Division of
Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **KATHLEEN LYSEK,** Complainant, v. **CHRISTIAN CENTRAL ACADEMY,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10180743

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on March 23, 2018, by Martin Erazo, Jr. , an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any

member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: MAY 16 2018
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

Division of
Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **KATHLEEN LYSEK,** Complainant, v. **CHRISTIAN CENTRAL ACADEMY,** Respondent.	**RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER** Case No. **10180743**

SUMMARY

Respondent's policy unlawfully considers the familial status of job applicants. Respondent unlawfully varied the terms and conditions of its job offer to Complainant because she had a family with children. Respondent is directed to change its familial status policy, and cease and desist from making unlawful inquiries into the familial status of job applicants. Respondent is also assessed a civil fine and penalty.

PROCEEDINGS IN THE CASE

On March 31, 2016, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Martin Erazo, Jr., an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on November 15, 2017.

Complainant and Respondent appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq., Senior Attorney. Respondent was represented by Michael J. Balestra, Esq.

The parties were granted permission to file post-hearing briefs by January 19, 2018. Respondent submitted a timely brief. The Division did not submit a brief.

FINDINGS OF FACT

1. Complainant had one minor child, Caleb, 15 years of age, during the relevant time-period of the present complaint. (Tr. 17-18, 35)

2. Complainant has a Master of Science Degree in Childhood Education, holds New York State certifications in childhood and early childhood education that permit her to teach "birth – 2nd" and "pre-k through 6," and has teaching experience in the public school districts of Williamsville, North Tonawanda and Buffalo. (Respondent's Exh. 1)

3. Respondent is a private school with grades kindergarten through 12, unaffiliated with any church or denomination. (Tr. 44-45)

4. Respondent is a member of the Association of Christian Schools International and interacts with a variety of local churches and denominations that refer many of its students, but is "not answerable" to any of those. (Tr. 11, 48, 76, 78)

5. Respondent's highest governing body is its own board of trustees and no other organization has direct control over the school. (Tr. 48, 73, 76-78)

6. Respondent describes itself as an "intentional Christian community" and "faith based organization." (Tr. 44-45, 47)

7. Respondent has a "Statement of Faith" that states its religious creed and a "Philosophy of Christian Education" for its school. (Tr. 53-54; Respondent's Exhs. 1, 4)

8. Respondent's academic curriculum includes algebra, English, foreign language and bible class. (Tr. 45)

9. Respondent encourages its teachers to incorporate its Statement of Faith and Philosophy of Christian Education into their curriculum. (Tr. 46, 54)

10. Respondent begins each school day with prayer as part of a 20-minute service. Prayers are also performed in class and prior to every athletic practice. (Tr. 45-46, 56-57)

11. Prayer sessions can be led by teachers, by the head of school or by a student chaplain. All teachers are required to lead prayer sessions as part of their job duties. (Tr. 56-57)

12. All teaching and non-teaching staff are required to "model Christlike virtues" and sign Respondent's Statement of Faith document. (Tr. 57-58)

13. Respondent's hiring policy requires all teachers to enroll their school-age children in Respondent's school. (Tr. 60, 75-76)

14. Respondent makes inquiries into the familial status of all applicants to determine if they have school-age children. (Tr. 60, 75-76)

15. Respondent believes that its enrollment policy is consistent with its Philosophy of Christian Education in that if teachers believe in their mission as a Christian school, they "will invest" their own children into Respondent's school and serve as an example to others of their

commitment. Respondent believes that "as a private organization, we get to make those rules." (Tr. 61-62)

16. On August 8, 2002, the Internal Revenue Service ("IRS") confirmed Respondent's tax-exempt status, "as a school," under "section 501 (c) (3)," and other provisions, of the Internal Revenue Code. (Respondent's Exh. 2)

17. The IRS acknowledged Respondent's status as tax-exempt school because the New York State Education Department approved Respondent's charter amendment on June 18, 2002. (Respondent's Exh. 2)

18. Respondent did not submit a copy of its current New York State charter, provisional charter or amended charter. (Tr. 84-85; Respondent's Exhs. 2, 3)

19. I do not give any evidentiary weight to Respondent's document captioned "Secondary School Registration Report," dated June 5, 1987, ostensibly filed with the New York State Education Department, that Respondent offered in support of its argument that its legal status is that of a religious organization. The document is not relevant or reliable as evidence, since it appears to be incomplete, unsigned, contains no verification of authenticity as an official government document, and a plain reading of the document shows that it does not describe Respondent's current legal status. (Tr. 51; Respondent's Exh. 3)

20. On August 3, 2015, Complainant applied for a first-grade teaching position with Respondent. (Tr. 12, 37; Respondent's Exh.1)

21. Respondent's application for the first-grade teaching position asks if the applicant holds a New York State certification to teach and the certification number. (Respondent's Exh. 1)

22. Respondent's application contains a "spiritual qualifications" section that Complainant completed. In that section, Respondent asks Complainant to describe her personal relationship

with God; if she subscribes to its Statement of Faith without reservation; and asks her attitude toward liquor, drugs, and matters of environment, and recreation; and asks how the Lord led her toward Christian school teaching. (Respondent's Exh. 1)

23. The duties of a first-grade teacher at Respondent's school "are straightforward in many ways and traditional." The teacher is expected to start work at 7:30 a.m.; greet students as they come in; teach the students the fundamentals of reading, writing, math, science; integrate God where they can; teach them how to follow instructions; test and grade students; keep in close contact with parents; participate in open houses; participate in the life of the school such as engaging in fundraising projects; and model Christian character in their behavior and interactions with others. (Tr. 68-70)

24. On August 3, 2015, Complainant acknowledged that she received and subscribed to Respondent's "Statement of Faith," "Philosophy of Christian Education," and that she would "respect the distinctive doctrinal views of the various churches represented in the school community." (Tr. 22, 37; Respondent's Exh. 1)

25. Thad Gaebelein is Respondent's head of school. (Tr. 41, 44, 55)

26. Gaebelein is responsible for all hiring and firing of personnel, maintaining the budget, enforcing the school's policies, and sustaining quality control of all aspects of the school. Gaebelein answers directly to Respondent's Board of Trustees. (Tr. 55, 59)

27. On August 3, 2015, and March 2, 2016, Complainant was interviewed by Respondent's division head of kindergarten through 12th grade Sue Cooke, Gaebelein, and other faculty members. (Tr. 33, 37, 59, 60, 63)

28. During Complainant's March 2, 2016 interview, Gaebelein asked her if she had any children. (Tr. 37, 60)

29. Gaebelein informed Complainant that Respondent's policy required teachers to enroll their school-age children in Respondent's school. (Tr. 27, 60, 64)

30. Complainant explained to Gaebelein that she was reluctant to remove her son, Caleb, from his public high school, at the Clarence School District, halfway during his sophomore year, because doing so would be disruptive to his education. Complainant explained that Caleb had previously moved from another school system, had been in the Clarence system since the 5th grade, would have to adjust to a new school, and leave another set of friends. (Tr. 27, 38)

31. Gaebelein replied, "15 year olds shouldn't make the decisions in the household." (Tr. 27)

32. Gaebelein informed Complainant that "there was a 50% discount for faculty sending their child to [Respondent's] school." With the discount, Complainant's yearly tuition would have been $4,500 per year. (Tr. 27, 30, 32-33)

33. Gaebelein did not inform Complainant that there was any other scholarship or discounts that that might be available. (Tr. 35)

34. If a faculty member presses Gaebelein on the need for financial aid he will allow that individual to apply for financial aid beyond the standard discount. (Tr. 60, 65)

35. Gaebelein testified, "That the financial aid piece – that's that last card we play in, in the process. And we kind of hold that back simply because we're not too eager to give away money…" (Tr. 65)

36. Teachers with no children or with children who are not of school-age are not required to make any financial contribution to the school. (Tr. 82)

37. Complainant's salary would have been approximately $30,000 to $33,000 a year given her experience and education. (Tr. 32, 70)

38. Gaebelein found Complainant qualified to teach 2nd grade at Respondent's school, liked her demeanor, found her well-spoken, mature, and found that having her own children was a positive attribute, a "bonus," that spoke to her ability to work with children. (Tr. 59-60, 65)

39. On March 2, 2016, Cooke called Complainant and left a voicemail offering her the first-grade teaching position. (Tr. 12, 28, 38, 59)

40. Cooke made the job offer contingent on Complainant's son, Caleb, attending Respondent's school, and asked that Complainant call back with a decision. (Tr. 12, 28, 64)

41. Complainant returned Cooke's call, left a voicemail, and reiterated the reasons she could not remove Caleb from the Clarence School District. Complainant also explained that after speaking with her husband, they agreed that they could not afford the $4,500 per year to enroll Caleb in Respondent's school, that they were trying to save for Caleb's college costs, and that they were paying education expenses for their eldest son who was already in college. (Tr. 28)

42. Complainant also called Gaebelein and left him the same message as she did with Cooke and asked if he would make an exception in Caleb's case. (Tr. 30)

43. Cooke returned Complainant's call and told her that "Gaebelein was not willing to budge on that issue and that [Complainant] had to send [her] child to [Respondent's school] in order to get the job." (Tr. 30, 64)

44. On March 3, 2016, Complainant declined Respondent's offer of employment. (Tr. 12, 38)

45. At the public hearing, Complainant did not offer any proof of economic or emotional damages, as she was not seeking any damages. (Tr. 31-32)

OPINION AND DECISION

Ministerial Exception Defense

Respondent raised the affirmative defense of "ministerial exception" in employment discrimination matters and argued that it is not subject to N.Y. Exec. Law, art. 15 ("Human Rights Law"). *Hosanna-Taber Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S.Ct. 694 (2012). The ministerial exception is based on the Free Exercise Clause of the First Amendment to the United States Constitution that restricts the government's ability to intrude into ecclesiastical matters or to interfere with a church's governance of its own affairs. *Equal Employment Opportunity Commission v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912, 101 S.Ct. 3143 (1981). In *Hosanna-Taber* the United States Supreme Court held that for the "ministerial exception" to bar an employment discrimination claim, two factors must be present: (1) the employer must be a religious institution, and (2) the employee must be a ministerial employee. *Hosanna-Tabor at 709*. There has been much litigation on the issue of what constitutes a religious institution and a ministerial employee. Courts have wrestled with each of those questions based on the unique, particular circumstances of each case.

With respect to the first element in *Hosanna-Tabor,* there was no question that the Hosanna-Tabor Evangelical Lutheran Church and School was a "church." The Court held that the ministerial exception prohibits courts from interfering with religious decisions regarding whom to employ within the "church." *Id. at 705*. The Court explained that, "the exception ensures that the authority to select and control who will minister to the faithful – a matter 'strictly ecclesiastical' – is the church's alone." *Id. at 709*. With respect to the second element in *Hosanna-Tabor*, the Court considered several factors to determine if Cheryl Perich, who

worked for Hosanna-Tabor as a teacher, was also a minister. Perich was classified as a "called" teacher, meaning that she was "regarded as having been called to [her] vocation by God through a congregation." Perich worked at the church's school that had as its mission to offer a "Christ-centered education." Hosanna-Tabor held Perich out as a minister and Perich held herself out as a minister at Hosanna-Tabor. Perich had also completed certain academic requirements. Hosanna-Tabor issued Perich a "diploma of vocation" that gave her the title "Minister of Religion, Commissioned." Perich completed eight ministerial-related college-level courses, obtained endorsement of her local Synod district, passed an oral examination, and claimed a special housing allowance on her taxes that was only available to individuals earning compensation for ministry. *Id. at 669-700, 707-08.*

Respondent claims that it is a religious institution with a school. However, there is no credible evidence in this record to support that position. Although Respondent points to the status and history of its predecessor institutions that were founded by a church, Respondent itself is not a church, a church with a school, or a religious institution with a school. Respondent's own proof established that its current legal status is that of a 501(c)(3) tax-exempt school, answerable only to its own board of trustees. Respondent established that, as a school, it has chosen to immerse Christian values and principles into its curriculum. However, Respondent made it very clear that it is not operated, supervised, controlled by, or connected with any religious organization, church, congregation or denomination. During the public hearing, Respondent did not provide any other evidence or clarity regarding its legal status although encouraged by the presiding ALJ to do so. Ultimately, the nature or character of a corporation is properly to be determined by the laws under which it was created, and by its certificate of incorporation or charter, and not by what activity it has chosen to engage in. *In re Beekman's*

Estate, 232 N.Y. 365, 134 N.E. 183 (1921); *In re De Peyster's Estate*, 210 N.Y. 216, 104 N.E. 714 (1914); *In re McCormick's Estate*, 206 N.Y. 100, 99 N.E. 177 (1912); *In re Kennedy's Estate*, 240 A.D. 20, 269 N.Y.S. 136 (1st Dep't 1934), aff'd, 264 N.Y. 691, 191 N.E. 629 (1934); *In re Loeb*, 167 A.D. 588, 152 N.Y.S. 879 (1st Dep't 1915). *In re White's Estate*, 118 A.D. 869, 103 N.Y.S. 688 (1st Dep't 1907).

Respondent also did not establish that Complainant was a minister. Respondent references a U.S. Fourth Circuit Court of Appeals case (case name and citations were not provided) for the general proposition that "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision of participation in a religious ritual and worship, he or she should be considered clergy." Respondent references several cases where courts found that employees were ministers, in support of its argument that Complainant was also a minister: "*Starkman v. Evans*, 198 F. 3d 173 (5th Cir. 1999) (lay choir director); *Catholic Univ.*, 317 U.S. App. D.C. 343, 83 F. 3d 455 (member of university canon law faculty); *Rayburn*, 772 F. 2d 1164 (non-ordained associate in pastoral care); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F. 2d 277 (5th Cir. 1981) (faculty of seminary)." However, the court in *Hosanna-Tabor* made it clear that it declined to adopt a "rigid formula" for deciding when an employee is a minister within the meaning of the ministerial exception. *Hosanna-Tabor at 706.* As the voluminous decisions on the issue demonstrate, courts have wrestled with the fact sensitive nature of each case. This matter is distinguishable from the cases cited by Respondent. The essential facts in this matter are more closely related to the cases of *Emily Herx v. Diocese of Fort-Wayne-South Bend, Inc. and St. Vincent De Paul School*, 48 F. Supp. 3d 1168 (N.D. Ind. 2014) and *Richardson v. Northwest Christian University* 242 F. Supp. 3d 1132 (2017).

Herx, who is a female, was a language arts teacher at a Catholic junior high school. Herx's contract with the diocese specifically stated that:

> "Acknowledging and accepting the religious and moral nature of the Church's teaching mission, the undersigned agrees to conduct herself or himself at all times, professionally and personally, in accordance with the episcopal teaching authority, law and governance of the Church." *Id. at 1171-1172.*

The diocese's education policy stated that:

> "Since the distinctive and unique purpose of the Catholic school is to create a Christian education community, enlivened by a shared faith among the administrator(s), teachers, students and parents, the highest priority is to hire Catholics in good standing in the Catholic Church who demonstrate a commitment to Christian living, are endowed with and espouse a Catholic philosophy of life, and believe in the Catholic Church and her teachings. Both Catholic and non-Catholic teachers who are employed in a Catholic school must as a condition of employment, have a knowledge of and respect for the Catholic faith, abide by the tenets of the Catholic Church as they apply to that person, exhibit a commitment to the ideals of Christian living, and be supportive of the Catholic faith." *Id. at 1172.*

The Catholic diocese in *Herx* argued that, based on the tenets of the church, it did not renew Herx's teaching contract because she underwent *in vitro* fertilization treatments. The Catholic diocese argued that although Herx was not employed as a religion teacher, she qualified as a "minister" because the "Church, the School, and the parents of students at the school expected and relied on her to perform the function of a minister every day while teaching her students." The Catholic diocese also argued that "even Mrs. Herx agreed that she was to provide students with an example how to live their faith to share her devotion to God whenever she could." *Id. at 1176.*

The court in *Herx* determined that Herx was not a "minister" for purposes of the ministerial exception to Title VII's non-discrimination mandate. The *Herx* court followed the same logic applied by the U.S. Supreme Court in *Hosanna-Tabor*. The *Herx* court determined that Herx, unlike Perich in *Hosanna-Tabor*, never had, nor was not required to have, any

religious instruction or training in order to be a teacher at the school, did not hold title with the Catholic church, and never held herself as a priest or minister. The court found that deeming Herx a minister "would expand the scope of the ministerial exception too far and, in fact would moot the religious exemptions of Title VII and the ADA." The court allowed Herx to proceed with her Title VII sex discrimination claim and ADA claim based on disability.

As in *Herx*, Complainant was not hired as a religion teacher, did not receive any specialized training or have any religious instruction, was required to model Christian behavior, was required to help create a Christian community with students and staff, but was not a "called teacher" by a congregation as in *Hosanna-Tabor*. Also, as in *Herx*, Complainant was required to comport her behavior to Respondent's "Statement of Faith" and "Philosophy of Christian Education." However, Respondent's own hiring literature restricted Complainant's role as a teacher in the area of faith by cautioning Complainant to "respect the distinctive doctrinal views of the various churches represented in the school community."

The plaintiff in *Richardson*, was a "professor of exercise science." Coty Richardson, an unmarried female, was fired when she became pregnant after refusing Respondent's options of either no longer living with the father of the child or marrying him. The court held that the ministerial exception did not apply to Richardson's discrimination claims of pregnancy and sex because she held a secular title and did not undergo any specialized religious training before assuming her position. The Court in *Richardson* found that, although Richardson held herself out as a Christian, there was no evidence she held herself out as a minister. The Court found that Richardson performed some important religious functions in her capacity as a professor as she was expected to integrate her Christianity into her teaching and demonstrate a maturing Christian faith but nonetheless found that her religious role was secondary to her secular role. *Richardson*

at 1145. The Court in *Richardson* held that if it found Richardson "was a minister, it is hard to see how any teacher at a religious school would fall outside the exception. Courts have properly rejected a broad reading of *Hosanna-Tabor,* which would permit the ministerial exception to swallow the rule that religious employers must follow federal and state employment laws," citing to *Dias v. Archdiocese of Cincinnati*, 2013 WL 360355, *4 (S.D. Ohio Jan. 30, 2013). *Id. at 1145-1146.*

Ultimately, Respondent failed to meet its evidentiary burden to establish an affirmative defense on both elements that are necessary to establish a ministerial exception. Respondent is a school rather than a church. Complainant was not a minister. See *Winbery v. Louisiana College*, 124 So. 3d 1212 (3rd Cir. 2013) and *Mississippi College at 485.* (among other factors, in both matters, the courts found that Respondents were not a church, that the faculty and staff did not function as ministers, that the faculty members were not intermediaries between a church and its congregation. Although faculty members were expected to serve as exemplars of practicing Christians, that fact did not serve to make the terms and conditions of their employment, matters of church administration, or of "ecclesiastical concern."); see also *Puri v. Khalsa*, 844 F.3d 1152 (9th Cir. 2017) (in a dispute over two nonprofit entities within the Sikh Dharma religious community, the court found that the district court erred in dismissing this matter. The ministerial exception did not apply because the defendants were not churches and the duties of the board members in question were not religious or ecclesiastical in nature comparable to those found in *Hosanna-Tabor.*)

<u>Human Rights Law § 296.11 Exemptions</u>

Respondent also argues that its actions are exempted under the Human Rights Law § 296.11, which states: "Nothing contained in this section shall be construed to bar any religious

or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained." Human Rights Law § 296.11 is consistent with the provisions of *Hosanna-Tabor*, but, outside the ministerial exception, this provision also permits preferences to persons of the same religion or denomination. Complainant's creed is not an issue in this matter, therefore this statutory provision is inapplicable. Human Rights Law § 296.11 also permits the specified institutions from "taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained." Respondent's actions are not exempted under the Human Rights Law § 296.11 because it is not a covered institution. As stated above, contrary to Respondent's arguments, the only credible evidence it provided regarding its legal status was that of a tax-exempt school. Respondent's own proof established that is not operated, supervised, controlled by, connected with any religious organization, or that is was a denominational institution or organization.

Familial Status Analysis

Human Rights Law § 296.1(a) states that it shall be "...an unlawful practice... [f]or an employer ... because of an individual's ... familial status...to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Human Rights Law § 292.26 defines familial status as (a) any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained

the age of eighteen years, or (b) one or more individuals (who have not attained the age of eighteen years) being domiciled with: (1) a parent or another person having legal custody of such individual or individuals, or (2) the designee of such parent.

Complainant may establish a prima facie case of discrimination by demonstrating that she is a member of a protected class, she was qualified for her job, and she was terminated or suffered an adverse employment action under circumstances giving rise to an inference of discrimination. *Rainer N. Mittl, Ophthalmologist, P.C. v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 330, 763 N.Y.S.2d 518, 520 (2003). If Complainant establishes a prima facie case, the burden shifts to Respondent to articulate a legitimate non-discriminatory reason for its actions. Thereafter, Complainant must demonstrate that the reasons offered by Respondent are merely a pretext for unlawful discrimination. *Ferrante v. American Lung Ass'n.,* 90 N.Y.2d 623, 665 N.Y.S.2d 25 (1997).

Complainant has established a prima facie case of familial status discrimination. Complainant had a minor child. Complainant was qualified for the position of first-grade teacher. Respondent offered Complainant the position based on her academic credentials and performance during her interviews. Complainant suffered an adverse employment action under circumstances that gave rise to an inference of unlawful discrimination. Respondent's policy required it to offer Complainant a position as a first-grade teacher with terms and conditions that were different than employment offers made to teachers with no children or with children over the age of eighteen. Specifically, Respondent required Complainant to remove her minor child from a public high school, to enroll her child in Respondent's school, and to pay Respondent $4,500 a year in tuition. Teachers with no children or with children over the age of eighteen were not required to pay any cost towards tuition or make any financial contribution to the

school.

Respondent presented legitimate and nondiscriminatory reasons why it did not violate the Human Rights Law.

First, Respondent argued the Human Rights Law "is intended to prevent parents from being punished" for having young children and "intended to redress beliefs that they are less productive, less reliable, or irresponsible for opting not to forego a career and stay home with their children." Respondent viewed Complainant's experience as a mother as a "bonus," not a liability. Complainant was offered a job. Respondent finds that teachers who happen to be parents have a unique opportunity to demonstrate their commitment to Respondent's Christian mission by enrolling their own children at Respondent's school. Therefore, Respondent argued, Complainant failed to show that it had any discriminatory motive or animus against her familial status.

Second, Respondent views its policy as an employment benefit and not a burden. Complainant was offered a private education for her child at a reduced rate that Respondent argued was not available to most others in the community. Respondent also argued that Complainant could have asked for financial aid beyond the teacher discount but failed to do so. As a result, Respondent contends, Complainant failed to show that she suffered an adverse employment action with respect to its policy.

Third, Respondent argued that Complainant failed to show that she would have made less money than a similarly situated employee without children since her salary was never agreed upon. Therefore, Respondent argued, Complainant failed to show that she suffered an adverse employment action with respect to compensation.

Complainant demonstrated that the reasons offered by Respondent are a pretext for

unlawful discrimination.

First, Human Rights Law § 296.1(a) specifies that unlawful discrimination includes "terms, conditions or privileges of employment." Because Respondent offered Complainant a job does not absolve Respondent from the claim that the offer was discriminatory. Complainant established that there were two hiring standards. Respondent's hiring policy treated applicants with a family differently than those without one. Applicants with children, as defined under the Human Rights Law, were required to have their children enrolled in Respondent's school. Applicants without children or without school age children do not have to make the choice of accepting a job with this condition. Respondent admitted that "as a private organization, we get to make those rules." Respondent's stated goals of promoting its school by having the children of teachers attend the school does not mitigate the discriminatory motive. Plainly put, Respondent's policy clearly imposes a term, condition, or privilege of employment, on an applicant because of her familial class status.

Second, Respondent argued that its policy was a benefit, not a burden, because Complainant was offered the opportunity to have her child receive a private education, at a reduced rate, not available to most others in the community. However, Complainant established that the members of the community at large are not similarly situated to her. The correct comparators are teachers with no children or with children that are not school-age. Similarly situated teachers were not required to make any financial contribution to the school. A financial burden was placed on Complainant because she had a minor child. Complainant's tuition cost, with the teacher discount, would have been $4,500 a year.

Third, Respondent argued that Complainant failed to ask for financial aid beyond the discount. As a result, Respondent posited that Complainant did not prove how Complainant's

tuition payment would have impacted her salary or that she was offered a lower salary than other teachers. Complainant showed that these arguments are unavailing. Complainant did not claim she was offered a lower salary. Complainant established that she was required to contribute financially to the school, by way of tuition, while similarly situated teachers were not. In addition, Complainant proved that she was not offered financial aid. At the public hearing, Respondent's head of school, Thad Gaebelein, admitted he made it very difficult to reveal the availability of financial aid. Gaebelein testified, "the financial aid piece – that's that last card we play in, in the process. And we kind of hold that back simply because we're not too eager to give away money…"

Fourth, Respondent also imposed non-financial burdens on Complainant not imposed on similarly situated teachers. Complainant established that she was concerned for her son's academic and emotional well-being if she was required to remove him from his current high school system, halfway during his sophomore year. Complainant's son would have to leave his friends and adjust to a new school. As stated, applicants without children or without school age children did not have to make the same non-financial choices in order to accept the job.

Finally, Complainant's proof shows that Respondent violated Human Rights Law § 296.1(d), which specifies that it is an unlawful discriminatory practice "for any employer…to use any form of application for employment or make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to …familial status ...or any intent to make any such limitation specification or discrimination," unless based upon a bona fide occupational qualification ("BFOQ"). The proof shows that Respondent's inquiries into familial status clearly expressed an unlawful limitation and specification. Respondent's inquiries were not merely informal questions, asked in passing

during an interview, outside a context of unlawful discrimination. *Matter of Delta Airlines v. New York State Division of Human Rights,* 91 N.Y.2d 65, 72 (1997). Respondent gathered unlawful information on familial status for the express purpose of making employment decisions. Applicants were specifically asked if they have minor children to decide whether to apply Respondent's mandatory enrollment policy as a condition of a job offer. The BFOQ is an extremely narrow exception to the anti-discrimination provisions of the Human Rights Law. It is an affirmative defense which must be pleaded and proved by Respondent. In this matter, Respondent neither raised a BFOQ as an affirmative defense nor proved that an applicant's familial status was necessary to perform the duties of a first-grade teacher. *New York State Div. of Human Rights v. New York-Pennsylvania Professional* Baseball League, 36 A.D.2d 364, 320 N.Y.S. 788 (4th Dept. 1971), aff'd 29 N.Y.2d 921, 329 N.Y.S.2d 99 (1972).

Damages

In this matter Complainant did not make any emotional damages or lost wage claims.

Civil Fine and Penalty

Human Rights Law § 297.4(c)(vi) authorizes the Division to assess civil fines and penalties, "in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious." Any such civil penalty "shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article." Human Rights Law § 297.4(e). In determining the amount of a civil penalty, the Division should consider the goal of deterrence, the nature and circumstances of the violation, the degree of the respondent's

culpability, any relevant history of the respondent's actions, the respondent's financial resources, and other matters as justice may require. *Gostomski v. Sherwood Terrace Apartments*, DHR Case Nos. 10107538 and 10107540 (November 15, 2007), *aff'd*, *Sherwood Terrace Apartments v. New York State Div. of Human Rights*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009).

The goal of deterrence; Respondent's degree of culpability; and the nature and circumstances of Respondent's violation warrant a penalty. Respondent cannot engage in a deliberate practice of considering the familial status of its applicants. Respondent admittedly made inquiries into the familial status of all applicants, including Complainant, that violated Human Rights Law § 296.1(d). Furthermore, Respondent made Complainant a job offer that unlawfully varied her terms and conditions of employment, in violation of Human Rights Law § 296.1(a), because she had a family with children. Respondent imposed burdens on Complainant not imposed on others with no children or no children of school-age. Respondent's job offer required Complainant to remove her minor child from a public high school, to enroll her child in Respondent's school, and to pay Respondent $4,500 a year in tuition. Teachers with no children or with no children of school-age were not required to pay any cost towards tuition or make any financial contribution to the school. Considering these factors, a civil fine in the amount of $3,000 may act as an inducement for Respondent to comply with the Human Rights Law in the future, deter others from future discriminatory action, and present an example to the public that the Division vigorously enforces the Human Rights Law. *See Matter of Li v. New York State Div. of Human Rights*, 147 A.D.3d 1321, 1322, 46 N.Y.S.3d 345, 346 (4th Dept. 2017).

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED that Respondent, and its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and it is further

ORDERED that Respondent shall take the following action to effectuate the purposes of the Human Rights Law and the findings and conclusions of this Order:

1. Within 60 days of the date of the Commissioner's Order, Respondent shall pay a civil fine and penalty to the State of New York in the amount of $3,000. This payment shall be made in the form of a certified check made payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, Esq., General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York, 10458. Interest on this award shall accrue at a rate of nine percent per year from the date of the Commissioner's Order until payment is actually made by Respondent; and

2. Within 60 days of the date of the Commissioner's Order, Respondent shall conform its employment policies and practices to comply with the Human Rights. In particular, Respondent shall cease and desist from making employment inquiries into the familial status of its applicants and cease and desist from considering the familial status of applicants as part of its employment decisions; and

3. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: March 23, 2018
Buffalo, New York

Martin Erazo, Jr.
Administrative Law Judge