

## **INVESTIGATIVE REPORT**<sup>1</sup>

VHRC Case PA15-0026

Complainant: “Ms. Poe” o/b/o “O.P.”

Respondent: Camels Hump Middle School and Chittenden East Supervisory Union

Charge: Public Accommodations – Disability Discrimination

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### **Summary of Complaint:**

On May 11, 2015, O.P. filed a discrimination complaint with the Vermont Human Rights Commission (VHRC), alleging that Camels Hump Middle School (CHMS) and Chittenden East Supervisory Union discriminated against her in a place of accommodations on the basis of her disability in violation of the Vermont Fair Housing and Public Accommodations Act (VFHPAA).

Specifically, O.P. alleges that she was born with a rare physical disability, she requires the use of hearing aids and a personal Frequency Modulator (FM) system as a reasonable accommodation and that some teachers and after-school activity leaders did not provide the accommodation.

### **Summary of Response:**

On June 10, 2015, Respondents provided a written response denying that any discrimination occurred.

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<sup>1</sup> This is a redacted Investigative Report. Portions of this investigative report have been removed after a no reasonable grounds recommendation by the Administrative Law Examiner and a decision by the Vermont Human Rights Commissioners to accept the recommendations.

## Procedural Due Process

The Respondents provided a brief to this investigation and argued that the VHRC failed to provide adequate due process to Respondents for two reasons: (1) It shared the response with the Complainant without notice to the Respondent; (2) the Complainant furnished a reply to the response that had not been provided to the Respondents before their witnesses were interviewed. Respondents argued that Complainant's reply essentially amended the complaint.

The VHRC provides the parties with notice at the outset and an opportunity to be heard after an investigation has been completed. Similar to the general rules of pleading, the complainant sets forth short and plain statements that create a prima facie case of discrimination, if found to be true. The Respondents are served this complaint and have 14 days to provide a written response. At the closure of an investigation, both parties have the right to receive notice of the investigative report, provide a written response and appear before the Commission to make brief arguments in favor or against the investigator's recommendations.

In between, the investigator has wide discretion in conducting her investigation. There are limited procedural or substantive due process rights afforded to either party during the investigation. It is through practice, not by way of rule or otherwise, that the investigator may provide the complainant a copy of the response and request a reply. This narrows the issues for investigation should the parties agree on certain facts. Typically, the complainant's reply to the response is returned fairly quickly and then immediately sent to the Respondent as a courtesy. In this case, the original investigator had not extended this courtesy to the Respondents, most likely as an oversight. Despite this oversight and given the fact that Respondents have no further rights to notice beyond the complaint and report, Respondents have not been prejudiced. Most of the facts that appear in this investigative report come not from the Complainant's reply but instead from the documents provided by Respondents and the sworn statements of their witnesses, all of whom were interviewed with the Respondents' attorney present. Although, it's not unusual in an investigation or during discovery in litigation for facts to be uncovered that were not known at the beginning of a case, it does not always merit an amendment of the complaint where the original complaint provided adequate notice. Such was the case here. Lastly, both parties have

the right to inspect and copy the HRC file at any time and this investigation invited both parties to provide any additional documents, witnesses or other evidence it wished to be considered.

### **Preliminary Recommendations:**

This investigation makes a preliminary recommendation that the Human Rights Commission find there are **reasonable grounds** to believe that the Respondent discriminated against O.P. on the basis of her disability and violated the VFHPAA, codified at 9 V.S.A. §4502 (c), when Respondents' music teacher failed to use the FM system in two courses, Chorus and Band Lessons, for two years.

### **Documents:**

05/11/2015 – Complaint	Respondent's Brief and Statement of Facts
06/10/2015 – Response to Complaint	The Craniofacial Center written summary of follow up exam of O.P. on 04/24/12.
Camel Hump Middle School email and letter correspondence regarding O.P.	CHMS employee Martha Alexander, R.N.'s file on O.P.
O.P.'s 504 Plans for 2012-2013, 2013-2014 academic years and 504 meeting notes for all academic years at CHMS.	9East Network/Laurel Scannel's file on O.P.
Letter from Jeffrey A. Fearon, M.D., provided to Respondents.	CHMS calendar and O.P.'s grade reports
Letter from Brian Peters, M.D. to Principal Mark Carbone.	Email correspondence provided by O.P.'s parents.
	Physical Therapy Assessment by Michelle L. Villeneuve, MS, PT dated 5/25/2013.

### **Interviews:**

Ms. Poe – O.P.'s mother	Martha Alexander – CHMS Nurse
Mr. Poe – O.P.'s father	Anna Kovaliv – Field Hockey Coach

Angela Zagursky - Classroom Teacher

Michelle Carter – Field Hockey Coach

Mark Carbone – Principal

Darlene Kelleher – Speech Pathologist

Heather Schoppmann – Music/Chorus Teacher

Leah Licari – Special Educator

Rebecca Thompson – Field Hockey Coach

Laurel Scannel – 9East Network Consultant

### **Facts:**

O.P. is 13-years old and in the seventh grade at CHMS. She was born with Pfeiffer Syndrome, a rare genetic disorder which is characterized by the premature fusion of certain bones of the skull that prevents further growth of the skull and affects the shape of her head and face.<sup>6</sup> The characteristics of Pfeiffer Syndrome include a prematurely fused skull, bulging wide-set eyes due to shallow eye sockets, underdevelopment of the midface, broad and short thumbs and big toes, high arched palate and small jaw, missing eye muscles and nystagmus<sup>7</sup>, conductive hearing loss, a Ventricular-Peritoneal shunt (VP shunt)<sup>8</sup> to divert fluid buildup in her brain and essential tremor. As a result of this disorder, O.P. has had to undergo numerous surgeries in her childhood including: Intestinal Malrotation repair<sup>9</sup>, strabismus<sup>10</sup> (x3), Tonsils (x2), bone anchored hearing aids implant (BAHAs), Cranial Vault Remodeling<sup>11</sup>, VP Shunt Replacement, Septoplasty<sup>12</sup>, Le Fort III with halo distraction (midface advancement)<sup>13</sup>, Chiari Malformation Decompression<sup>14</sup> (x2) and VP Shunt Revision (x2).<sup>15</sup> O.P.'s visual-perceptual, hearing and speech and language difficulties affect her ability to communicate, learn and socialize

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<sup>6</sup> Interview with Ms. Poe, Mr. Poe, 504 Plans.

<sup>7</sup> Nystagmus is a vision condition in which the eyes make repetitive, uncontrolled movements, sometimes resulting in reduced vision.

<sup>8</sup> A VP shunt is a device which drains the extra fluid in the brain into the peritoneal cavity where the fluid can be absorbed.

<sup>9</sup> An intestinal obstruction that blocks the digestive tract that prevents the passage of food.

<sup>10</sup> A vision condition in which the eyes cannot be aligned.

<sup>11</sup> This procedure involves the surgical removal and reshaping of fused cranial bones, or craniosynostosis, to allow for the natural growth and development of a normal skull.

<sup>12</sup> Surgical procedure to correct a deviated nasal septum.

<sup>13</sup> A surgical and medical technique used to correct the face – often in patients with Pfeiffer syndrome.

<sup>14</sup> A highly complex surgical procedure to correct structural defects in the cerebellum.

<sup>15</sup> 504 Plans in CHMS File, Interview with Ms. Poe.

### O.P.'s Mobility and Physical Limitations

O.P. has some physical and agility limitations because of Pfeiffer Syndrome. O.P. is sometimes wheelchair bound during a period of recovery after a surgical procedure and must sometimes wear a back brace. O.P. works with an occupational therapist for fine motor skills and sees a physical therapist for gross motor skills.<sup>16</sup> O.P. suffers from some hand tremors that might compromise her safety in Physical Education class (PE) and Technology (TechEd) class. O.P. cannot do stretches, yoga, gymnastics or allow other children to climb on her, or in any way compromise her head, neck and back.<sup>17</sup> A physical therapist's observation of O.P.'s mobility at CHMS resulted in recommendations that she walk up and down the stairs during low traffic times (before or after the majority of students walk through); hold the rail and walk rather than run; use a backpack to keep hands free for the rail and balance or limit what she can carry in one hand if a backpack is unavailable.<sup>18</sup> Any fall at school is of particular concern and must be reported to O.P.'s parents immediately. Mr. and Ms. Poe have intimately been involved in creating a safety plan for O.P. specifically regarding different PE units, as they occur.<sup>19</sup>

Contrary to some of the recommendations, O.P. typically walks, climbs and descends stairs and plays at recess without the assistance of another individual or the use of a device or aid.<sup>20</sup> O.P. has participated in many PE units, some of which have been modified (i.e. no stretches) and some have remained unchanged. O.P. has participated in sports such as basketball, softball and soccer.<sup>21</sup> O.P. wears a facemask during softball when she is in the infield.<sup>22</sup> O.P. does not wear any protective gear during basketball or soccer.<sup>23</sup>

### O.P.'s Hearing Loss

O.P. sees two separate audiologists on an annual basis because O.P. has moderate to severe hearing loss as a direct result of Pfeiffer Syndrome.<sup>24</sup> Because Pfeiffer Syndrome is a

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<sup>16</sup> 504 Plans

<sup>17</sup> Interview with Ms. Poe and Mr. Poe; 504 Plan

<sup>18</sup> PT Assessment 5/28/2013 in CHMS file.

<sup>19</sup> Interview with Mr. Poe, Ms. Poe, Principal Mark Carbone.

<sup>20</sup> PT Assessment 5/28/2013 in CHMS file.

<sup>21</sup> Interview with Mark Carbone.

<sup>22</sup> Interview with Ms. Poe; email from Ms. Poe to CHMS 9/3/14.

<sup>23</sup> Interview with Ms. Poe.

<sup>24</sup> 9East Network File.

craniofacial syndrome that affects the shape of the head and face, O.P.'s ear canals are significantly more narrow than someone with normal hearing, thus reducing the level of sound waves entering her inner ear.<sup>25</sup> Sound occurs when sound waves in the environment enter the eardrum and cause the eardrum to vibrate, sending the bones in the middle ear into motion. The motion is converted into electric impulses by tiny hair cells inside the inner ear, referred to as the cochlea. These impulses are sent to the brain, where they are perceived by the listener as sound. In O.P.'s case, her cochlea is intact; she does not suffer from sensorineural loss.<sup>26</sup> O.P. has conductive hearing loss which occurs when there is a problem conducting sound waves somewhere along the route to the cochlea. O.P. has two BAHA implants for this purpose.

Sound waves are received by the BAHA sound processor and changed into vibration. The vibrations from the sound processor are transferred through the abutment to the titanium implant. The implant uses direct bone conduction to transfer the sound vibrations to the functioning cochlea, bypassing her ear canals.<sup>27</sup>

When O.P. has the advantage of being in a soundproof room, she has 100% speech discrimination with her BAHA implants alone.<sup>28</sup> However, if there is noise introduced into the environment, her ability to discriminate speech or a specific sound reduces to 60%.<sup>29</sup> Noise comes from classmates, squeaky chairs, and loud ventilation systems.<sup>30</sup> Thus, the BAHA implants by themselves are typically insufficient to allow O.P. to hear sounds in most environments since most environments are not completely sound-proof. Using the BAHA implants in conjunction with the use of a FM system is not only optimal but necessary.<sup>31</sup>

The FM system is akin to a miniature radio station operating on special frequencies. The personal FM system consists of a transmitter microphone used by the speaker (such as a teacher) and a receiver used by O.P. The receiver transmits the sound directly to the BAHAs, thereby

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<sup>25</sup> Interview with Laurel Scannel.

<sup>26</sup> Id.

<sup>27</sup> 9East Network file, Interview with Laurel Scannel.

<sup>28</sup> Id. Respondent's Statement of Facts, Paragraph 5, citing Ms. Kelleher's HRC testimony, "O has 100% discernment in a quiet soundproof booth, without the use of the FM system...as background noise increases, her discernment decreases, and this is what the FM system is meant to address.

<sup>29</sup> 9East Network file, Interview with Laurel Scannel, CHMS file.

<sup>30</sup> 9East Network file.

<sup>31</sup> Interview with Laurel Scannel, 504 Plans in CHMS file.

allowing O.P. to hear. In a room with other noise, using both the BAHA and FM system, O.P. has 93% discrimination.

Despite the latest technology, O.P. is considered a person with a hearing loss.<sup>32</sup> Children with any degree of hearing loss experience more difficulty than normal hearing children when they are tested on a series of educational and functional test measures.<sup>33</sup> They are at risk for delayed development of verbal skills and reduced academic achievement.<sup>34</sup> Furthermore, children with moderate to profound hearing losses have been shown to exhibit a number of problems with social and emotional development as well as having behavior problems in school.<sup>35</sup> O.P. has difficulty understanding speech in a background of noise/reverberation, even with the use of an FM system.<sup>36</sup> Enhancement of listening skills, auditory programming and modifications of the learning environment are also helpful.<sup>37</sup> Thus, it is imperative that O.P. receive hearing-related educational services and specialized strategies that work for her.

#### O.P.'s 504 Plan and Camels Hump Middle School

CHMS serves students grades 5-8 and is located in Richmond, Vermont, adjacent to its elementary counter-part, Richmond Elementary School.<sup>38</sup> Having completed the fourth grade at Richmond Elementary, O.P. transferred to CHMS in the Fall of 2013.<sup>39</sup> In two or three transition meetings in the early Spring of 2013, Principal Mark Carbone met with individuals from Richmond Elementary School and Mr. and Ms. Poe. to discuss O.P.'s disability, her unique needs, her hearing loss, safety concerns, and reasonable accommodations and the types of services and support she would require at CHMS.<sup>40</sup> During her entire tenure at CHMS, O.P. had

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<sup>32</sup> Letter from Brian Peters, M.D. to Mark Carbone in CHMS File.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Richmond Elementary School and Camel Humps Middle School are located on the same lot, sharing the same driveway and parking spaces.

<sup>39</sup> Interview with Mark Carbone.

<sup>40</sup> Interview with Mark Carbone

in place a 504 Plan pursuant to Section 504 of the Rehabilitation Act of 1973<sup>41</sup>, addressing the obligations of a public school to meet the needs of a student with a disability.<sup>42</sup>

O.P.'s 504 team consisted of the following individuals:

1. O.P.
2. Ms. Poe
3. Mr. Poe
4. Principal Mark Carbone – Case Manager Fall 2013 and Spring 2014.
5. Assistant Principal Lashawn Whitmore-Sells – Case Manager Fall 2014-Spring 2015
6. Martha Alexander, R.N.
7. Darlene Kelleher, Speech Language Pathologist
8. Leah Licari – Special Educator, Case Manger from Fall 2015 - present
9. Kerry Young – Classroom Teacher (2014-2015 school year)
10. Angela Zagursky – 6<sup>th</sup> grade classroom teacher (2014-2015 school year)
11. Maureen Williams – 5<sup>th</sup> grade classroom teacher (2013-2014 school year)
12. Gordon St. Hilaire – 5<sup>th</sup> grade classroom teacher (2013-2014 school year)

Although it was not unusual for team members to change when O.P. graduated from one grade to the next as her primary classroom teachers also changed, a noteworthy change did occur in Fall 2014.

Prior to school starting in Fall 2014, during a 504 team meeting, Principal Carbone referred to O.P. as “lazy” in a discussion about O.P.’s academic struggles. Specifically, Principal Carbone stated that O.P. appeared to produce more work when she received one-on-one attention from a teacher, O.P. did not put a lot of effort into her work and O.P. had a tendency to be lazy.<sup>43</sup>

Offended by this comment and because they believed Principal Carbone lacked an understanding and appreciation for their daughter’s disability, Mr. and Ms. Poe requested Principal Carbone be removed as the 504 team case manager. As a result, Superintendent John Alberghini replaced

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<sup>41</sup> 29 U.S.C. § 701 et. seq.

<sup>42</sup> 29 U.S.C. § 701 et. seq. and Department of Justice’s *FAQ on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools*.

<sup>43</sup> Interview with Mark Carbone.



Principal Carbone with then Assistant Principal Lashawn Whitmore-Sells as the case manager for O.P.'s 504 team, effective immediately.<sup>44</sup>

In compliance with The Rehabilitation Act of 1973<sup>45</sup> and in order to meet O.P.'s educational needs, O.P.'s 504 team identified and specifically listed accommodations that were to be followed by CHMS staff and teachers. The relevant 504 Plans are from school year 2013-2014 and 2014-2015, O.P.'s fifth and sixth grade, respectively.

Five categories of accommodations are identified in O.P.'s 504 Plan for academic year 2013-2014 and they are *Amplification, Communication, Instructional, Physical and Social-Emotional*:<sup>46</sup>

1. Amplification
  - a. BAHA
  - b. Personal FM
  - c. Sound checks for FM, daily
  - d. Battery changes
2. Communication
  - a. Preferential seating
  - b. Obtain student's attention prior to speaking
  - c. Reduce auditory distractions
  - d. Enhance speed reading conditions (avoid hands in front of face, trim mustaches, no gum chewing, etc.)
  - e. Clearly enunciate speech
  - f. Extra time for processing information
  - g. Repeat and rephrase information when necessary
  - h. Frequent checks for understanding
  - i. Support O.P.'s communication with others

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<sup>44</sup> Interviews with Mark Carbone, Lashawn Whitmore-Sells, and email from Superintendent Alberghini to Mr. and Ms. Poe, 9/4/2014.

<sup>45</sup> 29 U.S.C. §701 et. seq.

<sup>46</sup> Social-emotional services and accommodations are not addressed in this investigative report as they are not relevant to the complaint and analysis.

3. Instructional<sup>47</sup>
  - a. Visual supplements
  - b. Additional time of written work
  - c. Verbal prompts
  - d. Enlarge print
4. Physical
  - a. Continued physical therapist consultation to help modify curriculum and assess safety of PE and playground activities; O.P. will be checked with our new playground equipment before she is cleared to use it. *Contact activities and sports are to be avoided [emphasis in original]*.

The language on contact sports appears in the 504 Plan for academic year 2013-2014 504 Plan but is missing from the previous 504 Plan when O.P. was in the fourth grade at Richmond Elementary School.<sup>49</sup> There's no explanation as to why this change was made in O.P.'s fifth grade. To add to the confusion, CHMS has no record of O.P.'s 504 Plan for academic year 2014-2015; the year she began field hockey at CHMS. This appears to have been a failure to memorialize the meetings that did take place that year on O.P.'s 504 Plan, starting with the transition meeting on August 26, 2014.<sup>50</sup> The notes from the transition meeting contain the language: "same plan as last year;" language that appears next to "FM system."<sup>51</sup> It's clear from the notes that the team intended the FM system and procedures to operate the same in O.P.'s sixth grade as it did in O.P.'s fifth grade. However, it's less clear if the team intended the entire 504 Plan to be identical as the previous plan. Both CHMS and O.P. continued to operate under the 504 Plan of 2013-2014 throughout O.P.'s sixth grade and no one noticed the plan was missing until this investigation required it.

In addition to the listed accommodations, the 504 Plan specifically identifies O.P.'s disability, past surgical procedures, her hearing loss and notably, O.P.'s speech discrimination scores with BAHAs alone and with BAHAs and the FM in both a quiet and noisy environment<sup>52</sup>

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<sup>47</sup> Not all of the accommodations were listed as they were not relevant to the analysis.

<sup>49</sup> 504 Plan 2012-2013.

<sup>50</sup> 504 transition meeting notes 8/26/2014.

<sup>51</sup> Id.

<sup>52</sup> 504 Plans in CHMS file.

Furthermore, the plan states that O.P. would transfer the FM system from classroom to classroom and that:

“FM unit should be worn, powered on, with the unit approximately 6 inches from your mouth, *at all times* [*emphasis added*]. On during instruction, and shut off when working with other individual students, or at other private times. If O.P. says she doesn’t need it, please ask her why...FM should be passed across all settings – cafeteria/recess.”<sup>53</sup>

### FM System

As stated earlier, when used and used properly, the FM system allows for the teacher to transmit sound directly to O.P.’s BAHAs, thereby allowing her to hear with 93% discrimination in a room that contains noise.<sup>54</sup> Without the FM system and using the BAHAs alone, O.P. can only hear with 60% discrimination in the same environment.<sup>55</sup>

The benefits of using a personal FM system in the classroom is analogous to using a PA system and microphone in a noisy gym during an assembly. Additionally, rooms that do not have good acoustics add additional concerns for a student with a hearing loss.<sup>56</sup> Personal FM systems act as a means of reducing the speaker to listener distance, thus improving the signal-to-noise ratio which makes it significantly easier for a student with a hearing loss to hear the teacher over the background noise. Teachers also experience benefits in the form of reduced vocal strain and a decrease in need for repetition.

Equally important as understanding why the FM system should be used is when it should be turned on and off. The FM system should be used during instruction<sup>57</sup> and on occasion, the FM system transmitter should be transferred to another student if he/she is speaking during a presentation or when students break off into small groups.<sup>58</sup> If the classroom is watching a movie, the FM transmitter could be placed in front of the speaker.<sup>59</sup> The FM system should not be used during independent work times when the teacher is circulating the room and providing one-on-one or small group assistance and should not be used when a teacher is providing information to

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<sup>53</sup> Id.

<sup>54</sup> Interview with Laurel Scannel, 9East Network file, 504 Plans in CHMS file.

<sup>55</sup> Id.

<sup>56</sup> Interview with Laurel Scannel.

<sup>57</sup> Id.

<sup>58</sup> 9East Network file.

<sup>59</sup> Interview with Angela Zagursky.

another student and any time the teacher does not intend the student with the hearing loss to hear what the teacher is saying.<sup>60</sup>

These parameters of when the FM system would be turned on and off were identified in O.P.'s 504 Plan and specifically and separately corroborated by all of CHMS teachers and staff and independent contractor and hearing specialist, Laurel Scannel.<sup>61</sup>

### CHMS Music Teacher and Director

O.P. alleges in her complaint that although classroom teachers did a good job of meeting O.P.'s academic needs and accommodating her hearing loss, many of the specials and after-school activities teachers did not.<sup>62</sup> Ms. Poe mentions that some teachers did not always use the FM system when they should be using it and that the field hockey coaches struggled with passing the FM system between them, causing O.P. to be yelled at unnecessarily by other players when she did not hear the instructions to return from the field.<sup>63</sup> The FM system was also not being used in band by CHMS teacher Anna Roy<sup>64</sup> and there was some inconsistent use in Physical Education (PE). At the end of O.P.'s fifth grade, during a 504 team meeting, O.P. reported that not all teachers were using the FM system<sup>65</sup> and in response, CHMS Speech and Language Pathologist Darlene Kelleher sent an email reminding all teachers that O.P. should bring the FM to every class, be encouraged and reminded to do so by all teachers and that teachers should be using the FM system.<sup>66</sup> In this email, Ms. Kelleher emphasized the importance of using the FM for classroom instruction and when directions are given to the group but that it is not needed during independent work time, one on one time or social times.<sup>67</sup> Heather Schoppmann, the CHMS music teacher and musical director who was included in this email, promptly responded to Ms. Kelleher's email asking that a further discussion occur in Band and Chorus class.

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<sup>60</sup> "Using Hearing Assistive Technologies in the Classroom: Why, When and How" 9East Network file;

<sup>61</sup> 504 Plan 2013-2014; Interviews with CHMS employees, Interview with Laurel Scannel.

<sup>62</sup> Complaint.

<sup>63</sup> Interview with Ms. Poe.

<sup>64</sup> Interview with Heather Schoppmann.

<sup>65</sup> 504 Meeting Notes 5/20/2014.

<sup>66</sup> Email from Darlene Kelleher to CHMS, 5/14/2014.

<sup>67</sup> Id.

Despite some of the aforementioned issues at CHMS, Mr. and Ms. Poe's foremost grievance surrounds the failure of Respondents to enforce the FM system usage by Ms. Schoppmann.

Heather Schoppmann teaches general music class, chorus class, 5<sup>th</sup> and 6<sup>th</sup> grade band lessons and is primarily in charge of District Chorus, Select Chorus, CHMS plays and the Music Festival.<sup>68</sup> Having worked as an aide at Richmond Elementary School, Ms. Schoppmann was familiar with O.P. but the two did not officially meet until Fall 2013 when O.P. became a student at CHMS.<sup>69</sup> As was typical of any teacher who had a student in her classroom on a 504 Plan, Ms. Schoppmann read O.P.'s 504 Plan before O.P. became her student. As a result, Ms. Schoppmann was able to provide a basic description of O.P.'s disability and the concerns about compromising O.P.'s head, neck and back. Ms. Schoppmann had knowledge of O.P.'s hearing loss and was aware that O.P. wore hearing aids. Despite the 504 Plan specifically addressing the FM system as an accommodation and setting forth O.P.'s discrimination scores with and without the FM system, Ms. Schoppmann did not appear to possess an understanding or appreciation for O.P.'s hearing loss and the necessity of the FM system. Asked what her understanding was of O.P.'s level of hearing with the FM system versus without the FM system, Ms. Schoppmann stated, "I do not know"<sup>70</sup> although Ms. Schoppmann was aware that the FM system was listed as an accommodation on O.P.'s 504 Plan.<sup>71</sup>

#### General Music, Band Lessons, Chorus

General Music is a CHMS required course and typically includes 18-22 students, meeting 50 minutes once a week, for a trimester.<sup>72</sup> The class reviews general music principles and covers a variety of music units which may include silent movies, African drumming, music olympics, etc. Most of the class involves instruction. Ms. Schoppmann reported using the FM system in every general music class, stating that she wore it all times and turned it on and off when necessary, specifically turning it off when students were broken into small groups. On occasion, O.P.

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<sup>68</sup> Interview with Heather Schoppmann.

<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Id.

<sup>72</sup> O.P. attended General Music three times per week from 12/2/03-3/7/14 in the fifth grade. Respondent's brief and calendar.

would forget to bring the FM system to general music class and Ms. Schoppmann would remind her but this occurred only a few times and was typical of someone O.P.'s age.<sup>73</sup>

Although Ms. Schoppmann is not the band teacher, she teaches band lessons, a CHMS elective course that meets once per week, for a fifty-minute period.<sup>74</sup> O.P. was in band lessons with Ms. Schoppmann from September through June in both her fifth and sixth grade years at CHMS.<sup>75</sup> Students interested in participating in band take band lessons in their respective instrumental group. O.P. played percussions and took band lessons with Ms. Schoppmann along with 4-6 other percussionists.<sup>76</sup> The class combined instruction and playing although how much time was devoted to each varied throughout the course.<sup>77</sup> Ms. Schoppmann stated she never used the FM system during Band Lessons while O.P. was her student in the fifth and sixth grade.<sup>78</sup> Ms. Schoppmann stated that she made a joint decision with Band Teacher, Anna Roy, not to use the FM System in Band Lessons because of a concern regarding over-amplification, specifically that it could cause O.P. pain to do so.<sup>79</sup> Ms. Schoppmann never consulted Ms. Scannel or O.P.'s audiologist on the matter.<sup>80</sup>

The issue regarding over-amplification of the FM system in Band/Band Lessons was not the only time a CHMS teacher raised this concern. Tech. Ed. teacher Phillip Peterson had a similar concern that the power tools used in class would be problematic if the FM system remained on. Mr. Peterson communicated this to Ms. Kelleher. Ms. Kelleher contacted Laurel Scannel who checked in with O.P.'s audiologist at Fletcher Allen. The audiologist stated that the BAHAs were designed to compress very loud noises to prevent over-amplification.<sup>81</sup> Ms. Scannel conducted an observation of Tech. Ed. on March 26, 2014 and provided feedback to Mr. Phillips.<sup>82</sup>

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<sup>73</sup> Id

<sup>74</sup> Interview with Heather Schoppmann.

<sup>75</sup> CHMS calendar and schedule, 2013-2014, 2014-2015.

<sup>76</sup> Interview with Heather Schoppmann.

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> Ms. Schoppmann wanted to note that when she and Ms. Roy started using the FM system in band this year after they were instructed to do so, O.P. complained that it caused her pain. Interview with Heather Schoppmann.

<sup>81</sup> Email from Laurel Scannel to Phillip Peterson, Darlene Kelleher 3/28/14

<sup>82</sup> 9East Network file.

Ms. Schoppmann also taught Chorus at CHMS, another elective course, which met for 50-minutes, once per week from September through June, each year.<sup>83</sup> O.P. was in Chorus for fifth and sixth grade. There were approximately 50-65 students in Chorus, combining 5<sup>th</sup> and 6<sup>th</sup> graders in one class.<sup>84</sup> The class consisted of multiple singing parts with some instruction at the beginning.<sup>85</sup> Ms. Schoppmann testified that very little of the class was devoted to instruction. Ms. Schoppmann admitted she never used the FM system during Chorus class in both O.P.'s fifth and sixth grade years, even during instructional periods.<sup>86</sup> Ms. Schoppmann explained her reason for not using the FM system in Chorus class was because the songs typically involved different parts, frequently changing in the middle of a sentence. It was a decision based on "best practice" to prevent "confusion" for O.P.<sup>87</sup> Ms. Schoppmann placed O.P. in the front and next to other students who sang the same parts as O.P.

Ms. Schoppmann stated that the decision to avoid the FM system in Chorus and Band Lessons was not a unilateral decision but one that came about as a result of having discussed the concerns and best practice strategies with Ms. Kelleher and with the knowledge and consent of Assistant Principal Whitmore-Sells at one of their weekly meetings.<sup>88</sup> As a matter of practice, teachers, special educators and sometimes administrative staff met on a weekly basis to discuss student needs. For Ms. Schoppmann, these meetings were referred to as EXP meetings which included the Exploratory Team of teachers and staff. According to Ms. Schoppmann, it was during one of these meetings that the decision to not use the FM system in Chorus and Band Lessons was jointly made.<sup>89</sup>

Ms. Schoppmann stated that Ms. Whitmore-Sells was aware that the FM system was not being used in Chorus and Band Lessons because Ms. Whitmore-Sells was present during the discussions about not using the FM system.<sup>90</sup> Contrary to this testimony, Ms. Whitmore-Sells

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<sup>83</sup> Respondent's Statement of Facts, CHMS Calendar

<sup>84</sup> Interview with Ms. Schoppmann, Respondents Statement of Facts, paragraph 51, citing HRC interview with Ms. Schoppmann ("about 65 kids").

<sup>85</sup> Interview with Heather Schoppmann.

<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> Id. Email from Ms. Schoppmann to Ms. Kelleher on May 14, 2014 stating that there were some "unique problems" in choral and band programs and that further discussion needed to take place.

<sup>89</sup> Id.

<sup>90</sup> Id.

stated she believed Ms. Schoppman was using the FM system in Chorus.<sup>91</sup> When asked to recall a specific moment in which she observed Ms. Schoppmann using the FM system, she was unable to do so.<sup>92</sup> When told that Ms. Schoppmann had testified to the contrary, Ms. Whitmore-Sells became defensive and insisted that Ms. Schoppmann had used the FM system “sometimes” and that Ms. Schoppmann in fact told her that O.P. sometimes complained and “turned-off” the FM transmitter being worn by Ms. Schoppmann.<sup>93</sup> Asst. Principal Whitmore-Sells has no written record or recollection as to when these conversations or observations were made and simply stated that her office was located in the main office, which was directly across the hall from the Chorus classroom although she did not mean to suggest that she could actually see Ms. Schoppmann from her office.<sup>94</sup> To support the fact that Ms. Schoppmann used the FM system in Chorus, Respondents point to an email from Ms. Poe to CHMS on May 12, 2014, that concerns the coordination of two FM systems in Chorus.<sup>95</sup> The matter was resolved fairly quickly through email and did not require Ms. Scannel nor Ms. Kelleher to observe Chorus.

The possibility exists that Ms. Schoppmann may have used the FM system in Chorus a couple of times but could not recall it during her interview. But it would be nonsensical to infer from this email or incident that Ms. Schoppmann suffered such a memory lapse; testifying that she had not used the FM system at all in two classes for two years when she in fact had used it “sometimes” as Asst. Principal Whitmore-Sells insisted upon. Ms. Schoppmann stated under oath that she had not used it all in both Chorus and Band Lessons and that this was a conscious and thoughtful decision that came about as a result of discussions with CHMS staff.<sup>97</sup> Being that only Ms. Schoppmann and O.P. can truly attest to whether the FM system was used in Chorus and Band Lessons and O.P. has declined to provide testimony, Ms. Schoppmann’s statement against her own interest is the most credible and reliable.

Ms. Whitmore-Sells further described the appropriate times to turn the FM system on and off.<sup>98</sup> Some examples Ms. Whitmore-Sells provided included Tech. Ed. where there had been safety

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<sup>91</sup> Interview with Lashawn Whitmore-Sells.

<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> Email from Ms. Poe to CHMS, May 12, 2014.

<sup>97</sup> Interview with Heather Schoppmann.

<sup>98</sup> Interview with Lashawn Whitmore-Sells.



concerns about the transmitter hanging around the teacher's neck. Ms. Whitmore-Sells stated that it would have been appropriate not to use it at that point. However, in the instruction room, it would have made sense to keep the FM system on.<sup>99</sup> Likewise, in Chorus class, if students were divided into small groups, and Ms. Schoppmann wanted to provide instruction to a group that did not include O.P. that it would have been appropriate to turn off the FM at that point.<sup>100</sup> Ms. Whitmore-Sells further stated that if a teacher wanted to opt out of using the FM system in its entirety, that teacher would have had to consult Ms. Whitmore-Sells who was the 504 team case manager during O.P.'s sixth grade, because teachers were aware that CHMS held monthly 504 meetings.<sup>101</sup>

Leah Licari, who sat in on many EXP meetings stated that there was never a plan made, different from any other plan with other teachers, regarding the use of the FM system in Chorus.<sup>102</sup> It was expected that the FM system would be worn, turned on during whole class instruction and turned off during small groups.<sup>103</sup> Ms. Licari stated that a conversation about the FM system always included appropriate times when to use and when not to use the FM system. Asked if she had ever made a plan with Ms. Schoppmann to not use the FM system at all, Ms. Licari stated, "that would go against the 504 Plan."<sup>104</sup> Ms. Licari stated that none of the teachers ever said they didn't want to use it and that the FM system was not optional.<sup>105</sup>

As mentioned earlier, Ms. Schoppmann requested a conversation with Darlene Kelleher, after Ms. Kelleher notified CHMS teachers of the need to use the FM system.<sup>106</sup> Ms. Kelleher recalls having a few conversations with Ms. Schoppmann about the use of the FM system in her classrooms. The conversations involved how to use the FM system in Chorus and times for turning it on and off, surrounding O.P. with other students singing her part and providing visual cues to O.P.<sup>107</sup> However, Ms. Kelleher made recommendations for use of the FM system which included encouraging O.P. to bring the FM to Chorus, turning the FM system on during whole

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<sup>99</sup> Id.

<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> Interview with Leah Licari.

<sup>103</sup> Id.

<sup>104</sup> Id.

<sup>105</sup> Id.

<sup>106</sup> Email from Heather Schoppmann to Darlene Kelleher, 5/14/14.

<sup>107</sup> Interview with Darlene Kelleher.

group instruction, turning it off during small group instruction when the message was not being directed towards O.P.'s group so as not to provide O.P. conflicting information. Asked if a teacher did not use the FM system at all, whether this act would be a deviation from O.P.'s 504 Plan, Ms. Kelleher consulted O.P.'s 504 Plan and stated, "it would be."<sup>108</sup> As far as Ms. Kelleher was concerned, there was never a plan created to avoid the FM system in its entirety in Ms. Schoppmann's classes.<sup>109</sup>

In summary, there was some conversation about the FM system in Ms. Schoppmann classes but no person and no evidence corroborated Ms. Schoppmann's testimony that a decision or plan was made to allow her to not use the FM system in her classrooms with O.P. In fact, everyone that Ms. Schoppmann refers to simply stated that to not use the FM system at all would be a deviation or violation of O.P.'s 504 plan because the FM system was not optional.

Principal Mark Carbone testified that he would have a concern if a teacher was not using the FM system at all and although he hesitated, stated that it would be problematic if the FM system had not been used at all in a class.<sup>110</sup>

Despite the lack of FM use in Chorus and Band Lessons, O.P. received positive remarks from Ms. Schoppmann and a grade of "3" throughout her fifth and sixth grade, indicating O.P. was meeting classroom expectations.

### Training

Ms. Schoppmann never received any training from Hearing Specialist Laurel Scannel despite the fact that O.P. was in three of Ms. Schoppmann's classes for both fifth and sixth grade.<sup>111</sup> Ms. Schoppmann's "training" was limited to the information she received from either Assistant Principal Lashawn Whitmore-Sells or Speech and Language Pathologist Darlene Kelleher.<sup>112</sup>

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<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Interview with Principal Carbone.

<sup>111</sup> Interview with Heather Schoppmann.

<sup>112</sup> Interview with Heather Schoppmann. Respondents point in their brief that Ms. Schoppmann received training from Respondents' attorney, Heather Lynn, Esq. in Spring 2016. However, this training occurred in the second half of O.P.'s seventh grade, after the HRC complaint was filed and therefore, not relevant to the analysis in this report.

Hearing Specialist and Consultant Laurel Scannel from 9East Network<sup>113</sup> was invited to provide in-service trainings to CHMS staff and teachers at the beginning of Fall 2013 and Fall 2014 but Heather Schoppman did not attend any of these.<sup>114</sup> Asked if Ms. Schoppmann was present during any of these in-service trainings, Principal Mark Carbone stated, “yes” although there is no documentation or other evidence to support this fact and more importantly, Ms. Schoppmann herself stated otherwise. When confronted with Ms. Schoppmann’s statement to the contrary, Principal Carbone added, “I would have gotten to her later” although he could not recall when that would have happened.<sup>115</sup> Furthermore, Principal Carbone stated that the training provided by Ms. Laurel Scannel was qualitatively different from that provided by other CHMS staff.<sup>116</sup> The training that Laurel Scannel offered covered the breadth and scope of O.P.’s hearing loss, with particulars.<sup>117</sup> Ms. Scannel provided an audiogram which highlighted the need for the FM. On the other hand, the information Ms. Kelleher offered was more about how to use the FM system; when to turn it on and off and how the FM system worked.<sup>118</sup> Similarly, O.P.’s sixth grade teacher, Angela Zagursky who had been trained by Ms. Scannel, stated that the training included a review of O.P.’s audiogram which showed O.P.’s hearing abilities with and without the FM unit, instruction on how to use the FM unit, and included lessons on how O.P. would hear without the FM unit, helping teachers and staff understand O.P.’s hearing loss. Ms. Zagursky stated that she knew O.P.’s hearing would be low without the FM system.<sup>119</sup>

During this investigation, Ms. Scannel provided a brief training on O.P.’s hearing loss, similar to her in-service trainings to CHMS teachers and staff. Ms. Scannel provided an overview of O.P.’s disability, the cause and extent of O.P.’s hearing loss, the benefits and purpose of the BAHAs and FM systems as well as reviewed O.P.’s audiogram. Ms. Scannel also conducted a couple of learning exercises, allowing the investigator to use the FM system while Ms. Scannel spoke

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<sup>113</sup> 9East Network was previously known as the Vermont Center for Deaf and Hard of Hearing. Interview with Laurel Scannel.

<sup>114</sup> Ms. Schoppmann was on maternity leave for part of O.P.’s first year at CHMS; missing O.P.’s first trimester and the beginning of the second trimester in the fifth grade. Thus, Ms. Schoppmann would have missed the in-service training for Fall 2013 but been available for Fall 2014 in-service trainings. Furthermore, CHMS has the ability to request Laurel Scannel provide trainings and services to specific teachers, throughout the academic year.

<sup>115</sup> Interview with Mark Carbone.

<sup>116</sup> Id.

<sup>117</sup> Id.

<sup>118</sup> Id.

<sup>119</sup> Interview with Angela Zagursky.

through the transmitter at the same time as she moved about a quiet room, left the room, turned her back and introduced noise from another speaker at a normal volume.

In addition to the demonstration provided to this investigation, Ms. Scannel described the situations in which the FM should be turned on and off. The FM system should not be left on all of the time to prevent the student from being exposed to competing signals. The FM system should be turned on during whole group discussion. When the teacher is having individual conversations, it should be turned off. If O.P. is working with a partner, it makes sense to pass the transmitter to the partner or it should be placed on the table if O.P. is working with a couple of people. When the teacher is showing a movie, the transmitter should be placed in front of the stand next to the equipment.<sup>120</sup>

Ms. Scannel took this investigator on a tour of the Chorus classroom and said that the room had good acoustics.<sup>121</sup> Ms. Scannel stated that if O.P. was sitting at close range to the teacher, was surrounded by other students who were quiet, and everyone was listening to the teacher, that O.P. could have heard what she needed to hear without the FM system, emphasizing, “up close, quiet room, visual access” would be ok since the FM system accommodates distance and noise and O.P. is not without any auditory access. Ms. Scannel’s testimony is not without reservation. It is not the case that Ms. Scannel would be without any concerns but that she would aim for optimal and ideal auditory access and would like to see the FM system used for direction time and when the teacher is singing O.P.’s part.<sup>122</sup>

#### Using the FM system in Chorus in 2015-2016 and Classroom Observation

Since the filing of the complaint with the HRC, Ms. Schoppmann was instructed to start using the FM system in Chorus and has started doing so.<sup>123</sup> O.P. is no longer in band and therefore no longer taking band lessons. Ms. Schoppmann hasn’t noticed any difference since she’s started using the FM system.<sup>124</sup> Ms. Schoppmann wanted to emphasize that she never had a problem

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<sup>120</sup> Interview with Laurel Scannel.

<sup>121</sup> Id.

<sup>122</sup> Id.

<sup>123</sup> Interview with Heather Schoppmann.

<sup>124</sup> Id.

with the level of difficulty or comfort in using the FM system. O.P. always sang correctly in class now as she had done before.<sup>125</sup>

Prior to O.P.'s complaint with the HRC, CHMS invited Laurel Scannel to observe O.P. in several classrooms including math and social studies and all core classrooms in the fifth grade.<sup>126</sup> Ms. Scannel also spoke to the math, social studies and Tech.Ed. teachers and observed the sixth grade classrooms before O.P. entered the sixth grade.<sup>127</sup> In the sixth grade, Ms. Scannel observed math, social studies, art and checked in with the Tech. Ed. teacher again.<sup>128</sup> Despite O.P. being in three of Ms. Schoppmann's classes, Ms. Scannel was never invited to train, consult or observe Ms. Schoppmann.<sup>129</sup> On September 29, 2015, when O.P. had been at CHMS for two full years, now a 7<sup>th</sup> grader, Ms. Scannel was invited to observe Ms. Schoppmann in Chorus.<sup>130</sup>

On September 29, 2015, Ms. Scannel completed an observation of Ms. Schoppmann's chorus classroom for the first and only time.<sup>131</sup> Overall, Ms. Scannel's observations of Ms. Schoppmann were positive. She observed Ms. Schoppmann using the FM system properly, except for a minor recommendation that the transmitter be cinched up higher. Ms. Scannel commented on the observation as follows:<sup>132</sup>

O.P. entered the chorus room and handed her FM transmitter to Ms. Schoppmann. She then took her seat in the front row. Ms. Schoppmann led the group in several rounds by section and by row. O.P. had no trouble singing her part each time...the students learned a new piece which they sang in unison. Ms. Schoppman modelled the part and they repeated it multiple times. O.P. participated appropriately...Next, the group worked on a new piece by ear. Ms. Schoppman modelled each phrase and asked the students to repeat multiple times. She also played the notes on a piano keyboard as she sang. O.P. sang along with the group as directed.

According to Ms. Schoppman, O.P. does a good job of singing her part. She has seated O.P. up front with students singing her part on each side and behind her. This seating arrangement has worked well for O.P. Ms. Schoppman noted that as the semester progresses, there will be more harmony singing which means she will not always be singing O.P.'s part. Ms. Schoppman checked in with O.P. after class about the

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<sup>125</sup> Id.

<sup>126</sup> 9East Network file.

<sup>127</sup> Id.

<sup>128</sup> Id.

<sup>129</sup> Interview with Heather Schoppmann, 9East Network file.

<sup>130</sup> 9East Network file.

<sup>131</sup> Id.

<sup>132</sup> Id.

amplification. *O.P. stated that it was going well for her to have Ms. Schoppman wear the transmitter and it was not confusing when Ms. Schoppman sang another part.* [emphasis added]. O.P. agreed to check in with Ms. Schoppmann as the semester progressed about this issue or any other concerns.

Ms. Scannel also recommended that in the future it might be appropriate for another student to wear the FM system if the singing pieces become more challenging and that providing sheet music to O.P. to take home would be helpful.<sup>133</sup>

Ms. Scannel attended O.P.'s 504 meeting on August 24, 2015 and informed the team that "the [FM] device should be worn by classroom teacher at all times, and establish a consistent spot for receiving and delivering the device to O.P. at start and end of class."<sup>134</sup>

### Email Communication

From before O.P. was ever an official student at CHMS until the filing of the HRC complaint, there was a plethora of email communication between O.P.'s parents and CHMS staff, teachers and administration, many occurring the same day, some within minutes of each other. These numerous emails paint a picture of two parents who are very intimately involved in O.P.'s social, emotional and physical well-being as well as her educational needs. The emails also reflect Mr. and Ms. Poe's competing desire to keep O.P. absolutely safe and protected yet not limiting O.P. in any way. The emails also showcase many CHMS teachers and staff who made attempts to accommodate O.P.'s disability, to keep her safe and to be responsive to Mr. and Ms. Poe's concerns and complaints. Some of these emails include weekly updates from O.P.'s classroom 6<sup>th</sup> grade teacher Angela Zagursky to Mr. and Ms. Poe on O.P.'s progress, emails about keeping O.P. safe on field trips, and helping O.P. navigate social groups at CHMS. Emails came from Mr. and Ms. Poe informing the schools about O.P.'s disability, surgical status, PE concerns, field hockey, etc. Mr. and Ms. Poe also sent several emails thanking CHMS teachers and staff for their efforts and O.P.'s successes. But they also sent unhappy emails that complained about O.P.'s placement in the fifth grade classrooms, about O.P. being on a 504 Plan instead of an Individualized Education Plan (IEP), about O.P.'s audition in plays, music festival, district chorus and threats to file discrimination complaints against CHMS. There are over forty emails

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<sup>133</sup> Id.

<sup>134</sup> 504 Meeting notes 8/24/2015.

between O.P.'s parents and CHMS that mention the importance of the FM system in one context or another. It's reasonable to conclude that CHMS was exhausted by the level and extent of communication and complaints made by Mr. and Ms. Poe and that it strained the relationship to the point where, responses from CHMS became narrowly tailored and limited in nature.

What follows is a glimpse of the some of the emails sent to and from CHMS regarding the FM system:<sup>135</sup>

**December 2, 2014:** The context of the email is about play auditions. Ms. Poe writes:

...Her teacher asked me yesterday if the FM should be brought to the audition and I said, yes. When O.P. checked in with me last evening, she said that the teacher had brought it to Heather and Heather said, "We don't need it." It's not her decision to make.

**December 3, 2014:** Superintendent Alberghini writes:

I will not go into details, but would like to make sure everyone is getting an equal opportunity and any accommodations for O.P. are in place.

**December 16, 2014:** Ms. Poe writes:

O.P. and A.P. have both told me that on 3 separate occasions that O.P. was involved in, the FM system was not used (so O.P.'s accommodations did not happen, thus because of her severe hearing loss, she did not have equal access that other children had). The one attempt that her teacher made to give the unit to the drama teacher, she was told, "we don't need that."

**Later the same day,** Ms. Poe writes:

Again, another point of not allowing O.P. the same access as other children. Her teacher asked me yesterday if the FM should be brought to the audition and I said yes. When O.P. checked in with me last evening, she said that the teacher had brought it to Heather and Heather said, "we don't need it." It's not her decision to make. I understand that there may be times when there are parts and she's singing something helping other kids and it would confuse O.P. to hear that but in this case, if words are words, she hasn't heard or are difficult to pronounce, she's not getting a fair chance at the audition.

**December 18, 2014:** Superintendent Alberghini writes:

...I will follow up with Mark and Lashawn to inquire why the FM system was not used..."

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<sup>135</sup> Not included in this list is the previously mentioned email sent from Darlene Kelleher to CHMS teachers regarding the FM system.

**January 4, 2015**, Ms. Poe wrote to CHMS: <sup>136</sup>

...I'm hoping that the FM situation can be resolved sooner than later... it's pretty clear that O.P. is not hearing the words to the songs correctly... Heather and Anna really need to know that this is important to her.

**January 6, 2015**, Assistant Principal Lashawn Whitmore-Sells writes:

...As far as the play, the ladies are happy to have her. I am sure O.P. will pick up on the songs as they practice on a regular basis.

**January 6, 2015**, Ms. Poe writes to CHMS:

...O.P. will "pick-up" on the songs, but the approach doesn't feel right to us. I have lost track of the number of emails I've written since the play tryouts regarding the use of the FM system and its importance for O.P. My understanding from the girls is that there was a conversation between Angela and Heather yesterday which resulted in O.P. sitting up front, but still no FM usage. I still have to wonder why it's not being used. Is it because folks are making a "judgement" (sic) call? I'm thinking that perhaps specials teachers and extracurricular folks may need training and information on O.P.'s extent of hearing loss. There's no question that O.P. has adapted very well to her hearing loss and does pretty well for the most part. However, if folks want the facts, without the FM use in the background noise (1 person talking or a hundred people talking with noise in the background), O.P. only hears 50% of what's being said...that's very significant). I would challenge folks who don't want to use the FM with her to try themselves and see how well they function. I'm not saying there are not times where it doesn't have to be used 100% of the time, but that should be worked out and we should be included in that conversation. We have seen her at concerts where it hasn't been used where she looks confused and unsure of what she's supposed to be doing. That's not fair to her and I'm guessing not conducive to Heather's Broadway quality shows. A similar thing happened in field hockey. The FM was always brought down, but what ended up happening was her coach would wear it but the A team coach was always the one calling kids on and off the field and O.P. was always dazed and confused and the kids were yelling at her to get off the field, when she couldn't hear that what she was supposed to be off the field. Again, not fair to O.P. and in reality discriminating against her and making her stand out even more with a disability. It's also not following her accommodations for the same accessibility as other students....

**January 17, 2015**. The context of the email surrounds O.P. being reprimanded for her behavior towards another child, Ms. Poe states:

Another point I'd like to bring up is that O.P. did NOT [emphasis in original] have the FM system available today for the play...Sounds like using it this week during the week

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<sup>136</sup> Email from Ms. Poe to Assistant Principal Lashawn Whitmore-Sells, Superintendent John Alberghini, Martha Alexander R.N., Angela Zagursky.



went well but there needs to be some communication and assignment of who does what for the weekend so that the FM gets where it should be so that it can be used in the future...I hope that she can continue with the play and that boundaries (including the use of the FM on days like Saturdays where there are many moving parts, at least for directions, transitions purposes) can be put in place for her to continue and be successful.

**March 3, 2015:** Ms. Poe sends out an email to CHMS about O.P. being chastised for not doing something right.<sup>137</sup> Ms. Poe writes:

... We also heard that the FM was not being used, which probably had something to do with her not following directions...Laurel Scannel has told us that she would be happy to come in and give tips on how to use the FM during the play, and how to use cues such as marks on the state for O.P. to follow...

**March 4, 2015,** Ms. Schoppmann responds to Ms. Poe and copies Asst. Principal Whitmore-Sells:

O.P. was not doing anything wrong...She has given me the FM when she would like me to wear it as the plan was laid out at the beginning. She is welcome to give it to me whenever she would like it used and I am happy to wear it. I would be happy to meet with anyone, but I will leave it to Mark or Lashawn to schedule Laurel Scannel as they see fit.

**March 4, 2015,** Ms. Poe writes back<sup>138</sup>:

...This is one of the concerns we had brought up at the beginning about the equipment being used. We have always and will continue to encourage O.P. to advocate for herself. It's really hard for her because she doesn't want to be "different" but we've expressed to her that this will help her in school, extracurricular activities and eventually a job and life of her own...

**March 4, 2015,** Ms. Poe writes again

...I would really encourage that the FM be used all the time and not just when O.P. gives it to an adult. If she doesn't know exactly what's happening that (sic) rehearsal, it's hard for her to know to give it to you ahead of time, and in general it should be available for all of the time...

**March 11, 2015,** Ms. Poe writes to Asst. Principal Whitmore-Sells and Superintendent John Alberghini asking why despite repeated requests, Laurel Scannel has not been invited to any 504 meetings, consulted on the play or worked with CHMS Drama teachers and staff.

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<sup>137</sup> Email from Ms. Poe to Heather Schoppmann and Asst. Principal Whitmore-Sell, 3/3/2015.

<sup>138</sup> Email from Ms. Poe to Heather Schoppmann and Asst. Principal Whitmore-Sells, 3/4/2015.

**April 1, 2015:** Ms. Poe writes to CHMS asking if music sheets were not provided and whether the FM was used for the Music Festival audition.<sup>139</sup>

**May 6, 2015:** Superintendent John Alberghini writes to Principal Mark Carbone and Asst. Principal Whitmore-Sells:

Ms. Poe contacted me yesterday and was very upset. She shared the music teachers are not using the FM system and this is a 504 accommodation for O.P. Please make sure all personnel working with O.P. are using the FM system...

**May 6, 2015:** Superintendent Alberghini responds to Mr. and Ms. Poe via email but does not address the FM concerns.

**May 6, 2015:** Ms. Poe contacts Superintendent Alberghini stating that the FM affects O.P.'s education and that she is being discriminated against and reiterates that the teacher does not wear the FM. Ms. Poe specifically states,

“Could someone please explain this to Heather Schoppmann. O.P. is already scared of her because she refuses to use the equipment and O.P.'s a kid for God's sake...”

It would be a fair and accurate assessment to say that Mr. and Ms. Poe's emails primarily address Ms. Schoppmann's failure to use the FM system consistently in the play<sup>140</sup> and music festival but in fact do not address Ms. Schoppmann's failure to use the FM system in Band Lessons and Chorus.

*(some facts have been removed based on a NRG finding)*

### **Legal Analysis:**

This investigation finds that the report requires an analysis of three fundamental factual circumstances:

1. The Music Teacher's failure to use the FM system in Chorus and Band Lessons for academic years 2013-2014 and 2014-2015.
2. (deleted)
3. (deleted)

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<sup>139</sup> Email from Ms. Poe to Heather Schoppmann and Asst. Principal Whitmore-Sells, 4/1/2015.

<sup>140</sup> The complaint never addresses play or play rehearsals and Mr. and Ms. Poe do not bring plays up in their interviews other than in the general context of Ms. Schoppmann consistently not using the FM system.

Section I of the report sets forth the legal framework governing disability discrimination in a place of public accommodation and identifies the elements of a prima facie case of discrimination and the defenses. Section II examines Ms. Schoppmann’s failure to use the FM system in Chorus and Band Lessons for two years under this legal framework, and recommends the Commission find there are reasonable grounds to find Respondent discriminated against O.P.

*(Sections III and IV have been removed)*

## I. Legal Framework

The Vermont Fair Housing and Public Accommodations Act (VFHPAA), 9 V.S.A § 4502 states:

(c) No individual with a disability shall be excluded from participation in or be denied the benefit of the services, facilities, goods, privileges, advantages, benefits, or accommodations, or be subjected to discrimination by any place of public accommodation on the basis of his or her disability.

The VFHPAA sets forth nine separate ways in which discrimination may occur, but a plaintiff need only make a showing under one of these provisions.<sup>162</sup> This report examines the three most relevant VFHPAA subparts: 9 V.S.A. §4502 (c) subparts (1), (5) and (6):

9 V.S.A. § 4502 (c)(1): A public accommodation shall provide an individual with a disability the opportunity to participate in its services, facilities, privileges, advantages, benefits, and accommodations. *It is discriminatory to offer an individual an unequal opportunity* [emphasis added] or separate benefit; however, it is permissible to provide a separate benefit if that benefit is necessary to provide an individual or class of individuals an opportunity that is as effective as that provided to others.

9 V.S.A. § 4502 (c)(5): A public accommodation shall make reasonable modifications in policies, practices, or procedures when those modifications are necessary to offer goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.

9 V.S.A. § 4502 (c)(6): A public accommodation shall take whatever steps may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, *or otherwise treated differently* [emphasis added] than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or

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<sup>162</sup> Part (c)(4) of the VFHPAA has been repealed but is not significant to this analysis. *Id.*

accommodations being offered or would result in an undue burden on the public accommodation.

#### A. Prima Facie Case

The burden is on O.P. to establish a prima facie case of public accommodations discrimination but this burden is a “relatively light” one as the Second Circuit Court of Appeals has held that the burden of establishing a prima facie case under the ADA is not onerous.<sup>163</sup> To establish a prima facie case of public accommodations discrimination under the VFHPAA, O.P. must show:

- 1) O.P. is a person with a disability;
- 2) CHMS and the Chittenden East Supervisory Union are places of public accommodation;
- 3) O.P. was excluded from participation in or was denied the benefit of the services, facilities, goods, privileges, advantages, benefits or accommodations, or subjected to discrimination in one of nine ways; and
- 4) O.P. must show that the discrimination alleged was on the basis of her disability.

In an analysis regarding reasonable modifications, the Supreme Court of Vermont has held that a Plaintiff need only show that (1) she is disabled; (2) the defendant is a place of public accommodation; and (3) the defendant failed to make reasonable modifications that would accommodate the plaintiff’s disability without fundamentally altering the nature of the public accommodation.<sup>164</sup> Thus, a plaintiff need not demonstrate that the discrimination is on the “basis of her disability” as is the case in discrimination claims in housing and employment where a failure to make a reasonable modification without a valid defense constitutes violation of the Americans with Disabilities Act (ADA).<sup>165</sup> Even as this report considers the fourth element of “on the basis of her disability,” when examining the other provisions of the VFHPAA, a plaintiff does not have to prove intent or ill-will on the part of the respondent in order to prevail. At most, if a plaintiff were seeking compensatory damages under the ADA, the plaintiff would have to show the

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<sup>163</sup> *Kennedy v. Dresser Rand Co.*, 193 F.3d 120, 122 (2<sup>nd</sup> Cir. 1999); see also *Dean v. Univ. at Buffalo School of Medicine, et. al.*, 804 F.3d 178, 189 (2<sup>nd</sup> Cir. 2015).

<sup>164</sup> *Bhatt v. University of Vermont*, 184 Vt. 195, 200 (2008).

<sup>165</sup> *Community Services v. Wind Gap*, 421 F.3d 170, 177 (3<sup>rd</sup> Cir., 2005) (it is a violation...to discriminate even if the motive was benign or paternalistic).

respondent acted with “deliberate indifference” but a request for an injunction or declaratory relief does not require more than a showing of a potential future harm.<sup>166</sup>

## B. Defenses

It shall be an affirmative defense if Respondents can show that making the modifications or taking the steps necessary to ensure O.P. is not treated differently would “fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations.” Similarly, it is an affirmative defense if Respondents are able to demonstrate that taking the steps necessary to ensure O.P. is not treated differently would result in an “undue burden” on the school.<sup>167</sup>

Undue burden is defined as significant difficulty or expense. Courts will consider the economic conditions on the resources available to an entity. However, the decision that a particular aid or service would result in an undue burden must be made by a high level official and must include a written statement of the reasons for reaching that conclusion. The burden is on the school to demonstrate that providing the requested aid or service would result in such an alteration or burdens.<sup>168</sup>

## C. The Americans with Disabilities Act and Section 504 of the Rehabilitation Act

The legal standards, duties and requirements set forth under VFHPAA are to be construed consistently with The Americans with Disabilities Act (ADA).<sup>169</sup> Thus, in addition to looking at Vermont law, we also look to federal interpretations of that statute in determining whether complainant has met her claim.<sup>170</sup>

Title II of the ADA prohibits discrimination in the same way as the VFHPAA: <sup>171</sup>

...no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

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<sup>166</sup> *Martin v. Halifax Healthcare Systems, Inc.* 621 Fed. Appx. 594 (11<sup>th</sup> Cir. 2015). See also *Camarillo v. Carrols Corporation*, 518 F.3d 153 (2<sup>nd</sup> Cir. 2008).

<sup>167</sup> 9 V.S.A. §4500 (c)(5)(6).

<sup>168</sup> 28 C.F.R. §35.164.

<sup>169</sup> 9 VSA § 4500 (a) and ADA, 42 U.S.C. §12101 et. seq.

<sup>170</sup> *Id.* See also, *State v. G.S. Blodgett Co.*, 163 Vt. 175, 180 (1995); *Hodgdon v. Mt. Mansfield Co.*, 160 Vt. 150, 165, (1992).

<sup>171</sup> 42 U. S. C. § 12132 and § 12133.

The VFHPAA subpart (c)(6) is equivalent to the ADA's effective communication language:

A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public and companions with disabilities are as effective as communications with others.<sup>172</sup>

Both VFHPAA and the ADA include "assistive listening devices and systems" under the definition of auxiliary aids and services.<sup>173</sup>

Title II of the ADA is construed coextensively with Section 504 of the Rehabilitation Act because the statutory language prohibiting discrimination is also analogous:

No otherwise qualified individual with a disability in the United States, as defined in section 705 (20) of this title, shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...<sup>174</sup>

The VHRC does not have jurisdiction over Section 504 despite the similarities between the statutes above. Nevertheless, this report would be amiss not to include a brief discussion of Section 504 as it provides background information necessary for understanding O.P.'s 504 Plan and its intended purpose and because O.P.'s 504 Plan provides a framework for analyzing O.P.'s claims under the VFHPAA.

Section 504 has two relevant provisions; one prohibits discrimination as previously mentioned; the other requires that public schools provide a free appropriate public education (FAPE) to all disabled students:

A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap;<sup>175</sup>

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<sup>172</sup> 42 U.S.C. §12101 et. seq. See also 28 CFR §35.160.

<sup>173</sup> 9 V.S.A. §4501 and 28 CFR §35.160 and Department of Justice's *Revised Regulations on Effective Communication*, Jan. 31, 2014.

<sup>174</sup> 34 CFR 104.

<sup>175</sup> 34 CFR Part 104.33. This language on FAPE is also similar to the language found in The Individuals with Disabilities Education Act, 20 USC §1400 et seq.

This requirement of FAPE is similar to language found in the Individuals with Disabilities Education Act (IDEA). However, Section 504 requires public schools to provide disabled students FAPE regardless of the nature or severity of the disability.<sup>176</sup> Public schools must provide, (or not deny) a disabled student regular or special education, related aids and services that are designed to meet the student’s educational needs as adequately as the needs of nondisabled students are met.<sup>177</sup> Although, the aids, benefits, and services are not required to produce the identical result or level of achievement for disabled and nondisabled students, they must afford disabled students equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement.<sup>178</sup> Furthermore, 504 Plans govern teachers and their treatment of students. A teacher’s failure to implement the plans can cause the school district to be in noncompliance with Section 504.<sup>179</sup>

Unlike the IDEA and Section 504, Title II of the ADA does not have statutory language that specifically addresses FAPE. However, courts have found that where a disabled student is denied FAPE and the school acted with “bad faith and gross misjudgment,”<sup>180</sup> a claim of discrimination under both Section 504 and Title II may stand. Courts have held that nothing in the ADA shall be construed to apply a lesser standard than the standards applied under Section 504.<sup>181</sup> Title II and Section 504 share the same definition of disability, protect disabled students regardless of their eligibility for special education and are both applicable to every public elementary and secondary school.

Most of the case law involving students with disabilities in elementary and secondary schools are disabled students who are part of an Individualized Education Plan (IEP) pursuant to the IDEA or disabled students claiming the right to an IEP. O.P. is not a student on an IEP plan and she is not claiming here that she was denied FAPE under IDEA or even Section 504. More

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<sup>176</sup> Office of Civil Rights *FAQ on Section 504 and the Education of Children with Disabilities*.

<sup>177</sup> Section 504 of the Rehabilitation Act, 29 U.S.C. § 701 et seq. and 34 CFR 104.4

<sup>178</sup> *Id.*

<sup>179</sup> OCR FAQ on Section 504 and the Education of Children with Disabilities.

<sup>180</sup> Plaintiffs need not show that defendants acted with animosity or ill will to support a claim under the ADA or Section 504. *C.L. v. Scarsdale*, 744 F.3d at 841, 841 (2014) citing *R.B. ex rel. L.B.*, 99 F. Supp.2d at 419 [S.D.N.Y. 2000]

<sup>180</sup> *Id.*

<sup>181</sup> *Scaggis v. New York Dept. of Educ.*, 35 NDLR P 23 (Not reported in F. Supp. 2d (E.D.N.Y. 2007)).

importantly, a disabled student's claims of discrimination will not always involve a FAPE violation and just because a student is on a 504 Plan does not mean that her case must be analyzed under Section 504.<sup>182</sup> Title II's effective communication regulation establishes independent obligations on the part of public schools to students who are deaf or hard-of-hearing, outside a FAPE analysis.<sup>183</sup>

Because an analysis of FAPE is not required in O.P.'s case and it is not within the purview of the VHRC to review, this investigation draws no conclusion as to whether Respondents denied O.P. FAPE or violated Section 504.

Under the principles of deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>184</sup> courts give controlling weight to agency interpretations.<sup>185</sup> The federal agency tasked with the duty to provide interpretations in this body of law is the U.S. Department of Justice (DOJ). The regulations require school districts to know that a student needs assistance with communication. The school district has an affirmative obligation to provide effective communication under Title II, whether or not a parent requests specific aids or services under Title II.<sup>186</sup> And these additional obligations are outside or in addition to a student's IEP or 504 Plan.

The case of *K.M. v. Tustin Unified School District and D.H. v. Poway Unified School District*,<sup>187</sup> illustrates this issue. K.M. and D.H. were two high-school students with hearing disabilities, who requested their schools provide them a transcription service. The schools argued they met their obligations under both students' IDEA plans and provided to the students FAPE and therefore were not obligated under Section 504 or ADA to do anything further. K.M.'s teachers

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<sup>182</sup> *Rodriguez v. City of New York*, 197 F.3d 611 (2<sup>nd</sup> Cir., 1999); *Howard v. Department of Social Welfare*, 163 Vt. 109 (1994).

<sup>183</sup> *K.M. v. Tustin Unified School District and D.H. v. Poway Unified School District*, 725 F.3d 1088 (9<sup>th</sup> Cir., 2013).

<sup>184</sup> 467 U.S. 837 (1984)

<sup>185</sup> Courts give controlling weight to agency interpretations unless they are arbitrary, capricious, or manifestly contrary to the statute. *K.M. v. Tustin Unified School District and D.H. v. Poway Unified School District*, 725 F.3d 1088 (9<sup>th</sup> Cir., 2013) citing *Armstrong v. Schwarzenegger*, 622 F.3<sup>rd</sup>. 1058, 1065 (9<sup>th</sup> Cir., 2010).

<sup>186</sup> Department of Justice's *FAQ on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools*.

<sup>187</sup> *K.M. v. Tustin Unified School District and D.H. v. Poway Unified School District*, 725 F. 3d 1088 (9<sup>th</sup> Cir., 2013).



testified that she was following classroom discussion well and participated similarly to her non-disabled peers. On the other hand, K.M. testified that although she could usually hear teachers, she had trouble hearing her classmates and classroom videos and that she could only follow along in the classroom with intense concentration leaving her exhausted at the end of the day. Likewise, D.H. testified that she sometimes had trouble following class discussions and teacher instructions. Although D.H. used visual cues to follow conversations, these strategies required a lot of mental energy and focus and left her drained at the end of the school day. D.H.'s teachers testified that they believed D.H. heard enough of what her teachers and fellow pupils say in class to allow her to access the general education curriculum. Both students lost their claims at the administrative level based on the testimonies of their teachers. However, the circuit court held the failure of an IDEA claim does not automatically foreclose a Title II claim grounded in Title II effective communications regulation. Furthermore, courts have also held that generally, the effectiveness of auxiliary aids and/or services is a question of fact precluding summary judgment.<sup>188</sup>

Title II requires schools take steps towards making existing services not just accessible but equally accessible to people with communication disabilities and provide an equal opportunity to participate in and enjoy the benefits of the school program.<sup>189</sup> The key to communicating effectively is to consider the nature, length, complexity, and context of the communication and the person's normal method(s) of communication. The ADA places responsibility of providing effective communication directly on the places of accommodations.<sup>190</sup> In determining how it will meet the child's needs, the ADA regulations require that the school "give primary consideration to the requests of the individual with disabilities." This choice must be honored unless the place of public accommodation can demonstrate that the use of the means would result in a fundamental alteration or in an undue burden.

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<sup>188</sup> *K.M. v. Tustin Unified School District and D.H. v. Poway Unified School District*, 725 F.3d 1088 (9<sup>th</sup> Cir., 2013) citing *Chisolm*, 275 F.3d at 327 (3<sup>rd</sup> Cir., 2001).

<sup>189</sup> 28 C.F.R. §§ 35.160 (a)(1) and (b)(1).

<sup>190</sup> Department of Justice's published *FAQ on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools*.

The terms “equally effective” does not necessarily mean that that schools are required to produce the identical result or level of achievement for disabled and non-disabled peers but that schools must afford disabled students the equal opportunity to gain the same benefit.<sup>191</sup>

II. Respondents violated VFHPA when its Music Teacher, Heather Schoppmann failed to use the FM system in two of O.P.’s courses, for two years.

a. O.P. is a person with a disability.

Title II defines a disability as 1) a physical or mental impairment that substantially limits a major life activity; 2) a record of such an impairment; or 3) being regarded as having such an impairment. A major life activity includes functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.<sup>192</sup>

O.P. and Respondents agree that O.P. is a person with a disability.<sup>193</sup> O.P.’s disability affects her ability to walk, hear, speak and learn. O.P. and Respondents have been operating on a 504 Plan because O.P. has a disability that requires certain accommodations.<sup>196</sup>

b. Respondents are places of public accommodations

The VFHPAA §4500 includes “schools” in its definition of public accommodations and Respondents are schools. The parties do not dispute this definition or this fact.<sup>197</sup>

c. The failure to use the FM system in Chorus and Band Lessons for a period of two years violated the Vermont Fair Housing and Public Accommodations Act.

This investigation finds that the facts, taken as a whole, support a finding that Respondents denied O.P. an equal opportunity to participate in its services, privileges, benefits, etc.,<sup>198</sup> denied her a reasonable modification necessary to access her education<sup>199</sup> and treated her differently

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<sup>191</sup> *Loye v. County of Dakota*, 625 F. 3d 494, 499 (8<sup>th</sup> Cir.,2010).

<sup>192</sup> ADA, 42 U.S.C. §12101 et. seq.

<sup>193</sup> Complaint, Response.

<sup>196</sup> 504 Plan setting forth accommodations, CHMS file.

<sup>197</sup> Complaint, Response.

<sup>198</sup> 9 V.S.A. §4502 (c)(1).

<sup>199</sup> 9 V.S.A. §4502 (c)(5).

because of the absence of auxiliary aids and services<sup>200</sup> but this finding is not without some reservations, as explained below.

Ms. Schoppmann's statements that she did not use the FM system in Chorus or Band Lessons for two years, while O.P. was her student is more than concerning. Principal Carbone stated that he believed the complete lack of use would be problematic.<sup>201</sup> Ms. Kelleher and Ms. Licari stated that it would have been a violation of O.P.'s 504 plan to not use the FM system at all and that they never made a plan with Ms. Schoppmann to avoid the FM system in her classes, in its entirety.<sup>202</sup> Ms. Schoppmann made a unilateral decision to not use the FM system in two of her classes, despite having read O.P.'s 504 Plan, which identified the FM system as an accommodation:

“FM unit should be worn, powered on, with the unit approximately 6 inches from your mouth, *at all times* [*emphasis added*]. On during instruction, and shut off when working with other individual students, or at other private times. If O.P. says she doesn't need it, please ask her why... FM should be passed across all settings – cafeteria/recess.”<sup>203</sup>

Ms. Schoppmann testified that there was some instruction in both Chorus and Band Lessons<sup>204</sup> and all of the CHMS teachers and staff testified that the FM system should be turned on during instruction.<sup>205</sup> On the other hand, how much instruction was provided in each of these classes varied throughout the course, depending on the teacher, students and nature of the instruction. It was difficult for this investigation to ascertain and for Ms. Schoppmann to recall accurately how much time was devoted to instruction versus singing or playing. Ms. Schoppmann testified that only a few minutes of instruction occurred at the beginning of Chorus class.<sup>206</sup> Similarly, Band Lessons would have consisted mostly of instrument playing although the ratio of instruction to playing remains unclear. At the very least, there were several minutes of instruction in the classroom from September through June when the class met, during O.P.'s fifth and sixth grades. The FM system is not limited only to instruction as O.P. would have also needed to hear the

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<sup>200</sup> 9 VSA S4502 (c)(6).

<sup>201</sup> Interview with Principal Mark Carbone.

<sup>202</sup> Interviews with Leah Licari, Darlene Kelleher.

<sup>203</sup> 504 Plans

<sup>204</sup> Interview with Heather Schoppmann.

<sup>205</sup> Interviews with Angela Zagursky, R.N. Martha Alexander, Leah Licari, Darlene Kelleher, Lashawn Whitmore-Sells, Mark Carbone, Laurel Scannel.

<sup>206</sup> Interview with Ms. Schoppmann.

music and singing, especially when the classroom consisted of many students singing different parts. O.P.'s ability to hear the classmates seated next to her who were supposedly singing her parts, would have been compromised by the surrounding students singing different parts.

Ms. Schoppmann's efforts to accommodate O.P.'s hearing loss by sitting O.P. up close and surrounded by other singers are consistent with the identified accommodation of *Communication* found in O.P.'s 504 Plan<sup>207</sup>, which included:

- a. Preferential Seating
- b. Obtain student's attention prior to speaking
- c. Reduce auditory distractions
- d. Etc...

However, the 504 Plan identified *Communication* as a separate accommodation from *Amplification* which required CHMS teachers and staff to wear the FM system at all times.<sup>208</sup>

There's no documentary evidence that would support a conclusion that providing the *Communication* accommodation would substitute for the *Amplification* accommodation or that CHMS teachers and staff had the option to choose one accommodation in lieu of the other.

On the other hand, Chorus class had good acoustics and O.P. is not without any auditory access.<sup>209</sup> In a completely quiet room, O.P. has 100% discrimination with her BAHAs alone. Hearing Specialist and Consultant Laurel Scannel stated that if O.P. was sitting at close range to the teacher, was surrounded by other students who were quiet, and everyone was listening to the teacher, that O.P. could have heard what she needed to hear without the FM system.<sup>210</sup> Ms. Scannel's testimony is not without any concern, testifying that she would aim for optimal and ideal auditory access and would like to see the FM system used for direction time and when the teacher is singing O.P.'s part.<sup>211</sup>

In order to accept Ms. Scannel's opinion that O.P. received everything she was supposed to, it must also be accepted that for two years, O.P.'s ability to hear was never compromised –

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<sup>207</sup> 504 Plans 2013-2014.

<sup>208</sup> *Id.*

<sup>209</sup> Interview with Laurel Scannel.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

classmates were always quiet, there was never any rattling or noisy ventilation or any other noise that interfered with her ability to discriminate speech, especially in a classroom size of 50-65 students. Even if one were inclined to accept that Chorus class was sound-proof every time Ms. Schoppmann spoke for two years, this would not resolve the problem that Ms. Schoppmann never used the FM system even when she was singing O.P.'s part. O.P.'s ability to hear the words for songs was compromised by the number of students in the classroom singing other parts. Had Ms. Schoppmann used the FM system when she and O.P. were singing the same part or provided the FM system to a classmate who was singing O.P.'s part, this investigation could confidently assess what, if anything, O.P. missed. Since this did not happen and O.P.'s discrimination score is only at 60% in an environment with noise, O.P. could not have received an equal opportunity to access the same benefits and services as her non-disabled peers.<sup>212</sup>

Comparatively, Band Lessons occurred with very few students and the chances that other students created noise would have been a lot less compared to Chorus. The concern that using the FM system in Band Lesson would cause pain for O.P., although seemingly reasonable, was unsupported since O.P. never complained that using the FM system could cause her pain<sup>213</sup> and Ms. Schoppmann never asked Laurel Scannel or O.P.'s audiologist about these concerns, as her colleague had done in Tech Ed. when the concern about over-amplification arose in that class.<sup>214</sup> Additionally, this concern doesn't justify why the FM system was not used at least during instruction in Band Lessons as the 504 Plan had required.

Ms. Schoppmann testified that O.P. reported this year to Ms. Roy that the instrument caused her pain and yet O.P.'s audiologists told Ms. Scannel that the BAHAs were created to reduce loud noises and prevent over-amplification. This investigation is without sufficient information to make a finding as to whether using the FM system during instrument playing could cause O.P. pain. However, the facts support a finding that at the very least, the FM system should have been used during instruction and had not been used.<sup>215</sup>

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<sup>212</sup> Id.

<sup>213</sup> Interview with Heather Schoppmann.

<sup>214</sup> Interview with Laurel Scannel.

<sup>215</sup> Interview with Heather Schoppmann.

O.P. received positive comments and grades in both Band Lessons and Chorus class throughout her fifth and sixth grades.<sup>216</sup> But positive evaluations from a teacher does not necessarily mean that O.P. did not have to exert more effort, focus or strategies than her peers to receive the same benefits and services as her non-disabled peers.

Although Respondents do not have to produce the identical result or level of achievement for O.P. and her non-disabled peers, Respondents do have to afford O.P. an equal opportunity. It is reasonable to expect that there would be an imperfect use of the FM system, with trial and error occurring at the beginning of a relationship between student and school. This was the case in PE, Tech.Ed., Field Hockey, and in some core classrooms in O.P.'s first year at CHMS but in all of those cases, every CHMS staff and teacher attempted to use the FM system. The same cannot be said of Ms. Schoppmann. The length of time the FM system went unused in Chorus and Band Lessons plus Ms. Schoppmann's unilateral decision without deference to the 504 Team Manager, O.P. or her parents are the most detrimental facts that tip the analysis in favor of finding discrimination. This investigation finds that without the use of the FM system in Chorus and Band Lessons for two years, O.P. had to have missed some instruction, music and singing and that she was provided an unequal opportunity to receive the same benefits and services provided to her non-disabled peers.

Respondents argue that despite the numerous emails that went back and forth between O.P.'s parents and CHMS, O.P.'s parents never complained about the lack of FM system use in Band Lessons and Chorus. What Mr. and Ms. Poe knew or should have known and whether they should have complained to CHMS, must be viewed in light of the fact that all of the CHMS teachers and staff who had proximity and opportunity to observe Ms. Schoppmann were not aware that Ms. Schoppmann had not used the FM system at all, in two classes, for two years. Accordingly, the discussion and decision regarding FM system usage in Chorus or Band Lessons never made its way to the appropriate forum; the 504 meetings that took place throughout both years where Mr. and Ms. Poe were always present.

Additionally, whether Mr. and Ms. Poe complained is not relevant to O.P.'s ability to make a prima facie case under VFHPAA. The law does not require that O.P. make a specific complaint,

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<sup>216</sup> O.P.'s grades 2013-2014, 2014-2015, CHMS file.

request a reasonable modification or even that she inform Respondents that she needed to use the FM system in order to receive effective communication, to trigger the protections of the statute. When the school district knows that a student needs assistance with communication because she has a hearing disability, the school district has an affirmative obligation to provide a reasonable modification and effective communication under Title II, whether or not a parent requests specific aids or services under Title II.<sup>217</sup> Nevertheless, O.P. and her parent's participation in the 504 team meetings where the FM system was identified as a necessary accommodation, provided sufficient notice. The latest point in which Respondents learned of O.P.'s disability and needs occurred in Spring 2013, during the 2-3 transition meetings involving Principal Carbone, O.P.'s parents and Richmond Elementary School. The purpose of those meetings was to discuss O.P.'s disability, her unique needs, her hearing loss, safety concerns, and reasonable accommodations that were required at CHMS.<sup>218</sup> During her entire tenure at CHMS, O.P. had in place a 504 Plan, the purpose of which was to address how Respondents would accommodate O.P. in her classes and activities at CHMS. Furthermore, O.P. made her own request to the 504 Team in May 2014, at the end of her first year at CHMS, informing them that not all of the teachers were using the FM system. This was obviously a concern because in response, Ms. Kelleher sent an email to CHMS teachers and staff to tell them the FM system needed to be used.<sup>219</sup> The multiple emails that came from O.P.'s parents asking Respondents to make sure the FM system was being used in one context or another, notified Respondents that O.P. had a hearing disability that required the use of the FM system.

O.P. and Respondents agree that the FM system was necessary for her education. Respondents stated in their brief that the purpose of the plan was to allow O.P. to access her education. If the FM system was not necessary for O.P., Respondents would never have listed the FM system in the 504 plan as an accommodation, would not have funded the purchase of the FM system and would not have invested in the trainings and services provided by Ms. Scannel to CHMS staff and teachers specific to O.P.'s hearing loss.

d. On the basis of O.P.'s disability

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<sup>217</sup> Department of Justice's *FAQ on Effective Communication*.

<sup>218</sup> Interview with Mark Carbone

<sup>219</sup> Email from Darlene Kelleher to CHMS, 5/14/2014.

Although Ms. Poe mentioned that O.P. was intimidated by Ms. Schoppmann and she questioned whether Ms. Schoppmann even liked O.P., this investigation did not find Ms. Schoppmann to harbor any ill-will or discomfort with O.P. or her disability, albeit somewhat defensive due to the nature of the investigation. Ms. Schoppmann used the FM system in General Music class and gave O.P. positive remarks and grades throughout all courses. Furthermore, O.P. was selected for plays and other CHMS programs by Ms. Schoppmann. The unilateral decision to not use the FM system, to deviate from the 504 Plan, to not provide adequate and formal notice to the 504 Team Manager and O.P.'s parents, to not consult with Ms. Scannel or O.P.'s audiologist, based on "best practice" as a teacher in Chorus and a premature "concern" in Band Lessons provides more than adequate proof that Ms. Schoppmann did not truly appreciate O.P.'s hearing loss. When asked to describe how much O.P. could hear with and without the FM system, Ms. Schoppmann stated, "I do not know." The law does not require malice or intent and the facts would not support such a conclusion. However, a reasonable jury could find that Ms. Schoppmann acted with "deliberate indifference" or at the very least that the discrimination was due to Ms. Schoppmann's underappreciation of O.P.'s disability. This underappreciation is sufficient to support a finding that the discrimination was on the basis of O.P.'s disability.

e. Ms. Schoppmann never received training from the Hearing Specialist

Receiving some of Ms. Scannel's training provided this investigation an in-depth look and appreciation for O.P.'s hearing loss and the necessity of the FM system that could not have been achieved through reading the 504 Plan alone or learning how the FM system operated. The lessons provided by Ms. Scannel showcased the importance of using the FM system and allowed for a necessary comparison between using and not using the FM system. Despite having no hearing loss, this investigator found the FM system to be incredibly helpful in hearing the speaker when she left the room, turned her back, and when another person spoke at a normal volume in a room that had no other distraction or competing sounds. It is the difference between reading a textbook and taking a course or learning how to operate a car and actually operating a car. There was a qualitative difference and one that would have given Ms. Schoppmann hesitation before she opted-out of using the FM system in its entirety. Ms. Schoppmann's decisions and actions are entirely attributable to Respondents not only because she is an agent but also because Respondents failed to train her.



CHMS provided two in-service trainings in the Fall of 2013 and 2014 but Ms. Schoppmann had attended neither of these. CHMS administrators did not track which teachers and staff members were in attendance. CHMS never followed up with Ms. Schoppmann to see if she had attended the in-service trainings despite having O.P. in three of her courses and therefore never asked Ms. Scannel to provide a training to Ms. Schoppmann later on in the year. CHMS never invited Ms. Scannel to observe Ms. Schoppmann in General Music or Band Lessons. Chorus was not observed until September 29, 2015, O.P.'s third year at CHMS and after the HRC complaint was filed. These facts taken together with CHMS Principal Carbone's statement that O.P. was "lazy," and the 504 manager's failure to memorialize a 504 Plan for academic year 2014-2015, reflect a laissez-faire attitude and approach in handling O.P.'s accommodations at CHMS. This investigation finds that this informal nature of handling O.P.'s accommodations resulted in Ms. Schoppmann's failure to accommodate O.P.

f. Respondent's cannot demonstrate "undue burden" or "fundamental alteration"

Respondents cannot show that using the FM system in Chorus and Band Lessons would create an undue burden. Undue burden is defined as significant difficulty or expense. If Respondents actually believed that providing the FM system would be difficult or expensive, it would not have been listed in the 504 plan or CHMS would have raised this concern at an earlier point. Public schools are not typically equipped with a surplus in their budgets that allow them to provide services and aids that are not necessary. In this case, CHMS had already purchased the FM systems and CHMS teachers and staff used them. As previously mentioned, Ms. Schoppmann's failure to use the FM system in Chorus and Band Lessons was not based on difficulty or expense. Furthermore, the decision that a particular aid or service would result in an undue burden must be made by a high level official and must include a written statement of the reasons for reaching that conclusion and this never occurred.

Similarly, Respondents cannot show that using the FM system in Chorus or Band Lessons would fundamentally alter the nature of the classes. Ms. Schoppmann testified that since she has started using the FM system in Chorus and Band Lessons that it was going well and that O.P. had not complained to her about confusion or over-amplification. When Ms. Scannel observed Ms.

Schoppmann in Chorus using the FM system, Ms. Scannel did not have any concerns and provided positive comments overall. And O.P. even stated to both Ms. Scannel and Ms. Schoppmann that using the FM system was in fact, not confusing for her.

In conclusion, Respondents violated VFHPAA when its music teacher, Ms. Schoppmann failed to use the FM system in Chorus and Band Lessons, offered O.P. an unequal opportunity to access the same services and benefits as her non-disabled peers; failed to provide a reasonable modification that was necessary for O.P. to access her education; and otherwise treated her differently because of the absence of auxiliary aids and services. Respondents can neither show “undue burden” nor “fundamental alteration” of their programs, policies or procedures.

**Conclusion:**

This investigative report recommends that the VHRC find that there are **reasonable grounds** to believe that Respondents discriminated against O.P. on the basis of her disability and violated the VFHPAA, codified at 9 V.S.A. §4502 (c), when Respondent’s music teacher failed to use the FM system in two courses, Chorus and Band Lessons, when O.P. was her student.

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Bor R. Yang, Administrative Law Examiner

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Date

Approved by:

\_\_\_\_\_  
Karen Richards, Executive Director  
& Legal Counsel

\_\_\_\_\_  
Date