THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION And [redacted], Complainants	)	
v.	)	**DOCKET NO. 09-BPA-00597**
The R.O.S.E. FUND, Inc., Respondent	)	

BRIEF OF COMPLAINANT [redacted] IN SUPPORT OF APPEAL TO THE FULL COMMISSION

Complainant [redacted] appeals to the Full Commission the Decision of the Hearing Officer dated January 31, 2014 (the "Decision") on the grounds that: (1) the determination that Respondent R.O.S.E. Fund, Inc. ("ROSE") is not a place of public accommodation is an error of law; and (2) the Hearing Officer improperly declined to address the merits of the Complainant's argument for discrimination in services under M.G.L. c. 151B, § 4(14) even though that issue had been certified for hearing and this Commission has already interpreted § 4(14) as covering the services at issue here.

INTRODUCTION AND SUMMARY OF LEGAL ERRORS FOR REVIEW

This case involves the exclusion of a man, Complainant [redacted] ("[redacted]"), solely on account of his sex, from a program operated by ROSE that arranges referrals to free surgical treatment for injured survivors of domestic violence. [redacted] was injured so severely by his male partner that he requires facial reconstructive surgery. For individuals in [redacted]'s position, ROSE offers a valuable public service. ROSE is the quintessential place of public accommodation. *See* M.G.L. c. 272, § 92A ("any place . . . which is open to and accepts or solicits the patronage of

the general public"). Like any social services provider, ROSE engages in advertising and outreach to the broader community serving the affected survivor population in order to identify potential service recipients and urge them to take advantage of ROSE's program. Specifically, ROSE "solicits" the broader community by: (1) emailing the listserv of a public agency; (2) urging email recipients to forward the email to others, without any limitations on to whom people should spread the word; (3) encouraging email recipients to reach out to professionals in the field in order to identify and refer survivors to ROSE; and (4) intensively calling domestic violence agencies throughout the state to solicit survivors.

The Decision is based on legal error and should be set aside for the following reasons:

(1) The Hearing Officer improperly relied upon inapposite legal principles, developed exclusively to analyze whether social membership clubs are public accommodations, to determine whether a social services provider is a public accommodation. Specifically, the Hearing Officer made a determination that ROSE is not a place of public accommodation because it has a limited target audience and applicant pool and exercises "genuine selectivity" because it has eligibility criteria for its services (income, type of injury, period of recovery, and geography). Decision at 6-7. However, the principle of "genuine selectivity" refers to selectivity in membership – not services – and is used only in the context of social clubs because those entities do not provide services but instead provide an opportunity to join with like-minded people based on common interests or social compatibility. This is, in fact, demonstrated by the sole case relied upon by the Hearing Officer for the relevance of ROSE's limited applicant pool. That case involved a Harvard University social club that limited membership to undergraduate males who must be personally invited to join by a member who is a friend or relative. Virtually all service providers have a target population and criteria to receive services. Eligibility criteria

for services cannot be treated as legally equivalent to genuine selectivity in membership. *See* Argument § IA, *infra*.

(2) Properly applying the law, the undisputed facts demonstrate that ROSE's activities easily fit within the definition of public accommodation. ROSE's solicitation of clients was not limited to the domestic violence community. Regardless, there is no basis in the language of § 92A or the case law to restrict the definition of public accommodation to only those entities that solicit the "public at large" or provide a good or service needed by every member of society. The Supreme Judicial Court has consistently held that the statutory language is not limited to such "traditional" places and must be construed broadly and inclusively. Given the broad statutory language, an entity "solicits" the "general public" when it offers its goods or services to the community of people who need it. Moreover, even if ROSE had done nothing to "solicit" clients, it would still come within the statutory language because a service provider by its very nature "accepts" the business of others. *See* Argument §§ IB & C, *infra*.

(3) If this Decision and its rationale are affirmed, then a huge swath of public accommodations – ranging from Greater Boston Legal Services to services for veterans and recovering addicts – will be free to discriminate, as all have some eligibility criteria analogous to that of ROSE. This absurd result underscores the inappropriateness of applying social membership club principles to service providers. *See* Argument § ID, *infra*.

(4) It is simply not the case, as the Hearing Officer suggested, that a decision for [redacted] in this case would mean that no philanthropic organization could serve a designated group of people. Decision at 8. The proper analysis in that regard is not to adopt an artificially restrictive definition of place of public accommodation – which is both contrary to the statute's language and leads to the anomalous result that ROSE is also free to discriminate based on race or other

protected statuses. Rather, the Commission's role is to determine whether an entity's exclusion is discrimination solely "on account of" sex or other status, or whether it can be justified based on the nature of the services provided. In this case, there is no difference between providing a medical referral to a man or to a woman; the exclusion of [redacted] was therefore solely because of his status as a man. These cases are fact-specific inquires and entities that can articulate a legitimate reason for differentiation related to the provision of services do not necessarily discriminate solely on account of protected class status. *See* Argument § IE, *infra*.

(5) The Decision was based upon legal error and an abuse of discretion because the Hearing Officer improperly concluded that [redacted]'s claim under M.G.L. c. 151B, § 4(14) for discrimination in the provision of services was not before her. Decision at 9 n.3. The issue was certified for public hearing and the Hearing Officer should have found for [redacted] because it is the precedent of this Commission that the nondiscrimination mandate of § 4(14) applies to all services. *See* Argument § II, *infra*.

STATEMENT OF PRIOR PROCEEDINGS

[redacted] filed a Complaint on March 4, 2009 alleging discrimination in a place of a public accommodation on the basis of sex and sexual orientation in violation of M.G.L. c. 272, §§ 92A and 98. A Motion to Amend the Complaint to add a charge of discrimination in the provision of services on the basis of sex and sexual orientation in violation of M.G.L. c. 151B, § 4(14) was filed on June 9, 2009 and granted on January 11, 2011. On August 31, 2011, the charge of discrimination on the basis of sexual orientation in violation of M.G.L. c. 272, §§ 92A and 98 was dismissed for lack of probable cause, and the charge of sex discrimination in violation of M.G.L. c. 272, §§ 92A and 98 was dismissed for lack of jurisdiction. The charge of

sex and sexual orientation discrimination in the provision of services in violation of M.G.L. c. 151B, § 4(14) was not addressed.

[redacted] appealed both dismissals on November 30, 2011. By Order dated July 10, 2012, the Investigating Commissioner reversed the lack of jurisdiction finding with respect to the claim of sex discrimination in a place of public accommodation and upheld the lack of probable cause finding with respect to sexual orientation discrimination. In that Order, the Investigating Commissioner affirmed the amendment of the Complaint to add the § 4(14) claim. The Commission issued a Certification for Public Hearing Order on January 8, 2013. Although no explicit finding of either probable cause or lack of probable cause was made during the investigative process as to the § 4(14) claim, the Investigating Commissioner attached the January, 2011 Order adding that claim to the Certification Order setting forth the issues for hearing.

On May 10, 2013, the parties filed a Joint Stipulation, which contains the agreed-upon facts for the Hearing Officer's decision and this Appeal. By Decision and Order dated January 31, 2014, the Hearing Officer determined that [redacted] is a member of the protected class (male) and was "denied access to the Rose Fund on the basis of his sex." Decision at 5. The Hearing Officer, however, dismissed the case because she concluded that ROSE was not a place of public accommodation. Decision at 6-8. In addition, the Hearing Officer declined to rule on the services claim because there had been no finding of probable cause. Decision at 9 n.3. [redacted] filed a timely notice of appeal on February 10, 2014.

STATEMENT OF FACTS

The parties have stipulated to the following facts:

A. The ROSE Fund Operates a Medical Referral Service Program That Enables Domestic Violence Survivors to Receive Free or Low-Cost Surgeries.

1. ROSE is a Massachusetts nonprofit corporation. ROSE is "domiciled" in Massachusetts and has an office in Wakefield. Joint Stipulation ("JS") ¶ 2.

2. ROSE operates a referral program that it designed to provide free or low-cost facial reconstructive surgery and other medical services to survivors of domestic violence. JS ¶ 6; Ex. 5, p. 1.

3. The program is known as "The ROSE Medical Network and Reconstructive Surgery Program" (the "Medical Referral Program"). JS, Ex. 5, p. 1.

4. ROSE states that the "range of medical services *we* provide" include: "facial plastic and reconstructive surgeries including scar revisions . . . and rhinoplasty (i.e., nose job)"; "[m]edical services and surgeries associated with the head, neck, ears, nose and throat . . . to include nasal, larynx/voice box, breathing/respiratory and hearing issues"; "[d]ental and orthodontic issues"; and "[o]ral/[m]axillofacial procedures associated with injuries of the jaw." JS, Ex. 5, p. 1 (emphasis added).

5. In the Medical Referral Program, ROSE partners with leading hospitals and physicians nationwide. ROSE makes agreements with them to provide domestic violence survivors with medical and dental reconstructive procedures for a substantially reduced fee or even for free. JS ¶ 6; Ex. 2, p. 1.

6. An example of the type of medical provider that ROSE has made such arrangements with is the Massachusetts Eye and Ear Infirmary. JS, Ex. 3, p. 1.

7. Patients who seek access to medical services through the Medical Referral Program submit an application to ROSE. ROSE then matches individuals with a participating medical provider and establishes the referral for medical care. JS ¶ 6; Ex. 2.

B. ROSE Advertises Its Services and Reaches Out to the Public to Solicit Candidates for the Medical Referral Program.

8. On or about November 4, 2008, ROSE "advertised" via email that it was offering free facial reconstruction surgery to survivors of domestic violence. JS ¶ 8; Ex. 3.

9. The email was sent by ROSE's staffperson and agent John Brisbin to the listserv of a public agency, the Massachusetts Office of Victim Assistance. JS, Ex. 3, p. 1. It indicated that recipients should "[f]eel free to forward this [email] to interested others." JS, Ex. 3, p. 2.

10. Mr. Brisbin indicated in the email that "[w]e've got surgery slots open right now at Mass. Eye and Ear Infirmary and are challenging ourselves to fill them in the next sixty days." JS, Ex. 3, p. 1.

11. Mr. Brisbin indicated that he had been calling three domestic violence agencies every day in order to find survivors who can utilize the services of the Medical Referral Program. JS, Ex. 3, p. 1. He characterized this approach as "partly successful." JS, Ex. 3, p. 1.

12. Mr. Brisbin also sought "advice" in order to "find professionals in the field who can get word to these survivors" about ROSE's Medical Referral Program. JS, Ex. 3, p. 1.

13. Mr. Brisbin suggested that email recipients should reach out to therapists of survivors to recruit individuals for the Medical Referral Program. JS, Ex. 3, p. 1.

14. Mr. Brisbin indicated that the goal of his telephone calls to domestic violence agencies and outreach to survivors' therapists is "to increase our success rate dramatically." JS, Ex. 3, p. 1.

15. In June 2009, Curt Rogers, Director of the Gay Men's Domestic Violence Project, received an email from ROSE with the subject line: "Free Medical Services Available to Women Survivors of DV." JS ¶ 12; Ex. 5, p. 1.

16. The June 2009 emails state that the "ROSE Medical Network and Reconstructive Surgery Program has expanded dramatically in 2009" and asks: "Do you know of a woman who has been injured or disfigured as a result of domestic violence that would be a worthy recipient of these free medical services??" JS ¶ 12; Ex. 5, pp. 1-2.

17. The June 2009 email also explains that "[t]here are only a few eligibility criteria" and lists them as: 1) "[t]he injury must be a direct result of a DV incident"; (2) "[w]e require proof of financial need"; and (3) "[t]he applicant must be in a safe place." JS, Ex. 5, p. 2.

18. After stating the Medical Referral Program's criteria, the email urges in bold capital letters: "APPLY NOW!" JS, Ex. 5, p. 2.

C. ROSE Excluded [redacted] From Its Medical Services Program Solely Because He Is a Male Survivor of Domestic Violence.

19. [redacted], who is forty-four years old, is a survivor of domestic violence. JS ¶ 1.

20. Mr. [redacted] was injured so severely by his male partner that he requires facial reconstructive surgery. JS ¶¶ 1, 9.

21. ROSE excludes male survivors of domestic violence from the Medical Referral Program, even if they have suffered severe facial injuries as a result of domestic violence and are in need of facial reconstructive surgery. JS ¶ 10.

22. In November 2008, the same month that ROSE's John Brisbin sent an email aggressively seeking more candidates for ROSE's Medical Referral Program, Stacie Nichols, a domestic violence advocate, contacted ROSE on behalf of Mr. [redacted] who was seeking facial reconstructive surgery. JS ¶ 9; Ex. 4.

23. In direct response to the inquiry about facial reconstructive surgery for Mr. [redacted], Mr. Brisbin informed Ms. Nichols that ROSE's Medical Referral Program was only for female survivors of domestic violence. JS ¶ 10.

24. Because Mr. [redacted]'s advocate, Ms. Nichols, was told that the Medical Referral Program was for women only, Mr. [redacted] did not apply for facial reconstructive surgery. JS ¶ 11.

25. Mr. [redacted] has not received facial reconstructive surgery. JS ¶ 12.

ARGUMENT[1]

I. ROSE IS A PLACE OF PUBLIC ACCOMMODATION AND IT DISCRIMINATED AGAINST [redacted] BASED ON SEX.

The Massachusetts Public Accommodation statute provides in relevant part:

> Whoever makes *any distinction, discrimination or restriction* on account of race, color, religious creed, national origin, sex, sexual orientation . . . deafness, blindness or any physical or mental disability or ancestry *relative to the admission of any person to, or his treatment in* any place of public accommodation, resort or amusement, as defined in section ninety-two A, or *whoever aids or incites such distinction, discrimination or restriction* shall be [subject to liability].

M.G.L. c. 272, § 98 (emphasis added). In addition, the statute declares:

> All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement subject only to the conditions and limitations established by law and applicable to all persons. This right is recognized and declared to be a civil right.

M.G.L. c. 272, § 98.

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[1] The Commission reviews the Decision for errors of law and to determine whether it was arbitrary and capricious or an abuse of discretion. 804 C.M.R. 1.23(1)(h)(3) & (6). As to findings on disputed facts, the Full Commission defers to the determinations of the Hearing Officer and reviews "whether the factual findings under review were supported by substantial evidence." *Stropnicky v. Nathanson,* 21 MDLR 149, 149 (1999); 804 C.M.R. 1.23(5). Because this case was submitted on agreed-upon facts, the Commission's review here is plenary.

The definition of a place of public accommodation includes "any place . . . which is open to and accepts or solicits the patronage of the general public, and without limiting the generality of this definition [sets forth an illustrative list of public accommodations]." M.G.L. c. 272, § 92A.[2] In light of this statutory language, the Hearing Officer committed legal error in determining that ROSE is not a place of public accommodation.

A. The Hearing Officer Committed Legal Error by Relying on Inapposite Cases That Are Relevant Only to Social Membership Clubs.

The Hearing Officer erroneously concluded that ROSE is a private entity because it has a limited applicant pool and target audience and exercises "genuine selectivity" because it has eligibility criteria for services. Decision at 6-7. This analysis, applicable to social membership clubs, is legally inappropriate for a service provider like ROSE.

The sole case which the Hearing Officer cites regarding a limited applicant pool, *Schkolnick v. The Fly Club*, 12 MDLR 1185 (1990), is wholly inapposite and has no relevance to this case. In *Schkolnick*, a woman alleged that she was denied admission to the Fly Club, an organization established as a "social club" at Harvard College that is "open only to invited male undergraduate students at Harvard University." *Schkolnick*, 12 MDLR at 1191. The club selected new members through a "five week process known as 'punching.'" *Id.* To be eligible to "punch," the "individual must be a male member of the sophomore, junior or senior class at Harvard College and must be invited to 'punch' by an undergraduate member of the club." *Id.* The Commission found that "[u]sually, the person so invited is a friend of the undergraduate member; occasionally, a graduate member of the club may ask that a relative be included." *Id.* at

[2] The Supreme Judicial Court has ruled that the illustrative examples in the statute are "nonexclusive" and "'do not restrict the preceding general statutory language.'" *Currier v. Nat'l Bd. of Med. Examiners*, 462 Mass. 1, 18 (2012) (quoting *Local Fin. Co. v. Mass. Comm'n Against Discrimination*, 355 Mass. 10, 13 (1968)).

1192. There is no advertisement of "punching," and "candidates for punching are invited personally to be considered." *Id.* Only about 100 persons within the group of approximately 2,900 upperclassmen are invited to "punch" each year. *Id.* The Commission noted that "the Fly Club's limited applicant pool" was a relevant factor in determining that it was a private club and not a place of public accommodation. *Id.* In contrast, ROSE, a medical service provider, is not a membership club and hardly limits solicitation for or participation in its services to a select few friends or relatives who are personally invited to access ROSE's services. Moreover, there is no doubt that entities with a limited target audience or applicant pool have been found to be places of public accommodation. *See, e.g., Currier v. Nat'l Bd. of Med. Examiners*, 462 Mass. 1 (2012) (medical graduates who are eligible to sit for medical boards); *Concord Rod & Gun Club, Inc. v. Mass. Comm'n Against Discrimination*, 402 Mass. 716 (1988) (people over 21 within a limited geographical area who meet requirements for a sporting license).

The Hearing Officer also improperly concluded that ROSE is a private entity because it exercises "genuine selectivity" by adhering to an "array of eligibility criteria involving economic status, type of injury, a period of recovery and residency restrictions." Decision at 7. This analysis is patently flawed. The phrase "genuine selectivity" refers in the case law to selectivity in *membership*. *See, e.g., Concord Rod & Gun Club*, 402 Mass. at 721 (finding the "determinative factor" that club is open to the public the "total absence of genuine selectivity in membership"); *Schkolnick*, 12 MDLR at 1189 (setting out multi-factored test to determine if membership is open to the general public, including "degree of selectiveness in membership requirements"); *Soltys v. Wellesley Country Club*, 15 Mass. L. Rep. 650, 653 (2002) ("Absent a genuine selectivity in choosing members, even a private club can fall within the ambit of the

Public Accommodations Act") (quoting *Haskins v. President & Fellows of Harvard College*, 13 Mass. L. Rep. 691 (2001)).

Eligibility criteria for services cannot be treated as legally equivalent to genuine selectivity in membership. The purpose of the genuine selectivity factor is to help determine whether the members of a club are truly choosing the particular individuals they want to socialize or affiliate with, or whether the "professed private character is a subterfuge for discrimination." *Schkolnick*, 12 MDLR at 1189 (citing *Oldham v. Concord Rod & Gun Club*, 7 MDLR 1003 (1984)). The legal concepts of genuine selectivity or limited applicant pool are wholly inapplicable to a service organization; virtually all service providers serve a target population and have eligibility criteria for services. The genuine selectivity standard has been used exclusively in the context of membership clubs because clubs do not exist to provide services to the public. Rather, they exist to give members the opportunity to socialize and engage with like-minded people. *See, e.g., Soltys*, 15 Mass. L. Rep. at 654 (finding selectivity where membership application was not available to the public, must be obtained from a member, and applicant must be known to or proposed by three members); *Concord Rod & Gun Club*, 402 Mass. at 719 (fact that club had no set requirement of length of time that a member is required to know a potential applicant in order to be sponsored for membership and no policy on degree of familiarity with prospective member weighed against genuine selectivity); *Murray v. Framingham Country Club*, 19 Mass. L. Rep. 592, 594 (2005) (factual disputes about genuine selectivity where application must be signed by two members but no requirement that members know applicant).

ROSE's medical services program is not choosing members with whom it can associate in an ongoing relationship for the purpose of jointly carrying on agreed-upon activities. In fact,

there is no indication that ROSE or anyone affiliated with ROSE has any further contact with candidates after it makes the referral for healthcare services.

B. ROSE's Outreach Is Not Limited to the Domestic Violence Community, But in any Event, the Statutory Language Easily Encompasses Service Providers That Reach Out More Specifically to the Sector of the General Public That They Serve.

The undisputed facts demonstrate that ROSE's outreach for clients was not limited to the domestic violence community. It engaged in intensive outreach efforts and its emails exhorted recipients to "feel free to forward this [solicitation] to interested others." *See* Statement of Facts, *supra*, ¶ 9. ROSE did not indicate any restriction or limitation regarding how widely others should spread the word.[3] This is plainly solicitation of the general public. In fact, the Hearing Officer noted that ROSE maintains a website. Decision at 6. Having a website that is not "members only" is the contemporary equivalent of hanging out one's shingle or advertising in the Yellow Pages. It is a clear indicator of ROSE's public character.

But even accepting the Hearing Officer's assumption that ROSE limited its outreach to the domestic violence community, there is no basis in the statutory language or the case law for the Hearing Officer's determination that the term "general public" is limited to what she characterizes as "the public at large," presumably meaning that every member of society could take advantage of what the entity has to offer. Decision at 6. No case supports such a proposition and, in fact, *Currier* leads to the opposite conclusion. In *Currier* (discussed more fully, *infra*), there was no indication that the National Board of Medical Examiners ("NBME") reached out to the entirety of the general public – and, in fact, that would make no sense – as opposed to those medical school graduates who met the eligibility criteria for the medical board examination. Nor

[3] It is worth noting, as ROSE clearly understood, that anyone in the "public at large" can be a domestic violence survivor and sustain facial injuries.

is there any language in § 92A that would exempt sellers of goods or services that have eligibility criteria.

The Hearing Officer's restriction of the statutory language is at odds with the mandate of the Supreme Judicial Court that the language of M.G.L. c. 272, § 92A be given a "broad, inclusive interpretation" to achieve its remedial goal of eliminating and preventing discrimination. *Currier*, 462 Mass. at 18 (quoting *Local Fin. Co. v. Mass. Comn'n Against Discrimination*, 355 Mass. 10, 14 (1968)). The Court, in fact, noted that the Legislature has "materially broadened" the definition of public accommodation over time. *Id.* It has emphasized that the definition is not limited to places of public accommodation that traditionally serve the "public at large," such as hotels and restaurants. *See Concord Rod & Gun Club,* 402 Mass. at 721 (finding a membership club to be a place of public accommodation even though "a membership organization is clearly different from traditional places of public accommodation like hotels and restaurants . . . in view of the broad remedial purpose of the anti-discrimination statute and the appropriateness of giving the statute a 'broad, inclusive interpretation'. . . .").

In *Currier*, for example, the Court opted for a broad, inclusive interpretation of the word "place." In that case, NBME was sued after it denied a request for extra break time to express breast milk during the medical board examination. *Currier*, 426 Mass. at 3. The NBME had no physical presence in Massachusetts, but was the entity responsible for administering the medical board examination. *Id.* at 19. The NBME claimed that it was not a "place" within the meaning of M.G.L. c. 272, § 92A because it did not maintain a physical presence in Massachusetts at a particular location. *Id.* at 18.

Construing the word "place" to mean physical place is certainly a plausible interpretation. But it is a narrow, restrictive interpretation. Instead, in light of the remedial nature of the statute,

the Court adopted this Commission's broad view of the term and concluded that an individual need not enter a physical structure in order to receive services from a "place" under M.G.L. c. 272, § 92A. The Court explained:

> [T]he "equal accommodations, advantages, facilities, and privileges" afforded by the statute are not restricted to a person's entrance into a physical structure. *See Samartin v. Metropolitan Life Ins. Co.*, 27 Mass. Discrimination Law Rep. 210, 213-214 (2005). Rather, the statutory protections extend to situations where services are provided that do not require a person to enter a physical structure, requiring equal access to the advantages and privileges of services and service providers.

Currier, 462 Mass. at 19.

The Court specifically endorsed this Commission's prior interpretation of § 92A in *Samartin*, which involved a challenge to the contents of a long-term disability insurance policy. *Currier,* 462 Mass. at 19. Relying on *Samartin*'s rationale, the Court explained that, "[t]imes are such today where business is increasingly conducted through the Internet or over telephones. To limit the statute's reach to physical accessibility would be contrary to the goals of the statute and 'would allow any number of discriminatory actions that the statute prohibits.'" *Currier*, 462 Mass. at 19 (quoting *Samartin*, 27 MDLR at 214).[4]

Likewise, here, the meaning of "general public" must be given a broad, inclusive interpretation. That directive removes any doubt that the term "general public" cannot be limited to those traditional public accommodations that serve the "public at large" and provide

[4] In *Currier*, the Court also endorsed the rationale of *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's of New England*, 37 F.3d 12, 20 (1st Cir. 1994), cited in *Samartin*, 27 MDLR at 214. In *Carparts*, a self-funded medical reimbursement plan which had capped AIDS-related benefits was sued under the public accommodation provisions of the Americans with Disabilities Act ("ADA"). *Carparts*, 37 F.3d at 14. The U.S. Court of Appeals for the First Circuit found that the contents of the plan were subject to the ADA's public accommodation provisions and reversed the district court's interpretation that the term "public accommodation" was limited to "actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein." *Id.* at 18 (internal quotations omitted).

something generally needed by everyone, such as food or lodging. The statute covers providers of goods and services. When an entity has a product or service that only meets the needs of a portion of the community, it, of course, targets its solicitation towards the relevant population. When an entity reaches out to some sector of the general public to promote its services, it is reaching out to the "general public" as that term is used in § 92A.[5]

It is for this reason that a business that sells prosthetic limbs and only reaches out to those who need one cannot deny limbs to people based on race, sex, sexual orientation, or any other protected classes. Nor can a restaurant that only advertises to the gay community discriminate.

C. The Facts Demonstrate that ROSE Easily Fits Within the Definition of a Place of Public Accommodation.

Within the proper legal framework, the facts before this Commission demonstrate that ROSE is a place of public accommodation.

1. ROSE "Solicits" the Patronage of the General Public.

ROSE is open for business and it has put out the message to the community: spread the word about our services and bring us clients. This is more than sufficient to bring it within the broad statutory language. Specifically, ROSE advertises and engages in intensive efforts to solicit clients from the broad community that serves its affected population. First, ROSE's November 4, 2008 email to the listserv of a public agency can only be read as a broad solicitation to the domestic violence community and beyond, aggressively seeking additional

[5] The Hearing Officer acknowledged that some places are "deemed places of public accommodation notwithstanding the fact that they provide services to a subset of the general population." Decision at 6. She then asserts that "some limitations on a target audience do not impact an entity's public status where the organization's initial outreach efforts are generic rather than restrictive in nature." Decision at 7. There are no grounds for this conclusion in either the language of the statute or the text or analysis in the cases cited by the Hearing Officer. Moreover, it is far from clear what constitutes "generic" outreach and how that would be proved. It simply cannot make sense, for example, that if ROSE had placed a single poster at an MBTA station, that would transform it from a private entity into a place of public accommodation.

clients for its services. There is clear evidence that ROSE solicited and was accepting the patronage of the general public by its acknowledgment of the email as an "advertisement"; the indication that its agent Mr. Brisbin had been calling three domestic violence agencies every day seeking applicants; and its strategy to use therapists as a mode of outreach to increase its volume of candidates. In fact, Mr. Brisbin directed that recipients of the email solicitation should "[f]eel free to forward [it] to others". *See* Statement of Facts, *supra*, ¶ 9. He placed no limits on to whom the email could be forwarded. He stated that the goal of the outreach was to dramatically increase the program's success rate. *See* Statement of Facts, *supra*, ¶¶ 8-14.

There is additional evidence that ROSE similarly solicited the public for its Medical Referral Program in June 2009. ROSE sent emails highlighting its "Free Medical Services" and asking: "Do you know of a woman who has been injured or disfigured as a result of domestic violence that would be worthy of these free medical services?" JS, Ex. 5, p. 1. The solicitation included the exhortation in large bold letters: "APPLY NOW!" *See* Statement of Facts, *supra*, ¶¶ 15-18.

2. ROSE "Accepts" the Patronage of the General Public.

Even if ROSE undertook no efforts to "solicit" clients, it "accepts" the patronage of the general public. ROSE is open for business, and its purpose is to provide medical referrals to domestic violence survivors. Because its goal is to serve clients, it necessarily and by definition "accepts" the patronage of the general public. In fact, all service providers "accept" business from the public; that is their very reason for existing.

D. The Hearing Officer's Rationale Would Permit Huge Swaths of Public Accommodations to Discriminate Against Those Intended to Be Protected Within §§ 92A and 98.

If an entity's limited applicant pool or eligibility criteria were improperly applied to service providers, then huge numbers of them would be free to discriminate. Like ROSE, virtually all social service agencies have a target population – a subset of the "public at large" – and have criteria for services, including factors based on type of service they provide, income, geography, and other prerequisites to measure readiness for the service. If the Hearing Officer's rationale regarding eligibility criteria were upheld by this Commission, innumerable service organizations which clearly fall within the definition of public accommodation would be transformed into private entities free to exclude based upon race, sex, sexual orientation, or any other protected class. For example:

1. **Greater Boston Legal Services** provides free legal assistance to certain low-income people. To be eligible clients must have a noncriminal issue, meet a residency requirement (City of Boston and 31 neighboring cities and towns), and meet income criteria. Greater Boston Legal Services, http://www.gbls.org/ (last visited Mar. 24, 2014).

2. **Mentor Match** is a mentoring program that has served youth with disabilities since 1985. Its goal is to help young people with disabilities meet their full potential for personal development and independence by matching them with a caring adult mentor. To be eligible, youth must have a disability, be between 6 and 24 years old, and live within the MA-128 belt surrounding Boston. Partners for Youth with Disabilities, http://www.pyd.org/mentor-match.php (last visited Mar. 24, 2014).

3. **The Supportive Services for Veterans Families program of Volunteers of America, Massachusetts** assists veterans and veteran families at risk of losing their current residence or in need of a permanent residence. Eligibility criteria are:

- Must be a single veteran or a family in which veteran is head of household;
- Served in active military and discharged under condition other than dishonorable;
- Live in the Greater Boston area including Suffolk, Norfolk and Plymouth Counties;
- Meet income criteria;

- Be either currently homeless, residing in transitional housing or staying in a shelter and scheduled to become a resident of permanent housing within the next 90 days; or
- Left permanent housing within the last 90 days in response to an emergency situation.

Volunteers of America Massachusetts, https://www.voamass.org/our-services/veterans/supportive-services-for-veterans-families (last visited Mar. 24, 2014).

4. **Child and Family Community Outreach Services (Gandara CSA)** provides several types of bilingual, bicultural services to youth with serious emotional disturbances and their families. To be eligible for services, youth must be under 21 years of age, be enrolled in MassHealth Common or Standard, and meet a diagnosis and needs criteria to establish a serious emotional disturbance. Gandara Center, http://gandaracenter.org/?page_id=38 (last visited Mar. 24, 2014).

5. **ACCESS Transitional Program** is a transition program for clean and sober, homeless men and women with a history of substance use disorders. Clients enter ACCESS after completing medical detoxification. The program staff provides stabilization services at a critical time in the early recovery process. ACCESS's clients are:

- Homeless men and women over the age of 18 with a history of substance abuse or alcoholism;
- Clean and sober for a minimum of three days;
- Able to stay up to six months, as long as they are clean and sober.

CASPAR, http://www.casparinc.org/programs/support-services/access-transitional-program/ (last visited Mar. 24, 2014).

If serving a specific target population or having eligibility criteria rendered a service organization nonpublic, the nondiscrimination mandate of the public accommodations law would be significantly undermined in contravention of the Legislature's intent and the well settled law of the Courts. All of these organizations – and innumerable others – would be free to exclude someone otherwise eligible for their services because of the person's race, sex, sexual orientation, disability or other protected status. This Commission should reject such a harmful and unfounded result.

E. A Determination That ROSE Is a Place of Public Accommodation and Discriminated Against Mr. [redacted] Will Not Prevent Organizations from Serving Specifically Designated Groups.

The Hearing Officer stated her concern that a ruling for [redacted] in this case would preclude the work of "innumerable private charities and philanthropic organizations that limit their mission and benefits to specifically-designated groups." Decision at 8. It is simply not the case that service organizations cannot provide services to a specific population, including based on sex. The Hearing Officer's concern conflated two distinct aspects of the prima facie case: 1) whether an entity is a place of public accommodation; and 2) whether the entity has discriminated against an individual "on account of" protected class status – in this case, sex.

In this case, ROSE is a place of public accommodation, *and* it has discriminated "on account of" sex because there is no difference between providing a medical referral to a man and providing it to a woman. Both men and women are similarly situated as survivors of domestic violence in need of a referral for reconstructive surgery. ROSE has not – and cannot – articulate why the wholesale exclusion of men is related to the service it is providing. As such, its exclusion of Mr. [redacted] was based solely on his status as a male.

In other cases, an entity that is a place of public accommodation may be able to demonstrate that it is not discriminating "on account of" sex because providing the service to a man is not the same as providing the service to a woman. For example, it is possible that an agency which provides support groups for female survivors of sexual violence could demonstrate that male and female survivors of sexual violence have different emotional and social experiences such that the services required are not the same. Similarly, an agency that provides supportive services to women breast cancer survivors may be able to articulate why the needs of women who have undergone a mastectomy and have unique concerns navigating personal and

social relationships create a legitimate reason that services for women are different than those for male breast cancer survivors. In those situations, however, the agency would have articulated a legitimate difference in services such that it would not be discriminating solely on account of sex. The same would be true for distinctions based on other protected classes.[6]

In any event, these are fact-specific questions based on the circumstances of each case, none of which are raised here. A determination that ROSE discriminated against [redacted] "on account of sex" here will not lead inexorably to the conclusion that no entity can provide services to a specific population, including a protected class.

In this case, by ruling that ROSE is not a place of public accommodation the Hearing Officer has created the anomalous result that ROSE can now discriminate not only against men, but also on the basis of race, national origin, religion, sex, sexual orientation, and disability as well. The proper analysis of these matters is not to adopt an artificially restrictive and unfounded definition of public accommodation, but to inquire whether the nature of an agency's services justifies one particular distinction.

II. ROSE IS LIABLE UNDER M.G.L. c. 151B, § 4(14) BECAUSE IT DISCRIMINATED AGAINST MR. [redacted] IN THE PROVISION OF SERVICES.

As a threshold matter, the Hearing Officer erred as a matter of law and abused her discretion by declining to rule on [redacted]'s claim under M.G.L. c. 151B, § 4(14). Decision at 9 n.3 (stating that Investigating Commissioner did not find probable cause). The Investigating Commissioner, however, affirmed the allowance of the Amended Complaint containing the § 4(14) claim and attached the Order granting that amendment to the Certification for Public

[6] While there are certainly agencies that can articulate legitimate nonpretextual differences in service needs, it is also worth noting that many agencies, recognizing that exclusion is unfounded and illegal, may focus their mission on a particular population, but would not turn away others.

Hearing Order, indicating that it was within the scope of the hearing. Regardless, [redacted] is entitled to a ruling on that claim. Rather than remand to the Individual Commissioner for a determination, it is proper for the Full Commission to decide this question because it raises a pure issue of law in a matter submitted upon stipulated facts. It would be inefficient and unduly cumbersome to remand it for a formal determination of probable cause. The Full Commission should decide the issue, which only requires the straightforward application of its existing precedent.

Turning to the statute, M.G.L. c. 151B, § 4(14) provides that it shall be unlawful:

> For *any person furnishing credit or services* to deny or terminate such credit or services or to adversely affect an individual's credit standing because of such individual's sex, gender identity, marital status, age or sexual orientation ... provided that in the case of age the following shall not be unlawful practices:
>
> (1) an inquiry of age for the purpose of determining a pertinent element of creditworthiness;
>
> (2) the use of empirically derived credit systems which consider age, provided such systems are based on demonstrably and statistically sound data and provided further that such systems do not assign a negative factor or score to any applicant who has reached age sixty-two;
>
> (3) the offering of credit life insurance or credit disability insurance, in conjunction with any credit or services, to a limited age group;
>
> (4) the denial of any credit or services to a person who has not attained the age of majority;
>
> (5) the denial of any credit or services the duration of which exceeds the life expectancy of the applicant as determined by the most recent Individual Annuity Mortality Table; or
>
> (6) the offering of more favorable credit terms to students, to persons aged eighteen to twenty-one, or to persons who have reached the age of sixty-two.

M.G.L. c. 151B, § 4(14) (emphasis added). There is no basis for any argument ROSE may make that the word "services" is limited only to credit-related services. Such a narrow interpretation is contrary to the plain meaning of the statute and the Legislature's directive that

Chapter 151B "be construed liberally for the accomplishment of its purposes." M.G.L. c. 151B, § 9.

First, the statutory language is the most important source for discerning the Legislature's intent. *See Brennan v. Governor,* 405 Mass. 390, 399 (1989) ("Statutory language is the principal source of insight into legislative intent.") The Legislature chose the broad language, "credit or services." If the statute were limited solely to credit, there would have been no need to include the word "services." *See Commonwealth v. Disler,* 451 Mass. 216, 227 (2008) (declining "to adopt an interpretation that ignores words and phrases of the statute" because "[e]very word in a statute should be given meaning.") (quoting *In re Yankee Milk, Inc.,* 372 Mass. 353, 358 (1977)) (internal quotation marks omitted). Moreover, cannons of statutory construction provide that terms connected in the disjunctive be given separate meanings. *See, e.g., Garcia v. United States,* 469 U.S. 70, 73 (1984); *Eastern Mass. Street Ry. Co. v. Mass. Bay Transp. Auth.,* 350 Mass. 340, 343 (1966).

Second, the Commission has interpreted § 4(14) as including all services rather than solely credit-related services. *See Stropnicky v. Nathanson,* 21 MDLR 149 (1999). The Commission declared: "The statutory language is clear that discrimination based on sex in the provision of 'services' is prohibited. We have no doubt that a lawyer provides 'services' to a client within the meaning of the statute. This language, therefore, makes it unlawful for a lawyer to deny services to a prospective client based on the client's sex."[7] There is no basis for the Commission to depart from its reasoned construction of § 4(14). There is no contrary appellate ruling known to the Complainant, and the Commission's construction is entitled to

[7] *See also Franklin v. Order of United Commercial Travelers of Am.,* 590 F. Supp. 255, 257 (D. Mass. 1984) (applying § 4(14) to insurance and stating that "the wording of this statute, which forbids discrimination in the furnishing of credit and services, is quite broad.")

substantial deference. *See Currier,* 462 Mass. at 18, 19 (Because the Legislature has "essentially delegated to the commission the authority in the first instance to interpret the statute and determine its scope," the Supreme Judicial Court was "guided in [its] interpretation of the statute by the construction afforded by the commission.") (citing *Bynes v. School Comm. Of Boston,* 411 Mass. 264, 269 (1991)) (finding the Commission's interpretation of its governing statute entitled to substantial deference).

Third, any assertion that the phrase "credit or services" in the first sentence of § 4(14) is limited by the context of subsections (1) - (6) is undercut by the history of the adoption of § 4(14). Section 14 was added to the General Laws by Chapter 168 of the Acts of 1973. It read in its entirety: "For any person furnishing credit or services to deny or terminate such credit or services or to adversely affect an individual's credit standing because of such individual's sex or marital status." 1973 Mass. Acts c. 168. Subsections (1) - (6) were not present in the original language of § 14 and therefore cannot possibly limit the Legislature's intent in adopting the broad language "credit or services."[8]

[8] Two Superior Court decisions have reached different conclusions on this issue. In *Green v. Blue Cross of Massachusetts, Inc.,* 8 MDLR 1257, 1261-1262 (1986), the court ruled that it was not "persuaded that the proximity of the words 'credit' and 'services' reflects a legislative intent that the former restrict the meaning of the latter. The two words also appear in subsection 10 [of M.G.L. c. 151B, § 4] where reference is made to 'any person furnishing credit, services or renting accommodations' and it cannot seriously be suggested that 'credit' somehow qualifies the construction to be given 'renting accommodations.'" In *Nathanson v. Commonwealth,* 16 Mass L. Rep. 761 (2003), a Superior Court Judge concluded in one sentence that the term "services" is limited to "credit services" because "portions of a statute cannot be read out of context." *See Nathanson,* 16 Mass. L. Rep. at 763 (2003) (citation omitted). Given the *Nathanson* Superior Court Decision's rationale, it appears that the parties had not brought to the court's attention the timing of the additions of subsections (1) - (6). In any event, Superior Court decisions are not binding on the Commission and are not grounds to depart from the Commission's interpretation.

Because the facts show that ROSE excluded [redacted] from services – its Medical Referral Program – on account of his sex, ROSE has violated M.G.L. c. 151B, § 4(14).

CONCLUSION AND REQUESTED REMEDY

Complainant [redacted] requests that the Commission set aside the Decision of the Hearing Officer and rule in favor of him on his claims under M.G.L. c. 272, §§ 92A and 98 and M.G.L. c. 151B, § 4(14). [redacted] requests that the Commission issue an order that Respondent shall cease and desist from engaging in any discriminatory conduct on the basis of sex in violation of M.G.L. c. 272, §§ 92A and 98 and M.G.L. c. 151B, § 4(14), including but not limited to failing or refusing to include men in the ROSE Medical Network and Reconstructive Surgery Program on the same terms as women.

Respectfully submitted,

Wayne A. Thomas Jr.
GLBTQ Domestic Violence Project
989 Commonwealth Ave.
Boston, MA 02215
(617) 779-2130
Counsel for Complainant [redacted]

Bennett H. Klein
Jennifer Levi
Gay & Lesbian Advocates & Defenders
30 Winter Place Suites 800
Boston, MA 02108
(617) 426-1250
Counsel for Complainant [redacted]

DATED: March 25, 2014

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Brief of Complainant [redacted] In Support Of Appeal to the Full Commission was served upon counsel of record for each party by first class mail, postage-prepaid on March 25, 2013:

Margaret Coughlin LePage, Esq.
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
(207) 791-1382
mlepage@pierceatwood.com

DATED: March 25, 2013

Bennett H. Klein