

## INVESTIGATIVE REPORT

VHRC Case PA17-0005

Complainant: "Mr. Oak" o/b/o "K.O."  
Respondents: The Town of Waterbury  
Charge: Public Accommodations Discrimination: Disability

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### Summary of Complaint

Mr. Oak brings this complaint on behalf of his ten-year-old son, K.O., who was diagnosed with an emotional disability with developmental trauma, alleging that the Town of Waterbury unlawfully discriminated against K.O. when they denied him reasonable accommodations and removed him from Waterbury's Recreation Day Program.<sup>1</sup>

### Summary of Response

Respondent admits that K.O. was removed from their summer program, that Mr. Oak made a request for reasonable accommodations and that request was denied. Respondent denies the remainder of the allegations.<sup>2</sup>

### Preliminary Recommendations

This investigation makes a preliminary recommendation that the VHRC find that there are **reasonable grounds** to believe that The Town of Waterbury discriminated against K.O. on the basis of his disability under the Vermont Fair Housing and Public Accommodations Act, codified at 9 V.S.A. §4502.

### Documents

1. Complaint
2. Response
3. Letter from Mr. Oak to Greater Burlington YMCA, 7/31/2017.

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<sup>1</sup> Complaint.

<sup>2</sup> Response.

4. A guide to accommodating K.O. at Camp Abnaki, provided by Mr. Oak.
5. Copy of one page of K.O.'s Individualized Education Program (IEP).
6. Letter from Mr. Oak to William Shepeluk, 7/14/2017.
7. Waterbury Recreation Day Camp Parent/Guardian Information and Policy Handbook.
8. Letter of apology from K.O. to Waterbury Recreation Day Camp.
9. Summerama Brochure.
10. Vermont State Police, Headquarters Radio Log Summary Report for 7/11/2017.
11. Waterbury Recreation Day Camp Counselor notes re K.O.
12. Waterbury Recreation Day Camp Payment Receipt, 3/17/2017, 6/2/2017.
13. Waterbury Recreation Day Camp Invoice and Registration Confirmation.
14. Emails between Mr. Oak, William Shepeluk, Debra Fowler.
15. Alice Woodruff's Memorandum on Accommodations at Waterbury Recreation Day Camp, drafted 9/10/2017.
16. Mr. Oak's Testimony to the Legislature
17. Six news articles and coverage on K.O. at Mount Diablo Elementary School in California.

#### Interviews

1. Mr. Oak
2. Mr. Oakley.<sup>3</sup>
3. William Shepeluk, Town Manager of Waterbury
4. Debra Fowler, Recreation Director
5. Alice Woodruff, Camp Director
6. Ryan Gosselin, Camp Director
7. Danielle Cummings, Senior Day Camp Counselor
8. Heather Cutler, Pool Director
9. Joby Feccia, former Chief of Police for Town of Waterbury
10. Marc Grimes, Prospect Middle School

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<sup>3</sup> Only one parent filed the complaint on behalf of K.O., but both have been provided a pseudonym in the interest of protecting K.O.'s identity.

## Facts

Born to a mother with a heroin addiction and an absent father due to incarceration, K.O. endured severe physical, psychological and emotional abuse. In the first two years of his life, he transitioned eleven times through seven different homes.<sup>4</sup> Despite being adopted at the age of three by two loving and supportive parents, Mr. Oak and Mr. Oakley, the traumatic beginning had long-term effects on his life. K.O. is plagued by deep insecurities and attachment issues. He is afraid to be alone, is easily frustrated by interpersonal relationships, is impulsive and seeks escape from situations. At school, K.O. is on an individualized education program (IEP) and requires special education. His IEP plan identifies his disability as:

...notable social skills problems. K.O. engages in inappropriate types of behavior or feelings under normal circumstances. His work avoidance contributes to an inability to learn that cannot be explained by his test results on measures of intelligence and acquisition of basic academic skills. Therefore, K.O.'s expression of emotional and behavior problems is sufficient to support his identification as a student with an Emotional Disturbance...K.O.'s disability impacts him across all settings, in and out of school. It can greatly impact academics and the social aspects of the school day.<sup>5</sup>

K.O.'s strengths were also identified in his IEP:

K.O. is a likeable boy overall. He is charming and personable, and draws people in. He cares about pleasing adults and cares what they think. He is resilient, affectionate and sweet. K.O. is curious and asks lots of questions and is careful observer of his surroundings. He is a good negotiator and knows what he needs to do to get his needs met.<sup>6</sup>

Mr. Oak and Mr. Oakley recognize the challenges inherent in their son's disability but argue that when schools and recreation programs utilize simple accommodations, the results are efficacious.<sup>7</sup> Mr. Oak stated that K.O. has completed many other summer programs without incident, including the Y Program, Mud City Adventures, and Camp Abnaki, a two-week overnight camp. K.O. also attends the YMCA after-school program. K.O. is described by YMCA Director Marc Grimes, as energetic, competitive, emotional and sweet. According to

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<sup>4</sup> Mr. Oak's testimony to Legislature, and Mr. Oakley's interview with news outlet.

<sup>5</sup> K.O.'s IEP.

<sup>6</sup> Id.

<sup>7</sup> Mr. Oak provided the name and contact information for the director of a summer program K.O. attended but investigation was unable to secure an interview with the director.

Mr. Grimes, there are 22 children registered for the after-school program and 8-15 students in attendance at any given time. It is a small program that consists of outdoor activities, exploration clubs, yoga, fishing and sports. Because K.O. has a fair amount of social friction with other children in the program, he requires accommodations such as providing him direct attention (similar to a 1:1) or keeping him close-by, giving him reminders, assisting him with tasks, changing the rules of games or finding alternative activities. It hasn't always been easy to provide K.O. the supports that he needs, and at times the quality of the program, has been affected. But providing K.O. these accommodations has allowed K.O. and other children to safely engage in the same program. K.O. has never hit anyone in the program although he demonstrates an uneasiness around peers and other children have antagonized him. His aggressive behavior is more "blind rage" and involves throwing objects. More often, he has engaged in elopement behavior. While K.O. required more attention at the beginning of the school year, this has decreased.<sup>8</sup>

Unfortunately, not all of K.O.'s experiences have been positive. Several preschool programs expelled him, and his parents removed him from an elementary school after learning he was restrained 57 times in two months.<sup>9</sup> In California, his elementary school went on lock-down and the police were called after reports he "terrorized" other children. Parents kept their children home from school after hearing other children were allegedly hit, bit and punched.<sup>10</sup> News coverage of a school board meeting showed a community frustrated but also supportive of K.O. They urged the district to provide the necessary accommodations for him to be successful in the same school as their children. K.O.'s parents filed a complaint against the district, alleging a denial of a free and appropriate public education (FAPE) when it failed to provide the legally required accommodations to their son. Their complaint was found to be meritorious.<sup>11</sup>

#### The Waterbury Recreation Day Camp Program

The Town of Waterbury operates several summer programming activities including swim lessons and mini-camps for soccer, lacrosse, theater and more. Waterbury also has a very popular

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<sup>8</sup> Interview with Marc Grimes.

<sup>9</sup> Mr. Oak's testimony to the legislature.

<sup>10</sup> News stories and articles.

<sup>11</sup> Interview with Mr. Oak.

8-week summer day program open to both residents and non-residents, at the cost of \$650 and \$700, respectively. Approximately 80 children from kindergarten through fifth grade attend the day camp program.<sup>12</sup> It is a popular summer choice for parents and fills up in less than four hours from the time it opens at 6 a.m. on Town Meeting Day. The camp is primarily recreational, providing sports, crafts, field trips to campers.<sup>13</sup> It is filled on a first come, first serve basis.<sup>14</sup>

The camp starts at the end of June and runs through mid-August. Daily, the camp runs from 7:30 a.m. through 5:00 p.m. The day begins with large group activities before campers separate into their assigned small groups. Campers are assigned to one of four small groups based on age. In 2017, kindergarteners and first graders were assigned to one group, fifth and sixth graders were assigned to another group, and the remaining three groups consisted of second, third and fourth graders. Two counselors were assigned to each group.<sup>15</sup> The state requires a ratio of 13:1, children to staff but the camp strives to maintain a ratio of 10:1 or less, whenever possible. Swimming at the community pool typically dominates the afternoons although the daily schedule varies depending on field trips or all-camp activities and weather.<sup>16</sup>

Campers and their parents are asked to review the disciplinary policy prior to the start of camp. The policy outlines a gradation of discipline. First, campers are given warnings for inappropriate or unsafe behavior. Then, they receive strikes when a safety rule has been broken or several warnings have failed to curb a behavior. Three strikes in one day results in a removal from the camp for that day. Campers who are asked to leave three times in the same summer are expelled from the program. According to the policy, some behavior may warrant a strike without a warning and a particularly egregious action by a camper could result in expulsion without any warnings or strikes, at the discretion of the Municipal Manager and/or Recreation Director.<sup>17</sup>

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<sup>12</sup> After 2017, the summer program was only open to Kindergarten through 4<sup>th</sup> grade as there was another middle-school camp that included 5<sup>th</sup> and 6<sup>th</sup> graders.

<sup>13</sup> Interview with Ryan Gosselin, William Shepeluk.

<sup>14</sup> Interview with Debra Fowler, William Shepeluk.

<sup>15</sup> Interview with Ryan Gosselin.

<sup>16</sup> Town of Waterbury Recreation Day Camp Handbook.

<sup>17</sup> Id.

As the Municipal Manager and Chief Executive Officer for the Town of Waterbury, William Shepeluk is charged with responsibility for all programs, supervision of all employees, oversight of the budget, as well as rules and policies enacted by the select board.<sup>18</sup> Mr. Shepeluk has been in the role for 30 years and is more familiar with the programs than any other witness interviewed. While his role does not include daily supervision or management of the camp, he was familiar with how the camp has historically handled campers with disability-related accommodations. There is precedence for using a child's school or designated agency to access supports and services. Mr. Shepeluk recalled Waterbury making arrangements to provide an ASL interpreter for a camper who was deaf and use of telephone interpreters for campers who were new Americans. Typically, the financial burden has been on an outside agency to provide accommodations rather than the camp which runs on a budget of only \$67,000.<sup>19</sup>

Alice Woodruff, one of two Day Camp Directors said the camp has accommodated many children but that "it is impossible to provide 1:1 supports."<sup>20</sup> At the end of the summer 2017 session, Ms. Woodruff drafted a memorandum on accommodations at the camp. They included: creating a special star chart and incentives for a specific child, being in frequent contact with the parents, having a counselor stay close to a camper, providing individual instructions, warnings and feedback, using visual cues and allowing sensory toys, providing a specific task to help a camper deescalate, creating a safe space for a camper to retrieve to in high-challenge situations, etc.<sup>21</sup>

Debra Fowler has been the Recreation Director for two years, after having been a liaison and advisor to Waterbury.<sup>22</sup> Ms. Fowler organizes and administers the program. She hires, supervises and directs all camp counselors including ten full-time seasonal staff and four junior counselors at peak hours of the day.<sup>23</sup> Most counselors are college-age, but the camp has employed older staff as well.<sup>24</sup> The camp is primarily operated by two-day camp directors

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<sup>18</sup> Interview with William Shepeluk.

<sup>19</sup> Id., Email from William Shepeluk to Mr. Oak, 7/13/2017.

<sup>20</sup> Interview with Alice Woodruff, Waterbury Recreation Day Camp Supports and Accommodations for Campers, 9/10/2017.

<sup>21</sup> Id.

<sup>22</sup> The Town of Waterbury hired its first Recreation Director in 2012.

<sup>23</sup> Interview with Debra Fowler.

<sup>24</sup> Interview with Alice Woodruff.

whose primary role is to manage the staff and campers and ensure safety. In summer 2017, the day camp directors were Ryan Gosselin, in his sixth year working for the camp and Ms. Woodruff, in her third year.<sup>25</sup> Ms. Fowler's office is within walking distance of the camp and she is readily available, whenever the need arises.<sup>26</sup>

Prior to the start of camp, all employees participate in a mandatory week-long orientation where they receive safety training including how to administer CPR, first-aid and execute emergency plans.<sup>27</sup> The orientation is also an open forum for discussing challenges of previous seasons and anticipated challenges for the upcoming summer session.<sup>28</sup> Third-year camp counselor Danielle Cummings said the orientation was an opportunity to learn how to interact with children, learn how the program is structured, how to schedule and execute emergency procedures. Ms. Cummings said some days were longer than others and she didn't attend all training sessions last year. Ms. Cummings mentioned that the camp maintains a profile on each camper that outlines specific needs. Ms. Cummings said she recalled a presentation at orientation on different kinds of disorders that children may have.<sup>29</sup> Alice Woodruff, Day Camp Director said the training includes a discussion of different tiers of support and accommodations the camp can make for campers.<sup>30</sup> This investigation could not determine the quantity or depth of training on disability-related accommodations or the Americans with Disabilities Act (ADA) because Waterbury did not keep records related to their orientations and Ms. Woodruff's memorandum on accommodations was drafted after the 2017 summer session.

In addition to the orientation, some counselors have also attended a day-long training program in Vermont called "Summerama." Summerama offers a series of sessions from educators and recreation directors on gaming, water safety, programming, managing behaviors and conflict, etc.<sup>31</sup> In 2017, only two persons from Waterbury attended Summerama. However, all counselors attended the program prior to the 2018 summer session.<sup>32</sup>

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<sup>25</sup> Interview with Ryan Gosselin.

<sup>26</sup> Id., interview with Debra Fowler.

<sup>27</sup> Two days are full and two are half days. Interview with Alice Woodruff.

<sup>28</sup> Interview with Debra Fowler.

<sup>29</sup> Interview with Danielle Cummings.

<sup>30</sup> Interview with Alice Woodruff.

<sup>31</sup> Summerama brochure.

<sup>32</sup> Interview with Debra Fowler.

July 11, 2017

K.O. was registered for the Waterbury Recreation Summer Day Program in March 2017. K.O. started camp a week late as he was attending other camps in Vermont.<sup>33</sup> The camp's records indicate a start date of Monday, July 3 but Mr. Oak said, K.O. started camp on Wednesday, July 5, after the holiday.<sup>34</sup> Regardless, K.O. was permanently removed from the camp on Tuesday, July 11, after only a few days. K.O.'s parents chose to not disclose his disability to staff prior to the start of camp.<sup>35</sup> They found that when they have shared his disability in the past, it led to their son being unfairly targeted and admonished for incidents wrongfully imputed to him.<sup>36</sup>

For those first few days at camp, K.O. had done reasonably well without any accommodations. Mr. Oakley checked in with counselors at the end of each day and counselors expressed no concerns.<sup>37</sup> Debra Fowler, Recreation Director said she met K.O. on the first day and did not recall receiving any troubling feedback about K.O. for those first few days.<sup>38</sup> Ryan Gosselin, Camp Director said K.O. had a great first day but he wanted to change groups to be with familiar peers which he was able to do. Mr. Gosselin recalled the second day being more difficult with social engagement and compliance with rules.<sup>39</sup> Danielle Cummings, a third-year camp counselor said she remembered K.O. having some anger issues. She recalled some mutual aggression between K.O. and other children.<sup>40</sup>

On July 11, Ms. Cummings was substituting as the day camp director as Alice Woodruff was on vacation. Ms. Cummings recalled it being a difficult morning for K.O. because he had a disagreement with another child.<sup>41</sup> Notes from a different counselor revealed an altercation between K.O. and other children over a game in which K.O. had been hit with a ball and refused to leave per the rules of the game. The children began to yell at him to get out of the game and

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<sup>33</sup> Email from Mr. Oak to Deb Fowler, 5/31/2017 and Response.

<sup>34</sup> Camp was closed on Tuesday, the Fourth of July. Waterbury Day Camp records, Interview with Mr. Oak.

<sup>35</sup> Interview with Debra Fowler, William Shepeluk, Ryan Gosselin, Mr. Oak.

<sup>36</sup> Interview with Mr. Oak, email from Mr. Oak to William Shepeluk, 7/13/2017.

<sup>37</sup> Interview with Mr. Oakley.

<sup>38</sup> Interview with Debra Fowler.

<sup>39</sup> Interview with Ryan Gosselin.

<sup>40</sup> Interview with Danielle Cummings.

<sup>41</sup> Id.

in response, he yelled back and then ran away to hide, where he was found crying.<sup>42</sup> Ms. Cummings was not aware of any physical aggression between the children although K.O. later reported to his fathers that another child hit him during this encounter.<sup>43</sup> Before lunch, the campers went on a nature walk to a nearby brook but still agitated from the morning, K.O. was given the option to stay behind with Ms. Cummings and another child who was waiting for a parent. Disturbed and unsettled from being hit and targeted by his peers, K.O. lashed-out. In Ms. Cumming's written summary of the event, she wrote that K.O.:

...threw multiple tennis balls over the fence to the pool, threw pieces of monopoly all over the building and one in the trash, pushing chairs over, threw a rock at me, threw a hockey stick into the drain, tried to lock me out of the building...attempted to pick up picnic table and throw it, knocked multiple things over inside and outside, tried to throw other campers' belongings over the fence and into the trash.<sup>44</sup>

Ms. Cummings said the picnic table was too heavy for him to pick up and the rock he threw was larger than a pebble, but not huge. While it was clear to Ms. Cummings that K.O. intended to throw it at her as they were only ten feet apart, she was never hit with the rock. Fearing for her safety, she contacted Camp Director Ryan Gosselin who ran back from the brook. Ms. Cummings said the other camper was unphased by the situation and none of the other campers were present during the entire incident.<sup>45</sup>

Mr. Gosselin said he received several calls from Ms. Cummings who reported K.O. as "disrespectful," "disruptive" and "not listening." The situation required that he run back from the brook which took him two minutes. He admitted that he did not observe K.O. throw rocks or items over the fence as Ms. Cummings reported but it was obvious from the state of the camp. Additionally, Mr. Gosselin said he thought Ms. Cummings had been hit by a rock. Mr. Gosselin's efforts to console K.O. and reason with him were futile. Because he had not been trained on physically handling children, he called Ms. Fowler, who arrived shortly thereafter.<sup>46</sup>

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<sup>42</sup> Summary of July 11, 2017 incident by Kyle Leggett, 7/11, 2017.

<sup>43</sup> Interview with Mr. Oak.

<sup>44</sup> Summary of July 11, 2017 incident by Danielle Cummings, 7/11/2017 at 12:25 p.m.

<sup>45</sup> Interview with Danielle Cummings.

<sup>46</sup> Interview with Ryan Gosselin.

Ms. Cummings estimated their total time with K.O. be a half hour before Ms. Fowler was contacted and arrived on the scene.<sup>47</sup>

Ms. Fowler's office was no more than a five-minute walk away and she arrived immediately to find the camp in a disarray with games tossed throughout the building. Ms. Fowler said some of the campers observed K.O.'s upheaval as they had returned from the brook to have lunch and K.O. flipped a wagon near them.<sup>48</sup> This is contrary to Ms. Cummings's statement that none of the other campers were present for the entire incident.<sup>49</sup> If the campers observed anything, it was very little as the camp counselors immediately removed them from the scene. At this point, Mr. Gosselin had notified Mr. Oakley by telephone and asked that he retrieve his son. While K.O. continued running outside, Ms. Fowler contacted the Waterbury Police to assist. As K.O. attempted to pick up a heavy sewage cover, Ms. Fowler stepped on it and prevented him from grabbing it. Ms. Fowler followed him inside the building where he attempted to throw more things around. She grabbed K.O.'s wrists and said to him, "you need to stop now." She then pulled him down and put her hip on his buttocks to secure him in place. Ms. Fowler said she has never had to employ emergency procedures of this sort before. K.O. stayed agitated and continued an aggressive tone with her, thrashing around and attempting to kick her. He said, "get off me woman" and "you're a stupid woman." According to Ms. Fowler, K.O. only stopped when Joby Feccia from the Waterbury Police arrived and said, "Hey bud, I need you to calm down." Immediately, the behavior stopped. Ms. Fowler said the entire situation was approximately five to ten minutes.<sup>50</sup>

Mr. Feccia, former Police Chief for the Town of Waterbury, said that he was dispatched regarding an "out of control" subject at the pool. Police records show a call was made at 12:22 p.m. and Mr. Feccia arriving at the scene at 12:23 p.m. Mr. Feccia was present for a total of 27 minutes, from 12:23 to 12:50 p.m. Mr. Feccia described the scene as "calm" and "relaxed" when he arrived. No other children were in the building and he did not observe any staff crying or frightened. He observed a male child on the floor, restrained by Ms. Fowler laying on top of him, with "her wrists on his wrists and her ankles on his ankles." K.O. was "passive" and

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<sup>47</sup> Interview with Danielle Cummings.

<sup>48</sup> Interview with Debra Fowler, Debra Fowler notes from 7/11/2017

<sup>49</sup> Interview with Danielle Cummings.

<sup>50</sup> Interview with Debra Fowler.

“calm.” Mr. Feccia took K.O.’s limp hand and asked if he would be “cool.” Ms. Fowler released K.O. who sat up on the floor and cried. Mr. Feccia received a summary of what occurred from Ms. Fowler. Mr. Feccia said Mr. Oakley showed up fifteen minutes after he had arrived on the scene. Mr. Feccia overheard Mr. Oakley ask Ms. Fowler if this meant K.O. would be removed from the program and Ms. Fowler responded, “yes.”<sup>51</sup>

Upon arriving, Mr. Oakley engaged in a brief conversation with Mr. Feccia outside who said, “he’s inside and things are fine now.” Mr. Oakley sensed from their conversation that Mr. Feccia was “embarrassed” to have been called to respond to such a situation. Mr. Oakley was unhappy that the police had to be involved as it was very traumatic for K.O., whose biological mother had the police called on her several times. Entering the building, Mr. Oakley immediately saw that his son was very sad and depressed. He found Ms. Fowler to be very “matter of fact” in what he called an “unemotional conversation” between the two of them. Mr. Oakley asked if they were releasing him from the program and Ms. Fowler said, “Yes.” Mr. Oakley then said, “Really?” Mr. Oakley sensed that the decision was relatively final by the time he and K.O. left the camp.<sup>52</sup>

After the incident, Ms. Fowler held a debriefing meeting with the other campers, as many of them had witnessed the police vehicle lights. Ms. Fowler sent an email later that evening to parents explaining the situation. In that email, Ms. Fowler told the parents that “at no time was anyone in danger” and “the camper that was involved in the incident is no longer part of the program.”<sup>53</sup> Ms. Fowler said a couple of parents reached out to inquire about what happened, more out of curiosity than concern.<sup>54</sup>

K.O. later shared with his fathers that he felt targeted by the other children and another child had instigated a fight with him. K.O. had thrown the small rock out of frustration rather than to harm Ms. Cummings. According to K.O.’s dads, he’s not violent and doesn’t hit or attack other people. K.O. suffers from flight syndrome and often desires to leave. He’s been successful in

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<sup>51</sup> Interview with Joby Feccia.

<sup>52</sup> Interview with Mr. Oakley.

<sup>53</sup> Email from Debra Fowler to parents, 7/11/2017 at 3:17 p.m.

<sup>54</sup> Interview with Debra Fowler.

overnight camps without any violent altercations.<sup>55</sup> Mr. Oak reached out to Ms. Fowler the evening of July 11 and asked Ms. Fowler to reconsider her decision. He explained K.O.'s background, disability and behavior. Ms. Fowler said this was the first time that she learned of K.O.'s disability but said she felt strongly that his behavior warranted expulsion nevertheless. In the same conversation, Ms. Fowler said, "this is not an ADA camp." Mr. Oak was shocked and appalled by this statement. In his email to Ms. Fowler the following day, Mr. Oak again said, "I think your assertion yesterday that the Town is not accountable to the Americans with Disabilities Act shows a lack of knowledge or experience in your role."<sup>56</sup> Ms. Fowler admitted to making the statement but explained that she meant they did not have the ability to provide 1:1 support and it wasn't designed to be a "cancer" or "diabetic" camp and was "not set up for anyone with a disability."<sup>57</sup> But both Ms. Fowler and Mr. Oak stated that neither party discussed 1:1 support in this conversation.<sup>58</sup>

The next day, Mr. Oak sent an email to Ms. Fowler with a letter of apology hand-written by K.O. that read: *sorry for hitting you with a rock and dumping stuff at rec. sorry.*<sup>59</sup> Mr. Oak also wrote to Municipal Manager William Shepeluk, who responded by inviting Mr. Oak to a meeting. Before this meeting, Mr. Oak and Mr. Shepeluk continued to communicate via email. Mr. Oak informed Mr. Shepeluk and Ms. Fowler further of K.O.'s disability, the requirements of the Americans with Disabilities Act and expressed his disappointment and belief that K.O. was treated unfairly under the disciplinary policy.<sup>60</sup> Mr. Shepeluk explained the difficulty in addressing K.O.'s needs without prior knowledge of K.O.'s disabilities and explained that the camp operates on a small budget of only \$67,000, making it difficult to employ staff with the "necessary qualifications to meet all the potential needs of campers."<sup>61</sup>

Prior to the scheduled meeting with Mr. Oak, Ms. Fowler and Mr. Shepeluk had a private conversation about K.O. in which Mr. Shepeluk asked Ms. Fowler if there was any way K.O. could return to the camp. Ms. Fowler rejected this idea as she believed that the situation had

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<sup>55</sup> Interview with Mr. Oakley.

<sup>56</sup> Email from Mr. Oak to Debra Fowler, copied to William Shepeluk, 7/12/2017.

<sup>57</sup> Interview with Debra Fowler.

<sup>58</sup> Id., Interview with Mr. Oak.

<sup>59</sup> Email from Mr. Oak to Debra Fowler with attached letter from K.O., 7/12/2017.

<sup>60</sup> Email from Mr. Oak to William Shepeluk, Debra Fowler, 7/12/2017, 7/13/2017.

<sup>61</sup> Email from William Shepeluk to Mr. Oak, 7/13/2017.

been “aggressive,” had escalated too quickly and it was “very dangerous” for him to return. Ms. Fowler said she believed the purpose of the meeting with Mr. Oak was to explain the policy and procedure and provide information about alternative camps but the decision to remove K.O. from the program was final.

The morning of the meeting, Mr. Oak made a formal request for accommodation under the ADA in an email to Mr. Shepeluk. He explained that K.O. had a disability and was not a safety risk. Mr. Oak further explained that they were not requesting a “therapeutic program” for their son but simply that the camp consider making some reasonable accommodations that other camps had made that allowed K.O. to be successful. Specifically, Mr. Oak requested:

If K.O. has another crisis, we simply ask that you remove as many people from the situation as possible and have one or two trusted counselors (I would suggest that Ryan be one of them) talk to K.O. and help him calm down. Removing the audience is one of the best strategies to manage the crisis. You should call one of us to come pick him up immediately and let us manage him for the remainder of the day and help him process the stressors that lead to the breakdown. I believe this accommodation is very reasonable.<sup>62</sup>

Mr. Shepeluk, Mr. Oak and Ms. Fowler met on Friday, July 14, 2017. According to Mr. Shepeluk, Mr. Oak was very transparent about K.O.’s traumatic early life and how he had been tremendously abused. He further explained K.O.’s behavior and triggers. Mr. Shepeluk said Mr. Oak was sympathetic to the camp’s reaction and was satisfied with Ms. Fowler’s response to the situation including contacting the police.<sup>63</sup> Mr. Oak thought they had a productive meeting and that Mr. Shepeluk was reconsidering Ms. Fowler’s decision denying K.O. the right to return to camp.

On July 18, Mr. Shepeluk informed Mr. Oak that the Town was not changing its decision. Mr. Shepeluk wrote:

Deb feels strongly that the behaviors exhibited by K.O. rose to the level where dismissal from the program is necessary. Even if we had known about K.O.’s disability and had been prepared to accommodate his needs, he would have been dismissed from the program if he behaved as he did last week. It is too bad we won’t know whether the outburst could have been avoided had we been aware of

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<sup>62</sup> Letter from Mr. Oak to William Shepeluk, 7/13/2017.

<sup>63</sup> Interview with William Shepeluk.

his needs beforehand. I asked Deb if we could have K.O. come to camp a few days a week or partial days. Again, she believes given the circumstances of his behavior last week that it is inappropriate to allow him back even on a part-time basis...I must support her judgement and her recommendation.<sup>64</sup>

In the same email, Mr. Shepeluk invited Mr. Oak to register K.O. in other camps including a week-long tennis camp and a soccer camp. K.O. was invited to sign up for swim lessons and was invited to use the pool. Heather Cutler, Pool Director said the pool was open to both campers and members of the public in the afternoons. Typically, there are 150 people in the area and 80-100 in the pool area alone. Children under six must be accompanied by an adult at the pool but older children such as K.O. are free to utilize the pool without a guardian present. Ms. Cutler said there are 4-10 lifeguards on duty at any given time.<sup>65</sup>

Ms. Fowler said if K.O. met the age requirement in 2018, he would have been welcomed back to the camp. She explained that her concerns about safety were the same but because the other camps involved different people in different settings, some being only half day, that K.O.'s behavior on July 11 did not merit exclusion from all programs. According to Ms. Fowler, K.O. was not the first child asked to leave the camp. In a previous year, a child who was prone to running away and hitting other children was asked to leave after the camp's efforts to create a safe space and provide support did not reduce the flight risk. That child received three strikes per day for three days and was removed from the program for the remainder of the summer.<sup>66</sup>

Ms. Fowler and Mr. Shepeluk along with other camp counselors expressed frustration about the lack of advance notice of K.O.'s disability. But when asked what tools, services or supports could have been accessed prior to the start of camp that were no longer available in the second week of camp, no clear answer was provided. Ms. Fowler and Mr. Shepeluk never researched additional services or supports.<sup>67</sup>

Mr. Shepeluk expressed skepticism about K.O.'s disability to this investigator despite the numerous email communications and in person meeting between himself and Mr. Oak. And Mr. Shepeluk was of the impression that parents had called to "complain" about the July 11 incident

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<sup>64</sup> Email from William Shepeluk to Mr. Oak, 7/18/2017.

<sup>65</sup> Interview with Heather Cutler.

<sup>66</sup> Interview with Ms. Fowler.

<sup>67</sup> Interview with Ryan Gosselin, Ms. Fowler, Mr. Shepeluk.

but then said parents didn't directly contact him. Mr. Shepeluk later recanted the term "complain."<sup>68</sup> In her interview, Ms. Fowler said parents contacted her out of curiosity more so than concern. Ms. Fowler and Mr. Gosselin believed that Ms. Cummings had been hit with the rock but Ms. Cummings herself said he had not been hit, harmed or injured. Ms. Fowler insisted this fact would not have affected her decision to remove K.O. from the camp. K.O. received a full refund despite the disciplinary policy that allows the camp to keep the payment when a child is removed for behavioral issues.

### Analysis

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 available defenses.

#### I. The Legal Framework and *Prima Facie* Case

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 disability discrimination may occur, but a complainant need only make a showing under one of these provisions. This report examines the most relevant and cognizable claims based on the allegations in the complaint. First, the allegations require an analysis of an intentional discrimination claim under 9 V.S.A. §4502 (c) subpart (1) which states:

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 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.

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<sup>68</sup> Interview with William Shepeluk.

To establish a *prima facie* case under this provision, K.O. must show:

- 1) He is a person with a disability;
- 2) The Town of Waterbury Recreation Day Camp is a place of public accommodation;
- 3) He was offered an unequal opportunity to participate in Respondent's services, facilities, privileges, advantages, benefits *because of* his disability;<sup>69</sup>

Second, the allegations support an analysis of a reasonable modification claim pursuant to 9 V.S.A. §4502 (c) subpart (5) which states:

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.

To establish a *prima facie* case under this provision, K.O. must show:

- 1) He is a person with a disability;
- 2) The Town of Waterbury Recreation Day Camp is a place of public accommodation;
- 4) He made a request for a reasonable modification.
- 5) The Town of Waterbury failed to make reasonable modifications that would accommodate K.O.'s disability without fundamentally altering the nature of the public accommodation.<sup>70</sup>

The burden is on K.O. to establish a *prima facie* case of public accommodations discrimination but this burden is "relatively light" 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>71</sup> The legal standards, duties and requirements set forth under VFHPAA are to be construed consistently with The Americans with Disabilities Act (ADA).<sup>72</sup> Thus, in addition to looking at Vermont law, we also look to federal interpretations of that statute in determining whether complainant and respondent have met their respective burdens.<sup>73</sup> Under the principles of deference established in *Chevron*

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<sup>69</sup> *J.V. v. Albuquerque Public Schools*, 813 F.3d 1289, 1295 (10<sup>th</sup> Cir. 2016).

<sup>70</sup> *Bhatt v. University of Vermont*, 184 Vt. 195, 200 (2008).

<sup>71</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>72</sup> 9 VSA § 4500 (a) and ADA, 42 U.S.C. §12101 et. seq.

<sup>73</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).

*U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>74</sup> courts give controlling weight to agency interpretations.<sup>75</sup>

A. K.O. has a disability as defined by the VFHPAA and meets the first prong of both *prima facie* cases.

Title III of the ADA and the VFHPAA share the same definition of disability:

- (A) a physical or mental impairment which limits one or more major life activities;
- (B) a history or record of such an impairment; or
- (C) being regarded as having such an impairment.<sup>76</sup>

The Supreme Court has adopted a three-step approach to determining “disability” under the ADA: 1) Plaintiff must show he suffers from an impairment; 2) Plaintiff must show impairment of a major life activity; and 3) the impairment must “substantially limit” that major life activity. There isn’t an exhaustive list of physical or mental impairments. However, the VFHPAA specifically identifies “emotional illness” as the type of impairment covered under the statute.<sup>77</sup> A child with an impairment or condition that meets the definition of disability under the Individual with Disabilities Education Act (IDEA,) for purposes of establishing special education, does not per se meet the definition of disability under the ADA since the IDEA does not require a showing of substantial limitation of a major life activity. However, courts have held that an IDEA disability probably will substantially limit a major life activity.<sup>78</sup> A major life activity is one “of central importance to daily life.”<sup>79</sup> The U.S. Department of Justice, the federal agency tasked with enforcement of the Title III of the ADA identifies “learning” as a major life activity.<sup>80</sup> Lastly, a substantial limitation is established “when the individual's important life

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<sup>74</sup> 467 U.S. 837 (1984)

<sup>75</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>76</sup> VFHPAA 9 V.S.A. §4501 (2)

<sup>77</sup> *Id.*

<sup>78</sup> *Mann v. Louisiana High School Athletic Ass'n*, 535 Fed.Appx. 405, 410 (5<sup>th</sup> Cir. 2013).

<sup>79</sup> *Weixel v. Board of Educ. of City of New York*, 287 F.3d 138, 147 (2<sup>nd</sup> Cir. 2002) citing to *Bragon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998).

<sup>80</sup> Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities. 28 CFR 36.102-36.104.

activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.”<sup>81</sup>

K.O. is on an Individualized Education Plan (IEP) and receives specialized educational services at school. While this fact alone is not sufficient to meet the definition of disability under the VFHPAA nor the ADA, it is clear from his IEP that K.O. has a mental impairment: Emotional Disturbance. Although K.O. does not have a learning disability, his emotional disturbance has greatly impacted his learning and social skills. His IEP indicates “notable social skills problems...inability to learn...emotional and behavior problems...disability impacts him across settings, in and out of school.”<sup>82</sup> Compared to others under similar circumstances, K.O. is greatly restricted. His IEP describes the impact of his disability on his academics and social environment as “notable” and “great.” Mr. Grimes described K.O. in the after-school program as someone lacking a fair amount of social skills. These facts suffice to prove a substantial limitation of a major life activity.

While Mr. Shepeluk expressed skepticism about K.O.’s disability, all witnesses generally agree that K.O.’s behavior on July 11 was atypical. Ms. Fowler said she has never had to physically restrain a child before and all camp counselors interviewed expressed a concern over K.O.’s behavior. K.O. has been removed from several pre-schools and programs and was restrained 57 times in two months at an elementary school. Based on the totality of the circumstances, this investigation finds that K.O. has met the light burden of showing he has a disability under the VFHPAA.

B. K.O. can show that The Town of Waterbury Recreation Day Camp is a place of public accommodation under VFHPAA and thus, meets prong two of both *prima facie* cases.

Any school, restaurant, store, establishment or other facility at which services, facilities, goods, privileges, advantages, benefits or accommodations are offered to the general public is

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<sup>81</sup> *Charbonneau v. Gorczyk*, 176 Vt. 140, 142, (2003) citing to 28 C.F.R. Pt. 35, App. A 35.104 (2003).

<sup>82</sup> K.O.’s IEP.

considered a place of public accommodation.<sup>83</sup> Places of recreation such as the Town of Waterbury Recreation Day Camp have been found to be a place of public accommodation under the law.<sup>84</sup> It is open to all members of the public, including residents and non-residents of Waterbury and provides the benefits of recreational activities and care for children five days out of the week for eight full weeks in the summer.

C. K.O. cannot show he was removed from or not allowed to return to the camp *because of his disability and thus has not met the burden of proving an intentional discrimination *prima facie* case.*

To show an intentional discrimination claim, K.O. must prove “animus against the protected group was a significant factor in the position taken.”<sup>85</sup> The law does not require a but-for cause. In fact, multiple factors may be the cause of an adverse action. K.O. need only show that his disability was a motivating factor for the expulsion and/or the Town of Waterbury’s refusal to allow him to return. In doing so, K.O. does not have to provide direct evidence as “animus may be inferred from the totality of the circumstances, including the historical background of the decision; the specific sequence of events leading up to the challenged decision; and contemporaneous statements made by Defendants.”<sup>86</sup>

In a case involving an HIV positive child denied admission to a basketball camp, the court held that plaintiff had met the burden of showing animus when defendant admitted to having concerns about him using the pool and bathroom, complained about the parent not providing a full medical history, and there had been multiple conversations focused on the alleged heightened risks posed by the side-effects of his HIV medication.<sup>87</sup> In a different matter involving an officer’s response to a 11-year-old with a disability, the Court found that child’s ADA claim failed because the officer arrested the child based on the child’s assaultive conduct, not her disability.<sup>88</sup>

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<sup>83</sup> VFHPAA 9 V.S.A. §4501 (1).

<sup>84</sup> *Doe v. Deer Mountain Day Camp, Inc.*, 682 F. Supp.2d 324, 342 (2010).

<sup>85</sup> *Id.* at 343.

<sup>86</sup> *Id.* at 343-344.

<sup>87</sup> *Id.* at 344.

<sup>88</sup> *J.H. ex. rel. J.P. v. Bernalillo County*, 806 F. 3d. 1255, 1256-1260 (10<sup>th</sup> Cir. 2015).

In reviewing the history of the camp, the only other child expelled from the program had received three strikes per day on three separate days. That child was a flight risk and when unable to escape, hit other children.<sup>89</sup> Here, K.O. was permanently removed after only one incident in which no person was actually harmed. This investigation found Ms. Fowler's statement, "this is not an ADA camp" to be alarming and her explanation to be unpersuasive. It demonstrated a lack of sensitivity and understanding of the disability laws governing the camp she is charged with operating. But Ms. Fowler's immediate decision to remove K.O. from the camp could not have been the result of animus towards persons with disabilities because the camp did not have knowledge of K.O.'s disability at the time he was expelled. Furthermore, this investigation cannot ignore the gravity of the incident on July 11<sup>th</sup> as very few facts are in dispute. Ms. Fowler, Ms. Cummings and Mr. Gosselin were credible witnesses whose statements were corroborated by one another. Furthermore, Ms. Fowler stated that K.O.'s behavior that day was unlike any other child's behavior, causing her to employ emergency procedures that she's never had to utilize. Lastly, Ms. Fowler said K.O. was welcome to use other recreational facilities and had he met the age requirement for the 2018 session, K.O. would have been welcomed back to camp. This investigation cannot conclusively find that K.O.'s disability was a motivating factor and substantial cause of his removal from camp.

In sum, the totality of the circumstances sway in favor of finding that K.O. was removed from camp because of his behavior, not his disability. Ms. Fowler also relied on the same set of facts in her decision to deny K.O. the right to return. Thus, K.O. cannot meet the burden of showing a *prima facie* case of intentional discrimination under the VFHPAA and this analysis turns to the remaining prong of the second *prima facie* case.

D. K.O. can show he made a request for reasonable modification.

A place of public accommodation may be on notice that a person needs an accommodation even before that person has requested one.<sup>90</sup> The latest point in which this occurred here is Mr. Oak's letter to Mr. Shepeluk on July 14, 2017 in which Mr. Oak specifically requested a reasonable accommodation for his son, as follows:

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<sup>89</sup> Interview with Debra Fowler.

<sup>90</sup> *Robertson v. Las Animas Cty, Sheriff's Dep't.*, 500 F.3d 1185, 1197-1198 (10<sup>th</sup> Cir. 2007).

1. Remove as many people from the situation as possible;
2. Designate one or two trusted counselors to talk to K.O. and help him calm down.
3. Call a parent to pick him up immediately so he can process the stressors.<sup>91</sup>

Mr. Shepeluk stated that Mr. Oak never provided any suggestions on how to prevent K.O. from behaving as he did on July 11, nor did he provide any suggestions for outside resources. Mr. Shepeluk and Ms. Fowler believed that the only way to adequately accommodate K.O. was to give him 1:1 support, something they were adamant could not be accomplished due to timing and lack of resources. But Mr. Oak's requested accommodations for his son were not designed to prevent K.O. from reacting to varying stimuli or pressures. The accommodations were designed to prevent escalation, which Mr. Oak argued were successful when employed. Mr. Shepeluk and Ms. Fowler were not persuaded as they saw these accommodations to be the same tactics they had already employed on July 11<sup>th</sup>. But a deeper dive into the accommodations reveals some important distinctions. First, with the knowledge of K.O.'s disability and needs, Waterbury could have designated specific counselors to K.O.'s group. The counselors could have kept a closer eye on the game and immediately checked in with him when he was hit with the ball. If he was in fact hit by another child, they would have seen this and immediately intervened. The counselors could have removed him from the situation, outside the prying eyes of his peers and provided him comfort, support, feedback and suggestions on how to handle the other children who were yelling at him to get out of the game. The camp could have contacted Mr. Oakley immediately that morning. K.O. could have had more time to demonstrate his strengths and ability to comply with the rules. It may be that even with accommodations he would have been removed from the camp but then he would have had the same opportunity as his non-disabled peers. The Respondent should have tried the accommodations to see if they worked not rejected them outright.

E. K.O. can show The Town of Waterbury failed to make reasonable modification that would accommodate K.O.'s disability without fundamentally altering the nature of the public accommodation.

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<sup>91</sup> Letter from Mr. Oak to William Shepeluk, 7/13/2017.

Although Mr. Shepeluk takes full responsibility for the decision to expel K.O. from the program and said he discussed the matter further with Ms. Fowler after the July 14, 2017 meeting with Mr. Oak, it's clear the decision was made the afternoon of July 11th. In his email response to Mr. Oak, Mr. Shepeluk admitted that he was yielding to Ms. Fowler's discretion and decision. On July 11, 2017, Ms. Fowler told Mr. Oakley that K.O. was not welcome back to the camp and sent an email to parents that said, "the camper that was involved in the incident is no longer part of the program."<sup>92</sup> Ms. Fowler said the purpose of the meeting with Mr. Oak was to provide him understanding of their policies and procedures but not to provide him a platform for discussing the decision further since that decision had been made and was not changing.

The reasonable modification requests would not have fundamentally altered the nature of the Waterbury Recreation Day Camp. A fundamental alteration is a "modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered."<sup>93</sup> In order to raise this issue, respondent had to complete an individualized inquiry as to K.O.'s disability, his requests and "carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable."<sup>94</sup> While Ms. Fowler certainly wasn't utilizing stereotypes about disabled children to make her decision, she did make her decision relatively quickly, in reaction to the incident. Once that decision was made, she never reconsidered it even with additional information. Furthermore, the modifications requested were the same as those provided to other children in the same camp. In Ms. Woodruff's memorandum, the camp provides accommodations such as being in frequent contact with the parents, having a counselor stay close to a camper, providing individual instructions, warnings and feedback, using visual cues, providing a specific task to help a camper deescalate, creating a safe space for a camper to retreat to in high-challenge situations.<sup>95</sup>

In sum, K.O. has met his burden of proving a *prima facie* case of disability discrimination by showing he has a disability, Respondent is a place of public accommodation, he made a request

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<sup>92</sup> Email from Debra Fowler to parents, 7/11/2017 at 3:17 p.m.

<sup>93</sup> ADA Title III Technical Assistance Manual.

<sup>94</sup> *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 691 (2001)

<sup>95</sup> *Id.*

for a reasonable modification and that request was denied even though it would not have fundamentally altered the nature of camp's goods, services and programs.

II. Legal Defenses: Fundamental Alteration, Undue Hardship and Direct Threat.

As discussed above, Respondent may raise a defense of "fundamental alteration" to K.O.'s *prima facie* case but because it was already offering those same accommodations to other children, this defense is without merit.

Under the canons of statutory construction, the absence of the terms "undue burden" from subpart five of V.S.A. §4502 (c) while including it in other sections of the same statute, indicates that the Vermont Legislature did not intend to provide a defense of "undue burden." However, courts have allowed an undue burden argument in similar ADA claims and the Town of Waterbury raised it more or less, in this matter. Undue burden is defined as significant difficulty or expense. Courts will consider the economic consequences of the request on the resources available to an entity: the nature and cost of the aid or service relative to their size, overall financial resources, and overall expenses.

The Town of Waterbury Recreation Day Camp may operate on a small budget, but the defense of undue burden is without merit. First, Mr. Oak's list of accommodations would have utilized existing staff and resources. Second, if K.O. indeed required 1:1 supervision and support as Mr. Shepeluk and Ms. Fowler both insinuated, it's not clear that an existing counselor could not have provided this support since the camp was operating at a lower adult to child ratio than what was required by the state. Third, the burden is on the Town of Waterbury to provide evidence in support of this defense and Mr. Shepeluk and Ms. Fowler never explored alternative options or additional resources and could not provide the cost-benefit analysis. Mr. Shepeluk also argued that had they received advance notice of K.O.'s disability, perhaps something could have been different, but this was mere conjecture as he never made any further inquiries into the matter.

The most compelling and cognizable defense is "direct threat;" that is, there was a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies,

practices or procedures...<sup>96</sup> The risk must be “substantial” not mere speculation.<sup>97</sup> Unlike K.O.’s burden to prove his *prima facie* case which is light, the law imposes a “heavy” burden on the Respondent.<sup>98</sup> The law requires the place of public accommodation conduct an individualized assessment using “reasonable judgment” and “current medical knowledge” or “on the best available objective evidence” to ascertain:

- (1) the nature, duration, and severity of the risk; and
- (2) the probability that the potential injury will actually occur; and
- (3) whether reasonable modifications of policies, practices, or procedures will mitigate the risk.<sup>99</sup>

Here, there are compelling facts that favor both parties. On July 11, K.O.’s behavior was out of control and it required two camp counselors and the Recreation Director to subdue him. The police were contacted out of a very reasonable fear that K.O. could have caused real harm or injury to himself or others. He attempted to turn over a wagon and picnic table and attempted to pick up a hard metal sewage cover that could have caused bodily harm if thrown. And he did actually throw a rock at a counselor. This was not the first time K.O. has been accused of throwing rocks and having the police called on him. At a previous school, children reported him kicking, hitting and punching them and throwing rocks. The school was on lock-down and the police contacted. K.O. has been expelled by other programs and physically restrained on numerous occasions.

Different adults and children across various circumstances have expressed a fear of K.O.’s behavior. The other campers at the Waterbury Recreation Day Camp had to be removed from the situation. If Ms. Cummings was correct in her recollection of the incident, she and Mr. Gosselin spent approximately 30 minutes with K.O. prior to Ms. Fowler arriving on the scene. Ms. Fowler contacted the police who arrived within a minute of the emergency call. Mr. Feccia said K.O. and the camp were calm when he arrived. Thus, the entire duration of the incident was approximate 30-35 minutes in length. In other cases, the place of public accommodation is assessing threat prior to an incident but here, the threat was assessed after the incident occurred.

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<sup>96</sup> *Doe v. Deer Mountain Day Camp, Inc.* 682 F. Supp.2d 324, 345 (2010).

<sup>97</sup> *Id.* at 346.

<sup>98</sup> *Id.* at 347.

<sup>99</sup> VFHPAA 9 V.S.A. §4502 (h), 28 C.F.R. § 36.208(c).

Thus, the the camp utilized “reasonable judgment” and “the best available objective evidence” to assess threat.

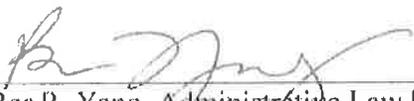
On the other hand, Mr. Grimes described K.O. as “energetic, competitive, emotional and sweet.” And his IEP team described his strengths as, “likeable,” “charming,” “personable,” “resilient,” “affectionate” and “sweet.” His first few days at the camp were uneventful and he had received no accommodations on those days. There is no evidence in the record that K.O. has actually caused harm or injury to anyone at camp or in other settings. The other child that was present with K.O. and Ms. Cumming, appeared “unphased.” No parents contacted the Town of Waterbury to address what their children observed that day. Ms. Cummings was never hit with the rock K.O. threw in her direction. In Ms. Fowler’s email to parents on July 11, 2017, she wrote, “at no time was anyone in danger.” Perhaps the most compelling fact is that The Town of Waterbury invited K.O. to join other camps and use the pool at his discretion; a pool that he could access unaccompanied and unsupervised by an adult, at the exact same time the pool was open and available to the other campers from the day camp.

But the question before this investigation is not whether K.O. poses a direct threat to the health and safety of others in general; it is whether the significant risk can be eliminated by the modifications of practices or procedures of the camp. And this investigation answers this question in the affirmative. K.O. has been successful in programs that have provided him the same accommodations requested of the Town of Waterbury. He’s finished Camp Abnaki, a two-week overnight camp. In Mr. Grimes’ after-school program, K.O.’s need for direct attention has decreased over time and he’s never harmed another person.

The Town of Waterbury cannot rest on its argument that it had a legitimate non-discriminatory reason to expel K.O. from camp because when it learned that he had a disability and a need for accommodations, it had a responsibility and legal obligation to assess whether K.O. could return to the camp safely with the requested accommodations. Here, the decision was made on the day of the incident and the Town of Waterbury was never open to changing that decision despite learning about K.O.’s disability and need for accommodations.

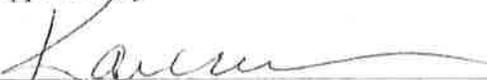
Conclusion

For the foregoing reasons, this investigation recommends that the Vermont Human Rights Commission find that there are **reasonable grounds** to believe that The Town of Waterbury discriminated against K.O. on the basis of his disability under the Vermont Fair Housing and Public Accommodations Act, codified at 9 V.S.A. §4502.

  
Bor R. Yang, Administrative Law Examiner

8/27/2018  
Date

Approved by:

  
Karen Richards, Executive Director  
& Legal Counsel

8/27/18  
Date

STATE OF VERMONT  
HUMAN RIGHTS COMMISSION

"Mr. Oak" o/b/o "K.O.",  
Complainant )  
 )  
 )  
v. ) VHRC Complaint No. PA17-0005  
 )  
 )  
The Town of Waterbury,  
Respondent )

FINAL DETERMINATION

Pursuant to 9 V.S.A. 4554, the Vermont Human Rights Commission enters the following Order:

1. The following vote was taken on a motion to find that there are reasonable grounds to believe that The Town of Waterbury, the Respondent, illegally discriminated against "Mr. Oak" o/b/o "K.O.", the Complainant, in violation of Vermont's Fair Housing and Public Accommodations Act.

Kevin Christie, Chair	For <input checked="" type="checkbox"/> Against <input type="checkbox"/> Absent <input type="checkbox"/> Recused <input type="checkbox"/>
Nathan Besio	For <input checked="" type="checkbox"/> Against <input type="checkbox"/> Absent <input type="checkbox"/> Recused <input type="checkbox"/>
Mary Brodsky	For <input type="checkbox"/> Against <input checked="" type="checkbox"/> Absent <input type="checkbox"/> Recused <input type="checkbox"/>
Donald Vickers	For <input checked="" type="checkbox"/> Against <input type="checkbox"/> Absent <input type="checkbox"/> Recused <input type="checkbox"/>
Dawn Ellis	For <input checked="" type="checkbox"/> Against <input type="checkbox"/> Absent <input type="checkbox"/> Recused <input type="checkbox"/>

Entry:  Reasonable Grounds  Motion failed

Dated at Montpelier, Vermont, this 20<sup>th</sup>, day of September 2018.

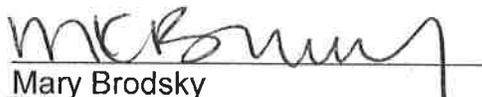
BY: VERMONT HUMAN RIGHTS COMMISSION



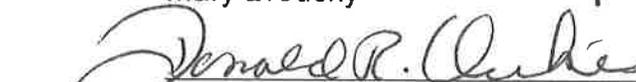
Kevin Christie, Chair



Nathan Besio



Mary Brodsky



Donald Vickers



Dawn Ellis