

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

Docket No. 31854

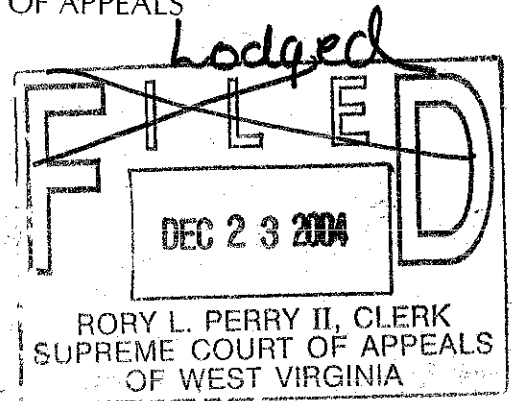
WEST VIRGINIA HUMAN RIGHTS
COMMISSION; and BEVERLY L. WATTIE,
on behalf of KRYSTAL WATTIE, a minor,

Complainant-Respondents,

v.

BARBARA COBB,

Petitioner.



REPLY BRIEF OF PETITIONER

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Introduction

Several points raised by the Commission must be responded to. First, the "rant and rave" findings make it impossible to square many of the legal and factual findings with the record, rendering the Final Order hopelessly conflicted. The amount of "discipline" actually involved in this record (one day of "ALC")¹ also haunts many of the factual and legal conclusions. In many situations, the Commission is actually arguing with its own findings. Finally, the conflicting findings of the Commission that the discipline imposed was both "to some extent appropriate," but also "disproportionate," squarely brings into question how the duty of a teacher to maintain discipline can be harmonized with the

¹Alternative Learning Center means student comes to school but basically attends a day-long study hall and are otherwise isolated from all of the students in the school and from all school activities.

HRA.²

- I. THE FINDING THAT THE STUDENT WAS SO OPENLY, CONTINUALLY AND INTENTIONALLY DISOBEDIENT AND DISRESPECTFUL UNDERMINES MANY OF THE COMMISSION'S KEY FINDINGS.
 - (a). The Commission Refuses to Recognize That There Was an Obvious, and Overdue, Need for Discipline of the Student.

The Commission refuses to accept its own finding that the Student engaged in utterly unacceptable behavior which called for discipline. The Commission repeatedly tries to sweep these facts under the carpet by arguing that the Student was "no worse than any other" student. (B. 19 and B. 17, n. 10). If public education has reached the point where the "ranting and raving" behavior is common, how can learning occur?

As is documented by our analysis of various confrontations between the Student and the Teacher and the reaction to those confrontations, Attachment A following p. 20 below, each confrontation did not result in recommendations of discipline. Five of the nine incidents did. Only one of those, the first, resulted in any discipline – one day of "ALC." Except for the "hallway" incident (as to which the Commission made no finding as to how it started), all of the incidents were without question initiated by the Student either directly or by engaging in obviously prohibited behavior, such as being late to class or blocking the hallways. Further, the Commission ignores the consequence that the Student set the stage for the refusal of the Teacher to provide her with assignments, updating

²The Brief of Petitioner will be referred to as "B. ___"; the Respondent's Brief of November 22, 2004 herein, Brief of Appellee West Virginia Human Rights Commission, will be referred to as "HRC B. ___"; and the Final Order of the Human Rights Commission, the Order appealed from entered January 30, 2004 will be referred to as "FO ___" or "Final Order ___."

material and the like immediately upon a tardy entrance to the classroom and at the expense of the students who were already there and engaged in the learning process. T II, 114-15.

The "rant and rave" findings are inherently inconsistent with the Commission's damage findings (Final Order 10) that the Student "was miserable as a result of the racially hostile environment created by [the Teacher] and suffered humiliation, embarrassment and emotional distress, and loss of personal dignity ...," are based upon two pages of the most standard, sing-song, emotional damage testimony of the mother.³ (T I, 114-117) Further, the Student, at least judging by the grading system and the statement of administrators, enjoyed a high grade average and esteem, hardly the status of one who is embarrassed and humiliated. Any student who is able to stand in front of another class of her peers and accuse the Teacher of acting like a "two-year-old and a student" could not have likely been "humiliated."

Any initial "hostility" on this record was created by the Student's improper behavior which she persistently engaged. Any hostile "environment" was created by the Student, as the rant and rave findings reveal.⁴ It should be noted that the Student continued to make good grades in all of her classes, to participate in many activities. Consistent with the

³The Student did not testify as to damages.

⁴It should be kept in mind that in the "rant and rave findings" the Commission found that the Student "engaged in inexcusably antagonistic behavior ..." "regardless of any racial bias by the [Teacher]" C.16. Contrary to the assertion at HRC B.16 that the Student "was singled out among other African-American students," it is clear that her own antagonistic, confrontational and disrespectful behavior brought her to the attention of the Teacher and other teachers.

foregoing, the Commission never specified which "certain advantages, privileges and services" were not available to or were taken from the Student because of the asserted "virtually hostile environment" were, other than the right to be free of "disproportionate" discipline and the finding that the Student was improperly denied credit for a book report, which the Teacher had no record of having been turned in. (T II, 110-11, 256) Since the Student eventually received an A in the class anyway, the dispute over whether or not she turned in the book report, which resulted in her having a B in the Teacher's class (until the Teacher had to leave because of cancer), falls far short of a racially hostile environment.

Discipline for all of the events in the record, in the end amounted only to one day of "ALC" and several trips to the front office. Except the "library incident" (B 14-15), none of the events resulting in discipline are even argued to be meritless. Attachment A, Column 3 summarizes each event.

HRC B. 3-4 makes it appear that the Teacher was constantly belittling and picking on the black students. This overlooks the finding of the ALJ that the Student was chronically late to class. For example, her continued tardiness caused the lockout incident. The Teacher at times refused to respond to the Student's raised hand because the Student had arrived late and made a habit of demanding to be "brought up to date" on what had happened during her absence. (T II, 114-15) The Teacher believed, and the ALJ came close to finding, that the tardiness was intentional.

None of the above amounts to a "hostile" racial educational environment. Instead, the rant and rave findings readily explain that any conflict in the class in question was caused by the Student's disruptive, rude and disrespectful behavior. For example, on

November 29, 2000, the Teacher made a report when the Student and a friend were caught at their lockers when they should have been in class and then, contrary to the Teacher's directions, refused to go to class immediately. That, like the others, had nothing to do with the color of their skin.⁵

(b). The Blatant Misconduct of the Student Undermines the Hostile Environment Findings by Failing to Recognize That Any "Hostile" Relationship or Involvement Was Created by the Student.

After the many complaints about loudness of the African-American students, it is difficult to understand how an offhand remark by the Teacher that someone had told her that African-Americans were loud by nature is evidence of a discriminatory intent. Nor is it surprising (or racially discriminatory) for the Teacher, after apparently being treated very rudely by the parent of the Student (who disobeyed a direct order to not allow the Student in the classroom), to say that she could better understand the other student's refusal to show the Teacher the respect of obeying a direct order made during class. It may not have been a tactful thing to say, but it is not serious evidence of racial discrimination.

As explained (B 21), the incident involving Ms. Quazi involved the Student and Teacher when the Teacher expressed concern that another African-American student should not be taken out of the HSTA program.⁶ The Teacher's concern was that expelling

⁵Nearby teacher McNeil testified that over the years she has had to tell several students during class to close their lockers. The Student was the only one who ever refused. T II, 31.

⁶It is a program for African-American students to encourage them to become involved in the health care fields and apparently is reserved for promising students.

the other African-American student was an extreme sanction for her recent lie to Ms. Quazi. Since this event followed the bathroom incident, Ms. Cobb simply remarked that if anyone were to be taken out of HSTA for misconduct it should be the student who had recently, as Ms. Cobb saw it, assaulted her. It is noteworthy that Mrs. Cobb was actually speaking up on behalf of another African-American student. Nor does the record reveal any effort on the part of Ms. Cobb to have the Student taken out of the program. She was simply making a comparison. How the Teacher treated Ms. Quazi after that encounter might be the subject of another proceeding, but it has no relevance to this one. T I.

Mrs. Cobb was disciplined for the manner in which she complained about the exclusion of all faculty members from a committee, which was supposed to be made up of faculty members, to select African-American students for inclusion in a college orientation program.⁷ She never made any effort to interfere with the Student's participation in the program. T II, pp. 227-34.

Obviously, consistent with fellow-teacher Burch, Cobb believed that the Student was getting away with misbehavior because she was a good manipulator of a situation. Burch, T III, 140-43, 133. The Teacher felt the injustice of the Student's constantly, as the Teacher saw it, getting away with behavior which was not tolerated from other students.

⁷The circumstance which could not be in the record since it happened after the record was made that the discipline of the Teacher turned out to be nearly a year's suspension with pay, followed by restoration of her position without any further discipline strongly suggest that the school system could not see Mrs. Cobb as a wrongdoer but rather saw her as someone who could not participate effectively in the first couple years of "transition" at Riverside involving consolidation of the predominantly black DuPont High School and predominantly white East Bank.

Penn, T III, 193-4, 201-3, 207. The Teacher believed that she had information relevant to the Student which should be brought up when the Student was being considered for certain honors – such as participation in the pre-college program and HSTA – which were supposed to involve faculty approval. The remarks in these areas were expressions of a legitimate institutional concern: if the faculty is supposed to have a say in various appointments, then they should have that and that opportunity.⁸ T III, pp. 35-39.

From both of the foregoing events, the Commission came to the conclusion that, "Respondent constantly harangues everyone and anyone concerning complainant [the Student] ... and bristles at any honor she receives." The finding goes on to say that the Teacher was trying to get the Student removed from the HSTA program (FO 9, FOF 20 and FO 17) and concluded that the Teacher "constant[ly] attacks [the Student] ... and others whenever [the Student] was honored or recognized for her achievements." There was no "attack." In the HSTA situation, the Teacher was simply attempting to see that another African-American student was treated fairly, and in the faculty meeting she was complaining (inappropriately in the opinion of management) that the teachers had been improperly excluded from a selection process. Those realities simply do not support the broad conclusions reached based on two very limited situations.

- (c). The Finding that Race Had Surfaced as a Problem in the Classroom is not Supported by the Testimony of the School Administrators and Was Initially Denied by the Student and Her Mother and the Issue was Originally Surfaced by the Mother.

⁸The Student's name came up secondary to the question in issue (whether to discipline the other HSTA member and compliance by the administration with the requirement of including faculty members on certain award committees.

Relying on the testimony of Principal Clendenin (T II, pp. 73-105, especially 96-99) and the Assistant Principal Potter (T I, 156-83)⁹ the Commission found (Decision p. 3, FOF 5) that race was identified as an issue during the time the student was in the Teacher's classroom, specifically during the course of certain discussions between the Principal and the Student's mother. B. 16, p. 7. In fact, the issue of race did not come up until the following year, the second year, 2000-01, when the student was no longer in the Teacher's classroom. In the previous year when the student was in the Teacher's classroom, the mother asked for a conference with the Principal and the Teacher on two occasions. In the second of those meetings, the Student's mother specifically denied, as did her daughter, in response to a question from the Principal, that race was a problem.¹⁰

⁹The testimony of Clendenin (Vol. I, pp. 73-103) did reveal that other faculty members complained about noise and about the Student (74). The testimony of the Assistant Principal, Paula Potter's, at T I, 63-64, is consistent with the rant and rave finding of the ALJ. Cobb continued making complaints about the Student which Potter tried unsuccessfully to remedy, but Potter was "not saying that her [the Teacher's] complaints were unfounded ...". Potter did talk to the Student and work with her "to make it a better transition year for ..." the Student.

¹⁰Ms. Cobb attended all meetings requested by the mother as long as the student was in the Teacher's class. Although the first meeting was somewhat productive, the second meeting was not and the Teacher then regarded meetings with the student's mother as a waste of time. Mrs. Cobb only refused to meet with Mrs. Wattie after the Student was no longer in her class and Principal Clendenin confirmed that Mrs. Cobb was under no obligation to meet with Ms. Wattie. T II, pp. 97, 101. Certainly, the ugly confrontation where Mrs. Wattie and her daughter walked into another class of Mrs. Cobb's when it was in progress, demanded an immediate meeting and called the Teacher a "second grader" in front of the students probably contributed to Mrs. Cobb's unwillingness to meet with the Student's mother, once the Student was no longer in any of her classes. B. 20. Since Mrs. Cobb was not required to meet with the mother, the Commission's ruling penalizing her for not meeting with the mother once the Student was out of the Teacher's class cannot stand.

In fact, the Principal recalled the daughter's response to the question as indicating that any problem between the Teacher and the Student was a result of a personality conflict. Clendenin related how the issue of race in fact arose in one of the two meetings:

... I don't know whether I brought it up or whether Ms. Wattie brought it up, but the question in essence was do you think there is a racial issue. And both Mrs. Wattie and Krystal at that time said no, we don't think so, and that was it I don't believe it ever came up again in that light. However, Krystal was quick to indicate a personality conflict, not a racial problem. T. II 82-3, 100.

The Student, according to the Principal, said, "I don't like her [Mrs. Cobb, the Teacher] and she don't like me' and it [was] in the vernacular." The dislike by the Student of the Teacher is most dramatically seen in the Commission's finding that the Student called the Teacher a "B*****" by mouthing the word in her direction during a football game. FOF 7.

The issue of racial discrimination only came up when the Principal suggested that the Student be moved to another classroom. The mother rejected the offer and only then raised the issue of race by stating that her daughter was entitled to a non-discriminatory education (T 81), implicitly threatening a specific reaction if her daughter were moved. One other African-American student, Amber Watts, was moved to another classroom. Other than the fact that she was an African-American, nothing in the record suggests that Ms. Watts was escaping a racial atmosphere in Ms. Cobb's classroom, which atmosphere had been in effect denied by both the Student and her mother. (T 95-96) Therefore, neither the testimony of Principal Clendenin nor Assistant Principal Potter establish that "Cobb focused her disciplinary attention on African-American students,"(B 16) or that race was an

issue in the class.¹¹ The Principal did not believe that race was an issue. T II, 83-94.

(d). Protected Class Not More Likely to Receive Discipline.

The assertion at B 16 that African-American students were far more likely to receive discipline from Mrs. Cobb was not established. Setting aside the worthless testimony of the Student that African-American students were "always" (T 206) sent to the office and sometimes misidentified by the Teacher, testimony to which the Commission gave virtually controlling weight (see Finding of Fact 8), the 2000-01 records of the school indicate that the Teacher did not discipline African-American students disproportionately when compared to students of other ethnic backgrounds. Eight of the eleven individuals she disciplined were white.¹² But, more significantly, the number of disciplinary incidents involving African-Americans in her other classes, ten, for a total of 123 students, reveals that African-Americans were disciplined. Less than 8% of the incidents involved African-Americans. Eight of eleven students sent to the office were white.

The finding of "almost constant disciplinary referrals" simply does not reflect the record in this case. Per Attachment A,¹³ the Teacher made formal discipline referrals in

¹¹Clendenin denied that Ms. Cobb used the words "rude and crude and disrespectful" to demean certain African-American students.

As far as referring to them in a demeaning sense of their race, no, I don't recall that she ever did that.

T 88-89.

¹²Interrogatory answers, Exhibit RX 15.

¹³The Teacher issued discipline slips on the following days in 2000: 3/21, 10/10 (incident no. 1), 11/29 and 12/6. She issued a discipline slip for the bathroom incident,

only five of the nine incidents discussed in these briefs and throughout the record. At other times the Teacher sent students to the office. The frequency of this kind of trip is not specified with any degree of certainty in the record, despite the hyperbole of the findings that it occurred almost constantly. At least six other teachers complained about the Student's conduct.¹⁴ When asking Mrs. Penn on cross examination if she recognized the Student as being a leader in the school, Ms. Penn replied instead that the Student "ruled the hallways."¹⁵ While Ms. Cobb may have been the only one of those teachers who made a written disciplinary referral, the others made oral ones (Clendenin, T II, p. 98). As noted, Ms. McNeil gave the Student a disciplinary slip for refusing to go to class. Thus, the Teacher was not "the only teacher who found that [the Student's] conduct warranted a disciplinary response." The only actual formal discipline the Student received was one day in "ALC" (which had been reduced administratively from two days). None of Mrs. Cobb's

3/30/01. On the remaining four other incidents summarized in Attachment A, no disciplinary action was taken by the Teacher.

¹⁴McNeil testified that the Student was extremely rude and demeaning to other teachers. Although the Student and her friends may not have been able to recall the Teacher sending white students to the office, the Principal, Mrs. Cobb and Crist recalled that one particular white student (C.S.) was sent several times.

¹⁵Teacher Hopkins testified that the Student felt that the Teacher was trying to communicate with her in the hallway and asked Teacher Hopkins to accompany her to avoid such contacts. T II, 13. The Student herself did not testify that she was afraid of the Teacher or that she understood the hall escort to be for the purpose of protecting her. Hopkins never said that the Student reported being afraid of the Teacher and given the various hallway maneuvers that the Student and her friend engaged in and her reputation for "ruling the hallways," manipulation rather than fear was the motivation. Perhaps the Student did not testify on this point for fear of highlighting the undisputed testimony, in particular undisputed by her, that she was involved in blocking the hallways and in light of the perception stated by Teacher Penn that the Student "ruled the hallways." T III, 203.

other disciplinary forms (RX 7, 9, 11, 12 and 19) were ever responded to;¹⁶ although, she had discussed them with administrative officials including Ms. Potter and the Student may have spent some time in Ms. Potter's office as a result of Ms. Cobb's discipline slips. Nor when one considers the three years covered by the record in this case, it cannot fairly be said that the Teacher "found [the Student] in almost constant need of disciplinary action," or that one day of ALC was "disproportionate" discipline for stomping out of class on March 21, 2000.¹⁷

II. The Commission Cannot Argue With Its Own Rejection of the Materiality of the "Dialect" and Profiling Argument.

Certain of the Commission's arguments go beyond its findings and are an attempt to beef up its position before this Court by arguing that the findings it made below should have been more inclusive. For example, the Commission now attempts to make much of the dialect and profiling issues. They were fully briefed to the ALJ but which were not adopted by the ALJ nor the Commission.

"Profiling" apparently refers to the practice of some law enforcement officials of stopping an unduly large percentage of cars driven by African-American for investigation. The Commission now argues that the Teacher engaged in racial profiling; however, neither

¹⁶No support is found in the record and no law is offered (nor is there any) in support of the argument at HRC B 25-26 that, unless school administration embraced her disciplinary referral, her actions were not entitled to any deference.

¹⁷The ALJ's finding as to this event (FOF 10 at p. 5) only relates some of the facts of the "library" event of March 21, 2001. See B. 14-15 for a discussion of the largely undisputed facts and the admission by the Student's friend, P.B., that the Student left the library contrary to the Teacher's instruction. T I, 216.

the ALJ nor the Commission accepted this argument and, critically, the Commission did not make a finding on the issue. Thus, the issue simply is not in the case.

Faced with a multitude of conflicting accounts of the bathroom incident, the ALJ limited his findings to stating that the Student evidently "shouldered" the Teacher during the course of the event. In the context at hand whether the action is characterized as "shouldering" or "shoving" (even assuming there is some difference between those two words and the present context), the Commission argues, contrary to its own finding, that the Teacher was the first of the two to make contact. This makes little difference because it is clear that the ALJ determined that it was the Student, not the Teacher, who crossed the "touching" barrier.¹⁸ The effort of the Commission to reargue the facts of that incident (HRC B. 7), based on some supposed material difference between the word "shoulder" and

¹⁸The circumstance that the Teacher is an employee of the school system does not preclude Teacher from seeking law enforcement when a battery occurred, nor under the circumstances was it an extreme action. Unfortunately, for Mrs. Cobb, she did not understand the workings of the criminal justice system and the likelihood that nothing would come of her efforts. Calling police - Indeed, public and judicial policy favor resort to law enforcement in situations such as the one described because of, among other things, the effect police has of channeling the problem (however meritorious or non-meritorious it may be) away from the immediate participants and into the criminal justice system. (FO 16). Given her frustration with the school system's approach to the Student's open defiance of authority, the Teacher's action was understandable. Absent malice and the other elements of a false arrest tort, a citizen should be free to call the police under virtually any circumstances. Thus, the finding that in doing so the Teacher violated the Human Rights Act cannot stand.

Nor can the Commission's effort to characterize calling the police as violating any "no further discipline" directive (HRC B. 25); because, the police operate entirely out of the school system and in particular the school system's internal discipline procedures. In any event, calling the police is hardly "discipline." Therefore, the argument that the Teacher took discipline into her own hands cannot stand. No record was found that either AW or her mother were "humiliated," as found at FOF 15. T I 25-28.

"shoved," is totally incompatible with the Commission's complete adoption of the ALJ's findings.¹⁹

The Teacher did keep extensive notes, something, we submit, a person who is intentionally discriminating against another would be unlikely to do. The Teacher testified that, since she was interested in dialects, she kept notes of what the Student said in the vernacular the Student voiced them. The Commission argued to the ALJ unsuccessfully that the keeping of such notes was evidence of racism. The ALJ ignored the argument, and the point was not argued to the Commission. Thus, by adopting the ALJ's decision wholesale, the Commission has already rejected this argument.

III. THE CONFLICTING FINDINGS OF THE COMMISSION THAT THE DISCIPLINE WAS BOTH "APPROPRIATE" AND "DISPROPORTIONATE" EVIDENCES THE FAILURE OF THE COMMISSION TO ADDRESS THE CONFLICT BETWEEN THE LEGAL DUTIES OF A TEACHER TO WHO IS DUTY BOUND TO ENGAGE IN THE INTENTIONAL ACT OF DISCIPLINING A STUDENT WHO IS IN A CLASS PROTECTED BY THE HRA AND ENFORCEMENT OF THE HRA.

Contrary to the assertion at HRC B. 24 that the Teacher's "status ... was not ignored in arriving at the conclusion that she engaged in unlawful discrimination," there is no analysis of the obligations of the Teacher to maintain order and discipline²⁰ on the one hand and comply with the civil rights laws at the same time. Nor do any of the cases cited

¹⁹Teacher Rebecca Burch testified that she thought she saw the Student "pushing Barbara ... I didn't see hands, I saw kind of a push, like a shoulder push." T III, 152-3. "It looked like she was being shoved, I guess that's physical contact. ... But, you know, she was being shoved, I grabbed her, got her out of the way. ..." T III, 156.

²⁰Teacher Cavendar-McNeil volunteered that she had a duty to take disciplinary action. T II, p. 20.

at HRC B. 21-26 even involve the situation where the two issues squarely meet, that is when a member of a protected class is "disruptive ... combative ... confrontational ..." (FO 10) and seeks to "goad" a teacher into confrontation. Instead, the Commission sidesteps the issue when it found that the discipline imposed was "to some extent appropriate" (FO 14-15); but, in the next breath found that the discipline was "disproportionate." (FO 15) The Final Order fails to provide the analysis needed to determine where the line between (1) permissibly disciplining a recalcitrant member of a protected class and (2) the protections the HRA provides that person is to be drawn. Unless such a line is drawn, the Human Rights Commission, the court system, or both, will become a threatened or actual haven for disciplined students who happen to be in a class protected by the HRA.

We agree with the Commission that the fact that the students are "children" should be taken into account; but, that does not necessarily mean, as the Commission seems to suggest, that they should be given preferential or "easy" treatment. HRC B. 14.

The juvenile status of the discriminatee is relevant. (HRC B. 14) Outside of the protected environment of a school, it is doubtful that the Student's behavior would have been tolerated more than once or twice in virtually any real world setting. And certainly the color of skin would be less likely to take on the controlling influence it has on the Final Order.²¹

²¹In the end, the overarching question is whether the fundamental purpose of public education of preparing "children" for the real world. We respectfully submit that due to the failure of the Commission to give deference to the disciplinary actions of the Teacher and its willingness to engage in second guessing of how a very aggravated situation in a separate environment should be handled, that the fundamental purpose has not been served.

In this situation, before a Human Rights Act violation is considered, the question of the reasonableness of the discipline should be deferentially considered. If the Teacher is found to be within the legal bounds of the disciplinary action,²² the claim of racial discrimination should, of course, still be carefully and scrupulously examined because, as the Commission has argued, the disciplinary issue should never be used as a shield for racist activity. If the Director still believes that race may be a material factor, an ultimately reviewable finding should be made and the case should be tried without the presumption of McDonald-Douglas. Once discipline becomes an issue, the McDonald-Douglas formulation will not work; because, multiple legal issues, discrimination and excessive discipline, are involved. Even if McDonald-Douglas is viewed as a good way of resolving the single issue of discrimination and isolation, it will not work when two separate legal issues are involved. In addition, the imposition of discipline on a member of a protected class by a teacher establishes all three of the elements of a prima facie case, as described by the Commission in its Decision at page 11: (1) the complainant is a member of a protected class, (2) the complainant attempted to avail himself of ... advantages, privileges or services of a place of public accommodation (i.e. educational services), and (3) those services were withheld by the imposition of discipline.

The findings mentioned above should be required at each relevant step especially in light of the administrative setting. An agency accustomed to enforcing a single statute may

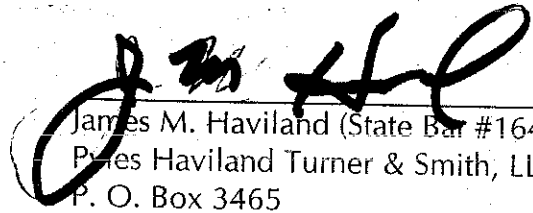
²²It should be kept in mind that most teachers, as occurred herein, generally can only propose serious disciplinary action and the decision to undertake it is made generally by their superiors.

subconsciously favor "... its" law over outside law which it does not have a day-to-day familiarity. Further, the teacher would be before an agency which, in effect, would decide whether the discipline was, or was not, right. Therefore, considerable deference to the professional judgment of the teacher should be made and the process should be memorialized by a written finding. Probable cause should be based on a study which affords considerable deference to the Teacher's decision. McDonald-Douglas is particularly inappropriate in this setting because the alleged discriminatee is required to take an adverse action, that is part of his or her job, as Mrs. McNeil voluntarily recognized. A written finding should be made at each level. Further, McDonald-Douglas, as applied in this particular setting, could be seen by the student as a means of possibly immunizing himself from discipline. In short, the issue of discipline should be recognized and dealt with as a separate but equally relevant legal issue and appropriate findings documenting the handling of the discipline issue should be made at each stage.

Conclusion

The Court should reverse the Final Order and direct that the administrative case be dismissed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James M. Haviland", is written over a horizontal line.

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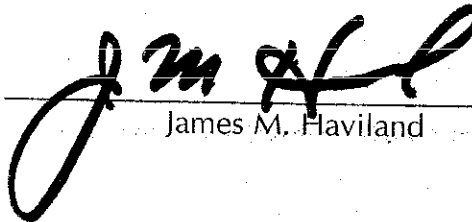
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I, James M. Haviland, hereby certify that a copy of the foregoing REPLY BRIEF OF PETITIONER was served on opposing counsel by first-class mail, postage prepaid, to:

Paul Sheridan
Office of the Attorney General
Civil Rights Division
812 Quarrier Street, 5th Floor
P. O. Box 1789
Charleston, WV 25326-1789

this ^{23rd}~~22nd~~ day of December, 2004.


James M. Haviland

ATTACHMENT A

<u>DATE</u>	<u>INCIDENT</u>	<u>DISCIPLINE RECOMMENDED</u>	<u>NO REQUEST FOR DISCIPLINE</u>
	99-00		
3/21	library incident, see B 14-15 CX 3, RX 16	teacher took student to front office and issues discipline slip, RX 7	
	00-01		
9/29 ¹	As witnessed by fellow teacher, Deanna Penn (T III, pp. 191-3) and possibly by another teacher, Mrs. Burch (Tr. III, 133-36, 149-50). While returning from an assembly with teacher Deanna Penn, loud student voices behind the two teachers, the student says "watch her [the teacher] say something! She had better not say something. Just watch her say something to me!" CX 2 at 3-4, RX 20 at p. 4, CX 7. Teacher Penn encouraged the students to "go on down the hallway," the Teacher avoided conflict and instead went to the faculty mail room where Ms. Penn found her. The incident "bothered" Ms. Penn "because like I said, I really finally realized or witnessed that maybe Barbara was having a problem. She has acknowledged it throughout the whole time and I just said to myself, "maybe she is having a problem." T III, 191-94. This is one of the specific events that the ALJ found that the <u>teacher</u> was being harassed by the student when he concluded that the statement was made so that the teacher "would know she was being talked about by KW and her friends. KW would not back down when confronted by [the teacher] and would yell, rant and rave back in [the teacher's] face."		CX 2 no request, p. 2, RX 20, p. 4

10/10 No. 1	Teacher took student and another, Margaret _____, to office because they refused to close their lockers and go to class after the bell for class had rung. RX 20, p. 4, CX 2, pp. 3 and 4, CX 7	Discipline slip, RX 19	
10/10 No. 2	"Class room" incident described at B 16, RX 20, RX 19, during which Student and her mother interrupted Teacher's ongoing class and entire class accused Teacher of "acting like a two-year-old and a student." CX 2, p. 3, RX 22	Not impose discipline	Asked front office for help, Principal warned mother and daughter never to do again
10/24	Hallway incident (B 8-9; CX 2, pp. 6-7; CX 6-7, RX-22)		Talked to Principal, not request discipline
10/26	the Student and Amber Watts making loud noises in the hallway, CX 2, p. 6		not reported CX 2, p. 3
11/29	Student refused to close locker and go to class after class bell rang	disobedience RX 9, discipline slip	
12/6	Students, including the Student, caused a semi-blockage in the school hallway by forming a loose phanlax leaving only minimal space for Teacher and others to pass through. Witnessed by Teacher Burch, Tr. III, 133-6.	discipline slip for threats and intimidation, CX 9 and RX 10	

3/30/01	Bathroom incident described at B ___.	Discipline report dated 4/2, RX 11, alleging assault and battery	
	02-03		
10/3/02	Student stops abruptly in front of Teacher while both walking down the hallway causing Teacher to narrowly avert collision with Student. CX 2, p. 3; RX 2, p. 5		no action

1. Faculty meeting. The Teacher and other teachers complained about loudness in the halls, argumentative communication and disrespectful remarks. Teachers told to encourage students to attend Jump Start on time and to discourage loud noises that may interrupt classes. Teacher asserts "I have made specific effort to not address this in the hallway with the individuals in this particular group." B 8-9, RX 2, p. 4, RX 19, RX 21, p. 2, letter from Superintendent Duerring, Superintendent of Kanawha County Schools, acknowledging "that there is a problem with immature inconsiderate behavior of certain students at Riverside."