

STATE OF MAINE

PENOBSCOT, SS

SUPERIOR COURT
DOCKET NO. CV-09-201

JOHN DOE and JANE DOE,

And

MAINE HUMAN RIGHTS COMMISSION
(FOR THE USE OF JANE DOE, PARENT
AND NEXT FRIEND OF SUSAN DOE)

Plaintiffs,

v.

KELLY CLENCHY, individually
And in his capacity as the Superintendent
Of the Orono School Department,

ORONO SCHOOL DEPARTMENT,

SCHOOL UNION 87, and

REGIONAL SCHOOL UNIT 26, a/k/a
RIVERSIDE REGIONAL
SCHOOL UNIT

Defendants.

AMENDED COMPLAINT

COUNT I
(BY ALL PLAINTIFFS)
VIOLATION OF TITLE 5 M.R.S.A. §4602 and 5 M.R.S.A. §4553(10)(D):
DISCRIMINATION IN EDUCATION BASED ON DENIAL OF ACCESS TO GIRLS'
BATHROOM

- 1) The Plaintiffs John Doe and Jane Doe are the parents and next friend of Susan Doe and were, at all times relevant, residents of Orono, County of Penobscot, State of Maine.
- 2) The Plaintiff the Maine Human Rights Commission ("the Commission") is an independent commission empowered by the Maine Human Rights Act, 5 M.R.S.A. §4551, *et seq.*, to file civil actions in its name for the use of victims of alleged discrimination in the Superior Court seeking appropriate relief. The Commission brings this action for the use of Plaintiffs, John Doe and Jane Doe, as the parents and next friend of Susan Doe.
- 3) The Defendant Kelly Clenchy is being sued individually and in his capacity as the Superintendent of School Union 87 and Regional School Unit 26 a/k/a Riverside Regional School Unit ("Riverside RSU") and, at all times relevant, had an office in Orono, County of Penobscot, State of Maine.
- 4) The Defendant Orono School Department is a municipal school unit organized under the laws of the State of Maine located in the Town of Orono, County of Penobscot, State of Maine.
- 5) The Defendant School Union 87 is located in the Town of Orono, County of Penobscot, State of Maine. School Union 87 is organized under the laws of the State of Maine and is a union composed of the municipal school units in Orono and Veazie for the purpose of providing joint administrative services, including a joint superintendent.

- 6) Based on information and belief, the Orono School Department delegated the decision-making authority concerning the allegations contained herein to School Union 87.
- 7) In the alternative, based on information and belief, the Orono School Department retained that decision-making authority for itself and School Union 87 acted as its agent with respect to the allegations contained herein.
- 8) Riverside RSU is located in the Town of Glenburn, County of Penobscot, State of Maine. Riverside RSU was created on July 1, 2009 as a result of a statutory consolidation of the Orono School Department and two other municipal school units.
- 9) Pursuant to statute, Riverside RSU assumed responsibility on July 1, 2009 for all of the management and control of the public schools and programs that had been within the management and control of the Orono School Department prior to July 1, 2009.
- 10) Pursuant to statute and without payment by Riverside RSU, Riverside RSU acquired the account balances of the Orono School Department and all property of the Orono School Department necessary to carry out the functions of Riverside RSU, which included all of the property owned by the Orono School Department other than a swimming pool and a hockey rink.
- 11) Riverside RSU is a successor in interest to the Orono School Department and is responsible for the payment of any liability incurred by the Orono School Department in this action.
- 12) This count is brought pursuant to Title 5 M.R.S.A §4602(4)(A), prohibiting discrimination based on sexual orientation in education, as well as 5 M.R.S.A. § 4553(10)(D), prohibiting aiding and abetting another to do any such types of unlawful discrimination.

- 13) Susan Doe was, at all times relevant, a transgender student in the Orono School Department attending school at Asa Adams Elementary School and Orono Middle School.
- 14) Prior to the 2007-2008 school year Susan Doe's parents, John and Jane Doe, met with administrative staff at the Asa Adams Elementary School and agreed that Susan would be addressed by her new name, the staff would use the female pronoun in referring to Susan, and Susan would use the girls' bathroom unless other girls or their parents objected.
- 15) In or around October 2007 a male student (hereinafter referred to as "Male Student") followed Susan Doe into the girls' bathroom at the Asa Adams Elementary School.
- 16) On or about October 5, 2007 news stories began to appear in the Bangor Daily News and other local newspapers about Susan Doe's use of the girls' bathroom.
- 17) On October 9, 2007 the Superintendent of the Orono School System terminated Susan Doe's right to use the girls' bathroom, forcing her to use a staff bathroom, because of her sexual orientation.
- 18) Within several days after Susan Doe's rights to use the girls' bathroom were terminated, Jane Doe called administrative staff at the Orono School Department and strongly opposed the School System's decision to deny Susan Doe the right to use the girls' bathroom.
- 19) Shortly after the Superintendent and the School's October 9, 2007 decision forbidding Susan Doe from using the girls' bathroom, John and Jane Doe asked to meet with Superintendent Clenchy. Superintendent Clenchy asked the Does "What can I do to fix this?" Jane Doe advised, "I want the child back in the bathroom." Superintendent Clenchy responded, "I am not going to do that."

- 20) Though Susan Doe's parents have repeatedly requested it, Superintendent Clenchy, the Orono School Department, School Union 87, and the Riverside Regional School Unit have since that time refused to provide Susan Doe with the reasonable accommodation of allowing her to use the girls' bathrooms in the Orono Schools, including during Susan Doe's sixth grade year at Orono Middle School (2008-2009).
- 21) From October 9, 2007 to the end of Susan Doe's sixth grade year, Superintendent Clenchy, the Orono School Department, School Union 87, and the Riverside Regional School Unit, by refusing to allow Susan Doe to use the girls' shared bathrooms, separated and segregated Susan Doe from her peers.
- 22) On April 10, 2008 Jane Doe, as mother and next friend of Susan Doe, filed a complaint with the Maine Human Rights Commission alleging violations of the Maine Human Rights Act arising from Susan Doe's fifth grade year at Asa Adams Elementary School (2007-2008).
- 23) As a direct and proximate result of the school's refusal to allow her to use the girls' bathroom, Susan Doe was ostracized, segregated, and without support in the Orono School Department.
- 24) On June 29, 2009, the Maine Human Rights Commission unanimously found reasonable grounds to believe the Orono School Department, Kelly Clenchy, and School Union 87 had engaged in unlawful education and public accommodation discrimination because of sexual orientation when Complainant was denied access to common bathrooms that are consistent with Complainant's gender identity during Susan Doe's fifth grade year at Asa Adams Elementary School.

- 25) The Commission failed, within 90 days after finding reasonable grounds, to enter into a conciliation agreement to which Jane Doe, as the parent and next friend of Susan Doe, was a party.
- 26) On November 30, 2009, John and Jane Doe, as next friends of Susan Doe, filed a complaint with the Maine Human Rights Commission alleging violations of the Maine Human Rights Act arising from Susan Doe's sixth grade year at Orono Middle School (2008-2009).
- 27) On September 20, 2010, the Maine Human Rights Commission unanimously found reasonable grounds to believe Riverside RSU, individually and as successor to the Orono School Department and School Union 87; Orono School Department; School Union 87; and Kelly Clenchy, individually and in his official capacity as the Superintendent of School Union 87 and Riverside RSU, unlawfully discriminated against John Doe and Jane Doe, as parents of and on behalf of Susan Doe, in education and access to a place of public accommodations because of Susan Doe's sexual orientation when she was denied access to the common bathrooms while a student at the Orono Middle School that were consistent with her gender identity.
- 28) The Commission failed, within 90 days after finding reasonable grounds, to enter into a conciliation agreement to which John Doe and Jane Doe, as the parent and next friend of Susan Doe, were a party.
- 29) As a direct proximate result of the discrimination by the Defendants, Susan Doe has been compelled to move to a different school and has suffered severe and extreme emotional distress.

WHEREFORE, the Plaintiffs demand judgment declaring that Defendants' practices complained of herein are unlawful as alleged; ordering Defendants to cease and desist from the unlawful practices specified herein; granting Plaintiffs a permanent injunction enjoining Defendants to allow transgender students to use bathrooms that are consistent with their gender identities; ordering Defendants to reasonably compensate Plaintiffs Does for their losses; and awarding Plaintiffs Does civil penal damages, interest, costs, attorneys fees, and such further relief as this Court deems just and proper.

COUNT II

(BY ALL PLAINTIFFS)

**VIOLATION OF TITLE 5 M.R.S.A. §4592 and 5 M.R.S.A. §4553(10)(D):
DISCRIMINATION IN PUBLIC ACCOMMODATION BASED ON DENIAL OF
ACCESS TO GIRLS' BATHROOM**

- 30) The Plaintiffs repeat, reaver and reallege and incorporate by reference each and every allegation contained in paragraphs one through twenty-nine as if expressly set forth herein.
- 31) This count is brought pursuant to Title 5 M.R.S.A. §4592(1) prohibiting discrimination based on sexual orientation in public accommodations, as well as 5 M.R.S.A. § 4553(10)(D), prohibiting aiding and abetting another to do any such types of unlawful discrimination.
- 32) As a direct proximate result of the discrimination by the Defendants, Susan Doe has been compelled to move to a different school and has suffered severe and extreme emotional distress.

WHEREFORE, the Plaintiffs demand judgment declaring that Defendants' practices complained of herein are unlawful as alleged; ordering Defendants to cease and desist from the unlawful practices specified herein; granting Plaintiffs a permanent injunction enjoining Defendants to allow transgender students to use bathrooms that are consistent with their gender identities; ordering Defendants to reasonably compensate Plaintiffs Does for their losses; and awarding Plaintiffs Does civil penal damages, interest, costs, attorneys fees, and such further relief as this Court deems just and proper.

COUNT III
(BY PLAINTIFFS DOES ONLY)
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

- 33) The Plaintiffs repeat, reaver and reallege and incorporate by reference each and every allegation contained in paragraphs one through thirty-two as if expressly set forth herein.
- 34) The Record, a newsletter of the Christian Civic League of Maine a/k/a Maine Family Policy Council, somehow obtained information that Susan Doe was a "special needs" child and referred to her as a "transvestite child."
- 345) On April 11, 2008 in an interview with the Portland Press Herald, Superintendent Clenchy stated that "the situation has been rectified" and "appropriate accommodations" had been made thereby confirming the Religious newsletter's statement that Susan Doe was a "special needs" child.
- 36) During the 2007-2008 school year Susan Doe was, in fact, identified by the Orono School Department as a special needs student.

- 37) Superintendent Clenchy, the Orono School Department, and School Union #87 either intentionally or recklessly divulged that Susan Doe was a "special needs" child which inflicted severe emotional distress upon Susan Doe or was substantially certain to.
- 38) The Defendants' conduct in divulging Susan Doe's special needs was extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable.
- 39) The Defendants conduct did in fact cause Susan Doe to suffer emotional distress.
- 40) Susan Doe's emotional suffering was so severe that no reasonable person could be expected to endure it.
- 41) As a direct proximate result of the actions by Superintendent Clenchy, Susan Doe has been compelled to move to a different school and has suffered severe and extreme emotional distress.
- 42) Superintendent Clenchy's actions are with malice or are so outrageous that they cannot be tolerated in a civilized society and imply malice.

WHEREFORE, the Plaintiffs Does demand judgment in such amount as is reasonable in the premise, plus punitive damages, interests, costs, attorneys fees, and such further relief as this Court deems just and proper.

COUNT IV
(BY PLAINTIFFS DOES ONLY)
VIOLATION OF TITLE 5 M.R.S.A. § 4602 and 5 M.R.S.A. §4553(10)(D):
DISCRIMINATION IN EDUCATION BASED ON HARASSMENT AND "EYES ON"
POLICY

- 43) The Plaintiffs repeat, reaver and reallege and incorporate by reference each and every allegation contained in paragraphs one through forty-two as if expressly set forth herein.
- 44) This count is brought pursuant to Title 5 M.R.S.A. § 4602(4)(A), prohibiting discrimination based on sexual orientation in education, as well as 5 M.R.S.A. § 4553 (10) (D), prohibiting aiding and abetting another to do any such types of unlawful discrimination.
- 45) During her fifth grade year at the Asa Adams Elementary School (2007-2008) and her sixth grade year at the Orono Middle School (2008-2009), Susan Doe was subjected to severe and pervasive harassment by Male Student and other students on the basis of her sexual orientation. This harassment created a hostile educational environment for Susan Doe which the Defendants were aware of, but failed to take immediate or appropriate corrective action to remedy. Moreover, separate from the failure to respond appropriately to eliminate the harassment perpetrated by other students, the Defendants' actions created a hostile educational environment and discriminated against Susan Doe under Title 5 M.R.S.A. § 4602 (4) (A) by adopting a policy in response to the harassing behavior of Male Student and other students, described below as the "eyes on" policy, which had the independent effect of excluding Susan Doe from participation in, denying her the benefits of, and subjecting her to discrimination in, the schools' academic, extracurricular, and other programs and activities.
- 46) From September 2007 until the end of Susan Doe's sixth grade year in June 2009, Male Student continuously and without abatement engaged in a campaign to stalk, harass, threaten, and intimidate Susan Doe because of her sexual orientation.

- 47) In September 2007 Male Student, who had learned that Susan Doe is transgender, approached Susan Doe and said to her: "I didn't know there was a faggot in my class."
- 48) In addition to his harassing conduct following Susan Doe into the girls' room in response to the use of such restroom by a transgender female student, Male student, from September 2007 to June 2009, continually and on multiple occasions made derogatory comments about Susan Doe's sexual orientation and followed Susan Doe throughout the school, including in the hallways, lunch room, after school events, and on field trips. In addition, Male Student continually and on multiple occasions stared at Susan Doe and made obvious his intent to watch her at all times.
- 49) Male Student was significantly larger than Susan Doe.
- 50) Male Student's pattern of stalking and harassment was so overt and continuous that it was obvious to Susan Doe, other students, and school personnel that his intent was to traumatize Susan Doe and place her in fear of bodily injury due to hostility to Susan Doe's sexual orientation. In fact, Male Student's behavior did have such a devastating effect on Susan Doe, and on more than one occasion Susan Doe refused to go to school due to fear of what Male Student might do to her.
- 51) The Defendants acknowledged the severity and pervasiveness of Male Student's ongoing harassment of Susan Doe by stating to John and Jane Doe on more than one occasion that Male Student's behavior posed a safety risk to Susan Doe.
- 52) John and Jane Doe requested that Male Student be removed from Susan Doe's classroom and that the school take other steps to ensure that Male Student was not in Susan Doe's presence.

- 53) The Defendants, including Defendant Clenchy, were at all times aware of the harassment perpetrated by Male Student, including through communications from Jane, John and Susan Doe, but declined at any time from October 2007 to June 2009 to remove Male Student from Susan Doe's classroom, suspend Male Student from school, or otherwise take steps to separate him from Susan Doe.
- 54) Instead, beginning in or about October 2007, the Defendants, including Defendant Clenchy, assigned a teacher or other personnel to follow Susan Doe everywhere she went and stand near enough to watch her at all times, with the exception of during class (the "eyes on" system). This process continued from in or about October 2007 through the end of Susan Doe's sixth grade year in June 2009.
- 55) Other students at Asa Adams Elementary School and Orono Middle School were aware that school personnel were following Susan Doe at all times and understood that such practice was implemented because of hostility to Susan Doe's sexual orientation.
- 56) The "eyes on" policy intimidated and traumatized Susan Doe. It stigmatized her and publicly marked her as being different than other students based on her sexual orientation. The omnipresence of school personnel watching Susan Doe isolated her and caused other students to ostracize her, thus preventing her from becoming integrated into the school educational and social environment. The "eyes on" policy and its effects caused Susan Doe to experience anxiety, depression, and other psychological distress, and denied her the ability to participate in and receive the benefits of the school's academic, extracurricular, and other programs and activities.
- 57) Upon information and belief, Defendants' response to the harassment of Susan Doe based on her sexual orientation was more lenient to the perpetrator of such harassment

- than it would have been for harassment based on other protected or nonprotected categories.
- 58) Upon information and belief, the Defendants failed to follow their anti-harassment and anti-bullying policies and procedures in responding to the harassment of Susan Doe.
 - 59) In February 2008 on an off-campus trip, Male Student stood in the hallway by the bathrooms staring at Susan Doe and watching which bathroom she used.
 - 60) On one occasion in March 2008, Susan Doe entered the girls' bathroom to be with her friends. Male Student again followed her into the bathroom and harassed her.
 - 61) In May 2008 Susan Doe, then a student at Asa Adams Elementary School, went to use the library at the Orono Middle School which was just up the hill. Three students accosted Susan Doe in the library, repeatedly saying, "you're a boy, not a girl." The response of school officials was to state that John Doe and Jane Doe should be fearful of Susan Doe's graduation to Middle School.
 - 62) In October 2008 Male Student began following Susan Doe at the Orono Middle School Family Fun Night at the Orono/Old Town YMCA and chased her down a long back hallway.
 - 63) In March 2009 a student approached Susan Doe and derisively said to her, "hi lesbian."
 - 64) In March 2009 another student ridiculed Susan Doe about her sexual orientation in front of a group of students, saying to her: "You'll never have a boyfriend because you're a boy."
 - 65) In May 2009 Male Student approached Susan Doe in gym class and said: "I didn't know that girls could grow a mustache."

- 66) The harassment to which Susan Doe was subjected during her fifth grade year at the Asa Adams Elementary School and her sixth grade year at the Orono Middle School was based on her sexual orientation.
- 67) The harassment to which Susan Doe was subjected was sufficiently severe and pervasive so as to alter the conditions of her educational environment and exclude her from participation in, deny her the benefits of, and subject her to, discrimination in the schools' academic, extracurricular, and other programs and activities.
- 68) The harassing conduct by Male Student and other students was both objectively and subjectively offensive, such that a reasonable person would find it hostile and abusive and Susan Doe did in fact perceive it to be so.
- 69) The Defendants and their agents or supervisory employees knew or should have known of the harassing conduct and, in fact, each instance of harassing conduct was brought to the attention of school personnel by John and Jane Doe and/or Susan Doe. The Defendants, however, failed to take immediate and appropriate corrective action.
- 70) By implementing the "eyes on" policy and stigmatizing Susan Doe due to her sexual orientation, rather than removing or otherwise appropriately responding to the perpetrators of the harassment, Defendants discriminated against Susan Doe based on her sexual orientation, stigmatized her, denied her the same educational environment and opportunities as were afforded to other students, denied her the benefits of and participation in the schools' programs and activities, and impeded her academic and social progress and development, based on her sexual orientation.
- 71) On November 30, 2009, John and Jane Doe, as next friend of Susan Doe, filed a complaint with the Maine Human Rights Commission alleging violations of the Maine

Human Rights Act that Defendants subjected Susan Doe to a hostile educational environment on the basis of sexual orientation during her the school years 2007-2008 and 2008-2009.

- 72) On September 20, 2010, the Maine Human Rights Commission dismissed the case pursuant to 5 MRSA §4612 (2).

WHEREFORE, the Plaintiffs' demand judgment declaring that Defendants' practices complained of herein are unlawful as alleged; ordering Defendants to cease and desist from unlawful practices specified herein; ordering Defendants to reasonably compensate Plaintiffs Does for their losses; and awarding Plaintiffs Does civil penal damages, interest, costs, attorneys fees, and such further relief as this Court deems just and proper.

COUNT V

(BY PLAINTIFFS DOES ONLY)

VIOLATION OF TITLE 5 M.R.S.A. § 4592 and 5 M.R.S.A. §4552(10)(D):
DISCRIMINATION IN PUBLIC ACCOMMODATIONS BASED ON HARASSMENT AND
"EYES ON" POLICY

- 73) The Plaintiffs repeat, reaver, and reallege and incorporate by reference each and every allegation contained in paragraphs one through seventy-two as if expressly set forth herein.
- 74) This count is brought pursuant to Title 5 MRSA § 4592(1) prohibiting discrimination based on sexual orientation in public accommodations, as well as 5 MRSA § 4553 (10)(D), prohibiting aiding and abetting another to do any such types of unlawful discrimination, arising from both the harassment of Susan Doe by other students and the implementation by Defendants of an "eyes on" policy as described above.

WHEREFORE, the Plaintiffs' demand judgment declaring that Defendants' practices complained of herein are unlawful as alleged; ordering Defendants to cease and desist from unlawful practices specified herein; ordering Defendants to reasonably compensate Plaintiffs Does for their losses; and awarding Plaintiffs Does civil penal damages, interest, costs, attorneys fees and such further relief as this Court deems just and proper.

Dated: *May 9, 2011*

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Dated: *May 9, 2011*

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Dated: *May 9, 2011*

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