

**BEFORE THE HUMAN RELATIONS COMMISSION
FOR THE STATE OF DELAWARE**

KATELYNN & BERNARD PAUTLER)
obo X.P., a minor)

Complainant,)

v.)

MARIAM BANOUB)
& HAPPY KIDS ACADEMY, INC.)

Respondents.)

Case No. NC-EA-1666-17

PANEL DECISION AND ORDER

Pursuant to due notice of time and place of meeting served on all parties in interest, the above stated cause came before a panel of the Delaware State Human Relations Commission on Monday July 16, 2018 in the Carvel State Building, 3rd Floor Conference Room, New Castle County, Delaware, to determine whether a violation of the Delaware State Equal Accommodations Law, 6 *Del. C.* Ch. 45, had occurred.

PRESENT:

Calvin Christopher, Commissioner and Panel Chair

Olga Ramirez, Commissioner

Whittona Burrell, Commissioner

Zoe M. Plerhoples, Attorney for the Commission Panel.

APPEARANCES:

David G. Culley, Esq., for complainants

Lauren P. DeLuca Esq., for respondents

A meeting of a panel of the Human Relations Commission (“HRC”) convened on July 16, 2018 in order to determine whether a violation of Delaware’s Equal Accommodation Law, 6 *Del. C.* § 4504, occurred. Specifically, Katelynn and Bernard Pautler brought a complaint on behalf of their minor son, X.P.¹ alleging that Mariam Banoub and Happy Kids Academy, Inc. (“Happy Kids”) discriminated against X.P. on the basis of his disability. After the hearing, the panel recessed until July 17 to continue deliberations.²

Summary of the Complaint

The Complainants, Katelyn and Bernard Pautler (hereinafter, “the Pautlers”), bring a Complaint alleging that their minor son X.P. was refused, withheld or denied accommodations, facilities, advantages, or privileges of a place of public accommodation because of his disability.

The Complaint alleges that X.P., who was four years old at the time of the filing of the Complaint, was diagnosed with encopresis (chronic and severe constipation) at a very young age. The Complaint further alleges that X.P. was enrolled in daycare at Happy Kids and that Happy Kids staff treated X.P. poorly; that Happy Kids did not offer any accommodations to X.P. or his family or engage in an interactive process with them; and that X.P. was ultimately terminated because of his disability.

Pre-Hearing Matters

Prior to the start of the hearing, the Panel asked if either party wanted to raise any

¹ X.P. is a minor child, the son of Katelyn and Bernard Pautler. Because his medical condition is discussed at some length throughout this opinion, we elect to use his initials or refer to him as “the minor child.”

² Both parties submitted exhibits to the Division of Human Relations (“the Division”) prior to the hearing. The Panel received those exhibits the day of the hearing. The Panel recessed until the following day so that all Panel members could fully review the exhibits.

pre-hearing issues. The Pautlers' attorney, Mr. Culley, stated that one of the witnesses he intended to call, Dr. Elpida Nissirios, M.D., was not present and stated that he was not aware if the subpoena was timely served.³ Mr. Culley made no further comment or request to the Panel regarding that witness.

On behalf of Ms. Banoub and Happy Kids, Ms. DeLuca raised an objection to certain exhibits submitted by the Pautlers on the grounds of hearsay and lack of foundation. Upon the advice of counsel, the Panel informed the parties that in the context of an administrative proceeding, the exhibits would be admissible and argument could be made as to the weight to give each exhibit.

Both parties requested the sequestration of witnesses, which was granted, and requested to address their respective motions for attorneys' fees at the close of the evidence. Both parties made opening statements and the Pautlers called their first witness.

Summary of the Evidence

Complainant's Case

A. Respondent Mariam Banoub ("Ms. Banoub")

Ms. Banoub was sworn and testified that she is one of the owners of Happy Kids Academy, ("Happy Kids"), a licensed daycare facility in the State of Delaware. The other owner is her husband Medhat Banoub. Happy Kids has been in operation since May of 2006. She currently works at Happy Kids as the administrator, handling the day to day operational matters, supervising the staff and handling the licensing. Her hours are

³ By letter dated July 10, 2018, Mr. Culley requested that the Division of Human Relations serve a subpoena *ad testificandum* to Dr. Nissirios. A review of the Division's file indicates that the subpoena was served on or about that date. Dr. Nissirios did not appear, and neither party requested that the Panel compel her to appear.

variable. Happy Kids is open Monday to Friday, 6 a.m. to 6 p.m. She is aware that the events that gave rise to the current Complaint occurred in 2017. There are 12-14 employees at Happy Kids, all of whom, save, one are teachers. She is in charge of Happy Kids.

Ms. Banoub was directed to the first page of Complainant's exhibit D-1.⁴ She identified this exhibit as the enrollment application the Pautlers submitted for X.P. on September 25, 2015 and agreed that the application indicated that his start date at Happy Kids was September 28, 2015. She agreed that the date of birth on the application was likely correct and that X.P. would have been approximately 2.5 years old when he started at Happy Kids, and that he was placed in the two-year-old class. At that time, Brenda Bynum was the teacher in charge of the two-year-old class. She identified pages 4-5 in D-1 as information on a form filled out by the Pautlers regarding X.P.'s developmental history, completed as part of the enrollment application. She was directed to the next page, where Ms. Pautler had answered the question "What goals do you have for your child this year?" with "to be potty trained." She understood that when X.P. enrolled at Happy Kids, he was not yet fully potty trained.

Ms. Banoub was directed to the following page of the enrollment application's developmental history section, and agreed that the Pautlers had indicated on the form that X.P. did not have regular bowel movements, that he had an issue with constipation, and that she was therefore aware of those facts when X.P. was enrolled in Happy Kids.

Ms. Banoub was thereafter directed to exhibit D-2, and identified it as the 2015 version

⁴ Complainants' exhibits are listed as D-1 to D-8; Respondent's exhibits are listed as F with a corresponding page number.

of the Happy Kids Parent Handbook (“handbook”)⁵. Ms. Banoub was asked if there was any language in the handbook regarding anti-discrimination, she answered that the handbook is updated every year so she would have to review this version to see if there were any provisions regarding anti-discrimination policies. After briefly reviewing the exhibit, Ms. Banoub identified a passage on the last page of D-2 as containing “anti-discrimination” language.⁶ Ms. Banoub was then questioned regarding the handbook’s section entitled “Our Philosophy” and was asked if Happy Kids truly does believe each child is a unique individual. She answered in the affirmative. Ms. Banoub was directed to other sections of the handbook detailing Happy Kids’ policy on fees and tuition and confirmed that the Pautlers had not been delinquent in any payments. She confirmed that the handbook requested that parents not pay teachers the tuition, but that checks or money orders were to be given to the office and was asked if the policy for delivery of medical notes was the same. Ms. Banoub stated that medical notes are dropped off at the office. Complainant then questioned Ms. Banoub about Happy Kids’ discipline policy as set forth in page 4 of the handbook. Ms. Banoub confirmed that Happy Kids’ policy is to not punish a child for toileting accidents, and further stated that state regulations prevent disciplining a child for toileting accidents.

Ms. Banoub was asked about yearly training her staff received. She does not know if they receive specific anti-discrimination training. They do early learning and childhood development training pursuant to licensing obligations. The topics are specific to age groups and include how to feed children of various age groups, how children play, gross

⁵ Complainant’s D-2 is hereinafter referred to as “the handbook.”

⁶ The passage indicated by Ms. Banoub reads, in pertinent part, “Happy Kids Academy prohibits discrimination against its customers, employees and applicants for employment on the bases of race, color, national origin, age, disability, sex, gender identity, religion, political beliefs and marital status.”

and fine motor skills, and transitioning kids from different age group rooms within a facility. She stated that she does not think that her staff received Americans with Disability Act (“ADA”) training. Ms. Banoub stated that handling potty-training is absolutely an important aspect of the developmental process for two- to four-year-olds. She understood that X.P. would be engaging in potty-training activities at Happy Kids, and that Happy Kids does engage in potty-training of children. The policy is that a child in the three- to five-year-old room should be potty-trained.

When X.P. was moved to the three-year-old room in May of 2016, he was slightly over three years old. At that time, she believed that he was fully potty-trained. He would have accidents occasionally, but Ms. Banoub considered that “very normal,” for a child his age. When asked what “fully potty-trained” meant from her perspective, she stated that X.P. was wearing underwear and could go to the bathroom unattended, even if he had accidents for the first couple of months. Happy Kids has bathrooms in the classrooms, and the toilets are available for children to use any time they want to go. Teachers can assist kids even if they are fully potty-trained, if necessary. Teachers are not allowed to touch the children’s buttocks area, pursuant to state regulations, but they can hold a child’s hand and help them wipe.

Ms. Banoub was directed to page 6 of the handbook, the section entitled “Children with Diverse Needs,” specifically to a sentence stating that “[t]eachers review copies of the child’s current IFSP or IEP or notes from a therapist or specialist.” Ms. Banoub confirmed that was the practice of Happy Kids. She stated that, prior to this Complaint being filed, she was not aware that X.P. was receiving ongoing medical treatment from a gastroenterologist (“G.I. doctor”) or a behavioral therapist in 2017. Ms. Banoub said that

Ms. Pautler did not make her aware of X.P.'s medical condition. She agreed that if X.P. had been diagnosed with chronic constipation, fecal impaction or encopresis, he would qualify as a child with "special needs" pursuant to Happy Kid's handbook, but she said that she was not aware of those facts until the week before his contract was terminated, when a nurse or some other medical professional called her. She did not know that he was under someone's care. She knew that he went to the doctor "here and there," but did not know the specifics.

Ms. Banoub was directed to page 9 of the handbook, to the section regarding termination procedures.⁷ She confirmed that the Pautlers had not been delinquent with fees nor had they been inappropriate with staff. Ms. Banoub stated that X.P.'s behavior in the classroom constantly endangered other students. He pushed students, threw chairs at other students, scratched them, used profanity around other students, including the "f-word and the s-word," he would hurt other students and other students would hurt him in response. She relied upon those circumstances when determining to terminate his contract. The reasons were mainly his behavior and the health of the other kids in the classroom. X.P.'s contract was terminated by written notice, in accordance with the procedures in the 2017 handbook; she is not sure without looking at it how the 2017 handbook differs from the 2015 handbook, and X.P.'s contract was terminated in 2017.

Ms. Banoub was directed to Complainant's exhibit D-7, a medical note dated February 20, 2017, written by Dr. Sheeja Abraham from Nemours duPont Pediatrics at Thomas

⁷ The pertinent section reads as follows: "Termination procedure may be implemented at any time by Happy Kids Academy with written notification delivered to the parent. Such notification will state the day and date for the final of attendance. Termination may result when payment is two or more weeks in arrears, when a parent, guardian, or other family member uses loud, inappropriate language when addressing staff members, when a child's behavior consistently endangers others in the classroom, or other situations as may be determined by the administrator."

Jefferson University Hospital ("Nemours"). The note reads as follows:

"Please allow [X.P.] to use the bathroom according to his needs. He has a condition that can cause acute urgency in using the bathroom, and it is important that he have free access to the bathroom. He is on daily laxative therapy and will tend to have frequent loose stools which is not due to an infection. He may have soiling episodes with stool. Please allow him to use a Pull-up if necessary. If you require additional information or would like to discuss, please call me at the number above."

Ms. Banoub was questioned about her understanding of the note. She stated that she believed that this note meant that X.P. had diarrhea, and that kids get sick and get diarrhea at times, but that Happy Kids could take care of him. When children have diarrhea, in order to attend daycare they need a doctor's note to confirm that it's not due to a virus that would transmit to other kids. Happy Kids did not mind taking care of him, but he needed this note to come to allow him to come to the daycare. She did not agree that Ms. Pautler communicated to her or to X.P.'s teacher that he was being treated for severe constipation. She did not need additional information beyond what was provided in this note; if a child was having diarrhea, they could use pull-ups, this was a normal practice.⁸ She believes that the urgency in using the bathroom and the loose stool referred to in this note pertained to X.P. having diarrhea. If she saw a child having diarrhea, she would usually call the parents. She did not contact Dr. Abraham after receiving the note.

Ms. Banoub was directed to Complainant's exhibit D-3, titled "Behavior Report," dated April 4, 2017, and purporting to be authored and signed by Denise Gardner. Ms. Banoub recognized D-3 as the Behavior report written by Denise Gardner, the main teacher in X.P.'s classroom at the time he was terminated from Happy Kids. The other teacher in the classroom was Ms. Caitlin, last name unknown. Neither teacher is still

⁸ Pull-ups, as referred to throughout this Order, are a type of undergarment that function as diapers that children can put on themselves. They are not traditional underpants.

employed with Happy Kids. A Behavior Report is prepared when a child's behavior reaches an extreme; when the child can hurt themselves or other kids in the classroom; the purpose of the Report is to make the parents aware of what is happening and have them acknowledge the behavior; also to have the parents know what action Happy Kids has taken and to ask the parents for help in addressing the behavior. The Behavior Report for X.P. dated April 4, 2017 reads, in pertinent part, as follows:

"[X.P.] was in centers playing with the race cars. One of the children noticed BM⁹ on the floor. I asked X.P. did he have an accident and he said 'no.' I asked him again and he replied 'no.' I asked a thrid [sic] time and told him to tell me the truth, and he answered 'yes.' I had him go to the bathroom and helped him get cleaned up. He told me that he did it on purpose, and that on purpose means 'you mean to do it.' I helped [X.P.] get his socks and things cleaned up and put in a bag. I cleaned the chairs, floor and sanitized toys that were exposed to the feces, and cleaned his shoes. I explained to [X.P.] that he has got to start going to the bathroom, and when has to go, just go in the toilet, where it belongs. Please help me to get [X.P.] to understand this is serious and is not acceptable. Please help him to understand that when he needs to go to the bathroom, he should tell the teacher or go on his own if in the classroom."

The Report is signed by Denise Garner. Ms. Pautler, and Ms. Banoub identified Ms. Gardner's signature above the line for "Administrator/Manager." Ms. Banoub stated that she talked every day about X.P.'s behavior¹⁰, there were a lot of steps before they wrote this report, and that she did not direct Ms. Gardner to prepare the report. Once a teacher finishes a report, Ms. Banoub reads it and signs it, and that procedures was followed here. Ms. Banoub stated that she spoke to Ms. Pautler about X.P.'s behavior, she cannot remember specific dates, but recalled that she would speak to Ms. Pautler when she came to pick X.P. up from daycare. Most of the time, she saw X.P.'s grandmother, and would talk to her. They would talk about X.P.'s general behavior problems. This is the

⁹ BM refers to feces in this context.

¹⁰ It is unclear from the record who Ms. Banoub was referring to when she testified "I talked every day about X.P.'s behavior."

only Behavior Report that Happy Kids had for X.P.

Ms. Banoub was directed to Complainant's D-4, which she identified as a "Boo-Boo Report," which served to give the Pautlers written notice of how and why X.P. incurred an injury. The Boo-Boo Report is dated April 27, 2017, and describes an incident where X.P. shoved a classmate, who then struck X.P. in the face, leaving a mark. The Boo-Boo report was signed by the teacher who witnessed the incident, Ms. Banoub, and Ms. Pautler.

Ms. Banoub was directed to Respondent's Exhibit F, pages R00014-R00018. She identified this exhibit as handwritten notes by Ms. Gardner, ranging in time from December 2016 to May of 2017.¹¹ Ms. Banoub said that Ms. Gardner wrote these notes daily, and that all of the teachers wrote their observations of behavior problems with all of the kids in that notebook. Ms. Banoub explained that these are the pages pertaining to X.P., and detail times when he would hit or spit at other children. These notes detail the incidents that she testified to earlier. Happy Kids gave Daily Sheets to the parents. They do not keep copies of all of the Daily Sheets because they have 92 kids enrolled in the school. She does not have any copies of the sheets given to the Pautlers in her possession; Daily Sheets would also have extreme behavior written on them, and these things would also be verbally communicated to parents or grandparents who picked children up. Ms. Banoub said X.P.'s behavior problems, or at least some of them, were reported to the Pautlers in writing and orally; he could have several incidents in one day. She does not read all of the Daily Sheets that the teachers prepare, but she is aware that they do it because it's their policy. She confirmed that D-3 is the only Behavior Report for

¹¹ None of these notes were read into the record. The Panel reviewed them during deliberations, and they detail Ms. Gardner's recounting of multiple behavioral incidents with X.P. that she apparently deemed noteworthy, including what appears to be violent, aggressive or defiant behavior that X.P. displayed.

X.P. She confirmed that the Behavior Report did refer to a toileting accident that X.P. had, and she stated that it also referred to how he was not telling the truth about his accident. The other behaviors detailed in the Daily Sheets would not necessarily rise to the level of a behavior Report.

Ms. Banoub was directed to Respondent's exhibit F page R00022. She identified this as a report from the Office of Child Care Licensing, ("OCL Report") arising from a complaint to that agency by Ms. Pautler on May 3, 2017. The complaint had to do with a toileting incident involving X.P. Ms. Banoub met with a licensing specialist on May 8, 2017. The specialist did not tell her who made the complaint, but she was aware of what child was involved because of the specifics of the complaint. She did not remember the time of day that she met the specialist.

The witness was directed to Complainant's D-5, which she identified as the termination letter for X.P. dated May 8, 2017. She wrote this letter and hand-delivered it to Ms. Pautler on May 8, 2017. She was not angry about the licensing complaint; it is something that happens when you work in childcare. It was just a coincidence that she terminated X.P.'s contract on the same date that the licensing specialist came to Happy Kids. The phone number and address for OCL is in the Happy Kids handbook as required by a Delaware statute called "parent's right to know." It is also in the application form. At that point, Complainant tendered the witness. Respondent's attorney reserved her questions for her client for her own case.

In response to a question from the Panel, Ms. Banoub stated that the behaviors detailed in the notes by Ms. Gardner would have been communicated to the parents when those behaviors started in December 2016. Happy Kids has parent-teacher conferences

twice a year; Ms. Pautler did not attend the conferences. Happy Kids makes efforts to reach the parents, some kids just have behavior issues and they work with it. He's not the only child with these types of behavior issues; other kids also have troubles.

B. Katelyn Pautler, Complainant ("Ms. Pautler")

Ms. Pautler was sworn and testified that she is the mother of X.P., that X.P. does not have any siblings. She is married to Bernard Pautler. Both Pautlers work full-time, Ms. Pautler as a veterinary technician and Mr. Pautler as a truck driver. Currently, Mr. Pautler's work allows him to be home at night; previously, he was only home every two weeks, so X.P.'s grandmother (Ms. Pautler's mother) would assist in picking up X.P. from Happy Kids. Ms. Pautler would usually drop X.P. off at Happy Kids in the morning, between 6:30 and 6:45 a.m. His first teacher was Ms. Brenda (Bynum). Her mother would pick up X.P. two days a week (Monday and Wednesday) and she would pick up X.P. on the remaining weekdays. Most days when she picked X.P. up, his teachers, Ms. Denise (Gardner) or Ms. Caitlin were present. Ms. Banoub was not there when Ms. Pautler dropped X.P. off, and was there occasionally when she picked X.P. up.

Ms. Pautler was directed to Complainant's exhibit D-1, and identified the handwriting on the enrollment application for X.P. as her own, and she verified his date of birth. She confirmed that X.P.'s first day at Happy Kids was September 28, 2015. X.P. was first enrolled in the two-year-old classroom. He was not fully potty-trained when he started at Happy Kids, and he was not fully potty-trained when he moved into the three-year-old classroom. X.P. could urinate into the toilet, but he would not defecate. He could not feel when he had to go.

X.P. was diagnosed with encopresis in February of 2017. The witness identified

Complainant's D-6 various medical records for X.P. from Nemours.¹² He had chronic constipation and fecal impaction. He started withholding his bowel movements and had to go to the emergency room because he was in so much pain. The first time that they took him to the doctor for this issue, he was prescribed Miralax, which was tapered up and down to help him without causing excessive diarrhea. He was also taking two ex-lax pills. He then went to see a GI doctor, Dr. Sheeja Abramson. Dr. Abramson prescribed him lactulose. He was so blocked up that his colon stretched out, and he could not feel when he had to go anymore, so he would have accidents. This was upsetting to him, and he would hide the fact that he had accidents from his parents. X.P. was under the care of a GI doctor and a behavioral therapist. She gave a doctor's note to Ms. Banoub in February of 2017. That was the only time that she gave a written document from a medical professional to Happy Kids.

During the time-period before he was diagnosed, and shortly after, X.P.'s behavior began getting worse, both at school and at home. He would throw tantrums and have meltdowns at home if he was not getting attention. She communicated his diagnosis verbally to teachers at Happy Kids: she gave them whatever information she had. There was no meaningful discussion about X.P.'s behavior with the teacher, and she does not recall the behaviors being written on Daily Sheets. There were two or three instances when she got written information from teachers. One instance with X.P. caused her concern: when she came to pick him up from school, she heard a teacher ask him in front

¹² The medical records for X.P. from Nemours reference constipation in an emergency visit on May 14, 2016. The records further indicate that CT scans showed a large amount of stool in X.P.'s colon, and he received several enemas, which relieved his pain. The next encounter visit in the records is for February 20, 2017, with Dr. Abraham, and it appears that date is the first date X.P. received the diagnosis of encopresis with constipation and overflow incontinence.

Additional records for X.P. are found at Complainant's D-8, which detail therapy sessions with Dr. Elpida Nissirios.

of other students, 'Did you have an accident?' X.P. was already being called a baby because he wore pull-ups. The Pautlers sent X.P. to Happy Kids with pull-ups and instructed the school to use them, but they failed to help him. Ms. Pautler testified that on one occasion, Ms. Banoub told her that she "did not believe that [X.P.] did not know when he had to go to the bathroom, because he [X.P.] was too smart for that."

The witness was directed to Complainant's D-7, the Behavior Report from April 4, 2017. She stated that Denise Gardner gave her this report, and Ms. Gardner stated that Ms. Banoub directed her to write the report, and that she [Ms. Gardner] did not think it was necessary. She identified her signature on the behavior report.

The witness was directed to Respondent's exhibit F, page R00022, the complaint to OCL. Ms. Pautler verified that she filed a complaint with OCL based on X.P.'s report that a teacher at Happy Kids reprimanded him for an accident he had and would not let him use the bathroom. Ms. Pautler was unclear as to who the individual who denied X.P. access to the bathroom was, but she believed it to be a relative of Ms. Banoub's. She was also concerned because an individual she did not know was in the classroom with X.P.¹³ No one from OCL called her or spoke to her or tried to contact her in any fashion after she filed the complaint.

Ms. Pautler was then directed to Complainant's exhibit D-5, the termination letter from Happy Kids dated May 8, 2017. That document reads, in pertinent part:

"Dear parents of [X.P.], Throughout the course of the past few months, Happy Kids Academy has been experiencing some difficult behaviors with X. His consistent uncontrollable bowel movements have made it difficult for the teachers to provide an equal amount of attention to the classroom while also giving constant attention to him as he needs as a four-year-old in this classroom. This has also caused a problem with the health standards in this facility because the bowel movements

¹³ Per the report from OCL, both concerns were found to be unsubstantiated. There was no testimony from the individual who performed the investigation.

have ended up on the floor, toys, cots, etc. X has also had some other troubling behavior including being aggressive with his classmates. For these reasons, Happy Kids Academy can no longer provide care for X for his safety and for the safety of other children.”

She was shocked and upset by this termination letter. X.P. had a difficult medical condition, and Happy Kids did not care for him appropriately. She believes the termination was because of his medical condition. When asked what accommodations she wanted for X.P., she stated that she wanted them to not treat his bowel movements as a problem, to acknowledge that he had a medical condition and to treat him well, like a normal child, to let him drink water freely throughout the day and to help him. She reiterated that she gave Happy Kids information when she had it and that she communicated his diagnosis to his teacher. Ms. Pautler said that she felt that Ms. Banoub did not believe that X.P. had a medical condition.

X.P.’s condition got to the point that he recently had a complete colon clean out: he was brought to the hospital, sedated, and given enemas to clean him out and reset his colon.

After she received the termination letter, she searched for a new daycare for X.P., and he is now in A.S. Academy in Newark, Delaware. He is flourishing there, he is doing much better. The staff and teachers handle his situation differently and the communication is better. The class size is smaller. She gets very good daily reports about him. He still occasionally has accidents.

Respondent’s attorney conducted cross-examination of Ms. Pautler. When questioned about the note from Dr. Abraham dated February 20, 2017, requesting that X.P. be allowed to wear pull-ups, Ms. Pautler stated that X.P. did not have diarrhea when she got the note, but she thought he might get it in the future. X.P. started seeing a

behavioral therapist around February of 2017. The witness was referred to D-8 and stated that although X.P. saw the therapist prior to March, 2017, no records to that effect were produced or introduced as exhibits.

Ms. Pautler agreed that the application form for X.P. found at D-1 does not contain any information about X.P. using medications for his condition; she does not recall when exactly he started using Mirolax. She verbally told someone at Happy Kids that he was on Mirolax prior to May, 2016, but she did not provide a doctor's note from a pediatrician stating that he was prescribed Mirolax.

Ms. Pautler confirmed her prior testimony that she generally picked X.P. up two to three days a week. On days when she worked late, her mother would pick X.P. up from Happy Kids. She stated that Ms. Banoub "frequently" asked to speak to her. No one else was present when Ms. Banoub said "X.P. was too smart to not know when he had to go to the bathroom."

The witness was questioned about X.P.'s statements "he did it on purpose" in the Behavior Report found at D-7. She stated that X.P. was repeating what he was told at home, he was using wording his parents had used with him and he was still having problems telling us if he meant to do something. Ms. Pautler confirmed that she received the Boo-Boo Report found at D-4 and that the report said X.P. pushed a classmate. She stated that she was only aware for that one incident, and then stated that there were two or three incidents between X.P. and classmates that teachers informed her about.

Ms. Pautler was asked about the requests in Dr. Abraham's February 20, 2017 note. She agreed that the note requested that he be allowed to use the bathroom freely, and that he be allowed to wear pull-ups. She agreed that X.P. was never forbidden to

wear pull-ups at Happy Kids. She testified that there was never a time when X.P. came home and said he wasn't allowed to use the bathroom. She agreed that the note did not mention "treating X.P. like a normal child."

Ms. Pautler received Daily Sheets several times a week, usually they referenced the activities X.P. had done that day. Sometimes there would be comments about needing more clothes. There was never a written request on the Daily Sheet to send more pull-ups or a change of clothes for X.P., or not often. Maybe once or twice a month they were told he needed more clothes. When X.P. had accidents, he would come home wearing extra pairs of pants. The daycare would not provide pull-ups. The clean out of X.P.'s colon occurred pretty recently, roughly six months prior to this hearing.

Ms. Pautler testified further in response to questioning that she spoke to Ms. Denise frequently about X.P.'s accidents. He would lie and say he hadn't had an accident, and then they would find out when they got him home that he had an accident. They would only tell Ms. Denise that they were dealing with the same issue at home. They did not have much information and they were playing around with his medications; all they knew was that if he was more constipated he would have more accidents. They asked Happy Kids that he not be reprimanded for those accidents. X.P. told her one day that Ms. Caitlin yelled at him after an accident. Ms. Mariam's (Banoub) attitude was that the accidents were a problem. There was a parent-teacher conference scheduled to discuss X.P., and Ms. Pautler took off work early to attend, but when she arrived, she was told that it had been scheduled on the wrong day.

Ms. Pautler further testified that on one occasion, she heard a teacher saying "did you have an accident," to X.P. and that concerned her. It was not reprimanding him but it

made the situation worse. In the A.S. Academy, there are maybe 9 or 10 kids in his class; she does not know how many children were in X.P.'s class at Happy Kids. She would not be surprised that there were 19 or 20 kids in that class.

In response to questioning from the Panel, Ms. Pautler stated that she knew X.P. wasn't really potty-trained because he was having accidents. When asked at what point she made the director Ms. Banoub aware of what X.P. was going through, Ms. Pautler stated that she was fairly certain that they told Ms. Donisc that he was on medications, but they didn't have much information. At that point they hadn't gone to a specialist. X.P. was engaging in the same behavior at home as he was in school, not using the bathroom. Happy Kids accepted the pull-ups, they put them in his cubby. Occasionally he would come home wearing a pull-up, but most of the time he was just wearing three or four pairs of underwear.

The Panel asked Ms. Pautler what accommodations could Happy Kids have offered to satisfy you? Ms. Pautler answered that she believed that the fact that they were treating X.P.'s accidents like a problem made the situation worse. Ms. Pautler said that the terminology in the incident report they sent to her shows that they were not appreciative of X.P.'s problem and they did not tolerate it. She further stated that Happy Kids did not use the pull-ups they supplied and did not contact the doctor if they had questions: they didn't do anything besides saying he's having accidents. Most of the information she gave them was verbal; the GI doctor wrote the note dated February 20, 2017, but she verbally told Happy Kids about X.P.'s diagnosis and she attempted interactive engagement on her end. Ms. Pautler said that there has been a complete 180 since he moved to another school.

At that point, the Complainants rested.

Respondent's Case

A. Witness Maria Alley ("Ms. Alley")

Ms. Alley was sworn and testified that she currently works at Happy Kids. She has been there 3.5 years and has worked in childcare for 18+ years. She recalls X.P. from his time at Happy Kids, and she taught him there. She is currently a teacher with the one-year-olds, and was previously in the pre-school classroom with the three-year-olds. She worked with X.P. in 2016, from roughly February or March to May or June. This was prior to most of the incidents in the Complaint and prior to his termination. When asked if there were any behavioral issues with X.P., Ms. Alley stated that he had a little bit of anger and verbal aggression towards students and teachers. She does not remember if she took daily notes on the children at that time. She worked with Ms. Denise as a co-teacher and said that Ms. Denise was the main teacher.

Ms. Alley recalled that X.P. had issues using the toilet. On one occasion, he was hiding behind a bookshelf and had a bowel movement. They did not reprimand him for having the bowel movement, it's not what they do at Happy Kids. She spoke to X.P.'s grandmother at that time, and the grandmother said she would pass the information on to the mother and father. Ms. Alley did not see X.P.'s mother or father often. Ms. Alley told X.P.'s grandmother on one occasion that X.P. was running out of underwear.

Ms. Alley testified that X.P. was not sent home with pull-ups and she did not request pull-ups for X.P. Pull-ups were not used in her classroom. She testified that no one at Happy Kids ever prevented X.P. from using the bathroom whenever he needed to, and

no one prevented him from using a pull-up. Ms. Denise did not do so and Ms. Alley did not do so. Ms. Denise never yelled at X.P. for having a bowel movement. Ms. Alley did not work with or discuss X.P. with Ms. Caitlin. Ms. Caitlin replaced Ms. Alley when she moved to the one-year-old classroom.

Ms. Alley testified that she recalls one instance where X.P. told staff that he had a bowel movement on purpose. This happened when he was hiding behind the bookcase. When asked why, X.P. stated "I just wanted you to change me."

Ms. Alley is familiar with the Daily Sheets. They are used to provide parents with information about their kid's day. When she taught X.P., he had Daily Sheets sent home every day. The Daily Sheets would mention his toileting accidents; including the one behind the bookshelf and another incident where he had an accident on the playground. Ms. Denise had to take X.P. into the classroom to change him; Ms. Alley would be busy with the other children. Ms. Alley recalls that the Daily Sheets did describe other issues going on with X.P., and she talked with Ms. Gardner about those issues. Any communications with the parents would have been through Ms. Denise.

Complainant's attorney cross-examined Ms. Alley. She clarified that she was not working in the three-year-old classroom the year X.P.'s contract was terminated, and she left that room because she was needed in the one-year-old room. Ms. Caitlin took her spot in the three-year-old room. The three-month period working with Ms. Denise in the three-year-old room would have been in 2016. They shared the responsibility of creating the Daily Sheets. Ms. Alley was directed to Complainant's D-3, the Behavior Report for X.P. from April 4, 2017. She never created any such reports for X.P.

The Panel then asked questions of the witness. At the time she worked in the three-

year-old classroom, there may have been 15 children in the class. She did not recall any other children having accidents like X.P. No one told her that X.P. had a medical condition. X.P. was treated like the other children: she was not aware of any medical issues with his bowel movements and no one explained any such medical issues to her.

In response to further questions, Ms. Alley testified that when children have accidents, staff will get clean clothing from the child's cubby, take the child into the bathroom to clean and change the child, and then place the wet clothes in a bag. When Ms. Alley was in the classroom with X.P., he had underpants, but did not have pull-ups in his cubby.

There were no formal meetings of teachers to confer about handling problems with the kids; there would be informal discussions between the teachers or with Ms. Banoub. She and Ms. Denise talked amongst themselves to try to handle the issues with X.P. There were parent-teacher conferences, but she did not personally sit down with parents during the parent teacher conferences. X.P. had aggression and made verbal threats: he would ball his fists up and charge at other students, tell other students "I'm going to kill you," and use curse words. He would hit other students. Ms. Alley was then excused.

B. Respondent Mariam Banoub

Ms. Banoub was sworn and testified on her own behalf. She is the current Administrator of Happy Kids, and has been serving in that capacity since the facility opened. She has credentials and education in childcare and early childhood development. She earned her Bachelor's Degree in early childhood development and is working on her Master's. She is qualified as an administrator of a childcare facility by the State through the Office of Childcare Licensing (OCL) and the Delaware Department of Education. She is qualified to care for infants, toddlers and school age children. All of her

education and credentialing has been completed in the United States. She is an immigrant from Egypt, where she has a background in engineering and childcare. She came to the United States in 1999. Happy Kids was founded in 2006, and she is here to represent Happy Kids.¹⁴

Happy Kids is licensed with OCL, and must renew that license annually. They are subject to random review by OCL, where investigators will come to the location and look at facilities, staff, policies and individual children's files. They are part of the Delaware Stars Program and currently have a rating of 5 out of 5 stars. At one point their rating dropped to 4 stars, but they were able to bring it back up to 5 stars. They have no prior complaints for failing to accommodate a child. Happy Kids has never had its certificate revoked and neither she nor the facility have ever been disciplined by the state.

Ms. Banoub was directed to her prior testimony regarding X.P. and his family. The agreement for X.P. would have been renewed every April per Happy Kids policy, and at the time of renewal, parents are given a copy of the new handbook. It is not accurate that Ms. Pautler was not given the handbook in 2016 and 2017; parents must sign an agreement that they have received the present version of the handbook. Ms. Banoub usually gives the handbook to parents herself and they sign the agreement in front of her. Every family gets a new handbook every year.

Decisions as to which child will be in which classroom are made on a monthly basis. Planning for the classrooms is determined by a child's age and development. Some children may move faster developmentally, so they will be moved ahead. Most of the time, the classes are grouped by age. Depending on the amount of children at Happy Kids, the

¹⁴ Pursuant to Equal Accommodations Regulation 8.11, "...A business organization may be represented by a non-attorney employee."

staff does this monthly or bi-monthly. Happy Kids has a termination policy. Two weeks' notice is required for parents to terminate the contract. The Pautlers renewed their contract in April of 2016 and then in April of 2017.

When she stated in her prior testimony that X.P. was fully potty-trained, she means that he was wearing underwear and could go to the bathroom by himself at any time. When children move to a new room with a different teacher, it's a different environment for them, and they sometimes have accidents. She considers this normal for a young child. She interprets potty-trained as wearing underwear and using the bathroom independently. Each child is different when it comes to potty-training with urination versus defecation. It depends on what they do at home, how their parents are helping them, and their daily routine.

When X.P. moved to the pre-school classroom in May of 2016, Ms. Banoub was not aware that he was unable to have a bowel movement by himself. Ms. Brenda had been in that classroom for twelve years. If there was an issue, she or Ms. Banoub would talk to parents and say we think your child can stay in a lower room to help with potty-training. In X.P.'s case, he stayed an extra month in a lower classroom prior to moving up to the three-year-old classroom, but she believed it was a normal situation and was unaware that it had to do with his potty-training. There were approximately 19 or 20 students in the pre-school classroom when X.P. was in there. Children are not allowed to wear pull-ups or diapers in the pre-school classroom; that would not work with the other 19 kids in the classroom who need attention. Happy Kids does not potty-train children in the pre-school room, the only exception for pull-ups or diapers would be a medical condition where a child needs to wear them. This was done for X.P., he was allowed to

wear pull-ups.

The witness was directed to Complainant's D-3; she testified that the Behavior Report was meant both as documentation and to let X.P.'s parents know what was going on with him. These reports are done when prior attempts at communication or previous reports do not get any response from the parents and it comes to a point where a situation needs to be taken care of. This report is also to comply with their termination policy, as referencing a child's behavior that is endangering other children. Other documentation of behavioral or other issues includes the notebooks the teachers keep and the Daily Sheet. Happy Kids has an open door policy. Parents can call, email or come whenever they want. They have family events on holidays, including a Thanksgiving event, a BBQ and other family nights. Happy Kids holds parent-teacher conferences twice a year.

In response to a question regarding a formal policy on behavioral reports versus direct communication with the parents, Ms. Banoub stated that a teacher will come to her and talk to her if other parents are complaining about a child and the teacher tells her that they need to do something about the situation. Parent-teacher conferences are optional: Happy Kids offers several time slots for parents to sign up for a conference. The conferences are meant to benefit Happy Kids as well as the parents, because Happy Kids gets to show the kids' progress, the stepping stone of the kids' development and to maintain communication with the parents. Ms. Banoub discussed the issues surrounding the scheduling of the parent-teacher conference for X.P. that Ms. Pautler referenced in her testimony. Ms. Banoub stated that Happy Kids made an error in scheduling that conference. X.P. was with Happy Kids for over two years and so he should have had at least four parent-teacher conferences, but Ms. Pautler only signed up for one conference.

When signed up, Happy Kids printed the wrong day on the sign-up sheet and Ms. Pautler did not appear when they expected her. When Ms. Banoub discovered the error, Ms. Pautler was offered a new date for a conference, but she declined, stating that she had spoken to Ms. Caitlin and that there was a plan for X.P. Ms. Banoub was never shown the plan.

The first and only doctor's note that Ms. Banoub received was the February 20, 2017 note from Dr. Abraham. That's when she first became aware that X.P. had a medical condition of some kind; she did not know what his condition was beyond the fact that he was a normal sick child. X.P.'s mother never gave her additional information beyond the note. She never knew that he needed additional accommodations beyond the need to use pull-ups and allowing him access to the bathroom. Water was always available to children in the classrooms. Ms. Banoub was directed to Complainant's D-7 and identified it as the note from Dr. Abraham. She believes she received it close in time to the date on the note. Ms. Banoub stated that no one at Happy Kids ever prevented X.P. from using the bathroom, they would have been fired if they did so. The bathrooms in the classrooms are free for any child to use. The only time children are prevented from using the bathroom is if a child of the opposite sex is currently using it. There are scheduled times for the children to use the bathroom as well. They are sent to use the bathroom as they transition from activity to activity: before lunch, before naptime, before they go outside. They can also go in between the scheduled times.

Ms. Banoub was directed to page R00010 of Respondent's exhibit F; she identified this document as the schedule showing various scheduled bathroom times through out the day. Ms. Banoub then identified a series of pictures found at Respondent's exhibit F,

pages R00037 to R00043 as pictures of the bathrooms in the classroom that X.P. was in and bathrooms in other areas of Happy Kids. She stated that X.P. had access to these bathrooms whenever he wanted in his classroom as well as in another classroom. Referring back to D-7, Ms. Banoub stated that she saw nothing outside the norm about this note, and that she thought it was clear what the doctor was requesting for X.P., so she did not require additional information from the doctor. The Pautler's did not request any other accommodations for X.P., and there was never any discussion with the Pautlers regarding reprimanding X.P. for having an accident.

Ms. Banoub was referred to pages R00019 to R00021 in Respondent's exhibit F. She identified this document as a memorandum that Denise Gardner wrote and gave to her after Ms. Banoub received notice of the complaint against Happy Kids from the Division of Human Relations. Ms. Banoub believed that she had an ongoing open conversation with X.P.'s parents like she did with all other parents. During drop off and pick up, all Ms. Banoub does is speak with parents.

Ms. Banoub was directed to Respondent's exhibit F, page R00020-21.¹⁵ She referenced a discussion she had with Denise Gardner about whether X.P. understood if he was "going on purpose," Ms. Banoub thinks that his understanding of "on purpose" is along the lines for children his age. He told them "on purpose" means "I did it because I wanted to," and Ms. Banoub told him "Ok, we don't want to do this again, we want to use the bathroom."

Ms. Banoub testified that Ms. Denise created a chart with stickers and prizes that

¹⁵ The handwritten notes state, in pertinent part, "Before X.P. got ready to leave the facility, he was having more frequent accidents, and would even tell us 'I did it on purpose.' I asked him what did that mean and he said 'On purpose means I meant to do.' I informed Ms. Mariam and he told her the same thing. I also informed the grandmother, and he told her the same thing."

was used for the whole classroom. It was a project for everyone; Denise did this because she could not ignore the other children to focus only on X.P. The kids earned fake money for good behavior throughout the week and could redeem the money for prizes. Denise also created a chart to give X.P. stickers when he did use the bathroom. When X.P. got prizes, he wouldn't have accidents. When he didn't get prizes, he would have accidents. Ms. Banoub was directed to R00011 of Respondent's exhibit F. She identified this exhibit as a piece of construction paper that hung in her office with X.P.'s name on it. Every time he used good behavior, went to the bathroom or was a gentleman she would put a sticker on the paper and X.P. would give her a high five. She believes she showed this to Ms. Pautler, who was happy with it and thanked her.

Ms. Banoub then testified about the complaint Ms. Pautler made to OCL. She gets visits from OCL maybe once or twice a year; they can be random visits or the result of a complaint from a parent. It's a very normal reaction from a parent. OCL can walk in and investigate any time they want, per state law. Ms. Banoub was directed to R00023 at Respondent's exhibit F. She confirmed that she had previously contacted OCL regarding the situation with X.P.¹⁶ She was asked why she contacted OCL and she explained that they are a good source of advice. She once tried to speak with Mr. Pautler in April of 2017 when Mr. Pautler came to pick him up. X.P. had a bad day that day, she told Mr. Pautler that X.P. was hitting his friends. Mr. Pautler stated "I'm tired of this," and turned away from her to take things out of X.P.'s cubby. She felt she could not engage him. This reaction was one of the reasons she terminated X.P.'s contract in May 2017. Ms. Banoub

¹⁶ The pertinent part of the document states as follows: "Ms. Banoub had contacted LS Bailey in April 2017 requesting some advice on handling a behavioral issue with a child, and her rights as the provider. Ms. Banoub explained at the time of this investigation that this was regarding [X.P., Child #1 in the report]."

was reaching out, but she was finding closed doors. She was calling anyone she could to get help, and she could not get a plan from X.P.'s mother. It was just not fair to the other kids.

Ms. Banoub was directed to page R00035 of Respondent's exhibit F. She identified this as the 2017 Happy Kids Parent handbook. She testified that the paragraph regarding termination procedures was an accurate representation of the procedures in place at Happy Kids in 2017 at the time of X.P.'s termination. That section reads, in pertinent part, as follows:

"Termination procedure may be implemented at any time by Happy Kids Academy with written notification delivered to the parents. Such notification will state the day and date for final of attendance. Termination may result when payment is two or more weeks late, when a parent, guardian or other family member uses loud and inappropriate language when addressing staff members, when a child's behavior consistently endangers him/her or others in the classroom, when the child's behavior unacceptable *[sic]* or other situations as may be determined by the administrator."

Ms. Banoub stated that X.P.'s behavior was unacceptable because he could hurt other kids or hurt himself because kids would hit or scratch back when he attacked them; he threw chairs at kids, he was rude with them, called them names and used bad language. This was all happening on a daily basis. She has had to terminate other kids for similar reasons.

Ms. Banoub testified that she has had other requests to accommodate health conditions; including from therapists who have actually come to the daycare facility. No therapist came to the daycare regarding X.P., but she does recall that someone who identified themselves as a nurse or therapist called and left her a message after she left for the day. She called that person back and left a message, but she never received a call back.

Complainant's attorney then cross-examined Ms. Banoub. Ms. Banoub agreed that she did not speak to Dr. Abraham about the note; Ms. Banoub did tell Ms. Pautler that she received the note, although she does not recall a specific date when she told her. Ms. Banoub was referred to Complainant's exhibit D-8, page 11. She agreed that the exhibit seems to reflect a record of a telephone encounter documented by Dr. Elpida Nissirios on May 3, 2017, wherein Dr. Nissirios indicated that she called the school to discuss X.P.'s toileting concerns and requested a call back. The same exhibit further documents that on May 4, 2017, that the "School returned clinician's call and left message requesting call back to discuss behavior problems within the classroom." Ms. Banoub stated that she and the therapist missed each other's calls. Ms. Banoub did not know if the therapist would call back, and she wasn't even clear exactly who this person was or what was going on. She assumed that if it were a serious issue, the therapist would have called back. She did not wait to act until the therapist called: she has an email and there are other ways to get in touch with her.

Ms. Banoub was asked "how the Behavioral Report" at complainant's D-3 "is not a punishment." She answered that it is not punishment; it was a report meant for X.P.'s parents. She was then directed to D-5, the termination letter sent to the Pautlers dated May 8, 2017. She stated that the termination was not punishment for the toileting; the termination was because there were too many issues around taking care of him, and his behavior made it hard for everyone at Happy Kids. Happy Kids had to change X.P. 3 to 5 times a day, and they had to give him extra clothes on occasion. The situation was difficult to accommodate; lots of points made it difficult to deal with X.P. She loved X.P.; she thought he was a sweet and smart child but his behavior made it too hard to keep him at

Happy Kids.

On redirect, Ms. Banoub testified that children are not punished at Happy Kids, they are redirected to correct their behavior. The Respondent then rested, and renewed objections to certain exhibits submitted by the Pautlers on the grounds of hearsay and lack of foundation, specifically, the medical records at D-6 and D-8. The Panel ruled that, pursuant to the Administrative Procedures Act, which governs hearing before the Commission, the hearsay evidence was admissible,¹⁷ and all the exhibits submitted by both parties were moved into evidence.

Closing Argument

Complainants argued that X.P. has a disability due to his diagnosis of encopresis as defined by both the DEAL and the ADA. His diagnosis impacts his daily living activities, specifically, his ability to defecate. Happy Kids denied that X.P. had a disability and did not act on the information they were given regarding X.P.'s medical condition. There were multiple communications between the parent and the daycare provider, and though X.P. was not a usual "special needs" child, he met the definition of that term as per Happy Kids' own handbook. Happy Kids knew that X.P.'s situation was unusual and atypical, and they should have engaged with Ms. Pautler about the nature of the condition in more detail. There was no testimony regarding any meaningful discussion with the Pautlers regarding X.P. A behavioral therapist who had been treating X.P. for months contacted the school to talk about his issues and to make suggestions; there was a return call from the school, and then they waited four days and issued a termination letter. Ms. Banoub had no interest in this medical condition and did not believe that it existed. There was a

¹⁷ See 29 Del. C. § 10161(a)(5) and (e).

complete lack of interest in how to deal with the medical condition, and that is sufficient for a finding of discrimination.

There is some evidence about his other behavioral issues, but only Ms. Gardner's notes and some testimony from another teacher. These "behaviors" were a pretext for the termination. There were no written behavioral reports about multiple episodes of aggressive or violent behavior by X.P. There were no Daily Sheets presented to the Panel. There was no testimony from any teachers other than Ms. Alley who taught X.P. for a short period of time a year prior to these events and no testimony about his behavioral problems in 2017. Ms. Banoub decided to terminate the Pautler's contract the same day that she received a visit from OCL establishing that the termination was retaliatory. Ms. Gardner was not a bad lady or a bad teacher, but was overwhelmed by the situation and did not do what was needed to handle this problem. Complainants requested monetary damages for emotional distress; they also appealed to the Commission's duty to ensure the public good and asked that the Commission order Ms. Banoub and her staff engage in anti-discrimination training and implement a written policy pertaining to accommodation of disabilities. The Pautlers also requested a written apology.

Respondent argued that the Complainants are trying to elevate the standard of behavior required by the Delaware Equal Accommodation Law (DEAL); in their Complaint, they stated that Happy Kids did not accommodate X.P., but the evidence showed that Happy Kids did try to accommodate X.P. and made reasonable and good faith efforts to engage the Pautlers. They tried to speak to the parents. X.P. had access to the bathroom. OCL did not substantiate the complaint filed by Ms. Pautler stating that

X.P. was not allowed to use the bathroom. During the time at issue in the Complaint, Happy Kids did make accommodations for X.P. Today, a couple of new requests came up: allowing X.P. to drink water and being nicer to X.P.

At no point did Happy Kids discipline X.P. for his condition. Reasonable accommodations are not required when they would be an undue hardship. Ms. Banoub attempted to reach out to the Pautlers and to the therapist; she also followed the requests made by the doctor's note. The communication process with the parents broke down in April, leading to X.P.'s termination in May. He was having behavioral issues, and that was a factor in his termination. The daycare that X.P. transferred to has a much smaller class size. Respondent asked that the Complaint be dismissed, and that attorney's fees be awarded to the Respondent, as the Complaint was made for an improper purpose.

Findings of Fact and Conclusions of Law

Complainant has alleged that the Respondents Mariam Banoub and Happy Kids violated 6 *Del. C.* § 4504(a), which provides that "no person being the owner...manager...agent or employee of any place of public accommodation, shall directly or indirectly refuse, withhold from or deny to any person, on account of race, age, marital status, creed, color, sex, handicap or national origin, any of the accommodations, facilities, advantages or privileges thereof." The provisions of the DEAL are to be "liberally construed" to safeguard the rights set forth therein. 6 *Del. C.* §4501. "The ultimate purpose [of the Law] is to "eliminate the inconvenience, unfairness, and humiliation of ... discrimination." *Uncle Willie's Deli v. Whittington*, 1998 WL 960709 at *4 (Del. Super., 1998) (Citations omitted).

In Delaware, the adjudication of claims alleging a direct or indirect refusal or denial

of public accommodations based upon unlawful discrimination is guided by the three-part analysis established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) for proving employment discrimination. See, e.g., *DP, Inc. v. Harris*, 2000 WL 1211151 at *6 (Del. Super., 2000) (“Delaware Courts have applied the standard articulated in *McDonnell Douglas Corporation v. Green* for cases alleging unlawful discrimination”) (citations omitted); *Uncle Willie’s Deli v. Whittington*, 1998 WL 960709 (Del. Super. 1998) (applying the *McDonnell Douglas* analysis to a case brought under the Act).

In *McDonnell Douglas*, the United States Supreme Court established a three-part burden-shifting test. For a complainant to prove a denial of public accommodations claim, the procedure is as follows:

- a. The complainant must establish a *prima facie* case of discrimination.
- b. Once the *prima facie* case is established, the burden shifts to the respondent to present evidence of a legitimate, non-discriminatory reason for denying plaintiff access.
- c. After this production of evidence, the plaintiff retains the burden of persuading by a preponderance of the evidence that the defendant’s proffered reason was a pretext for discrimination. *Salty Sam’s Pier 13 v. Washam*, 2000 WL 1211227, at *2 (Del. Super. 2000) (citations omitted).

To meet the initial burden of going forward and establishing a *prima facie* case of discrimination, Complainants, on behalf of their minor son X.P., must demonstrate proof of the following elements: (1) that X.P. is a member of a protected class, in this case, based on his disability, (2) that X.P. was denied access to the public accommodations,

and (3) that non-members of the protected class were treated more favorably. As noted above, Equal Accommodations hearings before the Commission are subject to the APA, which states, in pertinent part that “the burden of proof shall always be upon the applicant or proponent.”¹⁸

For reasons stated below, we find that the Complainants did not meet the burden of establishing a *prima facie* case of discrimination. After hearing the testimony of all of the witnesses and reviewing the exhibits supported by both parties, the Panel does not find that Complainants have proven by a preponderance of the evidence that X.P. has a “disability” within the meaning of the DEAL.

At the outset, the Panel notes that the testimony from all witnesses was generally credible, although there were some inconsistencies relating to particular incidents or statements made, mainly relating to who knew what about X.P.’s behavior and his diagnosis, and when they knew it. The Panel can reconcile these inconsistencies with the sad fact that forms the heart of this case: the evidence establishes that there were some profound miscommunications between the parties as to the nature and extent of X.P.’s medical condition.

Complainants have indeed established that X.P. has been diagnosed with a medical condition: encopresis or chronic constipation.¹⁹ However, the DEAL defines a “disability” for the purposes of a claim of discrimination as “a physical or mental impairment that **substantially limits a person’s major life activities...**”²⁰ (emphasis added). Although X.P.’s mother testified, very credibly, that this condition had caused X.P.

¹⁸ 29 Del. C. § 10125(c).

¹⁹ See Complainant’s Ex. D-6, medical encounter with Dr. Sheeja Abraham dated February 15, 2017.

²⁰ 6 Del. C. § 4502(7)

great pain on several occasions and had caused difficulties for X.P. and his family, there was little to no evidence presented about how X.P.'s major life activities were "substantially limited." Any abnormal medical condition may occasionally cause inconvenience, pain or disturbance; it does not axiomatically follow that every medical condition is therefore a "disability" as defined by the DEAL. It is the proponent's burden to demonstrate why a given medical condition is a disability; the mere assertion is not enough.

The context surrounding this diagnosis is also important: X.P. was a very young child when he was diagnosed with this condition, and of an age where toileting accidents are not uncommon. He was able to attend school, to play, to eat, sleep and do things expected of a child his age. Though X.P. had accidents after being potty-trained and had to have specialized treatment for his constipation, there was no testimony, medical or otherwise, that this condition was so far outside the norm for a child his age that it constituted a disability.

Because Complainants have the burden of proof as to every element of their *prima facie* case, and because the evidence on this point was so limited, the Panel cannot find by a preponderance of the evidence that encopresis with toileting accidents constitutes a disability for the purposes of the DEAL. This is not intended to minimize the difficulties that X.P.'s parents had in dealing with X.P.'s condition: the evidence presented in the hearing showed that the Pautlers were loving and concerned parents who wanted what was best for their child.

Although the inquiry must stop at this point for the purposes of assigning liability under the DEAL to Happy Kids and Ms. Banoub, we think it will be instructive to lay out

the additional analysis and findings of the Panel as to the other elements of the *prima facie* case. The Panel finds that Happy Kids did not intentionally or functionally deny X.P. any services or accommodations on the basis of his medical condition; however the Panel further finds that Happy Kids **did** terminate X.P. at least partially based on his medical condition, and that the termination occurred because of a failure of communication on the part of both parties.

The evidence showed that Ms. Banoub, in her role as the administrator of Happy Kids, was made aware of the fact that X.P. had a medical condition on or around February 20, 2017, by way of a note from X.P.'s G.I. doctor, Dr. Sheeja Abraham. The note in question requested the following accommodations for X.P.: that he be allowed free access to the bathroom and that he be allowed to use pull-ups, which are not typically allowed in his classroom. Happy Kids accommodated these requests, and did not inquire further of X.P.'s doctor what his specific condition was. The evidence shows that Ms. Banoub believed that X.P. had diarrhea not caused by a virus, and she believed that the doctor's note was for the purpose of allowing X.P. to come to the daycare with diarrhea. There is no other written communication from the Pautlers to Happy Kids or Ms. Banoub indicating what, specifically, X.P. was diagnosed with. The only other communication from a medical professional in this case occurred on May 3, 2017, when Dr. Nissirios apparently made a telephone call to Happy Kids to discuss X.P.'s toileting issues. That phone call was returned by Ms. Banoub, who left a message requesting a call back and apparently never received a call back.²¹

Ms. Pautler testified that she communicated X.P.'s diagnosis of encopresis and its

²¹ See Complainant's D-8. It is unclear from this record why Dr. Nissirios neglected to call Happy Kids on May 5, 2017, and unfortunately, she was not present to testify.

attendant issues to the teachers verbally, and that she gave them whatever information she had, but there is no evidence that suggests that Happy Kids really understood what the diagnosis was or what it meant. For this point, the daily notes and the subsequent memorandum from Ms. Gardner, who was X.P.'s main teacher during the time-period in question, are instructive. A review of these documents, found at Respondent's exhibit F, pages 00014-18 and R00019-21, respectively, does not tend to show that Ms. Gardner knew or understood what X.P.'s diagnosis was, or that the diagnosis was communicated to her. In fact, Ms. Gardner's memorandum at R00019 states that she spoke to Ms. Pautler on one occasion about her concerns over the number of accidents that X.P. was having, and Ms. Pautler stated that "they were having the same problems at home, and she didn't know what was going on." Ms. Gardner goes on to describe multiple interactions with X.P. wherein he refused to go to the bathroom because he wanted to continue playing,²² and that he told both Ms. Gardner and Ms. Banoub that he had a bowel movement "on purpose."²³ There was also testimony from a teacher, Ms. Alley, who worked with X.P. before he was formally diagnosed with encopresis. She indicated that he had similar behavioral issues and toileting accidents during the time-period that she worked with him. Although it is quite likely that X.P. did not understand what he was doing, and that his accidents in his pants were not "on purpose," as an adult would understand the term, both Ms. Gardner and Ms. Banoub drew an appropriate conclusion that he was acting on purpose based on the information they had at the time.

Ms. Gardner's daily notes on X.P., exhibit F, pages 00014-18, also do not show that she was aware of his diagnosis. Instead, they detail a number of incidents where X.P.

²² Resp. Ex. F, pg. R00020

²³ *Id.* at R00021.

was aggressive and violent towards other children, or used foul language.²⁴ This is consistent with Ms. Pautler's testimony that around the time he was diagnosed, X.P.'s behavior was getting worse both at home and at school: that he was "throwing tantrums," and "having melt-downs." This behavior is also presumably consistent with that of a child who is in pain from abdominal issues or going through a difficult developmental phase. It is also instructive to note that it is not apparent that any staff member of Happy Kids gave the Pautlers detailed or comprehensive information about X.P.'s behavioral issues at school. Hence, when Ms. Pautler received the "Behavior Report" at D-3, and then, shortly thereafter, she was apparently shocked. Whether Happy Kids fell short of some other obligation to keep X.P.'s parents appropriately informed is outside the scope of this inquiry.²⁵ We do note that Happy Kids seemingly did not give written reports to the Pautlers in accordance with their own termination policies, which likely contributed to the Pautlers feeling blindsided by X.P.'s termination. It is also not within this Panel's purview to determine if the Pautlers could have communicated that X.P. had a specific medical condition possibly causing these behavioral issues to Happy Kids in a more definitive form. However, the evidence did show that the only doctor's note provided to Happy Kids could reasonably be interpreted to indicate that X.P. was suffering from diarrhea, and Ms. Banoub testified credibly that she actually believed X.P. had diarrhea. We can only infer that better communication between the parties might have saved everyone some grief.

Given the information available to Happy Kids in February of 2017, and given the

²⁴ See, e.g., R00014; the beginning note dated December 12, 2016 reads: "[X.P.] hit a friend in the face with his hand because they kept looking at him." A series of similar notes follows, up until May 11, 2017: "[X.P.] has had a morning. He is yelling in peoples [sic] faces and pushing."

²⁵ The DEAL does not impose a requirement that places of public accommodation engage in an "interactive process." That is a requirement imposed by the ADA, and the Commission does not have the authority or jurisdiction to hear claims brought under that statute. There was also no testimony or other evidence presented by the complainants tending to show that the accommodations offered by Happy Kids were objectively unreasonable.

accommodations requested, we cannot find, as a matter of fact or law, that Happy Kids denied services or accommodations to X.P. on the basis of his disability. The evidence showed that the relations between the parties had almost fully broken down by the end of April 2017, when Mr. Pautler refused to speak to Ms. Banoub about X.P.'s behavior, telling her, "I'm tired of this."²⁶ We do not interpret that statement as an indication that Mr. Pautler did not want to solve the problem, but rather that she did not have the ability to deal with the difficulties inherent in solving the problem. Likewise, when Ms. Banoub testified that the "doors were closed," we do not interpret that to mean that she did not want to help X.P., but rather that she did not know how to do so. The evidence also showed that Ms. Banoub cared about X.P., and that she and his other teachers at Happy Kids made some efforts to work with him using positive reinforcement and rewards; X.P.'s medical records indicated that he needed something else, in the form of scheduled toilet time and medications.²⁷ Unfortunately, Happy Kids was not aware of those needs.

It is also true that X.P. was terminated from Happy Kids with a letter that referenced his medical condition. Ms. Gardner wrote in her memorandum that "Soon after, [X.P.] was having BM hard balls falling onto the floor in our classroom. There were occasions that the children would step in the BM and we had one child actually pick the BM up in their hand."²⁸ This note is consistent with the termination letter dated May 8, 2017. While X.P.'s parents had some right to feel aggrieved that their child was being terminated from a daycare for a condition he could not help, it is clear from the testimony presented from Ms. Banoub and the exhibits from both parties that the situation had become untenable.

²⁶ The testimony on this point was undisputed

²⁷ See Complainant's D-8.

²⁸ Respondent's F, pg. R00020

The fact that X.P. was formally terminated the same day that OCL made a visit to Happy Kids based on a complaint filed by Ms. Pautler does not necessarily lead to an inference of discriminatory intent: while Ms. Banoub was more likely than not unhappy with the fact that Ms. Pautler had complained to OCL, her decision to terminate X.P. was apparently based on some real health hazards and behavioral issues. We think that rather than retaliation for a report of discrimination, the date of the termination is further evidence of how badly the relations between the parties were broken.

Because the Panel has engaged in a comprehensive analysis of the first two prongs of the Complainants' *prima facie* case and made a determination, based on the available evidence, that Complainants have not shown that X.P. was a member or a protected class nor that he was denied services or accommodations by Happy Kids, we must find in favor of Respondents Happy Kids and Mariam Banoub and dismiss the Complaint.

As a final issue, both parties properly submitted motions for attorney's fees. Pursuant to 6 Del. C. § 4508(g) "If the panel determines that a violation of § 4504 of this title has not occurred, it shall issue an order dismissing the complaint. The panel may award reasonable attorneys' fees, costs and expenses to the respondent pursuant to this subsection if it determines that the complaint was brought for an improper purpose, such as to harass or embarrass the respondent." The Panel does not find that the complaint in this matter was brought for an improper purpose. There was no evidence to suggest that the Pautlers do not sincerely believe that their child was suffering from a medical condition at the time of his termination from Happy Kids, and that his termination was based solely on his medical condition. It is also clear that the Pautlers believe that X.P.'s condition

constitutes a "disability" under the DEAL. Though the Panel finds that they have not proven that point, there is no indication of bad faith in the record. Therefore, the Panel denies Respondent's request for attorney's fees and costs. Because the DEAL does not allow for an award of attorney's fees to a complainant who does not prevail on their claim, we likewise deny the Complainant's motion for attorney's fees.²⁹

Conclusion

The Panel of the HRC, by unanimous vote, finds as follows:

As to the Respondents Happy Kids Academy and Mariam Banoub, the Panel of the HRC finds that no violation of the Delaware Equal Accommodations Law was established and finds in favor of the Respondent. The Panel further finds, by unanimous vote, that the complaint was not brought for "any improper purpose."

ORDER: The complaints against Respondent Happy Kids Academy and Mariam Banoub are dismissed. Respondent's motion for attorney's fees and costs is **denied**. Complainant's motion for attorney's fees and costs is likewise **denied**.

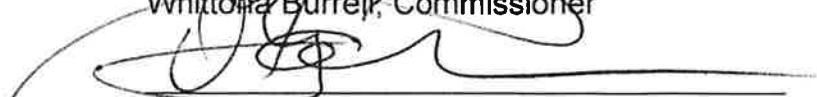
IT IS SO ORDERED this 7th day of August, 2018.



Calvin Christopher, Commissioner, Panel Chair



Whittona Burrell, Commissioner



Olga Ramirez, Commissioner

²⁹ The Panel believes that a common sense interpretation of 6 Del. C. § 4508(h), which reads, in pertinent part: "If the panel determines that a violation of § 4504 of this title has occurred, it shall issue an order stating its findings of fact and conclusions of law and containing such relief as may be appropriate, including actual damages suffered by the aggrieved person "including damages caused by humiliation and embarrassment," costs, expenses, reasonable attorneys' fees and injunctive or other equitable relief..." only allows for the award of attorney's fees to a Complainant who prevails on their claim.

