

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

HOWARD HORSMAN & CAROLE HORSMAN,
On behalf of BENJAMIN HORSMAN, AND
MASSACHUSETTS COMMISSION AGAINST
DISCRIMINATION,

Complainant

v.

DOCKET NO. 95-BPA-0003

REHOBOTH SUMMER ATHLETIC PROGRAM, INC.,
JOHN EGAN, AND DIGHTON-REHOBOTH REGIONAL
SCHOOL DISTRICT,

Respondents

Appearances: Barbara Maxwell, Esq. for Complainants
David Sullivan, Esq. for Respondents Rehoboth Summer Athletic Program
& John Egan
John F.D. Jacobi, III, Esq. for Respondent Dighton Rehoboth Regional
School District

DECISION OF THE HEARING OFFICER

On January 5, 1995, the Complainant's parents Carole and Howard Horsman filed a complaint of discrimination on behalf of their son, Benjamin Horsman, the Complainant in this case, against Respondents, Rehoboth Summer Athletic Program, Inc., John Egan, the Director of the summer program, and the Dighton-Rehoboth Regional School District. The Complaint alleged that Respondents had discriminated against Benjamin Horsman on account of his disability, cerebral palsy, in that he was denied the opportunity to fully participate in the activities of summer camp. The Investigating Commissioner found probable cause to credit the allegations of the

complaint and efforts to conciliate the matter were unsuccessful. The Investigating Commissioner issued a Complaint for Certification to public hearing on August 3, 2001. The following issues were certified to public hearing: (1) whether Respondents discriminated against Complainant by their actions or inaction in the summer of 1994 in violation of G.L. c. 272 s. 98A; (2) whether the Dighton-Rehoboth Regional School District is liable for any alleged discrimination because of a landlord-tenant relationship with the Rehoboth Summer Athletic Program or by any theory of agency; and (3) whether Complainant suffered damages as a result of the alleged discriminatory acts of Respondents, and the amount of value of any such damages.

A public hearing was held before the undersigned hearing officer on June 11 and 12, 2002. Respondents submitted post-hearing briefs in September 2002. Respondents seek dismissal of the claim against the Dighton-Rehoboth Regional School District on the grounds that there is no relationship between the school district and the Rehoboth Summer Athletic Program that would warrant any finding of liability against the former. Respondent John Egan also seeks his dismissal as an individual Respondent in that he took no actions in his individual capacity in furtherance of the alleged acts of discrimination. Complainant's counsel sought several continuances and did not file a post-hearing brief until January 24, 2003. Having reviewed the entire record in this matter, and the proposed findings of the parties, I make the following findings of fact, conclusions of law and Order.

II. FINDINGS OF FACT

1. The Complainant, Benjamin Horsman, (age 18 at the time of the hearing) was 10 years old in 1994 at the time of the alleged acts of discrimination.

2. Complainant suffers from cerebral palsy which limits his mobility, particularly his ability to walk. Complainant is, however, ambulatory and he is not now, nor was he at the time of the alleged discrimination confined to a wheelchair. In 1994 he used crutches, a walker and a wheelchair to aid his mobility. He used the wheelchair if he needed to traverse long distances or to rest. He was able to seat himself in his wheelchair and to stand and walk away from his wheelchair without assistance from others.

3. Respondent Rehoboth Summer Athletic Program (RSAP) is a non-profit corporation organized pursuant to chapter 180 of the Massachusetts General Laws. RSAP ran a camp during the summer for a number of years in the town of Rehoboth. Respondent John Egan was the executive director of the camp and an employee of RSAP. RSAP had its own officers and directors, sources of funding and employees. It had an employer identification number, a payroll account and other indicia of ongoing independent corporate existence. RSAP hired its own employees and established its own programs and policies.

4. The town of Rehoboth owns the schools in the Dighton-Rehoboth School District and leases them to the District. Respondent Dighton-Rehoboth Regional School District, in turn, subleases its school facilities to community groups when school is not in session. RSAP sub-leased the Palmer and Beckwith Schools from the School District for the period of July 11 to August 4, 1994.

5. The camp was held on the athletic fields and grounds of the Palmer and Beckwith Schools in Rehoboth. Aside from the location, the School District had no role in establishing or operating the Summer Athletic Program. No school committee members or school administrators served on its Board of Directors or as officers of RASP. The

School District had no financial interest in the Summer Athletic Program, exercised no control or supervision over the Program and had no input, direction, control or connection to its programs and activities, or the hiring of its employees. The only relationship between the School District and the Athletic Program was that of landlord-tenant.

6. By the summer of 1994, RSAP had run a summer camp in the town of Rehoboth for a number of years. The camp consisted of two divisions, one for children ages 5-9 and one for children ages 10-13. The program for younger children consisted of arts and crafts and instruction in athletics, such as baseball and soccer. The so-called senior camp focused less on arts and crafts and instruction and was in large part geared to actual competition in baseball, soccer, and football and other sporting events. In 1994 the camp ran from July 5 to August 4, and each session was from 8:30 am to 11:30 am.

7. Complainant had attended the younger children's camp in the summer of 1992 and 1993 with no complaints. At an IEP meeting conducted in the 1993-94 school year, Complainant's mother, Carole Horsman mentioned to Complainant's adaptive physical education teacher, Linda Miller, that Complainant was enrolled in the RSAP program for older children for the summer 1994 session. Linda Miller advised against this for safety reasons, however Complainant's father rejected this advice.

8. Subsequently Carole Horsman approached John Egan, the director of the camp, at a small restaurant in town where she worked and where Egan was a frequent customer. She discussed the fact that her son would be attending the older children's camp and expressed her concerns for his safety because of the competitive nature of the games. She asked if Egan could arrange for Complainant to participate, while still being safe.

They discussed allowing Complainant to participate more in a social way, to carry a clipboard and whistle, to keep score and referee, rather than actively compete in the actual games. Egan was enthusiastic about finding ways to include Complainant and encouraged his attendance at the camp. He said he would assign Complainant to a beat counselor, Bill Gray. Apparently Carole Horsman did not discuss this matter with her husband, and they both testified that no accommodation had been requested for Complainant. I do not credit this testimony.

9. Complainant claims that he was treated in a discriminatory manner on approximately six days at the summer camp: July 5, 6, 7, 8, 12, and 27, 1994. He claims that the discrimination on the first four days of camp in July 1994 consisted of leaving him in his wheelchair for most of the camp session and not inviting him to participate in activities, and that camp counselor Bill Gray was responsible for this. The acts of discrimination alleged to have occurred on July 12th and 27th involved Complainant being carried off a bus on each occasion by a camp counselor, Scott Eaton, on a field trip to a water slide park and on a field trip to the movies. There is no allegation that John Egan was directly involved in any of these incidents. He is charged with discrimination in his capacity as Executive Director of the camp and as a result of a conversation he had with Complainant's parents.

10. Complainant, appeared to have little or no independent recollection of the events that had occurred in 1994 when he was 10 years old, apart from what his parents have told him. Howard Horseman testified that on the first few days of camp when he came to pick up his son, Benjamin was sitting alone in his wheelchair, and told his father that he had been left alone. According to his father, Benjamin told him that he had been left sitting in

his wheelchair all day for the first four days of camp. There was testimony that during those first four days of camp, Benjamin carried a clipboard and a whistle and refereed games. The Counselor assigned to Complainant, Bill Gray, testified that Complainant was not confined to his wheelchair by anyone at the camp and that he participated in many of the activities that day. Another witness, Jeffrey White, who was Complainant's physical education teacher at the Dighton Elementary School that year, testified that he visited the camp on July 6th and saw Complainant participating in all of the activities, enjoying himself immensely, and in fact watched him play baseball, which included batting and running the bases. While Complainant clearly could not participate in some activities at the level of the other children, the evidence from those who were present suggests that he did participate in activities commensurate with his abilities.

11. Howard Horsman was dissatisfied with the level of his son's participation at the camp over the first few days. Based on information relayed to him by Complainant, he requested a meeting on July 8, 1994 with John Egan. The meeting took place on July 11, 1994 and at the meeting Mr. Horsman requested that his son be allowed to participate more fully during the remainder of the camp. There is some dispute about the discussion that ensued at that meeting with Complainant's father claiming that Egan asked them to sign a liability waiver and stating "What if Ben gets hit in the balls?" Egan claims that he was legitimately concerned about Complainant getting injured while playing on the field in a baseball game as he would be relying on his crutches, and asked "What if Ben gets hit with a ball?" I find that Egan was genuinely concerned for Complainant's safety and believe the latter statement to be more credible. Mr. Horsman wrote a letter at the end of camp professing to be satisfied with his son's camp experience after that meeting.

12. The other two incidents in which Complainant's parents claim he was treated in a discriminatory manner occurred when he was assisted on or off the bus by counselors at a field trip to the movies and to a water slide park. In his previous two years at camp, Complainant had to be carried on and off the bus for field trips. Complainant testified that he had learned to enter and exit the school bus without assistance during the 3rd grade school, however neither of his parents had communicated this to anyone at RSAP.

Complainant claims that on the July 12, 1994 bus trip to the waters slide park, counselor Scott Eaton asked him if he needed help exiting the bus and he said "yes," so Eaton then put his hands under Complainant's arms and carried him off the bus. Complainant now claims to have been humiliated by this treatment, however at the time neither he nor his father spoke to Scott Eaton or protested the manner in which Complainant was assisted.

13. Eaton testified that he was not on Complainant's bus on the trip to the water slide. He was, however, on Complainant's bus on the return trip to camp from the movies on July 27, 1994, and asked Complainant if he needed help, was told he did, and placed his hands under Complainant's arms to carry him down the steps. Complainant claims to have been humiliated once again by this treatment, however, neither he nor his father, who witnessed the event, made their feelings known to the counselor. I find that the actions of Eaton in assisting Complainant off the bus on one or both occasions was not discriminatory.

14. Complainant's father first notified school committee member, Janice Terry, of the alleged acts of discrimination against his son at 8:30 am on July 27, 1994. By that time all of the alleged acts of discrimination had already occurred except for the bus incident cited above which occurred later that day. Complainant's father did not ask the Dighton-

Rehoboth school committee to take any action. However, as a result of his call to Janice Terry, the then Superintendent of Schools, Richard Kisiel, asked the then Assistant Superintendent, Frank Connor, to mediate between the Horsmans and RSAP. On July 29, 1994, Connor did act as a mediator at a discussion between the parties and they all pronounced themselves to be satisfied with the discussion. In letter dated August 3, 1994 from Complainant's parents to Mr. Connor, they indicated that their concerns were adequately addressed and that a reasonable resolution was agreed upon. (Ex. R-1). On January 5, 1995, Complainant's father filed the instant complaint with the MCAD.

III. CONCLUSIONS OF LAW

A. Dismissal of Claims against Dighton-Rehoboth School District

Massachusetts General Laws c. 272 s. 98 states "Whoever makes any distinction, discrimination or restriction on account of...any physical or mental disability... relative to the admission of any person to or his treatment in any place of public accommodation...or whoever aides or incites such distinction, discrimination or restriction...shall be liable to any person aggrieved thereby for....damages..." The statute clearly contemplates that anyone who aides or incites discriminatory conduct may be liable.

The Dighton-Rehoboth Regional School District has moved for dismissal as a party-respondent on the grounds that they have no affiliation with the Rehoboth Summer Athletic Program aside from sub-leasing to them certain facilities on which camp activities are held. Respondent D-R School District argues that there is no relationship

between it and the RSAP that would warrant a finding of liability for any discrimination by RSAP.¹

In my estimation, a more significant inquiry, irrespective of the mere landlord – tenant relationship between the two parties, is whether there is evidence that the School District committed any acts or failed to act in a manner that could reasonably be determined to constitute aiding or inciting the alleged discriminatory acts.

The facts suggest that the first time Complainant’s parents contacted anyone affiliated with the School District regarding allegations of discriminatory treatment was on July 27, 1994, when Mr. Horsman placed a call to School Committee member, Janice Terry. As a result of this call, the then Superintendent of Schools, Richard Kisiel, asked the Assistant Superintendent, Frank Connor, to mediate between the Horsmans and RSAP. While it is not apparent that the School officials had any duty to act in this matter, they took reasonable steps to attempt to resolve the problem by offering to serve as a mediator. The evidence does not suggest that the School District acted or failed to act in any way that would make it liable for any discrimination by RSAP.

B. Liability of RSAP for Handicap Discrimination

Massachusetts General Laws c. 272 s. 98 prohibits discrimination in a place of public accommodation on account of physical or mental disability.² The Commission is authorized to enforce the public accommodations statute pursuant to G.L. c. 151B s.5. In

¹ Based upon my conclusion *infra*. that RSAP did not engage in unlawful discrimination, I decline to rule on Complainant’s argument that the D-R School District is vicariously liable based on a theory of agency arising out of the landlord-tenant relationship.

² While the parties did not specifically address the issue of whether RSAP was a place of public accommodation, Respondent RSAP did not deny that it was. There was no evidence regarding who was eligible to enroll in the camp, whether it was open to all members of the public or if admission was restricted, and the degree of selectivity in admission, if any. In the absence of any such evidence, I will draw the inference that the camp was open to the public and subject to G.L. c. 272 s.92A.

order to establish a prima facie case of discrimination in a place of public accommodation, the Complainant must show that (1) he is a member of a protected class, (2) that he was denied access to or restricted in the use of (3) a place of public accommodation. Cummings v. Safeguard Security and Galleria Mall, 24 MDLR 174 (2002). The crux of this matter is whether RSAP and John Egan are liable for discrimination against Complainant because of the alleged actions of Respondents' camp counselors in not allowing Complainant to participate fully in camp activities and by assisting him on and off the camp bus. While the former allegations are disputed, the evidence suggests to me that Complainant's mother specifically told Egan that she wanted her son to participate in activities in a manner that would not place him in jeopardy of injury and that Egan suggested various avenues of participation that would include Complainant and make him feel part of the team. I conclude that Complainant was invited to participate in camp activities and did participate in various activities commensurate with his physical abilities. While Respondent may have had an obligation to make some accommodations to Complainant's handicap, the evidence suggests that counselors did so to the extent feasible, and paid special attention to Complainant whenever possible, without disrupting the camp activities for all the other children. A place of public accommodation has an obligation to treat each member of the public equally, except for good cause. Smith v. Suburban Restaurants, Inc., 374 Mass 528 (1978).

In this instance, Respondents RSAP and Egan had a duty to provide a satisfactory camp experience for all the enrollees and to allow Complainant to participate in a realistic fashion that did not significantly disrupt the experience of others. Given this set of

circumstances, I find that the neither Egan nor the camp counselors discriminated against Complainant and did their best to enhance his experience and to make him feel included, in light of their obligations to all the other children.

I conclude that the claim against John Egan individually as the Director of RSAP, must also be dismissed. The evidence does not suggest that Egan while director of the camp, engaged in conduct that discriminated against Complainant on account of his handicap. Nor did he take any actions to incite or aide discrimination against Complainant. To the contrary, the evidence suggests that Egan did everything within his power to make Complainant's camp experience an enriching one.

While there is an allegation by Complainant's parents that Egan made a rude comment to them regarding potential injury to their son and did discuss the camp's liability issues, I do not credit the parents' testimony that Egan made rude or inappropriate statements to them and do not believe that this discussion demonstrated discriminatory animus on the part of Egan toward the Complainant with respect to his participation in the camp.

Finally, I do not find that the actions of the counselors in assisting Complainant off the bus by carrying him constituted discriminatory treatment in violation of G.L. c. 272. I find that the counselors asked Complainant if he needed assistance and he indicated that he did. It is apparent that the counselors reasonably believed Complainant sought and needed their assistance and in view of this they acted appropriately. The fact that Complainant was embarrassed by being carried off the bus was unfortunate, but he did not notify the counselors of his discomfort at the time. I conclude that the

Respondents' actions did not constitute discrimination in a place of public accommodation and believe that they acted appropriately given this challenging situation.

For the foregoing reasons, I conclude that Respondents RSAP and John Egan are not liable for discrimination in violation of G.L. c. 272. s. 98.

IV. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Complaints against RSAP, Dighton-Rehoboth Regional School District and John Egan are hereby Dismissed.

So Ordered this 24th day of July, 2003.

Eugenia M. Guastaferr
Hearing Officer