NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

AMELIA KEARNEY ON BEHALF OF HER
MINOR CHILD EPIPHANY KEARNEY,
Complainant,

v.

ITHACA CITY SCHOOL DISTRICT,
Respondent.

NOTICE AND
FINAL ORDER

Case No. 10109266

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 April 11, 2008, by Christine Marbach Kellett, 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 GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"), WITH THE FOLLOWING AMENDMENT:

- Both damage awards are reduced from $500,000 to $200,000. The Recommended Order is otherwise adopted in its entirety.

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 08 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
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on the Complaint of

AMELIA KEARNEY ON BEHALF OF HER MINOR CHILD EPIPHANY KEARNEY,
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v.

ITHACA CITY SCHOOL DISTRICT,
Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10109266**

SUMMARY

Complainant established her daughter was the victim of horrendous, repeated, racially-motivated harassment by other students in school and on the school bus in violation of N. Y. Executive Law § 296(4) (the "Human Rights Law"). Complainant also established Respondent permitted such discriminatory conduct by failing to take appropriate or meaningful actions to stop these racially motivated attacks despite the opportunity and authority to do so. Complainant established that Respondent's policies against racial harassment and discrimination were a sham as Respondent's staff repeatedly put the interests of the white male students harassing Complainant's daughter ahead of the Respondent's stated policies regarding discrimination and harassment. Complainant is entitled to compensatory damages and injunctive relief.

PROCEEDINGS IN THE CASE

On January 13, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to education 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 an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

In a Decision and Order issued on September 11, 2007, the Hon. Robert C. Mulvey determined that the Division's position that it had jurisdiction over Respondent as an education corporation or association under NYS Executive Law sec. 296 (4) was correct. (ALJ Exh. 5)

After due notice, the case came on for hearing before Christine Marbach Kellett, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on December 19-20, 2007.

Complainant, her daughter Epiphany, and Respondent appeared at the hearing. Complainant and her daughter Epiphany were represented by Raymond M. Schlather, Esq.. Respondent was represented by Subhash Viswanathan, Esq.

Permission to file post-hearing briefs was granted. Counsel timely filed their post-hearing submissions.

FINDINGS OF FACT

1. Complainant charged Respondent with violating the Human Rights Law when it permitted repeated acts of racial harassment directed at her minor daughter both on the school bus and in school. (ALJ Exhibits 1,2)

2. Respondent admitted that Complainant's daughter had been victimized by white male students, but asserted it took appropriate disciplinary steps and denied illegal discrimination. (ALJ Exh.3)

3. Respondent, a public school district located in and around the City of Ithaca, New York, has both an anti-discrimination policy and a student discipline policy, copies of which are

provided to students and made available to parents. The policies provide for the reporting of racial harassment and for the discipline of students found guilty of racial harassment in a stepped discipline process ranging from in school suspension, 1-3 days suspension from school to a superintendent's hearing (for long terms suspensions) and reporting the incident to the police. (Complainant's Exh. 7; Respondent's Exhibits 31, 32, 33 and 34; Tr. 34-35, 56)

4. In academic year 2005-2006, Respondent saw an increase in the number of racially motivated incidents taking place in school and on its buses. (Complainant's Exh. 5; Respondent's Exhibits 25, 26, 27, 29; Tr. 507-09, 626-27, 667)

5. Complainant is the mother of Epiphany Kearney ("Epi"), date of birth July 9, 1993. (ALJ Exh. 1; Tr. 33-34).

6. Complainant and her daughter are African -American. (ALJ Exh. 1)

7. In academic year 2005-2006 Epi attended the seventh grade at the DeWitt Middle School ("DeWitt"). (ALJ Exh. 1; Tr. 39)

8. In order to get to and from school, Epi rode a school bus on Route 57. Epi was one of two African-American children on the bus. (Tr. 441) As the Respondent's Vice-Principal admitted, the Route 57 bus was a "hell hole." (Tr. 641)

9. DeWitt had a student population of 564 students, with 388 White, 64 African-American, 66 Asian, 33 Hispanic and 13 Native American/Eskimo. (Tr. 592)

10. Respondent conceded Epi was subjected to repeated racially-motivated harassment by several white male students as follows: on September 29, 2005, when a white male student said to Epi: "Do you mind if I call you my nigger?"; on September 30, 2005 Epi was called "Nigger"; on October 28, 2005, when Epi was called "chocolate;" on November 8, 2005, when Epi was sworn at and called names; on December 6, 2005, when Epi was spit on by a white male

student; had her book bag thrown to the back of the bus and was tripped; and on December 7, 2005 when Epi was taunted for crying the day before. (ALJ Exh. 3; Respondent's Exhibits 3, 4, 5, 6, 7, 8, 16, 17, 18; Tr. 426-31)

11. On December 9, 2005, the white male students were captured on video recordings by a camera on the bus saying they had a gun. (Respondent's Exhibits 11, 19; Tr. 548-50)

12. On December 7, 2005, one of the white male students told Epi that he had a hunting rifle with her name on it. (Respondent's Exh. 16)

13. In addition, although Respondent only admits another black female student heard one white male student say "we shoot niggers like you in the woods." I find the remark "we shoot niggers like you in the woods." was made in presence of and directed to, Complainant's daughter, Epi. (ALJ Exh. 3; Tr. 502-505)

14. Respondent's own witness, James Thomas ("Thomas"), the Vice-Principal at Dewitt, admitted the steps taken to discipline the offending students, including the imposition of two day suspensions from school, were meaningless and did not prevent reoccurrence of racially harassing conduct. (Tr. 579, 594)

15. Thomas described the out-of school suspensions as one of the most severe tools he had. (Tr. 579)

16. However, the policy allowed for a superintendent's hearing for longer suspension periods, but Thomas never contemplated that for these white male students. (Tr. 589-591)

17. Thomas admitted he was focused on trying to persuade the parents of one of the offending white male students to permit the child to go to a special BOCES program. (Tr. 580-81, 639)

18. Thomas admitted the use of "chocolate, "cunt" and "nigger" while offensive, had not triggered in him the need of pursuing more aggressive and severe punishment for the white male boys, in part, because the hallways were filled with this language. (Tr. 609-610)

19. Episodes continued to occur: on February 17, 2006, a white male student held up a sign at the bus window saying "KKK is coming to your house, niggers" (Respondent's Exh. 22). On that same day the same student took a piece of paper and a highlighter and wrote "KKK and I hate niggers".(Respondent's Exh. 22)

20. This episode did result in the removal of the offending student from the bus for the remainder of the year. (Tr. 575)

21. Respondent also failed to utilize available resources, such as putting a school bus monitor on the bus to prevent reoccurrences of racially discriminatory conduct directed toward Epi, although Complainant asked for that to be done to protect her child. (Tr. 539, 543-44)

22. Respondent rewarded one of the offending students by recognizing him as a "leader", a designation that permitted him to participate in designing bias-free, cross cultural programs outside the regular class room as part of the efforts to find peer-based solutions to the racially hostile environment. (Tr. 678-81, 689)

23. The Respondent's School Superintendent, Judith Pastel ("Pastel") testified how her goals included changing behavior. (Tr. 805)

24. But although she was kept informed of the broad situation at DeWitt, she paid little to no attention to the specific situation Complainant faced and never responded directly to Complainant's letters or e-mails sent to her. (Tr. 57)

25. Pastel testified she would not have sought suspensions for the students for the verbal abuse inflicted on Epi. (Tr. 826-27)

26. This is inconsistent with her position regarding a black male student at the high school who was expelled after writing an essay on gun violence in English class. (Tr. 820-23, 826-27).

27. Nor did Pastel consider filing a PINS petition in Family Court on any of these repeatedly offensive and harassing white male students. (Tr. 746-47)

28. As a result of her treatment on the bus and in school, Epi's grades and behavior deteriorated. (Tr. 42, 94, 112, 133, 142) She began sleeping on the floor of her room, below window level. (Tr. 133) She became insolent, withdrawn, and fearful. (Tr. 51, 97) Upon occasion she would lash out at her attackers, and once received notification she could not ride the bus. (Complainant's Exhibits 19, 20) She began arriving late to class, resulting in her being placed on the "restricted" list. (Complainant's Exh. 11; Tr. 133-137) Her relationship with her mother, which had been warm and close, changed. (Tr. 42-44) She withdrew from friends. (Tr. 96-97, 133) She refused to cooperate with attempts at counseling. (Complainant's Exhibits 15, 17; Tr. 146-50, 153, 254)

29. Epi herself reported she felt sadness, worthlessness, and anger at herself; she was scared and humiliated. (Tr. 302, 309-10, 325)

30. Complainant felt hurt and angry, and wanted the horrible things happening to her daughter to stop. (Tr. 51) She proceeded to take a series of steps designed to alert the authorities and stop the harassment of her daughter.

31. Beginning October 16, 2005, Complainant contacted Respondent, the members of the Board of Education, the superintendent, the principals and the director of transportation, on a regular basis, reporting the harassment her daughter was subjected to, but she received little to no response. (Complainant's Exhibits 1, 2, 3; Tr. 46, 49, 60, 63, 74-76, 146)

32. On December 7, 2005, Complainant filed a police report regarding the harassment, but the police were told by Respondent that Respondent was handling the situation. (Complainant's Exh. 4; Tr. 115)

33. After the incident on the bus in December, Complainant attempted to keep Epi home for her own safety and requested a tutor for her daughter, but Respondent refused to provide a tutor, telling Complainant it was her choice to keep her daughter home. (Tr. 79, 80, 101, 119-20)

34. In response to Complainant's attempts to obtain counseling and suitable programming for her daughter, Respondent's Middle School teachers determined that the path to follow was to direct Complainant to have Epi diagnosed by her pediatrician with Attention Deficit Hyperactive Disorder, a diagnosis the pediatrician could not and would not make, as it was inappropriate. The pediatrician suggested Post Traumatic Stress Disorder as a possibility. (Complainant's Exhibits 9, 11, 13, 15, 18; Respondent's Exhibits 2, 12, 13, 14, 15; Tr. 449, 453-55, 474, 494-96, 578)

35. On July 9, 2006, Complainant did obtain an order of protection from Family Court for her daughter prohibiting one of the white male students from assaulting, harassing, threatening or intimidating Epi. (Respondent's Exh. 30)

OPINION AND DECISION

Human Rights Law §296.4 states in applicable part:

> It shall be an unlawful discriminatory practice for an education corporation or association ...to permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, sexual orientation, military status, sex, age or marital status...
>
> N.Y. Executive Law §296.4

Complainant charged Respondent with violating the Human Rights Law when her daughter was subjected to numerous episodes of racial taunting and physical violence on the bus and in school.

Respondent denied discriminatory practices but admitted that the atmosphere in school was tainted by rampant racial tensions.

Respondent's explanation of its specific actions in connection with the complaint filed establish it was more concerned with getting the taunting white boys into special BOCES programs than protecting the black girl from racial hazing.

Respondent's employees repeatedly violated Respondent's policies regarding the investigation and discipline of racial incidents. Because the Respondent chose to pursue a course of conduct that permitted the repeated racial harassment of this particular student on the bus and in the school, it violated the Human Rights Law. Complainant is entitled to damages.

In connection with complaints of discrimination in employment and housing, the Division has adopted the analysis used by federal courts in Title VII cases. In this case, a more accurate analysis is found in the federal decisions adopted under Title VI of the Civil Rights Act ("Title VI") (race) and Title IX of the Education Amendments ("Title IX) (sex) as applied to

educational institutions.[1]

As Respondent's post hearing submission acknowledges, the standard of liability imposed on an educational institution in student racial harassment cases under Title VI and student sexual harassment cases under Title IX is whether or not the educational institution showed deliberate indifference to the harassment. *See Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S. Ct. 1661 (1999). The Second Circuit found that deliberate indifference to discrimination can be shown from a respondent's actions or inactions in light of the known circumstances, and can be found when the respondent's responses to the known discrimination "is clearly unreasonable in light of the known circumstances." (citation omitted). (emphasis added). *Gant v. Wallingford Board of Education*, 195 F. 3rd 134, 141 (2d Cir. 1999)

Respondent's reliance on *Doe v. Lennox School District No. 41-4*, 329 F. Supp.2d 1063 (D.S.D. 2003) is misplaced. The record established that the Respondent's administrators repeatedly chose a course of action which both put the interests of the white male perpetrators ahead of the interests of the black female student, and was repeatedly shown to be, and acknowledged to be, ineffective in stopping the discriminatory conduct.[2] By such repeated choices, Respondent's conduct met the definition of "permit" which means "to allow to be done," "to allow" and "to give opportunity." *Webster's New World Dictionary, 2d ed.*

As the record established it became unreasonable in the face on continued occasions of discriminatory conduct to continue to impose 2 day out of school suspensions as the suspensions were having no effect on the conduct. *Gant v. Wallingford Board of Education*, 195 F. 3rd 134, 141 (2d Cir. 1999) The Respondent's investigations into the complaints made by Epi are tainted

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[1] Respondent's Post Hearing submission and Complainant's pre-hearing brief as adopted by reference in Complainant's Post-Hearing submission address the Title VI and Title IX standards.

by indifference. The Assistant Principal routinely violated the stated policies regarding reports of discrimination and of violence. The administration in general refused to return Complainant's calls or respond to her emails.

Respondent ignored or fought Complainant whenever she sought to protect her daughter and stop the inexcusable and despicable conduct inflicted on her daughter. Respondent attempted to evade scrutiny of its conduct by citing federal legislation designed to protect children's privacy. While it is true that Epi's peers were the actors in terms of the racially offensive taunts, discriminatory remarks, racially abusive language, and despicable conduct that should not be tolerated, this case is really about the failure of the adults responsible for the students in their school to stand up to and stop conduct they knew was wrong. At each opportunity the adults made the wrong choice: they protected the perpetrator and thus permitted the repeated discriminatory conduct to be inflicted on Complainant's child. This is a gross abuse of their authority, their discretion, and an abdication of their responsibilities to Epi, to Complainant and to the school population at large.

The Commissioner is authorized to award compensatory damages for the pain and suffering resulting from discriminatory conduct. Complainant faced a parent's nightmare: her child was repeated taunted racially, humiliated, made fearful, her self-confidence eroded before Complainant's eyes. Complainant took all reasonable steps to help her daughter but was met with a stonewall of silence, and a failure to respond. Her requests for such obvious remedies as a monitor on the bus, or a tutor, or even regular counseling, were denied. An award of $500,000 to Complainant will permit Complainant to seek the counseling necessary for her daughter, to seek an educational alternative for Epi, and to compensate Complainant for the mental anguish, pain

[2] The parties did not present this case as one of discrimination based upon sex. The history of black women being subjugated to the interests of white

and suffering she endured as a result of Respondent's conduct, and its indifference toward the horrendous abuse perpetrated on Complainant's daughter.

Epiphany Kearney was the victim of gross, repeated racially motivated harassment, discrimination and abuse. She went from an average child to one who is withdrawn from her peers, fearful and distrustful. She has been spat upon and harassed by the foulest of language. She watched as her mother's efforts to protect her were ignored. She was forced to go on a school bus twice a day knowing she would be victimized by white male boys on the bus. An award of $500,000 in compensatory damages for the mental anguish, pain and suffering endured by Epi, made payable to the Complainant in trust for her daughter is appropriate here.

Both these awards meet the goals and objectives of the Human Rights Law and are consistent with prior awards. *See: New York City Transit Auth. V. New York State Div. of Human Rights (Nash)*, 78 N.Y.2d 207, 573 N.Y.S.2d 49 (1991); *Kondrake v. Blue,* 277 A.D.2d 953, 716 N.Y.S.2d 533 (4th Dept. 2000); *Hempstead v. New York State Div. of Human Rights*, 233 A.D.2d 451, 649 N.Y.S.2d 942 (2d Dept. 1996).

The Commissioner is authorized to award equitable relief in the form of an equitable order. It is recommended that the Commissioner order the District as follows: that within 60 days of the Commissioner's Final Order, that the Respondent's teachers, administrators, school bus drivers, cleaning staff and all other employees be trained in the recognition of discrimination and the effects of discrimination on children; that Respondent review and revise its student disciplinary code to incorporate effective progressive options for changing student behavior; that the Respondent in conjunction with the Division develop plans for the creation of proactive programs for students and their parents to address discrimination; and that the Respondent develop staffing plans to insure the District's staff has the diversity and tools necessary to end

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men is well known. Here we see it inflicted on a twelve year old.

the racial disharmony evidenced by the record at this public hearing.

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 the Respondent shall cease and desist from discriminatory practices in education; and it is

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

1. Within 60 days of the date of the Commissioner's Final Order, Respondent, its Board of Education, its superintendents, bus drivers, cleaners, clerical staff, representatives, employees, teachers, volunteers and administration shall participate in an intensive training program approved by the Division for the recognition of discrimination and its effect on children.

2. Within 90 days of the date of the Final Order, Respondent shall review, redesign, revise, adopt and implement a new student disciplinary code to incorporate effective progressive discipline and effective practices for changing student behavior.

3. Within 150 days of the Final Order, Respondent shall develop and implement a community base program to address the racial tensions in its schools.

4. Within 180 days of the Final Order, Respondent shall develop staffing plans to insure the Respondent's staff has the diversity, the sensitivity, the training and the tools necessary to end the racial disharmony evident in this record.

5. Within 60 days of the Final Order, Respondent shall pay to Amelia Kearney as compensatory damages for the mental anguish, pain and suffering inflicted upon her by Respondent's discriminatory conduct toward her daughter the sum of $500,000.

6. Within 60 days of the Final Order, Respondent shall pay to Amelia Kearney, in trust for her minor daughter Epiphany Kearney, the sum of $500,000 as compensatory damages for the mental anguish, pain and suffering she suffered as a result of Respondent's conduct.

7. The aforesaid payments shall be made by Respondent in the form of two certified checks, one made payable to the Order of Amelia Kearney and the other made payable to the Order of Amelia Kearney in trust for her minor daughter Epiphany Kearney, and delivered by certified mail, return receipt requested to Complainant's attorney, Raymond M. Schlather, Esq., Schlather, Geldenhuys, Stumber & Salk, 200 East Buffalo Street, Ithaca, New York

8. Respondent shall furnish written proof to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of its compliance with the directives contained in this order.

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

DATED: April 10, 2008
Bronx, New York

Christine Marbach Kellett

Christine Marbach Kellett
Administrative Law Judge