a transgender student, the statute protects Susan.[11]

b. School Restrooms Fall Under Section 4602(4)(A) by Virtue of § 4.13

The question of whether restrictions on restroom usage in a public school could constitute educational discrimination is less clear. When the Maine Human Rights Act was enacted in 1983, it prohibited educational discrimination based on sex in five specific areas. 5 M.R.S.A. § 4602(1)(A-E). That statute remains unchanged except for the added prohibition against discrimination in education based on sexual orientation in the same five areas. *Id.* at § 4602(4)(A-E).

The legislature appears to have intended that these five statutorily identified areas be exclusive, for when the original statute was enacted, its Statement of Fact stated that it did not prohibit any educational institution from maintaining separate toilet facilities, locker room, or living facilities for different sexes so long as comparable facilities are provided for each, even though the statute itself contained no such provision. The only way this statement can be reconciled with the wording of the statute is to conclude that its framers did not intend for restroom usage to be addressed by the statute at all. Therefore, taken alone, the statute does not envision that school restroom discrimination based on sex would fall under Section 4602.

The Commission later enacted Me. Human Rights Comm'n Reg. § 4.13, a regulation that parroted the Statement of Fact and permitted schools to separate restroom

[11] 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). Similarly, Regulations that the Maine Human Rights Commission has enacted in the employment area include transgender within the meaning of "gender identity." Me. Hum. Rights Comm'n Reg. § 3.02.

usage by sex. It is likely that § 4.13 was enacted because it was conceivable that restrictions on restroom usage could be construed as educational discrimination, and also because public accommodation discrimination could otherwise prevent schools from separating the sexes in restroom, shower, and locker room usage, even if such separation had not been intended to constitute educational discrimination. In enacting this regulation, the Human Rights Commission has made the two forms of discrimination coterminous in the educational setting such that neither prohibits the separation of the sexes in restroom, shower, and locker room usage. In so clarifying the issue, the Commission also brought school restroom use under the umbrella of Section 4602.

c. Commission Permits School Restroom Discrimination based on Sex

Without considering § 4.13, and based on statutory provisions alone, establishing separate girls' and boys' restrooms, showers or locker rooms in a public school would constitute unlawful discrimination because establishing such boys' and girls' facilities requires separation or segregation by sex. Addressing this result that is so fundamentally contrary to accepted societal practice, and wishing to codify the Statement of Fact accompanying the original discrimination in education bill, the Maine Human Rights Commission enacted the aforementioned regulation, pursuant to its rule making authority, which states:

> An educational institution may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

Me. Human Rights Comm'n Reg. § 4.13.

Since segregating restroom usage based on sex or sexual orientation clearly constitutes unlawful discrimination under applicable statutes, the only issue to be decided

in this case is whether applying the regulation to the school's actions in this regard provides an effective defense against the claim that the school unlawfully discriminated against a transgender student by preventing her from using the restroom of her sexual identity.[12] The Defendants assert that in prohibiting Susan from using the girls' restroom, they were only following the regulation. Plaintiffs argue that the Defendants discriminated against Susan by prohibiting her from using the girls' restroom, and also assert that the regulation has nothing to do with restroom usage by transgender students. In order to determine whether the regulation protects the Defendant, the Court must accurately characterize the Defendant's allegedly discriminatory actions.

2. Discrimination Under Section 4592(1) and 4602

Clearly, up to the beginning of Susan's fifth grade year, school officials had permitted her to use the girls' restroom at her school. As a result of the unfortunate incident precipitated by the desire of a student's grandfather and guardian to make a social statement, the school was confronted with a controversy surrounding Susan's use of the girls' restroom. In retrospect, it appears inevitable that a controversy of some sort would arise, and was even anticipated, as evidenced by the willingness of Susan's parents to re-evaluate their insistence that Susan use the girls' restroom and accept the default restroom if the parents of female students complained.

When school officials encountered the controversy, they chose to prohibit Susan's use of the girls' restroom and, because no one considered her use of the boys' restroom to be appropriate, provided her with a separate unisex restroom for her use. There is no

[12] This is a case and statute specific analysis for which federal precedent provides little guidance. Caselaw concerning Titles VII and IX is not enlightening because neither Title prohibits discrimination because of sexual orientation. *See Etsityy v. Utah Transit Authority*, 502 F.2d 1215, 1222 (10th Cir. 2007).

indication in the summary judgment record that school officials banned her or prevented her from using the boys' restroom.[13] The school's decision to exclude Susan from the girls' room was explicitly permitted by Me. Human Rights Comm'n Reg. § 4.13 because Susan's biological sex was that of a male.

Against this, Plaintiffs insist that § 4.13 does not address restroom usage by transgender students on the theory that the regulation interprets only the sex discrimination prohibition in the Act and does not apply to sexual orientation discrimination. Clearly, the Commission did not enact Rule 4.13 with transgender students in mind because it was enacted prior to the addition of "sexual orientation" to the statute. However, the practical reality is that the regulation specifically permits schools to separate students in restroom usage by sex and has the effect of legitimizing the Defendant's actions in this regard. The terms "sex" and "sexual orientation" are closely entwined in this context because a school could not permit transgender students to use the restroom of their gender identity and still follow a policy of segregating restroom usage by sex. One necessarily impacts the other.

The distinction between sex and sexual orientation as they relate to restroom usage has been addressed in the context of Minnesota's discrimination statute, which also prohibits sexual orientation discrimination. In *Goins v. West Group,* 635 N.W. 2d 717 (Minn. 2001), the Defendant's decision to enforce its policy on restroom use according to biological gender and to offer the transgender plaintiff-employee a single occupancy restroom was ruled not to violate that state's human rights act that prohibited sexual

[13] Related to this point, the parties disagree on whether the school would have permitted Susan to use the boys' room had the issue been directly raised. The school's actual actions and policies are at issue, however, not what their actions would have been had the issues unfolded differently. Whether or not the school would have let Susan use the boys' room is irrelevant because, in fact, the school did not prevent her from using it or enact a policy prohibiting her from using it.

orientation discrimination. That court based its decision on its conclusion that the company's policy was grounded on gender and restroom designation by gender was a traditional practice. It concluded that "the MHRA neither requires nor prohibits restroom designation according to self-image of gender or gender," *Id.* at 723, and stated that absent more express guidance from the legislature, the Defendant's designation of restroom use was based on gender and was not sexual orientation discrimination.

Similarly, in *Hispanic Aids Forum v. Estate of Bruno,* 16 A.D.3d 294, 792 N.Y.S. 2d 43, the court denied relief to a tenant who asserted that a lease provision that required the tenant to agree in writing to not let transgender persons use the restroom of their gender identity amounted to sexual orientation discrimination. The Court adopted the *Goins* rationale, indicating that the policy was nothing more than requiring all individuals to use the restroom of their biological sexual assignment, and not discriminatory. *Id.* at 298. Without the benefit of a regulation that permitted restroom assignment by biological sex, these Courts decided that a sexual orientation discrimination claim was trumped by the inherently acceptable practice of designation of restroom use by assigned sex. In Maine, the case is much stronger, because the practice is codified by regulation.

Discrimination based on sexual orientation was added to the Maine Human Rights Act after the enactment of this regulation and its addition raised the obvious question of how this expansion of the Act affected the authorized practice of designating restroom use by sex. The Maine Human Rights Commission has taken no effective action to address the issue, other than by becoming a plaintiff in this lawsuit, and at argument indicated it was not necessary to enact or clarify regulations because the existing law was clear, and compatible with its present position. This Court believes that it was and is

unrealistic to conclude that Maine public schools would naturally understand that existing law required them to permit students having the assigned sex of male to share shower, locker room and restroom facilities with students having the assigned sex of female. This is the type of controversial issue that required explicit action by the Commission, but none has been forthcoming.[14]

The Maine Human Rights Commission argues that with regard to the disputed interpretations of the Act, its reasonable interpretations are entitled to deference. Concerning its interpretation of the Act that is found in its enactment of the regulation, the Court agrees. This enactment of the regulation is not challenged and has the force of law, duly enacted as a result of a formal process consistent with the Administrative Procedures Act. With regard to the Commission's interpretation of its regulation, which is certainly within its area of expertise, it is entitled to deference only to the extent that it is necessary to resolve ambiguities in its regulation. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). The Court does not find § 4.13 to be ambiguous because the regulation explicitly permits schools to segregate restrooms by sex. The issue raised is how the regulation relates to other aspects of the Maine Human Rights Act and is not related to an ambiguity in the regulation itself. Additionally, the Commission argues that its conclusion that its statutes and regulations prohibit schools from preventing transgender persons from using the restroom of their gender identity is entitled to deference, yet that proposition is more the product of an adjudicatory hearing as opposed

[14] It is implicit in the Commission's argument that by virtue of being transgender, Susan must be permitted to use the restroom of her choice because to prevent her from doing so would be to discriminate on the basis of sexual orientation. 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). In application, therefore, the Commission's view would permit any person covered by the definition of sexual orientation to use the restroom of his/her choice. This would be an absurd result and would completely undermine § 4.13.

to the agency's interpretation of a specific rule or statute. Was the ruling based on disparate impact, on the fact that transgender females are of the female sex, on a conclusion that § 4.13 does not apply to transgender restroom use, or on some other principle? As such, it is difficult to discern whether the result was based on an interpretation of the Commission's own rule or some other factor.[15]

Plaintiffs could also argue that transgender students such as Susan are members of the female sex and are thus entitled to use the girls' restroom according to the plain meaning of the regulation. Prior to 2005, the protections of Sections 4592 and 4602 prohibited education and public accommodation discrimination based on sex. In 2005 those statutes were expanded by adding discrimination based on sexual orientation as a type of discrimination that was prohibited and clarified at the time that gender identity fell within the definition of sexual orientation. If the concept of sex that was expressed in the statute had included sexual orientation or gender identity, then there would have been no need to add sexual orientation to the list of those classifications that were protected. The separate treatment of sexual identity by the legislature in this regard leaves little doubt that "sex" means biological sex. Additionally, the traditional dictionary definition of sex refers to the "sum of the peculiarities or structure and function that distinguish a male from a female organism." *Black's Law Dictionary* 1379 (7th ed. 1999).

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[15] The issue of giving deference to an agency's interpretation of a statute or rule traditionally arises when a person or entity appeals or litigates the agency's ruling. In the posture of this case, the agency decided to become a plaintiff in the case after making its ruling in favor of the other plaintiff and is asking the court to defer to that ruling. This would have the effect of giving the Commission and the co-plaintiff a leg up in this civil action, thereby upsetting traditional concepts of the burden of proof in civil litigation. It also assists the co-plaintiff in seeking money damages directly in Counts I and II and indirectly in Counts III and IV. Despite this, there is legal precedent for granting deference to an agency that interprets its own rules and later brings a civil suit to enforce them. *See Me. Human Rights Comm'n. v. Local 36, United Paperworkers International Union AFL-CIOet al.*, 383 A.2d 369, 378 (Me. 1978).

3. Disparate Treatment

Though § 4.13 clearly establishes that the school was not discriminating on the direct evidence before the Court, Plaintiffs attempt to show discriminatory motive based on circumstantial evidence under the burden shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 14, 824 A.2d 48 ("When a plaintiff lacks direct evidence that an employer's actions were motivated by discriminatory animus and relies instead on circumstantial evidence of discrimination, the burden-shifting framework of [*McDonnell Douglas*], applies"). The Court can find no instance where *McDonnell Douglas* has been applied outside of the employment law context in the State of Maine, and the Court is unconvinced that the *McDonnell Douglas* test is appropriate here.

However, even if the Court were to apply that test, it would conclude that Defendants are entitled to judgment as a matter of law. Under *McDonnell Douglas*, Plaintiffs must first show a prima facie case of discriminatory motive. To accomplish this, Plaintiffs must show (1) that Susan was a member of a protected class; (2) Susan was qualified to use the public accommodation in question (or entitled to the educational opportunity in question); and (3) Susan was denied access to that for which she qualified. *Daniels v. Narraguagus Bay Health Care Facility*, 2012 ME 80, ¶ 14, 45 A.3d 722. If Plaintiffs can meet that burden, then Defendants will have to show a legitimate, nondiscriminatory reason for their alleged discriminatory conduct. *Id.* at ¶ 15. Finally, if this burden is satisfied, Plaintiffs must then put forward sufficient evidence of pretext from which a fact-finder could "determine that either (1) the circumstances underlying

the [school's] articulated reasons are untrue, or (2) even if true, those circumstances were not the actual cause of the [school's] decision." *Id.*

Here, while Plaintiffs can show that Susan, as a transgender student, is in a protected class, they cannot show that she was qualified to use the girls' restroom because she is not a biological female pursuant to § 4.13. Thus, Plaintiffs have failed to establish a prima facie case and shift the burden to the school, and they cannot survive summary judgment on their disparate treatment claim.

C. Education Discrimination by Harassment

Defendants move for summary judgment on Count IV, which alleges discrimination based on sexual orientation in education under, 5 M.R.S. § 4602(4)(A), and aiding and abetting another in the same under, 5 M.R.S. § 4553(10)(D). Section 4602(4)(A) states:

> It is unlawful education discrimination in violation of this Act, on the basis of sexual orientation, to:
>
> A. Exclude 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;

Section 4553(10)(D) states:

> Unlawful discrimination includes: D. Aiding, abetting, inciting, compelling or coercing another to do any of such types of unlawful discrimination; obstructing or preventing any person from complying with this Act or any order issued in this subsection; attempting to do any act of unlawful discrimination; and punishing or penalizing, or attempting to punish or penalize, any person for seeking to exercise any of the civil rights declared by this Act or for complaining of a violation of this Act or for testifying in any proceeding brought in this subsection;

1. Aiding and Abetting

As a threshold matter, Plaintiffs claim that Defendants are liable for aiding and abetting JM in discrimination under 5 M.R.S. § 4553(10)(D). The inclusion of aiding and abetting language in the Maine statute creates an explicit prohibition against such conduct. Based on the plain meaning of the words, however, the Court finds the contention that the school aided and abetted JM to be unfounded. As is discussed more fully below under the deliberate indifference analysis, the school's actions were to do the exact opposite of aid and abet JM. While Plaintiffs attempt to fault the school for not doing more, such as suspending JM, it is clear to the Court that it was attempting to adopt a reasonable solution for all involved and certainly was not assisting JM in mistreating Susan.

2. Federal Discrimination Standards

The application of federal discrimination principles creates the potential for the school to be liable for student-on-student harassment without reaching the high hurdle of actually aiding and abetting. Federal courts have developed two separate discrimination analyses for discrimination in education (Title IX)[16] and discrimination in the workplace (Title VII).[17] The Title IX standard requires a showing of deliberate indifference to known harassment. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999); *Santiago v. Puerto Rico*, 655 F.3d 61, 73 (1st Cir. 2011). In contrast, the Title VII standard only requires a showing that the harassment is known or should be known and

[16] "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681.

[17] "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(a)(1).

there has been a failure to take appropriate remedial action. *Espinal v. Nat'l Grid NE Holdings 2, LLC*, 693 F.3d 31, 36 (1st Cir. Mass. 2012); *Wilson v. Moulison North Corp.*, 639 F.3d 1, 7 (1st Cir. Me. 2011). The Law Court has yet to establish which test applies to alleged discrimination in an educational setting in Maine and the parties are in disagreement on this issue. Under either Title IX or Title VII, however, a plaintiff must show that the harassment was so "severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650; *See Wills v. Brown Univ.*, 184 F.3d 20, 38 n. 8 (1st Cir. 1999).

Defendants point to the Supreme Court's language in *Davis*, where it stated:

> Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. See, *e.g.*, Brief for National School Boards Association et al. as *Amici Curiae* 11 (describing "dizzying array of immature . . . behaviors by students"). Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.

Davis, 526 U.S. at 651-652. Conversely, Plaintiffs point to the New Jersey Supreme Court decision in *L.W. v. Toms River Regional Schools Bd. of Educ.*, 915 A.2d 535, 549 (N.J. 2007), where that court stated, "as a matter of law it would be unfair to apply a more onerous burden on aggrieved students than on aggrieved employees . . . [s]tudents in the classroom are entitled to no less protection from unlawful discrimination and

harassment than their adult counterparts in the workplace." Maine courts "look to federal case law to provide significant guidance in the construction of our statute." *Maine Human Rights Commission v. City of Auburn*, 408 A.2d 1253, 1261 (Me. 1979).

2. Severe and Pervasive Harassment

The Court first looks to whether the harassment was so severe and pervasive that it deprived Susan of access to educational opportunities or the benefits provided by the school. Defendants bear the burden on their summary judgment motion to show that there is no genuine issue as to this matter. They have not met this burden. There is sufficient evidence in the record that would support a jury conclusion that the harassment suffered by Susan at the hands of JM and other students could have deprived her of educational opportunities. *Davis*, 526 U.S. at 633-635, 651-653 (pattern of sexual harassment over the course of several months sufficiently severe and pervasive because of persistence and severity of conduct).

3. Education Discrimination

That conclusion is not the end of our inquiry, however, because the Court must also determine whether to apply the Title IX standard or the Title VII standard, and determine whether the selected standard has been met as a matter of law. Plaintiffs assert that the employment discrimination standard should apply requiring merely that the Plaintiffs show that the school knew or should have known of the discrimination and failed to take appropriate remedial action.

a. Education Discrimination Test

The Court is unconvinced that the employment discrimination standard is suited to education discrimination law. Plaintiffs' assertion that Title VII should apply fails to

convincingly address why, in an education discrimination case such as this, the Court should not apply federal education discrimination law. Instead, the federal standard followed in Title IX for education discrimination appears most appropriate. *Helwig v. Intercoast Career Inst.*, 2012 Me. Super. LEXIS 29 (Feb. 9, 2012) (applying Title IX standard to education discrimination claim). To apply the same standard to a school that is applied to employers would result in the creation of an extraordinary burden on our State's educational institutions.[18] The U.S. Supreme Court has stated that the deliberate indifference test of Title IX is designed to preserve the flexibility that school administrators have historically had over student discipline. *Davis*, 526 U.S. at 648. Applying the Title VII standard to Maine's education discrimination law would be inapposite to that view. Courts are in no position to second-guess the disciplinary practices of educational institutions beyond the facial analysis for unreasonableness envisioned by the Title IX standard. Therefore, the Plaintiffs must show a genuine issue that the school was deliberately indifferent to known student harassment.

b. Student-on-Student Harassment

When assessing a case for deliberate indifference, "courts should refrain from second guessing the disciplinary decisions made by school administrators." *Davis*, 526 U.S. at 648 (disagreeing with party's contention that expulsion of every student accused

[18] A contributing factor to this conclusion is that schools have less control over students in the sense that they cannot simply fire them at will, as an employer may an employee. Schools are tasked with educating our youth and developing them into upstanding citizens. This implies the necessity of remedial action that is less absolute than an instantaneous termination of the relationship. Schools must engage in the delicate process of engaging the adolescent mind to effectuate change and this requires the application of complex and ever developing psychological principles. To apply the employment discrimination standard to an educational setting would require that the Court determine the appropriateness of the schools conduct in light of such factors. This is a task that courts are ill suited to undertake. Instead, schools should be given deference in the approach taken to remediate bullying with an eye toward deliberate indifference only.

of misconduct would be required under the deliberate indifference standard). The test for deliberate indifference is whether the school's "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Id.* "In an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not "clearly unreasonable" as a matter of law." *Id.* at 649.

Here, Plaintiffs do not survive the deliberate indifference standard of Title IX on the record before the Court. There is ample, uncontroverted evidence that the school was not indifferent and its conduct was not clearly unreasonable. The school devised a 504 team to implement a plan to facilitate Susan's particular needs. The school regularly engaged the parents and considered their concerns, including listening to recommendations from Susan's counselor and engaging in an "eyes on" policy at the request of Susan's parents to ensure her safety. The School also reprimanded JM every time he entered the girls' restroom, removed him from Susan's classroom, and enacted a restroom schedule to mitigate the number of times that Susan would encounter JM in the hall. The school likewise reprimanded other students when they harassed Susan. Similarly, the school addressed JM's conduct with his grandparents and even went so far as to report JM's grandfather to the police for encouraging his grandson to enter the girls' restroom. This conduct, considered together, is sufficient to support this Court's conclusion that the school was not "deliberately indifferent" to the harassment Susan was experiencing as a matter of law.

c. Harassment through the "eyes on" program

Nor did the school itself engage in harassment against Susan through the "eyes on" program. There is uncontroverted evidence that the "eyes on" program was the joint creation of both the school and Susan's parents and continued only with the express consent of her parents. As such, it cannot be said to have been harassment. The term harassment implies that it is unconsented to and unwanted. Not only did Susan's parents ask that the program begin, they in fact asked that it be continued beyond the initial two-month period it was intended to run. Therefore, there is no reasonable inference that the "eyes on" program was harassment.

The real focus of Plaintiffs' complaint with regard to the "eyes on" program is that it should not have been applied to Susan at all, but instead should have been applied [redacted] school's discipline of JM. This argument ignores the undisputed facts that multiple other students harassed Susan, though not as intensely as JM, and the "eyes on" program was designed for her transition into middle school. In fact, the "eyes on" program appears to have been created after an incident at a public pool during the summer that did not [redacted] deliberately indifferent to JM's harassment, it will not therefore permit the Plaintiffs to ostensibly pursue that same argument through the "eyes on" program challenge.

D. Public Accommodation Discrimination

Defendants also move for summary judgment on Count V, which alleges discrimination based on sexual orientation in public accommodations, 5 M.R.S. §

4592(1), and aiding and abetting another in the same, 5 M.R.S. § 4553(10)(D) based on harassment and "eyes on policy."[19] Section 4592(1) is described in this order above.

The legal principles in deciding Count V are the same as the legal principles involved in deciding Count IV. Therefore, the Court's conclusions in Count IV are controlling with regard to Count V.

The Court is not unsympathetic to Susan's plight, or that of her parents. It is no doubt a difficult thing to grow up transgender in today's society. This is a sad truth, which cannot be completely prevented by the law alone. The law casts a broad stroke where one more delicate and refined is needed. Although others mistreated Susan because she is transgender, our Maine Human Rights Act only holds a school accountable for deliberate indifference to known, severe, and pervasive student-on-student harassment. It does no more.

In this case, the school acted within the bounds of its authority in prohibiting Susan from using the girls' restroom, it did not itself harass Susan by its actions, and it was not deliberately indifferent to the harassment that Susan experienced from others. The Court finds that there is no evidence of deliberate indifference with respect to Plaintiffs' claims of education discrimination, and it finds that Defendants acted within the law under the public accommodation discrimination claim. Therefore, the Court grants summary judgment to Defendants.

The entry is:

1. Defendants' M.R. Civ. P. 56 Motion for Summary Judgment as to all Counts is **GRANTED.**

[19] Plaintiffs seek application of the Title VII hostile work environment standard to Count V.

2. At the direction of the Court, this Order shall be incorporated into the docket by reference pursuant to M.R. Civ. P. 79.

Dated: November 20, 2012

William R. Anderson
Justice, Superior Court