

**BEFORE THE HUMAN AND CIVIL RIGHTS COMMISSION
FOR THE STATE OF DELAWARE**

INDIA SCOTT,)	
)	
Complainant,)	
)	
v.)	Case No. K-EA-2586-22
)	
)	
POSTLETHWAIT MIDDLE SCHOOL,)	
CAESAR RODNEY SCHOOL)	
DISTRICT, DELAWARE STATE POLICE)	
TROOP 3, <i>et. al.</i>)	
)	
Respondents.)	

MEMORANDUM DECISION AND ORDER

PRESENT:

Gail Launay-Tarlecki, *Commissioner and Panel Chairperson*
Dwayne Bensing, *Commissioner and Panel Member*
Doris Cooper, *Commissioner and Panel Member*

APPEARANCES:

Kemba S. Lydia-Moore, Deputy Attorney General, *Counsel for the
Commission and Panel*
India Scott, *Complainant, pro se*
James H. McMackin, III, *Counsel for Respondents Postlethwait
Middle School, Caesar Rodney School District, Cliffvon Howell,
Dr. Kristina Failing, Dr. Tamara Toles-Torain*¹
Joseph C. Handlon, Deputy Attorney General, *Counsel for
Respondent Delaware State Police Troop 3*²

¹ These Respondents are part of or employed with the Caesar Rodney School District and will collectively be identified hereinafter as “CRSD.” Individually, the Respondents will be identified as “Postlethwait,” “the school district,” “Mr. Howell,” “Dr. Failing”, and “Dr. Toles-Torain.”

² Hereinafter, this Respondent will be identified as “DSP.”

INTRODUCTION

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 Human and Civil Rights Commission (“Panel”) to determine whether a violation of Delaware Equal Accommodations Law (“DEAL”), codified at 6 *Del. C.* Ch. 45, occurred.

The Panel convened via Microsoft Teams audio and video teleconference for an evidentiary hearing to determine whether DSP and CRSD violated 6 *Del. C.* § 4504 as alleged in the Complaint filed by India Scott (“Ms. Scott”). Ms. Scott alleged Respondents discriminated against her minor son, C.C., on the basis of race/color (Black).³

On Wednesday, March 1, 2023, prior to the evidentiary hearing, the Panel held a prehearing conference with Ms. Scott, Mr. Handlon, and Mr. McMackin (collectively “the parties”). During the prehearing conference, the parties provided proffers for their witnesses^{4,5} and the Panel considered objections, if any, to the proffered witnesses’ testimony. At the conclusion of the prehearing conference, the

³ DEAL provides that “no person being the owner, lessee, proprietor, manager, director, supervisor, superintendent, 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...any of the accommodations, facilities, advantages or privileges thereof.” 6 *Del. C.* § 4504(a).

⁴ There were no proffers for Mark Gaglione and Det. Jason Minear because they were identified as witnesses for both Ms. Scott and DSP.

⁵ There were no proffers for Dr. Toles-Torain because she identified as witnesses for both Ms. Scott and CRSD.

Panel informed the parties which witnesses were deemed to have relevant, admissible evidence and permitted to testify.

At the start of the evidentiary hearing, the parties presented opening statements, which were followed by Ms. Scott presenting her direct examination and then Mr. McMackin cross-examining her. At the conclusion of Mr. McMackin's cross-examination, he moved to dismiss the Complaint against CRSD. On behalf of DSP, Mr. Handlon joined the motion to dismiss.

On March 2, 2023, prior to resuming the evidentiary hearing, the Panel issued its ruling on CRSD's motion to dismiss and granted the motion. The Panel also considered Ms. Scott's objection to admissibility of the January 10th assault video. Ms. Scott's objection was treated as a motion to strike and the motion was denied.

DSP's motion to dismiss was held abeyance to be considered after Mr. Handlon cross-examined Ms. Scott. Upon completing cross-examination, Mr. Handlon renewed DSP's motion to dismiss and Ms. Scott presented her re-direct examination prior to the Panel ruling on DSP's motion to dismiss. DSP's motion was granted.

SUMMARY OF THE COMPLAINT

In her Complaint, Ms. Scott alleged that DSP and CRSD refused, withheld, and/or denied C.C. accommodations, facilities, advantages, or privileges of a place

of public accommodation because of his race/color (Black) in violation of DEAL.

According to Ms. Scott, C.C. was subjected to bullying and physical assaults by Postlethwait students during the school day and CRSD failed to properly address these incidents because C.C. is Black. Ms. Scott contends one incident of assault occurred on January 10, 2022 and Det. Minear investigated the incident but did not initiate criminal charges against the offending student, F.D., which was contrary to Ms. Scott's requests. Instead, Det. Minear referred F.D. to the Juvenile Offender Civil Citation Program ("CCP") in which F.D. was allowed to participate in intervention services in lieu of formal arrest and prosecution.

Ms. Scott further contends Det. Minear falsely informed the Victims' Compensation Assistance Program ("VCAP") that she did not wish to have F.D. criminally prosecuted, which precluded Ms. Scott from receiving reimbursement for expenses incurred due to the injuries C.C. sustained from the assault. Ms. Scott believes Det. Minear did not take seriously the assault on C.C. or his resulting injuries and that Det. Minear treated F.D., a White male, more favorably than C.C.

PRE-HEARING CONFERENCE

The following is a summary of the witness proffers and objections, if any:

- **Richard Brown** – Ms. Scott said Mr. Brown was one of the teachers present in the gym on January 10, 2022 when C.C. was assaulted.

Neither CRSD nor DSP objected to this witness' testimony.

- **F.D.** – Ms. Scott said F.D. was the student who assaulted C.C. on January 10, 2022. Ms. Scott intended to question him about what happened after the assault, whether he was seen by the school nurse, and where he went when he exited the gym. CRSD objected to this witness’ testimony as being irrelevant. CRSD argued that the issue here is whether Ms. Scott or C.C. were discriminated against due to their race and it is doubtful that F.D. can offer testimony about some students being treated more favorably than others. CRSD said it is irrelevant that F.D. is White. DSP did not explicitly object but stated F.D.’s testimony is likely irrelevant to claims that DSP treated him more favorably than C.C. because of their races.
- **Alex Dyer** – Ms. Scott said she would question Mr. Dyer about how the school administration communicated with him, whether he initiated contact with DSP, whether he received a police report, and whether he requested that F.D. be placed in CCP. CRSD objected to this witness’ testimony as being irrelevant and adopted the arguments previously made with respect to F.D. DSP did not object to this witness’ testimony.
- **Jill Carroll** – Ms. Scott said this witness was the school nurse who evaluated C.C. multiple times, including on January 10, 2022 and February 14, 2022 . Ms. Scott said she intended to question Ms.

Carroll about whether she knew C.C. had a concussion, why Ms. Carroll did not take more action if she knew of the concussion, and why there was no documentation in C.C.'s records related to her evaluation on February 14th. CRSD and DSP did not object to this witness' testimony.

- **Tonya Baker** – Ms. Scott said this witness was the Assistant Principal at Postlethwait who participated in a meeting held on February 22, 2022 at the district office with Dr. Toles Torrain. Ms. Scott said this witness was at Postlethwait on January 10, 2022 so Ms. Scott assumed she was involved in the investigation and the discipline imposed. CRSD objected to this witness' testimony because there is no indication she has relevant, admissible testimony about the issue of race discrimination and Ms. Scott made assumptions about this witness' prospective testimony. DSP said it did not have standing to object to this witness's testimony.
- **Kurt Cherry** - Ms. Scott said this witness was C.C.'s teacher at Postlethwait and he hit C.C. on the head with a ruler. Ms. Scott said Mr. Cherry admitted to hitting C.C. and she wanted to ask him questions about that incident. Ms. Scott said she also wanted to question Mr. Cherry about a bullying incident that occurred in his classroom on March 1, 2022 that was investigated and substantiated

by Postlethwait. CRSD objected to this witness' testimony and noted that Mr. Cherry is a Black male which makes the race discrimination allegation against him questionable. CRSD stated that according to a report, Mr. Cherry tapped a number of students, both Black and White, on the head as a congratulatory measure because they did well in class and that is not indicative of racial discrimination. DSP did not object to this witness' testimony.

- **Anthony Roper** – Ms. Scott said this witness was a constable at Postlethwait and she met with him a week after the January 10, 2022 assault to review the surveillance video. She said they spoke about safety concerns. Ms. Scott said she also spoke with Mr. Roper during the week of the October 2021 school bus incident during which racial slurs were directed at C.C. CRSD objected to this witness' testimony as being irrelevant because there is no indication that Mr. Roper will provide evidence of race discrimination. CRSD said there was an unsuccessful attempt to get an audio recording of the October 2021 incident to corroborate the allegations, and Mr. Roper will say there was no discrimination. CRSD said when it was revealed that C.C. sustained a concussion from the January 10th assault, CRSD requested the criminal charges be enhanced from offensive touching to assault. DSP did not object to this witness' testimony.

- **Fleur McKendell** – Ms. Scott said this witness was the Director of the NAACP Central Branch located in Dover, DE, who in February and March 2022 contacted DSP to get the January 10th police report. Ms. Scott said she wanted to question this witness about her efforts to contact DSP. CRSD did not object to this witness’ testimony. DSP did not object to this witness’ testimony about her assistance in getting the police report but reserved the right to object if this witness testifies beyond that about issues irrelevant to the Complaint.
- **Devon Hynson**– Ms. Scott said this witness is a Parent Information Center (“PIC”) representative and will testify about assisting Ms. Scott with filing a due process complaint with the Department of Education. Ms. Scott said Mr. Hynson spoke with Mr. McMackin in March 2022, and she wanted to question Mr. Hynson about whether they discussed if Mr. McMackin maliciously intended to dismiss the due process complaint. CRSD objected to this witness’ testimony as being irrelevant because due process complaints are governed by federal law, the lawsuit was filed in a different venue, Mr. McMackin’s discussion with Mr. Hynson was about that lawsuit, and Mr. Hynson is not an employee of the school district so if he did discriminate it cannot be attributed to the school district. DSP took no position.

- **Adrienne Newman** – Ms. Scott said this witness is the VCAP representative who denied her claim requesting reimbursement of expenses related to the January 10th assault. Ms. Scott said she wanted to question Ms. Newman about Det. Minear saying Ms. Scott denied prosecution of F.D. CRSD took no position. DSP did not oppose this witness’ testimony and noted that the evidence will show DSP ultimately helped Ms. Scott obtain VCAP assistance.
- **Jayla Scott-Cottman** – Ms. Scott said this witness is her oldest daughter who was present when Ms. Scott met with Mr. Hynson, and the witness was present during Ms. Scott’s meeting with DSP on June 3, 2022. Ms. Scott said she wanted to question this witness about what she heard during those meetings. CRSD took no position. DSP objected to this witness’ testimony as being duplicative and explained that Ms. Scott submitted a recording of the June 3rd meeting at DSP and there is no objection to admissibility of the recording. DSP also objected because testimony about the meeting with Mr. Hynson will divulge irrelevant information.
- **Stephanie Scott** – Ms. Scott said this witness is her mother who was present when Ms. Scott met with Mr. Hynson, and the witness was present during a school district meeting where the witness asked Dr. Toles-Torain if she believed that “the good citizens were responsible

for other students.” CRSD objected to this witness’ testimony on the bases of relevance and duplicity. CRSD said, regarding the “good citizen” question, when the January 10th assault was terminated, Dr. Toles-Torain allegedly said a good bunch of kids and citizens broke it up before the adults could do so but such a statement is not indicative that Dr. Toles-Torain, a Black woman, had a discriminatory motive. CRSD also said Ms. Scott, Dr. Toles-Torain, and the audio recording are available to address the purported “good citizen” statement which is not helpful to establishing a discriminatory motive. DSP took no position.

- **Delores Benson** – Ms. Scott said this witness is her grandmother who was present during a school district meeting where the witness asked questions about the continuing incidents at Postlethwait and requested an official apology. CRSD objected to this witness’s testimony on the same bases as espoused for Stephanie Scott’s testimony and stated a request for an apology is irrelevant. DSP took no position.
- **C.C.** – Ms. Scott said this is her son and he is the reason for this case. She explained he has had several incidents involving the school district, including assault, discrimination, and cyberbullying. Ms. Scott said C.C. would testify about what he has and continues to experience. DSP did not object to this witness’ testimony but objected

to testimony about the purported cyberbullying incident as it is irrelevant and was not raised in the Complaint. CRSD did not object to this witness' testimony but objected to possible testimony about the school district not handling these matters correctly, which CRSD says is a policy decision and irrelevant here.

- **Dr. Kristina Failing** – Ms. Scott said this witness was the principal at Postlethwait and she informed Ms. Scott about the January 10th assault, but the witness did not provide details and simply said C.C. would return home on the school bus. Ms. Scott said she wanted to question this witness about the following: a school bus incident that occurred on September 29th when someone tried to pour water on C.C., a school bus incident involving a White student that occurred in October 2021 where proper action was not taken, bullying incidents that occurred after the January 10th assault, and why complaints about the bullying were not immediately substantiated. CRSD did not object to this witness' testimony and noted she is also a CRSD witness. DSP did not object to this witness' testimony.
- **Cliffvon Howell** – CRSD said this witness is a party to the case and requested that Mr. Howell be permitted to testify on that basis. CRSD also said this witness is the Title VI Diversity, Equity, and Inclusion coordinator for the school district, he investigated the Title VI

complaint that mirrors the allegations here, and he concluded there was no discrimination. Ms. Scott and DSP did not object to this witness' testimony.

- **Dr. Tamara Toles-Torain** - CRSD and DSP did not object to this witness's testimony.
- **Det. Jason Minear** – CRSD and DSP did not object to this witness's testimony.
- **Mark Gaglione**⁶ – CRSD and DSP did not object to this witness's testimony.

After considering the proffers and objections, the Panel determined that the following witnesses were permitted to testify because they had relevant, admissible testimony: Richard Brown, F.D., Alex Dyer, Jill Carroll, Kurt Cherry, Anthony Roper, Adrienne Newman, Stephanie Scott, C.C., Dr. Kristina Failing, Dr. Tamara Toles-Torain, Det. Jason Minear, Sgt. Mark Gaglione, and Cliffvon Howell. The Panel determined that Fleur McKendell was not permitted to testify because she did not have relevant, admissible testimony. The Panel reserved ruling on whether the following witnesses had relevant, admissible testimony: Tonya Baker, Devon Hynson, and Jayla Scott-Cottman.

⁶ The Panel is aware that Mark Gaglione is a retired Delaware State Police Sergeant and he will be referred to hereinafter as "Sgt. Gaglione."

OPENING STATEMENTS

Both parties made opening statements which are part of the record but are not summarized here because such statements are not evidence to be considered by the Panel during deliberations.

SUMMARY OF THE EVIDENCE

A. Complainant India Scott's Testimony

1. Direct Examination

Ms. Scott, duly sworn, testified that in September 2021, on the same day that a school bus incident involving C.C. occurred, she sent an email message to Postlethwait administration. Ms. Scott said the Assistant Principal, Ms. Sell, conducted an investigation and then Ms. Scott was informed that a surveillance video recording of the incident revealed C.C. trying to fight off three Black people who were trying to pour water on him. According to Ms. Scott, she was informed the three students would be disciplined by being prohibited from riding the bus, but she was never informed that the incident was the result of a mutual conflict. Ms. Scott provided a copy of the email message she sent to Postlethwait⁷ as well as the

⁷ This document was entered into evidence as Complainant's Exhibit 1 ("CP Ex 1"). Hereinafter, Ms. Scott's exhibits will be identified as "CP Ex ___." Please note that because of the numerous CP exhibits, the Panel lost track of numbering during the hearing and the latter CP exhibit numbers may differ from the numbering applied during the hearing. Nevertheless, the exhibit numbers identified herein coincide with Ms. Scott's presentation of evidence.

communication she received in response.⁸

Ms. Scott testified she sent an email to Postlethwait administration addressing a school bus incident involving C.C. that occurred on October 20, 2021.⁹ Ms. Scott said a White male student took C.C.'s cell phone, and when C.C. tried to retrieve it, the White male student pushed down, kicked, beat, and punched C.C. According to Ms. Scott, the White male student also called C.C. "the N word" and said, "that's why Blacks get beat." According to Ms. Scott, the White male student later threatened to physically harm C.C. and continued to call C.C. racial slurs. Ms. Scott said Postlethwait administration did not take measures to ensure C.C.'s safety, and C.C. was treated differently than the White male so she went to speak with the White male student and his mother, but they denied that the incident occurred.

Ms. Scott testified she spoke with Mr. Roper who said a video recording of the incident revealed that the White male student made racial statements. Ms. Scott said Mr. Roper informed her there were previous similar incidents with the same student. Ms. Scott said Postlethwait should have banned the student from riding the bus for an extended period of time and not just the few days that were imposed.

Ms. Scott testified she received a call on January 10, 2022 from Dr. Failing who notified her that C.C. had been involved in a fight in gym class (hereinafter

⁸ Admitted into evidence as CP Ex 2.

⁹ Admitted into evidence as CP Ex 3.

referred to as “January 10th assault”). According to Ms. Scott, Dr. Failing did not provide details and simply said C.C. would catch the bus home after school. Ms. Scott said she also received a call from the school nurse who said C.C. had a busted lip and ointment was put on his lip. Ms. Scott said C.C. did ride bus home, and he reported he did not know the other individual involved in the fight. Ms. Scott said she was never informed C.C. did anything wrong and he was permitted to attend school on January 11th.

Ms. Scott testified about an email message she sent to Postlethwait administration on January 11, 2022¹⁰ wherein she requested an in-person meeting to discuss what occurred on January 10th, and she asked to see a video recording of the incident because she was concerned about the bump on C.C.’s head. Ms. Scott noted she had not been previously informed of the bump.

Ms. Scott testified she met with Mr. Roper about the January 10th assault and watched a video recording of said incident. Ms. Scott said upon viewing the video she could see the students were in gym class playing dodge ball, F.D. got hit with one ball, and C.C. hit F.D. with another ball. Ms. Scott said F.D. got upset and slammed C.C.’s head on the wall which caused C.C. to fall to the floor. When C.C. was on the floor, F.D. punched and kicked him and then multiple students tried to pull F.D. off C.C.

¹⁰ Admitted into evidence as CP Ex 4.

Ms. Scott testified she reviewed the January 10th assault video 12 times and was baffled by the teachers' responses or lack thereof. Ms. Scott said the video revealed two teachers on the opposite side of the gym who were sitting and talking and a third teacher, Mr. Brown, slowly walked toward the fight from the opposite side of the gym when he realized what was happening. Ms. Scott said neither of the 3 teachers intervened in the fight or checked on C.C. Ms. Scott said although the police report she received indicated the January 10th assault video was 11 seconds long, it was much longer.

Ms. Scott requested that the video be played for the Panel. Mr. Handlon played a 30 second video that he described as a zoomed in version.¹¹ Ms. Scott said the 30 second video is not the one she viewed with Mr. Roper. A video pre-marked as CRSD Ex R¹² and a video pre-marked as CRSD Ex Q¹³ were played and Ms. Scott said neither were the entire video she saw with Mr. Roper. Ms. Scott said

¹¹ This is the first of three videos the Panel viewed during the hearing. All three videos appear to capture the January 10th assault, but this video only contains a portion of what is captured in the other videos. Although neither party requested that the videos be admitted into evidence, because the Panel viewed the three videos pursuant to Ms. Scott's request, the videos are in evidence and as discussed below, Ms. Scott's motion to strike the videos was denied. This first video is admitted into evidence as DSP Exhibit 8 ("DSP Ex 8") because it was shared by Mr. Handlon. Hereinafter, DSP exhibits will be identified as "DSP Ex ____."

¹² This is the second video the Panel viewed during the hearing. Because this video was pre-marked as a CRSD exhibit, it is admitted into evidence as CRSD Exhibit 1 ("CRSD Ex 1"). Hereinafter, CRSD's exhibits will be identified as "CRSD Ex ____."

¹³ This is the third video the Panel viewed during the hearing. Because this video was pre-marked as a CRSD exhibit, it is admitted into evidence as CRSD Ex 2.

CRSD Ex 2 (pre-marked CRSD Ex Q) appears to be missing some scenes and it does not depict all the people that she saw moving about when she viewed the January 10th assault video with Mr. Roper.¹⁴

Ms. Scott admitted into evidence, without objection, the following exhibits:

- A picture of C.C. showing a lip injury,¹⁵
- A picture of C.C. showing an ear injury,¹⁶
- Email messages between Ms. Scott and Dr. Failing, dated January 11 and 12, 2022, pertaining to C.C.'s injuries, including a concussion,¹⁷
- A Bayhealth Diagnostic Imaging Report for C.C.'s January 12, 2022 CT scan,¹⁸
- A Nemours Children's Health After Visit Summary for C.C. dated January 18, 2022,¹⁹
- An email chain containing a message from Ms. Scott to Dr. Failing, Det. Minear, and Tonya Baker consisting of Nemours Children's Health paperwork dated January 18, 2022,²⁰

¹⁴ Mr. McMackin proffered that he received CRSD Exhibits R and Q in early 2022, the videos were in the same condition as received and had not been edited, and the videos contained a recording of the entire fight which lasted 11 seconds.

¹⁵ Admitted into evidence as CP Ex 5.

¹⁶ Admitted into evidence as CP Ex 6.

¹⁷ Admitted into evidence as CP Ex 7.

¹⁸ Admitted into evidence as CP Ex 8.

¹⁹ Admitted into evidence as CP Ex 9.

²⁰ Admitted into evidence as CP Ex 10.

- Kids & Teens Pediatrics paperwork pertaining to C.C.'s medical appointment on January 26, 2022,²¹ and
- An email chain that includes a January 20, 2022 email from Ms. Scott to Det. Minear, Dr. Failing, and others addressing Ms. Scott's concerns about the January 10th assault after having reviewed the video recording.²²

Regarding CP Ex 7, Ms. Scott testified she sent the January 12th email to ensure the school was aware of the serious injury that C.C. sustained during the January 10th assault. Regarding CP Ex 12, Ms. Scott testified she sent the email to explain what she saw upon viewing the January 10th assault video. Ms. Scott said no one from the school board responded and the superintendent only responded to say someone else would be in contact.

Ms. Scott testified that on January 12, 2022, she spoke with Det. Minear who said he had already written the police report for the January 10th assault and had referred F.D. to CCP. Ms. Scott said she told Det. Minear she did not agree with the referral to CCP. Ms. Scott said after C.C.'s medical appointment that day, she left a voicemail message for Det. Minear informing him that C.C. had a concussion.

Ms. Scott testified she went to DSP on January 19, 2022 because she did not

²¹ Admitted into evidence as CP Ex 11.

²² Admitted into evidence as CP Ex 12.

understand why she had not received the police report, she should have received a police report or complaint number, and she did not understand why Det. Minear referred F.D. to CCP. In relation to the January 19th DSP visit, Ms. Scott submitted the document that was pre-marked as P-6X-01.²³

Ms. Scott testified she received a redacted copy of the police report more than a month after the January 10th assault, but it did not identify who assaulted C.C. Ms. Scott submitted the document pre-marked P-6X-06,²⁴ an email message from Det. Minear referencing an attached police report, which was the redacted report she received. Ms. Scott testified she asked for an unredacted copy of the police report so that she could identify the perpetrator as they should be responsible for paying restitution, and Det. Minear instructed her to contact VCAP. Ms. Scott said she contacted VCAP and she was told to go to Delaware State Police State Bureau of Investigation (“SBI”), but SBI instructed her to get the police report from Family Court and Family Court instructed her to get it from the Attorney General’s Office. Ms. Scott said she did not get the police report from either of those places and ultimately went back to Det. Minear to obtain an unredacted copy. In support of this testimony, Ms. Scott submitted the documents pre-marked as P-6X-09²⁵ and P-6X-10.²⁶ Regarding CP Ex 16 (pre-marked P-6X-

²³ Admitted into evidence as CP Ex 13.

²⁴ Admitted into evidence as CP Ex 15.

²⁵ Admitted into evidence as CP Ex 14.

²⁶ Admitted into evidence as CP Ex 16.

10), Ms. Scott noted that Det. Minear instructed her to make a Freedom of Information Act (“FOIA”) request. Ms. Scott submitted the document pre-marked P-6X-11²⁷ to show that her FOIA request was denied.

Ms. Scott testified she ran around for weeks, spending a significant amount of time, effort, and expenses, trying to get an unredacted copy of the police report, but she was unsuccessful. Ms. Scott said that on March 29, 2022, Sgt. Gaglione called and explained the process for obtaining the information she needed to file a lawsuit although she did not have the perpetrator’s identification. Ms. Scott recorded her conversation with Sgt. Gaglione and played approximately 6 minutes of the recording during the hearing.²⁸ Ms. Scott said she was unable to file a lawsuit without the perpetrator’s information and she sent an email to Daniel Meadows for assistance.²⁹ Ms. Scott said that in April 2022, Sgt. Gaglione emailed her an unredacted copy of the police report.³⁰

Ms. Scott testified she emailed Det. Minear and Sgt. Gaglione after learning during a meeting with VCAP that her claim was denied because she refused prosecution.³¹ Ms. Scott testified she never said she did not want F.D. prosecuted and she submitted the document pre-marked P-6X-15 as supporting evidence.³²

²⁷ Admitted into evidence as CP Ex 17.

²⁸ Admitted into evidence as CP Ex 18 over DSP’s objection as to its relevance.

²⁹ Admitted into evidence as CP Ex 19.

³⁰ Admitted into evidence as CP Ex 20.

³¹ Admitted into evidence as CP Ex 21.

³² Admitted into evidence as CP Ex 22.

According to Ms. Scott, when she called VCAP a second time, she was informed her claim was denied based on what Det. Minear reported, but approximately two weeks later she received notification that her VCAP claim was approved.

Ms. Scott admitted into evidence, the following exhibits:

- Email messages, dated May 31, 2022, wherein Ms. Scott discussed the discrimination complaint she filed against DSP,³³
- Letter addressed to the Delaware State Police Office of Professional Responsibility, dated May 27, 2022, wherein Ms. Scott alleged DSP discriminated against her and C.C.,³⁴
- A copy of Lt. Johnathan Packard's business card that she received during a meeting on June 3, 2022,³⁵
- A copy of Sgt. Gaglione's business card that she received during a meeting on June 3, 2022,³⁶
- An email to Sgt. Gaglione and Lt. Packard, dated June 27, 2022, in follow up to their June 3rd meeting,³⁷
- An email to the school district, the Department of Education, and

³³ Admitted into evidence as CP Ex 23.

³⁴ Admitted into evidence as CP Ex 24.

³⁵ Admitted into evidence as CP Ex 25 over DSP's objection as to its relevance.

³⁶ Admitted into evidence as CP Ex 26 over DSP's objection as to its relevance.

³⁷ Admitted into evidence as CP Ex 27, but the Panel noted DSP and CRSD's objections to the Panel considering the "knife incident" discussed in the email on the basis that it was beyond the scope of this hearing.

others, dated February 2, 2022, wherein Ms. Scott stated she and C.C. were being treated differently because of their race.³⁸

Ms. Scott testified about the document pre-marked as P-7X-02³⁹ which she described as an email from Dr. Failing wherein Dr. Failing addressed the alleged bullying investigations she conducted during the school year. Ms. Scott said a September 27, 2021 incident and a January 25, 2022 incident were determined to be unsubstantiated for bullying.⁴⁰ Ms. Scott said a February 2, 2022 incident in which the same White student as the January 25th incident called C.C. a snitch in front of the class was determined to be substantiated for bullying.⁴¹ Ms. Scott said a February 23, 2022 incident was determined to be unsubstantiated although she attended a district meeting on February 22, 2022 and reported C.C. was “having issues with other Caucasian students in the classroom.”⁴² Ms. Scott said there was an investigation of a White teacher who on February 24, 2022, posted a laughing emoji online in response to Ms. Scott’s discussion about the January 10th assault.

³⁸ Admitted into evidence as CP Ex 28.

³⁹ Admitted into evidence as CP Ex 29. This exhibit identifies and addresses six dates on which bullying incidents allegedly occurred (i.e., September 27, 2021, January 25, 2022, February 2, 2022, February 23, 2022, February 24, 2022, and March 1, 2022).

⁴⁰ An email from Ms. Scott to Dr. Failing addressing this incident was entered into evidence as CP Ex 30.

⁴¹ Ms. Scott submitted an exhibit pre-marked P-4X-04 pertaining to this incident that was entered into evidence as CP Ex 31.

⁴² Ms. Scott submitted an exhibit pre-marked P-4X-05 pertaining to this incident that was entered into evidence as CP Ex 32.

Ms. Scott said on March 1, 2022, when she picked up C.C. from school she noticed tape on the back of his clothes, and C.C. said a White student put tape on his clothes, kicked him, yelled in his ear, ran up on him, and slammed items on his desk, but the teacher did not intervene. Ms. Scott said she reported the March 1st incident to the Department of Justice Ombudsperson and Postlethwait administration.

Ms. Scott testified that typically the bullying allegations were immediately unsubstantiated and then two weeks later they would be substantiated. Ms. Scott said there was a common pattern of CRSD immediately denying and disregarding her advocacy to end the bullying of her Black son, but it got to a point where she had to transfer him to another school. Ms. Scott referenced the last paragraph on page 2 of CP Ex 29 and stated Dr. Failing instructed her to transfer C.C. to another school. Ms. Scott said she felt Dr. Failing seemed to believe Ms. Scott was doing too much and saying too much so Dr. Failing did not want to deal with her. Ms. Scott said she felt discriminated against because of this and because she was not fully informed of what the transfer process entailed nor was she informed the process would take several days. Ms. Scott explained that C.C. had an Individualized Education Program (“I.E.P.”) and he was already behind.⁴³

⁴³ CRSD objected to Ms. Scott’s testimony about the transfer process and argued that it was beyond the scope of the Complaint. The Panel noted CRSD’s objection, noted this was the first time Ms. Scott raised an issue about the school transfer process, and said the testimony would be given the weight it deserved, if any.

Ms. Scott introduced into evidence a document pre-marked as P-10X-05⁴⁴ which she described as an email that she sent Dr. Failing after they spoke on the phone. Ms. Scott said the email pertained to C.C. not attending school on April 1, 2022 because there was only a half-day of classes and C.C. was going to be transferred to another school.

2. CRSD Cross Examination

During cross examination by Mr. McMackin on behalf of CRSD, Ms. Scott testified the email she sent Dr. Failing on September 29, 2021 pertained to the September 2021 school bus incident.⁴⁵ Ms. Scott agreed the incident was deemed to be a conflict between students and not bullying, but she does not know if the other students were Black. Ms. Scott said she is not aware of non-Black students involved in this incident being treated more favorably than C.C.

Regarding the October 2021 school bus incident, Ms. Scott testified a student called C.C. racially derogatory names. Ms. Scott said she was informed Postlethwait investigated the incident and for the first time, during the hearing, she was informed Postlethwait notified law enforcement about the October 2021 incident. Ms. Scott said Postlethwait notifying a constable⁴⁶ does not mean the incident was taken seriously. She explained that Mr. Roper informed her he saw a

⁴⁴ Admitted into evidence as CP Ex 33.

⁴⁵ See CP Ex 1.

⁴⁶ The Panel is aware Anthony Roper was the constable for Postlethwait at all times relevant to the Complaint.

video of the October 2021 incident, he spoke with students about the incident, the offending student posed a safety risk as this was not the student's first incident, and other students were afraid to ride the bus with the offending student. Ms. Scott further explained that the offending student called other students on the bus, who were predominately Black, the "N-word" and the student said they got beat because they were slaves. Ms. Scott said because such behavior creates a hostile environment the school district should not allow the offending student to ride the bus, but he was allowed to ride. Ms. Scott confirmed she did not have the student who said the derogatory names scheduled to testify.

Ms. Scott testified she initially knew Postlethwait's principal and assistant principal conducted an investigation of the October 2021 incident, but she only became aware of Mr. Roper's investigation days later. According to Ms. Scott, Mr. Roper informed her he could see and hear what occurred from viewing the October 2021 video, but Postlethwait said there was no sound. Ms. Scott said her request to view the video was denied and she was informed that it was unavailable.

Ms. Scott agreed that at times schools cannot solve every problem, but she believes some incidents can be controlled and managed better. Ms. Scott said the school district did not properly address the October 2021 incident because it was trying to avoid having a bad report sent to the Department of Education. Ms. Scott testified the school district needs to take a stronger stance on racism, bigotry, and bullying and the stance should apply equally to Black and White students. Ms.

Scott testified if an allegation can be verified then students should be disciplined, but it is not always necessary to expel them from school. She said if a student is creating a racist, hostile environment they should be disciplined and students should be able to ride the bus without being called the “N-word.” Ms. Scott said although Postlethwait claimed it could not verify what the offending student said, Postlethwait reported that other students confirmed the student’s use of the “N-word” and Mr. Roper also confirmed it, but she was uncertain what Mr. Roper would say when he testified during the hearing. Ms. Scott said it is her opinion that C.C. was treated differently because he is Black and the offending student is White, but she has no evidence of disparate treatment.

Ms. Scott said there were no additional incidents between C.C. and the offending student after October 20, 2021, but the offending student’s brother and another student threatened C.C. Ms. Scott confirmed there were only students who used the racially derogatory terms and none of Postlethwait’s employees ever used those terms towards her or C.C. Ms. Scott said she was unaware of an incident in which a Black student acted in a racially hostile manner toward a White student and the Black received more severe discipline than the offending student involved in the October 2021 school bus incident.

Regarding the January 10th assault, Ms. Scott confirmed Dr. Failing called her the day of the assault, but Ms. Scott said she was concerned because Dr. Failing did not say how significant the assault was. Ms. Scott said she has no

evidence of a similar situation involving a White student victim, no evidence of a similar situation in which the parent of a White student victim was instructed to come pick up the student, and no evidence of a White student victim receiving better treatment from the school nurse⁴⁷ after having been in a fight. Ms. Scott explained she would not have such information because Postlethwait does not discuss students' personal information, but she included F.D. and Alex Dyer as witnesses so they can testify about the type of treatment they received on January 10, 2022. Ms. Scott said Postlethwait did not provide her any information that would be evidence of White people receiving different treatment.

Ms. Scott testified that on January 10th or 11th, 2022, she informed Postlethwait that C.C. had a bump on his head and a swollen lip. Ms. Scott said she now understands but did not previously understand, that due to those injuries, the criminal charge could be enhanced from offensive touching to assault. Ms. Scott said she now also understands that is why Postlethwait asked that the criminal case be prosecuted.

Ms. Scott testified she does not know if on January 10th Postlethwait was aware of C.C.'s concussion, but she believes C.C. did not receive proper care because concussion protocol should have been followed due to C.C. being hit in the head multiple times. Ms. Scott testified that after she sent Postlethwait

⁴⁷ The Panel is aware Jill Carroll was the nurse for Postlethwait on January 10, 2022.

documentation from Kids & Teens and Nemours Hospital about C.C.'s concussion, Postlethwait followed concussion protocol, C.C.'s I.E.P. was updated, and the I.E.P. team took action to ensure compliance with the medical recommendations, but Postlethwait did not implement a safety plan for C.C. Ms. Scott said other than the facts that the nurse is White and C.C. is Black, she has no evidence that the nurse discriminated against C.C.

Ms. Scott testified she has no knowledge of Mr. Brown responding to fights between White and Black students more quickly than he did on January 10, 2022, but she believes he would have reacted differently if a White student were being assaulted. Ms. Scott admitted her belief was speculation and said she is not aware of an incident in which the school staff acted more quickly when a Black student was the assailant.

Ms. Scott testified Postlethwait's refusal to reveal F.D.'s identifying information was discriminatory. Ms. Scott said it was discriminatory because F.D. is White and C.C. is Black, but Ms. Scott admitted she had no evidence of a Black student's identifying information being provided and she had no evidence that a Black student had been treated less favorably than a White student with regards to providing identifying information. Ms. Scott said she is now aware that federal and state law prohibited Postlethwait from disclosing that information, but she was not aware at the time that she requested F.D.'s information. Ms. Scott said she now understands the prohibition is for F.D.'s privacy, but she questioned how C.C.'s

interests were considered given that he was suffering from a brain injury.

Ms. Scott testified about an incident that occurred on February 14, 2022 involving a teacher Kurt Cherry. Ms. Scott said Mr. Cherry hit C.C. on the head with a ruler although he knew C.C. had a concussion. Ms. Scott said Dr. Failing did not immediately inform her of this incident, instead Ms. Scott received a call from Mr. Cherry acknowledging what occurred. Ms. Scott said Dr. Failing did not respond to her phone call, so she sent Dr. Failing an email message inquiring what happened. Ms. Scott said Dr. Failing is the one that discriminated by not notifying Ms. Scott of the incident.

Ms. Scott said Postlethwait substantiated as bullying the March 1, 2022 incident,⁴⁸ which entailed a White student yelling in C.C.'s ear, kicking his chair, and putting tape on his hoodie, but she was upset that this was not addressed in the classroom by the teacher.

Ms. Scott testified Dr. Failing called her about transferring C.C. to another school. Ms. Scott said Dr. Failing then sent the March 25, 2022 email and that is when she requested that C.C. be transferred to another school.

Ms. Scott acknowledged she had filed an internal discrimination complaint against Cliffvon Howell⁴⁹ and she filed 6 or 7 lawsuits against the school district. Ms. Scott said she was ignored by some people working for the school district, but

⁴⁸ See CP Ex 39.

⁴⁹ The Panel is aware Mr. Howell was an employee of the school district.

acknowledged she exchanged hundreds of emails with Superintendent Dr. Kristina Alois between April 1 and July.⁵⁰ According to Ms. Scott, at the time of this hearing, she had not been in contact with Dr. Alois in several months, but she was in contact with Dr. Loftis who is the school district's Director of Special Programs. According to Ms. Scott, at the time of this hearing, all her concerns had been addressed and she is not alleging that Dr. Loftis has racially discriminated. Instead, Ms. Scott said there are communication issues and education bias.

When asked if her witnesses would provide specific facts of Black people being treated differently than White people or White people being treated more favorably, Ms. Scott said Mr. Roper will provide testimony about the school because that is where he works. Ms. Scott said she has not spoken with Mr. Roper since January 2022 and she does not know what his testimony will entail. Ms. Scott also said three of her witnesses would provide testimony about interactions between Ms. Scott and school district representatives that they observed, but the three witnesses have no specific evidence confirming her opinion that there was racial discrimination. Ms. Scott said she has no knowledge or evidence of any school district employee using racial, bigoted language towards her or C.C.

⁵⁰ The Panel is uncertain what year the email communications occurred.

B. CRSD Motion to Dismiss

1. The Motion

Relying upon Super. Ct. Civ. Rules 50 and 56, Mr. McMackin requested that the Complaint be dismissed against CRSD. Mr. McMackin argued there is no direct or circumstantial evidence that would enable Ms. Scott to establish a *prima facie* case of discrimination and therefore Ms. Scott cannot prevail on her Complaint.⁵¹ In making this motion, Mr. McMackin relied upon Ms. Scott's testimony which included Ms. Scott stating that none of her witnesses will present evidence of discrimination.⁵²

2. Panel Questioning/Ms. Scott's Response to the Motion

In an effort to properly address CRSD's motion and consider Ms. Scott's response thereto, the Panel questioned Ms. Scott about her testimony. In response to the Panel's questions, Ms. Scott testified she had bases to believe that the school

⁵¹ In Delaware, claims alleging a refusal or denial of public accommodation based upon unlawful discrimination are decided by applying the three-part analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See also DP, Inc. v. Harris*, 2000 WL 1211151, *6; *Uncle Willie's Deli v. Whittington*, 1998 WL 960709, *4 (Del. Super. Dec. 31, 1998). Part one of the analysis requires the complainant to establish a *prima facie* case of discrimination by showing that (a) they are a member of a protected class; (b) they were denied access to public accommodation; and (c) non-members of their protected class were treated more favorably. *Boggerty v. Stewart*, 14 A.3d 542, 550 (Del. 2011) (citations omitted); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). A complainant cannot prevail if they fail to establish a *prima facie* case. *Boggerty*, 14 A.3d at 551.

⁵² DSP joined CRSD's motion to dismiss and preserved the opportunity to make arguments in support of its motion to dismiss.

district treated her and C.C. different than White students and parents. Ms. Scott said the school district's responses to treatment of C.C. were so grossly inadequate that discrimination can be the only explanation. Ms. Scott said the following school district actions or inactions were grossly inadequate and demonstrate discrimination:⁵³

- On October 20, 2021, there was a delay in taking care of “the issue” and in communicating with Ms. Scott. Instead, Ms. Scott said she had to address “the issue” by talking to the involved student’s family.
- Regarding the January 10, 2022 assault, Ms. Scott reiterated that the video shared during the hearing was not the video she previously viewed with Mr. Roper and she appeared to say that based upon the video she viewed there was clearly gross negligence given that neither of the Postlethwait staff persons assisted C.C. after he was assaulted. Ms. Scott said no one inquired if C.C. was okay and he had to walk

⁵³ This testimony was presented over CRSD’s objection. Mr. McMackin objected to the Panel’s line of questioning and argued it was an inappropriate effort to “make the case for the petitioner.” Mr. McMackin further argued that Ms. Scott had presented her case and the Panel was trying to inappropriately bolster it. In response, Chairperson Launay-Tarlecki stated that the Panel has authority to question witnesses, which includes asking questions of pro se litigants in an effort to “bring to light the information that is needed for the hearing.” Commissioner Bensing stated that the questions stemmed from and included a summarization of Ms. Scott’s testimony and there was no intent to add to her testimony. Commissioner Bensing also said the questions were asked in an attempt to permit Ms. Scott an opportunity to summarize her testimony in a manner that directly addressed the motion to dismiss.

out of the gym by himself. Ms. Scott said the staff's failure to assist was because F.D. is White and C.C. is Black.

- On February 14th, Ms. Scott never received a call from Postlethwait's administration although they knew C.C. was suffering from a brain injury. According to Ms. Scott, the involved teacher called and was "basically crying on the phone for making a bad mistake." Ms. Scott said this is evidence of Postlethwait's continuous cycle of failing to notify her about incidents that occur.
- On April 1st, C.C. was cyberbullied by White students in the school district and nothing was done.⁵⁴
- During a school board meeting a White principal said, "you don't even belong here."⁵⁵
- The Postlethwait principal, who is a White woman, failed to timely communicate with her on several occasions.

3. Panel Ruling

On March 2, 2023, prior to issue its ruling, the Panel inquired if the parties had preliminary matters to be addressed. In response, Ms. Scott requested that the

⁵⁴ The Panel noted that Ms. Scott's testimony about cyberbullying is beyond the scope of the Complaint and would not be addressed by the Panel when considering the motion to dismiss.

⁵⁵ The Panel noted CRSD's objection to Ms. Scott's testimony about this statement and said the Panel will give the testimony the weight it deserves, if any.

Panel permit Mr. Roper to testify before ruling on CRSD’s motion to dismiss. DSP did not oppose her request. CRSD opposed and argued that Ms. Scott spoke to Mr. Roper more than one year ago and there was no indication he had evidence relevant to the motion to dismiss. CRSD argued that Ms. Scott said her witnesses would not provide evidence of different treatment and therefore Ms. Scott speculated that she and C.C. were discriminated against, which is insufficient evidence. The Panel did not permit Mr. Roper’s testimony and orally issued the following ruling on CRSD’s motion to dismiss:

“Yesterday, Mr. McMackin, . . . counsel for the school respondents,⁵⁶ motioned for Ms. Scott’s complaint against the school respondents to be dismissed. Mr. McMackin’s motion came after a pretrial hearing in which Ms. Scott proffered the evidence she would elicit from identified witnesses and [after] he completed cross examination of Ms. Scott. In support of the motion, Mr. McMackin argued that after hearing Ms. Scott’s testimony it is clear she has no direct or circumstantial evidence enabling her to establish a *prima facie* case of discrimination. Mr. McMackin cited Superior Court Rules of Civil Procedure 50 and 56 to support his motion to dismiss at this juncture—after the hearing has already begun but before the presentation of all evidence.

While this is an administrative hearing that is not subject to the Superior Court Rules of Civil Procedure, the Panel notes that oftentimes those rules are applied in these matters where there is no DEAL statute . . . or Equal Accommodations Regulation⁵⁷ that directly addresses a particular issue. Additionally, there is at least one provision within DEAL that incorporates by reference the Superior Court Rules of Civil Procedure. *See 6 Del. C. § 4510*. Lastly, there are provisions within DEAL that permit Superior Court actions related to

⁵⁶ In its ruling, the Panel referred to CRSD as “school respondents.”

⁵⁷ The Delaware Equal Accommodations Regulations are codified at Delaware Administrative Code, Title 1, Section 600.

alleged violations of DEAL. *See* 6 *Del. C.* §§ 4511 and 4512. Therefore, the Panel considered Superior Court Rules of Civil Procedure 50 and 56 in relation to the school respondents' motion to dismiss.

The Panel finds that Rule 50 does not apply because the rule pertains to motions made after a party has been fully heard on an issue and Ms. Scott has not completed her case in chief. Regarding Rule 56, while a motion from a defending party may be appropriate at any time,⁵⁸ the Panel is hesitant to rely upon a summary judgment motion to dismiss at this juncture before the Complainant has had an opportunity to present all of her evidence in her case in chief. Therefore, the school respondents' motion to dismiss in reliance upon Rules 50 and 56 is denied.

However, the Panel finds that Ms. Scott's complaint against the school respondents shall be dismissed pursuant to Superior Court Rule 41(e) which states, "The Court may order an action dismissed, *sua sponte*...for any...reason deemed by the Court to be appropriate."

On February 23, 2023, this Panel issued an Order in which it denied the school respondents' motion to dismiss that appeared to rely upon Equal Accommodations Regulation 5.1.5.2⁵⁹ which permits pre-hearing dismissal of a complaint when facts alleged in the complaint do not state a violation of [DEAL.] At that time, the motion was denied because based upon the information contained in Ms. Scott's complaint there was a reasonably conceivable set of circumstances susceptible of proof. Although Regulation 5.1.5.2 does not apply now that the hearing has begun, after [hearing] Ms. Scott's testimony and proffers for each of her witnesses, the Panel finds that it is appropriate to dismiss Ms. Scott's complaint because it does not state a violation of [DEAL]. The panel notes that its jurisdiction is limited to acts of discrimination in violation of [DEAL]; our ruling in this matter has no bearing on the appropriateness or legality of other nondiscriminatory acts and [omissions] by the school respondents which Ms. Scott has eloquently evidenced and presented.

The Panel agrees with the school respondents' argument that

⁵⁸ *See* Super. Ct. Civ. R. 56(b).

⁵⁹ *See* 1 *Del. Admin. C.* § 600-5.1.5.2.

the Complainant has identified no direct or circumstantial evidence that would establish a *prima facie* case of discrimination. Under Delaware law, claims alleging a direct or indirect refusal or denial of public accommodations based upon unlawful discrimination are decided using the guidance of the U.S. Supreme Court's three-part analysis in the case *McDonnell Douglas Corporation v. Green*.⁶⁰ The first part of that analysis is germane to the school respondents' motion to dismiss.

Ms. Scott must establish a *prima facie* case of discrimination which means she must prove (1) that her son is a member of a protected class, (2) that he was denied access to public accommodation, and (3) that non-members of his protected class were treated more favorably. While the Panel understands the challenges of identifying comparative evidence that is not entirely within a complainant's control, our antidiscrimination laws do not permit our Commission to engage in fishing expeditions in waters not known. [A complainant's heavy burden includes the burden to identify] with some particularity more than just the denial of accommodation. [A complainant must also show] that different treatment of non-members of the protected class occurred. Ms. Scott repeatedly testified that she does not have evidence that nonmembers of the protected class race were treated more favorably. When Ms. Scott made proffers for each of her witnesses' testimony, there was no indication they would testify that nonmembers of the protected class race were treated more favorably. Given that Ms. Scott, by her own admission, cannot establish a *prima facie* case of discrimination, pursuant to Superior Court Civil Procedure Rule 41(e), the Panel finds it appropriate to *sua sponte* dismiss Ms. Scott's complaint against the school respondents.

.....

Given the Panel's dismissal of the complaint against the school respondents, the Panel has reassessed the relevance and admissibility of Ms. Scott's remaining witnesses. Based upon Ms. Scott's proffer[s], the Panel finds that only testimony [from] the following witnesses is relevant to the complaint against the [DSP]: Adrienne Newman, [F.D.], Alex Dyer, Anthony Roper, [C.C.], Jayla Scott-Cottman, Detective Jason Minear, and Mark Gaglione. The remaining

⁶⁰ 411 U.S. 792 (1973).

witnesses—Richard Brown, Jill Carroll, Tonya Baker, Kurt Cherry, Devon Hynson, Stephanie Scott, and Delores Benson—are all excused.”

Post-hearing, upon further consideration of Delaware Superior Court Rules of Civil Procedure, the Panel also relies upon Super. Ct. Civ. R. 12(b)(h)(2) in support of its decision to dismiss the Complaint against CRSD. According to Rule 12(b)(h)(2), “[a] defense of failure to state a claim upon which relief can be granted...may be made...at the trial on the merits.” Mr. McMackin’s oral motion to dismiss was made during the hearing on the basis that Ms. Scott was unable to establish a *prima facie* case (i.e., Ms. Scott did not have a claim for which relief could be granted). As discussed, Ms. Scott cannot prevail and does not have a valid claim if she fails to establish a *prima facie* case.⁶¹

C. Complainant India Scott’s Motion to Strike

On March 2, 2023, when the Panel inquired if the parties had preliminary matters to be addressed before issuing its ruling on CRSD’s motion to dismiss, Ms. Scott expressed concern about the January 10th assault videos shown during her testimony.⁶² She said neither video was the video she previously viewed with Mr. Roper.

On behalf of DSP, Mr. Handlon said CRSD timely provided the videos and

⁶¹ *Boggerty*, 14 A.3d at 551.

⁶² *See* DSP Ex 8, CRSD Ex 1, and CRSD Ex 2.

Ms. Scott did not previously object to authenticity nor did she contend that the videos had been altered.

On behalf of CRSD, Mr. McMackin said the viewed videos were from his personal files and were in the same condition as when he initially received them in March 2022. Mr. McMackin said he did not alter the videos and one can see they have not been altered. He explained that the videos are from two different vantage points, but they capture the same occurrence, and perhaps Ms. Scott saw videos from other vantage points.

The Panel treated Ms. Scott's objection to the videos as a motion to strike and denied the motion. During the hearing, the Panel explained that Ms. Scott is the only party who questioned authenticity of the video, and the Panel now further explains that Ms. Scott did not present a compelling reason to reject the videos; she simply stated they were different than the ones she viewed and that argument, alone, is insufficient justification for striking the viewed videos.

D. Complainant India Scott's Testimony (continued)

1. DSP Cross Examination

During cross examination by Mr. Handlon, Ms. Scott testified this case was initiated by her filing a complaint with the Delaware Human and Civil Rights Commission ("Commission") in March 2022. Ms. Scott confirmed she commenced

the complaint by sending the documents pre-marked as DSP Exhibit K.⁶³ Ms. Scott specifically identified her letter to the Delaware Division of Human Relations,⁶⁴ dated March 7, 2022 appearing on pages 1 through 2 of DSP Ex 1, as setting forth the details of her complaint wherein she discussed Postlethwait's negligence and she requested an investigation. Ms. Scott confirmed her March 7th letter included specific demands for DSP to follow and included a list of requests for change in policy and improved communication with parents.

Ms. Scott testified that pages 16 through 22 of DSP Ex 1, containing her letter to the school district, administration, and staff dated February 1, 2022, include a discussion on page 18 of her displeasure with F.D.'s referral to CCP, and she confirmed that the letter did not include an allegation that Det. Minear referred F.D. to that program because he is White. Ms. Scott admitted the February 1st letter is the only document in DSP Ex 1 that discusses Det. Minear's referring F.D. to CCP. Ms. Scott said everyone knew her position because she spoke about it several times, she sent follow up emails, and when she spoke with Det. Minear she informed him of her discrimination allegation as well as her objection to F.D. being referred to CCP.

Ms. Scott testified she has no knowledge that Det. Minear was at

⁶³ Admitted into evidence as DSP Ex 1.

⁶⁴ Delaware Division of Human and Civil Rights ("DHCR") was previously named Delaware Division of Human Relations.

Postlethwait on January 10, 2022 during the assault, and Mr. Roper was present at the school but not in the gym. Ms. Scott said she informed Det. Minear of the assault on January 11th, she explained what C.C. was experiencing, and Det. Minear said it sounded like C.C. had a concussion. According to Ms. Scott, Det. Miner described CCP as a new program that the school district used to give students arrested for committing crimes the opportunity to avoid having a criminal record. Ms. Scott said Det. Minear never informed her that her consent was necessary for the CCP referral. Ms. Scott said upon learning her consent was necessary, on January 12th, she informed Det. Minear that she did not consent because five hours of community service was insufficient.

Ms. Scott testified that when she spoke with Det. Minear on January 12th C.C. was not yet diagnosed as having a concussion. Ms. Scott said she later learned that Det. Minear charged F.D. with assault and she later learned that if F.D. had not successfully completed CCP he could have been prosecuted for assault. Ms. Scott said she was aware that police officers have discretion in deciding whether to issue criminal charges.

Ms. Scott testified there was a similar situation to the January 10th assault that occurred within the school district in May.⁶⁵ Ms. Scott explained that a White female student assaulted a Black female student, and the White student was

⁶⁵ Ms. Scott did not specify a date or year.

referred to CCP over the Black student's parent's objection. Ms. Scott could not provide names of the involved students and said she assumed Det. Minear was involved because he was the school resource officer for the school district. Ms. Scott also said a teacher standing nearby when that incident occurred did not intervene and the teacher was terminated.

Ms. Scott testified she reviewed the document pre-marked as DSP Exhibit G,⁶⁶ which Mr. Handlon proffered is a spreadsheet containing information about Det. Minear's arrests for 2022. Ms. Scott said she did not have any information to rebut the veracity of the information contained in the spreadsheet.

Ms. Scott testified she went to DSP on January 19, 2022 and provided restitution documentation because she wanted that information included in the police report. Ms. Scott said at the time she did not know Det. Minear could not order restitution, but she later learned it could be awarded through VCAP.

Ms. Scott testified that in February 2022, she received a victim's copy of the police report related to the January 10th assault and F.D.'s address was redacted. Ms. Scott said Det. Minear told her she could obtain an unredacted copy via a FOIA request, and she is now aware of an established exception to FOIA which precluded that. Ms. Scott said she wanted an unredacted police report so she could obtain F.D.'s address for purposes of filing a lawsuit against him. Ms. Scott said

⁶⁶ Admitted into evidence as DSP Ex 2.

she received an unredacted copy in April 2022 and she filed a lawsuit that she later dismissed because it was too taxing for her to pursue.

Ms. Scott testified she eventually applied to VCAP for restitution, which was ultimately approved. Ms. Scott said after twice speaking with the VCAP investigator, Adrienne Newman, she received a letter dated May 11, which stated she was awarded medical and mental health benefits.⁶⁷ Ms. Scott said she was later advised in a January 26, 2023 letter that she was awarded lost wages,⁶⁸ but she will not be able to receive that award because she received “paid time off” from her employer.

Ms. Scott testified that when she emailed Daniel Meadows⁶⁹ she did not know who he was, but she is now aware that he was the Lieutenant Colonel. Ms. Scott said he called and offered assistance and he was nice to her. Ms. Scott testified that on June 3, 2022, she met with Det. Minear, Sgt. Gaglione, and Lt. Packard at DSP and they had a lengthy discussion about restitution and why Det. Minear indicated in the police report that prosecution was declined. Ms. Scott said although she initially thought “prosecution declined” meant she did not want to prosecute, after the meeting she understood that verbiage was necessary for the CCP referral. Ms. Scott acknowledged that the June 3rd meeting was recorded and

⁶⁷ Admitted into evidence as DSP Ex 3.

⁶⁸ Admitted into evidence as DSP Ex 4.

⁶⁹ See CP Ex 19.

she submitted into evidence the recording that was pre-marked as P-6X-19a.⁷⁰

Ms. Scott agreed that not every fight is the same, each fight must be individually assessed, and some fights warrant filing more serious charges while others warrant filing lesser charges. Ms. Scott said based upon the video she viewed with Mr. Roper, criminal charges and an arrest were justifiable. Ms. Scott admitted she did not see kicking in the videos viewed during the hearing,⁷¹ and she said she assumed because the police report identifies the “Weapon Force” as “Personal Weapons hands/feet,” “feet” meant there was kicking.^{72,73} Ms. Scott confirmed the videos viewed during the hearing capture a fight involving C.C.

2. Re-Direct Examination

Ms. Scott testified that between January and June,⁷⁴ DSP, specifically Det. Minear, committed racial discrimination. Ms. Scott said her parental rights were violated when she was not permitted to express her position about F.D. entering CCP. She said when she spoke with Det. Minear on January 12, 2022 she said she did not agree with F.D. entering CCP, and on the same day she also left Det. Minear a voicemail message stating she did not agree with F.D. entering CCP. Ms.

⁷⁰ Admitted into evidence as DSP Ex 5.

⁷¹ See DSP Ex 8, CRSD Ex 1, and CRSD Ex 2.

⁷² The initial police report was admitted into evidence at DSP Ex 6, over Ms. Scott’s objection that the copy she received looked different. Ms. Scott confirmed that the police report she received appears on page 44 of DSP Ex 1.

⁷³ The supplemental police report was admitted into evidence as DSP Ex 7.

⁷⁴ Ms. Scott did not specify dates or years but based upon Ms. Scott’s overall testimony the Panel deduced that Ms. Scott was testifying about the year 2022.

Scott said the following week she left medical documents and pictures for Det. Minear at DSP.

Ms. Scott testified that when she learned C.C. had a concussion she left a voicemail message informing Det. Minear, and she should have been provided the complaint number and the police report at that time. Ms. Scott said she then went to DSP to get the information. Ms. Scott said when she asked Det. Minear for the complaint number he agreed to provide it, but there was a delay and Ms. Scott had to contact him again. Ms. Scott said she received the complaint number on January 21, 2022 and the police report on February 23, 2022.

Ms. Scott testified the police report says C.C. had an “apparent minor injury” but a concussion is a serious injury for which C.C. was still under the care of Nemours Hospital. Ms. Scott said the “Personal Weapons hands/feet” language in the police report⁷⁵ is consistent with the video she saw with Mr. Roper and she maintained that the videos viewed during the hearing are different than the video she viewed with Mr. Roper. Ms. Scott said the police report accurately reflects the video she saw with Mr. Roper and that report is inconsistent with the videos viewed during the hearing.

Ms. Scott testified that between January and February 2022, she was not getting the fulfillment she needed as a parent and C.C.’s medical needs were not

⁷⁵ See DSP Ex 6.

being met. Ms. Scott said the victim's parents should not be responsible when an assault occurs and she was left with no help. Ms. Scott questioned if restitution was supposed to be addressed in CCP, then who was responsible for addressing that.

Ms. Scott testified she was annoyed with having to run around between March and April 2022 to get the police report. She said it was unacceptable to be told "I didn't know that I was supposed to give you a victim's report."⁷⁶ Ms. Scott said she was then told to submit a FOIA request knowing it was going to be denied, which required her to return to Det. Minear and again ask for the police report. Ms. Scott said the unnecessary run around that is attributed to Det. Minear was the result of a discriminatory act.

Ms. Scott testified she has not received any compensation from VCAP notwithstanding the letters indicating that she was awarded compensation.⁷⁷

Ms. Scott testified there was an incident in May⁷⁸ at Magnolia Middle School in which a White family, who Ms. Scott cannot identify, was treated differently than her and C.C.

Ms. Scott testified F.D. was treated differently because he was "pushed through the program without taking proper evidence," he was given the opportunity to participate in CCP, and then he returned to school, but C.C. did not

⁷⁶ Ms. Scott did not specify who made this statement, but based on Ms. Scott's testimony, the Panel deduced she attributed this statement to Det. Minear.

⁷⁷ See DSP Exs 3 and 4.

⁷⁸ See footnote 65.

have an opportunity to return to school. Ms. Scott testified she believes DSP contacted Donna Pugh to process him through CCP. Ms. Scott said this was more favorable treatment than the treatment her family received and she believes there was discrimination during this entire period of time, but she does not have any evidence.

3. Panel Questions

The Panel asked Ms. Scott if she was able to provide evidence of the discriminatory acts and Ms. Scott replied, “not from other people, no.”

D. DSP Motion to Dismiss

1. The Motion

When Mr. McMackin motioned to dismiss the Complaint against CRSD, Mr. Handlon joined the motion and requested dismissal of the Complaint against DSP. When issuing its ruling in relation to CRSD’s motion, the Panel said DSP’s motion was premature and permitted DSP to renew its motion after Mr. Handlon cross-examined Ms. Scott.

Upon completing cross-examination, Mr. Handlon motioned to dismiss the Complaint against DSP and adopted the arguments previously made by CRSD. DSP further argued that the Complaint should be dismissed pursuant to Super. Ct. Civ. R. 41 because Ms. Scott provided no evidence that Det. Minear was discriminating when he chose to divert F.D. to CCP. DSP said Ms. Scott’s vague

reference to a different fight for which she assumed Det. Miner diverted a White student to CCP is insufficient. Instead, there is evidence that DSP “went out of its way” to assist Ms. Scott (i.e., the DSP Lieutenant Colonel contacted Ms. Scott personally; two troopers met with Ms. Scott although she did not have a scheduled appointment; the two troopers had an extensive conversation with Ms. Scott).

DSP also argued that the Complaint should be dismissed because the Panel lacked jurisdiction, which was a renewed argument previously addressed by the Delaware Human and Civil Rights Commission (“Commission”) after consideration of DSP’s pre-hearing *Motion to Dismiss the Delaware State Police*, filed in reliance upon Regulation 5.1.5.1⁷⁹ which permits pre-hearing dismissal of a complaint for lack of jurisdiction. On October 18, 2022, the Commission issued an order denying DSP’s pre-hearing motion to dismiss and on November 21, 2022, the Commission denied DSP’s motion to reconsider the October 18th order.

2. Response to the Motion

Ms. Scott’s re-direct testimony (see above) was treated as her opposition to DSP’s motion to dismiss.

3. Panel Ruling

In reliance upon Super. Ct. Civ. R. 41(e), the Panel granted DSP’s motion to dismiss. The Panel determined that Ms. Scott “has not been able to offer a *prima*

⁷⁹ See 1 *Del. Admin. C.* § 601-5.1.5.1.

facie case.” Here, the Panel further explains that after cross examination by Mr. Handlon, Ms. Scott still had not identified any direct or circumstantial evidence that would establish a *prima facie* case of discrimination. Based upon her testimony and witness proffers, it was clear that Ms. Scott could not satisfy the third prong for establishing a *prima facie* case—non-members of C.C.’s protected class were treated more favorably.

The Panel did not reconsider or readdress DSP’s motion to dismiss on the basis that the Commission lacked jurisdiction.

CONCLUSION

In reliance upon Super. Ct. Civ. Rule 41(e),⁸⁰ during the hearing the Panel *sua sponte* dismissed Ms. Scott’s Complaint against CRSD and DSP for reasons

⁸⁰ According to Superior Court Civil Rule 41(e), “The Court may order an action dismissed, *sua sponte*, upon notice of the Court for failure of a party diligently to prosecute the action, for failure to comply with any rule, statute, or order of the Court, or **for any other reason deemed by the Court to be appropriate**. In the event that the Court shall conclude, *sua sponte*, that dismissal upon any of the foregoing grounds appears appropriate, the procedure for such dismissal shall be as follows: The Prothonotary shall forward to the party a notice directing that the party show cause why the action should not be dismissed for the reasons stated in the notice. The notice shall direct the party to respond within fifteen (15) days from the date of the notice. After consideration of such response, the Court shall enter an order dismissing the action or maintaining jurisdiction of the case. If a response is not filed within the time allowed, the dismissal shall be deemed to be unopposed. If the Court is satisfied that the action should be dismissed, it shall enter an order of dismissal. Upon entry of any order of dismissal, the Court shall specify the terms thereof including provision for payment of costs.” (emphasis added).

the Panel deemed to be appropriate. Consistent with Rule 41(e), Ms. Scott was provided notice of the possibility of a dismissal when both CRSD and DSP motioned to dismiss the Complaint. Also consistent with Rule 41(e), Ms. Scott had an opportunity to respond to the motions. Regarding CRSD's motion to dismiss, the Panel inquired why Ms. Scott alleged that CRSD's actions were discriminatory and Ms. Scott explained the bases for her allegations. Likewise, following DSP's motion to dismiss, Ms. Scott presented re-direct testimony to address the motion and to further support her allegation that DSP engaged in discriminatory conduct. Throughout her testimony, Ms. Scott repeatedly said she did not have independent evidence that non-members of C.C.'s protected class were treated differently or more favorably than C.C., and she said her allegations were based upon her beliefs and assumptions.

Dismissal prior to completion of the complainant's case in chief may be uncommon, but when the party with the burden of proof repeatedly states she cannot satisfy the burden, dismissal pursuant to 41(e) is warranted as it is within the purview of "any other reason deemed by the Court to be appropriate." Moreover, dismissal during trial on the merits is permissible pursuant to Super. Ct. Civ. R. 12(b)(h)(2) where the party bearing the burden of proof fails to state a claim upon which relief can be granted and admits she cannot satisfy the burden of proof.

After careful consideration of the evidence presented, the Panel, by

unanimous vote, concludes that Ms. Scott cannot establish a *prima facie* case and therefore she cannot prevail in this matter.

ORDER

IT IS SO ORDERED this 25th day of July, 2023 that the Complaint filed by India Scott against Postlethwait Middle School, Caesar Rodney School District, Cliffvon Howell, Dr. Kristina Failing, Dr. Tamara Toles-Torain, and Delaware State Police Troop 3 is **DISMISSED**.


Gail Launay-Tarlecki (Jul 19, 2023 17:20 EDT)

Gail Launay-Tarlecki
Commissioner and Panel Chair


Dwayne Bensing (Jul 20, 2023 17:07 EDT)

Dwayne Bensing
Commissioner and Panel Member


Doris Cooper (Jul 25, 2023 10:39 EDT)

Doris Cooper
Commissioner and Panel Member