MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Law Docket No. PEN-12-582

JOHN DOE, ET AL.
Plaintiff-Appellant

v.

KELLY CLENCHY, ET AL.
Defendants-Appellees

ON APPEAL FROM THE PENOBSCOT COUNTY SUPERIOR COURT

BRIEF OF APPELLANT MAINE HUMAN RIGHTS COMMISSION

John P. Gause, Esq., Bar No. 8192
Commission Counsel
Maine Human Rights Commission
51 State House Station
Augusta, ME 04333-0051
(207) 624-6290

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Constitutional Provisions

Books

Law Review Articles

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellant, the Maine Human Rights Commission ("the Commission"), is the state agency that administers the Maine Human Rights Act, 5 M.R.S. §§ 4551-4634 (2012) ("MHRA"). *See Watt v. Unifirst Corporation*, 2009 ME 47, ¶ 26, 969 A.2d 897, 903-904. After a finding that reasonable grounds to believe that unlawful discrimination has occurred, and after conciliation efforts have failed, the MHRA authorizes the Commission to file a complaint in the Superior Court for the use of the victim of alleged discrimination. 5 M.R.S. §§ 4612(4)(A), 4613(1) (2012). The Commission brought this action for the use of John Doe and Jane Doe, as parents and next friend of Susan Doe, after finding reasonable grounds and after conciliation failed. (A. 60 ¶ 2, 63-64 ¶¶ 24-28; Answer to Amended Complaint ¶¶ 24-28).

Specifically, on June 29, 2009, the Commission unanimously found reasonable grounds to believe that the predecessors in interest to Appellee, Regional School Unit 26 ("RSU 26"),[1] had engaged in unlawful education and public accommodations discrimination because of sexual orientation when Susan Doe was denied access to common bathrooms that are consistent with her gender identity during Susan's fifth grade year at the Asa Adams Elementary School ("Asa Adams School") in Orono, Maine. (A. 63 ¶ 24; Answer to Amended Complaint ¶ 24.) On September 20, 2010, the Commission again unanimously found reasonable grounds to believe RSU 26, individually and through its predecessors, 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's sexual orientation when she was denied access to the

[1] By Joint Stipulation of Dismissal and Assumption of Liability all claims against former defendants Kelly Clenchy, Orono School Department, and School Union 87 were dismissed, and RSU 26 assumed liability for any conduct attributable to them that is found to violate the MHRA in this action. (A. 11). For ease of reference, all present and former defendants will be referred to herein as RSU 26.

common bathrooms that were consistent with her gender identity at the Orono Middle School ("Middle School") in Orono, Maine. (A. 64 ¶ 26; Answer to Amended Complaint ¶ 26).

The Commission has asserted claims in Counts I & II of the Amended Complaint. Count I alleges that RSU 26 engaged in unlawful education discrimination in violation of the MHRA when it denied Susan Doe access to the girls' shared bathrooms and assigned her to a single-use staff bathroom in the Asa Adams School and a refurbished single-use bathroom in the Middle School. Count II alleges that the same conduct constituted unlawful public accommodations discrimination in violation of the MHRA. Both Counts also allege that RSU 26 and its predecessors in interest engaged in unlawful discrimination under the MHRA by aiding and abetting one another in engaging in such unlawful discrimination.

The Commission adopts by reference the facts and procedural history set forth in the Brief of Appellants John and Jane Doe.

The Commission filed a timely Notice of Appeal.

STATEMENT OF ISSUES ON APPEAL

1) Whether the Superior Court erred by entering summary judgment for RSU 26 on Counts I & II of the Amended Complaint and failing to enter summary judgment for the Commission on Counts I & II pursuant to Maine Rule of Civil Procedure 56(c).
2) Whether the Superior Court erred by dismissing, pursuant to Maine Rule of Civil Procedure 12(b)(6), that portion of Count II of the original complaint, which alleged that RSU 26 failed to provide Susan Doe a reasonable accommodation for her gender identity by allowing her access to the girls' shared bathrooms.

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

RSU 26 violated the MHRA by refusing Susan Doe access to shared bathrooms consistent with her gender identity and assigning her to separate bathrooms. The MHRA prohibits "discrimination," which is expressly defined to include segregation, on the basis of "sexual orientation," defined to include "gender identity." There is no dispute that RSU 26 assigned Susan to segregated bathrooms because of her transgender gender identity. The MHRA also prohibits denying students the full and equal enjoyment of facilities because of "gender identity." Regardless of motivation, RSU 26's denial of Susan's access to the girls' shared bathrooms constituted unlawful discrimination. The regulatory and statutory provisions that permit bathrooms to be separated by sex do not change the outcome. The Superior Court erred by granting summary judgment for RSU 26 and denying it for Appellants.

The standard of review on cross motions for summary judgment is de novo:

> Cross motions for summary judgment neither alter the basic Rule 56 standard, nor warrant the grant of summary judgment *per se.* Thus, we apply familiar principles: We review the court's ruling on cross-motions for summary judgment de novo, considering only the portions of the record referred to, and the material facts set forth in the M.R. Civ. P. 56(h) statements. Summary judgment is appropriate if the record reflects that there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. We analyze each motion separately, giving the opposing party the benefit of any reasonable inferences that can be drawn from the presented facts. When facts, though undisputed, are capable of supporting conflicting yet plausible inferences-inferences that are capable of leading a rational factfinder to different outcomes in a litigated matter depending on which of them the factfinder draws-then the choice between those inferences is not for the court on summary judgment.

F.R. Carroll, Inc. v. TD Bank, N.A., 2010 ME 115, ¶ 8, 8 A.3d 646, 648-649 (citations and quotation marks omitted).

Although the Commission did not join the Does' Motion for Summary Judgment, it did request in its opposition to Defendants' Motion for Summary Judgment that summary judgment

be entered for it pursuant to Maine Rule of Civil Procedure 56(c). (MHRC Opposition to Defendants' Motion for Summary Judgment at 18). "A cross-motion is not required in order for a summary judgment to be granted for the party opposing the original motion." *South Portland Civil Service Com'n v. City of South Portland*, 667 A.2d 599, 601 (Me. 1995). "The moving party concedes the absence of a factual issue only for purposes of his own motion." *Perry v. Town of Friendship*, 237 A.2d 405, 409 (Me. 1968) (quoting 2 FIELD, MCKUSICK & WROTH, MAINE CIVIL PRACTICE § 56.9 (2d ed. 1970)). "This means that if a party moves for summary judgment on a particular legal ground and fails to persuade the court that summary judgment should be entered in his favor, it does not *necessarily* follow that summary judgment must be entered against the moving party. There may be other factual issues in the case that would preclude the entry of summary judgment." FIELD, MCKUSICK & WROTH, MAINE CIVIL PRACTICE § 56.9 (Supp. 1981). The standard of review following the denial of such a request is otherwise the same as on cross motions for summary judgment. *Cf. Rippett v. Bemis*, 672 A.2d 82, 85 (Me. 1996) ("when reviewing a grant of a summary judgment [entered pursuant to Maine Rule of Civil Procedure 56(c)], we view the evidence in the light most favorable to the party against whom the judgment has been granted, and review the trial court's decision for error of law.").

The standard of review following a dismissal pursuant to Maine Rule of Civil Procedural 12(b)(6) is also de novo. *Ramsey v. Baxter Title Co.*, 2012 ME 113, ¶ 6, 54 A.3d 710, 712.

> [U]pon review of a judgment granting a motion to dismiss pursuant to M.R. Civ. P. 12(b)(6), [the Law Court] consider[s] the facts stated in the complaint as if they were admitted. [The Court] examine[s] the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory. Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim.

Saunders v. Tisher, 2006 ME 94, ¶ 8, 902 A.2d 830, 832 (citations and quotation marks omitted).

ARGUMENT

I. THE MHRA

The MHRA proscribes unlawful public accommodations discrimination, in relevant part, as follows:

> It is unlawful public accommodations discrimination, in violation of this Act: For any [covered entity] to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of . . . sexual orientation . . . any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the . . . terms or conditions upon which access to accommodation, advantages, facilities, goods, services and privileges may depend.

5 M.R.S. § 4592(1) (2012).

The MHRA proscribes unlawful education discrimination, in relevant part, as follows: "It is unlawful education discrimination in violation of this Act, on the basis of sexual orientation, to: . . . Exclude a person from participation in, deny a person the benefits of or subject a person to discrimination in any academic, extracurricular, research, occupational training or other program or activity." 5 M.R.S. § 4602(4)(A) (2012).

The Act defines "discriminate" to include, "without limitation, segregate or separate." 5 M.R.S. § 4553(2) (2012).

The term "sexual orientation" means "a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression." 5 M.R.S. § 4553(9-C) (2012). The Commission's employment regulations define the term "gender identity," in part, as "an individual's gender-related identity, whether or not that identity is different from that

traditionally associated with that individual's assigned sex at birth, including, but not limited to, a gender identity that is transgender." 94-348 C.M.R. ch. 3, § 3.02(C)(2) (2013).[2]

II. ASSIGNMENT TO SEPARATE BATHROOMS

RSU 26 violated the MHRA when they segregated Susan Doe from her peers by assigning her to a single-use staff bathroom in the Asa Adams School and a refurbished single-use bathroom in the Middle School. The public accommodation and the education provisions of the MHRA prohibit "discrimination" against a person "on account of" and "on the basis of" sexual orientation, which includes gender identity. *See* 5 M.R.S. §§ 4553(9-C), 4592(1), 4602(4)(A) (2012). "Gender identity" includes a gender identity that is different from that traditionally associated with an individual's assigned sex at birth. *See* 94-348 C.M.R. ch. 3, § 3.02(C)(2) (2013). "Discriminate" is expressly defined to include segregation and separation. 5 M.R.S. § 4553(2) (2012). Thus, RSU 26 assigning Susan to separate bathrooms from her peers because of her transgender gender identity constituted unlawful public accommodations discrimination and unlawful education discrimination.

RSU 26 asserts, and the Commission does not contest, that it was not motivated by Susan's gender identity when it refused her access to the girls' shared bathrooms. Rather, RSU 26 claims that it denied Susan access to the girls' bathrooms because she was of the opposite sex.[3] (Defendants' Memorandum in Support of Motion to Dismiss at 6, 9). The claim relating to the refusal to allow Susan access to the girls' bathrooms is discussed separately in the next section. With respect to the claim that Susan was unlawfully assigned to separate bathrooms, however, RSU 26 did not dispute below that it made the assignments because of Susan's

[2] The term "gender identity" should be defined the same way throughout the MHRA and the Commission's implementing regulations.

[3] The summary judgment record only supports that Susan's assigned sex at birth was male, not that she was a biological male. (A. 174 ¶ 2).

transgender gender identity, and the summary judgment record establishes that motivation. The use of the staff and the refurbished bathrooms were conceptualized as a part of Susan's "504 plan" for her transgender gender identity. (A. 86-88 ¶¶ 53-72, 104-106 ¶¶ 35-37 ¶¶ 47-49, 111 ¶¶ 97-99, 124-126 ¶¶ 35-37 ¶¶ 47-49, 141 ¶¶ 97-99). RSU 26's explanations for the assignment also show it was motivated by Susan's transgender gender identity in that it claims that it made the assignment to avoid the controversy arising out of objection raised by a guardian of a male student and for Susan's safety and privacy. (Defendants' Motion for Summary Judgment at 5 ("the school was attempting to find a common sense solution to the situation that was disruptive to the school experience of Susan and other students"); A. 136 ¶ 86 (noting that the School Principal's stated reason for assigning Susan to the staff bathroom was for her safety and privacy).

III. DENIAL OF ACCESS TO GIRLS' SHARED BATHROOMS

1. Segregation and Denial of Full and Equal Enjoyment

Defendants' refusal to allow Susan to use the girls' shared bathrooms also resulted in unlawful discrimination by denying her the full and equal enjoyment of its bathroom facilities and segregating her from her peers. The MHRA protects more than just actions that are motivated by a person's protected-class status—it protects consequences as well. *See Maine Human Rights Comm'n v. United Paperworkers Int'l Union*, 383 A.2d 369, 375 (Me. 1978) (employment case); 5 M.R.S. § 4592(1) (prohibiting discrimination "directly or indirectly"). The focus is on whether in fact the disputed practice results in unlawful discrimination, not whether Defendants intend to discriminate. *Maine Human Rights Comm'n v. United Paperworkers Int'l Union*, 383 A.2d at 375.

In *United Paperworkers*, plaintiff was fired for failure to pay union dues, although she had informed her union that her religious beliefs as a Seventh-day Adventist precluded her from paying the dues. The union asserted that it did not violate the Act because it was not motivated by plaintiff's religion but simply implemented a neutral policy. *Id.* at 374. This Court rejected the union's argument, finding "nothing in the Maine Act which suggests that the Legislature intended it to apply to the limited situation, typically devoid of proof, that an employer or labor organization intends to discriminate." *Id.* at 375. It reached the following conclusions:

> Defined in this manner, the union's argument that it did not discriminate against Ms. Michaud is simply without merit. The presiding Justice found, and no one disputes, that Ms. Michaud's religious beliefs are sincere and earnest. Her religious beliefs, as a Seventh-day Adventist prevented her from joining or financially supporting the union. She was threatened with discharge because she would not meet her financial obligations to the union. The combined effect of the union and company's conduct was to discriminate against Ms. Michaud in violation of 5 M.R.S.A. § 4572.

United Paperworkers Int'l Union, 383 A.2d at 375.

While this was an employment case, its holding applies equally to the claims asserted here. Like the statutory language here prohibiting discrimination "on account of" or "on the basis of" protected-class status, the employment provisions of the Act prohibit discrimination "because of" protected-class status. *Compare* 5 M.R.S. § 4572(1)(A, C) *with* 5 M.R.S. §§ 4602(4)(A), 4592(1). This Court also relied on the definition of "discriminate" in the Act, *United Paperworkers Int'l Union*, 383 A.2d at 375, which is equally applicable to public accommodation and education discrimination. *See* 5 M.R.S. § 4553(2) ("As used in this Act, unless the context or subchapter otherwise indicates, the following words have the following meanings: . . . 'Discriminate' includes, without limitation, segregate or separate.") (emphasis added).

Here, over Susan's parents' objection, RSU 26 excluded Susan from the shared girls' bathrooms in both the Asa Adams School and the Middle School. (A. 89 ¶ 79, 98 ¶ 142, 109-111 ¶¶ 82-84 ¶¶ 97-99, 135-141 ¶¶ 82-84 ¶¶ 97-99). The consequence was that Susan was denied the full and equal enjoyment of RSU 26's bathroom facilities and segregated from her peers because of her gender identity. Susan is a transgender girl, meaning, although assigned the male sex at birth she has always had a female gender identity. (A. 76-77 ¶¶ 1-2). As a girl, she used the single-stall girls' bathrooms at the Asa Adams School in the third and fourth grade and the shared girls' bathroom in the fifth grade until October 2007. (A. 80 ¶21, 103 ¶ 25, 106 ¶ 52, 109 ¶¶ 82-84, 121 ¶ 25, 128 ¶ 52, 135-136 ¶¶ 82-84). In October 2007, after the two incidents in which a male student followed Susan into the girls' bathroom, Defendants terminated Susan's use of the shared girls' restroom—over Susan and her parents' objections—and required that she use a staff bathroom. (A. 109 ¶¶ 82-84, 135-136 ¶¶ 82-84; 89 ¶ 79). No student other than Susan used the staff bathroom in Susan's fifth grade year; they all used either the shared girls' bathroom or the shared boys' bathroom. (A. 89-90 ¶¶ 81-82). Defendants also excluded Susan from the shared female restrooms in the Middle School and assigned her to a separate, refurbished single-use bathroom, despite the insistence of Susan and her parents that she be permitted to use the shared female restrooms. (A. 98 ¶ 142, 111 ¶¶ 97-100, 141-142 ¶¶ 97-100). It was not possible for Susan to use the boys' shared bathrooms because of her transgender gender identity. (Defendants' Motion at 4; A. 93 ¶¶ 107-112, 105 ¶ 44, 126 ¶ 44). In fact, it would not have been safe for Susan to use the boys' shared bathroom. (A. 93 ¶ 109, 196 ¶ 109).

The use of the shared girls' bathroom was very important to Susan's emotional, social, and educational development. (A. 87 ¶¶ 61-62 ¶ 66, 88 ¶ 69, 90 ¶¶ 86-87, 91-93, ¶¶ 90-106). There have been no other situations in which a student who was not misbehaving in a bathroom

was prohibited from using that bathroom. (A. 94 ¶ 113). No student other than Susan used the staff bathroom in Susan's fifth grade year; all other fifth grade students used either the shared girls' bathroom or the shared boys' bathroom. (A. 89-90 ¶¶ 81-82). Because the staff bathroom in fifth grade was adjacent to both the shared boys' and girls' restrooms, when Susan went to the restroom everybody watched her leave the group. (A. 90 ¶ 83). When Susan was told that she had to use the staff bathroom, she felt isolated, abnormal, and punished for something she didn't do. (A. 90 ¶ 84). Susan described that after she was required to use the staff bathroom:

> [I]t was sort of like something that's pulling you out from a crowd, like here are the normal kids, here's you. They can use normal bathrooms. You have to use the staff bathroom. And I'm pretty sure I didn't work there. So it kind of made me feel like one of those things that points out that you're different. You don't -- it's like I'm trying to live as normally as I can, but there's just that reminder. And it's just uncomfortable and not a good feeling to have when you just want to go to the bathroom and talk about boys and clothes and things like that. You're a fifth grade girl. We all know what goes on in the bathroom, ladies.

(A. 90 ¶ 85).

With respect to the public accommodations claim, these facts show that RSU 26, on account of Susan's gender identity, denied Susan the full and equal enjoyment of its bathroom facilities and segregated her from her peers. *See* 5 M.R.S. § 4592(1); *Maine Human Rights Comm'n v. United Paperworkers Int'l Union*, 383 A.2d at 375. Similarly, with respect to the education claim, they show that RSU 26, on the basis of Susan's gender identity, excluded her from participation in, denied her the benefits of, and segregated her from her peers in, its programs. *See* 5 M.R.S. § 4602(4)(A); *United Paperworkers Int'l Union*, 383 A.2d at 375.

The Superior Court relied on two cases that interpret laws that prohibit sexual orientation discrimination, *Goins* and *Hispanic Aids Forum*, (A. 37-38), but they are unhelpful here. *Hispanic Aids Forum* contains no independent legal analysis of the issue and simply relies on *Goins*. *See Hispanic Aids Forum v. Estate of Bruno*, 792 N.Y.S.2d 43, 47 (N.Y.A.D. 1 Dept.

2005). In *Goins*, the plaintiff alleged "disparate treatment" discrimination, meaning she alleged her employer was motivated by her gender identity in denying her access to the men's bathroom. *See Goins v. West Group*, 635 N.W.2d 717, 722 (Minn. 2001). Here, the Commission does not claim that RSU 26 was motivated by Susan's gender identity when it denied her access to the girls' bathrooms. In addition, the agency that enforced the law at issue in *Goins* had taken a position against coverage, while the Commission here supports it. *See id.* at 723. Finally, the court in *Goins* provided no analysis of the language in the statute, noting simply that bathrooms have historically been segregated by sex and the statute is not express. *See id*.[4] The same could be said for racial segregation leading up to the passage of the Title VII of the Civil Rights Act 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Then, the traditional and accepted practice in parts of the country was to segregate bathrooms and other facilities based on race. Here, as with Title VII, the "traditional and accepted" norms must yield to the requirements of the MHRA.

2. Denial of Reasonable Accommodation

In light of the fact that RSU 26's conduct toward Susan was discriminatory in effect, it had an obligation to provide her with a reasonable accommodation in order to avoid that discrimination. *See United Paperworkers Int'l Union*, 383 A.2d at 375 (noting lower court's approach of examining the Commission's reasonable accommodation regulation after in effect finding discrimination). Although the MHRA does not explicitly require the provision of a reasonable accommodation for gender identity, it is appropriate to impose such an obligation on

[4] The insistence in *Goins* that, given the potentially controversial nature of this issue, there must be "more express guidance from the legislature" is untenable. The MHRA appropriately covers broad categories of discrimination, and bathroom use is a subset of a broad category (e.g., "facilities" in public accommodations and "programs" in education). The Maine Legislature and voters have already spoken here by passing a broad mandate forbidding discrimination based on sexual orientation.

a defendant who would otherwise engage in unlawful discrimination.[5] *See Maine Human Rights Com'n v. City of South Portland*, 508 A.2d 948, 955-956 (Me. 1986); *United Paperworkers Int'l Union*, 383 A.2d at 375.

In finding that the MHRA does not require RSU 26 to provide a reasonable accommodation for a student's gender identity, the Superior Court incorrectly focused on the absence of such an explicit requirement in the MHRA or the Commission's regulations. (A. 19-22).[6] This Court has previously upheld the Commission's authority to interpret the MHRA by regulation to require employers to accommodate the religious beliefs of employees despite the absence of such an explicit requirement in the MHRA itself. *See United Paperworkers Int'l Union*, 383 A.2d at 378 ("One of the purposes of [the Commission's regulation] is to breathe flexibility into an otherwise airtight prohibition against religious discrimination, by providing that a reasonable accommodation need not be made if it would amount to undue hardship. We find nothing unreasonable in such an interpretation."). This Court has extended this approach to section 4592, even in the absence of a Commission regulation. *See Maine Human Rights Comm'n v. City of South Portland*, 508 A.2d at 955-956. *See also Curry v. Allan S. Goodman, Inc.*, 944 A.2d 925, 939 (Conn. 2008) (recognizing reasonable accommodation for disability in employment in absence of statutory provision or regulation); *Moody-Herrera v. State, Dept. of Natural Resources*, 967 P.2d 79, 87 (Alaska 1998) (same).

[5] Similarly, a defendant must show in disparate impact cases that there were no alternatives available that would not have the undesirable effect. *See Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979).

[6] The court also discounted the applicability of *United Paperworkers*, finding that it relied on a federal counterpart to the MHRA that does not exist in the context of "sexual orientation" discrimination. (A. 21-22). In fact, while *United Paperworkers* did discuss a corresponding reasonable accommodation requirement in the Title VII regulations, its holding was that the Commission's regulation "is a reasonable construction of the Maine Act." *See United Paperworkers Int'l Union*, 383 A.2d at 378.

In *Maine Human Rights Comm'n v. City of South Portland*, this Court recognized that section 4592, which did not contain an express reasonable accommodation requirement for disability at the time, imposes an obligation to provide reasonable accommodation: "We conclude that the court committed no legal error in interpreting subchapter V in accord with the doctrine of reasonable accommodation. The creation of a physical barrier in circumstances where that result could reasonably have been avoided without financial or administrative burden, constitutes an illegal act of discrimination." *Maine Human Rights Comm'n v. City of South Portland*, 508 A.2d at 955-956.

Here, as in *City of South Portland* and *United Paperworkers*, the MHRA has an "airtight prohibition" against gender identity discrimination. *Id.* at 955. "Equal access is declared to be a civil right and discrimination is prohibited with respect to public accommodations." *Id.* A reasonable accommodation requirement would "preserve the flexibility suggested by the legislative statement of purpose." *Id.*

What constitutes a "reasonable accommodation" will necessarily vary depending on the circumstances. In *City of South Portland*, this Court limited the reach of a reasonable accommodation "to that which can reasonably be accomplished without undue financial or administrative burden." *Maine Human Rights Comm'n v. City of South Portland*, 508 A.2d at 955. Similarly, the Commission has adopted regulations that require reasonable accommodation of gender identity in employment unless the covered entity "can demonstrate that the accommodations would impose an undue hardship on the conduct of the business of the covered entity." 94-348 C.M.R. ch. 3, § 3.12(F)(1) (2013).[7]

[7] The regulation provides, in full, as follows:
(1) It is an unlawful employment practice for an employer, employment agency, or labor organization to fail or refuse to make reasonable accommodations in rules, policies, practices, or services that apply directly or indirectly to gender identity or gender expression, unless the covered entity can demonstrate

Here, the Commission alleges that denying Susan access to the shared girls' bathrooms was a denial of a reasonable accommodation. (A. 54 ¶ 20). RSU 26 has not asserted that allowing Susan to use the shared girls' bathroom would constitute an undue hardship or an undue financial or administrative burden. Nevertheless, given that this issue was decided on a M.R.Civ.P. 12(b)(6) motion to dismiss, the parties have not yet had an opportunity to develop the record on whether RSU 26's refusal to allow Susan access to the shared girls' bathrooms constituted a reasonable accommodation. Accordingly, if the Court were to decide the appeal on this basis, the case should be remanded for further proceedings.

3. Disparate Impact

In addition, RSU 26's practice of segregating bathrooms based on biological sex has a disparate impact on students who are transgender, including Susan. A prima facie case of disparate impact is established when a practice or selection criterion "is facially neutral but in fact affects more harshly one group than another. Proof of disparate impact upon one group supports an inference of unlawful discrimination against a particular plaintiff who is a member of that group." *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1264 (Me. 1979).

---

that the accommodations would impose an undue hardship on the conduct of the business of the covered entity.

(2) It is an unlawful employment practice for an employer, employment agency, or labor organization to deny employment or labor organization membership opportunities to an applicant, employee, or labor organization member if the denial is based on the need of the covered entity to make reasonable accommodations in rules, policies, practices, or services that apply directly or indirectly to gender identity or gender expression, unless the covered entity can demonstrate that the accommodations would impose an undue hardship on the operation of the business of the covered entity.

(3) With respect to the two preceding paragraphs, the burden of proof on the issue of whether the accommodations would impose an undue hardship is on the employer, employment agency, or labor organization. Resolution of such cases depends on the specific factual circumstances and involves a balancing of the needs of the applicant, employee, or labor organization member with the degree of hardship imposed on the covered entity's business operation.

94-348 C.M.R. ch. 3, § 3.12(F) (2013).

See also Paper v. Rent-A-Wreck, 463 N.W.2d 298, 300 (Minn.App. 1990) (public accommodation case). Once plaintiff has made this showing, defendant must establish that the practice or selection criterion is justified by a "business necessity . . . not mere business convenience." *City of Auburn*, 408 A.2d at 1265. The fact-finder also may consider the existence of effective alternatives that would not have the undesirable discriminatory effect. *Id.* at 1268.

Here, RSU 26 claims to have excluded Susan from the girls' shared bathroom pursuant to a practice of segregating bathrooms based on biological sex and excluding students from bathrooms of the opposite sex. (Defendants' Memorandum in Support of Motion to Dismiss at 6). Such a practice has a disparate impact on transgender students, including Susan. Under such a practice, no transgender students are permitted to use a shared bathroom that is consistent with that student's gender identity, while non-transgender students are permitted to use shared bathrooms that are consistent with their gender identities. Transgender students are also segregated under such a practice in that they have no alternative[8] but to use separate bathrooms while other students share common bathrooms. RSU 26 has not articulated how its policy may be justified by a "business necessity."

IV. BATHROOM REGULATION AND STATUTE

The Superior Court relied on section 4.13 ("Rule 4.13") of the Commission's regulations in finding that RSU 26 did not violate the MHRA when it segregated Susan from her peers. (A. 37). Rule 4.13 states, in part, that a school may provide separate toilet, locker room, and shower

[8] Most, like Susan, cannot use shared bathrooms consistent with their biological sex because of their non-conforming gender expression.

facilities on the basis of sex.[9] The Superior Court found that segregating Susan was explicitly permitted by Rule 4.13 because Susan's biological sex was that of a male. (A. 37). This was error.

Rule 4.13 interprets only the sex discrimination prohibition in the MHRA, not the sexual orientation provisions. *See* 94-348 C.M.R. ch. 4, § 4.01(A) (". . . this rule designed to assure nondiscrimination on the basis of sex . . ."). The rule simply makes clear that it is not illegal *sex* discrimination to offer different facilities based on sex. Separating bathrooms according to biological sex, however, is unlawful *sexual orientation* discrimination if transgender students are denied equal enjoyment or are segregated.

The Commission adopted Rule 4.13 in 1984, long before "sexual orientation" was added to the MHRA as a protected class. *See* PL 2005, ch. 10, § 3. The Superior Court acknowledged that Rule 4.13 was adopted without regard for transgender students. (A. 37). Nevertheless, the court found that the "practical reality is that the regulation specifically permits schools to separate students in restroom usage by sex and has the effect of legitimizing the Defendant's actions in this regard." *Id.* This overstates the Commission's authority. The Commission could not have enacted a regulation interpreting a statute that did not yet exist, and a regulation cannot legalize conduct that is expressly prohibited by a subsequent statutory enactment. Here, the MHRA prohibits segregating a student from her peers based on her gender identity and denying

[9] Rule 4.13 provides, in full, as follows:

> 4.13 COMPARABLE FACILITIES
> An educational institution may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

94-348 C.M.R. ch. 4, § 4.13 (2013).

her the same enjoyment as her peers based on her gender identity. The Commission's sex discrimination regulation does not and cannot take away that statutory right.[10]

Moreover, it was the Superior Court's erroneous interpretation of Rule 4.13, rather than the meaning of Rule 4.13 itself, that put the regulation on a collision course with the statutory prohibition against sexual orientation discrimination. The Superior Court found that Rule 4.13 is "unambiguous" and that separating bathrooms by "sex" means separating them by "biological sex." (A. 39-40). Regardless of the applicability of the regulation to "sexual orientation" discrimination, this Court's resolution of the meaning of the term "sex" is important and not only because of the Superior Court's reading of Rule 4.13. Although RSU 26 did not raise it, the Commission has become aware of a provision in Title 20-A that says a school administrative unit shall provide toilets that are "[s]eparated according to sex."[11] The existence of this statute necessitates interpreting the meaning of the term "sex" in both Rule 4.13 and the statutes.[12]

---

[10] This is not a case, as was suggested (A. 36) in which the Commission is bringing an action against a defendant that relied on the Commission's regulation in conducting itself. There is no evidence in the record that RSU 26 relied on Rule 4.13 when it separated bathrooms by sex or when it segregated Susan.

[11] The Title 20-A bathroom statute provides as follows:

> Sanitary facilities shall be provided as follows.
> **1**. **Toilets.** A school administrative unit shall provide clean toilets in all school buildings, which shall be:
> A. Of the flush water closet type and connected to a sewer, filter bed or septic tank, or of another design approved by the Department of Health and Human Services;
> B. Separated according to sex and accessible only by separate entrances and exits;
> C. Installed so that privacy, cleanliness and supervision are assured; and
> D. Free from all obscene markings.

20-A M.R.S. § 6501(1) (2012).

[12] The Commission has not yet briefed the issue of the meaning of "sex" in Rule 4.13. RSU 26 raised it in its Memorandum in Reply to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment (pages 2-3), not in its Motion for Summary Judgment or Memorandum of Law in Support of Motion for Summary Judgment. At oral argument on the motions for summary judgment, the Commission requested an opportunity to brief the issue in the Superior Court, but that request was denied. (A. 13). The court did allow the Commission to submit case authority supporting the proposition that the term "sex" as used

The only statutory definition of the term "sex" in Maine law is the non-exhaustive definition in the MHRA, which defines it to include "pregnancy and medical conditions which result from pregnancy." 5 M.R.S. § 4572-A(1) (2012).[13] Because this definition is not meant to be exhaustive, further interpretation is necessary.

In doing so, the remedial provisions in the MHRA and the Commission's education regulations must be interpreted broadly and the exceptions construed narrowly. *See Maine Human Rights Comm'n v. United Paperworkers Int'l Union*, 383 A.2d at 378; 94-348 C.M.R. ch. 4, § 4.01(C)(1) (2013) ("Consistent with the public policy underlying the Maine Human Rights Act, this rule shall be liberally construed to accomplish the purposes of the governing legislation."). *Cf. Director of Bureau of Labor Standards v. Cormier*, 527 A.2d 1297,

---

in federal antidiscrimination laws covers more than discrimination because of biological sex, (A. 13), and the Commission provided that authority to the court (A. 12).

Technically, RSU 26 waived its argument regarding Rule 4.13 with respect to its Motion for Summary Judgment by raising it for the first time in its Reply. *See* M.R.Civ.P. 7(e) (reply "shall be strictly confined to replying to new matter raised in the opposing memorandum"); *Mason v. City of Augusta*, 927 A.2d 1146, 1151 n. 4 (Me. 2007); *Russell v. Atlas Van Lines, Inc.*, 411 F.Supp. 111, 115 (D.C.Okl. 1976) (issue raised in reply brief not appropriate basis for summary judgment without giving opposing party opportunity to respond). RSU 26 did raise Rule 4.13 in its Memorandum in Opposition to the Doe Plaintiffs' Motion for Summary Judgment, but only to address the Doe Plaintiffs' argument with respect to legislative history. (RSU 26 Memorandum at 5 n.3). This limited argument appears to stem from RSU 26's misinterpretation that the Superior Court's earlier dismissal decision was broader than it was. (RSU 26 Memorandum at at 3-5; A. 25 n. 2).

RSU 26 did raise the issue in its Memorandum in Support of Motion to Dismiss. (Memorandum in Support of Motion to Dismiss at 8, 12-13). In response, the Commission argued that Rule 4.13 interprets "sex" not "sexual orientation discrimination." (Response at 12-13). The Superior Court did not address the scope of Rule 4.13 in its Decision on Defendants' Motion to Dismiss. (A. 19, mentioning regulation).

In light of this procedural background and the importance of addressing the meaning of section 6501(1) in the context of the issues presented, both Rule 4.13 and section 6501(1) should be fully briefed and decided at this time.

[13] In full, the definition reads:

> Sex defined. For the purpose of this Act, the word "sex" includes pregnancy and medical conditions which result from pregnancy.

5 M.R.S. § 4572-A(1) (2012).

1300 (Me. 1987) ("Remedial statutes should be liberally construed to further the beneficent purposes for which they are enacted.") (construing 26 M.R.S. § 664 (Supp.1986)).

"Where the language is clear, this Court is bound by the plain meaning of the words." *Jackson Brook Inst., Inc. v. Maine Ins. Guar. Ass'n*, 2004 ME 140, ¶ 13, 861 A.2d 652, 657. Here, however, the plain meaning of the term "sex" is elusive. The Superior Court relied on the dictionary definition in defining "sex" as "biological sex." Summary Judgment Decision at 16. The dictionary is an inappropriate tool here, however, because there is disagreement in the scientific community concerning the factors that determine sex. *See, e.g.*, *Schroer v. Billington*, 577 F.Supp.2d 293, 306 (D.D.C. 2008) (describing "impressive" testimony of two competing expert witnesses on whether gender identity is a factor that constitutes a person's sex); *Kastl v. Maricopa County Community College Dist.*, 2004 WL 2008954, *2 n.5 (D.Ariz. 2004) ("Medical evidence suggests that the appearance of genitals at birth is not always consistent with other indicators of sex, such as chromosomes."); *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) ("Recent research concluding that sexual identity may be biological suggests reevaluating *Holloway*."); *Ulane v. Eastern Airlines, Inc.*, 581 F.Supp. 821, 825 (N.D.Ill. 1983) ("I find by the greater weight of the evidence that sex is not a cut-and-dried matter of chromosomes, and . . . the term, 'sex,' as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity…"), *rev'd* 742 F.2d 1081 (7th Cir. 1984); ANNE FAUSTO-STERLING, SEXING THE BODY 5 (Basic Books 2000) ("Choosing which criteria to use in determining sex, and choosing to make the determination at all, are social decisions for which scientists can offer no absolute guidelines."); JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW 15 (New York University Press 2012) ("Although medical experts agree that many factors contribute to a person's sex, the attributes

that have been used to differentiate men from women have varied over time and the issue is still a matter of great controversy."). A court is not limited to the dictionary definition of a term in construing a statute. *See Bill Fitts Auto Sales, Inc. v. Daniels*, 922 S.W.2d 718, 720 (Ark. 1996) ("[W]e are not limited to the dictionary definition of a term. . . . The basic rule of statutory construction to which all other interpretive guides defer is to give effect to the intent of the legislature.").

Undoubtedly, many people have preconceived notions of "sex" as being a matter of biology. Further reflection, however, reveals its complexity. As United States District Court Judge Grady observed thirty years ago:

> Prior to my participation in this case, I would have had no doubt that the question of sex was a very straightforward matter of whether you are male or female. That there could be any doubt about that question had simply never occurred to me. I had never been exposed to the arguments or to the problem. After listening to the evidence in this case, it is clear to me that there is no settled definition in the medical community as to what we mean by sex.

Ulane v. Eastern Airlines, Inc., 581 F.Supp. at 823, *rev'd* 742 F.2d 1081.

In fact, several courts have found that transgender or transsexual individuals are members of a sex that is different from their biological sex at birth. *See Radtke v. Miscellaneous Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund*, 867 F.Supp.2d 1023, 1032 (D.Minn. 2012) (also noting that "an individual's sex includes many components, including chromosomal, anatomical, hormonal, and reproductive elements, some of which could be ambiguous or in conflict within an individual"); *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S.2d 391, 396 (N.Y.Sup. 1995) ("Being a transsexual male he may be considered part of a subgroup of men."); *Richards v. U. S. Tennis Ass'n*, 400 N.Y.S.2d 267, 272 (N.Y.Sup. 1977) ("When an individual such as plaintiff, a successful physician, a husband and father, finds it necessary for his own

mental sanity to undergo a sex reassignment, the unfounded fears and misconceptions of defendants must give way to the overwhelming medical evidence that this person is now female."); *In re Lovo-Lara*, 23 I. & N. Dec. 746, 753 (BIA 2005) ("We are not persuaded by the assertions of the DHS counsel that we should rely on a person's chromosomal pattern or the original birth record's gender designation in determining whether a marriage is between persons of the opposite sex. Consequently, for immigration purposes, we find it appropriate to determine an individual's gender based on the designation appearing on the current birth certificate issued to that person by the State in which he or she was born.")

The fact that the Superior Court characterized the term "sex" as "biological sex" is an indication of its inherent ambiguity. The regulation and the education statute do not use the term "biological sex"—they say "sex." The MHRA definition alone, defining sex as including pregnancy and attendant medical conditions, reveals Legislative intent that "sex" means more than "biological sex."[14] Without the qualifier "biological" in front of it, it is unclear whether the term "sex" means biological sex, assigned sex at birth,[15] gender or sexual identity, or some other definition of sex. In actuality, "sex" means all of those things.

In the context of Title VII, before *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), courts more frequently took a narrow view of

[14] Although pregnancy is undoubtedly a biological state, it is not the same as the biological state of being female.

[15] Sex on a birth certificate does not necessarily equate with "biological sex." *See* FAUSTO-STERLING, *supra*, at 44-63 (discussing methods for assigning sex of intersexuals). Maine permits people to change their "sex" category on their birth certificates following surgery and name change. *See* 22 M.R.S. § 2705 (governing amendments to vital records); 10-146 C.M.R. ch. 2, §§ 6(C), 11 (2013) (criteria for change of sex on birth certificate).

the term "sex," defining it simply as a matter of biology and anatomy. *See Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (citing cases). "Sex" in these cases was viewed as distinct from "gender," meaning an individual's sexual identity or socially constructed characteristics. *See id.* (citing *Dobre v. Amtrak*, 850 F.Supp. 284, 286 (E.D.Pa.1993)).

Following the Supreme Court's decision in *Price Waterhouse*, however, many courts have recognized that Title VII covers discrimination based on gender in the context of sex stereotyping. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) ("discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender"); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573 (6th Cir. 2004) ("the Supreme Court established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination"); *Schwenk v. Hartford*, 204 F.3d at 1202 ("'sex' under Title VII encompasses both sex—that is, the biological differences between men and women-and gender"); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, 2003 WL 22757935, *4 (W.D.N.Y. 2003) ("Thus, under *Price Waterhouse,* 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women— *and* gender.").

The Ninth Circuit has explained that "the terms 'sex' and 'gender' have become interchangeable." *Schwenk v. Hartford*, 204 F.3d at 1202. *See also Enriquez v. West Jersey Health Systems*, 777 A.2d 365, 373 (N.J.Super.A.D. 2001) ("The word 'sex' as used in the LAD should be interpreted to include gender, protecting from discrimination on the basis of sex or gender."). The Equal Employment Opportunity Commission has

recognized that the term "sex" in Title VII proscribes gender discrimination and not just discrimination on the basis of biological sex. *Mia Macy v. Eric Holder*, EEOC Decision No. 0120120821, 6-7 (Apr. 20, 2012), viewed online on March 10, 2013, at http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt.

Likewise, this Court should interpret the term "sex" in Rule 4.13 and section 6501(1) as being broader than "biological sex."[16] "Sex" can mean, without limitation, "biological sex," sex assigned at birth, or gender identity. In other words, "biological sex" is not necessarily a determinative factor in deciding someone's "sex" for purposes of the regulation or statute. Such a construction reconciles Rule 4.13, section 6501(1), and the MHRA.[17] *See Steele v. Smalley*, 141 Me. 355, 358, 44 A.2d 213, 214 - 215 (Me. 1945) ("The entire statute should be considered as a whole, and all statutes on the same subject should be considered together in order to reach an harmonious result."). Under such a construction, neither Rule 4.13 nor section 6501(1) bars a transgender student from using bathrooms consistent with her gender identity. While a school must separate bathrooms by "sex," it may not exclude anyone who meets one or more of the criteria upon which "sex" is determined. A student who is transgender falls under the "sex" that matches her gender identity.

---

[16] With respect to Rule 4.13, the Commission's interpretation is entitled to deference. *See Maritime Energy v. Fund Ins. Review Bd.,* 2001 ME 45, ¶ 7, 767 A.2d 812, 814 ("When the dispute involves an agency's interpretation of a statute administered by it, the agency's interpretation, although not conclusive, is entitled to great deference ...."); *Federal Exp. Corp. v. Holowecki* 128 S.Ct. 1147, 1155 (2008) ("Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance, . . . the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force.").

[17] The term "sex" has the same meaning in subsection 6501(1), the MHRA, and Rule 4.13. *See* 94-348 C.M.R. ch. 4, § 4.02 (2013) ("All terms used in this rule, unless the context otherwise indicates, shall have the same meaning as in the Maine Human Rights Act, Title 5, M.R.S. §§ 4551, *et seq*., and applicable provisions of Title 20-A.").

This interpretation is also consistent with the MHRA as a whole. Its purpose is to address discrimination against classes of people who have been historically disadvantaged based on prejudice and unfounded stereotypes. *See, e.g.*, *Maine Human Rights Commission v. Canadian Pacific Ltd.*, 458 A.2d 1225, 1231 (Me. 1983); *Wells v. Franklin Broadcasting Corp.*, 403 A.2d 771, 773 (Me. 1979). In the case of sex discrimination, the prejudices and stereotypes that the MHRA is concerned with are directed at women based on their status as women, which is usually determined by identity and perception, not biology. A company that refuses to hire a woman as its president because she is female does not check her chromosomes first.

In the context of bathrooms, the meaning of the term "sex" should be no different. Women and men of the same gender share a common identity. The reasons for separating bathrooms evaporate in light of that commonality.[18] Here, before one boy's guardian decided to make a political statement, the perception and reality in the Asa Adams School was that a girl was using the same bathroom as other girls.

Conversely, strictly "biological sex" is an unreasonable criterion for separating bathrooms that is inimical to the public interest. *See Brent Leasing Co., Inc. v. State Tax Assessor*, 2001 ME 90, ¶ 6, 773 A.2d 457, 459 ("In the absence of a legislative definition,

[18] While the legislative or rulemaking history does not reveal the reasons behind bathroom separation in Maine, one law professor who researched the historical underpinnings of separating bathrooms in the United States identified the following four factors:

> 1) the vulnerable, weak bodies of women needed special protection in the dangerous public realm; 2) sex-separation was one aspect of providing "adequate" sanitary toilet facilities, a sanitation concern as important as cleanliness; 3) Victorian concerns of modesty viewed sex-separation of toilet facilities as necessary to protect a woman's privacy when engaged in intimate bodily functions; and 4) sex separation of public toilets was necessary to vindicate the social morality of true womanhood, a morality steeped in the separate spheres ideology of the virtuous woman in her domestic haven.

Sex-Separation in Public Restrooms: Law, Architecture, and Gender, 14 Mich. J. Gender & L. 1, 54 (2007).

the term must be given a meaning consistent with the overall statutory context and must be construed in the light of the subject matter, the purpose of the statute and the consequences of particular interpretation. We avoid statutory constructions that create absurd, illogical, or inconsistent results.") (citations and quotation marks omitted); *Schwanda v. Bonney*, 418 A.2d 163, 166 (Me. 1980) ("In interpreting a statute courts must presume that the Legislature did not intend unreasonable or absurd consequences, nor results inimical to the public interest."); *S.D. Warren Co. v. Inhabitants of Town of Gorham*, 25 A.2d 471, 474 (Me. 1942) ("In considering the action of the Legislature, the presumptions against unreason, inconsistency, inconvenience, and injustice are not to be overlooked."). If Rule 4.13 and section 6501(1) were interpreted to require that bathrooms be separated according to biological sex in all instances, the consequence would be that students who are transgender would have to use bathrooms that are consistent with their biological sex but opposite their gender identities.[19] Thus, in our case, it would appear that a girl was using the boys' bathroom.

While transgender access to bathrooms consistent with gender identity goes undetected in most cases, transgender access to bathrooms that are *inconsistent* with gender identity is readily noticeable and patently unsafe. *See* Jennifer Levi & Daniel Redman, *The Cross Dressing Case for Bathroom Equality*, 34 Seattle U. L. Rev. 133, 135-138 (2010) (discussing harassment and assaults in public restrooms leading to transgender avoidance of public restrooms). It goes without saying that a person with a

[19] Intersex students (those who are neither biologically male nor female) would not be allowed to use either bathroom. This could impact as many as one to two percent of the school population. *See* JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW, *supra*, at 2 ("Most experts agree that approximately 1-2 percent of people are born with sexual features that vary from the medically defined norm for male and female."). This result would be an unreasonable or absurd consequence, inimical to the public interest.

female gender identity and expression would also be embarrassed and humiliated using a men's bathroom. The record in this case establishes that it would not have been possible or safe for Susan to use the boys' bathroom because of her gender identity. (A. 93-94 ¶¶ 107-112, 196-197 ¶¶ 107-112). The Legislature could not have intended that in separating bathrooms by sex it would make them less safe, render them humiliating, and cause people to avoid using them.[20]

In addition, a rule based strictly on biological sex would be impracticable to enforce. How would the "biological sex" of students be determined? Certain inquiries or examinations would implicate students' Constitutional rights. *See, e.g.*, *Kastl v. Maricopa County Community College Dist.*, 2004 WL 2008954, *5 (D.Ariz. 2004) ("Defendant, in demanding details about Plaintiff's genitalia, has implicated Plaintiff's Fourteenth Amendment right to privacy in personal information."). Schools' examining students as a prerequisite to bathroom use would be absurd, and the Legislature could not have intended this result.

Following the more reasonable construction, a corresponding federal provision separating bathrooms by "sex" in the workplace has been interpreted to allow transgender access to bathrooms consistent with gender identity. The United States Department of Labor Occupational Safety & Health Administration ("OSHA") sanitation standard for general industry requires employers to provide their employees with toilet facilities "in toilet rooms separate for each sex. . . ." 29 C.F.R. § 1910.141(c)(l)(i). Although OSHA has not had occasion to provide a written interpretation on the meaning of "sex" in this

[20]Such a construction would also put the State of Maine in the contradictory position of allowing people to change their sex on their birth certificates, 10-146 C.M.R. ch. 2, §§ 6(C), 11 (2013), yet barring them access to bathrooms consistent with their changed sex.

regulation, the United States Office of Personnel Management ("OPM") has interpreted the OSHA regulation to mean that a federal employee who has begun living and working full-time in the gender that reflects his or her gender identity should be allowed access to restrooms and (if provided to other employees) locker room facilities consistent with his or her gender identity.[21]

The United States Department of Education enforces a regulation that is identical to Rule 4.13 interpreting Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* ("Title IX"). *See* 34 C.F.R. § 106.33 ("Comparable facilities. A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."). Although the DOE has not yet issued a public opinion addressing transgender bathroom use under its regulation, it interprets Title IX, which prohibits "sex" discrimination, to cover

---

[21] OPM's Guidance on sanitary and related facilities provides, in full:

> **Sanitary and Related Facilities:** The Department of Labor's Occupational Safety and Health Administration (DOL/OSHA) guidelines agencies to make access to adequate sanitary facilities as free as possible for all employees in order to avoid serious health consequences. For a transitioning employee, this means that, once he or she has begun living and working full-time in the gender that reflects his or her gender identity, agencies should allow access to restrooms and (if provided to other employees) locker room facilities consistent with his or her gender identity. While a reasonable temporary compromise may be appropriate in some circumstances, transitioning employees should not be required to have undergone or to provide proof of any particular medical procedure (including gender reassignment surgery) in order to have access to facilities designated for use by a particular gender. Under no circumstances may an agency require an employee to use facilities that are unsanitary, potentially unsafe for the employee, or located at an unreasonable distance from the employee's work station. Because every workplace is configured differently, agencies with questions regarding employee access to any facilities within an agency should contact OPM for further guidance.

"Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace," accessible online at http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/.

gender-based harassment. *See, e.g.*, United States Department of Education, Office for Civil Rights, "Dear Colleague" letter, dated October 26, 2010, accessed online on March 10, 2013 at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html ("[Title IX] also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as stereotypical characteristics for their sex, or for failing to conform to stereotypical notions of masculinity and femininity.").

Interpreting section 6501(1) in this manner is also required to preserve its constitutionality. *See Town of Baldwin v. Carter*, 2002 ME 52, ¶ 9, 794 A.2d 62, 66 ("If at all possible, we will construe the statute to preserve its constitutionality."); *Rideout v. Riendeau*, 2000 ME 198, ¶ 14, 761 A.2d 291, 297-298 (plurality opinion) ("Because we must assume that the Legislature acted in accord with due process requirements, if we can reasonably interpret a statute as satisfying those constitutional requirements, we must read it in such a way, notwithstanding other possible unconstitutional interpretations of the same statute."). Article I, Section 6-A of the Maine Constitution provides that no person shall "be denied the enjoyment of that person's civil rights." Sections 4591 and 4601 of the MHRA expressly recognize and declare that the opportunity to access public accommodations and participate in educational programs free from discrimination on the basis of sexual orientation (defined to include gender identity and expression, 5 M.R.S. § 4553(9-C)(2012)) are a "civil right."[22] 5 M.R.S. §§ 4591, 4601 (2012). If "sex" in

[22] Although the MHRA does not control the definition or interpretation of what Maine's Constitution protects as "civil rights," it is persuasive. *See, e.g.*, *Davis v. City of Berkeley*, 794 P.2d 897, 906 (Cal. 1990) ("The Legislature's interpretation of uncertain constitutional terms, as reflected in subsequently enacted legislation, is entitled to great deference by the courts."); *Edge v. Brice*, 113 N.W.2d 755,

section 6501(1) were interpreted to mean exclusively "biological sex," such an interpretation would bar a transgender students from using bathrooms consistent with their gender identity and would result in their segregation. *See* discussion of MHRA claims, supra. As such, section 6501(1) would deny the students the enjoyment of their constitutionally-protected "civil right" to access public accommodations and participate in educational programs free from discrimination on the basis of gender identity. Reading the statute in the manner proposed herein, however, would preserve its constitutionality. *Cf. Town of Baldwin v. Carter*, 2002 ME 52, ¶ 9, 794 A.2d at 66; *Rideout v. Riendeau*, 2000 ME 198, ¶ 14, 761 A.2d at 297-298.[23]

The fact that the MHRA has included specific protection for discrimination based on gender identity and gender expression does not, as the Superior Court found, defeat a finding that "sex" may include gender identity. Summary Judgment Decision at 16. It is well-settled that a subsequent legislative enactment does not control the interpretation of existing statutory provisions. *See Bakala v. Town of Stonington*, 647 A.2d 85, 87 (Me. 1994); *Stone v. Board of Registration in Medicine*, 503 A.2d 222, 227 (Me. 1986). There is also nothing unusual about overlapping protected classes within the MHRA. The concepts of "race," "ancestry," "national origin," and "religion" often overlap to protect the same thing. *Compare, e.g.*, *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613, 107 S.Ct. 2022, 2028 (1987) ("[W]e have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected

---

759 (Iowa 1962) ("The General Assembly of course cannot by subsequent legislation define the scope of constitutional provisions. That is a judicial function. But the determination of the Congress and the various legislatures is entitled to weight in our consideration of the scope of the constitutional provision.").

[23] Moreover, the characterization of the right as a "civil right" indicates that the Legislature intended to elevate MHRA rights above conflicting statutory rights.

to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid….") (holding that someone born an Arab is in the protected category of "race") *with* 5 M.R.S. § 4592(1) (2012) (prohibiting discrimination based on race *and* ancestry). In light of *Price Waterhouse* and its progeny, "gender expression" and "sex" undoubtedly protect same thing. *Compare, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. at 250, 109 S.Ct. at 104 ("an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender") (interpreting "sex" in Title VII); *Glenn v. Brumby*, 663 F.3d at 1317 ("discrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute discrimination under Title VII according to the rationale of *Price Waterhouse*"); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n. 4 (1st Cir. 1999) ("Just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity."); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997) ("[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he...does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex."), *vacated and remanded on other grounds*, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998) *with* 94-348 C.M.R. ch. 3, § 3.02 (2013) ("The term 'gender expression' means the manner in which an individual's gender identity is expressed, including, but not limited to, through dress,

appearance, manner, speech, or lifestyle, whether or not that expression is different from that traditionally associated with that individual's assigned sex at birth.").

When the Legislature wanted to avoid overlap between protected classes, it did so expressly. *See* 5 M.R.S. § 4553-A(3)(B) (providing exception to definition of "physical or mental disability" for any condition covered under the definition of "sexual orientation"). Notably, the Legislature did not exempt gender identity from coverage under the protected category of "sex" despite the fact that it did so with respect to the protected category of "physical or mental disability." *See id.*

In this case, there is no dispute that Susan is a girl. (A. 77-82 ¶¶ 2-5 ¶¶ 14-15 ¶¶ 23-26 ¶¶ 29-32, 174-178 ¶¶ 2-5 ¶¶ 14-15 ¶¶ 23-26 ¶¶ 29-32). The following is a photograph of Susan in fifth grade:

(A. 83 ¶ 33, 178 ¶ 33).

The following is a photograph of Susan in sixth grade:

(A. 98-99 ¶ 143, 204 ¶ 143).

Neither Rule 4.13 nor section 6501(1) legalized RSU 26's refusal to allow her access to the girls' bathrooms.

CONCLUSION

For the reasons stated above, the decision of the Superior Court entering summary judgment for RSU 26 on Counts I & II of the Amended Complaint should be reversed; summary judgment should be entered for the Commission on Counts I & II pursuant to M.R.Civ.P. 56(c); and the decision of the Superior Court dismissing, pursuant to M.R.Civ.P. 12(b)(6), the Commission's claim that RSU 26 failed to provide Susan Doe with a reasonable accommodation for her gender identity by allowing her access to the girls' shared bathroom, should be reversed and that part of the claim should be remanded for further proceedings.

Dated:

John P. Gause, Esq., Bar No. 8192
Commission Counsel
Maine Human Rights Commission
51 State House Station
Augusta ME 04333-0051
(207) 624-6290
ATTORNEY FOR APPELLANT MHRC

CERTIFICATE OF SERVICE

I, John P. Gause, Esq., hereby certify that I have caused two copies each of the foregoing brief to be served upon the attorney for Appellee RSU 26, Mellissa Hewey, Esq., and the attorneys for Appellant Does, by depositing them in the United States mail, postage prepaid, addressed as follows:

Melissa A. Hewey, Esq.
Drummond Woodsum & MacMahon
84 Marginal Way, Suite 600
Portland, ME 04101

Jodi L. Nofsinger, Esq., Bar No. 8373
Berman & Simmons, P. A.
P.O. Box 961
Lewiston, ME 04243-0961

Jennifer Levi, Esq.
Bennett H. Klein, Esq.
Gay & Lesbian Advocates & Defenders
30 Winter St., Suite 800
Boston, MA 02108

Dated:

_____

John P. Gause, Esq., Bar No. 8192
Commission Counsel
Maine Human Rights Commission
51 State House Station
Augusta ME 04333-0051
(207) 624-6290