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Charge No. P20130034X

Coy Mathis

By and through Jeremy and Kathryn Mathis

[REDACTED]

Charging Party

Fountain-Fort Carson School District 8
10665 Jimmy Camp Road
Fountain, CO 80817

Respondent

DETERMINATION

Under the authority vested in me by Colo. Rev. Stat. § 24-34-306(2), I conclude from our investigation that there is sufficient evidence to find that the Respondent discriminatorily denied the Charging Party equal terms and conditions of service of goods, services, benefits, or privileges; equal treatment based upon harassment; and the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations in a place of public accommodation due to the Charging Party's sex and sexual orientation. As such, I hereby issue a **Probable Cause** determination.

The Respondent, Fountain-Fort Carson School District 8 (the "District"), maintains a place of public accommodation within the meaning of Colo. Rev. Stat. § 24-34-601(1), Eagleside Elementary School. The Respondent, however, contends that the Division lacks jurisdiction over the instant claim because it was filed outside the mandatory jurisdictional filing period of 60 days. This is supported by Colo. Rev. Stat. § 24-34-604, which states that any public accommodations charge must be filed "within 60 days after the alleged discriminatory act occurred." The evidence demonstrates that the alleged discriminatory act occurred on December 10, 2012. The Charge of Discrimination was filed on February 7, 2013. The Charging Party filed 59 days after the alleged harm occurred.¹ Therefore, as the Charge was filed within the statutory 60-day time period, the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party, by and through her parents Jeremy and Kathryn Mathis ("J. Mathis" and "K. Mathis"), alleges that on or about December 10, 2012, the Respondent denied her equal terms and conditions of service of goods, services, benefits, or privileges; equal treatment based

¹ <http://www.timeanddate.com/date/dateadd.html>.

upon harassment; and the full and equal enjoyment of goods, services, facilities, privileges advantages or accommodations of a place of public accommodation due to her sex (female) and sexual orientation (transgender). The Respondent denies the Charging Party's allegations of discrimination in its place of public accommodation and avers that the Charging Party's inappropriate use of the girls' restroom creates safety concerns for parents and other students.

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof, then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the asserted protected group or status of the Charging Party. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997); Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a school district and political subdivision of the State of Colorado and offers educational services to children who reside both within and outside the District.

The facts indicate that the Charging Party is a 6-year old transgender girl who attended Eagleside Elementary School ("Eagleside") prior to filing the instant claim. Eagleside is a member of Fountain-Fort Carson School District 8, the Respondent. Cheryl Serrano ("Serrano") (female/non-transgender) is the District's Superintendent. Eagleside's Principal is Jason Crow ("Crow") (male/non-transgender). The Charging Party's Kindergarten Teacher was Cara Price ("Price") (female/non-transgender) and Julia Lujan ("Lujan") (female/non-transgender) was her First Grade Teacher. Others who were involved in this matter include Joanne Vergunst ("Vergunst") (female/non-transgender), Assistant Superintendent of Business and Auxiliary Services; John Fogarty ("Fogarty") (male/non-transgender), Director of Human Resources; Lisa Zimprich ("Zimprich") (female/non-transgender), School Psychologist; Dr. Montina Romero ("Romero") (female/non-transgender), Director of Exceptional Student Services, and Loren Martinez ("Martinez") (male/non-transgender), Music Teacher.

The following facts gathered during the Division's interviews with various parties are relevant for a proper understanding of the context and background of the case.

The Mathises state that since approximately 18 months old, the Charging Party, who was born male, non-verbally expressed her female gender identity through her likes and dislikes by gravitating towards feminine clothing and toys traditionally associated with girls. They also indicated that between the ages of 4 and 6, the Charging Party began articulating her belief that she was a girl and became much more vocal about her female gender identity. In or around August 2011, the Charging Party started kindergarten. The Charging Party was enrolled as a boy and was known by her classmates, the staff, and teachers as a boy. The facts indicate that as the months went by, the Charging Party began exhibiting strong and persistent female characteristics, demonstrated by the Charging Party's insistence on her feminine identity, preference for wearing girls' clothes, choosing female playmates, refusal to wear boys' clothes, and participation in traditional female roles and activities. Price confirmed the Charging Party's display of feminine attributes while in her kindergarten classroom. According to the Mathises, a refusal from her parents and teachers to accept her femininity began to cause enormous disruption in the Charging Party's life. The Charging Party became depressed; her learning ability was affected due to her high anxiety; and she did not want to leave the house unless she was dressed as a girl. Though the Mathises began to suspect that the Charging Party may be transgender, they did not raise the issue with the Respondent until it became necessary to do so.

Price, the Charging Party's Kindergarten Teacher, recounted a particular incident that occurred sometime toward the end of November 2011 which triggered the conversation between the Mathises and Eagleside about the Charging Party's transgender status. During the Charging Party's kindergarten year, Martinez, the Music Teacher, asked the boys and girls to line up in separate lines. The Charging Party stood in the girls' line. When Martinez corrected the Charging Party and asked her to line up with the boys, she became very upset and started crying. Price informed J. Mathis about this incident. The Mathises indicated that the Charging Party acquiesced to Martinez's request, but that when the Charging Party returned home that day, she was distraught and cried out, "Not even my teachers know I'm a girl!" K. Mathis e-mailed Price and a meeting was scheduled in the beginning of December 2011 between the Mathises, Crow, Price, and Zimprich to discuss the Charging Party's behavior.

The Mathises stated that initially the school was "really fantastic" and supportive of the Charging Party's needs. According to the evidence, during the meeting the Mathises proposed several changes in the way the teachers and staff interacted with the Charging Party, including the use of feminine pronouns, restrooms, attire, a general accommodation to her feminine gender expression, and how to best address the Charging Party's transition with her classmates. The Mathises suggested using Trans Youth Family Allies ("TYFA") as a resource, but the school declined. TYFA is an organization that strives to "empower children and families by partnering with educators, service providers, and communities to develop supportive environments in which gender may be expressed and respected."² The Charging Party's transition was not specifically addressed or explained to the class. The students were simply told that the Charging Party was now a girl. There was also an activity and book reading that the students participated in which focused on celebrating each others' differences. According to Price and the Mathises, only one

² <http://www.imatyfa.org>.

or two students questioned the Charging Party about her new gender identity. However, as soon as Price made it clear to the students that the Charging Party was a girl, the questioning stopped and the Charging Party was generally accepted as a girl.

In terms of the restroom, Crow stated that nothing was specifically mentioned about the Charging Party using the girls' restroom because it was not an issue in kindergarten. The evidence demonstrates that the kindergarten classrooms each have one restroom that is used by both boys and girls. Price confirmed that the restroom was not an issue because she ensured that all the students used the restroom prior to leaving the classroom for an outside activity. According to Crow, it was understood that the restroom issue would be revisited in first grade. The Mathises, on the other hand, indicated that it was decided during the meeting that the Charging Party could use the girls' restroom, and in fact, did use the girls' restroom during her kindergarten year. According to K. Mathis, she witnessed the Charging Party walking into the girls' restroom at various times during the school year when she was not in her kindergarten class.

K. Mathis stated that in July 2012, prior to the Charging Party starting first grade, she contacted the school to ensure that the Charging Party's move from kindergarten to first grade went smoothly. According to K. Mathis, she did not raise the restroom issue because it had been resolved in the December 2011 meeting. However, based on Crow's understanding that the restroom issue would be revisited, he contacted the District seeking legal advice and spoke with Vergunst. This prompted Serrano and the District to become involved. According to Serrano, several discussions took place between Serrano, Vergunst, Fogarty, Romero, Crow, and the Respondent's attorney. Ultimately, sometime in July/August 2012 Serrano, with the assistance of Vergunst and the Respondent's attorney, made the decision to bar the Charging Party from using the girls' restroom. Vergunst conveyed Serrano's decision to Crow. Though Serrano indicated that Crow was also involved in the entire summer discussions, during his interview with the Division Crow denied being part of the conversations and indicated that he was not aware that the District had reached a final decision. According to Crow, he stated that after speaking with Vergunst, he presented the District with a sexual orientation brochure that he obtained from the Division which appeared to contradict the District's position. Crow stated that he expected to receive a follow-up call from the District after it reviewed the brochure regarding its decision. Consequently, Crow permitted the Charging Party to use the girls' restroom until he received such confirmation.

Lujan, the Charging Party's First Grade Teacher, indicated during her interview with the Division that she became aware of the Charging Party's transgender status a few days prior to the start of first grade while reviewing her assigned students' files. Crow subsequently approached Lujan, as well, and informed her about the Charging Party's transition and proper form of interaction with her. There was no discussion about which restroom the Charging Party should use. Lujan stated that she encourages her students at the beginning of the school year to go to the restroom in pairs, and that she did not treat the Charging Party any differently. When the Charging Party raised her hand to go to the restroom, the Charging Party would pick a friend—always a girl—and they would go to the restroom together. According to Lujan, neither the Charging Party nor her classmates experienced any difficulty with this practice. Lujan indicated that she employs this practice because the transition from kindergarten to first grade can

sometimes be daunting for many children. They may be intimidated to walk around the school by themselves and by interacting with older students. Going to the restroom in pairs removes some of those fears and helps them make an easier adjustment to first grade. Once the first graders become accustomed to being on their own, Lujan stated that she allows them to go to the restroom by themselves. The evidence demonstrates that from August 2012 through December 2012, the Charging Party used the girls' restroom, accompanied by a female classmate, without issue. Lujan also stated that upon gaining full acceptance from her peers, the Charging Party blossomed, her learning capacity improved, and she generally appeared much happier.

The evidence indicates that sometime in November 2012, Romero discovered that the Charging Party was using the girls' restroom. She informed Serrano, who then confronted Crow. According to Serrano and Crow, Serrano instructed Crow to immediately inform the Mathises that the Charging Party could no longer use the girls' restroom. As instructed, Crow contacted the Mathises and informed them that the Charging Party would no longer be permitted to use the girls' restroom. Instead, she would have to use the boys' restroom or one of the single-user restrooms—the adult staff restrooms or the health office restroom. K. Mathis conveyed her concern that barring the Charging Party from using the girls' restroom created an unsafe environment for her, particularly if she had to use the boys' restroom. K. Mathis requested a copy of the District's written policy and the name of the appropriate person in the district office with whom they could continue the discussion. Crow stated that the directive was not a written policy, but rather the District's expectation, and referred them to Fogarty, Director of Human Resources. The Mathises removed the Charging Party from the school until the issue could be resolved. The evidence indicates that the Respondent was not willing to reconsider its decision.

Serrano recently expressed during her interview with the Division that having the Charging Party use the boys' restroom was not an option, considering the Charging Party's wholly female appearance. Serrano indicated that in December 2012, the signage on the men's and women's staff restrooms had been changed to reflect gender-neutral restrooms. A visual inspection of the school premises confirmed that the former staff restrooms are marked as single-user, gender-neutral restrooms. The evidence demonstrates that the signage was changed after the Mathises removed the Charging Party from Eagleside.

Based on the above facts, the Charging Party alleges that on or about December 10, 2012, she was discriminatorily denied use of the girls' restroom consistent with her sex and gender identity, and moreover, continues to be denied use of the girls' restroom. The Respondent does not dispute that it denied and will continue to deny the Charging Party use of the girls' restroom. However, the Respondent defends its position on several grounds, some of which will not be addressed because they are not within the Division's jurisdiction.

The Respondent avers that it did not discriminate against the Charging Party based on sex because according to the Charging Party's birth certificate, the Charging Party is a biological male and was not denied use of the boys' restroom. The Respondent also claims that the Colorado Civil Rights Commission (the "Commission") in its rules distinguishes between sex and gender, and thus, rationalizes its decision to segregate restrooms "on the basis of sex, not on the basis of gender." According to the Respondent, "'sex' refers to biological categories based

on male or female reproductive organs,” and “‘gender’ refers to social, cultural, behavioral or physiological traits typically associated with one sex.” Based on this line of reasoning, the Respondent legitimizes its right to bar the Charging Party from using the girls’ restroom.

Conversely, the Charging Party argues that she is a girl, despite the male label she was assigned at birth. Moreover, the Charging Party claims that in three relevant spheres—medical, legal, and social—both her sex and gender are identified as female. The Charging Party further counters that the option to segregate restrooms on the basis of sex is not a presumptive right to bar the Charging Party from using the restroom consistent with her gender identity, particularly since the Commission added a provision in the Rules specifically addressing the right of transgender persons to use the restroom consistent with their gender identity.³

The evidence demonstrates that the Charging Party’s 2006 birth certificate from the State of Texas identifies the Charging Party’s sex as male. The Respondent submitted the Charging Party’s Person Summary Report (the “Report”) to demonstrate that in 2011 the Mathises enrolled the Charging Party as a male student. The Report is a school document that reflects the biographical and demographic information about a student, including whether the student is male or female. The Report, however, does not ask for the sex of the student that is enrolling, but rather the student’s gender. According to the Charging Party’s Report, at the time of enrollment her gender is noted as male. However, more recent legal and medical documents identify both the Charging Party’s sex and gender as female. The evidence demonstrates that in 2013 the federal government and the State of Colorado issued the Charging Party a U.S. passport and a state identification card, respectively. The evidence demonstrates that on both these documents the Charging Party’s sex, not gender, is noted as female. Additionally, a Colorado physician completed a Medical Information Authorization (Change of Sex Identification) form which identified the Charging Party’s gender as female.

In light of the contradictory evidence, the Division sought additional information from independent research in an effort to clarify the inconsistencies. A study performed by Dr. Anne Fausto-Sterling from Brown University revealed that 1 in 100 children are born with “subtle forms of sex anatomy variations” that deviate from the standard male or female anatomy, some of which will not appear until later in life.⁴ According to the Intersex Society of North America (“ISNA”), doctors typically determine the sex of a child at birth based on their own ideas of what constitutes male and female genitalia, taking into account only the external reproductive organs of the child.⁵ The physician’s determination does not consider the internal reproductive organs which are not apparent by visual observation. For example, in certain cases a child may have external male reproductive organs, but internal female reproductive organs, or vice versa.⁶ Considering these parameters, the research demonstrates that sex assignments given at birth do not accurately reflect the sex of a child, indicating that birth certificates may no longer constitute conclusive evidence of a child’s sex.

³ 3 Colo. Code Regs. § 708-1:81.11(B).

⁴ <http://www.isna.org/faq/frequency>, (citing Anne Fausto-Sterling et al., “How Sexually Dimorphic Are We? Review and Synthesis,” 12 Am. J. Hum. Biology, 151 (2000)).

⁵ http://www.isna.org/faq/what_is_intersex.

⁶ The Division is not making a comparison between transgender and intersex, or averring that the Charging Party is intersex, but merely gathering additional data in an attempt to evaluate the contradictory evidence.

Though the Respondent is correct in stating that sex identifies the biological anatomy of a person while gender is associated with the characteristics of a particular sex, the evidence demonstrates that this distinction occurs only in certain circumstances. Evidence gathered from a law review article demonstrates that “legislation utilizes the word ‘sex’ yet courts, legislatures and administrative agencies often substitute the word ‘gender’ for ‘sex’ when they interpret these statutes.”⁷ The evidence demonstrates that although the words have different meanings, the legal system commonly substitutes one for the other. Thus, the use of the words “sex” and “gender” under Colorado law are consistent with the form and manner in which courts and administrative agencies around the country employ the terminology. The evidence, therefore, suggests that “gender-segregated facilities” are the same as “sex-segregated facilities.” The Respondent, however, argues that the Commission has not defined “gender-segregated facilities.” The evidence does not support the Respondent’s assertion. As noted below, in its rules the Commission clearly identifies restrooms as gender-segregated facilities.

Furthermore, pursuant to Colorado Anti-Discrimination Act (“CADA”), the Colorado Civil Rights Commission was granted authority to adopt regulations to interpret, implement, and aid in the enforcement of the statute. In 2008, in an effort “to contribute to the elimination of discrimination on the basis of sexual orientation, inclusive of transgender status, in employment, housing, public accommodations, and advertising,” the Commission adopted 3 Colo. Code Regs. § 708-1:81.1 *et seq.*, (hereinafter Rule 81.xx) entitled, “Sexual Orientation Discrimination Rules.”⁸ The Commission defined transgender, gender identity, gender expression, and specifically addressed restroom usage for transgender persons. The relevant rule referenced by the Charging Party that pertains to restroom usage is Rule 81.11, entitled, “Gender-Segregated Facilities.” The evidence demonstrates that Rule 81.11(A) states, “[N]othing in the Act prohibits segregation of facilities on the basis of gender.” Additionally, Rule 81.11(B) states, “[A]ll covered entities shall allow individuals the use of gender-segregated facilities that are consistent with their gender identity. Gender-segregated facilities include, but are not limited to, restrooms, locker rooms, dressing rooms, and dormitories.”

The Respondent, however, insists that Colorado law permits the Respondent to segregate the restrooms based on sex if “such restriction has a bona fide relationship to the goods, services, facilities, privilege, advantages, or accommodations of such place of public accommodation.” The Respondent raises a safety issue and posits that restricting restroom access based on sex has a bona fide relationship to the operation of the school district in that a transgender student will be less likely to be subjected to harassment from other students if the restrooms remain segregated. The Charging Party asserts that the Respondent’s reasoning is pretextual as she was not under any direct or indirect threat from using the girls’ restroom, whereas using the boys’ restroom would have raised serious safety concerns by subjecting her to bullying and harassment. The evidence demonstrates that Colo. Rev. Stat. § 24-34-601 *et seq.*, is the relevant statute referenced by the Respondent. According to legislative history, prior to 1969, the Civil Rights Antidiscrimination statute consisted of one paragraph, § 25-1-1, which read:

⁷ Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *Ariz. L. Rev.* 265, 274 (1999).

⁸ 3 Colo. Code Regs. § 708-1:81.1.

Equality of privileges to all persons.—All persons within the jurisdiction of the state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, restaurants, eating houses, barber shops, public conveyances on land or water, theatres, and all other places of public accommodations and amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens.

In 1969, this Act was repealed and re-enacted with amendments, and became more or less the current version. The statute underwent various other amendments throughout the years, including the addition in 2008 of sexual orientation as a protected class. The provision specifically referenced by the Respondent, Colo. Rev. Stat. § 24-34-601(3), which permits “a person to restrict admission to a place of public accommodation to individuals of one sex if such restriction has a bona fide relationship to the goods, services, facilities, privilege, advantages, or accommodations of such place of public accommodation,” remained unchanged since its adoption in 1969. The evidence does not suggest that this provision was enacted to restrict admission to restrooms since restrooms are not places of public accommodation, but rather facilities or services within places of public accommodation. Moreover, considering the era, the evidence suggests that the legislature did not enact this provision with the intent to restrict access to restrooms, but more likely to restrict access to establishments such as private men’s clubs.

The evidence demonstrates that the Respondent is correct in bearing the responsibility of protecting its students. The evidence, however, is not sufficient to demonstrate that the restroom restriction has a bona fide relationship to the operation of the school. According to Title IX of the Education Amendments of 1972,⁹ which prohibits discrimination based on sex, Eagleside and the District have a legal obligation to protect all students from bullying and discriminatory harassment, including gender-based discrimination. The obligation in such situations, as stated in a 2010 letter from the United States Department of Education, Office of Civil Rights, is for the Respondent “to take immediate and effective action to eliminate the hostile environment.”¹⁰ The purpose, however, is not to penalize the student who was harassed, rather the appropriate steps include taking disciplinary action against the alleged harasser. Thus, the evidence suggests that the Respondent’s responsibility in preventing harassment is to respond to individual incidents of misconduct, not to hinder students’ access to services or facilities. Moreover, the evidence does not demonstrate that the Charging Party was subjected to harassment or bullying while using the girls’ restroom.

Lastly, the Respondent contends that this is not an issue impacting solely the Charging Party’s use of the restroom at Eagleside, and that the District’s decision must take into account the broader impact that this decision would have on the entire school district. Among its concerns, the Respondent included the comfort level of non-transgender students and their parents. For example, the District stated that it “took into account not only Coy [the Charging Party] but other students in the building, their parents, and the future impact a boy with male genitals using a girls’ restroom would have as Coy grew older.” The Respondent also proffers “what-if” scenarios, such as a request coming from “a male high school student with a lower voice, chest

⁹ 20 U.S.C. § 1681 *et seq.*

¹⁰ Dep’t of Educ. Dear Colleague Letter, (2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>

hair and with more physically mature sex organs who claims to be transgender and demands to use the girls' restroom after having used the boys' restrooms for several years." The Respondent asserts that it has a duty to consider future situations of older students "claiming to be transgender" and the effect this would have on parents and other non-transgender students. The Charging Party, on the other hand, argues that the Respondent should not be permitted to violate her statutory rights merely to ensure the comfort of other students and their parents, or due to the Respondent's concern about hypothetical situations which have not occurred.

The evidence demonstrates that during the Charging Party's presence at Eagleside, Crow and Price received only one complaint from a parent who is no longer in the District. The parent was not concerned with the Charging Party's restroom selection. Rather, the parent raised moral issues with the Charging Party's upbringing. Crow and Price both indicated that the parent returned to apologize to Crow for her comments. This incident occurred at the end of kindergarten. According to Serrano and Lujan, they did not receive any complaints from parents or students during the Charging Party's first grade year. Lujan indicated that one girl made a comment about the Charging Party being a boy. However, once Lujan reaffirmed the Charging Party's sex, no further issues arose. Additional evidence in relation to the Charging Party's physical development "as Coy grew older" indicates that medical breakthroughs now allow a prepubescent transgender child to arrest the development of male (or female) features and encourage the advent of female (or male) characteristics.

Discriminatory Denial of Equal Terms and Conditions: Sex/Sexual Orientation

To prevail on a claim of discriminatory terms and conditions of service of goods, services, benefits, or privileges, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought goods, services, benefits or privileges from the Respondent; (3) the Charging Party was treated less favorably than other individuals seeking services from the Respondent; (4) the treatment was under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of protected classes based on her sex (female) and sexual orientation (transgender status). In this case, the Charging Party's sex is in dispute because the Respondent does not accept that the Charging Party is female. Her transgender status is not in dispute.

The Charging Party identifies as a female and possesses documents identifying her sex as female. The Respondent, on the other hand, disregards evidence from the State of Colorado and the U.S. government which acknowledges the Charging Party's sex as female, and chooses to rely solely on the Charging Party's Texas birth certificate to determine her sex. As discussed above, the Charging Party was labeled "male" on her birth certificate. Since then, however, the Charging Party has transitioned from male to female. The evidence demonstrates that socially, legally, and medically the Charging Party is considered female. For example, socially, the Charging Party conforms to the stereotypical notions of how girls her age are expected to act and appear. She wears dresses, has effeminate mannerisms, stands in the girls' line at school, and chooses to play with other girls. Eagleside was involved with and assisted in the Charging Party's transition. The Respondent acknowledges that the Charging Party identifies as a female

and conforms to socially accepted feminine behavior. Legally, the federal government and the State of Colorado regard the Charging Party's *sex* as female. Additionally, a Colorado physician identified the Charging Party's gender as female on the Change of Sex Identification form. While the Division concedes that the Charging Party's birth certificate indicates "male," given the contradictory evidentiary documents, the Division must weigh the totality of the evidence and rely on the most current legal documents to determine the Charging Party's sex and gender. A summary of the evidence demonstrates that as recent as 2013, medical and legal authorities identify the Charging Party's sex and gender as female. The Charging Party also has wholly integrated into society as a female. Finally, emergent research demonstrates that birth certificates may not accurately reflect the sex of a child. Thus, the Division finds that regardless of the assignation at birth, the weight of the evidence supports the Charging Party's sex as female, and the remainder of the analyses will reflect this fact.

The evidence demonstrates that on or about December 10, 2012 the Charging Party sought services from the Respondent in the form of access to the girls' restroom while at school. Based on the undisputed facts, the Charging Party was not permitted to use the girls' restroom. The Respondent asserts that the appropriate restroom for the Charging Party is the boys' restroom or one of the single-user, gender-neutral restrooms based on the Charging Party's perceived biological maleness as noted on her birth certificate. The Respondent perceives the Charging Party to be a boy based on her birth certificate because it suggest that she does not possess the typical female genitalia associated with girls. Sex assignment at birth, however, is merely a category that a child is placed in based on observable anatomy, and does not take into consideration the psychological and biological variations associated with the composition of each person. Given the evolving research into the development of transgender persons, compartmentalizing a child as a boy or a girl solely based on their visible anatomy, is a simplistic approach to a difficult and complex issue. The Respondent, moreover, ignores federal and legal documents—more current than the Charging Party's birth certificate—which undeniably state the Charging Party's sex as female. The evidence, as such, is sufficient to demonstrate that the Charging Party is a girl and identifies as a girl.

It is also undisputed that non-transgender students at the school are not denied use of their respective restroom choice. In other words, boys are permitted to use the boys' restroom, and girls are allowed to use the girls' restroom. The Respondent argues by presumption that these children are using the appropriate restrooms based on their sex because it assumes that boys have male genitalia and girls have female genitalia. Considering the number of children who, as research indicates, are born with biological variations, the Division cannot make the same presumption. Moreover, the possibility exists that the children are using the restroom with which they identify because, simply put, in their cases their genitalia coincides with their gender identity. By not permitting the Charging Party to use the restroom with which she identifies, as non-transgender students are permitted to do, the Respondent treated the Charging Party less favorably than other students seeking the same service. This evidence supports that the disparate treatment was under circumstances that give rise to an inference of unlawful discrimination based on the Charging Party's protected classes. Thus, a case of discriminatory terms and conditions of services has been established.

Discriminatory Denial of Equal Treatment based on Harassment: Sex/Sexual Orientation

To prevail on a claim of discriminatory denial of equal treatment based upon harassment, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party is a qualified recipient of the goods and services of the Respondent; (3) the Charging Party was subjected to adverse treatment based upon his or her protected class; (4) the treatment was severe or pervasive; (5) the treatment had the purpose or effect of creating an environment that was both objectively and subjectively hostile, intimidating or offensive; (6) the Respondent failed to exercise reasonable care to prevent and promptly correct such adverse treatment; and (7) the Charging Party took advantage of any preventative or corrective opportunities provided by the Respondent.

The Charging Party is a transgender girl and thus a member of protected classes based on her sex and sexual orientation. The Charging Party is also a qualified recipient of the goods and services of the Respondent. The Charging Party alleges that the Respondent subjected her to severe and pervasive adverse treatment based on her protected classes by creating a hostile educational environment when it barred her from using the girls' restroom. The Charging Party further alleges that the Respondent is not willing to reverse its decision and thus will continue to deny her access to the girls' restroom. The Charging Party claims that in doing so, the Respondent is subjecting her to stigmatization, ridicule, and humiliation.

For example, the Charging Party claims that the Respondent suggested that she use the boys' restroom, but that such suggestion was not only inappropriate because of the Charging Party's female appearance, but also completely discounted the Charging Party's gender identity. The evidence demonstrates that not all of the faculty, staff, and students were aware of the Charging Party's transition. Therefore, because the Charging Party's appearance and mannerisms are wholly female, anyone observing the Charging Party walk into the boys' restroom would see a girl entering the boys' restroom. Even though the District now acknowledges that it would not be appropriate for the Charging Party to use the boys' restroom, when making its initial decision in August 2012, the Respondent considered the Charging Party's use of the boys' restroom a viable alternative. The Respondent asserts, however, that the Charging Party had other restroom options, such as the gender-neutral staff restrooms. However, the Respondent did not take the appropriate steps to have the signage changed on the staff restrooms to indicate that the restrooms were gender-neutral until four months after making its decision. In the meantime, the Charging Party was expected to use the adult restrooms. This placed the Charging Party in a likely position of having to explain to an uninformed staff or faculty member why she was using those restrooms. To prevent this from happening, the Respondent would have been compelled to disclose the Charging Party's transgender status to the entire staff, further violating her privacy rights.

The evidence suggests that the restroom restriction also created an exclusionary environment, which tended to ostracize the Charging Party, in effect producing an environment in which the Charging Party was forced to disengage from her group of friends. It also deprived her of the social interaction and bonding that commonly occurs in girls' restrooms during these formative years, i.e., talking, sharing, and laughter. An additional problematic issue with this solution is the possibility that the Charging Party may be in an area where she does not have easy access to

approved restrooms. As a result, at six years old, the Charging Party is tasked with the burden of having to plan her restroom visits to ensure that she has sufficient time to get to one of the approved restrooms. Even if the Charging Party was in the vicinity of the staff or health office restroom, she would have to explain to her friends why she is not permitted to go with them into the girls' restroom. Telling the Charging Party that she must disregard her identity while performing one of the most essential human functions constitutes severe and pervasive treatment, and creates an environment that is objectively and subjectively hostile, intimidating or offensive.

In its defense, the Respondent claims that it was safer for the Charging Party to use one of the alternate restrooms to prevent the possibility of harassment or bullying, especially as the Charging Party grew older and began developing male features. The Respondent also contends that it is entrusted with the responsibility to ensure the well-being of all of its students. Therefore, the Respondent states that it had to consider the effect that its decision would have on parents and other non-transgender students in other schools within its district, particularly with older transgender students raising the same issue. The Respondent appears not to realize that it cannot completely prevent discriminatory harassment or bullying from occurring, regardless of how well-intentioned its actions. The Respondent's concern for the Charging Party and future transgender students must be handled in the same manner as it would handle any other type of safety concern for its students. For example, the Respondent would likely not consider having a separate classroom for African American students because it was concerned that they may be subjected to racial harassment, even though that harassment had not yet occurred. It is assumed that the Respondent would not tolerate such harassment and would discipline the alleged harasser. In similar fashion, the Respondent's response to potential harassment or bullying of the Charging Party and future transgender students would be to discipline the alleged harasser, not to segregate the students who were being harassed. Otherwise, the Respondent risks inciting the very harassment it is attempting to prevent and implicitly endorses further harassment. The Respondent, as such, cannot legally bar transgender students from their statutory right to use the restroom of their choice because of the Respondent's preoccupation with situations which have not yet occurred or in order to assuage the discomfort of parents. Moreover, the Respondent's concern over the Charging Party's safety is misplaced considering that the Charging Party has demonstrated that using the girls' restroom is not unsafe. Finally, it is highly probable that the Charging Party will appear even more feminine as she grows older given her desire and the medical options available to her.

The facts indicate that the Mathises attempted to resolve the issue with the Respondent. However, the Respondent was not willing to reconsider its decision and refused to reverse its mandate. Though the Respondent asserts that it was also willing to discuss the matter, the evidence indicates that the Respondent failed to exercise reasonable care to prevent and promptly correct the adverse treatment. Therefore, a case of discriminatory harassment has been established.

Discriminatory Denial of Service: Sex/Sexual Orientation

To prevail on a claim of discriminatory denial of goods, services, benefits, or privileges, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought services or goods from the Respondent; (3) the Charging Party is

otherwise a qualified recipient of the goods and services of the Respondent; (4) the Respondent denied the Charging Party the full and equal enjoyment of services or goods; (5) under circumstances that raise an inference of unlawful discrimination based on a protected class.

The Charging Party is a transgender girl and thus a member of protected classes based on her sex and sexual orientation. As previously discussed, the Charging Party sought services from the Respondent and is a qualified recipient of the services of the Respondent. The Charging Party alleges that she was denied services by the Respondent which resulted in her being deprived of the full and equal enjoyment of those services. The Respondent does not dispute that it denied the Charging Party use of the girls' restroom, but argues that the Charging Party was not denied services because she had access to other restrooms.

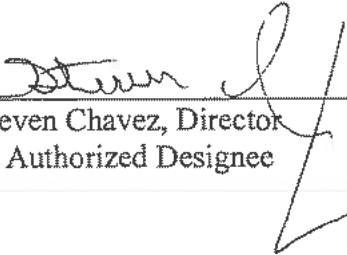
The Respondent perceives that as long as the Charging Party has access to a restroom, it is satisfying its obligation to provide services to the Charging Party. This perception is reminiscent of the "separate but equal" philosophy, which revealed, at least in terms of protected classes, that separate is very rarely, if ever, equal. School is not merely an institution for educating children through books and structured classes. It provides children with a platform that enables them to self-actualize into productive individuals. Children also learn social skills, such as respect, communication, trust, how to appropriately interact with people from different backgrounds, and how to become part of a community. Thus, a very important component of school is being accepted by one's peers. It enhances one's ability to learn and develop a healthy ego, which in turn ensures a positive educational experience. This was the case with the Charging Party. As previously stated, the Charging Party thrived in first grade once she was fully accepted as a girl, which included her ability to use the girls' restroom. Relegating the Charging Party to a set of restrooms which no other student is likely to use, even if permitted to do so, would prove disruptive to her learning environment and overtly demonstrate her separateness from the other students. Despite having access to other restrooms, by not permitting the Charging Party to use the girls' restroom, the Respondent creates an environment rife with harassment and inapposite to a nurturing school atmosphere. This deprives the Charging Party of the acceptance that all students require to excel in their learning environment, creates a barrier where none should exist, and entirely disregards the Charging Party's gender identity. Therefore, although the Respondent provided alternate restrooms in theory, the evidence demonstrates that, in practice, they do not constitute "services" sufficient to meet the Charging Party's needs.

Though the Respondent articulated various grounds to legitimize its position, none were substantiated by sufficient evidence. Instead, the Respondent misinterprets statutes and regulations, provides superfluous irrelevant information, appears to invalidate the Charging Party's transgender status by referring to the Charging Party as he or "her" (note the use of quotation marks), and demonstrates a lack of understanding of the complexity of transgender issues. The Respondent's safety concerns for the Charging Party, as well, are misstated since the Charging Party demonstrated that she was not in any danger while using the girls' bathroom. The Charging Party, on the other hand, provides evidence to demonstrate that using the girls' restroom was not disruptive to the school environment and permitted her to gain full acceptance from her peers. In light of the totality of the evidence, the Respondent's grounds for the denial of service are not credible and are a pretext for denying the Charging Party equal treatment. The circumstances of this denial demonstrate a reasonable inference of discrimination based upon the

sex and sexual orientation of the Charging Party. Therefore, a case of discriminatory denial of services has been established.

Based on the evidence contained above, I determine that the Respondent has violated Colo. Rev. Stat. §24-34-601(2) with respect to the Charging Party's claim of unlawful discrimination in a place of public accommodation. In respect to this Probable Cause determination, and in accordance with Colo. Rev. Stat. 24-34-306(2)(b)(II), the Director hereby orders the Parties to attempt amicable resolution of this claim by compulsory conciliation. The Division will contact the Parties to schedule this process.

On Behalf of the Colorado Civil Rights Division



Steven Chavez, Director
or Authorized Designee

6-17-2013
Date

CERTIFICATE OF MAILING

This is to certify that on June 18, 2013 a true and exact copy of the Closing Action of the above-referenced charge was deposited in the United States mail, postage prepaid, addressed to the parties and/or representatives listed below.

CCRD Case Number:
P20130034X

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