

STATE OF VERMONT  
HUMAN RIGHTS COMMISSION

Mr. and Mrs. "Moss" o/b/o "M.R.",	)
Complainant	)
	)
	)
v.	) HRC Complaint No. PA20-0018
	)
	)
Orchard School &	)
South Burlington School District,	)
Respondent	)

FINAL DETERMINATION

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

The following vote was taken on a motion to find that there are **reasonable grounds** to believe that Orchard School and South Burlington School District, the Respondents, illegally discriminated against Mr. and Mrs. "Moss" o/b/o "M.R.", the Complainant, in violation of Vermont's Fair Housing and Public Accommodations Act.

Kevin Christie, Chair	For <u>X</u> Against __ Absent__ Recused __
Nathan Besio	For <u>X</u> Against __ Absent __ Recused __
Donald Vickers	For <u>X</u> Against __ Absent __ Recused __
Dawn Ellis	For <u>X</u> Against __ Absent __ Recused __
Joan Nagy	For <u>X</u> Against __ Absent __ Recused __

Entry: X Reasonable Grounds \_\_ Motion failed

Dated at Montpelier, Vermont, this 27th day of January, 2022.

BY: VERMONT HUMAN RIGHTS COMMISSION

/s/ Kevin Christie  
Kevin Christie, Chair

/s/ Nathan Besio  
Nathan Besio

/s/ Donald Vickers  
Donald Vickers

/s/ Dawn Ellis  
Dawn Ellis

/s/ Joan Nagy  
Joan Nagy



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## **INVESTIGATIVE REPORT AND RECOMMENDATION**

HRC Case No. PA20-0018

COMPLAINANT: Mr. and Mrs. "Moss" o/b/o "M.R."

RESPONDENT: Orchard School and South Burlington School District

CHARGE: Discrimination in public accommodation based on race and color

### **Summary of Complaint**

The Complainants are the mother and father of a biracial child, "M.R.," who attended Kindergarten at Orchard School within the South Burlington School District. The Complainants allege that M.R. experienced a pattern of race- and color-based harassment from white students at Orchard School, and that Orchard School staff failed to communicate with them about these incidents and generally failed to protect M.R. from the harassment. They also allege that the school administrators blamed M.R. for the behavior she was exposed to, while excusing the harmful behavior of the white students. Complainants believe these actions amounts to unlawful harassment and a denial of equal access to the educational opportunities or benefits provided by the school, in violation of 16 V.S.A. § 570f. They also allege disparate treatment in the provision of public school services on the basis of race and color.

### **Summary of Response**

Respondents, Orchard School and South Burlington School District, deny that M.R. was denied equal access to the educational opportunities or benefits provided by Orchard School. They deny that M.R. experienced unlawful harassment and assert that the Orchard School took actions that were reasonable under the circumstances to remedy any problematic conduct on the part of other students towards M.R. Further, Respondents deny that M.R. was treated differently on the basis of her race and color.

### **Preliminary Recommendation**

This investigation makes a preliminary recommendation to the Human Rights Commission to find that **there are reasonable grounds** to believe that Orchard School discriminated against the Complainants based on race and color, in violation of the Vermont Fair Housing and Public Accommodations Act, 9 V.S.A §4502(a).

## Documents

- Orchard School Handbook
- South Burlington School District Policy F5
- Agency of Education Model Procedures on Prevention of Harassment, Hazing and Bullying of Students
- SWIS Student Dashboards regarding M.R., “Student A” and “Student B”.
- Timeline Document authored by Mrs. Moss.
- Email from Mrs. Moss to Tracy Garland, September 25, 2018.
- Email from Tracy Garland to Mrs. Moss, September 25, 2018.
- Email from Parent of “Student C” to Tracy Garland, November 30, 2018.
- Email from Tracy Garland to Parent of “Student C”, November 30, 2018.
- Email from Tracy Garland to Mrs. Moss, January 3, 2019.
- Email from Abby Hill-Armell to Mr. and Mrs. Moss, February 6, 2019.
- Email from Mrs. Moss to Abby Hill-Armell, February 6, 2019.
- Email from Abby Hill-Armell to Mr. and Mrs. Moss, February 7, 2019.
- Emails from Parents of “Student D” to Tracy Garland, March 7, 2019.
- Email from Tracy Garland to Aili Beeli, Abby Hill-Armell, and Mark Trifilio, March 8, 2019.
- Email from Mrs. Moss to Tracy Garland, March 12, 2019.
- Email from Tracy Garland to Mrs. Moss and other parents, March 18, 2019.
- Email from Mrs. Moss to Tracy Garland, March 19, 2019, at 8:03AM.
- Email from Tracy Garland to Mrs. Moss, March 19, 2019.
- Email from Mrs. Moss to Tracy Garland, March 19, 2019, at 4:23PM.
- Behavior Referral Form, March 19, 2019.
- Email from Mrs. Moss to Tracy Garland, March 21, 2019.
- Email from Tracy Garland to Mr. and Mrs. Moss, March 22, 2019, at 3:32PM.
- Email from Tracy Garland to Mr. and Mrs. Moss, March 22, 2019, at 5:20PM.
- Email from Tracy Garland to Mr. and Mrs. Moss, March 26, 2019.
- Email from Mrs. Moss to Tracy Garland, March 26, 2019.
- Email from Tracy Garland to Aili Beeli, March 27, 2019.
- Email from Aili Beeli to Tracy Garland, March 27, 2019.
- Email from Mrs. Moss to Tracy Garland, March 29, 2019.
- Email from Tracy Garland to Aili Beeli, March 29, 2019.
- Email from Aili Beeli to Mr. and Mrs. Moss, March 29, 2019.
- Email from Tracy Garland to Mr. and Mrs. Moss, March 29, 2019.
- Email from Mrs. Moss to Tracy Garland, April 2, 2019.
- Email from Tracy Garland to Mark Trifilio, February 19, 2020.
- Email from Mrs. Moss to Tracy Garland, May 1, 2019.
- Email from Tracy Garland to Mrs. Moss, May 1, 2019.
- Email from Mrs. Moss to Tracy Garland, May 7, 2019.
- Email from Abby Hill-Armell to Mr. and Mrs. Moss, May 10, 2019.
- Email from Mrs. Moss to Abby Hill-Armell, May 10, 2019.
- Email from Mrs. Moss to Aili Beeli, May 10, 2019.

- Email from Parents of “Student E” to Mrs. Moss, May 14, 2019.
- Email from Mrs. and Mr. Moss to Tracy Garland, May 14, 2019 at 10:01AM.
- Email from Tracy Garland to Mrs. Moss, May 14, 2019.
- Email from Mrs. Moss to Tracy Garland, May 14, 2019, at 11:33AM.
- Email from Tracy Garland to Mark Trifilio, Aili Beeli, and Abby Hill-Armell, May 14, 2019.
- Email from Tracy Garland to Brittany Brown, May 14, 2019.
- Email from Brittany Brown to Tracy Garland, May 14, 2019.
- Email from Mark Trifilio to Mr. and Mrs. Moss, May 14, 2019.
- Email from Tracy Garland to Parents of “Student E,” May 15, 2019.
- Email from Mr. and Mrs. Moss to Mark Trifilio, May 15, 2019.
- Email from Mark Trifilio to Mr. and Mrs. Moss, May 15, 2019.
- Email from Tracy Garland to Mr. and Mrs. Moss, May 15, 2019 at 6:06AM.
- Email from Mrs. Moss to Tracy Garland, May 15, 2019.
- Email from Tracy Garland to Mr. and Mrs. Moss, May 15, 2019, at 12:47PM.
- Email from Mrs. Moss to Mark Trifilio, May 28, 2019.
- Email from Mrs. Moss to Tracy Garland, May 28, 2019.
- Email from Tracy Garland to Aili Beeli, Abby Hill-Armell, Annie Coppock and Mark Trifilio, May 28, 2019.
- Email from Aili Beeli to Tracy Garland, Abby Hill-Armell, Annie Coppock and Mark Trifilio, May 29, 2019.
- Email from Mark Trifilio to Aili Beeli, Tracy Garland, Abby Hill-Armell, and Annie Coppock, May 29, 2019.
- Email from Tracy Garland to Aili Beeli, Abby Hill-Armell, Annie Coppock and Mark Trifilio, May 29, 2019.
- Email from Mark Trifilio to Mr. and Mrs. Moss, May 29, 2019.
- Email from Tracy Garland to Mrs. Moss, May 31, 2019.
- Email from Mrs. Moss to Tracy Garland, May 31, 2019.
- Email from Tracy Garland to Mr. and Mrs. Moss, June 15, 2019.
- Statement from Mrs. Moss, December 29, 2021.

### **Interviews**

- Mr. and Mrs. Moss, May 18, 2021 and October 21, 2021.
- Tracy Garland, Classroom Teacher, October 4, 2021.
- Aili Beeli, Guidance Counselor, October 4, 2021.
- Mark Trifilio, School Principal, October 4, 2021.
- Abby Hill, Behavioral Facilitator, November 10, 2021.
- David Young, South Burlington School District Superintendent, November 17, 2021.

## Facts

### Introductory Facts

“Mr. and Mrs. Moss” are a biracial couple with a child who will be referred to as “M.R.” for purposes of this investigation.<sup>1</sup> Mr. Moss is Black, and Mrs. Moss is white.<sup>2</sup> M.R. has brown skin.<sup>3</sup> M.R. was 5 years old at the time she entered Kindergarten at Orchard School in the South Burlington School District in the 2018-2019 school year.<sup>4</sup> Her classroom teacher was Ms. Tracy Garland, a teacher with more than 25 years of classroom experience.<sup>5</sup> The School Principal, Mark Trifilio, had over ten years of experience as Principal at Orchard School.<sup>6</sup> He reports to the District Superintendent, David Young.<sup>7</sup> All of the educators and administrators interviewed in connection with this investigation are white.

Orchard School uses “behavior referrals” as a tool for communicating with parents about student behavior.<sup>8</sup> Behavior referrals are logged into a database and also used to track data about students.<sup>9</sup> The School Handbook differentiates between minor behavioral referrals, which are typically a notice sent home to the parents, and major behavioral referrals, which typically involve a more serious action and result in an office visit with the principal or behavioral facilitator.<sup>10</sup>

The South Burlington School District Policy F5 defines a complaint as “an oral or written report on information provided by a student or any person to an employee alleging that a student has been subjected to conduct that may rise to the level of hazing, harassment, or bullying.”<sup>11</sup> The Secretary of Education published Model Procedures on the Prevention of Harassment, Hazing and Bullying of Students, which require any school employee who witnesses, overhears, or directly receives information about conduct that might constitute harassment to “immediately report the information to a designated employee and immediately complete a Student Conduct Form.”<sup>12</sup> It also states that, upon notice of information that harassment may have occurred, the designated employee should inform the school administrators.<sup>13</sup> “If in the judgment of the school administrator, the information alleges conduct which may constitute harassment, hazing, or bullying, the school administrator shall, as soon as reasonably possible,” provide a copy of the procedures to the complainant and the accused.<sup>14</sup> Under the model procedures, the school will initiate an investigation of any conduct which the school administrator reasonably believes may constitute harassment within one school, and notify the parties of the investigation as well as their right to be informed in writing of the outcome.<sup>15</sup>

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<sup>1</sup> The names of the parents and child involved in this complaint are altered for confidentiality purposes.

<sup>2</sup> Interviews of Mr. and Mrs. Moss, 5/18/21.

<sup>3</sup> *Id.*

<sup>4</sup> Interview of Mrs. Moss, 5/18/21.

<sup>5</sup> Interview of Tracy Garland, 10/4/21.

<sup>6</sup> Interview of Mark Trifilio, 10/4/21.

<sup>7</sup> Interview of David Young, 11/17/21.

<sup>8</sup> Interview of Abby Hill, 11/10/21.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* See also, *Orchard School Handbook*.

<sup>11</sup> SBSB Policy F5 on Prevention of Harassment, Hazing, and Bullying of Students, Adopted 11/15/17.

<sup>12</sup> Model Procedures on the Prevention of Harassment, Hazing, and Bullying of Students.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at Parts II and III.

The Mosses were never provided with a copy of the School District’s Policy on the Prevention of Harassment, Hazing, and Bullying of Students, nor was it mentioned to them by any staff members or administrators at any point in time.<sup>16</sup>

## Fall 2018

On September 17, 2018, Mrs. Moss chaperoned a class field trip to an apple orchard.<sup>17</sup> During the field trip, Mrs. Moss observed another student (hereinafter referred to as “Student A”, unprovoked, violently push and kick M.R. and then throw her lunchbox off a picnic table and tell her that she couldn’t sit there.<sup>18</sup> The teacher, Ms. Garland, was not present at that time, and so Mrs. Moss intervened to tell “Student A” to keep his hands to himself.<sup>19</sup> Later that day, back in the classroom, Mrs. Moss observed “Student A” poke M.R. in the face, causing her to fall.<sup>20</sup> Mrs. Moss told the teacher what happened, and the student was sent to the back of the room for a timeout.<sup>21</sup> Mrs. Moss left that day feeling very concerned about the wellbeing of her child, and whether the teacher had the ability to effectively manage the kindergarteners.<sup>22</sup>

On September 25, 2018, Mrs. Moss sent an email to Ms. Garland about conduct their child was experiencing from her peers at school, especially “Student A.” She stated, “we have been hearing from [M.R.] about a particular student in her class who has been aggressive with her and others. I also observed this same student kick and hit her on the apple picking field trip (on the second occasion I stepped in to remind him to use his words instead of his hands. I apologize that I forgot to mention this to you at the time. . . . I know it is a work in progress for all of the kids, but I wanted to bring this to your attention.”<sup>23</sup> Ms. Garland responded that evening, acknowledging “the observations and feedback” provided by Mrs. Moss, and indicated that she was “doing some intentional teaching about this.”<sup>24</sup> Ms. Garland also stated, “Safety remains paramount!”<sup>25</sup>

On November 19, 2018, Mrs. Moss attended a parent-teacher conference with Ms. Garland.<sup>26</sup> Ms. Garland described M.R. as one of the most “even-keeled” students in the class.<sup>27</sup> Mrs. Moss brought up the issue of “Student A’s” aggressive behavior, mentioned in the September 25 email.<sup>28</sup> Mrs. Moss indicated it was negatively impacting M.R.<sup>29</sup> Ms. Garland acknowledged there was an issue, and told Mrs. Moss that she was working hard to manage it, but that she could only do so much as a teacher with 17 kids in the classroom.<sup>30</sup>

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<sup>16</sup> Statement by Mrs. Moss, 12/29/21.

<sup>17</sup> Interview of Mrs. Moss, 5/18/21

<sup>18</sup> *Id.*; Timeline by Mrs. Moss.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Timeline by Mrs. Moss.

<sup>23</sup> Email from Mrs. Moss to Tracy Garland, 9/25/18.

<sup>24</sup> Email from Tracy Garland to Mrs. Moss, 9/25/18.

<sup>25</sup> *Id.*

<sup>26</sup> Timeline by Mrs. Moss.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

In the morning of November 30, 2018, another parent emailed Ms. Garland to inform her that M.R. was upsetting their child with certain behavior.<sup>31</sup> Ms. Garland responded later by stating that she was not aware of this behavior, and that she spoke with the children that day to resolve it.<sup>32</sup> Ms. Garland reported that M.R. apologized and that the other child felt better.<sup>33</sup>

### Winter-Spring 2019

On January 3, 2019, Ms. Garland emailed Mrs. Moss to inform her of an issue that had occurred that day.<sup>34</sup> Ms. Garland reported that a classmate of M.R.'s (hereinafter referred to as "Student B") had knocked her snack off of the table onto the floor.<sup>35</sup> M.R. had been upset and crying, but did not respond in anger, according to Ms. Garland.<sup>36</sup> Ms. Garland said that she helped the children talk about their feelings and reach a resolution.<sup>37</sup> She praised M.R. for how she handled the situation, and gave her a gift of a "giant eraser" that she could take home.<sup>38</sup> Mrs. Moss responded to the teacher's email, thanking Ms. Garland, and telling her that M.R. "was excited to return to school from the holiday break and says she has a great time each and every day. I know you are a hug part of that!"<sup>39</sup>

### January 15<sup>th</sup> Incident

On January 15, 2019, Principal Mark Trifilio called M.R.'s home, and left a voicemail.<sup>40</sup> His voicemail message indicated that M.R. had reported some "not too kind" behavior by another student and requested a call back.<sup>41</sup> When Mrs. Moss returned Principal Trifilio's call, he informed her that "Student B" had threatened M.R. and another, white, student that day.<sup>42</sup> The student had said that he had a gun and was going to go get it and shoot her.<sup>43</sup> Principal Trifilio told Mrs. Moss that he had spoken with the parents of the student who made the threat.<sup>44</sup> He said that he couldn't tell her anything else, for confidentiality reasons.<sup>45</sup> He stated that the student was just a young child "learning that his words can have power."<sup>46</sup> M.R. told her parents that this threat was scary, and that "Student B" had not been kind to her in the past.<sup>47</sup> After this incident, M.R.'s parents observed that M.R. started to have trouble sleeping, and began feeling negative about school in general.<sup>48</sup>

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<sup>31</sup> Email from Parent of "Student C" to Tracy Garland, 11/30/18.

<sup>32</sup> Email from Tracy Garland to Parent of "Student C", 11/30/18.

<sup>33</sup> *Id.*

<sup>34</sup> Email from Tracy Garland to Mrs. Moss, 1/3/19.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Email from Mrs. Moss to Tracy Garland, 1/3/19.

<sup>40</sup> Timeline by Mrs. Moss.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Interview of Mrs. Moss, 5/18/21.

<sup>48</sup> *Id.*



This investigation was provided with a compilation of all of the behavioral referrals issued to “Student B.” According to these records, “Student B” was not given a behavioral referral for knocking M.R.’s food off of the table on January 3<sup>rd</sup>, or for making the threat on January 15<sup>th</sup>.<sup>49</sup> “Student B” had previously received a major behavioral referral on December 5, 2018, after a child reported that he had said “I’m going to gun you and you will die,” and two other peers reported him saying something similar.<sup>50</sup> There is no indication that this prior incident was ever mentioned to the Mosses.

### February 6<sup>th</sup> Incident

On February 6, 2019, the parents of M.R. received an email from the Abby Hill-Armell, the Behavior Facilitator at Orchard School.<sup>51</sup> This was their first interaction with her.<sup>52</sup> The email stated as follows:

I wanted to let you know that I spent some time with [M.R.] this afternoon after an incident that occurred during lunch.

One of the cafeteria staff members informed me that [M.R.] had been pushed by a peer. [M.R.] was not hurt and was able to continue on with her regular lunch period. While gathering information about what led to the pushing, it was reported to me that [M.R.] had been repeatedly kicking the lunch box of the student in front of her while they were in line. The student reported asking [M.R.] to stop and that she continued the behavior. The student then pushed [M.R.].

When I talked to [M.R.] she took responsibility for continuously kicking the peer’s lunch box after repeatedly being asked to stop. I emphasized with [M.R.] that it is never okay for someone to push or hurt her. We discussed how our seeming small actions can create larger problems. [M.R.] suggested that she would like to apologize to the peer and they were able to have a conversation. Both [M.R.] and the peer apologized to each other and expressed their feelings about the other’s actions.

It was evident in our discussion that [M.R.] had not connected the incidents in this chain of events until it was pointed out. I am hopefully that [M.R.] will recall this situation when future social problems arise. At school we will work to support [M.R.] and all students around social behaviors and problem solving.<sup>53</sup>

That evening, Mrs. Moss talked with her daughter to gather more information and reinforce appropriate behavior, and then responded to Ms. Hill-Armell’s email.<sup>54</sup> Mrs. Moss relayed the following:

I wanted to share with you that, when I asked [M.R.] whose lunch box she kicked today, she said ‘my bully.’ When I asked her what that means, she said ‘a bully is a horrible friend, and he’s not a good friend because he pushes me all the time and calls me potty names even when I ask him to stop.’ She then recounted several different incidents at recess where this student pushed her (and others), she told the teacher (Marshall?), the

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<sup>49</sup> SWIS Student Dashboard report regarding “Student 9.”

<sup>50</sup> *Id.*

<sup>51</sup> Email from Abby Hill-Armell to M.R.’s parents, 2/6/19.

<sup>52</sup> Interview of Mrs. Moss, 5/18/21.

<sup>53</sup> Email from Abby Hill-Armell to M.R.’s parents, 2/6/19.

<sup>54</sup> Email from Mrs. Moss to Abby Hill-Armell, 2/6/19.

teacher told him to stop and the student promised he would, but then the behavior continued despite that promise. When I asked her if she continued to tell the teacher when he pushed her again she said no because there's 'no point', and that 'the teacher just keeps saying stop and then he just keeps doing it, so there's no way to make him stop.' She said that she usually avoids him but that today she was next to him in line.

She fully admitted to kicking the lunchbox, and we explained to her that this was not an appropriate response. She expressed that 'it's not fair that he gets to be mean to me but I can't be mean to him.' I understood why she would ask that question. However, we discussed that someone else's unkind behavior does not justify her own unkind behavior.

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In terms of her description of a cycle of behavior/events (ie, student pushes/calls names, she reports, teacher says stop, behavior continues), what is the best path forward for discontinuing that cycle, and as parents, what should we counsel her to do in the future should this cycle continue? From what [M.R.] relayed to us, it appears this is mostly an issue at lunch/recess time.<sup>55</sup>

Ms. Hill-Armell responded to Mrs. Moss the next day. Her email stated as follows:

Thank you for your response and sharing [M.R.]'s perspective of the situation. It probably feels concerning to hear her describe the other student as 'her bully.' Certainly, we keep an eye out for situations like that and track behaviors to look for patterns that arise. We do work with students at varying levels of ability in managing social situations and teaching students to have positive social skills is built into our daily interactions. That being said, we have to recognize the balance between students who are intending harm and students who are still learning what it means to be a good friend. Often times at this age we see students who fit into the latter category. This does not make pushing, name calling, or any other harmful behavior acceptable. It is helpful for [M.R.] to continue to speak up so that we know the behavior has not changed. This includes using the language that she has learned to tell someone to stop, moving away, ignoring a student, and getting help from an adult. I have regular check-in's with the recess supervisors and any information shared is used to help plan student learning. [M.R.] can also share with other adults that she feels comfortable with in the building, including Ms. Garland or myself.

I hope that I was able to answer most of your questions...<sup>56</sup>

Mr. Moss and Ms. Garland were included in these email exchanges.<sup>57</sup>

On February 8, 2019, midyear report cards were sent home.<sup>58</sup> M.R. received top grades in all academic areas, but scored on the lower end for behavioral categories.<sup>59</sup> Ms. Garland's comments in these areas stated that M.R. had trouble "accepting responsibility" and "reflecting on her choices and behavior" and that "Finding best ways to get along with others is an ongoing goal."<sup>60</sup> Mrs. Moss described feeling "blindsided" by these statements, and felt that they did not align with the events of February 6<sup>th</sup> – the only instance they had heard where M.R. had a

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<sup>55</sup> *Id.*

<sup>56</sup> Email from Abby Hill-Armell to Mrs. Moss, 2/7/19.

<sup>57</sup> *Id.*

<sup>58</sup> Timeline by Mrs. Moss.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

behavioral difficulty.<sup>61</sup> Mrs. Moss subsequently followed up with Ms. Garland by requesting a meeting to discuss report cards, which was eventually planned for March 21.<sup>62</sup>

### March of 2019

In the morning of March 7, 2019, Ms. Garland received an email from a parent, expressing concerns about interactions between their child and M.R., including that M.R. was threatening and mean to their child.<sup>63</sup> Ms. Garland responded by sitting the two children down together and helping them talk about what had occurred.<sup>64</sup> As a result of this meeting, the parents reported that their child was happy and relieved, and they expressed their appreciation for the seriousness with which Ms. Garland responded.<sup>65</sup> They also detailed prior incidents that had been described to them about M.R.'s conduct towards their child.<sup>66</sup> The next day, Ms. Garland forwarded the above email exchange to the Behavior Facilitator Abby Hill-Armell, the guidance counselor Aili Beeli, and Principal Trifilio, relaying that the reports from those parents gave her "great concern" about M.R.<sup>67</sup>

On March 12, 2019, Mrs. Moss sent an email to Ms. Garland to follow up about M.R.'s report card:

I was wondering if we could find a time to connect regarding [M.R.]'s report card. I noticed that she was squarely in the "sometimes" category for most social/behavioral items, so I just wanted to follow up with you to find out how we should interpret that – ie, whether it's common and/or expected for kindergarteners, or whether [M.R.] has some challenges and/or specific things she need to work on. Any context you could provide would be greatly appreciated and very helpful for us to know how best to support her.<sup>68</sup>

There is no indication that Ms. Garland responded to the March 12, 2019 email.

On March 18, 2019, Mrs. Moss chaperoned another class field trip.<sup>69</sup> While at the field trip, Mrs. Moss and Ms. Garland had a brief conversation about scheduling the report card meeting that Mrs. Moss had requested.<sup>70</sup> That evening, Ms. Garland emailed the parents who had chaperoned to thank them all.<sup>71</sup> In response to that email, on March 19<sup>th</sup>, Mrs. Moss informed Ms. Garland that she would be able to meet on March 21, 2019 to discuss the report card.<sup>72</sup>

Despite expressing "great concern" about M.R. to the principal and behavior facilitator, based on the other parents' report, Ms. Garland did not initiate an email or meeting with the

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Email from Parents of "Student D" to Mrs. Garland, 3/7/19, 7:00AM.

<sup>64</sup> Email from Parents of "Student D" to Mrs. Garland, 3/7/19, 7:59PM.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Email from Tracy Garland to Aili Beeli, Abby Hill-Armell, and Mark Trifilio, 3/8/19.

<sup>68</sup> Email from Mrs. Moss to Tracy Garland, 3/12/19.

<sup>69</sup> Email from Tracy Garland to Mrs. Moss and other parents, 3/18/19.

<sup>70</sup> Timeline from Mrs. Moss.

<sup>71</sup> Email from Tracy Garland to Mrs. Moss and other parents, 3/18/19.

<sup>72</sup> Email from Mrs. Moss to Tracy Garland, 3/19/19.

Mosses to discuss the matter.<sup>73</sup> Instead, after Mrs. Moss requested a meeting about the report card, Ms. Garland brought it up during the course of that meeting, discussed more fully below.<sup>74</sup>

### March 19<sup>th</sup> Incident

After the end of the school day on March 19, 2019, Ms. Garland responded to Mrs. Moss' last email, to confirm their upcoming meeting time, and added the following statement:

Also, [M.R.] and a classmate had a problem at lunchtime today. I wrote disciplinary referrals for both of them. [M.R.]'s is in her backpack. The guest principal, Mr. Goodreau processed the situation with them in his office. The referral needs to be signed and returned.<sup>75</sup>

Mrs. Moss responded to this email about an hour later.<sup>76</sup> She stated the following:

This is very disappointing and concerning, to say the least. This behavior is extremely out of character for [M.R.] and we will be taking time to process this both with her, and independently. In the meantime, [M.R.] will be losing privileges at home as part of her taking responsibility and accountability for her actions. Let's plan to incorporate this into our discussion Thursday. Your input will be invaluable in helping to determine next best steps to set [M.R.] up for success in the future.<sup>77</sup>

The Behavior Referral Form written by Ms. Garland on March 19, 2019 stated, "[M.R.] began kicking [Student B] under the table. [Student B] hit her back and then they got into a hitting match. This happened at lunch in the cafeteria. The students came back and told me what they did."<sup>78</sup> This was a minor behavior referral.<sup>79</sup> M.R.'s parents noted that "Student B" had previously threatened M.R. on January 15, 2019.<sup>80</sup> "Student B" was given a Behavior Referral on March 19, written by Ms. Garland, which stated that "The student told a peer who he got into a hitting match with that he would get his Dad's gun and shoot her and her family. He said he knew the code to the safe."<sup>81</sup> This was the third known instance of "Student B" making a death threat to another student.<sup>82</sup>

When Mrs. Moss asked her daughter what had happened, M.R. told her that the classmate had once again threatened to shoot her.<sup>83</sup> The student had told M.R. that he would come to her house and shoot her and her parents while they were sleeping.<sup>84</sup> He also told M.R. that he had a special machine that could find her house at night.<sup>85</sup> Next, the classmate proceeded to follow

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<sup>73</sup> Statement from Mrs. Moss, 12/29/21.

<sup>74</sup> *Id.*

<sup>75</sup> Email from Tracy Garland to Mrs. Moss, 3/19/19.

<sup>76</sup> Email from Mrs. Moss to Tracy Garland, 3/19/19.

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

<sup>78</sup> Behavioral Referral Form of M.R., 3/19/19.

<sup>79</sup> *Id.*

<sup>80</sup> Interview of Mrs. Moss, 5/18/21.

<sup>81</sup> SWIS Student Dashboard Report of "Student 9."

<sup>82</sup> *Id.*

<sup>83</sup> Timeline by Mrs. Moss.

<sup>84</sup> *Id.*

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

M.R. to a lunchroom table and sit next to her.<sup>86</sup> M.R. told her mother that she had kicked the classmate because he was leaning closer to her, and he wouldn't move when she asked him to.<sup>87</sup>

After receiving this second death threat from "Student B," M.R. became increasingly anxious and fearful about sleeping.<sup>88</sup> She wouldn't sleep for weeks, fearful that she or her parents would be shot if they fell asleep.<sup>89</sup>

On March 21, 2019, when Mrs. Moss and Ms. Garland met as planned to discuss the report card and this incident, Mrs. Moss learned that Ms. Garland knew about the threat that "Student B" had made to M.R.<sup>90</sup> Mrs. Moss was upset that the teacher knew this information and issued her daughter a disciplinary referral, and that the school had not notified her of the threat.<sup>91</sup> Mrs. Moss felt especially concerned because, in January, when a white student also received the threat, she received a phone call from the principal.<sup>92</sup> She felt this stood in stark contrast to this incident – where only M.R. was threatened, and, despite meeting with the guest principal that day, M.R. was sent home with a disciplinary referral indicating that she had misbehaved.<sup>93</sup> Ms. Garland told this investigation that she thought that the behavioral team who was working with the other child (the behavior facilitator, guidance counselor, and principal) would have communicated with the Mosses about the threat.<sup>94</sup>

In their March 21<sup>st</sup> meeting, Ms. Garland told Mrs. Moss that she had not informed her of the threat for confidentiality reasons.<sup>95</sup> Mrs. Moss responded that there should not be confidentiality rules in place which would prevent a parent from being notified about a death threat.<sup>96</sup> Ms. Garland also informed Mrs. Moss that Principal Trifilio was made aware of this threat, which Mrs. Moss found shocking and disappointing, because he had not contacted her as he had in January.<sup>97</sup> Principal Trifilio later admitted that the school had "dropped the ball" by failing to notify M.R.'s parents of this second death threat.<sup>98</sup>

In the course of this meeting, Mrs. Moss asked Ms. Garland how M.R. was doing socially, and in response to that, Ms. Garland said that M.R. was "aggressive" and "socially aggressive."<sup>99</sup> When Mrs. Moss asked for clarification, Ms. Garland told her that M.R. had scared another child by talking about a cat in the woods.<sup>100</sup> She did not say that M.R. had been unkind or threatening, nor did she mention the email exchange she had with the other child's parents which had caused her "great concern" about M.R.<sup>101</sup> Mrs. Moss asked if Ms. Garland thought Mrs. Moss should do anything to help the situation, but Ms. Garland told her everything had been resolved with the children.<sup>102</sup> Ms. Garland told Mrs. Moss that this was an example of

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<sup>86</sup> *Id.*

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

<sup>88</sup> Interview with Mrs. Moss, 5/18/21; see also Timeline by Mrs. Moss.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Interview with Mrs. Moss, 5/18/21.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Interview with Tracy Garland, 10/4/21.

<sup>95</sup> Interview with Mrs. Moss, 5/18/21.

<sup>96</sup> *Id.*, see also Timeline by Mrs. Moss.

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

<sup>98</sup> Interview with Mark Trifilio, 10/4/21.

<sup>99</sup> *Id.*; see also Complaint at Par. 14.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

how M.R. was more “savvy” than her peers, because her peer had taken it seriously when she was only pretending.<sup>103</sup>

### Request for Separation of Students

In their March 21<sup>st</sup> meeting, Mrs. Moss asked Ms. Garland to take steps to maintain separation between M.R. and “Student B,” who had now threatened her twice.<sup>104</sup> However, later that day, Ms. Garland paired the two children up for a math activity.<sup>105</sup> After learning of this from M.R., Mrs. Moss emailed Ms. Garland that evening.<sup>106</sup> That email followed up on academic matters they had discussed that day, and also stated the following:

We have spent the past two days talking with [M.R.] about expectations and strategies for success at school, and we even did role plays of various situations to help give her tools for how to respond. We have helped her to identify situations that are most challenging for her and how to be proactive in avoiding and managing those situations and bringing [sic] her best self to the table in all that she does. In that vein, we were wondering if, for now, you would please take into account past interactions with certain peers when grouping or pairing [M.R.] for activities. [M.R.] informed us that she was paired with [“Student B”] today for an activity and that this caused her stress. While we understand the need to be able to interact effectively with all peers, I think it would be helpful for her to have some distance from friends where interactions haven’t been great and foster deeper connections with friends who model the behaviors we are encouraging in [M.R.]. Please let us know your thoughts on the above, and/or whether you have any additional ideas....<sup>107</sup>

Ms. Garland responded after the following school day. She noted an improvement in M.R. that day, and said that M.R. seemed “more settled.”<sup>108</sup> She stated, “[M.R.] began sitting at table 2 yesterday and I think it’s a good spot with positive role models. She often seeks out connections with some of the peers that challenge her behaviorally, and I have tried to facilitate positive connections between them. I agree, however, that reaching out and joining in with ‘new’ friends is a good idea. I will arrange this within partnerships and small groups, as well.”<sup>109</sup>

### Fifth Grade “Buddy”

It is a practice at Orchard School that kindergarten students are paired up with fifth graders to walk them to their bus at the end of the school day, and to participate in some reading activities together over the course of the year.<sup>110</sup> This is called the “reading buddy” program.<sup>111</sup>

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<sup>103</sup> *Id.*; Interview with Tracy Garland, 10/4/21.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Email from Mrs. Moss to Tracy Garland, 3/21/19.

<sup>107</sup> *Id.*

<sup>108</sup> Email from Tracy Garland to Mr. and Mrs. Moss, 3/22/19.

<sup>109</sup> *Id.*

<sup>110</sup> Interview with Tracy Garland, 10/4/21.

<sup>111</sup> *Id.*

It was around this time in March that M.R. told her mother about comments her 5<sup>th</sup> grade “buddy” was making to her, which were concerning.<sup>112</sup>

On March 22, 2019, Mrs. Moss responded to Ms. Garland’s last email, expressing some positivity from M.R. that day after school.<sup>113</sup> Mrs. Moss had also learned from M.R. that certain 5<sup>th</sup> grade students had made comments about her hair, that her hair made her look like a rabbit, and also commented that she had a “big butt.”<sup>114</sup> M.R. said these comments made her uncomfortable. She also told her mom that her 5<sup>th</sup> grade “buddy” refused to call her by her name, and called her “L’il M\_\_\_,”<sup>115</sup> akin to a rapper’s name such as Lil Wayne or Lil John.<sup>116</sup> Mrs. Moss wrote, “[M.R.] was proud to share how she used some of the strategies we discussed with success. She also talked about the Billy the Bully book the class read today, and how it reminded her to ignore and/or tell the teacher in challenging situations. Apparently there has been some teasing from her 5<sup>th</sup> grade buddy and another 5<sup>th</sup> grader (certain comments about her hair and body), and since there wasn’t a teacher around, [M.R.] said she was able to successfully tell him to stop and then ignore him when he continued.”<sup>117</sup>

Ms. Garland responded to this email that she was “concerned about the buddy situation...”<sup>118</sup> She stated that she wanted to follow up with M.R. on Monday.<sup>119</sup> She also wrote the following to Mrs. Moss:

I noticed they were talking about her hair while waiting for dismissal today and I said, ‘I know, [M.R.] has beautiful hair!’ I helped her tuck it into her hood, but I didn’t know what the gist of the conversation was before that. In any case, her feeling bad about some of her buddy interactions needs to be addressed. Once I know the details, I’ll speak discreetly with her buddy to change this and repair any hurt feelings she may have been left with. This can be a helpful learning experience for the 5<sup>th</sup> grader.<sup>120</sup>

Ms. Garland told this investigation that she recalled the conversation she overheard involved the children talking about the “fullness” of M.R.’s hair.<sup>121</sup>

Mrs. Moss reported never receiving any follow up from Ms. Garland about the 5<sup>th</sup> grade buddy.<sup>122</sup> Ms. Garland testified that she did not connect the name “L’il M\_\_\_” with a rapper or realize it had racial overtones; she thought it was just related to the fact that M.R. was littler than her 5<sup>th</sup> grade buddy.<sup>123</sup> Ms. Garland testified that she did meet with the 5<sup>th</sup> grader, and told him that he needed to call her by her name and stop making comments about her appearance.<sup>124</sup> She reported to this investigation that the 5<sup>th</sup> grader understood and expressed embarrassment.<sup>125</sup>

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<sup>112</sup> Interview of Mrs. Moss, 5/18/21.

<sup>113</sup> Email from Mrs. Moss to Tracy Garland, 3/22/19.

<sup>114</sup> Timeline by Mrs. Moss.

<sup>115</sup> The name used by the 5<sup>th</sup> grader is not fully referred to in order to maintain confidentiality of M.R.

<sup>116</sup> Timeline by Mrs. Moss.

<sup>117</sup> Email from Mrs. Moss to Tracy Garland, 3/22/19.

<sup>118</sup> Email from Tracy Garland to Mrs. Moss, 3/22/19.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Interview with Tracy Garland, 10/4/21.

<sup>122</sup> Timeline by Mrs. Moss.

<sup>123</sup> Interview with Tracy Garland, 10/4/21.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

At some point after this, M.R. told Ms. Garland that her 5<sup>th</sup> grade “buddy” was calling her a “demon.”<sup>126</sup> The Guidance Counselor Ms. Beeli called Mrs. Moss about this and told her that the name-calling was due to the fact that M.R. had flipped her eyelids and/or rolled her eyes backward.<sup>127</sup> Instead of addressing the name-calling, or any other matters, Ms. Beeli told Mrs. Moss that M.R. should not do that with her eyes.<sup>128</sup>

### March 26<sup>th</sup> Meeting

On March 26, 2019, Mr. and Mrs. Moss met with Principal Trifilio to discuss the second death threat that M.R. had received.<sup>129</sup> In the course of this meeting, the Mosses recall Principal Trifilio stating that they had “dropped the ball” by failing to tell them about the death threat.<sup>130</sup> He told them that he had followed up with “Student B’s” parents, but that he could not tell the Mosses more about that due to confidentiality.<sup>131</sup> Principal Trifilio stated that he would not have reported the threats to the School District Superintendent, whom he reports to.<sup>132</sup> He told this investigation that he did not feel that “Student B” had actual access to a weapon, and therefore the threat was not substantiated, and that there was not a reason to involve police in threats by such a young student.<sup>133</sup>

In their March 26<sup>th</sup> meeting with the principal, the Mosses addressed the Behavior Referral Form from Ms. Garland.<sup>134</sup> They told the principal that they felt it was inaccurate, that it seemed like the teacher had intentionally omitted the information about the threat and taunting by the other student, and that they would not be signing the form.<sup>135</sup>

The Mosses also wanted to discuss with Principal Trifilio their concerns about the ongoing behavior of “Student A,” who had repeatedly assaulted M.R., including on the day of the apple picking field trip.<sup>136</sup> This investigation has reviewed the behavior referral records of “Student A,” which were never made available to the Mosses. The records reveal that “Student A” received a total of 13 Disciplinary Referrals in the 2018-19 school year, and 55 in the following year.<sup>137</sup> Most of the referrals involved aggressive physical behavior including hitting, pushing and punching.<sup>138</sup>

The Mosses recall telling Principal Trifilio in their March 26 meeting that they did not feel that enough was being done to protect M.R.’s emotional and physical well-being.<sup>139</sup> Principal Trifilio shared his perspective, which was that “Student A” “had a nervous energy” and that he had actually “toned down since the beginning of the year.”<sup>140</sup> He told the Mosses that he

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<sup>126</sup> Complaint Par. 26.

<sup>127</sup> Interview with Mrs. Moss, 5/18/21; Interview with Aili Beeli, 10/4/21

<sup>128</sup> *Id.*

<sup>129</sup> Timeline by Mrs. Moss.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Interview of Mark Trifilio, 10/4/21.

<sup>133</sup> *Id.*

<sup>134</sup> Timeline by Mrs. Moss.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Student Dashboard Report of “Student 10”.

<sup>138</sup> *Id.*

<sup>139</sup> Timeline by Mrs. Moss.

<sup>140</sup> *Id.*



was encouraging M.R. to be friends with “Student A,” as well as “Student B,” who had made two death threats to her.<sup>141</sup>

The Mosses told the principal that they are trying to teach their child that people who hit or threaten her are not her friends, and that they wanted the principal and Ms. Garland to see the behavior as harassment and bullying.<sup>142</sup> They expressed wanting the principal and teacher to stop encouraging interactions that were not beneficial to their child.<sup>143</sup> At the conclusion of the meeting, when the Mosses were leaving his office, Principal Trifilio asked them, “Just curious, is [M.R.] bossy?”<sup>144</sup> The Mosses were taken aback by this question.<sup>145</sup>

### March 26<sup>th</sup> Incident

When M.R. came home from school that day, she cried and told her parents that “Student B” had punched her in the chest that day.<sup>146</sup> According to M.R., she had asked the classmate if he knew Tae Kwon Do, which she had started taking, and then he said yes and punched her in the chest.<sup>147</sup> At 3:49pm that day, Ms. Garland sent an email to Mr. and Mrs. Moss, which stated the following:

After lunch, 2 classmates reported to me that [M.R.] was shaking the lunch table and wouldn’t stop, even after she was asked several times. We all talked about it together and agreed that when someone asks you to stop something that is bothering them, it’s kind and helpful to do so.

Later, [M.R.] approached a classmate asking him if he knows karate and moving her arms around in karate moves towards him. He did the moves back at her because he said he thought she was going to hit him. . . .<sup>148</sup>

Mrs. Moss responded to this email, as follows:

When we asked [M.R.] about shaking the lunch table she did mention that she joined in after 3 classmates [names omitted] started shaking the table, and she admitted to not stopping right away when . . . requested. We spoke to her about this and reiterated the need to think for herself and be aware of herself and others.

Regarding the incident with [“Student B”] today, [M.R.] had informed us about it prior to receiving your email, however what she told us was that she asked about karate moves and he punched her in the chest. We have asked her to choose other classmates to interact with. . .

As you know, we had a chat with Mark Trifilio today to discuss the most recent threat from her classmate. These incidents have cause [M.R.] a great deal of anxiety and she obsesses about them, and her safety, particularly at bedtime. I do think she seeks out [“Student B”] sometimes as her way of trying to resolve these things and to feel that he is a friend rather than someone who would hurt her, but as we know this typically backfires. We also discussed with Mr. T that it would be beneficial to have him and the school

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Email from Tracy Garland to Mr. and Mrs. Moss, 3/26/19.

counselor join [M.R.]’s conference. I think the school counselor could be a great resource for [M.R.] to confide in and help build friendships. [M.R.] desperately wants to make friends at school, and I know that is at the root of much of her behavior. She has many close positive friendships outside of school (including several first graders at Orchard who live in our neighborhood), and I think just having a few extra tools in her toolbox, and some distance from relationships that have been problematic, could go a long way. .

<sup>149</sup>

“Student B” did not receive a behavioral referral for hitting M.R. in the chest on March 26, 2019.<sup>150</sup>

The following day, on March 27, 2019, Ms. Garland forwarded the above email to the guidance counselor, Aili Beeli.<sup>151</sup> Ms. Garland said that she was sharing the email so that Ms. Beeli would “know what the parents are seeking” from her.<sup>152</sup> She also asked if Ms. Beeli could attend the conference scheduled for April 4, to which Ms. Beeli replied in the affirmative.<sup>153</sup>

In the morning of Friday, March 29, Mrs. Moss emailed Ms. Garland about a few things related to M.R.<sup>154</sup> In this email, Mrs. Moss referenced hearing from M.R. that she had been going to Mrs. Beeli’s guidance office with a small group of students for a reading activity.<sup>155</sup> Mrs. Moss’ email went on to state, “[M.R.] also mentioned that one of the members in her small group is a classmate that we have been trying to get some distance from, at least in the short term while she continues to process some past interactions with this student. Again, anything you can do to facilitate her physical and emotional space from this student while she continues to work through her feelings and establish positive friendships would be greatly appreciated.”<sup>156</sup> Ms. Garland forwarded this email to Ms. Beeli about an hour later.<sup>157</sup> Ms. Beeli sent an email to Mr. and Mrs. Moss that afternoon, in which explained more about the weekly meetings she was facilitating with small groups of students in her office, for four weeks per group.<sup>158</sup> She told the Mosses that the students were “monitored very closely” in her meetings and stated, “I am able to redirect any behaviors that need doing so...”<sup>159</sup> she stated the following:

“I wanted to introduce myself since we will be sitting down next week together during parent teacher conferences. I am the K-2 school counselor at Orchard.

I have been getting to know [M.R.] during a friendship group that I have been running with her and few other students from her class. This is an activity that I do with every student K-2 grade as a way to get to know each other, develop trust, share feelings, practice social skills etc. Please see the attached letter with more detail which was sent home with The Core a while back. The make-up of the groups are with kids that do not usually play together. The purpose of this is to gain a comfort and understanding towards kids that might not usually be in their social groups. During our 4 visits together we talk about, read book about and practice social skills in a small controlled setting in the

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<sup>149</sup> Email from Mrs. Moss to Tracy Garland, 3/26/19.

<sup>150</sup> SWIS Student Dashboard for “Student B.”

<sup>151</sup> Email from Tracy Garland to Aili Beeli, 3/27/19.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*; Email from Aili Beeli to Tracy Garland, 3/27/19.

<sup>154</sup> Email from Mrs. Moss to Tracy Garland, 3/29/19.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Email from Tracy Garland to Aili Beeli, 3/29/19.

<sup>158</sup> Email from Aili Beeli to Mr. and Mrs. Moss, 3/29/19.

<sup>159</sup> *Id.*

guidance playroom. It is a time that is monitored very closely by me and I am able to redirect any behaviors that need doing so or celebrate kind choices. This group that [M.R.] is in has been running since the beginning of March and will end next week. I look forward to speaking more as a school team next Thursday during the conference.”

Mrs. Moss also received an email from Ms. Garland that afternoon, which included a few notes about the guidance counselor’s small groups as well as interactions with the classmate who threatened M.R. The relevant portion of Ms. Garland’s email states the following:

I forwarded your message to Mrs. Beeli (bay-lee), the guidance counselor, so she could introduce herself and respond to your inquiry about [M.R.]’s friendship group. As she mentioned, this group started meeting before you and I met, [Mrs. Moss], and they only have one group time left. ... There was a lot going on in the classroom when Mrs. Beeli came in, and it honestly did not occur to me ahead of time, or at the moment, about the group members. If you would prefer that [M.R.] not attend their last group time, we will respect your wishes. Please let us know.

I will continue to do my best in the classroom to help them maintain distance. Keep in mind that at times, [M.R.] approaches the other child in a friendly way as he also approaches her. For example, today [M.R.] knelt next to him on the rug and asked him if she could have the book he was reading when he finished. He agreed and the interaction was very appropriate. In these instances I monitor as best I can.”<sup>160</sup>

Mrs. Moss responded to Ms. Garland’s email by saying, “I think that since the small group sessions have gone well in the past and will be closely monitored by Mrs. Beeli, then it would be beneficial to [M.R.] to attend the last session. She does enjoy her time with Mrs. Beeli and the content is important.”<sup>161</sup>

#### April 4<sup>th</sup> Conference

At the Mosses’ request, a parent-teacher conference was held with Ms. Garland on April 4, 2019, with Guidance Counselor Beeli and Principal Trifilio present.<sup>162</sup> The Mosses’ purpose in requesting this meeting was to put a plan in place that would prevent M.R. from continuing to be harassed by her classmates.<sup>163</sup> The Mosses were concerned that they had not been informed by Ms. Garland about the second death threat, and hoped that having more staff members discuss the issue would result in more action to protect their daughter.<sup>164</sup> However, Mrs. Moss reported that the staff did not seem responsive to the concerns, or interested in a concrete plan for action.<sup>165</sup>

The Mosses asked Ms. Beeli if she could be more involved with checking in with M.R.<sup>166</sup> Her response centered around the 4 week “friendship groups” she had been holding and explaining again why “Student B” was in the group with M.R.<sup>167</sup> Principal Trifilio told the

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<sup>160</sup> Email from Tracy Garland to Mr. and Mrs. Moss, 3/29/19.

<sup>161</sup> Email from Mrs. Moss to Tracy Garland, 4/2/19.

<sup>162</sup> Statement from Mrs. Moss, 12/29/21.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

Mosses that “Student A” and “Student B” had improved since the beginning of the year and assured them that over time things would get better.<sup>168</sup> When Ms. Garland told Principal Trifilio that M.R. was doing well academically, he responded that it didn’t sound like he needed to be at the meeting at all.<sup>169</sup> The Mosses left the meeting without a plan in place for any extra protection for M.R. and feeling the conference had been a waste of time.<sup>170</sup>

### April 29<sup>th</sup> Incident

The next incident of note took place about one month later, on Monday, April 29, 2019. On this date, M.R. came home from school and told her mother that a group of girls in her class had not let her play dolls with them because of her skin color.<sup>171</sup> The Mosses were very disturbed to hear this from their 6-year-old daughter.<sup>172</sup> Mrs. Moss waited to see if Ms. Garland was going to contact her about the incident.<sup>173</sup> By Wednesday morning, May 1<sup>st</sup>, she had not heard anything from Ms. Garland and emailed her.<sup>174</sup> Mrs. Moss wrote,

[M.R.] came home upset on Monday because she said a friend at school told her she couldn’t play dolls because she needed light skin to play. She mentioned that she told you about it and you helped them work through it. She immediately also recalled that a friend in her class last year told her she couldn’t ‘earn points’ because ‘people with dark skin aren’t allowed to earn points.’ As parents our hearts break to have these conversations, especially at this age, but we also feel it’s an important learning opportunity. I just wanted to check in with you to get your thoughts and perspective.<sup>175</sup>

Ms. Garland responded to Mrs. Moss in the afternoon of May 1, 2019. Her email provided more detail, as follows:

I’m glad [M.R.] told you about this hurtful situation. I reassured her that she did the right thing coming to me right away. This was during choice time with a lot going on, and I never would have known had she not reported. Needless to say, I was also very sad and surprised about what she reported. She calmly told me that a friend who was also playing with the dollhouse toys said, ‘You have to have light skin and black hair to have a doll.’ I immediately went back to the doll group with [M.R.] and stopped the playing for a serious conversation. I directly addressed the person who had made the comment, clarifying with her and the others that these words are hurtful and unacceptable. We further talked about the fact that each person’s skin has its own shade, and we are all unique and beautiful. We put our arms and hands into the middle of our circle and noticed how each one was a little different. We talked about our different hair color, and straight hair or curly hair, and one of the friends said, ‘I love the texture of [M.R.]’s hair. I wish I had curly hair like her.’ That led to a conversation about how people with straight hair often wanted to try out curly hair and vice versa. You get the point... it was a powerful discussion and everyone involved seemed to take it to heart. The child who

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Timeline by Mrs. Moss.

<sup>172</sup> Interviews of Mrs. and Mrs. Moss, 5/18/21.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Email from Mrs. Moss to Tracy Garland, 5/1/19.

made the comment had a private conversation with [M.R.] afterward. She apologized and appeared to feel embarrassed and remorseful- important lesson learned! I am also having a follow-up conversation with her parents to inform them.

As we strive to celebrate differences and foster inclusivity and kindness in kindergarten, these types of situations are disheartening. I felt very sad that [M.R.] had heard these hurtful words. I appreciate that she was willing to help turn the situation into a learning experience for everyone. We talked about how when children hear unkind words towards others they can stand up for what is right by using their own helpful words.

Thank you for touching base, [Mrs. Moss], and please let me know if you have any other questions.<sup>176</sup>

Mrs. Moss wrote back to Ms. Garland on May 7<sup>th</sup>. She stated, “Thanks very much for your responsiveness to the situation and for taking the time to provide the details above. Your perspective and insight is greatly appreciated as things sometimes get lost in translation when relying on a 6-year-old’s account of events. :)”<sup>177</sup>

### May 10<sup>th</sup> Incident

On Friday, May 10, 2019, Abby Hill-Armell emailed Mr. and Mrs. Moss, and stated as follows:

“My name is Abby Hill-Armell and I am the Behavior Facilitator at Orchard School. I wanted to let you know that I spoke with [M.R.] today regarding an incident in PE that resulted in a behavioral referral. The substitute PE teacher reported that while the students were engaged in a bowling activity, [M.R.] was swinging bowling pins at other students and hitting them. The substitute PE teacher asked [M.R.] to take a break after some unsuccessful redirection. While taking a break [M.R.] got up and ran across the gym to push a peer.

When I spoke with [M.R.] she first denied that she had engaged in this behavior. When I reminded her of the conversation that she had with the teacher and explained that participating in bowling requires safe bodies she replied that it doesn’t matter because today was the last day of bowling anyway. I reminded [M.R.] of our school expectations to be Respectful of Ourselves, Others, and the Environment.

I am not going to send home the behavior referral as this serves as our communication. Please let me know if you have any questions.<sup>178</sup>

Mrs. Moss replied shortly afterwards, stating that she was going to come into the school to talk with her daughter about what had happened.<sup>179</sup> She also forwarded the information to the guidance counselor Aili Beeli and invited her to join in the conversation she was going to have with M.R. at the school.<sup>180</sup> She did not hear back from the guidance counselor about her email.<sup>181</sup> Mrs. Moss was able to meet with Abby Hill-Armell and M.R. about the incident.<sup>182</sup> In

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<sup>176</sup> Email from Tracy Garland to Mrs. Moss, 5/1/19.

<sup>177</sup> Email from Mrs. Moss to Tracy Garland, 5/7/19.

<sup>178</sup> Email from Abby Hill-Armell to Mr. and Mrs. Moss, 5/10/19.

<sup>179</sup> Email from Mrs. Moss to Abby Hill-Armell, 5/10/19.

<sup>180</sup> Email from Mrs. Moss to Aili Beeli, 5/10/19.

<sup>181</sup> Timeline by Mrs. Moss.

<sup>182</sup> Interview with Mrs. Moss, 5/18/21.

her meeting, Mrs. Moss learned that the child whom M.R. had the altercation with was “Student A.”<sup>183</sup> This investigation has found that “Student A” received a major behavior referral for this incident.<sup>184</sup> The referral was issued by the substitute PE teacher, who noted “The student was hitting students with bowling pins. He was asked to take a break. “While he was supposed to be taking a break he continued hitting and pushing students.”<sup>185</sup>

#### May 14<sup>th</sup> Complaint by the Mosses

On May 14, 2019, Mrs. Moss sent a lengthy email to Ms. Garland addressing the PE incident and broader concerns about how the school was responding to incidents involving M.R.<sup>186</sup> The full text of the email was as follows:

I wanted to follow up with you regarding this incident. I did stop in to school to check in with [M.R.] and make sure she was in a good place to head to the K Space that afternoon. I checked in with Abby as well, and while speaking with both Abby and I, [M.R.] did take accountability for her part in the incident (ie, not listening initially when asked to put the pins down and eventually pushing [“Student A”]). She was able to finish her day at the K Space and when I picked her up, Dew relayed that [M.R.] had a great end to her day.

In speaking with [M.R.] more about the PE incident, some additional details about the context of the incident came to light, which opened up a broader conversation about her overall experience at school. In terms of context of the incident itself, the email that was sent home seemed to imply that [M.R.] was swinging pins at students with an intention to hit them and, in fact hitting them. What [M.R.] describes is that she picked up the pins and was swaying the pins close to her body ‘because it was fun’, and that she never hit anyone with the pins or tried to hit anyone. She did admit to not putting them down when asked, and we discussed with her that the better choice and expectation is for her to listen to the teacher and follow instructions. She said she sensed unfairness because, according to [M.R.], another student was taking the ball and not allowing her a turn, yet was not asked to put the ball down. During her timeout, [M.R.] said she was still holding two pins and that [another student] tackled her to get the pins and was also put in a timeout. This portion of the incident was missing from the email but was very significant to [M.R.].

The email also conveys that [M.R.] did not take accountability for her actions. When I arrived at school and spoke with her, she did take accountability. When I asked her why she said ‘today is the last day of bowling anyway’ (which I explained to her did not sound like taking responsibility for her actions), she explained that she said that in response to being told that she could no longer participate in bowling.

As for the broader picture, when I asked [M.R.] why she pushed [“Student A”], she said it’s because she was thinking about all the mean things he has done to her, and that he feels he can just kick, push, hit and be mean to her whenever he wants, and that ‘he has been doing it all year and never stops.’ She said she feels like adults don’t see everything that is going on (not just with [“Student A”] but generally), and that she doesn’t feel she has a trusted adult resource to help her outside of the classroom,

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<sup>183</sup> Timeline by Mrs. Moss.

<sup>184</sup> SWIS Student Dashboard, “Student A.”

<sup>185</sup> *Id.*

<sup>186</sup> Email from Mrs. Moss to Tracy Garland, 5/14/19.

particularly at lunch and recess. On this particular day, I know there was a substitute both in the classroom and at PE.

Our concerns as parents are tri-fold. First, we have observed that [M.R.], over the course of the year, has gone from a confident, happy-go-luck kid with a love of school, to an anxious child who says that school makes her feel ‘worried’ because of how she is treated by her peers. This treatment has included many unprovoked physical assaults, detailed death threats, name calling and, most recently, being excluded based on the color of her skin. The physical assaults date as far back as the beginning of the year, when I volunteered on the apple picking field trip and observed [“Student A”] unprovoked, kick and push [M.R.] and throw her lunchbox on the ground, telling her she couldn’t sit near him. On another occasion in the fall when I volunteered in the classroom, I observed [that same student] poke her in the face and shove her when she was walked to her spot for circle time. When he shoved her, he pushed her into another student, and that student shoved her again in response. You will recall that [M.R.] broke down in tears on my lap and continued to cry for the majority of the circle activity, even after the student was placed in a timeout. These are incidents that I witnessed first-hand while present in the classroom, and I have heard of several more throughout the year as relayed by [M.R.] and evidenced by apology notes that come home in her backpack. She’s also been bullied on the playground by a boy who was calling her stupid on a regular basis. We found out about this when we got an email home about her kicking his lunchbox, and she explained that he has been kicking her, her lunchbox, and calling her names regularly. As you know, [M.R.] has endured at least two death threats from a student (ie ‘I have a machine that can find your house and I’m going to come and shoot you and your parents while you’re sleeping’), and most recently, was excluded by a peer based on the color of her skin. [M.R.] cries herself to sleep many nights, communicates feelings of despair, complains of stomach aches each schoolday morning, and tells us that she is a ‘loser who never should have been born.’ When I ask her why she feels this way, she says that’s what kids at school tell her.

Second, it’s concerning as a parent to hear about significant events, such as death threats and racially discriminatory remarks (and most recently, being tackled), from [M.R.] herself rather than from the adults who were aware of the incidents. We would like to know more about the school’s protocol for informing parents when a student experiences emotionally or physically unsafe behavior. We feel that if kicking a lunch box or shaking a lunch table warrants a note home, then death threats and racially discriminatory remarks should as well. Lastly, regarding the student who excluded [M.R.] based on her skin color, we would like to confirm that the parents were, in fact, notified. While we don’t have an expectation that the parents reach out to discuss it, it certainly would have gone a long way, especially considering I’ve interacted with the student’s mom on several occasions, and now when I see her I’ll be wondering whether those are her views as well. If [M.R.] ever said anything like that to a peer, I would be mortified and would be calling the parents immediately to apologize and clarify that we do not hold or condone those beliefs. The silence causes us to question those beliefs and, in turn, the beliefs of our larger community.

Lastly, we have concerns about the manner in which incidents are reported and responded to by the school’s staff and administration. We believe the school should take more care in getting to the root cause of incidents and consider whether a student who might appear to be the aggressor could perhaps be a victim of bullying behavior and may lack the tools to cope with it effectively. We also feel that death threats should be reported immediately without exception. Lastly, we feel that teachers, staff and administrators should take more [sic] in how they characterize students and events. As a parent, it’s concerning to hear that a child who has been physically bullying our child all

year is viewed by the principal as simply having ‘nervous energy,’ that a student doling out detailed death threats is merely learning about ‘the power of his words,’ and that, when we met with the principal to talk about our concern with not being informed about the latest death threat, as well as our concern about its impact on [M.R.] his concluding question to us as we were ushered out of his office was ‘Do you think [M.R.] is bossy?’

We don’t know if [M.R.] will be returning to Orchard, but as of now we don’t feel that it is a physically or emotionally safe place for her. Whether we return or not, we hope there will be a closer look at how the school handles bullying, threats, and racial discrimination and more concrete plans in place for how to manage known challenges moving forward. As of now, we feel much is being done to protect and move along the students who are engaging in harmful behavior, and not enough is being done to protect the students impacted by that behavior and support the teachers tasked with managing it.

Whether we continue on at Orchard or not, we would welcome a deeper conversation about our experience and suggestions for improvements in the future.

Please know that none of what we have written above takes away from our appreciation of the excellent job you have done as [M.R.]’s teacher this year. When we asked [M.R.] if she felt there was anyone she could trust to talk to about what’s going on at school, she gave us one name, and it was you. We bring these things up just so that you and others can be aware of our full experience and facilitate a broader conversation as needed.

Many thanks for taking the time to read this message, and for being a continued support for [M.R.]”<sup>187</sup>

After reading this email, Ms. Garland responded to Mrs. Moss, stating “Thank you for taking the time to share all of this information and your heartfelt concerns. May I have your permission to share it with Mr. Trifilio, Mrs. Beeli, and Miss Abby? I will need a little time to follow-up in more detail with you and [Mr. Moss].”<sup>188</sup> Mrs. Moss promptly and gratefully responded in the affirmative.<sup>189</sup> Ms. Garland then forwarded the email on to the principal, guidance counselor, and behavior facilitator, with an email that stated, “Please read and let’s meet to talk ASAP!”<sup>190</sup>

In the evening on May 14, 2019, Ms. Garland spoke with the substitute PE teacher who had observed the interactions over the bowling pins on May 10<sup>th</sup>, Ms. Brown.<sup>191</sup> Ms. Brown provided Ms. Garland with more detailed information about what she had observed that day. She stated the following in an email to Ms. Garland:

While one of the teammates was bowling, I observed [M.R.] pick up two bowling pins from their lane and swing them around. As I was walking over to her, she began running over to a group of students and hitting several of them on their legs and feet with the pins. I asked [M.R.] to take a break, and first she did not stop what she was doing. I reminded [M.R.] that in order to do fun activities in school, she needs to show that she can have a safe body. At that point [M.R.] put the pins down and went to the blue tile spot to calm down. I told [M.R.] that when she felt she could have a safe body, she could go and rejoin her team.

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<sup>187</sup> Email from Mrs. and Mr. Moss to Tracy Garland, 5/14/19.

<sup>188</sup> Email from Tracy Garland to Mr. and Mrs. Moss, 5/14/19.

<sup>189</sup> Email from Mrs. Moss to Tracy Garland, 5/14/19.

<sup>190</sup> Email from Tracy Garland to Mark Trifilio, Aili Beeli, and Abby Hill-Armell, 5/14/19.

<sup>191</sup> Email from Tracy Garland to Brittany Brown, 5/14/19.



While [M.R.] was in the break spot, a peer who had been playing on the other side of the gym was asked to take a break at a spot about 15 feet away from [M.R.]. [M.R.] got up from the break spot, took the two pins back from the lane, and went back to sitting on the blue tiles. The peer taking a break crawled over towards her, and [M.R.] threw a pin at the peer. This peer then started grabbing and pulling the other pin, they both fell over, and [M.R.] pushed and pulled back. I instructed [M.R.] and the peer to take second breaks on opposite sides of the gym. After that, [M.R.] did seem to calm down. At this point, it was just about time to clean up due to the shortened period on the early release day. I told her that although she had missed part of the last day of the bowling ..., we have some fun units coming up that I know she will enjoy....<sup>192</sup>

At some point during the day on May 14<sup>th</sup>, Ms. Garland met with the parents of M.R.'s classmate who had made the statement about M.R. playing with the dolls. In the evening of May 14<sup>th</sup>, those parents emailed Mrs. Moss and told her about their conversation. The parents stated,

Tracey Garland made us aware today about an incident between [M.R.] and [our child] which happened a few weeks ago. Tracey apologized for not reaching us sooner. Her desire was to speak with us face to face, but with school break and changing schedules, we didn't get a chance to speak until today. Tracey shared what she did to address it in the moment and we felt compelled as concerned parents to also address it with [our child] about what happened. [Our child] was embarrassed over it, so we hope that lesson [our child] took from it made an impact. That is our hope as her parents. Please know that we care deeply about [M.R.] and [our child's] friendship.<sup>193</sup>

The parents of the other student shared that email with Ms. Garland, who responded to them as follows:

Thank you for sharing your note with [M.R.]'s parents with me. Again, I apologize that my delayed communication (in hopes to speak in person) also delayed the parent-to-parent communication that could have happened earlier. I take full responsibility for any misunderstandings, and I'm truly sorry to have made this learning experience more difficult for [your child], or for you as her caring and responsive parents.<sup>194</sup>

Principal Trifilio also emailed the Mosses in the evening of May 14, 2019, to address the lengthy email that Mrs. Moss had sent to Ms. Garland that morning. Principal Trifilio's email stated,

I was just able to closely read your email. I will check in with the Orchard Staff who observed and work on the P.E. issue first thing tomorrow and respond to your concerns. I apologize if any comment I had made was insensitive. We take physical aggression and threats seriously and follow up with both sets of parents. As I had mentioned in the past, we are not able to share with you the disciplinary efforts and communications with other parents. Additionally, I do not recall any discussions regarding racism. This is serious and I would like to hear your concerns. I would be

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<sup>192</sup> Email from Brittany Brown to Tracy Garland, 5/14/19.

<sup>193</sup> Email from Parents of "Student E" to Mrs. Moss, 5/14/19.

<sup>194</sup> Email from Tracy Garland to Parents of "Student E," 5/15/19.

willing to contact a district staff member to help us facilitate this conversation if you are interested and willing. Sincerely, Mark Trifilio<sup>195</sup>

The Mosses responded to Principal Trifilio's email the following morning. They wrote the following:

Thank you for your response and willingness to facilitate a larger conversation. You might be surprised to know that [M.R.]'s first encounter with a racially discriminatory comment at school was last year at a different school, when a peer told her that she wasn't allowed to 'earn points' because she has brown skin. The child was a close friend of [M.R.]'s who made his statement with genuine authenticity and had no idea that his words were hurtful. The school addressed it swiftly and appropriately through puppet-based play and discussion with the entire class; however, despite being notified, the child's parents (with whom we had interacted on many occasions) said nothing to us, which was hurtful and confusing. We learned from that experience the importance of facilitating communication not only with the school, but between families as well, from a healing and closure perspective. This is the reason we followed up with Tracy to confirm whether the family had been notified. We were happy to have received an email from [M.R.'s classmate]'s parents last night [concerning the doll incident], which we will respond to in kind today.

The issue is of course much larger than [M.R.] or our individual experience as parents, and we would most certainly be interested in and willing to participating [sic] in a larger discussion about the topic of racial equality and inclusion in school. Our goal in this discussion would be not only to share our concerns, but to put forward some thoughts and ideas regarding preventing, identifying and addressing racial discrimination in the school setting, and maximizing support for minority students who will likely face challenges that the larger school population does not. Some initial ideas/food for thought that we have are: (1) documenting and tracking incidents of racial discrimination in the same manner as other reportable behavior; (2) ensuring classroom demographics provide for adequate peer-level support of minority students; (3) increasing support of minority students at both the peer and adult level through social groups, focus groups, mentoring, etc.; (4) connecting families of minority students in a more meaningful way, whether to have an avenue for setting up playdates or discussing ideas and concerns; and (5) opportunities to modify or enhance the curriculum pertaining to equality, human rights, inclusion, etc.? Thank you again for reaching out, and we are happy to participate in a larger conversation at your convenience.<sup>196</sup>

Principal Trifilio responded to the Mosses that evening, thanking them for their response. He stated, "Yes, I would be very interested in meeting with you to hear your thoughts on supporting our students of color. Our school and our district has been engaged in initiatives on Diversity and Equity and have also been taking a course called Courageous Conversations. We actually are using some of your suggestions but would like to hear more about others. It sounds like we do not need a facilitator for this, we can just share and discuss. I am seriously booked but can be available any day next week after school or Friday morning."<sup>197</sup> Due to scheduling difficulties, the Mosses were not able to meet with Principal Trifilio until June 6, 2019.<sup>198</sup>

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<sup>195</sup> Email from Mark Trifilio to Mr. and Mrs. Moss, 5/14/19.

<sup>196</sup> Email from Mr. and Mrs. Moss to Mark Trifilio, 5/15/19.

<sup>197</sup> Email from Mark Trifilio to Mr. and Mrs. Moss, 5/15/19.

<sup>198</sup> Timeline by Mrs. Moss.

Also on May 15<sup>th</sup>, the Mosses had emails with Ms. Garland. Ms. Garland informed them that the PE substitute, Ms. Brown, had shared details about the bowling incident, and she would be sending that to them.<sup>199</sup> Ms. Garland's email also addressed the communication about the doll incident with the parents of the other classmate. Her email stated, "I apologize for any further angst my delayed conversation with [the parents] may have caused you. I planned to speak with them in person and some changing variables influenced that timeline, as they mentioned in their email to you. It is very important to them and to me that any further hurt or distrust among the girls and their families be repaired."<sup>200</sup>

Mrs. Moss responded to Ms. Garland's email, stating "Thank you for following up with Miss Brown, and please thank her on our behalf for taking the time to write her email about the PE incident. [M.R.] has described a different account of events, but we are going to chat with her again today, in light of these new details, to see if we can get to the bottom of it. While we want to reconcile [M.R.]'s account of events with Miss Brown's, we also want to ensure that [M.R.] is held accountable for her actions and takes full responsibility for any and all unsafe or unacceptable behavior."<sup>201</sup> Mrs. Moss also addressed the doll incident. She stated,

We appreciate your efforts to reach out to [the classmate's parents], and they did send a nice email last night which I will be responding to shortly. These kids are great kids, and they are all learning, just like the rest of us. As we relayed to Mr. Trafilio [sic] in our response to his email, communication between children AND their families, particularly in these types of situations, can go a long way in building understanding and fostering relationship. We are glad that with the lines of communication open and some healing words said, we can use this opportunity to strengthen our relationship with [that classmate's family]. Thank you again for your role in facilitating that.<sup>202</sup>

Ms. Garland emailed the Mosses back and addressed the correspondence with the principal. She stated, "I appreciate you including me in your email to Mr. Trifilio about areas of improvement regarding diversity, equity, communication, and protocols. I am eager to participate in that effort and very willing to learn, grow, and improve."<sup>203</sup>

### May 21<sup>st</sup> Incident

One week later, on May 21<sup>st</sup>, there was another incident involving "Student A." Ms. Garland emailed Mr. and Mrs. Moss to inform them, "Mr. Trifilio will be sending you an email about a lunch situation today. Though I was not present in the cafeteria, [M.R.] reported it to me on the way back to our classroom. I did some initial processing with her and the peer, but Mr. T did the bulk of it with them when he returned from his meeting."<sup>204</sup> At 8:53PM, the Mosses received an email from Principal Trifilio.<sup>205</sup> It stated as follows:

I'm sorry for the delay in this email but am just getting a couple of free minutes in to touch base. When I came back from a district meeting, I found another kindergarten

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<sup>199</sup> Email from Tracy Garland to Mr. and Mrs. Moss, 5/15/19.

<sup>200</sup> *Id.*

<sup>201</sup> Email from Mrs. Moss to Tracy Garland, 5/15/19.

<sup>202</sup> *Id.*

<sup>203</sup> Email from Tracy Garland to Mr. and Mrs. Moss, 5/15/19.

<sup>204</sup> Email from Tracy Garland to Mr. and Mrs. Moss, 5/21/19.

<sup>205</sup> Email from Mark Trifilio to Mr. and Mrs. Moss, 5/21/19.

student in the office waiting for me. I checked in with [M.R.] and the student and this is what I learned: [M.R.] sat next to the student at the lunch table. The other student told [M.R.] they were not allowed to sit together in the lunch room but [M.R.] wanted to sit next to another friend. The other student became agitated and insisted she move. When [M.R.] did not move, he pulled at her arm to push him [sic] away. He also twisted her arm – I believe purposefully.

As I have mentioned in the past, we cannot share our discipline work with other students though I can tell you we take these matters seriously and contact parents.

During my work with the two students, I left my table to take a phone call and then to meet with a teacher right outside of my office door. Both times I was away, the two of them began talking, joking and laughing. I told them I could see they wanted to be friends but behaviors were getting in the way. [M.R.] agreed and said that you did not want her playing with him because ‘he is a trouble maker.’ ...”<sup>206</sup>

“Student A” was not issued a disciplinary referral for his conduct that day.<sup>207</sup> This investigation was provided with correspondence from May 21<sup>st</sup>, 2019 in which Ms. Garland emailed with the parents of the other student involved.<sup>208</sup> The parents indicated that their child said that he had apologized to M.R., that she accepted his apology, and that they were friends.<sup>209</sup>

At just past midnight on May 28<sup>th</sup>, Mrs. Moss responded to Principal Trifilio’s email about the lunchtime incident. Her email stated the following:

Thanks for letting us know about this. To be honest, it is not surprising to us that there has been yet another incident involving [“Student A”]. As I mentioned in a previous email, there have been several unprovoked incidents involving this student over the course of the school year much to our dismay and to [M.R.]’s detriment. In fact, in the beginning of the year I witnessed first-hand an incident very similar to this. [M.R.] went to sit down next to [“Student A”] to eat her lunch and he threw her lunchbox on the ground and shoved her away. Later that day, I observed him kick her when she stood next to him. While we do not know all of the efforts that have been made by the school to address this behavior, from our perspective, whatever measures have been taken have been ineffective. As her parents, we feel uncomfortable sending her into an environment that we do not feel she is, or should have to be, equipped to handle effectively.

[M.R.] is suffering. I am sending this email at such a late hour due to the fact that I just spent nearly 3 hours putting her to sleep because she is dreading returning to school. She spent the last three hours processing with me (at her initiation) all of the things that have been negatively impacting her at school, and this has become a typical nighttime routine. While we understand that it is the school’s philosophy and approach to teach that all students are ‘friends’ (and certainly that is a respectable ideal) we, as her parents, do not feel that it is in [M.R.]’s best interest to encourage her to pursue friendships with students who repeatedly threaten and/or cause bodily harm or otherwise erode her sense of safety and self worth. [M.R.] is very confused because she is told at school that [“Student A”] is her friend, so she continues to engage and interact with him, only to be rejected and many times physically injured in the process. We teach [M.R.] that there is a difference between a classmate and a friend, and that it’s ok for her to request and maintain distance from someone whose behavior is causing her harm. To that

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<sup>206</sup> *Id.*

<sup>207</sup> SWIS Student Dashboard for “Student A.”

<sup>208</sup> Emails with Tracy Garland and Parents of “Student 10,” 5/21/19.

<sup>209</sup> *Id.*

end, as we have discussed with Tracy [Garland], we would ask that as much distance as possible be kept between [“Student A”/ “Student B” and M.R.] between now and the end of the year. We would like to be able to finish out the school year without another incident.

We would still very much like to meet with you to discuss [M.R.]’s experience at Orchard this year and our perspectives as her parents (particularly regarding school protocol for handling incidents of bullying and racial discrimination); however this week is proving difficult for us to arrange a time as [Mr. Moss] is heading out of town on a last-minute work trip...”<sup>210</sup>

On May 28<sup>th</sup>, M.R. was absent from school, due to the matters addressed in the above email.<sup>211</sup> That day, Ms. Garland sent an email to Guidance Counselor Beeli, Behavior Facilitator Hill-Arnell, and Special Educator Annie Coppock in which she stated that Principal Trifilio told her to speak with him “about putting together a coverage plan for [M.R.]”<sup>212</sup> She added that M.R.’s “parents withheld her from school today and something needs to be in place when she returns tomorrow.”<sup>213</sup> The next morning, Ms. Beeli responded to the group as follows:

Abby and I spoke about trying to give some check in type coverage during times that you were not with [M.R.]. Mainly lunch, recess and specials. What we can realistically offer is to take a look at her choice of peer interactions during those times. Who is she sitting with and playing with when we check in on her. We have divided the week up the best we can. During specials also to take a look at what’s going on and inform the specials teacher to have an extra eye out for her behaviors/choices. And this is with the understanding of we have these times in our schedules and if an urgent matter arises we will have to attend to that. Also, if and when Annie has any paras who are free during the day she will send them into your classroom for that extra adult supervision piece.

Mark, will you be sharing this plan with the parents? I think it is vital here that they know we are offering the best we can. Also we will continue to share with parents how [M.R.]’s choices and behaviors add to the situation. They need to know she has a big part of this and they are only hearing part of the story. I know Tracy has worked really hard in that part. Maybe some more behavior write ups would help zone in and record some of these examples.<sup>214</sup>

Principal Trifilio’s response to Ms. Beeli’s email stated, “Yep, I’m on it.”<sup>215</sup>

Ms. Garland responded to the group and shared an excerpt from her January report card regarding M.R., including the statement that “It is harder for [M.R.] to accept responsibility when she offends someone, and reflecting upon her own choices and behaviors is a process her teachers support. Making good friends is important, and finding the best ways to get along with others is an ongoing goal for [M.R.]”<sup>216</sup> Ms. Garland wrote to her colleagues about this report card note, “I am working on report cards and wanted to share my January report card comment

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<sup>210</sup> Email from Mrs. Moss to Mark Trifilio, 5/28/19.

<sup>211</sup> *Id.*; Email from Mrs. Moss to Tracy Garland, 5/28/19.

<sup>212</sup> Email from Tracy Garland to Aili Beeli, Abby Hill-Arnell, Annie Coppock and Mark Trifilio, 5/28/19.

<sup>213</sup> *Id.*

<sup>214</sup> Email from Aili Beeli to Tracy Garland, Mark Trifilio, Abby Hill-Arnell, and Annie Coppock, 5/29/19.

<sup>215</sup> Email from Mark Trifilio to Aili Beeli, 5/29/19.

<sup>216</sup> Email from Tracy Garland to Aili Beeli, Mark Trifilio, Abby Hill-Arnell, and Annie Coppock, 5/29/19.

with you all. If you read it carefully you'll see that my concerns about personal responsibility and friendships were respectfully expressed.”<sup>217</sup>

On May 29, 2019, Principal Trifilio wrote to the Mosses:

I'm sorry to hear that [M.R.] was having a tough time coming back to school. As I mentioned, the last time I spoke with her, she was having a nice conversation with [the student] and wanted to be friends. This will hopefully continue to get better this spring and next year.

Tracy [Garland] and I have been talking about creating ways to provide support for the students and are working with the special educator, Annie Coppock, to begin including special support staff to work in the classroom and work to ensure [M.R.] is not being bothered (this is not a special education issue, just to find possible available staff members to supervise and support). I am also working with Aili and Abby to check in during transition times, especially lunch/recess to make sure the students are safely apart.

I can definitely meet with you to review your concerns. I can be available Monday, Tuesday or Thursday morning whenever you can make it...<sup>218</sup>

### May 31<sup>st</sup> Incident

Two days later, on Friday May 31<sup>st</sup>, there was another incident involving M.R. and “Student A.” Ms. Garland emailed Mrs. Moss, “while retrieving the children at Music today, [M.R.] reported that a peer had ‘flicked her’ in PE, which was the class before. I asked her if she told Mr. Hamlin and she said no. I reminded [M.R.] that while she can always tell me anything, she really needs to report directly to the teacher in charge at the time so they are aware and can help at that moment. We saw Mr. Hamlin in the hallway on our way back to the classroom and he had a private conversation with [M.R.] and the other peer. They resolved the situation by talking and ending with a hug. Mr. Hamlin can speak further with you about this if you have any other questions or concerns.”<sup>219</sup> The student was not given a behavioral referral for this conduct towards M.R.<sup>220</sup>

Mrs. Moss responded shortly afterwards, stating that her daughter “had mentioned the PE incident to me after school and I also reminded her that she should have told Mr. Hamlin when it happened. Sounds like everything was resolved – thank you!”<sup>221</sup>

### June 6<sup>th</sup> Meeting

On June 6, 2019, Mr. and Mrs. Moss met with Principal Trifilio to discuss their experiences at Orchard School, the issue of racism toward M.R., and to provide their suggestions for improvements to meet the needs of students of color.<sup>222</sup> The Mosses felt that that Principal Trifilio appeared visibly uncomfortable throughout the meeting.<sup>223</sup> They found several remarks he made about race problematic.<sup>224</sup> At one point, he asked Mr. Moss if he should call him “Black

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<sup>217</sup> *Id.*

<sup>218</sup> Email from Mark Trifilio to Mr. and Mrs. Moss, 5/29/19.

<sup>219</sup> Email from Tracy Garland to Mrs. Moss, 5/31/19.

<sup>220</sup> SWIS Student Dashboard for “Student A.”

<sup>221</sup> Email from Mrs. Moss to Tracy Garland, 5/31/19.

<sup>222</sup> Timeline by Mrs. Moss.

<sup>223</sup> *Id.*

<sup>224</sup> Interviews with Mr. and Mrs. Moss, 5/18/21.

or African American.”<sup>225</sup> Mr. Moss felt this was not asked in a way that was sensitive or respectful.<sup>226</sup> Principal Trifilio told them that he has built a trusting relationship with a group of Black kids at the school who were often getting in trouble.<sup>227</sup> He stated that he didn’t understand why the father of a fourth grade Black student was upset that his child was reading a novel about the KKK.<sup>228</sup> When Mr. Moss offered an explanation as to why that would be upsetting, Principal Trifilio responded, “Yeah, I just don’t get it.”<sup>229</sup> He told the Mosses that they would be happy with the first grade curriculum because they explore a lot of tough topics including slavery.<sup>230</sup> When they asked him how they would bring positive minority perspectives into the curriculum, the principal told them that there would be a multicultural potluck in the fall.<sup>231</sup> He did not provide an explanation to the Mosses as to how race-based incidents are reported or tracked, and did not give them a copy of the school policy or procedure related to race-based harassment or bullying.<sup>232</sup> Principal Trifilio said that he would “follow up” on the items they had listed in their May 15<sup>th</sup> email to him, but they never heard back from him about it.<sup>233</sup>

The last day of school for the year was on June 14, 2019.<sup>234</sup> By that point, the Mosses had decided that they would not be sending M.R. to Orchard School for first grade, based on their concerns about how she would be treated.<sup>235</sup> In the time that she had been attending a different school, M.R. has not had any behavioral issues, and has not experienced any bullying or harassment.<sup>236</sup>

In the months that followed after M.R.’s kindergarten year ended, M.R.’s parents continued to feel dissatisfied with how school administrators handled their complaints and how their daughter was treated at Orchard School.<sup>237</sup> In January of 2020, Mrs. Moss called the school district Superintendent, David Young, and outlined her concerns to him by phone.<sup>238</sup> He agreed to schedule an in-person meeting for Mr. and Mrs. Moss to talk with himself and Principal Trifilio.<sup>239</sup> Superintendent Young intended there to be two meetings – one in which they would hear the parents’ concerns and ask clarifying questions, and a second meeting in which they would discuss outcomes.<sup>240</sup>

The first meeting with Superintendent Young, Principal Trifilio, and Mr. and Mrs. Moss took place on February 12, 2020.<sup>241</sup> In the course of this meeting, the Mosses discussed their experience with Orchard School and made suggestions for improvements.<sup>242</sup> Principal Trifilio acknowledged that M.R.’s classroom teacher knew about the second death threat and failed to

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<sup>225</sup> *Id.*

<sup>226</sup> Interview with Mr. Moss, 5/18/21.

<sup>227</sup> Timeline by Mrs. Moss.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Email from Tracy Garland to Mr. and Mrs. Moss, 6/15/19.

<sup>235</sup> Interview with Mrs. Moss, 5/18/21.

<sup>236</sup> Interview with Mrs. Moss, 10/21/21.

<sup>237</sup> Interview with Mrs. Moss, 5/18/21.

<sup>238</sup> Interview with David Young, 11/19/21.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

inform the Mosses.<sup>243</sup> He stated that they had “dropped the ball on that.”<sup>244</sup> He also apologized for his comment to Mr. Moss about whether to call him “Black or African American.”<sup>245</sup> The Superintendent acknowledged to the Mosses that the school district had problems with race relations, which they were working to improve.<sup>246</sup> The administrators were encouraging the Mosses to re-enroll M.R. in Orchard School and assuring them that things would be better.<sup>247</sup>

After the meeting, Superintendent Young testified that he and Principal Trifilio reviewed the concerns expressed by the Mosses and felt that an investigation into their complaints was not warranted.<sup>248</sup> He felt that the threats that M.R. experienced were made by an immature student, whom the guidance counselor was working with, and he also noted that there were only two instances.<sup>249</sup> He testified that, after meeting with the Mosses, he had discussions with Principal Trifilio to evaluate what they had learned from the situation, what they could have done better, and what they could do differently in the future.<sup>250</sup>

On February 19, 2020, the parties met again to follow up on their first meeting.<sup>251</sup> The school administrators continued to encourage M.R.’s return to Orchard School.<sup>252</sup> They assured her parents that M.R. would not be in a classroom with “Student B.”<sup>253</sup> The administrators told the Mosses that M.R. could enroll in another elementary school within the district, if they wanted.<sup>254</sup> They also talked with the Mosses about plans to provide more training to staff at Orchard School, and described the district’s Diversity, Equity and Inclusion initiatives.<sup>255</sup> The Mosses were not satisfied with their meetings with the Superintendents and decided to keep their child at the private school, where she was doing quite well and not having any problems with other students.<sup>256</sup>

During the 2018-2019 School Year, the South Burlington School District had a Policy on the Prevention of Harassment, Hazing, and Bullying of Students which is generally consistent with the Model Policy issued by the Agency of Education, pursuant to 16 V.S.A. § 570 *et seq.*<sup>257</sup> The Agency of Education had also issued Model Procedures on the Prevention of Harassment, Hazing and Bullying of Students which would have been effective for South Burlington School District during this time period.<sup>258</sup> The Model Procedures address reporting complaints, and provides that specific actions be taken, including an investigation, within 1-5 days of receipt of a report of harassment.<sup>259</sup> In 2021, the South Burlington School District formally adopted its own Procedures, which are consistent with the Model Procedures.<sup>260</sup> Superintendent Young testified

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> Interview with Mrs. Moss, 5/18/21.

<sup>247</sup> *Id.*

<sup>248</sup> Interview with David Young, 11/19/21.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> Interview with Mrs. Moss, 5/18/21.

<sup>253</sup> Interview with David Young, 11/19/21.

<sup>254</sup> Interview with Mrs. Moss, 5/18/21.

<sup>255</sup> Interview with David Young, 11/19/21.

<sup>256</sup> Interview with Mrs. Moss, 5/18/21.

<sup>257</sup> South Burlington School District Policy F4, adopted 11/15/17.

<sup>258</sup> Agency of Education Model Procedures on the Prevention of Harassment, Hazing, and Bullying of Students.

<sup>259</sup> *Id.*

<sup>260</sup> South Burlington School District Procedures F4, adopted March 23, 2021.



to this investigation that had those new District Procedures been in place during the 2018-19, then the events experienced by M.R. probably would have triggered the procedures.<sup>261</sup> He asserted that even if that had occurred, it would not have changed the outcome.<sup>262</sup>

### Legal Analysis

The Vermont Fair Housing and Public Accommodations Act (VFHPAA) states:

An owner or operator of a place of public accommodation or an agent or employee of such owner or operator shall not, because of the race, creed, color, national origin, marital status, sex, sexual orientation, or gender identity of any person, refuse, withhold from, or deny to that person any of the accommodations, advantages, facilities, and privileges of the place of public accommodation.

Harassment is a form of discrimination under the law; thus, the anti-harassment provisions of Title 16 V.S.A. §11(a)(26)(A)-(B) are relevant here

(26)(A) "Harassment" means an incident or incidents of verbal, written, visual, or physical conduct, including any incident conducted by electronic means, based on or motivated by a student's or a student's family member's actual or perceived race, creed, color, national origin, marital status, sex, sexual orientation, gender identity, or disability that has the purpose or effect of objectively and substantially undermining and detracting from or interfering with a student's educational performance or access to school resources or creating an objectively intimidating, hostile, or offensive environment.

(B) "Harassment" includes conduct that violates subdivision (A) of this subdivision (26) and constitutes one or more of the following:

...

(ii) Racial harassment, which means conduct directed at the characteristics of a student's or a student's family member's actual or perceived race or color, and includes the use of epithets, stereotypes, racial slurs, comments, insults, derogatory remarks, gestures, threats, graffiti, display, or circulation of written or visual material, and taunts on manner of speech and negative references to racial customs.

Section 570f(a)(1) outlines the duties of schools to address harassment. It states that:

“An educational institution that receives actual notice of alleged conduct that may constitute harassment shall promptly investigate to determine whether harassment occurred. After receiving notice of the alleged conduct, the school shall provide a copy of its harassment policy, including its harassment investigation procedure, to the alleged victim and the alleged perpetrator. If either the alleged victim or the alleged perpetrator is a minor, the copy of the policy shall be provided to the person’s parent or guardian.”<sup>263</sup>

Section 570f(b) indicates that a public accommodations lawsuit can only be brought in Court “after the administrative remedies available to the claimant under the policy adopted by the

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<sup>261</sup> Interview with David Young, 11/19/21.

<sup>262</sup> *Id.*

<sup>263</sup> 16 V.S.A. § 570f(a)(1).

educational institution . . . have been exhausted.” Exceptions are permitted under various circumstances, including if “the educational institution does not maintain such a policy,” if “a determination has not been rendered within the time limited established under section 570a of this title,” or if “exhaustion would be futile.”<sup>264</sup>

The statute also states that, in order to prevail in an action alleging unlawful harassment, the plaintiff shall prove both of the following:

- (1) The student was subjected to unwelcome conduct based on the student’s or the student’s family member’s actual or perceived membership in a category protected by law by 9 V.S.A. §4502.
- (2) The conduct was either:
  - (A) For multiple instances of conduct, so pervasive that when viewed from an objective standard of a similarly situated reasonable person, it substantially and adversely affected the targeted student’s equal access to educational opportunities or benefits provided by the educational institution; or
  - (B) For a single instance of conduct, so severe that when viewed from an objective standard of a similarly situated reasonable person, it substantially and adversely affected the targeted student’s equal access to educational opportunities or benefits provided by the educational institution.<sup>265</sup>

The above statutes are based on the expressed statutory policy that “all Vermont educational institutions provide safe, orderly, civil and positive learning environments. Harassment, hazing and bullying have no place and will not be tolerated in Vermont schools. No Vermont student should feel threatened or be discriminated against while enrolled in a Vermont school.”<sup>266</sup> To that end, the law requires that schools “develop, adopt, ensure the enforcement of, and make available . . . harassment, hazing, and bullying prevention policies that shall be at least as stringent as model policies developed by the Secretary.”<sup>267</sup> Further, “Any school board that fails to adopt one or more of these policies shall be presumed to have adopted the most current model policy or policies published by the Secretary.”<sup>268</sup>

### **Prima Facie Case: Harassment**

In order to make a prima facie case of harassment, the Complainants must establish (1) that M.R. was subjected to unwelcomed conduct on the basis of her race or color; (2) the conduct was so severe or pervasive that it negatively impacted her equal access to the learning opportunities at Orchard School; (3) that the Complainants exhausted their administrative remedies or had a valid reason for bypassing them; and (4) that Orchard School failed to take prompt and appropriate remedial action to stop the conduct towards M.R.<sup>269</sup>

### **Element One: Unwelcomed Conduct on the Basis of M.R.’s Race or Color**

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<sup>264</sup> 13 V.S.A. § 570f(b).

<sup>265</sup> 13 V.S.A. §570f(c).

<sup>266</sup> 13 V.S.A. §570(a).

<sup>267</sup> 13 V.S.A. §570(b).

<sup>268</sup> 13 V.S.A. §570(b).

<sup>269</sup> 13 V.S.A. §570f; *Washington v Pierce*, 2005 VT 125 ¶¶ 35-37.

There is no question that M.R. was subjected to inappropriate threats and violent, harmful behavior while in kindergarten, which no child should have to endure. When children of color are exposed to harassment or bullying at school, it can have detrimental effects on their overall health, their mental well-being, their confidence and interest in school, and their academic performance.<sup>270</sup>

In order to meet the legal definition of harassment, there must be some evidence that race or color were a motivating factor for the harasser.<sup>271</sup> Race and color need not be the *only* motivating factor, but must have played a role.<sup>272</sup> Determining what motivated someone's conduct can be difficult, particularly when behavior is not overtly racist, but tainted or influenced by racial bias. The young age of all students involved presented additional challenges to this determination, as they were too young to be interviewed concerning the events.

This investigation was not able to uncover any evidence that the conduct perpetrated by "Student A" and "Student B" was motivated by M.R.'s race or color. Evidence did not show that "Student B's" threats were motivated by M.R.'s race. They were not reported to have included any type of racial slur or race-based comment, and were not made in the context of circumstances indicating that they were based on M.R.'s race or color. Similarly, this investigation did not find evidence that the assaults and other aggressive behavior which M.R. experienced at the hands of "Student A" were race-related. The student who perpetrated these actions had a documented track record of being physically aggressive not just towards M.R., but towards various other classmates, in the 2018-2019 school year as well as throughout the 2019-2020 school year. There were not race-based comments or other circumstances reported to this investigation which would lead to a finding that "Student A's" aggression towards M.R. was racially motivated. The "bully" report made by M.R. to her mother on February 6<sup>th</sup> appeared to involve a third student, who was not in M.R.'s class. In that instance, similar to "Student A" and "Student B," there was no indication presented to this investigation suggesting that this conduct was based on M.R.'s race or color. This investigation was not in need of a "smoking gun" as such evidence is rarely available in these types of cases. Had M.R. been the primary target of either students, one could infer that race and color played a factor. Without any evidence that race or color were motivating factors for those students, a court of law could not be persuaded that the threats, aggression, or bullying conduct meets the legal definition of harassment; a definition that admittedly does not reflect the experiences and realities of students of color.

Other incidents, such as the doll play incident on April 29<sup>th</sup> and the comments of the fifth grade "buddy," were clearly related to M.R.'s race and color. In the doll incident, M.R. was excluded from play expressly because of her skin color. The statements made by M.R.'s fifth grade "buddy" were also race-related. The student referred to the fullness of M.R.'s hair, her

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<sup>270</sup> See, e.g., S. Russell et al., *Adolescent Health and Harassment Based on Discriminatory Bias*, Am. Journal of Public Health, March 2012 (finding that young people who had experienced bias-based harassment were more likely than were those who had not experienced harassment to report mental health issues, substance abuse, truancy, and being threatened with a weapon); see also S. Leath et al., *Racial Identity, Racial Discrimination, and Classroom Engagement Outcomes Among Black Girls and Boys in Predominantly Black and Predominantly White School Districts*, Amer. Educational Research Journal, Jan 14, 2019 (exploring school-based discrimination as an academic risk factor); and see also Committee for Children, *When Bullying is Racially Motivated: Recognizing it for What it Is and Supporting Kids to be Anti-Racist Upstanders*, November 2, 2020 ("Bullying behaviors motivated by racial bias harm the physical, psychological, and academic health of their victims. Race-based harassment and bullying places youth of color at greater risk for depression, substance use, and truancy.")

<sup>271</sup> *Rivera v Rochester Genesee Regional Transportation Authority*, 743 F.3d 11, 23 (2d Cir., 2014).

<sup>272</sup> *Id.*

“big butt” and used a nickname that had racial overtones. M.R. complained to her parents that these remarks made her uncomfortable. These two occurrences of race-related peer conduct are sufficient to satisfy the first element of Complainants’ prima facie case.

#### Element Two: Severe or Pervasive Conduct that Substantially and Adversely Impacted M.R.’s Access to Educational Opportunities

The next step of the analysis is to examine whether the two occurrences of explicitly race-related conduct that M.R. experienced at Orchard School are sufficiently severe or pervasive to have, in themselves, negatively impacted M.R.’s access to educational opportunities. The April 29 incident of race-based exclusion by other kindergarten classmates was addressed immediately by the teacher with the students, and turned into a learning moment for all of the students. It is unclear from the record how pervasive the statements made by the fifth grade “buddy” were – whether they were repeated over time, or made on a daily basis. The fifth grade “buddy” was not in M.R.’s classroom, but it does appear that M.R. would have interacted with her 5<sup>th</sup> grade “buddy” daily, because he walked her from the classroom to her bus in the afternoon.

The law demands that these instances be viewed from an objective standard of a similarly situated reasonable person<sup>273</sup> – in other words, a kindergartener who is the only brown-skinned student in her class, who is being singled out by white students on the basis of her skin color. Both of these occurrences led M.R. to report the conduct to an adult because of how uncomfortable they caused her to feel. When viewed through this perspective, it is possible that the incidents would have substantially and adversely affected her equal access to the educational opportunities of Orchard School. The Mosses also described a student who changed over the course of the school year from one who was even-keeled, confident, excited, and eager to learn, to a child who was worried, self-disparaging, anxious, and dreaded school by the end of the year. This testimony lends support to the Mosses having satisfied this element of the claim.

#### Element Three: Exhaustion of Administrative Remedies

Although an exhaustion of administrative remedies may be required for court action, it is not required before an investigation is started or completed at the HRC. Nevertheless, this investigation finds that the Complainants did exhaust the administrative remedies provided by the Respondents, sufficient to satisfy this element. M.R.’s parents reported the race-related comments to the classroom teacher, who brought them to the attention of the principal. The Mosses met with the principal to discuss their concerns, more than once. They subsequently met with the Superintendent. After finding no action was taken about their concerns, they filed this Complaint at the Human Rights Commission. The Agency of Education’s Model Procedures on the Prevention of Hazing, Harassment, and Bullying include the HRC as an avenue for complaints. The school never provided any policy or procedure to the Mosses that would have notified them of any additional or alternative administrative remedies available.

#### Element Four: Prompt and Appropriate Remedial Action to Stop the Racially-Motivated Conduct

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<sup>273</sup> 16 V.S.A. § 570f(c)(2)(A-B).

This investigation is not able to conclude that the Complainants have met their burden on this point, with respect to race-based conduct.

The classroom teacher, Ms. Garland, did take prompt and appropriate remedial action to stop the race-related conduct M.R. experienced by her classmate and her fifth grade “buddy.” Ms. Garland addressed the race-based exclusion in doll play with the students in the moment. Although she could have, and should have, informed both sets of student parents immediately when the events occurred, it does appear that the actions taken in the moment did effectively put a stop to any further race-based conduct in the classroom.

Similarly, Ms. Garland responded quickly and appropriately to the comments made by the fifth grade “buddy” once they were known to her. After that, there is no report that any race-based comments were repeated by him. Based on this investigation’s finding that Ms. Garland took prompt and appropriate remedial action to stop the instances of racial harassment experienced by M.R., the Complainants have failed to establish a prima facie case of student-based racial harassment.

### **Prima Facie Case: Discriminatory Treatment**

In addition to their peer harassment claim, Complainants’ complaint also alleges disparate treatment on the part of the school staff. Essentially, Complainants claim that the school administrators treated M.R. differently than white students; that they failed to adequately respond to the violence and threats which M.R. endured in kindergarten; and that this differential treatment was due to her race or color.

In order to make out a prima facie case of discrimination in public accommodations on the basis of race or color, the Complainants must show that: (1) Complainants are members of a protected class; (2) Respondents are a place of public accommodations; (3) Complainants were denied accommodations, advantages, facilities, and privileges of the place of public accommodation; and (4) The denial of accommodations, advantages, facilities, and privileges was because of Complainants’ membership in a protected class.<sup>274</sup> The burden of proof at the prima facie case stage is “a relatively light one.”<sup>275</sup>

#### **Element One: Members of a Protected Class**

As a biracial family with a biracial child, Complainants are members of a protected class.

#### **Element Two: Place of Public Accommodation**

Orchard School is a “school” and therefore falls within the definition of a place of public accommodation.<sup>276</sup>

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<sup>274</sup> This statement of the prima facie case for public accommodations discrimination claims is based on the language of 9 V.S.A. § 4502 and blends case law discussing the prima facie case elements for other types of discrimination/public accommodations cases. *See, e.g., Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir. 2001), and *Callwood v. Dave & Buster’s, Inc.*, 98 F.Supp.2d 694 (D. Md. 2000) setting out prima facie case elements in §1981 discrimination cases in the context of commercial establishments as public accommodations.

<sup>275</sup> *Robertson v. Mylan Laboratories, Inc.*, 2004 VT 15 ¶ 24.

<sup>276</sup> 9 V.S.A. § 4501(a).

### Element Three: Denial of Public Accommodations

A public school obviously offers innumerable services, advantages, and privileges to students and families. Of significant relevance to this case, schools are charged with a statutory duty to provide a learning environment free from bullying and harassment, and to carry out policies and procedures related to that duty, as directed by the Department of Education. Also relevant here, schools provide communication to parents and families about children while in school. Schools and school staff also protect children from threats, danger, and harm.

In this instance, there are many ways in which the Mosses feel that they and their child were denied the benefits, privileges and services of Orchard School. This investigation finds that the Orchard School failed to adequately notify M.R.'s parents when their child received the second threat on March 19<sup>th</sup> and when the race-based exclusion from a classmate occurred on April 29<sup>th</sup>. Orchard School failed to perceive the complaints made by Mrs. Moss, and outlined in her May 14<sup>th</sup> letter, as notice of a harassment complaint. Orchard School failed to give the Mosses a copy of the applicable policies and procedures, and failed to consider or conduct an investigation into potential harassment. Additionally, Orchard School staff failed to effectively separate M.R. from the two classmates who harmed and threatened her, after a specific request from Mrs. Moss on March 21<sup>st</sup>. Orchard School ultimately failed to adequately protect M.R. from bullying, threats, and aggressive behavior at the hands of her classmates, and instead repeatedly suggested that M.R. had responsibility for those occurrences. These failures amount to a denial of the advantages, privileges and services provided by Orchard School.

### Element Four: Discriminatory Basis for the Denial of Public Accommodations

The last prong of the prima facie case of discrimination can be proven with direct evidence. Direct evidence relates to the strength of the proof of discriminatory animus and not whether it is "circumstantial" evidence. It is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the action.<sup>277</sup> A plaintiff that proves their case through direct evidence is not subjected to the McDonnell-Douglas burden shifting analysis often used for discrimination cases.<sup>278</sup>

#### *Direct Evidence*

Direct evidence links the alleged discriminatory animus with the challenged action(s).<sup>279</sup> Direct evidence "typically consists of clearly sexist, racist, or similarly discriminatory statements or actions . . ." <sup>280</sup> There are several instances of conduct and statements on the part of Orchard School staff which suggest that racial bias and discriminatory animus played a role here.

Of particular concern in this case is the prevalence of "adultification" against M.R. This is a documented form of racial bias, experienced by Black girls, where they are perceived as less

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<sup>277</sup> *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004).

<sup>278</sup> *Fall v LA Fitness*, 161 F.Supp. 3d 601, 605-06 (S.D. Ohio 2016)..

<sup>279</sup> *Warch v Ohio Casualty Ins. Co.*, 435 F.3d 510, 520 (4<sup>th</sup> Cir. 2006)

<sup>280</sup> *Coghlan v Am. Seafoods Co.*, 413 F.3d 1090, 1095 (9<sup>th</sup> Cir. 2005).

innocent and more adult-like than white girls of the same age.<sup>281</sup> The conduct and statements by several staff members at Orchard reflect this racially-biased perception of M.R.

On March 26, in the context of a discussion about the threats and assaults M.R. was experiencing at school, Principal Trifilio described M.R. as “aggressive” and asked her parents whether she was “bossy.” Similarly, Ms. Garland used terms like “socially aggressive” and “savvy” to describe M.R. in her meeting with Mrs. Moss on March 21. This form of bias was also noted in the way in which Ms. Beeli, the guidance counselor, felt that M.R.’s parents needed to know that M.R.’s “choices and behavior” “had a big part” in the aggression and threats she experienced from “Student A” and “Student B.”<sup>282</sup> Adultification also occurred at the end of the school year, when Ms. Beeli and Ms. Hill offered to take part in a “coverage plan” for M.R., but would only monitor M.R.’s conduct and not the “choices and behavior” of the white students who had been threatening and assaulting her.

Principal Trifilio also made troubling remarks towards the Mosses that reflected racial insensitivity and ignorance. In their June 6<sup>th</sup> meeting, he asked Mr. Moss, who is Black, what he “should call” him – Black or African American – in a way in which Mr. Moss felt was insensitive. Principal Trifilio complained to the Mosses that he could not understand why a parent of color would be upset about a fourth grader reading about the KKK. Racial bias also permeated the principal’s description of how he was trying to cultivate relationships with a “group of black boys” who were “always getting into trouble,” telling the Mosses that the first graders would be discussing slavery in class, and touting an annual “multicultural potluck” as a way to bring positive minority perspectives into the student curriculum.

Based on the racial bias of adultification and the problematic statements of Principal Trifilio, there is sufficient direct evidence of racial animus on the part of the Orchard School staff to find that their treatment of M.R. was discriminatory. Given that a prima facie case of discrimination has been made based on direct evidence of racial animus, the analysis involving the McDonnell-Douglas burden-shifting is not necessary. Nevertheless, this investigation will analyze the indirect evidence of disparate treatment as well, below.

### *Indirect Evidence*

Absent direct evidence, the McDonnell-Douglas analysis provides that a Complainant can prove the last element of a prima facie case by showing that they were treated differently than a similarly situated comparator, and/or received services in a markedly hostile manner and in a manner in which a reasonable person would find objectively discriminatory.<sup>283</sup> Then, a Respondent may rebut the prima facie case of discrimination by producing a legitimate, non-discriminatory reason for the treatment. If they do so, then the Complainant may persuade the trier of fact that those reason lack credibility or are pretext for discrimination.

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<sup>281</sup> See R. Epstein et al., *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, Georgetown Law Center on Poverty and Inequality, available at: <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf>

<sup>282</sup> Email from Aili Beeli to Tracy Garland, Mark Trifilio, Abby Hill-Armell, and Annie Coppock, 5/29/19.

<sup>283</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

## *Comparators*

This investigation has found evidence that Orchard School staff treated M.R. differently than other students. First, there is the issue of how the school addressed the death threats made by “Student B.” It is notable that when M.R. and another, white classmate were both threatened by “Student B” on January 15, 2019, the principal notified the parents of the threat by phone. However, when M.R. was the sole recipient of an even more specific and concerning death threat by the same student on March 19, 2019, the school failed to notify the parents at all. In fact, Ms. Garland, who was aware of the specific threat made by “Student B,” actually sent a behavior referral home to the M.R.’s parent, which only discussed M.R.’s conduct. This comparison suggests that when white students were threatened, the school took the matter more seriously than when just M.R. was threatened.<sup>284</sup>

It is also worthwhile to compare how Ms. Garland addressed complaints by other parents about M.R. with how she responded to complaints that the Mosses made about white children. In November, Ms. Garland received a report from the parents of another classmate that M.R. was being unkind and causing her to feel scared. Ms. Garland responded by sitting M.R. down with her classmate that very day, and supporting resolution and restoration. This resulted in the classmate immediately reporting an improvement. Also, when other parents complained about M.R. on March 7, Ms. Garland again sat the students down right away to bring resolution and restore the relationship. Her intervention was once again reported to have positive results. However, when Mrs. Moss complained about aggressive conduct on the part of “Student A” against M.R., there was no such attempt at resolution and restoration that would bring relief for M.R. Instead the conduct continued to occur, and there was no evidence in this investigation that Ms. Garland ever worked to bring resolution for M.R. Rather, she cited M.R.’s “difficulty taking responsibility” and “reflecting on her choices and behaviors” in her midyear report card. A reasonable person could find that this differential treatment is objectively discriminatory.

## *Markedly Hostile*

Complainants have also put forward some evidence to show that they were treated in a “markedly hostile manner” that a reasonable person would find objectively discriminatory.<sup>285</sup>

M.R., a kindergartener, was repeatedly exposed to physical aggression and twice exposed to death threats. The teacher failed to notify the Mosses of the second death threat and instead wrote out a disciplinary referral for misbehavior on the part of M.R. The administrator did not inform them of any tangible actions taken to address the threats or the ongoing physical violence. Instead, they were offered explanations for the conduct that M.R. experienced which either

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<sup>284</sup> This investigation also notes that a lack of documentation and memory loss have hindered a more in-depth comparator analysis concerning the death threats. On December 5, 2018, “Student B” made death threats against other students not in the same kindergarten class. The school maintained very limited records of this threat, and staff are unable to recall for this investigation what race or color the recipients of those threats were. Assuming they were white, then it is worthwhile to compare the action taken against the student in that instance (a major behavior referral from the principal) to the action taken against the same student for the January 15, 2019 threat against M.R. (no documented behavior referral). If the students who were threatened on December 5, 2018 were students of color, then this would tend to show a race-based pattern or practice of threats, which would lend support to the Complainant’s harassment claim above. Should this matter proceed to litigation, the HRC reserves the right to engage in discovery to more fully explore this and other possible comparators.

<sup>285</sup> *Callwood v Dave & Buster’s Inc.*, 98 F.Supp.2d 694 (D. Md. 2000).



justified the behavior of the aggressors, or placed responsibility on M.R. Ms. Garland referred to M.R. as “savvy” and “socially aggressive,” while Principal Trifilio stated that the student who assaulted her “just had nervous energy” and the student who threatened her was “learning the power of his words.”

When M.R. was excluded from play by another classmate due to her skin color, the teacher failed to notify her parents of the incident. She only provided information about what happened when asked by M.R.’s mother. She took efforts to communicate “face-to-face” with the parents of the child who was responsible for the exclusion, but did not exercise the same concern towards the child who was actually excluded.

Additionally, Mrs. Moss’s March 21<sup>st</sup> request to separate the threatening and violent children from M.R. was not honored. This resulted in additional instances of assault against M.R. When an action plan for “coverage” was finally put into place, with only a couple of weeks left in the school year, the Guidance Counselor and Behavioral Facilitator only offered to observe M.R.’s choices and did not at all mention actions that would prevent other children from harming M.R. The Guidance Counselor even cautioned the Principal to tell the parents of M.R. that her “choices and behaviors add to the situation.” She also suggested that “more behavior write-ups” about M.R. be sent home to make M.R.’s parents aware of the fact that, according to her, M.R. had “a big part to play” in how she was being treated by her classmates.

In response to the Mosses detailed, written complaint on May 14<sup>th</sup>, the Principal never initiated an investigation, despite the requirements of the Model Procedures for Prevention of Harassment, Hazing and Bullying of Students. The totality of this evidence is sufficient to show that Complainants were treated in a markedly hostile manner that a reasonable person would find objectively discriminatory.

### *Legitimate Non-Discriminatory Reasons*

The burden now shifts to the Respondent to provide legitimate non-discriminatory reasons for the way it handled the situation. The Respondent’s burden at this stage “is solely one of production, not persuasion.”<sup>286</sup> The Respondent has put forward evidence of behavioral referrals which were made concerning the two most problematic classmates of M.R.’s, which show that the school was taking some efforts to address the conduct of those children. They also testified that they spoke with the parents of those children and were working with them to improve their behaviors. The Principal assessed the threats and did not find them to be substantiated. The classroom teacher used a “restorative approach” to address the instances of race-based behavior directly with the students.<sup>287</sup> The Principal acknowledged that they made a mistake by failing to notify the Mosses of the second death threat. He also said that he was working with the parents of “Student B” to put a stop to the threats. This investigation finds these reasons are adequate, given that the burden is not one of persuasion.

### *Pretext*

Since the Respondent has met their burden of showing legitimate non-discriminatory reasons existed, then “the presumption of discrimination disappears.”<sup>288</sup> The burden now shifts

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<sup>286</sup> Id. ¶ 26.

<sup>287</sup> Respondent’s Memorandum of Law, 12/16/21.

<sup>288</sup> Robertson, 2004 VT 15, ¶ 27.

