BEFORE THE HUMAN RELATIONS COMMISSION
FOR THE STATE OF DELAWARE

Brian RAY and Michelle RAY on behalf of M.R. (a minor)	)	
Complainant,	)	
v.	)	Case No. NC-EA-1894-19
MEDEXPRESS URGENT CARE, INC., et al.	)	
Respondents.	)	

MEMORANDUM DECISION AND ORDER

HEARING PANEL:

Gail Tarlecki, *Commission Chair and Panel Chair*,
Marty Rendon, *Commissioner and Panel Member*, and
Rosemarie Williams, *Commissioner and Panel Member*.

Daniel C. Mulveny, Deputy Attorney General,
Counsel for the Commission and the Panel.

APPEARANCES:

Tony Sierzega, Esq., COMMUNITY LEGAL AID SOCIETY, INC.,
Counsel for Complainant.

Maria R. Granaudo Gesty, Esq., BURNS WHITE LLC.,
Counsel for Respondents.

INTRODUCTION

Pursuant to due notice of time and place of meeting served on all parties in interest, the above-identified Panel of the Delaware State Human Relations Commission (the "SHRC" or "Commission") convened a hearing by videoconference on March 24, 2022 in order to determine whether a violation of Delaware's Equal Accommodation Law (the "DEAL", Title 6, Chapter 45 of the *Delaware Code*) occurred.

Mrs. Michelle Ray and Mr. Brian Ray, as parents of Complainant "M.R." (a minor) filed a complaint with the Commission alleging that Respondents MedExpress Urgent Care, Inc. ("MedExpress"), Dr. Lynnanne Kasarda, M.D., and Ms. Alicia Vogelson discriminated against M.R. based on his disability. Immediately after the hearing, the Panel conducted its deliberations.

BACKGROUND

This case comes to the Panel on remand from the Superior Court of the State of Delaware.[1] To briefly discuss what happened, upon recommendation of the Division of Human Relations, the Commission dismissed the Ray's complaint at the pleading stage finding that the complaint "fails to state a claim upon which relief is available…because the complaint does not state a claim for which relief is

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[1] *Ray, et al. v. State of Delaware Human Relations Commission, et al.*, C.A. No. N20A-09-001-VLM (Medinilla, J.) ["*Ray*"] (Del. Super. Nov. 22, 2021).

available."[2] The Rays requested reconsideration of the decision.[3] The Commission denied the request finding, again, that the complaint failed to state a claim upon which relief is available based on the Commission's belief that the DEAL requires that a reasonable accommodation may be made based on gender identity only.[4] The Rays appealed the Commission's dismissal to Superior Court.

In addressing the matter, the Court found that the Ray's complaint alleged two violations:

> *First*, that [M.R.] was not given a "reasonable accommodation in the form of communication assistance during the visual examination" and [*second*,] that "while discussing the failed examination" a MedExpress employee made a discriminatory or hostile comment that M.R. had Down Syndrome. M.R. alleges denied access to a public accommodation and that he was treated less favorably as a result of—either or both—the lack of communication assistance and the disparaging comment.[5]

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[2] *Ray*, at *5 (citation omitted).

[3] *Id.* (citation omitted).

[4] *Id.*, at *5-*6 (quotations, modifications, and citation omitted).

[5] *Id.*, at *10 (emphasis added, modifications and citations omitted). *See also*, *Ray*, at *4:

> The Rays alleged that MedExpress denied M.R. access to a public accommodation on the basis of his mental disability, namely that he was not given a reasonable accommodation in the form of communication assistance during the visual examination. A second claim included that "while discussing the failed examination" a MedExpress employee made an upsetting comment that M.R. "had Down Syndrome." (modifications and citations omitted).

The Court initially found, as the State conceded at oral argument, that thc Commission improperly failed to address the second claim.[6] The Court said that it would remand the case so that the Commission could "conduct the proper analysis."

The Court next turned to the "primary" claim relating to "reasonable accommodations". After a detailed analysis of the sections of the DEAL at issue, and in view of other legal authorities, the Court held that "discrimination based on disability does include the failure or refusal to make reasonable accommodations, adjustments, or modifications."[7] In view of this holding, the Court concluded that the Commission conducted an "overly narrow analysis of the protections afforded to individuals under the DEAL" and that the Commission erred in dismissing the complaint at the pleading stage for failure to state a claim.[8]

The Court reversed the Commission's dismissal and remanded the case for further proceedings.

On remand, the Division gave the parties an opportunity to informally present their cases to one another and to settle the dispute. No agreement was reached, and the matter was scheduled for a hearing before the Panel.

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[6] *Ray*, at *11-*12.

[7] *Id.*, at *20.

[8] *Id.*

SUMMARY OF THE COMPLAINT

The complaint alleges that M.R. was refused, withheld, or denied accommodations, facilities, advantages, or privileges of a place of public accommodation because of his mental disability; M.R. has Down's syndrome.[9]

The following events were alleged. On February 15, 2019, Mrs. Ray took M.R. to MedExpress's offices to get a physical examination. The physical was needed for M.R. to compete in the Special Olympics. During the vision[10] examination portion, M.R. could not verbalize his responses and no attempts were made to accommodate M.R. so that he could communicate his responses.

The complaint further alleges that when Mrs. Ray and M.R. were in the examination room, Dr. Kasarda came in and stated that M.R. could not pass the physical examination because he failed the vision test. While discussing the matter, Dr. Kasarda commented that M.R. "had Down syndrome". This comment upset Mrs. Ray and her daughter (who was also with them). The Rays left the exam room, requested and received a refund, and left MedExpress.

The complaint alleges that after the incident Mr. Ray called MedExpress's

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[9] The Panel takes notice that Wikipedia explains that "Down syndrome or Down's syndrome, is a genetic disorder caused by the presence of all or part of a third copy of chromosome 21. It is usually associated with physical growth delays, mild to moderate intellectual disability, and characteristic facial features." *See* https://tinyurl.com/wikidownsyndrome (visited April 7, 2022).

[10] The Panel notes that vision exam is also referred to as the eye exam.

corporate offices to discuss the grievance procedure. In a believed attempt to calm the Rays down, one employee was said to say: "come on, we both know that they should not have done that." In sum, the complaint avers that MedExpress denied M.R. service and discriminated against him based on his mental disability.

SUMMARY OF THE EVIDENCE

Both parties made brief opening statements in support of their respective cases.[11] Each then presented their case.

Complainant's Case

1. Mrs. Michelle Ray.

Mrs. Ray testified in response to questions from her counsel. She is M.R.'s mother. She explained that M.R. has Down's syndrome. M.R. has co-disabilities; he has speech apraxia. At the time of the incident with MedExpress, M.R. was 13, he is now 16. M.R. was diagnosed with ADHD at 13.

Mrs. Ray further explained that M.R. has heart disorder. He was diagnosed with ventricular septal defect ("VSD"), a condition where there is a hole in the heart wall separating its chambers. The VSD has since resolved; no surgery was performed. At the time of the incident, M.R. had VSD and he required periodic (every two years) screening. M.R. also has duodenal atresia.

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[11] The Panel notes that opening statements are not evidence and are not summarized here. They are, however, part of the official record.

Mrs. Ray said that they moved to Delaware four years ago; she did not have a pediatrician at the time. MedExpress has a website that advertises that they can perform physical exams. MedExpress had offices 1.5 miles from the Rays' home. She had been to MedExpress many times; all of her kids have been to MedExpress.

Mrs. Ray then explained the events underlying the complaint. M.R. participates in community sports. In February 2019, M.R. was to play basketball in the Special Olympics. His physical was about to expire. Based on her experience, Mrs. Ray believed that taking M.R. to MedExpress early on a Sunday morning would be the best time because there would be no wait.

Mrs. Ray went to MedExpress with M.R. and her daughter. They were the first to arrive. She filled out the paperwork and M.R.'s vitals (height, weight, blood pressure, temperature, etc.) were taken. They then went to the area where the eye exam is performed. Mrs. Ray said the MedExpress employee pointed to the eye chart. There was no response from M.R. They then went into an exam room. They waited for a fairly long time, about 30 minutes.

Eventually, a MedExpress employee came into the exam room and said that the doctor was not comfortable performing the physical exam. The employee said that M.R. had heart disease, failed the vision test, and had Down syndrome. For these reasons, the doctor was not willing to do the physical exam. Mrs. Ray asked for her money back. She said that M.R. was denied the physical exam because of

his disability.

When asked if MedExpress offered to perform the eye exam in other ways, Mrs. Ray said that a year ago M.R. could not pass the eye exam part but it wasn't an issue in getting the physical exam completed.

Mrs. Ray was asked to review a "Special Olympics Delaware Athlete Medical Form – Health History".[12] Mrs. Ray said that she believed that the form was the same form that was used in 2019.

Mrs. Ray explained that when M.R. needed physical exams in the recent past, she had taken him to MedExpress.

On cross-examination by Respondents' counsel, Mrs. Ray explained that she is the CEO of Blackwell HR Solutions. In her Facebook and LinkedIn accounts, Mrs. Ray identifies herself as a disabilities advocate.

Mrs. Ray said that she had taken M.R. to MedExpress previously—for COVID-19 testing.

Mrs. Ray was shown M.R.'s medical records from MedExpress for 2015 and

[12] Complainant's Ex. 1. Respondents objected to this exhibit because it was incomplete (it is missing the last page) and it was not relevant because it was dated after the date of the incident. These objections are overruled. This was an administrative hearing, and under SHRC Rule 8.16.1, formal rules of evidence are not strictly followed. The Panel considered the evidentiary value of this exhibit in view of Respondents' objections and the missing page.

2016.[13] Mrs. Ray had not seen M.R.'s medical records prior to the hearing. When questioned about M.R.'s specific visits to MedExpress, Mrs. Ray said that on August 25, 2015, M.R. had a physical exam performed at MedExpress; M.R. was born with VSD; Mrs. Ray confirmed that the 2015 medical record states that M.R. had aortic insufficiency and VSD. Mrs. Ray explained that the hole causing M.R.'s VSD had closed but the medical record does not say that. She said that MedExpress didn't ask about the hole. Mrs. Ray admitted that M.R. was not denied service that day in 2015; she did not recall if M.R. had a vision exam. The medical record does not say whether a vision exam was given, and Mrs. Ray couldn't say whether a vision exam was done.

Mrs. Ray was then asked about M.R.'s visit to MedExpress in 2016. This was for M.R. to get a physical exam. Mrs. Ray said the handwriting on page 8 of Defense Exhibit 3 was not hers. In 2016, Mrs. Ray provided MedExpress with M.R.'s records from a prior exam by M.R.'s pediatrician.

Mrs. Ray said that MedExpress should have completed the physical exam in 2019. She said nothing had changed with M.R. in the 2016-2019 period; MedExpress should have those documents.

Mrs. Ray explained that M.R. goes to a cardiologist every two years. For the

[13] These records were collectively marked as "Defense Exhibit 3".

2019 visit, M.R. would have seen a cardiologist in 2016. He's not seen to be cleared for sports; he's seen for clearance of multiple issues; M.R. does not always receive an echocardiogram; it depends on the exam.

On page 11 of Defense Exhibit 3, Mrs. Ray was asked about the handwritten statement: "fixed VSD - mild HR"; she was not sure what that meant. She explained that M.R. has yearly cardiology checkups and questioned whether the statement in the exhibit was accurate.

Mrs. Ray did not recall whether MedExpress performed an eye exam of M.R. in 2016; she said MedExpress always does the eye exam. She explained that M.R. can verbalize letters if he sees them; he does not have any vision impairments; he has speech apraxia.

When asked whether she has the 2019 Special Olympics health form, Mrs. Ray said that she did not have it; she said that Special Olympics of Delaware confirmed that the 2021 form was the same form. When asked about the 2021 form,[14] Mrs. Ray explained that Mr. Ray signed the form. She acknowledged that Mr. Ray did not check the boxes for congenital heart defect. When asked about the 2019 form, Mrs. Ray said that she checked the boxes for M.R.'s congenital heart defect and other issues.

[14] Marked as Complainant's Exhibit 1.

On the day of the events, February 17, 2019, Mrs. Ray said that they did not schedule an appointment—they walked in; MedExpress does not schedule appointments. When asked why the complaint states that the incident was on February 15, 2019, Mrs. Ray thought that could be an oversight. Mrs. Ray said that after the February 17, 2019 visit, she posted about it on Facebook.

Mrs. Ray explained that the Special Olympics deadline for the medical form was a few days after the incident. She said that M.R.'s pediatrician was able to complete the form; this was without having to see M.R. in person.

Mrs. Ray said that she thinks Dr. Kasarda should have seen M.R. on the day of the incident but she refused to see him because M.R. did not pass the eye exam. Mrs. Ray said M.R. did not have heart disease. She said M.R. did not get an opportunity to receive medical services because he had Down's syndrome. When asked if she believed that a doctor should put their medical license on the line when they say that a child is well enough to participate in sports, Mrs. Ray did not know.

Mrs. Ray explained that a nurse did M.R.'s vitals; she did not recall the nurse and could not describe the nurse. Afterwards, the nurse took them into an exam room. Mrs. Ray was in the exam room with M.R. and her daughter. The nurse was the person who attempted to do the eye exam. During the eye exam, the nurse put M.R. before the eye exam chart; there was an exchange of "eye looks"

between M.R. and Mrs. Ray. Without completing the exam, the nurse then said "Ok" and took them into the exam room.

Mrs. Ray did not know who came into the exam room. It was a medical professional; she didn't see the medical provider and did not remember what she looked like. While in the exam room, someone came in and said that the doctor did not feel comfortable providing the exam. This was a different person than the nurse. They never said anything about clearance. They said it was because M.R. couldn't complete the eye exam, had heart disease, and Down's syndrome. No one said anything about needing clearance because of a heart defect.

Mrs. Ray said the entire visit took about one hour. She did not recall being frustrated in the exam room.

Mrs. Ray was asked about her Facebook post. She had some recollection of the comments. When questioned about some of the comments on her Facebook post, Mrs. Ray said that M.R. should have been given service by MedExpress. She said MedExpress gave her a refund.

Respondent's Case

1. Dr. Lynnanne Kasarda.

Dr. Kasarda, duly sworn, testified in response to questions from Respondents' counsel. Dr. Kasarda said that she graduated from Jefferson Medical School. She is not a cardiologist. She has worked for MedExpress since 2013.

Dr. Kasarda explained that VSD occurs in about 50 percent of people with Down's syndrome; it's pretty common. With VSD there is an increased risk with physical activity; any heart defect causes increased risk. At MedExpress the practice is to get a note from the cardiologist clearing the patient for sports. M.R. had VSD. Dr. Kasarda did not know that the hole had closed up before.

Dr. Kasarda explained that in giving a physical, you go over the medical history, risk factors, etc., to see if there are any issues. The purpose is safety. A doctor's license is on the line.

Dr. Kasarda never met M.R. before the day of the incident. She said that her medical notes in Defense Exhibit 1 state that M.R. needed cardiologist clearance. She did not depend on M.R. having Down's syndrome. Dr. Kasarda needed current medical clearance from a cardiologist.

In explaining Defense Exhibit 1, Dr. Kasarda said that it shows M.R.'s medical history. In reviewing Defense Exhibit 1, Dr. Kasarda said that there was no indication that an eye exam was not done in 2016.

On the day in question, Dr. Kasarda remembers getting M.R.'s chart, reviewing it, and looking for cardiologist clearance. She went into the exam room. She did not recall the exact conversation. She knew that she couldn't clear M.R. for sports because they didn't have cardiologist clearance. She explained to M.R.'s mother that many Down syndrome patients have VSD and that she needed

cardiologist clearance. She asked the mother to get M.R.'s pediatrician to complete and sign the Special Olympics medical form. Dr. Kasarda expected that the pediatrician would have the Special Olympics form. Dr. Kasarda said that she has had prior situations where patients could not be cleared because they needed cardiologist clearance and parents would get very angry when that happened.

When asked what would happen if there was not cardiologist clearance in the file, Dr. Kasarda said that it would prevent her from clearing M.R. Dr. Kasarda said that there was a difference between not being able to clear M.R. and not getting service.

When asked about M.R.'s mother's demeanor, Dr. Kasarda said that she didn't think they were working well together; there was a communications block. Her notes in Defense Exhibit 1 state that M.R.'s mother did not have a note from the cardiologist. Dr. Kasarda recalled telling M.R.'s mother that she needed to get clearance from M.R.'s pediatrician. Dr. Kasarda said that she didn't decline to examine M.R. because he had Down syndrome; she thought she was doing the mother a favor by not charging her for a visit; she would have performed the physical portion of the exam if M.R.'s mother insisted.

On cross-examination by Complainant's counsel, Dr. Kasarda said that she was not aware of a policy at MedExpress for eye exams when a patient is not able to give verbal responses; she said there may be a protocol. On the day of the

incident, Dr. Kasarda was not present during M.R.'s eye exam. Dr. Kasarda further explained that there are three eye exam charts for use in different situations and that a patient could also write down their responses. For M.R., Dr. Kasarda said she did not address the visual exam.

When asked if she could have given M.R. a physical exam without cardiologist clearance, Dr. Kasarda said it could have been possible for her to complete some of the physical and have Mrs. Ray pay $30 and then have M.R.'s pediatrician fill out the missing parts; that was an option.

When asked if the eye exam is a key part, Dr. Kasarda did not know; it would be nice to have; she would try to get the eye exam completed. In M.R.'s case, if he did not have a heart condition, they would have taken steps to work with M.R. to complete the eye exam. Dr. Kasarda added that she could have failed M.R.'s physical because there was no cardiologist clearance; she was trying to do Mrs. Ray a favor by not charging her $30.

On redirect by Respondents' counsel, Dr. Kasarda said that MedExpress has three eye charts. She does not conduct the eye exams. Dr. Kasarda explained that she thought she was doing the right thing. She felt that things got confrontational; Mrs. Ray was not yelling; Dr. Kasarda felt pressured/tension.

In response to Panel questioning, Dr. Kasarda did not recall saying that she would not pass M.R.'s physical because he did not complete the eye exam; she

explained that she had no reason to say that; she was concerned about the cardiologist clearance issue.

When asked why she believed that she was doing Mrs. Ray a favor, Dr. Kasarda said that based on her past experience she would not be able to pass M.R. without cardiologist clearance. She said Mrs. Ray could take the medical form to M.R.'s pediatrician and have it filled out the next day.

2. Woodna ("Rebecca") Saint-Luc.[15]

Ms. Saint-Luc, duly sworn, testified in response to questions from Respondents' counsel. She worked at MedExpress for the past five years. She is a licensed radiology technician. She works as a medical assistant for MedExpress. She does about everything a nurse would do except some injections.

Ms. Saint-Luc did not specifically recall M.R., but she said that she took M.R.'s vitals. She was shown a picture of three eye charts.[16] Ms. Saint-Luc explained that these are charts to measure visual acuity. If a patient cannot verbalize his or her answers, they use a "tumbling E" chart and a patient can signal

[15] The Panel notes that the complaint identifies Ms. Alicia Vogelson as the MedExpress employee allegedly involved in the eye exam. As shown in this section (and as discussed in the findings of fact below), the Panel finds that Ms. Saint-Luc was the person involved. This appears to be a case of mistaken identity. Because it appears that MedExpress was not prejudiced by the mistake, the Panel reforms the complaint to replace Ms. Vogelson with Ms. Saint-Luc.

[16] Marked as Defense Exhibit 2.

the direction of the "E" as a response. Ms. Saint-Luc was trained on all the eye charts.

Ms. Saint-Luc explained that sometimes the eye exam is not needed to be done. A patient not being able to verbalize his or her answers would not be a reason to not do the eye exam. If a patient refused, she would note that in the records. If it's a situation where it is maybe a yes or no or the patient doesn't normally get an eye exam, it would be skipped. Sometimes the medical provider needs the eye exam and then it would be done. In M.R.'s medical records for the 2019 visit, because it was not marked done or not done, Ms. Saint-Luc believed the eye exam was skipped and she would have waited for further instructions.

On cross-examination by Complainant's counsel, Ms. Saint-Luc said that she did not recall M.R. but recognized her notes in M.R.'s chart; she does the same for every patient.

Closing Arguments

In closing, Complainant's counsel argued that it has been a long road to the Panel hearing. M.R. went to MedExpress to get a physical exam; the physical exam was not completed because M.R. could not verbalize his answers. In the situation presented, Dr. Kasarda had three options: (1) pass M.R., but she was uncomfortable doing so; (2) not clearing M.R. for sports after examining him; or (3) performing the physical exam with instructions to see a cardiologist. Instead,

Dr. Kasarda sent the Rays home without performing a physical exam because no reasonable accommodation was made for M.R. to complete the eye exam.

In response, Respondents' counsel argued that the key point of this case is the reason the physical exam was not done. It was not due to Down syndrome; it was due to not having cardiologist clearance. The vision part of the exam was not a denial, the exam was deferred until later. Dr. Kasarda gave Mrs. Ray the form and Mrs. Ray took the form to M.R.'s pediatrician to complete. Dr. Kasarda could not finish the physical because there was no cardiologist clearance.

Dr. Kasarda risked losing her license if she cleared M.R. without the cardiologist clearance. Counsel argued that it would be improper to impose on Dr. Kasarda a duty to complete a service that she could not complete in her reasonable professional judgment.

Respondents' counsel argued that there was no denial of service in violation of the DEAL. There was no showing that other people were treated differently; there was no evidence that other patients were treated differently; and MedExpress had accommodations available for the eye exam.

Panel Questions

The Panel asked what damages Complainant sought. In response, Complainant's counsel said that compensatory and emotional damages are being requested. And the Complainant is asking for MedExpress's practices to be

reviewed. Complainant, however, did not have either a specific dollar amount or any documentation to support the damages claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Complainant alleges that Respondents violated the DEAL for two reasons. First, that M.R. could not verbalize his responses during an eye exam and MedExpress made no attempts to accommodate M.R.'s disability. Second, that Dr. Kasarda made a disparaging comment that M.R. "had Down syndrome".

Section 4504(a)(1) of the DEAL 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, disability, sexual orientation, gender identity, 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.[17] "The ultimate purpose [of the DEAL] is to eliminate the inconvenience, unfairness, and humiliation of...discrimination."[18]

Under Delaware law, claims alleging a direct or indirect refusal or denial of

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[17] 6 *Del. C.* § 4501.

[18] *Uncle Willie's Deli v. Whittington*, 1998 WL 960709 at *4 (Del. Super. Dec. 31, 1998) (citations and internal quotations omitted).

public accommodations based upon unlawful discrimination are decided using the guidance of the U.S. Supreme Court's three-part analysis in *McDonnell Douglas Corp. v. Green.*[19,20] This analysis requires the following steps:

(1) The complainant must establish a prima facie case of discrimination.

(2) Once a prima facie case is established, the burden shifts to the respondent to present evidence of a legitimate, non-discriminatory reason for denying plaintiff access.

(3) After this production of evidence, the complainant retains the burden of persuading by a preponderance of the evidence that the respondent's proffered reason was a pretext for discrimination.[21]

Further, because Equal Accommodations hearings before the Commission are subject to the provisions of Delaware's Administrative Procedures Act (APA),[22] "the burden of proof shall always be upon the applicant or proponent."[23]

Discussion

The Panel begins with the first step of the *McDonnell Douglas* analysis—

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[19] 411 U.S. 792 (1973).

[20] *See also DP, Inc. v. Harris*, 2000 WL 1211151 at *6 (Del. Super. July 31, 2000) ("Delaware Courts have applied the standard articulated in *McDonnell Douglas Corporation v. Green* for cases alleging unlawful discrimination.") (citations omitted); and *Uncle Willie's*, 1998 WL 960709, at *4 (applying the *McDonnell Douglas* analysis to a case brought under the DEAL).

[21] *Salty Sam's Pier 13 v. Washam*, 2000 WL 1211227, at *2 (Del. Super. Aug. 3, 2000) (citations omitted).

[22] 29 *Del. C.* Ch. 101.

[23] 29 *Del. C.* § 10125(c).

whether or not Complainant established a prima facie case of discrimination under the DEAL. To do this, Complainant needs to show by a preponderance of evidence three things: (a) that M.R. is a member of a protected class; (b) that he was denied access to public accommodations; and (c) that non-members of the protected class were treated more favorably.[24]

Complainant brings two claims of discrimination.[25] *First*, that M.R. was not given a reasonable accommodation in the form of communication assistance during the visual examination. *Second*, that while discussing the failed physical examination a MedExpress employee made a discriminatory or hostile comment that M.R. had Down Syndrome. We discuss whether Complainant has shown a

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[24] *See Boggerty v. Stewart*, 14 A.3d 542, 550 (Del. 2011) (citations omitted); *see also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) ("First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination.").

[25] The Panel notes that this case has been extensively litigated at the complaint stage both before the Commission and before the Superior Court. At all times, Complainant has maintained these two claims as the basis for their complaint of discrimination. Therefore, the Panel concludes that these are the two claims that Complainant wants this Panel to address. The Panel recognizes that administrative hearings are by design (and often by necessity) flexible in how the claims are presented and generally speaking there is some latitude to be given when what is argued at a panel hearing wanders from what was originally alleged in the complaint. In the circumstances here, however, due process owed to Respondents requires the Panel to constrain its analysis to the specific alleged events and legal arguments set out in these two claims of discrimination because Complainant, represented by counsel, has consistently argued that these are the claims at issue and Respondents rightfully prepared their case based on these claims.

prima facie case of discrimination based on these two claims in turn.[26]

1. Complainant failed to show a prima facie case of discrimination in the conduct of the eye exam.

For the eye exam, the complaint alleged that MedExpress failed to accommodate M.R.'s disability so that he could complete the eye exam and, in turn, because the eye exam was not completed, Dr. Kasarda did not complete the physical exam. Stated another way, the complaint alleges that M.R. was denied access to public accommodations at MedExpress because the staff did not provide some form of communication assistance during the visual examination.[27]

The evidence presented, however, was insufficient to sustain that allegation.

Complainant's evidence about what happened during the eye exam was brief and added little detail to the allegations in the complaint. In her direct testimony, Mrs. Ray said that they went to the eye exam area and the MedExpress employee pointed to the eye chart. With no response from M.R., they were then taken into the exam room. In her cross-examination, Mrs. Ray said that the nurse put M.R. in front of the eye chart and there was an exchange of "eye looks" between Mrs. Ray

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[26] There is no dispute that M.R. was a member of a protected class, so this element of a prima facie case has been met for both of Complainant's claims.

[27] *See Ray* at 4 ("The Rays alleged that MedExpress denied M.R. access to a public accommodation on the basis of his mental disability, namely that he was not given a reasonable accommodation in the form of communication assistance during the visual examination.").

and M.R. The nurse then said "Ok" and took them into the exam room.

Against this, Respondents provided the testimony of Ms. Saint-Luc. She explained that she was the person who performed M.R.'s eye exam on the day of the incident and that when there is a holdup in performing the eye exam, she would skip the exam and wait to hear if the doctor needed it. Ms. Saint-Luc further explained that MedExpress has three different eye charts, including a "tumbling E" chart for patients who cannot verbalize their answers.[28] Ms. Saint-Luc testified that because she did not record in her notes that the eye exam was done (or not done), she believed that the eye exam was skipped. Complainant's counsel did not challenge the substance of Ms. Saint-Luc's testimony on cross-examination. Nor did Complainant present any witness testimony in rebuttal.

Dr. Kasarda's testimony corroborated Ms. Saint-Luc's version of what happened. Dr. Kasarda said that MedExpress had three eye charts for use in different situations and also that a patient could write down their responses.

In weighing the competing versions of what happened, the Panel finds that the parties largely agree that M.R. did not complete the eye exam because it was skipped. The issue is why the exam was skipped. Here, the parties disagree.

Complainant's version is that M.R. failed to perform the eye exam because

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[28] *See also* Defense Exhibit 2.

M.R. needed assistance to verbalize his answers and MedExpress failed to provide such assistance which caused M.R. to fail the eye exam which in turn caused Dr. Kasarda to refuse to complete the physical exam. The failure to accommodate M.R.'s disability caused a denial of access.

Respondent's version is that when M.R. did not readily respond when Ms. Saint-Luc attempted the eye exam, she skipped the exam with the intention to revisit the eye exam if the doctor believed it was needed. MedExpress had options available to accommodate M.R.'s disability if the doctor believed the eye exam was needed. Specially, MedExpress has three eye charts available including the "tumbling E" that can be used when patients cannot verbalize their answers. But the opportunity to use those options did not arise because Dr. Kasarda was concerned about M.R.'s VSD and needed cardiologist clearance to complete the physical exam.

The Panel finds Respondents' version of the events to be more believable. This is because the Panel found Ms. Saint-Luc's testimony to be more credible and more detailed than Mrs. Ray's. And weighing against Complainant is that there was no evidence presented showing that Mrs. Ray asked for assistance so that M.R. could complete the eye exam. Nor did Mrs. Ray testify that she was concerned that the eye exam wasn't done. Indeed, Mrs. Ray said in her direct testimony that during a prior visit M.R. could not pass the eye exam part but it

wasn't an issue getting the physical exam completed. In weighing all the evidence, it appears to the Panel that when Ms. Saint-Luc attempted the eye exam—and then skipped it—Mrs. Ray was Ok with that.

Other evidence supports Ms. Saint-Luc's testimony that sometimes the eye exam is skipped or not done. To begin, as found above, Mrs. Ray said that in a prior visit to MedExpress the eye exam was skipped when M.R. got his physical. Also, MedExpress's medical records from 2015 and 2016 do not show that M.R. was given an eye exam because there are no entries in the "Vision" section of the corresponding records.[29] In her cross-examination, when Mrs. Ray was asked whether MedExpress performed eye exams on M.R. in 2015 and 2016, she could not specifically recall, but she broadly said that MedExpress "always does the eye exam". However, Complainant—who has the burden of proof—did not present any additional evidence to support Mrs. Ray's broad testimony that MedExpress "always does the eye exam".[30] Without something to corroborate Mrs. Ray's broad declaration, the Panel finds more credible Ms. Saint-Luc's testimony about how the eye exam can be skipped, and on the day in question, she in fact skipped the

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[29] Defense Exhibit 3 at pp. 0007 and 0013 (Respondents' exhibits, including Exhibit 3 were Bates-stamped with the prefix "Ray - Defense exhibits" and a 4-digit page number that the Panel cites here).

[30] Indeed, Mrs. Ray's own testimony that M.R.'s eye exam was skipped the year before the incident directly conflicts with her broad claim here.

eye exam with the expectation to revisit the eye exam later if the doctor needed it.[31]

Based on the above, the Panel finds as a matter of fact that on February 17, 2019, Ms. Saint-Luc took M.R.'s vitals and then attempted the eye exam. When M.R. did not immediately respond, she did not use other eye charts or otherwise accommodate M.R.'s inability to verbalize his answers because these accommodations were not needed at that time. Instead, she took M.R. into the exam room with the expectation to revisit the eye exam if the doctor believed it was needed.

With a clear understanding of what happened during the eye exam portion of the physical, the Panel concludes that Complainant has failed to show evidence sufficient to establish a prima facie case that MedExpress violated the DEAL by not accommodating M.R.'s inability to verbalize his responses during the eye exam. Complainant's version of the events is not what actually happened. Instead, the Panel concludes that the evidence shows that MedExpress could have, and would have, accommodated M.R.'s disability to complete the eye exam, but the

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[31] The Panel notes that MedExpress's records contain a copy of M.R.'s Athlete Application for Participation in Special Olympics for 2016. *See* Defense Exhibit 3 at pp. 0012-13. The physical examination section of the form does not have any data recorded in the "Vision" and "Hearing" sections but nevertheless was signed and dated by the doctor. This tends to support Ms. Saint-Luc's testimony that the eye exam may sometimes be skipped and, as it appears in 2016, the eye exam was not done presumably because the doctor did not believe it was needed.

eye exam was skipped with an intent to revisit if needed. Based on the evidence presented, the Panel is unconvinced that Ms. Saint-Luc's skipping of the eye exam with an intent to revisit if needed is a refusal, withholding, or denial of accommodation in violation of the DEAL.

The Panel reads section 4504(a)(1)a. of the DEAL (that defines unlawful practices) to prohibit the direct or indirect refusal, denial, or withholding of "any of the accommodations, facilities, advantages, or privileges thereof".[32] In shorthand, and for convenience here, the Panel refers to these "accommodations, facilities, advantages, or privileges" as "access" and collectively refers to "refusal, denial, or withholding" as "denial". The DEAL prohibits the direct or indirect denial of access.[33]

While it could arguably be said that Ms. Saint-Luc's "skipping" of the eye exam was a denial of access because the eye exam was not performed, the evidence does not support this conclusion. Instead, as discussed above, the evidence shows that the conduct of the eye exam could have happened before the physical exam by the doctor, or after the physical exam, or in some cases, not at all. If the Panel were to accept the idea that Ms. Saint-Luc's skipping was the denial of access, then we would have to not only ignore Ms. Saint-Luc's testimony

[32] 6 *Del. C.* § 4504(a)(1)a.

[33] *Id.*

that she intended to revisit the eye exam if needed but also conclude as a matter of fact that the eye exam could have only been conducted prior to taking M.R. into the exam room under MedExpress's standard practices. But the evidence does not show that.

Looking at this another way, the Delaware courts have recognized that "a denial of access may take the form of something less than an outright denial of service."[34] However, there is not "a precise legal rule which articulates what does or does not constitute a denial of access."[35] Rather, the "question may be fact-intensive, depending upon the circumstances of a particular case."[36]

Under this alternate analysis, the Panel reaches the same conclusion—there was not a denial of access here. The caselaw is not extensively developed, but courts discussing this alternate analysis have explained that mere delay is not denial of access.[37] For example, the *Witcher* court reasoned that when the delay is used to frustrate customer in a hostile way, and the customer rebuffs the delay

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[34] *Stewart v. Human Relations Commission*, 2010 WL 2653453, at *3 (Del. Super. July 6, 2010) (citing *Hadfield's Seafood v. Rouser*, 2001 WL 1456795, at *4 (Del. Super. Aug. 17, 2001)).

[35] *Stewart*, 2010 WL 2653453, at *6.

[36] *Id.*

[37] *See, e.g.*, *Witcher v. Breeding*, 2012 WL 3518079, at *3 (Del. Super. July 31, 2012) (citing *Hadfield's Seafood*, 2001 WL 1456795).

tactic, there could be a denial of service.[38]

Applying this legal concept here, after weighing the evidence, the Panel finds that Complainant has not shown that Ms. Saint-Luc's "skipping" of the eye exam was meant to frustrate M.R. (or Mrs. Ray). Missing from Complainant's case was anything to support an inference that Ms. Saint-Luc's skipping of the eye exam was intended as a direct or indirect denial of access. That is, something to suggest that Ms. Saint-Luc acted with intent to deny M.R. access to the eye exam or with careless disregard of M.R.'s rights of access under the DEAL. Rather, as discussed above, the Panel finds that the evidence shows that Ms. Saint-Luc skipped the eye exam and Mrs. Ray was Ok with that. There was no testimony from Mrs. Ray regarding her concerns with Ms. Saint-Luc skipping the eye exam. And there was no testimony from Ms. Saint-Luc on cross-examination suggesting that she had an ill motive in skipping the exam. Instead, the evidence rather convincingly shows that Ms. Saint-Luc innocently skipped the eye exam with the intent to revisit it if needed. Without evidence showing (or even suggesting) some intent to deny access or a careless disregard of access, the Panel cannot find that Complainant has shown a prima facie case of discrimination.[39]

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[38] *Witcher*, 2012 WL 3518079, at *3 (citations omitted).

[39] The Panel notes that with its conclusion that Complainant failed to prove a prima facie case of discrimination in the conduct of the eye exam, it did not reach the question of whether or not MedExpress had a duty to provide M.R. a reasonable

Even if we set aside the question of whether or not there was a denial of service, the Panel also finds that Complainant failed to show the third element of a prima facie case, that is, evidence showing disparate treatment in the conduct of the eye exam. Complainant produced no evidence suggesting that M.R. was treated differently from anyone not in M.R.'s protected class in the context of MedExpress's conduct of the eye exam. Against zero evidence, Respondents provided Ms. Saint-Luc's unrebutted testimony that it was standard practice at MedExpress to sometimes skip the eye exam. And both Ms. Saint-Luc and Dr.

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accommodation so that he could complete the eye exam. *See Ray*, at 20 ("discrimination based on disability *does include the failure or refusal to make reasonable accommodations*, adjustments, or modifications.") (emphasis added). Because the Panel found as a matter of fact that the eye exam was skipped with the intention to revisit if needed, the questions of whether an accommodation was needed and whether such an accommodation was reasonable were not ripe for the Panel to address. Stated another way, the Panel finds that Complainant did not show by a preponderance of the evidence that the eye exam was a required part of M.R.'s physical exam. Because of this, the Panel believes that it would be inappropriate to assume a hypothetical—*that the doctor did require the eye exam*—and then consider the questions of whether or not MedExpress was required to provide a reasonable accommodation, and if so, what would be a reasonable accommodation. Even if the Panel were to consider this hypothetical question, it finds that Complainant did little to build a record to show what would be (or what was not) a reasonable accommodation in the circumstances of M.R.'s eye exam. And MedExpress presented evidence that it had multiple eye charts available to accommodate a variety of situations, including the "tumbling E" chart for patients who cannot verbalize their responses. MedExpress's accommodations seem reasonable, but Complainant did not give us his side of the case to compare. Given Complainant's failure to develop this issue at the hearing, the Panel declines to tackle the hypothetical question of what would have been a reasonable accommodation of M.R.'s disability here.

Kasarda testified that MedExpress had (and has) alternative eye charts available, including an eye chart for patients who cannot verbalize their responses.[40] When there is clear and convincing evidence that MedExpress was following its standard practices in the conduct of M.R.'s eye exam, it cannot be said that there was disparate treatment in violation of the DEAL.[41]

Because Complainant failed to present any direct evidence of disparate treatment, that is, that non-members of M.R.'s protected class were treated differently, the Panel must also consider whether M.R. was treated in a "markedly hostile" manner that was objectively unreasonable.[42]

The Panel finds that the evidence cannot support a conclusion that Ms. Saint-Luc's conduct was markedly hostile (or even hostile). It's not even close. And while the Panel understands that Mrs. Ray was upset by the end of the visit, there was no testimony suggesting that Mrs. Ray found that Ms. Saint-Luc's skipping of the exam to be unreasonable. Indeed, the evidence shows the

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[40] *Also see*, Defense Exhibit 2 (copies of the eye charts in use at MedExpress).

[41] MedExpress's use of three eye charts also weighs heavily in favor of concluding that MedExpress was not treating others more favorably because the evidence shows that MedExpress had in place mechanisms to accommodate a variety of patient abilities in the conduct of eye exams. In other words, these three eye charts suggest that MedExpress treated all of its patients equally.

[42] *Hadfield's Seafood*, 2001 WL 1456795, at *5 (recognizing that the courts have found disparate treatment if it is shown that the complainant received services in a markedly hostile manner that a reasonable person would find to be objectively unreasonable) (citations and quotations omitted).

opposite—Mrs. Ray was Ok with the skipping.

For these reasons, the Panel concludes that Complainant has not met his burden to show the third element of a prima facie case, and overall, his first claim of discrimination under the DEAL fails.

2. Complainant failed to show a prima facie case of discrimination when Dr. Kasarda said that M.R. had "Down syndrome".

Complainant's second claim is that Dr. Kasarda allegedly made a discriminatory or hostile comment in violation of the DEAL when she said that M.R. had 'Down syndrome". Here, we address whether Complainant has shown evidence sufficient to establish a prima facie case of discrimination.

With no dispute that M.R. is a member of a protected class, the Panel begins with the second element of a prima facie case, that is, whether Complainant has shown that he was denied access by Dr. Kasarda. The way Complainant phrased this second claim of discrimination, it appears to the Panel that Complainant recognizes that Dr. Kasarda *did in fact* provide M.R. some quantum of service, it's just *how* Dr. Kasarda provided that service that is the gravamen of this claim. Both parties more or less agree that Dr. Kasarda said "Down syndrome". The disagreement is how she said it.

Complainant alleges that Dr. Kasarda said "Down syndrome" in a hostile way. Respondents say it was said as part of explaining why Dr. Kasarda was

uncomfortable completing the physical exam without cardiologist clearance. As discussed above, Delaware law recognizes that a denial of access may take the form of something less than an outright denial of service."[43]

Before we start down this road, the Panel recognizes that it also needs to address the third element of a prima facie case—whether Complainant showed that non-members of the protected class were treated more favorably—and in certain circumstances, like here, where there is no evidence of comparative treatment, Delaware law looks to see if the service was provided in a "markedly hostile" manner such that it can be presumed that non-members of the protected class would have been treated better.[44]

Here, Complainant's second claim of discrimination appears to collapse the second and third elements of a prima facie case into a single concept: that Dr. Kasarda said "Down syndrome" in a hostile or discriminatory way.[45] Rather than try to untangle whether saying "Down syndrome" in an allegedly hostile or discriminatory way would be better addressed at the second element stage or in the third element stage, it seems more efficient to combine the analysis and get to a

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[43] *Stewart*, 2010 WL 2653453, at *3 (citations omitted).

[44] *Hadfield's Seafood*, 2001 WL 1456795, at *5.

[45] The complaint alleges that Dr. Kasarda's comment that M.R. had Down syndrome was hostile or discriminatory. Due process owed to Dr. Kasarda requires the Panel to limit its analysis to the allegations in this claim. *See* footnote 25 above.

result because common to both elements is the need for the Panel to carefully consider whether or not Dr. Kasarda said that M.R. had Down syndrome in such a way that it constituted a denial of access in violation of the DEAL.

After considering the evidence presented and the requirements of the second and third elements, the Panel finds Complainant has not met his burden to show a prima facie case.

Based on the evidence presented, the Panel cannot conclude that Dr. Kasarda said "Down syndrome" in a such a way that it amounted to either a denial of service or that it was said in a markedly hostile (that is, discriminatory) way. Complainant's evidence at the hearing was nothing more than a restatement of what was alleged in the complaint: Mrs. Ray testified that someone (Mrs. Ray did not specifically say it was Dr. Kasarda at the hearing) came in the exam room and said that M.R. had heart disease, failed the vision exam, and had Down syndrome and for those reasons, the doctor was not willing to do the physical exam.

In her direct testimony, Dr. Kasarda admitted that she could not remember the exact conversation, but she did recall explaining to Mrs. Ray that many Down syndrome patients have VSD and that she needed clearance from M.R.'s cardiologist to clear M.R. for sports. Dr. Kasarda asked Mrs. Ray to get clearance from M.R.'s pediatrician. Dr. Kasarda further explained at the hearing that it was MedExpress's practice is to get a note from the patient's cardiologist to clear the

patient for sports. Dr. Kasarda testified that she believed there was a communications block between her and Mrs. Ray and that they were not working well together.

In weighing the evidence, the Panel finds as a matter of fact that when Dr. Kasarda said "Down syndrome" in the exam room, it was said in the context of explaining Dr. Kasarda's rationale for needing cardiologist clearance. In making this finding, the Panel finds Dr. Kasarda's testimony about what happened in the exam room to be more credible because it was detailed and overall it makes sense that a licensed medical doctor would want to explain the basis of her concerns when she was declining to clear M.R. for sports.

Because the Panel finds that Dr. Kasarda said "Down syndrome" in the context of explaining the need for cardiologist clearance, the Panel cannot conclude that Dr. Kasarda said the words in a hostile way. Particularly because Complainant did not produce any evidence suggesting that Dr. Kasarda's tone or demeanor was terse, abrupt, harsh, or otherwise meant to aggravate the Rays. Indeed, Mrs. Ray's testimony on this key issue—exactly *how* Dr. Kasarda said "Down syndrome"—was nonexistent. She provided no detail on how Dr. Kasarda said "Down syndrome" other than saying that it made her daughter upset as a result. Based on this scant amount of evidence, and in view Dr. Kasarda's testimony, the Panel cannot infer that Dr. Kasarda said "Down syndrome" in a

discriminatory way. For these reasons, the Panel concludes that Complainant has failed to produce sufficient evidence to show a prima facie case of discrimination for the second claim. The second claim of discrimination under the DEAL also fails.

CONCLUSION

After careful consideration of the evidence and arguments presented, the Panel, by unanimous vote, concludes that Complainant has failed to show that Respondents violated the DEAL.

That said, the Panel recognizes that this may be a case that falls short of legally-cognizable discrimination under the DEAL but nevertheless involved a concerning set of circumstances. As the Panel sees it, on one hand MedExpress, Dr. Kasarda, and Ms. Saint-Luc all appeared to have followed the standard practices at MedExpress and as discussed above, this did not amount to discrimination under the DEAL. But on the other hand, Mrs. Ray left MedExpress with the sincere feeling that M.R. was discriminated against because of his disability—sincere enough to bring this case.

The problem seems to lie with the communications breakdown throughout the visit such that Mrs. Ray felt that M.R. was being discriminated against. While the Commission lacks power to order corrective measures here, the Panel believes that MedExpress needs to improve its practices. For example, while it may be

standard practice to skip the eye exam in the course of conducting a physical exam, a lot of trouble could have been avoided if the reasons *why* the eye exam was being skipped were explained to Mrs. Ray so that she would understand that the eye exam may or may not be needed depending on what the doctor decides. And while the Panel does not doubt Dr. Kasarda's professional judgment in her belief that she needed cardiologist clearance and also does not doubt that Dr. Kasarda thought she was doing Mrs. Ray a favor by not charging her $30 for the visit, it appears that Dr. Kasarda's concerns did not get effectively communicated to Mrs. Ray. Whether through additional training, revised procedures, or other measures, the Panel believes that MedExpress should review its practices and make any corrective actions necessary to avoid cases like this from happening again.

ORDER

Pursuant to 6 *Del. C.* § 4508(g), the complaint against Respondents is **DISMISSED**. Each party shall bear their own fees, costs, and expenses.

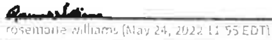
IT IS SO ORDERED this 24th day of May, 2022.

Gail Tarlecki (May 23, 2022 14:?4 EDT)

Gail Tarlecki, *Commissioner and Panel Chair*

Marty Rendon (May 24, 2022 10:52 EDT)

Marty Rendon, *Commissioner and Panel Member*



rosemarie williams (May 24, 2022 11:55 EDT)

Rosemarie Williams, *Commissioner and Panel Member*