STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DOCKET NO. EG09WE-65636

D.A.,	)	
	)	Administrative Action
Complainant,	)	
	)	**PARTIAL FINDING OF**
v.	)	**PROBABLE CAUSE**
	)	
Irvington Board of Education,	)	
	)	
Respondent.	)	

On October 29, 2015, Union County resident D.A. (Complainant), a 65-year old African-American female with disabilities that affect her mobility, filed a complaint with the New Jersey Division on Civil Rights (DCR) alleging that her employer, Irvington Board of Education (Respondent), discriminated against her because of her race, age, and disabilities, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Complainant amended her complaint on June 14, 2016 to include further allegations of discrimination based on her disabilities. The DCR investigation found as follows.

Summary of Investigation

Respondent is a public school district located in Irvington, New Jersey, run by Superintendent Neely Hackett. It operates thirteen public schools, including one pre-school, eight elementary schools, two middle schools, one high school, and one alternative/specialty school.

In or about September 2000, it hired Complainant to work as a special education teacher at its University Middle School. In or about September 2014, it transferred Complainant to Irvington High School to work as a special education inclusion teacher. In that role, Complainant assisted students with special needs in their general education classroom setting by modifying tests to accommodate a student's learning disability, demonstrating how to take proper classroom notes, and breaking down course material in a way the student can more efficiently understand. Complainant reported to Supervisor of Special Services Nicole Gilmore.[1] Irvington High School's principal is Sandra Boone-Gibbs.

Complainant alleges that during the course of her employment at the high school, she was subject to harassment and differential treatment based on her race, age, and disabilities, and denied reasonable accommodations that would have allowed her to perform the essential functions of her job and that Respondent failed to engage her in the interactive process.

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[1] Gilmore is currently serving as the interim Principal of Respondent's Mt. Vernon Avenue Elementary School.

a. Hostile Work Environment & Differential Treatment

Complainant initially alleged that in or around April 2015, Respondent's Director of Special Services Patricia Dowd, who is a 68 year-old Caucasian female with no known disabilities, and Respondent's Employee Health/Workers' Compensation Nurse Monique McGriff, who is a 48 year-old African-American female with no known disabilities, stated, "When are you going to get your knees replaced? Once you do, you'll move faster," and, "You have too many problems getting around because you're getting older and have trouble walking." During the course of the investigation, Complainant told DCR that Dowd and McGriff made the comments during a 504 meeting in 2013.[2] She clarified that Dowd asked her when she was going to get her knees replaced and that McGriff made the statement about her age.

Complainant also initially alleged that on or about May 15, 2015, Supervisor of Special Services Gilmore, who is a 45 year-old African American female with no known disabilities, scheduled her to be in her classroom eight to ten minutes before the start of each class, which, she alleged, was earlier than similarly-situated, younger, non-African American, non-disabled co-workers are scheduled to be in their classrooms. During the course of the investigation, Complainant clarified that she was given six to eight minutes to get to her next classroom as opposed to the standard three minutes as a 504 accommodation. She stated that she did not believe six to eight minutes was enough time due to her mobility impairments and the continuous issues with Irvington High School's elevator's functionality. She stated, "I don't believe any other teacher was given any time limit to get to class. When they wanted to show up, they would show up. They would show up later than three minutes." She stated that although she sometimes arrived at class late or missed a class altogether, she was never disciplined.

Complainant alleged that she was constantly monitored by Principal Boone-Gibbs, who is a 51 year-old African-American female with no known disabilities, based on her race, age, and disabilities. When asked during the investigation to elaborate on that allegation, she stated:

> I felt like Ms. Boone was monitoring me. I was in the cafeteria and I heard my name being called. And so I go to my classroom and the teacher says to me what did you do? And I said, what do you mean? She said Ms. Boone-Gibbs is looking for you. So it just seems like every time I turn around she wanted me for something. It's not one incident. It's several. At first the security guards would tell me when we were going to have a fire drill but then they stopped telling me. So I don't know what that was all about. And I was in the bathroom and Ms. Boone came into the bathroom and she started shaking on the door knob of the stall that I was in. And I didn't answer her or say anything. But she knew I was carrying this bag around and you can see the bag from under the stall. I just felt like her whole demeanor towards me was unnecessary.

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[2] A "504" refers to Section 504 of the Rehabilitation Act of 1973, requiring that school districts with students with disabilities be provided reasonable accommodations to allow access to educational programs and associated activities to the same extent as students without disabilities. School districts generally use the same process for accommodating staff members with disabilities.

Complainant alleged that a similarly-situated younger Caucasian employee, L.G., was not monitored by Boone-Gibbs and was allowed more time to get to her classroom in between blocks.[3] Complainant stated, "[L.G.] was hired after me and she had a room to put her things in. Actually this would be age discrimination not race. I was already in the building and I couldn't get a room and I didn't have any place to put my things. They had rooms to put their things in and [L.G.] was hired after me." She also stated that L.G. can "come and go as she pleases."

Complainant did not identify any witnesses or provide any additional evidence to support those allegations.

Respondent denied the allegations of harassment and disparate treatment in their entirety. It acknowledged that it permitted Complainant six to eight minutes to travel from class to class as a 504 accommodation and that the standard time is three minutes. It denied Complainant's assertion that no other teacher was given a time limit. During the fact-finding conference, Dowd stated, "Administration knew of the situation. We asked [Complainant] to let a security officer know if she would be late to class and then that officer would contact the office." Complainant acknowledged the accuracy of Dowd's statement.

Dowd stated that she did not specifically recall the contents of the 2013 504 meeting. She stated, "I know that sometimes our medical representative will ask questions related to the medical condition or what the employee intends to do." She stated that McGriff was the medical representative present during the meeting.

McGriff denied the allegations attributed to her. She stated that as a nurse, she does not make recommendations for treatment so she would not have asked Complainant when she was going to have her knees replaced. She stated that her role was to sit in with the doctor during worker's compensation appointments and help out when needed. She also sits in during 504 meetings as a medical representative. She stated she did not make any statements regarding Complainant's age.[4]

Principal Boone-Gibbs denied singling Complainant out for heightened monitoring because of her race, age, or disability. She stated:

> I have no idea what she is talking about. I don't shake bathroom doors. I don't even know who has a pocket book and who it belongs to. I don't recall looking for her. There are times that I may look for a staff member but I don't know why. As far as monitoring her, I don't monitor her. We have over 100 staff members. There is no reason why I would be looking for Ms. [Complainant] and shaking bathroom doors. I don't know what that's about.

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[3] A "block" refers to a period of time in which students and teachers are in one class. Irvington High School has four blocks per day. Each teacher teaches three of four blocks.

[4] McGriff is no longer employed by Respondent.

Boone-Gibbs stated that all inclusion teachers are housed in the west wing of the high school and that Complainant was the only inclusion teacher housed in the main building as an accommodation for her disability. She stated that the inclusion teachers store their personal items in one room in the west wing, whereas Complainant was given a different room in the main building to store her personal items. She added, "[Complainant] is talking about one particular teacher and whether or not that teacher chooses to follow our directives is another concern but it has nothing to do with [Complainant]'s claims of discrimination. It's a separate issue that will be dealt with administratively. Our directive is that the inclusion teachers have the room in the west wing."

Records indicate that Irvington High School employed 141 total teachers during the 2014-2015 school-year. Of those 141 teachers, sixty-nine are African-American (49%); fifty-nine are Caucasian (42%); nine are Hispanic (6%); and four are Asian (3%). Seventy-one of the 141 teachers are over 50 years-old (50%).

b. Failure to Accommodate

Complainant alleged that Respondent violated the LAD when it refused to repair the school elevator and denied her two transfer requests which, she contends, would have been reasonable disability accommodations.

i. The Elevator

Irvington High School's main building contains three levels and a basement level (ground level). The main building has a stairwell and an elevator. The elevator can be operated only by personnel who possess an elevator key. Elevator keys are distributed to security personnel, cafeteria staff, and employees with disabilities who require the use of the elevator.

Complainant, who is medically restricted from using stairs, alleges that the elevator is dilapidated to the point where it presents a serious danger to users. She alleges that the elevator sometimes skips floors, gets stuck, provides a bumpy ride, and that the doors frequently fail to open and must be opened manually. She alleges that as a result, she would often be unable to report to class within the six to eight minutes she was given as per her 504 accommodation. She alleged that sometimes, elevator issues caused her to miss class altogether.

Complainant alleges that she asked Boone-Gibbs to have the elevator repaired so that she could adequately perform the functions of her job. She produced emails dated February 19, April 20, and May 20, 2015, in which she reports issues with the elevator. For example, in an on February 19, 2015 email to her supervisor, Gilmore, she wrote: "The elevator is not working. I am waiting for it to be repaired. It was broken yesterday when I left the building." In a May 20, 2015 email to Director of Special Services Dowd, she wrote, "[Building and Ground Manager Roger] Moral [*sic*] was in the building two days ago. I was standing by the elevator. He went to pull out the key. I stepped away from the elevator door, showed him the keyholes were covered with tape. It is still working the same way, broken. I am still calling for the elevator on first, and third floors." She alleged that Respondent's failure to repair the elevator amounted to the denial of a reasonable accommodation.

Respondent contends that it provided Complainant with a reasonable accommodation. It argued that per Complainant's request, it gave her an elevator key and never held her responsible for being late to, or missing a class due to an elevator malfunction. It also gave her a classroom to stay in on the ground level should she be unable to travel to a different floor because of an elevator issue.

Director of Special Services Dowd acknowledged that Complainant reported problems with the elevator. During the fact-finding conference, Dowd stated, "Every time [Complainant] emailed me that there was a concern with the elevator, I would forward it to [Building and Grounds Manager Roger] Monel and let him know there was a problem. He told me it was being repaired. So I was under the impression it was repaired."

Principal Boone-Gibbs acknowledged the issues surrounding the elevator. She stated, "I've ridden the elevator. I know there were issues with it. It wouldn't move or the door wouldn't open." She also acknowledged that Complainant advised Respondent of the issues. Boone-Gibbs stated, "And for the most part it was either [Complainant] or the cafeteria people would report that it wasn't functioning."

Building and Grounds Manager Roger Monel stated, "There were issues with the elevator. Sometimes it would not move at all . . . Sometimes you would not be able to get into the elevator." He denied that the elevator was dangerous. He stated, "It was not dangerous to use because the elevator would not move." Monel told DCR that problems with the main building elevator began to surface in 2014. He stated whenever there was an issue reported, he would call a repair service. Records provided by Respondent indicate that Elevator Maintenance Corp. (EMCO) attempted several maintenance repairs on the elevator between June 2015 and March 2016. However, Monel told DCR that the repairs were not sufficient. He stated, "The elevator was old that's why it kept breaking. We kept doing repairs and the company [who did the repairs] recommended we just replace the whole thing and we did. In the meantime, we did repairs."

DCR spoke with EMCO owner Vinny Chianca, who stated his company began its business relationship with Respondent in or about August 2014. Chianca characterized the Irvington High School main building elevator as "deplorable," and "a total disgrace." He stated that the elevator was so unsafe that he "shut down" the elevator until Respondent agreed to allow EMCO to perform necessary repairs.[5]

DCR also spoke with New Jersey Department of Community Affairs Elevator Safety Unit elevator inspector Earnest Goldberg. Goldberg inspected the elevator at the request of Complainant's counsel on June 6, 2016. Goldberg characterized the main building elevator as "a mess" when he initially inspected it. He stated that the problems with the elevator included a worn out hoist machine which caused the elevator to bounce during the ride, worn down hatch ropes, hatch doors that would get stuck making it difficult to enter and exit the elevator, and a non-functional emergency phone. Goldberg told DCR that the elevator was unsafe. He stated

[5] Superintendent Hackett told DCR that she has no knowledge of EMCO shutting down the main building elevator in Irvington High School.

that when he returned to the site on August 29, 2016 for a follow up inspection, Respondent had made "some" repairs.

Records indicate that Respondent approved work for a "modernization" or replacement elevator in May 18, 2016. The work was completed in January 2017.

Complainant acknowledged that Respondent allowed her to stay in a classroom on the ground level in the event of an elevator malfunction, but stated that such an arrangement was not an adequate accommodation. Complainant stated:

> While on the ground floor I had to use the student's bathroom. The staff bathrooms were on the upper floors. I had to wait until the elevator was fixed to go to the staff bathroom. I would wait until all the students were in their classroom to use the girl's room.
>
> I am required to go Tuesday meetings in the auditorium on the first floor at Irvington High School. When the elevator is not working, I would have to walk down the stairs . . . Meetings were [also] held at other schools (Florence Ave School) I had to walk up and down the stairs to upper level floors in that building.

Superintendent Hackett acknowledged that there are no staff bathrooms on the ground level of Irvington High School. When asked if employees were permitted to use student bathrooms, Dr. Hackett stated, "It's not best practice. I wouldn't go in the bathroom with children. But if there's an emergency, you can."

Respondent acknowledged that Complainant had to attend department meetings every Tuesday either in the Irvington High School auditorium located on the first floor—which is one level above the ground level—or at an outside venue.

ii. Transfer Requests

In or around October 2015, Complainant suffered a workplace injury when a student bumped into her and she fell to the ground. Complainant subsequently began a medical leave of absence.

On January 19, 2016, while still out on medical leave, Complainant's counsel sent a letter to Respondent requesting that Complainant be transferred to a different school upon her return to work as a reasonable accommodation. Counsel attached a note from a doctor recommending that Complainant be "transferred to a school with younger students." The doctor wrote:

> [Complainant] is currently under my care for neck and back injuries. Because of these conditions, [Complainant] is severely restricted as far as physical activity at this time. She is currently not working and is out on Family Leave Act until re-evaluation in early March. When she returns to work, her status will be for light duty. [Complainant] has informed me that there is no such light duty available at

> the high school. Since this is the case, it would be in the best interest for all involved if she was not exposed to the older students which pose more of a risk of re-injury and subsequently, transferred to a school with younger students. She will be re-assessed and returned to work as soon as possible. If you have any further questions, feel free to call my office. Thank you.
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> [See Letter Dr. David Palombi, D.C., to Respondent, Jan. 15, 2016.]

In response, Respondent's counsel sent Complainant's counsel a letter denying the request noting that working with younger students would require her to be engaged in "more rigorous daily school activities," not fewer, because younger students would "require more attention and physical interaction." She wrote in part:

> Upon discussion of your letters with the Superintendent Dr. Hackett, she indicated to me that [Complainant]'s transfer request will be denied as her request contradicts her alleged medical condition; [Complainant] requests to be transferred from Irvington High School to a school with younger students on the basis of aiming to be placed on light duty.
>
> If [Complainant] is transferred to a school with younger students, she will be required to be engaged in more rigorous daily school activities since the students are younger and most certainly require more attention and physical interaction, hence her request to be transferred is denied as it contradicts her medical need.
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> [See Letter Stephanie Faloyin, Esq., to Nicholas Poberezhsky, Esq., Jan. 27, 2016.]

In an interview with DCR, Dr. Hackett confirmed that she unilaterally denied Complainant's request for a transfer to a school with younger students. When asked if she recalled reading the doctor's note described above, Dr. Hackett replied, "I didn't see the note but to be honest that means nothing to me. That is not a medical diagnosis. And if the doctor saw some of our kindergarten students, he may rethink that. So that would be ridiculous to me. I have to be honest with you."

When asked if there were any openings for an inclusion teacher in any of the District's elementary schools, Dr. Hackett stated, "I don't recall. I know we had one recently but [Complainant] was out of work. And we could not get in touch with her. She claimed she had all these ailments. We didn't know if she was ever coming back."

When asked why she denied Complainant's transfer request, Dr. Hackett disagreed with the assertion that "working with younger kids" could fairly be characterized as medically necessity. Dr. Hackett stated:

> Because the transfer was being made where she wanted to work with younger children because of a medical need. And I am not going to honor a transfer based on medical need. Now had she just sent a transfer that she wanted to work with younger children, that's different. But when you send me a transfer indicating

that this is something you need because it's medically necessary, I'm not going down that road because I don't know how working with younger kids is medically necessary. There is no research that I read that you're in less medical danger working with kindergartners than you are working with ninth graders. In fact I think it's just the opposite. This is an accident that happened at the high school. The kid was running and bumped into her. In elementary school you have more kids who run and you have to be more mobile with younger kids. So if her transfer said she wanted to go to elementary school that's different than giving me a letter saying it's medically necessary for me to do this. I am not giving someone a transfer that tells me it's medically necessary for them to work with kindergartners.

When asked if she attempted to obtain more information from Complainant's doctor or whether she requested permission from Complainant to do so, Dr. Hackett replied:

No. I don't think that was my place. The way the letter was written, it was very clear that I was not granting the transfer based on a medical diagnosis that kindergarten students pose less of a risk than high school students. So if the person who received that letter wanted to provide some medical information to me it's not my job to go get more information. If the response to that letter warranted more information, I should have been given that by the attorney or [Complainant] or simply read in between the lines of the letter and send me a letter saying you just want to be transferred to the elementary. But it's not my job to go out and do that kind of work.

When asked if there was any further discussion with Complainant or her representatives about this transfer request after the January 27, 2016 letter, Dr. Hackett replied:

Any discussion about moving someone to an elementary school so they could be more safe I wouldn't have continued in any conversation like that. I wouldn't entertain it. That's not a reason to grant someone a transfer. If I do that, you open up a can of worms and I don't grant transfers because it's safer to be with kindergartners than it is to be with ninth graders. And I don't know what doctor would put that in writing. I don't know. What if she goes there and she can't handle the little ones? What if she's not fine? Then I have to terminate her because she can't do her job. I can't be in that position. I can't do that. If she wants to go to an elementary school, she should simply write that she wants to go to a school with younger children.

On or about June 17, 2016, while still out on a medical leave of absence, Complainant's counsel sent a second letter to Respondent requesting that Complainant be transferred to a different school within the District due to the unsafe state of the elevator and Complainant's inability to use the stairs so that she would be able to return to work for the start of the 2016-2017 school-year. On August 22, 2016, Complainant's counsel wrote a follow-up letter to Respondent stating, in part:

I am writing to request a status update in this matter. Yadira Duran of your office previously advised me that the Board will grant [Complainant]'s transfer request if the elevator at Irvington High School is not repaired prior to the commencement of the 2016-2017 school year. Please indicate whether [the] elevator passed inspection and, if so, please produce the relevant certification from the Division of Consumer Affairs.

If the elevator has not been repaired to the Division's satisfaction, [Complainant] must be transferred to a new school, preferably to one in close proximity to her home.

[See Letter Nicholas Poberezhsky, Esq. to Ronald Hunt, Aug. 22, 2016.]

In a subsequent letter, Complainant's counsel wrote in part:

Please accept the instant correspondence as a reply to your letter dated September 6, 2016. [6] Unfortunately, the elevator at the high school that is presently inoperable and has not been approved for use by the Division of Consumer Affairs is the elevator that [Complainant] would use. The functional elevator is located at another building at the school, far from where [Complainant]'s classes are located. Again given her physical disabilities, the Board must accommodate her by honoring her transfer request to a different school in the district. At the very least, she should be reinstated to the Board's payroll while the elevator is being repaired.

[See Letter Nicholas Poberezhsky, Esq. to Ronald Hunt, Sept. 7, 2016.]

There is no indication that Respondent responded to the September 7, 2016 letter. Complainant was not granted a transfer to a different school. She did not return to work until work on the new elevator was completed and passed inspection in January 2017. She told DCR that she was not paid while out on leave.

During the fact-finding conference, Respondent's counsel was asked if Respondent was in possession of any letters sent to Complainant or her representatives in response to this transfer request. Defense counsel stated to the extent that such letters exist, his office would not be produce such information "since it was sent by an attorney."

Analysis

At the conclusion of an investigation, DCR is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief" that the statute has been violated. Ibid.

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6 DCR was unable to obtain a copy of the September 6, 2016 letter.

A finding of *no* probable cause is deemed to be a final agency order subject to review by the Appellate Division of the New Jersey Superior Court. See N.J.A.C. 13:4-10(e); R. 2:2-3(a)(2).

If, on the other hand, DCR determines that probable cause exists, then the matter will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby DCR makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

a. Harassment and Differential Treatment

The LAD makes it unlawful to discriminate against an employee in the terms, conditions, or privileges of employment based on his or her race, age, or actual or perceived disability. N.J.S.A. 10:5-12(a). Employment discrimination includes harassment that creates a hostile work environment. To establish a *prima facie* case of hostile work environment discrimination, an employee must show that the harassment (1) would not have occurred but for his or her gender or perceived sexual orientation, and (2) was "severe or pervasive" enough to make a (3) reasonable person of the same protected characteristic believe that (4) the conditions of employment have been altered and the work environment is hostile or abusive. Taylor v. Metzger, 152 N.J. 490, 498 (1998).

Here, Complainant alleges that Director of Special Services Dowd and Nurse McGriff made offensive inappropriate comments relating to her age and disability during a 504 accommodation meeting; that Principal Boone-Gibbs gave her less time to report to her classrooms than similarly situated co-workers; and that Boone-Gibbs constantly monitored her while similarly situated co-workers were not as closely monitored.

DCR does not need to determine whether Dowd and McGriff made the remarks attributed to them, or whether the remarks would be sufficiently "severe" or "pervasive" for purposes of the LAD, because during the course of the investigation, Complainant clarified that the comments were allegedly made in 2013, which would be outside the DCR's 180-day statute of limitations. N.J.A.C. 13:4-2.5. And the investigation found no persuasive evidence—and none was produced by Complainant—to support her theory that she was given less time to report to her classrooms than similarly situated co-workers or that she was constantly monitored by the Principal based on her race, age, or disability.

Based on the investigation, and in the absence of any persuasive evidence of a discriminatory animus, the Director cannot find a "reasonable ground for suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person to believe" that the Respondent singled out Complainant for harassment or disparate treatment based on her race, age, or disability. See N.J.A.C. 13:4-10.2.

b. Denial of Accommodation

Employers are required to make a "reasonable accommodation to the limitations of any employee or applicant who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business." N.J.A.C. 13:13-2.5(b). Once an employee with a disability requests assistance, "it is the employer who must make the reasonable effort to determine the appropriate accommodation." Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 400 (App. Div. 2002).

To determine what accommodation is necessary, the employer must "initiate an informal interactive process" with the employee to identify potential reasonable accommodations that could be adopted to overcome the limitations resulting from the disability. Ibid. An employer will be deemed to have failed to participate in the interactive process if (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability, (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. Id. at 400 (citing Jones v. Aluminum Shapes, 339 N.J. Super. at 400-01 (App. Div. 2001)); N.J.A.C. 13:13-2.5(a).

Here, the Director is satisfied for purposes of this disposition only that Complainant is a person with a disability as defined by the LAD, that Respondent was aware of Complainant's disability, and that Complainant's requests that Respondent repair the elevator and/or transfer her to a different school so that she could continue to report to work and get paid were requests for disability accommodations.

Respondent acknowledged that the elevator began malfunctioning in 2014. It argues that it made good faith efforts to repair the elevator, but acknowledges that problems continued. Respondent stated that it approved the installation of a replacement elevator in May 2016, which was seven months after Complainant filed the instant complaint. The work was completed in or around January 2017. Respondent has not argued that replacing the defunct elevator in 2014, 2015, or earlier in 2016 would have caused it to endure an undue hardship. Nor does Respondent contend that there was no other school with a fully functioning elevator to which Complainant could have been temporarily reassigned.

Respondent simply argues that to the extent it did not repair the elevator to Complainant's satisfaction, it nonetheless provided her with a reasonable alternative accommodation by (a) permitting her to stay in a room on the ground level when the elevator was not working properly, and (b) adopting a policy in which she would not be disciplined if she was late to class or missed a class altogether. However, the Superintendent acknowledged that there are no staff bathrooms on the ground level of Irvington High School, and that having employees use student bathrooms was "not best practice." The Superintendent stated, "I wouldn't go in the bathroom with children. But if there's an emergency, you can." Moreover, Respondent acknowledged that Complainant was required to attend department meetings every Tuesday either in the auditorium located on the first floor—which is one level above the ground level—or at an outside venue. Respondent presented no evidence that it offered Complainant

any accommodation that would permit her to attend those meetings when the elevator was not functioning.

It appears that this matter was complicated by the chiropractor's recommendation that Complainant be reassigned to a school with "younger children," which Superintendent Hackett characterized as a "ridiculous" recommendation. Dr. Hackett noted, "There is no research that I read that you're in less medical danger working with kindergartners than you are working with ninth graders. In fact I think it's just the opposite . . . What if she goes there and she can't handle the little ones? What if she's not fine? Then I have to terminate her because she can't do her job. I can't be in that position. I can't do that."

The Director has no reason to doubt that the Superintendent had genuine concerns about the chiropractor's recommendation. Nor does the Director doubt that the Superintendent relied on her own experience and judgment in rejecting the transfer requests. However, Respondent could have shared those concerns with Complainant and initiated a conversation to see if there was a viable alternative—such as temporarily transferring her to a school with a working elevator regardless of the ages of the students. In other words, it could have engaged in an interactive process. But there is no indication that it did so. Indeed, it appears that Respondent affirmatively elected not to engage in an interactive process. As a result, Complainant was unable to return to work until the new elevator in the high school was completed and passed inspection in January 2017.

Based on the above—for purposes of this disposition only—the Director finds that Respondent failed to provide Complainant with a working elevator or a viable alternative accommodation such as transferring her to a school with a fully functioning elevator or the means to participate in the required Tuesday meetings without climbing stairs, and that Respondent has not shown—or even argued—that implementing such accommodations would have somehow been unreasonable. Although Respondent may ultimately present persuasive evidence at a hearing to demonstrate that undertaking additional efforts with regard to the elevator or transfer requests would have imposed an undue hardship on its operations, and that an interactive process would have been futile because there were no feasible alternate accommodations, it has not done so at this juncture. Thus, at this preliminary stage of the process, the Director finds that the circumstances of this case support a "reasonable ground of suspicion" to warrant a cautious person in the belief that the matter should "proceed to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56.

DATED: 4-27-18

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS