



Maine Human Rights Commission

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June 13, 2014

INVESTIGATOR'S REPORT ED/PA12-0363

██████████ (██████████)

v.

██████████ (██████████)

I. Complainant's Complaint:

Complainant ██████████ ██████████ alleged that Respondent ██████████ (██████████) subjected her minor son ("Minor") to harassment in an educational setting and retaliated against him based on his sex and perceived sexual orientation.

II. Respondent's Answer:

██████████ stated that when Minor reported incidents of harassment, ██████████ dealt with each one on a case by case basis. The reported incidents involved different students on each occasion, and were handled based on the disciplinary rubric established in ██████████ bullying policies. ██████████ also stated that the incidents of harassment Minor experienced were not based on protected class status, and that the handful of allegations is not sufficient to create a hostile educational environment.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: August 2010 through August 2012.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): July 30, 2012. Amendment filed December 24, 2012.
- 3) Respondent has more than 15 employees, and is subject to the Maine Human Rights Act ("MHRA"), as well as state and federal education laws and regulations.
- 4) Complainant is represented by Courtney I. Beer, Esq. Respondent is represented by ██████████, Esq. and ██████████, Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties, an Interview with Complainant and Minor, a Fact Finding Conference, and a Request for Information. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

IV. Development of Facts:

1) The parties in this case are as follows:

- a) Ms. [REDACTED] filed this charge on behalf of Minor, who was a student at [REDACTED] School ("[REDACTED]" from August 2010 through May 2012¹.
- b) [REDACTED] is a public school system which has four schools in the system; two elementary schools, a junior high school, and a high school. There are approximately 2,362 students in [REDACTED] with approximately 535 enrolled at [REDACTED]
- c) Important third parties: "Principal" is the principal at [REDACTED] School ("[REDACTED]" "School Resource Officer" is the School Resource Officer assigned to work at [REDACTED]

2) Complainant provides the following in support of her position:

- a) Minor was bullied at [REDACTED] for approximately two and a half years.
- b) Minor was teased for having "man-boobs," and called gay.
- c) Minor had constant remarks made about his weigh, appearance and lack of sports of ability.
- d) During Minor's sixth grade year, a group of students would watch [REDACTED] him closely and stare at him from across the room. This escalated to the group cornering Minor near his locker. Minor would pull his shirt over his head to tune them out. When Minor began getting cornered at his locker, he spoke to his advisors/homeroom teachers about it. They told Minor to "suck it up", and asked him if he wanted a different locker. Minor did not change his locker because he felt the group of students would follow him to a new locker. Minor's homeroom teachers said that they would talk to the other students about their behavior and would stand out in the hallways for Minor, but never did.
 - i. This behavior continued to happen after Minor reported it to his homeroom teachers.
- e) During an incident in French class, another student brought cheese in for a class party and told Minor that he had been licking the cheese all night thinking of Minor.
 - i. Minor and the other student were separated during the party, but the other student kept trying to scoot his chair closer to Minor.
- f) During the 2010-2011 school year, male students were doing the "gay test" on Minor. The "gay test" was when a male student would come and touch Minor on the shoulder; if he did not notice the hand on his shoulder for 10 seconds, then it was declared that the he was gay.² Minor believed this occurred to

¹ Minor stopped going to [REDACTED] completely in October 2012, after he told Ms. [REDACTED] that he had been sexually assaulted three times at [REDACTED]

² When Minor and Ms. [REDACTED] met with Principal to discuss this, Ms. [REDACTED] stated that Principal said, "[n]ot that again."

him 30-40 times. When he would report the incidents to teachers, they would ask him if he was gay. Minor would respond no, and the teachers would tell him that he should not worry about it then.

- i. When the other students would do this to Minor, it made him very uncomfortable and it made him angry and scared that other students would put their hands on him at any time. In addition to reporting to teachers, Minor reported these incidents to Principal, and also told Principal how the incidents made him feel.
- g) Principal told Ms. [REDACTED] that he contacted the parents of the offending students. Ms. [REDACTED] called the parents of the students involved, and – of the four students involved – only one of the parents said they had been contacted by the school. Ms. [REDACTED] believed that the harassing behavior stopped only after she contacted the parents of the offending students.
 - h) Minor stated that there was another “gay test” that students performed. They would walk up to him and ask if he wanted to play fire truck. If he said yes, then another student would slide his hand down Minor’s forearm, and when Minor told him to stop the student would say fire trucks do not stop at red lights. When this occurred, Minor reported the incidents to a teacher who would tell the other student to knock it off.
 - i) In January 2011, another student witnessed a male student ask Minor if he wanted to “mate” with him. Minor reported it to his Science teacher. The Science teacher talked to the other student, who denied it. Minor also reported this incident to Principal, and the other student denied it again. [REDACTED] response was to have a School Counselor meet with the offending student.
 - j) In 2011, Minor had other male classmates try to get into the stall when he was changing for gym class. The Gym Teacher came by and the students stopped.
 - k) In Spring 2011, Minor’s Northwest Evaluation Assessment test scored dropped 10 points from his previous scores.
 - l) Minor was backed into a corner in a stairwell by a male student. He felt threatened and intimidated.
 - m) In November 2011, Ms. [REDACTED] contacted [REDACTED] because Minor was stressed and shutting down, unable to complete his work.
 - n) In December 2011, Minor reported that two boys told him, “I love you.” [REDACTED] responded by having a [REDACTED] official speak to the boys about their behavior.
 - o) In May 2012, Minor reported that a student touched his back and patted his shoulder. Principal spoke with the student who said “he did not mean anything by touching [Minor].”
 - p) In May 2012, Minor reported two students hitting him with their lacrosse sticks in the hallway in 2012. [REDACTED] had tapes of what occurred, but denied that the incident happened.
 - i. During a discussion about this incident, School Resource Officer told Ms. [REDACTED] that it was good that he had not heard about Minor before this incident. Ms. [REDACTED] told School Resource Officer that it was not good, since Minor had been bullied since sixth grade. Ms. [REDACTED] felt that the School Resource Officer should have heard about the incidents that had occurred then.

- ii. Ms. [REDACTED] mentioned to School Resource Officer that she did not know why the other students involved were not suspended. School Resource Officer told her that [REDACTED] does not want to suspend the students because they will miss school.
- q) In late May/early June 2012, Minor refused to go back to [REDACTED]. Ms. [REDACTED] emailed the Director and Coordinator of Prevention of Bullying with the State of Maine about Minor's refusal to attend school and asked about his missing assignments.
- r) On June 6, 2012, a meeting was scheduled with Mr. & Ms. [REDACTED] to create a safety plan for Minor so that he could finish out the school year. [REDACTED] implemented a plan that involved assigning Minor an adult escort to accompany him between classes or require Minor to stay late in class or leave early to avoid the hallways filled with students in between classes. Additionally the plan had Minor eating lunch in a teacher's classroom and allowed him to use a private bathroom. Minor felt that further isolation from his peers would call more attention to him, making him a larger target.
- s) On June 11, 2012, Minor was outside a classroom making up a test when two eighth grade boys called him a "douche bag." The Assistant Principal interviewed the boys, who denied saying anything to Minor. No consequences followed.
- t) In late May 2012, Minor was poked with a pushpin to see if he would deflate. Minor reported this incident to a teacher who took both the student and Minor into the hallway and asked the other student if he had poked Minor with a pushpin. The other student denied doing it. Minor's father met with Principal regarding this incident. School Resource Officer was also present for this conversation.
- u) On another occasion, a student stabbed Minor with a pencil. Minor reported the incident to a teacher. Minor stated that the teacher spoke to the student, and that there were minor consequences.
- v) In spring of 2012, Minor had another male student grab/stroke his chest.
- w) On or around October 19, 2012, Ms. [REDACTED] received an email from Principal which revealed that a male student had sat on Minor's lap. The email showed that "peer-to-peer" consequences were implemented in response to bullying behavior since it affected Minor's school attendance.
- x) On or around October 24, 2012, Ms. [REDACTED] told Minor that they were going to meet with [REDACTED] school staff to discuss ongoing bullying. Minor had a panic attack and disclosed that he was sexually assaulted three times by other students occurring in or about November 2011, February 2012, and May 2012.
 - i. Some of the students Minor accused of sexual assault were students he had previously identified as harassing him.
- y) Minor has not attended [REDACTED] since October 24, 2012 due to a heightened level of anxiety.
- z) Minor learned from previously reporting incidents that he could not depend on [REDACTED] to support him in the face of other students' behavior.

- aa) On or around October 25, 2012, Ms. [REDACTED] reported Minor's allegations of sexual assault to [REDACTED] school officials.
 - bb) On November 2, 2012, Ms. [REDACTED] took Minor to the Spurwink Child Abuse Program for an evaluation. The evaluation references Minor's disclosure of the sexual assaults to Ms. [REDACTED] and the Police Detective that interviewed him. The evaluation highlights the consistency of Minor's reporting of the assaults each time he was asked about them.
 - i. The evaluation included a medical examination. The doctor's exam noted a lesion on Minor's arm that was consistent with Minor's description of the November 2011 sexual assault, which involved a classmate cutting Minor's arm with a knife.
 - cc) On December 4, 2012, Ms. [REDACTED] admitted Minor into the hospital because of suicidal ideation. After inpatient and outpatient treatment, Minor was diagnosed with depression and post-traumatic stress disorder as a result of the sexual assaults. The aftercare referral indicated that Minor should "not" go back to the school where the assault occurred.
 - dd) Due to the continued lack of response by [REDACTED] Ms. [REDACTED] sent a letter to the [REDACTED] Superintendent requesting a Superintendent's Agreement allowing Minor to attend a different school. The Superintendent's Agreement was finalized on January 30, 2013.
 - ee) Minor never told [REDACTED] officials that he was homophobic, as [REDACTED] claims. He did state that he was afraid of the gay stalkers and that they would do something to him. He repeatedly told [REDACTED] staff about things that were happening to him, but they did not believe him.
 - ff) While Minor was a student at [REDACTED] his grades started out in the A, B, and C range. By the end of eighth grade his grades dropped to C's and Ds. Minor believed his grades dropped because the materials teachers expected students to memorize was getting hard, and he was not able to do that because he could not learn in the environment he was in with other students harming him physically and emotionally.
- 3) Respondent provides the following in response to Complainant's allegations:
- a) Minor was an active member of the [REDACTED] community. He ate lunch with his friends, chatted and joked with other students during class, and actively participated in educational exercises during class. Minor was involved in extracurricular activities such as chorus and the Analogue Technology Club, which he helped found.
 - b) Creating a safe environment for all students is one of the [REDACTED] primary goals. [REDACTED] has adopted and implemented anti-harassment, anti-bullying, and affirmative action policies. Specifically, [REDACTED] has taken done the following:
 - i. Hold assemblies at the beginning of each school year welcoming students back and sharing expectations regarding anti-bullying efforts and how students should properly interact with one another;
 - ii. Formed an anti-bullying committee that works proactively to prevent bullying before it begins. The committee meets throughout the school year;

- iii. Sent administrators and other school personnel to civil rights training conducted by the State's Attorney General's Office in September 2010;
 - iv. Had the Director of the Maine Attorney General's Civil Rights Team speak at a school-wide assembly to speak about healthy peer relationships as well as meet with the [REDACTED]'s civil rights team to provide feedback on anti-bullying efforts in March 2011;
 - v. Sponsored "Stand up to Bullying" weeks with activities regarding how to confront bullying;
 - vi. Conducted student surveys about [REDACTED] atmosphere and bullying and made positive changes to further combat bullying based on student input;
 - vii. Sent newsletters to parents with anti-bullying messages;
 - viii. Developed and implemented a peer-to-peer relationship and mentoring program where eighth grade students are trained to help sixth grade student transition to [REDACTED]
 - ix. Developed a system for dealing with student-to-student harassment and other inappropriate conduct (the "Rubric"), which provides a matrix for imposing disciplinary consequences for certain student behavior, (including bullying and harassment) based on a number of factors including the severity of the conduct and the number of occurrences;
 - x. [REDACTED] provides anti-bullying and harassment training on an on-going basis to staff;
 - xi. [REDACTED] Civil Rights Team has presented at staff meetings to allow staff to hear student perspectives; and
 - xii. Placed anti-bullying signs and posters at the entry door and throughout the [REDACTED] as a daily reminder to students that they should not bully or harass others.
- c) [REDACTED] has received local and national attention and recognition for its efforts to combat bullying and harassment.
- d) In January 2013, [REDACTED]'s plan for recording and responding to bullying incidents was posted on the Maine Department of Education's website as a model for addressing bullying.
- e) [REDACTED] does not deny that Minor was occasionally teased and made fun of by other students while enrolled at [REDACTED]. [REDACTED] officials have not heard any student call Minor gay. Minor himself told his advisor that he has not heard others say he is gay.
- f) The behavior Minor complained of did not affect his grades, did not cause him to drop out of the Gifted and Talented program, did not interfere with his ability to participate in class, and did not cause him to drop out of chorus or step down from his lead role in the Analogue Technology Club.
- g) Throughout Minor's two and a half years at [REDACTED] he made many reports regarding incidents with other students. When allegations of teasing were brought to [REDACTED] officials they were investigated and inappropriate conduct was addressed.³
- h) During the 2010-2011 school year when Minor was in sixth grade, a group of male students were performing something they called a "gay test" on a number of other students.⁴ The test involved a male

³ When investigating complaints that were made, [REDACTED] often found that Minor's perception of a situation did not line up with the reality of the events.

⁴ During the Fact Finding Conference, Principal stated that Minor called it the "gay test" but no other student referred to it that way.

student putting his hand on another male student's shoulder, and if the student being touched did not immediately flinch or remove the other student's hand, the student being touched was considered to be gay/or liked it by those performing the test.

- i. When [REDACTED] officials learned of the inappropriate behavior they initiated an investigation. [REDACTED] officials met with Minor and met separately with the offending students. The students told Principal that it was a game they were playing mostly within their group of friends, not just with Minor. Principal, in following [REDACTED] Rubric for bullying, told the students to stop the behavior and that it was not something that Minor liked. The parents of the offending students were also contacted. The offending students agreed to stop performing the test and there were no further issues since the end of January 2011.
 - a. During the Fact Finding Conference, Principal stated that he made phone contact with one of the student's parents, but left messages for the other two sets of parents to call him back. The parents that he left messages with did not call him back, and he did not attempt to call them again. Principal never heard anything else about the game reoccurring after it was reported to him and investigated.
 - ii. During the Fact Finding Conference, Principal stated that he was not aware of anything students called "playing fire truck," and that Minor never reported that to him.
- i) In January 2011, a [REDACTED] counselor was made aware that a male student had asked Minor if he wanted to mate with him, the incident was addressed at a meeting attended by the Support Team and Ms. [REDACTED]. The "gay test" incident was also addressed at this meeting.
- j) The incident with the pushpin occurred in Spring 2011. When [REDACTED] became aware that Minor was being picked on due to his weight, Minor's teacher held a conference with the students involved. The teacher provided instruction to the students regarding why their behavior was inappropriate and imposed classroom consequences.
 - i. Principal later met with Minor, his father, and School Resource Officer regarding the incident. Principal believed he asked Mr. [REDACTED] if he wanted to make a (police) report.
- k) In December 2011, Minor reported being backed into a corner of a stairwell by a male student. The School Counselor and the Assistant Principal reviewed the video of the stairwell where the incident allegedly took place. The video showed Minor backing away when he saw another student, but it did not show threatening behavior or Minor being cornered.
 - i. The School Counselor met with the student who allegedly cornered Minor and that student denied threatening Minor or backing him into a corner. Even though the School Counselor could not substantiate the allegation, she gave the student accused of cornering Minor instructions on how to handle similar interactions in the future.
- l) During Minor's seventh grade year, another student sat on his lap in the lunch room. Principal met with the student. The student told Principal that there were three tables, and some students would go around and sit on each other's laps. Principal gave instructions to the student that he should not engage in that activity. This was step 1 of the Rubric on bullying. The student told Principal they were just fooling around.

- m) In late Spring 2012, Minor reported that he was being teased for having "man-boobs." Minor reported the incident to the offending student's teacher. The student who made the comments was told that making comments about someone else's weight were not acceptable, and he received appropriate disciplinary consequences.
- n) On another occasion, Minor reported to Principal that he had been pushed in the hallway. Principal interviewed the student, watched video of the incident which showed that in this particular case, the bell had just rung and one student was rushing and bumped into Minor on his way down the hallway. Minor thought that he was being targeted, but the other student involved did not remember the incident. Principal met with Minor and showed him the video. Minor said that he could see that the other student was not trying to hurt him.
- o) In May 2012, Minor reported that he had been hit by another student in a hallway with a lacrosse stick. [REDACTED] officials looked into the incident and involved School Resource Officer because there was a concern that Minor may have been assaulted.
- i. School Resource Officer investigated the complaint by interviewing Minor and other students allegedly involved. School Resource Officer and other [REDACTED] officials along with Ms. [REDACTED] and Minor reviewed a video tape of the hallway where the alleged incident occurred. The video showed two students horsing around with each other while holding a lacrosse stick, but it did not show either student striking Minor.
 - ii. When one of the students involved was interviewed about the incident, the student credibly stated that he tapped Minor on the shoulder with the stick to say hi, and that Minor told him to stop and he did.
- p) [REDACTED] a June 2012 meeting with Minor and members of his family, Minor told one of his advisors that he suspected that people might be saying he was gay, but that he had never actually heard anyone call him gay.
- q) Even though the investigation of the incident did not establish that Minor had been hit or that other students were bullying or harassing him, [REDACTED] still took measure to ensure that Minor felt safe.
- i. [REDACTED] officials asked the other students involved to apologize if they had inadvertently bumped Minor, placed the students involved at the appropriate level on the Rubric, and after meeting with Ms. [REDACTED] instituted a plan that allowed Minor to leave class a number of minutes after other students if he wanted to so that he could avoid walking through the hallways when they were full of other students.
 - ii. Ms. [REDACTED] agreed to [REDACTED] proposed solution. However, Minor chose not to follow the agreed upon plan and left class at the same time as his classmates.
- r) When [REDACTED] became aware that students were trying to get into the bathroom stall that Minor was in, the Gym Teacher looked into and addressed the situation.

- i. The Gym Teacher found that Minor was taking a particularly long time to change in the stall and other students needed to use the stall to change and wanted Minor to hurry so they could change too and not be late for class.
- s) ██████ Officials met with Ms. ██████ and involved her in any plans or meetings regarding Minor. Ms. ██████ appeared to be thankful for the steps ██████ was taking to protect Minor. Minor often decided not to follow plans or solutions suggested by ██████ for example, Minor approached a student he was advised not to interact with (the other student was also advised to not interact with Minor as well).
 - i. ██████'s responses to complaints/reports by Complainant and Minor included interviews and meetings with students, meetings with other students' parents, meetings with Minor and Ms. ██████ and discipline pursuant to the Rubric where it was appropriate.
 - ii. ██████ also offered Minor and Complainant other supports, including regular visits with ██████'s guidance counselor, individualized counseling through a local school-based counselor, numerous meetings with ██████ personnel to discuss perceived issues and concerns, and access to a support team.
- t) To ██████ knowledge, after each intervention by ██████ the student or students doing the teasing stopped. This appeared to be a situation where one student would tease Minor then stop, then another student would tease Minor then stop; it was not a situation where one student repeatedly teased Minor and was permitted to get away with it.
- u) In September 2012, Minor stopped by Principal's office, as he often did since they had built a good rapport with each other. Minor told Principal that he was having a great school year.
- v) On or around October 25, 2012, Minor informed ██████ officials that he had been sexually assaulted by other students three times during the 2011-2012 school year. Minor's description of the assaults was graphic, but Minor was not able to explain why he never reported any of the incidents to ██████ school officials before October 2012.
- w) In response to the allegations of sexual assault, the Assistant Principal and Minor's Guidance Counselor met with Ms. ██████ and Minor to take Minor's account of what had occurred. ██████ notified School Resource Officer, called the Department of Health and Human Services, and spoke with ██████ staff, the Superintendent, and ██████ attorney. The students Minor alleged to have been involved in two of the three incidents were interviewed.⁵ The students on the gym class roster were also interviewed to determine if anyone had seen anything suspicious. No one remembered seeing anything, and those accused denied the accusations.
- x) Immediately after learning of the sexual assault allegations ██████ officials alerted the police and began an investigation.
 - y) After informing ██████ Officials of the alleged assaults, Ms. ██████ pulled Minor from his regular classes and requested that he receive tutoring outside of the regular classroom setting. ██████ believed that ██████ could provide a safe learning environment for Minor that would allow him to continue to succeed

⁵ The lights were out during one of the incidents and Minor was unable to identify anyone involved in that incident.

academically, however, the Superintendent and Principal granted Ms. [REDACTED] request that Minor be tutored.

- i. [REDACTED] agreed to provide private tutoring on a temporary basis with the goal of transitioning Minor back to his regular classes so that he would not fall behind academically and would not lose out on a critical component of a public education, the ability to work collaboratively with and learn from his peers.
 - ii. [REDACTED] took several steps to help Minor transition back into school, including:
 - a. Assembling a transition team to ensure Minor's successful re-entry to the school;
 - b. Creating a re-entry plan and transition scheduled for Minor, and
 - c. Attempting to meet with Minor and Ms. [REDACTED] on a number of occasions to discuss Minor's re-entry to school.
 - iii. The transition team met twice in December 2012 to create and finalize a re-entry plan, including a transition schedule designed to provide Minor with support throughout the school day. Ms. [REDACTED] was encouraged to attend both meetings, and she was invited to provide her own input into the re-entry plan while it was being developed. Ms. [REDACTED] did not attend the meetings or provide any input into the process.
 - iv. In a letter dated December 21, 2012, Ms. [REDACTED] requested that [REDACTED] agree to a Superintendent's Agreement between [REDACTED] and another school district so that Minor could attend school somewhere else.
 - v. Because [REDACTED] strongly believed that it was in Minor's best interest to work collaboratively with and learn from his peers in a classroom setting, and given Ms. [REDACTED] refusal to allow Minor to be educated at [REDACTED] [REDACTED] agreed to enter into the Superintendent's Agreement for the remainder of the 2012-2013 school year.
- z) [REDACTED] investigation of Minor's sexual assault allegations involved interviewing numerous students, including all students allegedly responsible for the assaults, several staff members, and meeting at length with Ms. [REDACTED] and Minor. When [REDACTED] was done with its investigation, it sent Ms. [REDACTED] a letter regarding the results. The sexual assault allegations were not substantiated by [REDACTED] investigation. The Police Department similarly determined that the allegations of sexual assault were not credible.
- aa) Officials at [REDACTED] took significant measures to combat bullying and harassment through the school, and took complaints by Ms. [REDACTED] and Minor seriously. [REDACTED] moved decisively to respond to complaints brought to their attention to protect Minor.
- 4) Fact Finding Conference
- a) Minor stated that some of the same students were involved in multiple incidents that he reported to [REDACTED] officials. [REDACTED] stated that each incident reported involved different students. During the Fact Finding Conference, Principal stated that the first step in the Rubric is most effective when handling incidents on a case by case basis.

- b) During the Fact Finding Conference, Principal stated that there were other students at [REDACTED] who complained of incidents of a sexual nature. [REDACTED] looked into all of the complaints. Typically, the incidents of a sexual nature that were reported were males calling female students derogatory names. If the incident involved protected class name calling, it was looked at and treated on a higher level. This would involve a meeting with Principal or the Assistant Principal and also a meeting with the parents. There could be a suspension involved, or the police could be involved, along with reports to relevant agencies. Principal did not believe that any complaints that he dealt regarding Minor with rose to this level.
 - c) School Resource Officer was not always involved in Minor's complaints regarding bullying/harassment at [REDACTED] School Resource Officer got involved after there were assault accusations. During the Fact Finding Conference, Principal stated that School Resource Officer does not usually get involved unless something gets to a criminal level.
- 5) A letter regarding attendance goes out to any student who has missed 10 or more days of school, excused or unexcused, to make parents and the student aware [REDACTED] School Board's policy that the student's progress will be reviewed more closely since so much school has been missed. Students who received these letters are looked at more closely at the end of the year to make sure they can move on to the next grade. Ms. [REDACTED] received one of these letters regarding Minor on January 17, 2012.
- a) After Ms. [REDACTED] received the letter she contacted [REDACTED] and stated that Minor was being bullied and did not want to come to school because he was afraid other students would hurt him. Ms. [REDACTED] spoke with the Assistant Principal and Minor's Guidance Counselor who told her that Minor needed to attend school because he was not getting his education. [REDACTED] looked into some of the concerns Minor had, some of which could not be substantiated.

V. Analysis:

- 1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The MHRA provides that discrimination complaints must be filed with the Commission "not more than 300 days after the alleged act of unlawful discrimination." See 5 M.R.S.A. § 4611. In cases involving discrete acts of discrimination, the filing deadline runs from the time that a reasonable person would have become aware of facts supporting a claim of discrimination. *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 11. In this case, however, Complainant has alleged that Minor was subjected to a hostile educational environment. In hostile environment claims, the filing deadline runs from the most recent act which contributed to the hostile environment. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002). See also *LePage v. Bath Iron Works Corp.*, 2006 ME 130, ¶ 12 (citing *Morgan* favorably). In this case, the Complaint was filed within 300 days of at least one act which formed the basis for Complainant's hostile environment claim. Accordingly, the charge was timely filed, and it is appropriate to look at the totality of incidents that occurred when making a determination was to whether harassment based on protected class status took place.
- 3) The MHRA makes it unlawful educational discrimination on the basis of sex or sexual orientation to "[e]xclude a person from participation in, deny the benefits of or subject to discrimination under any educational program or activity". 5 M.R.S. §§ 4602(1)(A) & (4).

- 4) "Sexual orientation means a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression." 5 M.R.S. § 4553(9-C).
- 5) A school is a "place of public accommodation" under the Act. 5 M.R.S. § 4553(8)(J). The public accommodations provision of the Act makes it unlawful to "discriminate against or in any manner . . . deny the full and equal enjoyment to any person, on account of . . . sexual orientation, physical or mental disability, . . . any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms or conditions upon which access to accommodation, advantages, facilities, goods, services and privileges may depend." 5 M.R.S. § 4592(1).
- 6) This provision is reasonably construed to prohibit a hostile educational environment. *Cf. L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 915 A.2d 535, 547 (N.J. 2007) (interpreting similar provision in New Jersey Law Against Discrimination).
 - a) "Hostile environment claims involve repeated or intense harassment sufficiently severe or pervasive to create an abusive [educational] environment." *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 23, 824 A.2d 48, 57 (employment case); *L.W. ex rel. L.G.*, 915 A.2d at 547. In determining whether an actionable hostile environment claim exists, it is necessary to view "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an [individual's enjoyment of an educational environment]." *Doyle*, 2003 ME 61, ¶ 23 (citations omitted). It is not necessary that the inappropriate conduct occur more than once so long as it is severe enough to cause the environment to become hostile or abusive. *See id.*; *Nadeau v. Rainbow Rugs*, 675 A.2d 973, 976 (Me. 1996) (employment). "The standard requires an objectively hostile or abusive environment—one that a reasonable person would find hostile or abusive—as well as the victim's subjective perception that the environment is abusive." *Nadeau*, 675 A.2d at 976. In the school context, the alleged harassment must be such that "a reasonable student of the same age, maturity level, and protected characteristic would consider sufficiently severe or pervasive enough to create an intimidating, hostile, or offensive school environment." *L.W. ex rel. L.G.*, 915 A.2d 535 at 547.
 - b) To establish liability on the part of a school for a hostile environment, Complainant must demonstrate that Respondent knew or should have known of the harassment and failed to implement prompt and appropriate action. *See Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 401 (1st Cir. 2002) (Title VII); *L.W. ex rel. L.G.*, 915 A.2d at 550 (applying negligence standard to New Jersey Law Against Discrimination applicable to schools notwithstanding "deliberate indifference" standard under federal Title IX in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)).
- 7) With regard to the education and public accommodations claims based on sex and sexual orientation, Complainant has established that he was subjected to a hostile environment, and that the school is liable for that environment, with reasoning as follows:
 - a) In this case, Complainant alleged that Minor was subjected to a hostile educational environment due to perceived sexual orientation and due to his sex. Respondent stated that while Minor was subjected to teasing by other students, it was not based on his (perceived) sexual orientation or sex, and each incident that was reported involved different students and was handled on a case by case basis.

- b) While Respondent argues that Minor was not teased due to perceived sexual orientation or sex, the facts show that there were several incidents that occurred which could be identified as relating to Minor's perceived sexual orientation and/or his fitting into stereotypes about males (sex). These include the "gay test", being told he had man boobs, the cheese incident, a male student sitting on his lap, grabbing/stroking his chest, and male students telling him "I love you".
- c) Additionally, the facts show that Complainant experienced a significant amount of teasing from classmates which was not overtly related to perceived sexual orientation or sex stereotypes, such as when Minor was hit with a lacrosse stick and stabbed with a pencil. Given that a significant number of incidents were related to Minor's sex/perceived sexual orientation, it is impossible to segregate out some teasing as part of the hostile environment, and some as outside of it. It is more likely that the incidents were interrelated, and the evidence supports a finding that Minor was harassed due to his protected class status.
- d) Looking at the totality of the incidents that occurred, they are pervasive. As to whether or not the incidents unreasonably interfered with Minor's enjoyment of his educational environment, Minor stated that he was increasingly uncomfortable when these incidents continued to occur. Respondent even stated that Minor became hypersensitive to the incidents, which tends to show that he was affected by what was occurring. The culmination was when Minor refused to return back to school on several occasions during his seventh and eighth grade years. While Respondent argues that Minor's grades and testing results showed little differentiation and that he continued to be active in clubs and have friends, it does not negate the fact that Minor was affected in other ways which interfered with his educational environment.
- e) The issue of whether or not Minor was sexually assaulted is a difficult one, and has been contested by both parties. Because the verbal and lesser physical harassment was pervasive and unreasonably interfered with Minor's educational environment, there is no need for the Commission to make a factual determination on this issue. It is worth noting, however, that sexual assault is obviously severe conduct which would support a finding of a hostile education environment. Complainant did have a physical injury matching his description of the assaults, and ultimately required inpatient treatment for depression after revealing that he was assaulted, which tend to support his allegations.
- f) The facts show that Minor subjectively perceived his educational environment to be hostile and abusive. As for the analysis of whether the educational environment could objectively be viewed as hostile or abusive, there is at least an even chance that a reasonable person could view the totality of the circumstances which Minor experienced as being hostile or abusive based on perceived sexual orientation and/or sex. While Respondent argues that none of the incidents had to do with Minor's perceived sexual orientation or sex, there were incidents that occurred which, while not overtly related to perceived sexual orientation or sex, could be viewed as relating to Minor's perceived sexual orientation or sex (e.g. statement that group did gay test within its circle, why they did it to Minor, licking cheese, thinking of him, sitting on lap, stroking his chest, man boobs).
 - i. Minor complained of these incidents and, while the other students involved denied them, Minor credibly stated with detail in his interview that these incidents occurred.
- g) With regard to Respondent's liability, Respondent was aware of most of the incidents reiterated by Minor in the Commission's investigation into this complaint. Respondent did, as it asserts here, take corrective action. It had good policies in place. However, it did not do enough in this instance. Due to

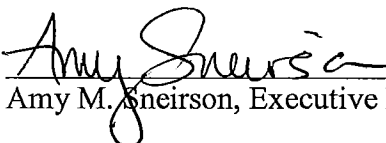
the number of incidents that occurred specifically to Minor, it is sensible to think that Respondent should have honed in on that fact to see if there was a bigger issue instead of handling each incident on a case by case basis for more than two and a half years.

- i. Minor complained to several teachers that incidents were occurring. It does not appear that all complaints made to teachers were communicated to higher officials. If this had happened, it might have assisted the Respondent in looking at the circumstances involving Minor differently and implementing the higher standard of review discussed by Principal during the Fact Finding Conference.
 - ii. The first incident Principal recalled being personally involved in was the "gay test." With regard to this incident, Principal made contact with only one set of parents and left voice messages for the other parents. Principal never heard back from those parents, and never made any further attempt to get in touch with those parents. Based on the facts submitted in the course of the investigation, this is also the only incident for which Respondent even attempted to speak with the parents of the other student(s) involved.
 - iii. The parties dispute whether the same students were involved in multiple incidents of harassment that were reported by Minor. Minor testified credibly in his interview that some students committed more than one act of harassment. However, even if none of the same students were involved in multiple incidents, Respondent took the approach to handle incidents reported by Minor on a case by case basis over a two and a half year period. The fact that Minor reported so many incidents over that period of time warranted a different approach by Respondent. By failing to look at the overall picture of what was happening to Minor, Respondent allowed a hostile education environment to persist for a lengthy period of time. While Respondent's response to Minor's/Complainant's reports may have been appropriate initially, it did not remain appropriate when it became clear that the case-by-case approach was not effective to stop the harassment Minor was experiencing.
- h) At this point of preliminary investigation, the facts presented give at least an even chance that Complainant may prevail in a civil action. This conclusion is reached by looking at the totality of the incidents that were reported by Minor, including their context, and the lack of effective remedial action taken by Respondent over a lengthy period of time when it knew Minor was being harassed.

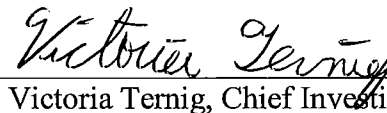
VI. Recommendation:

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

1. There are **Reasonable Grounds** to believe that Respondent [REDACTED] School District discriminated in educational opportunity and/or public accommodations against Complainant o/b/o Minor on the basis of perceived sexual orientation and sex; and
2. Conciliation should be attempted in accordance with 5 M.R.S. § 4612(3).



Amy M. Sneider, Executive Director



Victoria Ternig, Chief Investigator