State of Connecticut
Commission on Human Rights and Opportunities
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October 20, 2016

CHRO ex rel. Andrew Miranda v. New Haven Board of Education CHRO No. 1230148.

FINAL DECISION

Dear Complainant/Respondent/Commission:

Transmitted herewith is a copy of the Presiding Referee's Final Decision in the above captioned complaint.

The decision is being sent by via by via email to the commission and certified mail to the complainant, and respondent.

Very Truly yours,

Kimberly D. Morris
Secretary II

cc. Andrew Miranda
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Michele C. Mount, Presiding Human Rights Referee

STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF PUBLIC HEARINGS

Commission on Human Rights and Opportunities ex rel. Andrew Miranda, Complainant

CHRO No. 1230148

v.

New Haven Board of Education, Respondent

October 20, 2016

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FINAL DECISION

I.
PRELIMINARY STATEMENT

Andrew Miranda ("Mr. Miranda" or "Complainant") filed a complaint with the Commission on Human Rights and Opportunities (hereinafter "Commission" or "CHRO") on behalf of his son Andrew James Miranda (hereinafter "A.J."). Complainant alleged that A.J. was a disabled child born on May 26, 2005, and was discriminated against by the New Haven Board of Education ("Respondent" or "NHBOE") when he was unilaterally withdrawn on November 1, 2011 from John Daniels Magnet School in New Haven without his parents' consent. On October 4, 2013 compliant filed an amended complaint alleging violation of Conn. Gen. Stat. §46a-64; and the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., Section 504 of the Rehabilitation Act of 1973, 42 U.S.C. 1983, and the Equal Protection Clause of the 14th Amendment of the US Constitution, all as enforced by Conn. Gen. Stat. §46a-58(a).

A.J. attended kindergarten at John Daniels Magnet School in New Haven during the 2010-2011 academic year and was diagnosed with three intellectual disabilities; Asperger's Disease, Attention Deficit Hyperactive Disorder (ADHD) and Childhood Disintegrative Disorder. Complainants sought various accommodations for A.J., including transportation on a smaller school bus. On March 29, 2011,

A.J. was injured in school as a result of being pulled down to the ground on or about March 29, 2011 by another classmate. A doctor's note indicated that A.J. should not return to school earlier than March 31, 2011 or until symptoms subsided. A.J.'s parents notified the school that his doctors recommended that A.J. not return to school before March 31, 2011 or until his symptoms subsided. A.J. was not ultimately cleared by a doctor to return to school until after the school year. In the interim, on April 8, 2011, the Respondent sent a "habitual truancy" notice indicating that A.J. was a habitual truant because he had reached his twentieth unexcused absence (including all the days he was out of school because of the concussion) and that notice would be sent to court. A planning and placement team meeting (PPT) meeting was held May 5, 2011 to discuss A.J.'s situation, primarily to discuss whether A.J. should return to the status of special education rather than just falling under Section 504 of the Rehabilitation Act of 1973, 42 U.S.C. 1983 (§504). Mr. Miranda's explained that A.J. would not return to school until he was cleared by his doctors. Nevertheless, immediately after the PPT meeting, the NHBOE unilaterally withdrew A.J. from John Daniels on May 5, 2011, without the parents' knowledge.

The complaint was processed pursuant to §46a-83 through the Commission's Early Legal Intervention program and sent directly to public hearing. The Public Hearing was held on two dates: March 15 and March 17, 2016, before the undersigned.

II.
FACTS

1. Complainant currently lives at 161 West Spring Street, Apartment D-5, West Haven, Connecticut. (Tr. 5.)

2. In 2010, Complainant lived at, 711 Savin Avenue, West Haven, Connecticut. (Tr. 7-8.)

3. At the time of the incident giving rise to this action, in 2011, Complainant lived at168 Davenport Avenue in New Haven. (Tr. 6, 39)

4. Complainant filed this complaint on behalf of his son Andy James Miranda (A.J.) (Tr. 6)

5. A.J. was born on May 26, 2005. The present case was filed in November of 2011, when A.J. was six years old. (Tr.7)

6. A.J. was diagnosed as having Asperger's syndrome, a form of autism, on December 2009 by Dr. Sandra Boltax-Stern when he was four years old. (CHRO Ex-2)

7. A.J. was also listed has having Childhood Disintegrative Disorder on his health care assessment form on June 3, 2010 by his Health Care Provider at Chapel Pediatrics . (CHRO Ex-1)

8. Dr. Boltax-Stern, at Bridges Community Support System, sent letters to the NHBOE in October and November of 2010 informing them that A.J. has Childhood Disintegrative Disorder requesting that A.J. be accommodated with a smaller school bus, snack during the day, and other support services. (CHRO Ex-2,3, and 4)

9. Dr. Sude from Chapel Pediatrics also sent a letter requesting special services for A.J., corroborating Dr. Boltax- Stern's letter. (CHRO Ex-6)

10. In March of 2011, Cynthia Wilson of the Yale Child Study Center, also sent a letter, in which she stated A.J. was diagnosed as having a combined type of ADHD and "Anxiety D/O Nos." (CHRO Ex-7)

A. John Daniels Magnet School pre-concussion.

11. In February 2010, complainant submitted an application for A.J. to attend kindergarten at John Daniels Magnet School in New Haven. (Tr. 7)

12. The NHBOE operates the John Daniels Magnet School, an intra-district public school in New Haven, CT. (Tr. 160, CHRO Ex-22, CHRO Ex-23).

13. A.J. began at John Daniels school as a special education student with Independent Education Plan (IEP) and was entitled to special accommodation services. (Tr. 136-137)

14. Typhanie Jackson was at all relevant times the Director of Student Services for the NHBOE and oversaw all special education. Leonia Ambrosini was her direct report. (Tr. 141, 245, 258-259).

15. When a student from West Haven receives special education services while enrolled in a magnet school in New Haven, the PPT team consists of staff from both districts. The staff from both cities work collaboratively. West Haven is ultimately responsible for the student, which is the reason the PPT documents are on West Haven letterhead. (Tr. 143-144, 162-163).

16. The New Haven Board of Education receives approximately $36 million in state and federal funding to operate its public schools. (Tr. 161).

17. The John Daniels Magnet School is open to all state residents. (Tr. 160).

18. A lottery system is used because there are not enough seats for all the students who want to attend John Daniels. The application process is not merit based. (Tr. 160-161).

19. Complainant and his wife wanted A.J. to attend John Daniels, a New Haven magnet school, instead of a regular West Have Public School because the magnet school was Kindergarten through 8th grade, it had a dual language policy, a uniform policy, and the magnet program offered many opportunities for specialized high school. (Tr. 8)

20. In order to register for John Daniels as a West Haven resident, the Mirandas had to complete a dual registration with West Haven and New Haven. A.J. was enrolled in Mackrill in West Haven in order to allow him to attend John Daniels magnet school in New Haven. (Tr. 62, CHRO Ex-23)

21. A.J. was accepted to John Daniels on Congress Avenue in New Haven. He began attending John Daniels in September of 2010. (Tr. 8)

22. In the fall of 2010, A.J. was being seen by Dr. Sandra Boltax-Stern, a Yale psychiatrist with a practice with Bridges in Milford, CT. A.J. was also being seen by Megan O'Brien, a licensed clinical social worker with Bridges. (Tr. 16, CHRO-3, CHRO Ex-4, CHRO-5)

23. On October 19, 2010 Dr. Stern and Ms. O'Brien wrote a note to Ms. Barra at the NHBOE stating that they had been treating A.J. for 2 years and he has a diagnosis of Childhood Disintegrative Disorder. A.J. has trouble being with large groups of children and being in overstimulating and chaotic environments. (CHRO Ex-3)

24. Mr. Miranda observed physical manifestations of A.J.'s diagnoses, in that A.J. would shake his hands up and down in front of him, make unusual facial expressions, and display distorted speech. (Tr. 15)

25. In the beginning of the school year, the Mirandas informed John Daniels staff of A.J.'s diagnoses and met with the Special Education supervisor at the school, Marilyn Klatzkin. (Tr. 16)

26. A.J. started the 2010-2011 academic years at John Daniels in special education.

27. In November 2010 the school changed A.J.'s designation from special education to a §504 against his parent's wishes. (Ex. CHRO-9, pp. 7-8)

28. The Mirandas sought numerous accommodations for A.J. between September 2010 and March 2011, including requesting transportation on a small bus to and from school and having an additional snack to help his appetite due to his medication. (Tr. 17)

29. In March 2011, Ms. O'Brien and Dr. Boltax-Stern provided a letter to respondent detailing A.J.'s diagnoses and prescribed medications, Concerta and Ritalin. The letter described A.J.'s symptoms as follows: "inconsistent regression in normal development, poor social skills, sensory issues, difficulty managing feelings, auditory and visual hallucinations, challenges with concentration and focus, poor processing skills and difficulty with transitions." The letter sought several accommodations: frequent feedback about his performance, several breaks due to his sensory issues and tendency to become overwhelmed, positive reinforcement, accommodations for testing, and a smaller school bus. (Tr. 21-23, CHRO Ex-8).

B. Post Concussion

30. On March 29, 2011, A.J. was injured at school when another child pulled on his hooded sweatshirt and he fell. (Tr.25, Tr. 274)

31. On March 11, 2011, Mrs. Miranda was at John Daniels for a scheduled meeting and she learned that A.J. had been injured earlier that morning before school and was now complaining of a severe headache. (Tr. 25)

32. Due to the close proximity Mrs. Miranda carried A.J. from the school to the children's emergency room at Yale New Haven Hospital and Mr. Miranda met them there. (Tr. 25-26).

33. A.J. was in the emergency room for approximately four to five hours before discharge. Mr. Miranda received a diagnosis of concussion and received instructions for care upon discharge. (Tr. 26, CHRO Ex-10)

34. Upon discharge the Mirandas were given a return to school certificate which indicated that the patient could return to school, "when symptom free for 24[hrs] earliest 3/31/11." (CHRO Ex-11)

35. A.J. continued having symptoms such as: disorientation, malaise and headaches in the days following the injury. (Tr 31)

36. Miranda's spoke to Dr. Sude, A.J.'s regular doctor, regarding A.J.'s condition and continuing headaches. Dr. Sude recommended A.J. not return to school on March 31, 2011 and stay home from school until he was symptom free. (CHRO Ex-11)

37. Headaches were A.J.'s primary symptoms at that time. (Tr. 74)

38. On April 15, 2011, Mr. Miranda received a note from Hospital of Saint Raphael's Pediatric, which Mr. Miranda hand delivered to the secretary at the school. (Tr. 36-38)

39. The note provided that, A.J. "May return on the 18th," but did not specify a month. St. Raphael was not A.J.'s normal provider, therefore, the Mirandas attempted to contact Dr. Sude immediately. The Mirandas continued to observe symptoms of the concussion including daily headaches. (Tr. 36-38, CHRO Ex-13).

40. On May 5, 2011, a Planning and Placement Team ("PPT") meeting was convened at the NHBOE Superintendent's office regarding A.J. In attendance were: Mr. Miranda, NHBOE Administrator Kathleen Cassell, Special Education teacher Maralyn Klatzkin, school psychologist Lorna Link, teacher Kasey Masa, nurse/504 coordinator Donna Kosiorowski, Board Attorney Michelle Laubin, Principal Wells, Assistant Director West Haven Pupil Services Virginia Bauer, Director of Student Services Typhanie Jackson, and family advocate Amy Vatner. (CHRO-15).

41. A.J. was not medically cleared to return to school until August 9, 2011 (Ex. 21).

C. Truancy and Events Leading to Withdrawal

42. The Mirandas received phone calls from the Respondent, first from Principal Wells and later from the truancy department, when A.J. did not return to school on March 31, 2011 (Tr. 35).

43. On April 8, 2011, the respondent ran a "student absence inquiry" report that showed A.J. had been absent a total of 26 days during the 2010-2011, which included the days off for A.J.'s concussion injury. The report showed for that school year there was 16 excused and 10 unexcused absences. Eight of the 26 days were immediately following the March 29, 2011 injury and categorized as unexcused. (CHRO Ex-25)

44. Of the 18 absences prior to the injury, only two were unexcused on February 28, 2011, and March 16, 2011. Id

45. On April 8, 2011, the Respondent sent a "habitual truancy" notice indicating that A.J. is a habitual truant because he has reached his twentieth absence and that notice would be sent to court. (Tr. 35-36, CHRO Ex.-12)

46. The PPT that was scheduled for April 12, 2011, was rescheduled to May 5, 2011, so it could be held in the Board of Education office. (Tr. 126-129)

47. The PPT meeting was requested by the Mirandas to discuss whether A.J. was again eligible for special education services based on his current diagnoses and the truancy issues. The Mirandas believed that A.J. should be eligible for special education services. (Tr. 249-250)

48. Amy Vatner was an advocate working with the Mirandas seeking mediation regarding special education. (Tr. 95-96).

49. Pursuant to the 2010-2011 New Haven Public Schools ("NHPS") Student/Parent Handbook, four unexcused absences in a month, or 20 unexcused absences from school in any school year are considered a "habitual truant." (CHRO Ex-4)

50. Further, the Handbook provides that when a student is absent without an excuse for 10 days, the school will notify the parents of hearing to be held at the school. It results in a referral to truancy court if the parents don't respond to the notification. Id.

51. When a student is absent 20 days without an excuse, a letter from the superintendent is sent to the parents and truancy court. Id.

52. On April 13, 2011, Principal Wells forwarded an email from Ms. Vatner to Marlene Baldizon, William Clark, Leida Pacini, and Leona Ambrosini, a special education adviser from New Haven special services. Ms. Vatner's email was sent on behalf of the Mirandas to Principal Wells and Maralyn Klatzkin, the special education supervisor at John Daniels. In the forwarded email Wells stated, "FYI, this is the student who lives in West Haven and went to the mayor, The mayor has never heard about the student. Anyway, who responds to this? He is a magnet student from

West Haven, who has been absent over 30 days this year. **"Quite honestly, I think that we should withdraw him from New Haven Schools**." (emphasis added) (Tr. 174-176, CHRO- Ex. 29)

53. On September 16, 2010, Principal Wells sent to Assistant Principal Marlene Baldizon, among other respondent staff, an email with the subject line, "I will not be able to contain myself much longer - you may have to take over Marlene." The content of that email was a response by Mr. Miranda to Principal Wells for informing him of a "buddy" assigned to A.J. Mr. Miranda also stated that if he knew about the buddy earlier it would have been better communication would have prevented misunderstandings. Id.

54. In another email on April 13, 2011, from Principal Wells to the Leona Ambrosini, Principal Wells again copied, pasted and forwarded an email sent by Mr. Miranda in September of 2010, remarking that the email is, "an example of the dialogue between the father and the school since last September." (CHRO Ex-28)

55. On April 15, 2011, Ms. Amborsini sent a six page fax to Respondent's counsel Michelle Laubin. The fax sent by Ms, Ambrosini was made up of the following pages: (1) fax cover sheet, (2) CT BOE Request for Mediation form, (3) Yale New Haven ED PED Discharge Note, (4) Discharge Note continued, (5) Yale New Haven Return to School Note dated 3/29/11, and (6) Email from a Certified Legal Intern with the Quinnipiac University School of Law Legal Clinic to A.J.'s PPT members dated April 8, 2011. (Tr. 176-181, CHRO Ex-26, CHRO Ex-10, CHRO Ex-11, CHRO Ex-27)

56. Mr. Miranda retained Attorney Patricia Kaplan of New Haven Legal Aid to assist them in the truancy matter in court. (Tr. 38, 49)

57. In May 2011, the Mirandas moved from West Haven to 168 Davenport Avenue, New Haven, to an apartment renovated by a social services agency that provided temporary housing arrangements. The backyard fence line of 168 Davenport Avenue abutted the John Daniels' playground. (Tr. 39-40)

58. On May 5, 2011 a PPT was held. The purpose of that PPT was that A.J. was previously dismissed from special education services was was given a § 504 plan. At the PPT the team was going to look at reevaluations for special education services. (Tr. 249)

59. Mr. Miranda was unhappy and concerned that A.J. was no longer classified as special education, which required an IEP. (Tr. 229-230)

60. Mr. Miranda was questioned regarding A.J.'s continued absence from school. Attorney Laubin requested updated medical documentation. (Tr. 41-42, CHRO-Ex.15)

61. Mr. Miranda attempted to present a handwritten letter from Dr. Sude regarding A.J.'s current status and diagnosis with post concussive syndrome at the May 5,2011 PPT. However, the PPT team did not accept the letter because it was not completely legible, undated, and not on letterhead. (Tr. 44).

62. On May 16, 2011, Dr. Sude typed out her handwritten note, which the PPT team refused. It was faxed from Mr. Miranda to Attorney Kaplan. Attorney Kaplan forwarded the note to John Daniel's on or about June 2, 2011. (CHRO Ex. 18).

63. Mr. Miranda stated during the May 5, 2011 PPT that A.J. would not be coming back to school until his doctors cleared him to return. (Tr. 44, 50).

64. Mr. Miranda left the May 5, 2011 PPT meeting with the understanding that A.J. was still enrolled at John Daniels and that he needed to obtain a replacement letter from Dr. Sude for the Respondent. Mr. Miranda expected that A.J. would return to John Daniels as soon as his doctors medically cleared him. (Tr. 45, 50).

65. Mr. Miranda also expressed an interest in homebound services. Id.

66. Mr. Miranda was never asked to sign a withdrawal form, nor did he ever sign a withdrawal form. (Tr. 51-53, 56; Tr. 253, 264).

67. However, Typhanie Jackson obtained the withdrawal form from the front office immediately following the PPT, completed it, and signed it herself. She did not seek Mr. Miranda's signature. (Tr. 263-264)

68. On April 13, 2011, Principal Gina Wells sent an email to, New Haven Board of Education's (NHBOE) Chief of Staff Leida Pacini, NHBOE's Chief Operating Officer Attorney William Clark, Typhanie Jackson's subordinate, Leona Ambrosini, and Vice Principal Marlene Baldizon, suggesting that NHBOE should "withdraw" A.J. from New Haven's public schools. (CHRO Ex-30, CHROEx-15)

69. This suggestion of withdrawal came three weeks prior to the unilateral withdraw on May 5, 2011 by Typhanie Jackson. Wells' suggestion of withdrawal came after receiving notice from Attorney Amy Vatner with the African Caribbean American Parents of Children with Disabilities requesting a mediation meeting with the State Department of Education regarding A.J.'s disabilities. (CHRO Ex-

70. The respondent never received anything in writing from Mr. or Mrs. Miranda regarding withdrawing A.J. from NHPS. (Tr. 269).

71. Mr. Miranda learned that A.J. was withdrawn from NHPS in June 2011 when he went to the NHBOE office at 54 Meadow Street, New Haven. He stopped in the office on the first floor and spoke to a woman, who told him that A.J. was formally withdrawn on May 5, 2011. He also saw the withdrawal form for the first time on that date. (Tr. 51-53)

72. Mr. Miranda spoke with Typhanie Jackson after learning that A.J. had been withdrawn. He questioned the legality of withdrawing A.J. without the parents' consent or some formal process. (Tr. 54-56).

73. After questioning the respondents, Mr. Miranda did not think it was not possible to get the respondents to change their minds regarding the withdrawal. (Tr. 54-56)

74. Students are not withdrawn by the NHBOE for medical reasons. A student who is absent due to medical reasons is never withdrawn and returns to the same school when medically able. Homebound services are available for students out of school for medical reasons. A student is never withdrawn because he is on homebound services. (Tr. 263, 268-269).

75. When a West Haven student attends a New Haven magnet school and is in need of homebound services, New Haven typically coordinates the services. (Tr. 267-268).

76. A.J.'s alleged truancy from kindergarten is still on his record, despite medical documentation provided to the respondent to excuse his absences. (Tr. 76-77)

77. Mackrill was not a K-8 school and did not have a dual language policy. (Tr. 62)

D. Enrollment at Mackrill

78. The Mirandas' were uncertain of where they would ultimately live due to being in a temporary shelter. The Miranda's requested a residency hearing to determine where they lived and what schools A.J. would be able to attend since John Daniels refused to take him back. Two hearings were held, and in the first hearing, the hearing officer requested that Principle Wells clarify the situation surrounding the withdrawal. At the second hearing it was confirmed that the school unilaterally withdrew A.J.. (Tr. 56-67, CHRO Ex.20)

79. A.J. was dually enrolled as a West Haven student and a New Haven student. A.J. was enrolled in Mackrill in West Haven in order to allow him to attend John Daniels magnet school in New Haven. (Tr. 62, CHRO Ex-23)

80. It was ultimately determined that A.J. was a West Haven resident and would attend Mackrill in West Haven, which was Kindergarten through 4th grade because John Daniels refused to reinstate his enrollment. (Tr. 62)

81. Mr. Miranda sent a doctor's note dated August 9, 2011 to Attorney Laubin and to the West Haven Board of Education clearing A.J. to return to school (Tr. 75-76, CHRO Ex.-21)

82. Initially, the Mirandas did not know whether A.J. would start at the Kindergarten or first grade level at Mackrill as they were going to do an evaluation of A.J. on the first day of school. (Tr. 63-65).

83. A.J. and his parents were unable to meet his teacher before the first day of school and participate in the normal course of back-to-school preparations: A.J. was upset about not knowing what grade he would be in. Id

84. Ultimately, A.J. began Mackrill in the first grade. (Tr. 64)

85. A.J. liked his friends and the many activities in participated in at John Daniels. (Tr. 58).

86. A.J. could see friends from his window on the school playground, which he enjoyed, and was missing his friends as well as looking forward to going back to John Daniels. (Tr. 60)

IV.
LAW AND ANALYSIS

"In the decision of whether a discriminatory public accommodation practice has occurred, the determinative issue is whether an establishment that serves the general public has denied access to its goods and services to a member of a protected class." *Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm'n on Human Rights & Opportunities,* 204 Conn. 287, 298, 528 A.2d 352, 358 (1987). We look to General Statutes §46a-63 and §46a-64 to describe the elements of the complainant's claim; the complainant must prove by a preponderance of the evidence that: (1) the respondent is a public accommodation, resort or amusement; (2) the respondent ... denied [him] full and equal accommodations; and (3) the respondent's basis for said denial was [his] protected status. *Corcoran v. German Social Society Frohsinn, Inc.*, judicial district of New London at New London, Docket No. CV02-0562775s (June 1, 2005) (2005 WL 1524881, 3); rev'd on other grounds, 99 Conn. App. 839 (2007); on remand (February 21, 2008.

A.J. was designated either as a § 504 or a special education student with an individual education program[1] at John Daniels and was required to have meetings with the planning and placement team (PPT) a few times a year. Section 504 of the Rehabilitation Act of 1973 ("Section 504") and the

[1]. The record indicates that there were requests for accommodations for A.J. in the beginning of October that also contained a diagnoses of certain intellectual disabilities.

Americans with Disabilities Act ("ADA") require that "an otherwise qualified handicapped individual ... be provided with meaningful access to the benefit that the grantee offers." *Alexander v. Choate*, 469 U.S. 287, 301, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985).

To state a claim under either statute, courts consider the following framework: The elements for prima facie claims under § 504 and the ADA are nearly identical; the statutes require plaintiffs to show: (1) that they are "qualified individuals" with a disability; (2) that the defendants are subject to the ADA or § 504; and (3) that plaintiffs were denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or were otherwise discriminated against by defendants "by reason of such disabilities (for ADA claims) or "solely by reason of" the disabilities (for § 504 claims). A. ex rel. A., 976 F. Supp. 2d at 190. A. v. Hartford Bd. of Educ., No. 3:11-CV-01381-GWC, 2016 WL 3950079, at 28.

A. Public Accommodation

In Connecticut a place of public accommodation is defined in General Statutes §46a-63(1) as "any establishment which caters or offers its services or facilities or goods to the general public, including, but not limited to, any commercial property or building lot, on which it is intended that a commercial building will be constructed or offered for sale or rent." In *Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights & Opportunities*, 204 Conn. 287, 300 (1987), our Supreme Court observed that coverage under our public accommodations statute "depends, in each case, upon the extent to which a particular establishment has maintained a private relationship with its own constituency or a general relationship with the public at large. Further, General Statute § 46a-64 (a) provides that 'it shall be a discriminatory practice in violation of this section: (1) To deny any person within the jurisdiction of this state full and equal accommodations in any place of public

accommodation, resort or amusement because of race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability or physical disability, including, but not limited to, blindness or deafness of the applicant, subject only to the conditions and limitations established by law and applicable alike to all persons."

Our Supreme Court has stated that "[t]he legislative history of the [fair employment practices] act indicates that the statute was intended to provide strong protections for those with disabilities; *Curry v. Allan S. Goodman, Inc.*, 286 Conn. 390, 410–11, 944 A.2d 925 (2008); and that a thorough review of the legislative history reveals a consistent intent to increase protections for individuals with disabilities. Id., at 412. Because the intent of the legislature [was] to stamp out discrimination on the basis of physical disability and a wide range of other disabilities (mental disability, learning disability and [intellectual disability]), we must not interpret the statute in a way that would thwart this purpose." Id. (internal quotation marks omitted); *Thomson v. State Dep't of Soc. Servs.,* No. HHDCV146050384, 2016 WL 551368, at 3 (Conn. Super. Ct. Jan. 19, 2016).

"[I]n construing state antidiscrimination statutes that have similar federal counterparts,[Connecticut Courts] have looked to federal case law for guidance, even though the federal and state statutes may differ somewhat. It also has been recognized, however, that under certain circumstances, federal law defines the beginning and not the end of our approach to the subject.... Consequently, on occasion, we have interpreted our statutes even more broadly than their counterparts, to provide even greater protections to our citizens, especially in the area of civil rights. Our Supreme Court has observed that since their inception, our public accommodation statutes have repeatedly been amended to expand the categories of enterprises that are covered and the conduct that is deemed discriminatory. (Internal citation omitted; internal quotation marks omitted.) *Corcoran v.*

German Soc. Soc'y Frohsinn, Inc., 99 Conn. App. 839, 843–44, (2007); *Quinnipiac Council v. CHRO*, 204 Conn. 287, 296 (1987)

The purpose of any public school is to offer educational services to the general public. The magnet school is open to all Connecticut residents by lottery. A lottery system is used because there are not enough seats for all the students that want to attend John Daniels. Additionally, John Daniels Magnet School receives state and federal funding. A public school that is open for every student in its area meets the definition of providing "goods and services" within Connecticut Statute 46a-63a.

Moreover, A public school is expressly listed as place of public accommodation in 42 U.S.C. §1281(a)(J).2 The United States Supreme Court acknowledged that schools offer educational services. *Runyon v. Mccrary*, 427 U.S. 160, 172 (1976) (action to redress African- American student's denial of admission to private school under 42 U.S.C. §1981). Additionally, John Daniels Magnet School receives state and federal funding. John Daniels Magnet School, is a place of public accommodation under 42 U.S.C. §1281 by virtue of being an intra-district public school in New Haven, Connecticut, which receives approximately $36 million in state and federal funding to operate its public schools.

B. Disability

Title III of the ADA[3] proscribes discrimination against the disabled in public accommodations. Title III provides in relevant part: "No individual shall be discriminated against on the basis of disability in

[2] 42 U.S.C. §1281(a)(J) lists "a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education," as a place of public accommodation.

[3] Americans with Disabilities Act
42 U.S.C. § 12131: As used in this subchapter:
(1) Public entity. The term "public entity" means-- (A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government. ... (2) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or

the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a).

1. Mental disability

Pursuant to General Statute § 46a-51 (20) "Mental disability," refers to an individual who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders."

The Mirandas informed John Daniels staff of A.J.'s diagnoses and met with the Special Education supervisor at the school, Marilyn Klatzkin. Dr. Sandra Boltax-Stern diagnosed A.J. as having Asperger's syndrome, a form of autism, on December 2009 when he was four years old. Further, pursuant to General Statutes §10-206 (a) each local or regional board of education shall require each pupil enrolled in the public schools to have health assessments pursuant to the provisions of this section. Students are required to provide the school with a completed health care assessment form. A.J., on his health care assessment form of June 3, 2010, was listed has having Childhood Disintegrative Disorder by his Health Care Provider at Chapel Pediatrics. Additionally, Dr, Boltax-Stern sent letters to the Board of Education

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without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132: Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12182: (a) General rule. No individual shall be discriminated against on the basis of disability .in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

in October and November of 2010, stating that A.J. has Childhood Disintegrative Disorder and could they accommodate him with a smaller school bus, snacks during the day because his medication decreases his appetite and other support services. Moreover, Dr. Sude from Chapel Pediatrics also sent a letter corroborating the need for special services for A.J. as well. In March of 2011 Cynthia Wilson of the Yale Child Study Center, also sent a letter, in which she stated A.J. was diagnosed as having a combined type of ADHD and "Anxiety D/O Nos." A.J. had qualifying intellectual disabilities as defined in both the applicable state and federal statutes.

2. Physical Disabilities

General Statute § 46a-51 (15) states that "'[p]hysically disabled' refers to any individual who has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device." Similarly, General Statutes § 1-1f defines an individual who is physically disabled as one "who has any chronic physical handicap or impairment, whether congenital or resulting from bodily injury, organic processes or changes from illness ... Connecticut courts have interpreted Connecticut's definition of "disability" to be "broader than the ADA ... because it covers 'chronic' impairments even if not permanent." *Hutchinson*, 2011 U.S. Dist. LEXIS 110641, 2011 WL 4542957, at 9. In addition, § 46a-51(15) does not require that the chronic impairment "substantially limit" a major life activity. *Buotote v. Illinois Tool Works, Inc.*, 815 F. Supp. 2d 549, 556 (D. Conn. 2011); *Grunberg v. Quest Diagnostics*, Inc., No.3:05-cv-1201, 2008 U.S. Dist. LEXIS 8205, 2008 WL 323940, at 4 n. 2 (D.Conn. Feb. 5, 2008). *Rugh v. Astrue*, 2008 WL 2156715, *2, n. 2 (E.D.Pa.2008) defines post-concussion syndrome as follows:

"Post-concussive syndrome, or post-concussion syndrome, commonly follows a significant concussion with symptoms including headache, dizziness, fatigue, difficulty concentrating, variable amnesia, depression, apathy and anxiety. Symptoms usually resolve spontaneously over weeks to months. *The Merk Manual of Diagnosis and Therapy,* 18th ed. (2006), at 2575. *Pham v. Wal-Mart Stores, Inc.,* No. 2:11-CV-01148-KJD-GW, 2012 WL 1957987, at *3 (D. Nev. May 29, 2012) this tribunal also takes judicial notice or the recent discoveries surrounding long lasting effects of concussions.[4]

Whether post concussion syndrome is a "physical disability" under the State's discrimination laws appears to be a case of first impression. Post concussion syndrome can last anywhere for a couple of weeks to many months. Therefore, to determine if there is a physical disability, it well depend on the facts of each individual's injury. In this instance, A.J. was having symptoms that impaired his ability to perform tasks either or both cognitively or physically. This included his ability to go to school, read, play and interact with visual electronic devices, such as computers and televisions. These restrictions coupled with chronic headaches that last several months meet the criteria of a physical disability within the aforementioned General Statutes.

Even if it can be argued that post concussion syndrome is not a physical disability, it can be a perceived disability. Our Supreme court has opined, "After considering the intended scope of the term physically disabled in the context of the legislative history of the act and the decisions of the commission, we conclude that § 46a–60 (a)(1) protects individuals who are regarded as physically disabled from employment discrimination. To interpret the statute otherwise would be inconsistent with the legislature's efforts to define physically disabled to "cover as many people as possible under the

[4] See, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Division of Unintentional Injury Prevention, updated January 22, 2016 (http://www.cdc.gov/traumaticbraininjury/recovery.html)

definition and leave it open and broad"; 17 H.R. Proc., supra, p. 5130, remarks of Representative Thornton; and with the legislature's "consistent intent to increase protections for individuals with disabilities." *Desrosiers v. Diageo N. Am., Inc.,* 314 Conn. 773, 794, 105 A.3d 103, 114 (2014) citing *Curry v. Allan S. Goodman, Inc.*, 286 Conn. 390 (2008). The reasoning of Desrosiers would also apply to cases of discrimination in places of public accommodation under General Statute § 46a-64 (a), as it is part of the anti-discrimination statutory scheme. Nevertheless, A.J. is considered to have a intellectual disability and whether he is also physically disabled or not would not change the analysis of the facts hereinabove.

C. Discrimination on the Bases of Disability.

A.J. was denied access to the public school where he was officially enrolled through the lottery system. He was unilaterally withdrawn, without a legitimate reason. The respondent's testimony that Mr. Miranda requested the withdrawal was not corroborated, nor did it comport with facts and circumstances leading up to the withdrawal. There was evidence to show that principal Wells wanted to withdraw A.J. on April 13, 2011, almost a full month prior to the PPT on May 5, 2011. There were several emails from September 2010 to April 2011 illustrating the frustration of the school in dealing with the Mirandas. Despite doctors' notes and requests for accommodation, the school removed A.J. from the classification of special education with an IEP, to a § 504 against the parents' wishes. Moreover, the NHBOE was aggravated that the parents wanted a mediation to determine A.J.'s classification status. This is an illustration of the "sins of the fathers'" being exacted on a son.

The testimony at hearing tells the story of a rocky relationship between the Principle and A.J.'s parents. In September 2010, Principal Wells expressed at minimum exasperation with Mr. Miranda's communications regarding his son's enrollment and accommodations. This is apparent in the email that

was forwarded on September 16, 2010 to Assistant Principal Marlene Baldizon, among other respondent staff, which contained in the subject line, "I will not be able to contain myself much longer - you may have to take over Marlene." Wells, forwarded that email again, on April 13, 2011, to Leona Ambrosis as an example of the dialogue between the school and Mr. Miranda since September of 2010.

Testimony by William Clark indicates that a child is not withdrawn from a school for health issues or for truancy. There is strong evidence that the withdrawal was premeditated and unilateral. Respondent's only excuse presented by Typhanie Jackson, the person who withdrew A.J.is that Mr. Miranda requested the withdrawal. That reason lacks credibility. Based on the evidence A.J. was withdrawn due to his parents' advocacy for their disabled child. The fallout was that A.J. was no longer able to attend his school of choice, with his friends and caused a disruption to a consistency in the learning environment which was described as beneficial by his physician.

V.
DAMAGES

General Statute § 46a-86 (c) provides, "In addition to any other action taken under this section, upon a finding of a discriminatory practice prohibited by section 46a-58, 46a-59, 46a-64, 46a-64c, 46a-81b, 46a-81d or 46a-81e, the presiding officer shall determine the damage suffered by the complainant, which damage shall include, but not be limited to, the expense incurred by the complainant for obtaining alternate housing or space, storage of goods and effects, moving costs and other costs actually incurred by the complainant as a result of such discriminatory practice and shall allow reasonable attorney's fees and costs." The relevant portion of General Statute §46a-58(a) directs that "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage,

color, race, sex, gender identity or expression, sexual orientation, blindness, mental disability or physical disability."

In *Commission on Human Rights and Opportunities v. Board of Education of the Town of Cheshire. et al.*, the Connecticut Supreme Court opined that "From the beginning, the language and purpose of § 46a-58(a) have been consistently broad and inclusive. The statute has long been this state's fundamental civil rights statute, with a purpose to cast a broad net of protection for all persons from discrimination. Second, whenever the statute has been amended substantively the effects of the amendments have been to give the commission the power to enforce the statute and to broaden its coverage so as to reach additional forms of discrimination." *Cheshire*, 270 Conn. 665. 711-712 (200).

In interpreting our antidiscrimination and anti-retaliation statutes, we look to federal law for guidance in applying, drafting and modifying the Connecticut Fair Employment Practices Act "... our legislature modeled that act on its federal counterpart, Title VII [of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq.] ... and has sought to keep our state law consistent with federal law in this area." (Internal quotation marks omitted.) *Eagen v. Commission on Human Rights & Opportunities*, 135 Conn.App. 563, 579, 42 A.3d 478 (2012). Federal courts distinguish those claims and defenses in which the plaintiff has placed her mental health at issue, and thereby has expressly or impliedly waived the privilege, from those claims for "garden variety" emotional distress damages that do not constitute an express or implied waiver of the privilege. *Jaffee v. Redmond*, 518 U.S. 1 (1996); In re Sims, 534 F.3d 117 (2d Cir. 2008); *In re Consolidated RNC Cases, United States District Court,* (S.D.N.Y. January 8, 2009) (2009 WL 130178); *Green v. St. Vincent's Medical Center*, 252 F.R.D. 125 (D. Conn. September 15, 2008); *Brown v. Kelly,* United States District Court, Docket No. 05 Civ 5442 (SAS) (S.D.N.Y. April 16, 2007) (2007 WL 113877); *Gattegno v. Price Waterhouse Coopers, LLP.*, 204 F.R.D. 228 (D. Conn. October 30, 2001);

Ruhlmann v. Ulster County Dept. of Social Services, 194 F.R.D. 445 (N.D.N.Y. July 6, 2000). A "garden variety" emotional distress claim is the type of emotional injury that would ordinary result from the alleged conduct. Such emotional distress is incidental to the alleged misconduct and has no long term or lasting effect. *In re Sims*, supra, 534 F.3d 129; *Murray v. Taylor*, 65 Conn. App. 300, cert, denied, 258 Conn. 928 (2001). "[I]n garden variety emotional distress claims, the evidence of mental suffering is generally limited to the testimony of the plaintiff" *Patino v. Birken Mfg. Co.*, 304 Conn. 679, 707, 41 A.3d 1013, 1032 (2012) citing *Olsen v. Nassau*, 615 F.Supp.2d 35, 46 (E.D.N.Y.2009).

Criteria to be considered when awarding damages for emotional distress include: the complainant's subjective internal emotional reaction to the respondents' actions; the public nature of the respondents' actions; the degree of offensiveness of those actions; and the impact of those actions on the complainant. *Commission on Human Rights & Opportunities ex rel. Aguiar v. Frenzilli,* CHRO No. 9850105, pp. 9-15 (January 14, 2000).

As evidenced by testimony and the doctors' corroborating description, A.J. had a problem with inconsistency, focus, transitions, being overwhelmed and poor social skills. New situations caused A.J to experience, anger, withdrawal, and decreased verbalization. His father testified he missed his school and friends. He wanted to go back to his school and experienced anxiety over going to a new school. Subjectively, it would be logical to conclude that A.J. suffered more than a child without such disabilities. Further, we know, you take your plaintiff as you find them and compensate accordingly.

The very act of removing a child from a public school is quite public. All of his friends, and teachers would know A.J. didn't return to his school. The objective degree of offensiveness of the respondent's action is extremely high. The purpose of a public school is to benefit the child and provide a nurturing and educational environment. In this case the school focused on the parent's behavior, the

natural advocates for their children, which resulted in harm to the child. Children with disabilities require staunch support to meet their challenging needs. No matter what disagreements arose between the parents and the school, the consequences of having the child withdrawn and leaving truancy on his record, after doctors excused the child for his injury, is unprofessional and not to be tolerated. A.J., a child who must face many challenges in his life should not have been forced to change schools, lose his old friends, have fewer educational opportunities and be forced to endure another transition after 4 yrs instead of 8yrs. A.J.'s experience fulfill all the factors for garden variety emotional stress apply. For those reasons stated hereinabove, emotional distress damages are appropriate and deserved.

VI.
ORDER

1. The respondents are ordered to pay emotional distress damages in the amount of $25,000.

2. The notation of "truancy or habitual truancy," in A.J.'s Kindergarten records shall be removed forthwith.

3. The respondent shall cease and desist from all acts of discrimination prohibited by state or federal law, and shall provide a nondiscriminatory environment pursuant to state and federal law.

4. The respondent shall not—and shall ensure that employees do not retaliate against the complainant, relatives or any person who participated in this proceeding.

It is so ordered this 20th day of October 2016.

Michele C. Mount,
Presiding Human Rights Referee

cc.
Andrew Miranda – via email only
Jody Walker-Smith, Esq. – via email only
Christopher Neary, Esq. – via email only