



# Maine Human Rights Commission

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## INVESTIGATOR'S REPORT PA13-0563

Hilary Whitmore (Portland)

v.

Falmouth Pediatric Dentistry (Falmouth)

### **I. Complainant's Complaint:**

Complainant, who is Deaf, alleged that Falmouth Pediatric Dentistry ("Respondent") denied her the full benefits or enjoyment of a public accommodation by refusing to provide the reasonable accommodation of having an American Sign Language ("ASL") interpreter present for her minor child's dentist appointments.

### **II. Respondent's Answer:**

Respondent stated that it did not discriminate against Complainant because the dentist ("Dentist") who treated Complainant's son communicated effectively with Complainant using written notes.

### **III. Jurisdictional Data:**

- 1) Dates of alleged discrimination: August 2013.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): September 23, 2013.
- 3) Respondent is an establishment that offers services to the general public and is a "public accommodation" under the Maine Human Rights Act ("MHRA"), and is subject to the MHRA and the Americans with Disabilities Act ("ADA"), as well as state and federal antidiscrimination regulations.
- 4) Complainant is represented by Kristen Aiello, Esq. Respondent is not represented by counsel.
- 5) Investigative methods used: Thorough review of the materials provided by the parties, a request for additional information to both parties. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

### **IV. Development of Facts:**

#### *Complainant's Commission Claims*

- 1) Complainant is [REDACTED] and uses ASL to communicate effectively. Her four year old son was a patient at

Falmouth Pediatric Dentistry ("FPD").

- 2) On or about 10/10/2012, Complainant's son had an appointment at FPD. She requested an ASL interpreter so that she could understand what care her son needed, but her request was denied. During that appointment, Complainant tried to communicate with Dentist by writing notes. However, due to the fact that her English is not strong, she could not understand what was being communicated or express herself fully.
- 3) Complainant's son's next appointment at FPD was scheduled for 9/13/2012. Complainant made a request for ASL interpreter at that appointment, but that request was again denied by FPD.
- 4) In August 2013, the Maine Center on Deafness ("MCD") contacted FPD on Complainant's behalf to request an ASL interpreter for the September 2013 appointment, explaining that Complainant is [REDACTED] and needs an ASL interpreter for effective communication. That request was again denied by FPD.
- 5) On or 8/15/2013, the MCD followed up its oral request with a letter ('Exhibit A') reiterating its request for an ASL interpreter for Complainant's son's next dental appointment, due to the fact that, at the prior appointment, Complainant "tried writing back and forth and did not understand many 'big words'". Respondent FPD did not respond to this letter.

*Respondent's Answer to Complainant's Complaint*

- 6) Dentist saw Complainant's son for the first time on 10/16/2012 for the purpose of his initial dental oral health encounter. Complainant filled out all required forms properly and promptly. She and Dentist effectively communicated throughout the appointment using written notes. There were no difficulties whatsoever. There were no complications during this routine examination, and there was no further treatment necessary. FPD has never denied healthcare services to anyone because of a disability.
- 7) Respondent's written non-discrimination policy states in full as follows:

*Falmouth Pediatric Dentistry shall not deny an individual with a disability an opportunity to receive oral health services. We will make reasonable modifications when necessary to afford services to individuals with disabilities to ensure effective communication with the individual. Exchange of written notes, text messaging, instant messaging, email and use of telephone relay services will be provided for people who are deaf.*

- 8) Investigator's Note: As part of a written request for additional information, Respondent was asked to clarify whether the "telephone relay services" referenced in its non-discrimination policy were the type of video relay service that used a videophone phone/webcam to employ the services of an off-site interpreter. Respondent replied, "no," although it did assert that Complainant was made aware of the telephone relay service that FPD did have available. This service is text-based, and therefore uses English, not ASL.

*Complainant's Reply to Respondent's Answer*

- 9) Complainant attended Baxter School [REDACTED] [REDACTED] from the time she was small child until she graduated. ASL is Complainant's native language and she uses it to effectively communicate. Due to the nature, length, and complexity of the communication involved from a treatment provider, such as Respondent, the use of ASL is necessary for effective communication.
- 10) Respondent's non-discrimination policy violates the ADA and the MHRA in that it does not provide the

option of on-site interpreters, or even Video Remote Interpreting ("VRI").<sup>1</sup>

**V. Analysis:**

- 1) The MHRA provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) Here, Complainant, who is [REDACTED], alleged Respondent FPD repeatedly denied her requested accommodation of having an interpreter present during her son's dental appointments. Respondent denied this request on the basis that the dentist and Complainant's mother communicated effectively by using of written notes.
- 3) The Commission's Accessibility Regulation provides:

A public accommodation shall take those steps that may be necessary to ensure that no individual with a physical or mental disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.

Me. Hum. Rights Comm'n Public Accommodation Regulation, 94-348 Code of Maine Regulations, Ch. 7, § 7.17(A). *See also* 28 Code of Federal Regulations § 36.303 (c) (ADA).

- 4) The term "auxiliary aids and services" specifically includes "[q]ualified interpreters on-site or through video remote interpreting (VRI) services". Commission Pub. Accom. Reg., Ch. 7, § 7.17(B)(1).
- 5) To establish a denial of reasonable modification by a public accommodation, Complainant must show that:
  - (1) She comes within the protections of the MHRA as a person with a disability;
  - (2) Respondent operates a public accommodation under the MHRA;
  - (3) Respondent has in effect a policy, practice, or procedure that, directly or indirectly because of Complainant's disability, results in Complainant's inability to access Respondent's goods, services, facilities, privileges, advantages or accommodations;
  - (4) Complainant requested a reasonable modification in that policy, practice, or procedure which, if granted, would have afforded him access to the desired goods, services, facilities, privileges, advantages or accommodations;
  - (5) The requested modification—or a modification like it—was necessary to afford that access; and
  - (6) The Respondent nonetheless refused to modify the policy, practice, or procedure.

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

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<sup>1</sup> VRI uses video conferencing technology, equipment, and a high-speed internet connection to provide the services of an off-site ASL interpreter to [REDACTED] individuals at other locations.

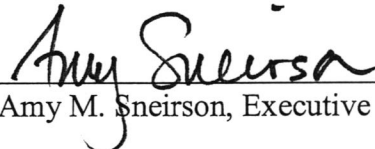
- 6) In proving that a modification is “reasonable,” Complainant must show that, at least on the face of things, it is feasible for the public accommodation under the circumstances. *See Reed v. Lepage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001) (employment case).
- 7) Upon such a showing, Respondent must make the modification unless it proves that doing so would alter the fundamental nature of its goods, services, facilities, privileges, advantages or accommodations; would impose an undue financial burden; or that the requested modification poses a direct threat to the health or safety of others. *See* 5 M.R.S. § 4592(1) & (1)(B); *Maine Human Rights Com'n v. City of South Portland*, 508 A.2d 948, 955 (Me. 1986); *Dudley v. Hannaford Bros. Co.*, 333 F.3d at 308; *Halpern v. Wake Forest University Health Sciences*, 669 F.3d 454, 464 (4th Cir. 2012).
- 8) Complainant has shown that she was denied a reasonable modification by Respondent, as follows:
  - a) Deafness is a *per se* disability (without regard to severity) under the MHRA definition of disability, 5 M.R.S. § 4553-A(1)(B).
  - b) Respondent is a public accommodation under the MHRA. Respondent's non-discrimination policy does not include the provision of ASL interpreting, which resulted in Complainant's inability to equally access Respondent's services, specifically the ability to effectively receive information and ask questions about her son's dental care.
  - c) Complainant requested a modification, an ASL interpreter, which was not offered under Respondent's non-discriminatory policy. Complainant believed that this modification would have afforded her equal access to the desired services, advantages or accommodations enjoyed by hearing clients.
  - d) Complainant believed that the requested modification—or a modification like it—was necessary to afford her access to effective communication, based upon her own prior experience at her son's prior appointment where she found note-writing to be ineffective, due to the fact that ASL is her primary language and that she “did not understand many ‘big words’”. While Dentist may have concluded that the parties “effectively communicated” by using written notes at that appointment, he would clearly have no way of knowing whether Complainant found the method to be effective.
  - e) Although communicating strictly through the use of written notes could constitute effective communication in certain situations, this would depend on the level of comfort that the [REDACTED] individual had with the English language. Because the grammar and syntax of ASL differ considerably from English, writing back and forth may not provide effective communication between a [REDACTED] individual and a healthcare provider, especially given the complexity of medical terminology.
  - f) It is also notable that Respondent's non-discriminatory policy apparently does offer the use of ASL interpreters under *any* circumstances, even presumably in cases where note writing was not an option, such as in cases where the discussions involved serious or complex medical issues or treatment, or for some reason the [REDACTED] individual was incapable of writing or reading handwritten notes. None of the other services offered to [REDACTED] clients (text messaging, instant messaging, email, use of a telephone relay service [with a teletypewriter]) would provide effective communication under the above circumstances.
  - f) Respondent does not dispute that it refused to grant the requested modification, based upon the doctor's conclusion that writing notes at the prior appointment resulted in effective communication.

- 11) Respondent has presented no facts or evidence to show that providing an ASL interpreter would alter the fundamental nature of its goods, services, facilities, privileges, advantages or accommodations; would impose an undue financial burden; or that the requested modification poses a direct threat to the health or safety of others. Respondent also did not allege that the cost of an interpreter, either in person or through a video remote interpreting service, would have been prohibitive, especially for something as short as a routine cleaning and check up.
- 12) Instead, as noted earlier herein, Respondent's sole explanation for why it refused to grant Complainant's requested modification was that the dentist unilaterally determined that he and Complainant had "effectively communicated" at the prior appointment by writing notes back and forth. Respondent also made no attempt to engage in the interactive process once Complainant's attorney notified him in August 2015 that writing notes had not been effective communication for Complainant at the prior visit.
- 13) Discrimination based on disability in public accommodation is found.

**VI. Recommendation:**

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

- 1) There are **Reasonable Grounds** to believe that Falmouth Pediatric Dentistry discriminated against Complainant Hilary Whitmore due to her disability by denying her a reasonable modification; and
- 2) Conciliation should be attempted in accordance with 5 M.R.S. § 4612(3).

  
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Amy M. Sneirson, Executive Director

  
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Robert D. Beauchesne, Investigator