STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION

KY'ALLA WILLIAMS, Complainant, vs. SCHOOL CITY OF MISHAWAKA Respondent.	Docket No.: EDra10040160 File Dated: OCT 26 2018 Indiana Civil Rights Commission

FINAL ORDER

On August 16, 2018, Hon. John Burkhardt, Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") issued his Findings of Fact, Conclusions of Law, and Order ("Order"). The parties had opportunity to object to the Order; neither party objected. With no objection or intent to review on record, the Commission shall affirm the Order. IC 4-21.5-3-29(c). After consideration of the record in this matter and the Order,

THE COMMISSION HEREBY ORDERS:

1. The findings of fact and conclusions of law as stated in the Order, a copy of which is attached hereto, are incorporated herein by reference. IC 4-21.5-3-28(g)(2).
2. The Order is AFFIRMED under IC 4-21.5-3-29 and hereby becomes the Final Order disposing of the proceedings. IC 4-21.5-3-27(a).

Either party to a dispute filed under IC 22-9 may, not more than thirty (30) days after the date of receipt of the Commission's final appealable order, appeal to the court of appeals under the same terms, conditions, and standards that govern appeals in ordinary civil actions. IC 22-9-8-1.

ORDERED by the Commission by majority vote on the 21TH day of September, 2018, and signed

this 21 day of September, 2018

Indiana Civil Rights Commission

Certificate of Service

Served this 26 day of October by United States Mail on the following:

Ky-Alla Williams
808 24th St.
South Bend, IN 46615

Tamika Kelly
808 24th St.
South Bend, IN 46615

School City of Mishawaka
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STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION

KY'ALLA WILLIAMS, Complainant, vs. SCHOOL CITY OF MISHAWAKA Respondent.	Docket No.: EDra10040160 DATE FILED AUG 16 2018 OFFICE OF THE ADMINISTRATIVE JUDGE

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On March 24, 2010, Tamika Kelly ("Kelly") filed a complaint of discrimination ("Complaint") on behalf of her then-minor daughter, Ky'Alla Williams ("Complainant"), alleging School City of Mishawaka ("Respondent") unlawfully discriminated against Complainant in education because of her race in violation of the Indiana Civil Rights Law (Ind. Code § 22-9) ("the ICRL").

On March 26, March 27, and April 13, 2011, then presiding Administrative Law Judge for the Indiana Civil Rights Commission ("ICRC"), Hon. Robert Lange, conducted a hearing at 1402 South Main Street, Mishawaka, Indiana, St. Joseph County, Indiana. Kelly, on behalf of Complainant, still a minor, was present, and the case in support of the complaint of discrimination was presented by ICRC Staff Attorney Frederick S. Bremer in the public interest. School City of Mishawaka ("Respondent") was present by its representative, Gregg Hixenbaugh and was represented by Counsel Jamie C. Woods and Lisa G. Schoetzow jointly of the firm Thorne Grodnik, LLC.

Complainant's case in chief was presented through witness testimony of Donald Wilson, Evelyn Wilson, Tamika Kelly, and Ky'Alla Williams. Respondent presented its case in chief through testimony of Greg Hixenbaugh, Jayden Starks, Abigail LaPlace, Peyton Huling, Quentin Kindig, Tiffany Johnson, Jayden Foster, Haley Lisenko, Connie Hoshal, Jeff Sherrill, Rose Clark, Dave Troyer, Latosha Toplin, Karen Baierl, Bradley Addison, Chad Brugh, Shelley Nowacki, and Eric Laudeman. Complainant called Cry'shalla Toplin as rebuttal witness.

Through the course of the hearing, Stipulated Exhibits A through C, F through W, X through II, KK through NN, PP, and QQ were admitted into evidence without objection. Exhibits D, E, Y were entered over the objection of ICRC counsel.

Respondent filed its **"Proposed Findings of Fact, Conclusions of Law, and Order"** on August 1, 2012 and a Post-Trial Brief on August 3, 2012. On August 1, 2012, Complainant filed **"Proposed Findings of Fact, Conclusions of Law and Order"** and a Post-Trial Brief.

Following Judge Lange's resignation, two other Administrative Law Judges for the ICRC presided over this matter with no dispositive order being rendered. On July 16, 2018, the present Administrative Law Judge for the Indiana Civil Rights Commission ("ICRC"), Hon. John F. Burkhardt, determined based on the entire record that an attempt at a repeated hearing was not necessary because this case does not fall within the "narrow set of cases hinging entirely on demeanor as admitted into evidence at a hearing." *Stanley v. Review Board of Department of Employment & Training Services,* 528 N.E.2d 811, 814 (Ind. Ct. App. 1988). (emphasis supplied). The current Administrative Law Judge, the appointed Presiding Officer over this case in which a hearing was already held, "stands in the same position as a reviewing court" and can, with care, "assess independently [the] evidence without invading the province of the trial court." *Cardinal Ritter High Sch., Inc. v. Bullock*, 17 N.E.3d 281, 291 (Ind. Ct App. 2014). Substantial evidence has already been admitted through voluminous stipulations, testimony, and exhibits sufficient to support ample "paper review" of the file and determination of the case based on the record at hand. *Roman Marblene Co. v. Baker*, 88 N.E.3d 1090, 1097 (Ind. Ct. App. 2017), *transfer denied,* 97 N.E.3d 236 (Ind. 2018).

Having carefully considered the foregoing and being duly advised in the premises, the presiding Administrative Law Judge for the ICRC hereby issues – pursuant to IC 4-21.5-3-27 – the following Findings of Fact, Conclusions of Law, and Order disposing of the case. **In the absence of an objection by a party under IC 4-21.5-3-29(d) or the ICRC's voluntary administrative review under IC 4-21.5-3-29(e), the ICRC shall affirm this order and it will become the final order in this case.** (IC 4-21.5-3-27(a), 29(c)).

FINDINGS OF FACT

I. Background

1. Respondent is a governing body of the public school system in Mishawaka, Indiana; Emmons Elementary School ("Emmons") and John J. Young Middle School ("John Young") are schools within this school system. (RP's Proposed FFCLO, p.2 NO.2).

2. At all times relevant to the complaint, Respondent maintained a policy for suspension or expulsion as outlined in "Rules of Student Conduct," "Policy 5500." Grounds for suspension or expulsion included:

> "Engaging in conduct that disrupts or interferes with school purposes. Such as the use of violence, force, noise, coercion, threat, intimidation, fear, passive resistance, or other comparable conduct, or urging other to engage in such conduct." (*sic*).
> (Exhibit P).

3. Ky'Alla Williams ("Williams"), was a sixth grade student at Emmons during the 2010/2011 academic year. (Tr. Vol. I 214:25-215:1). The following year, Williams transitioned to John Young for her 7th and 8th grade year. (Tr. Vol. I 16:24).

4. Williams is an African American female. (Tr. Vol. I 214:13-15).

5. Jayden Starks ("Jayden"), Williams' fellow student at the time, is a Caucasian female. (Tr. Vol. I 215:21).

II. Circumstances Underlying Disparate Treatment Claims

6. On the morning of Wednesday, March 3, 2010, Williams and her sixth grade classmates, including Jayden, were in physical education class playing a game called "Scoop Ball." The game involved passing a whiffle ball over a volleyball net with a plastic, handheld "scoop." (Tr. Vol. II 387:11-22).

7. Williams and Jayden were playing in adjacent groups, but were on opposite sides of the net. (Tr. Vol. II 365:4, 219:5).

8. A conflict developed between Williams and Jayden. It is highly disputed amongst the parties whether Jayden threw a ball or two at Williams. (Exhibit S, 11:3; Tr. Vol. II 366:12-21). There is no dispute that Jayden said to Williams something to the effect of "Just because you are black, doesn't mean you can beat people up." (Tr. Vol. II 366:22-24). Williams crossed under the net to Jayden, who stood there watching Williams walk up to her, and Williams hit her. (Exhibit S 11:6-7; Tr. Vol. I 279:23-25, 282:19-24, 284:1, 280:1-2, 280:8 "I hit her.").

9. The scuffle ended when Jayden "was on the ground," Williams "saw, like, [Jayden] was really hurt" and "stopped hitting her," and Jayden "started crying;" two other students, Abby and Tiffany, broke up the fight, pulling Williams away from Jayden. Williams was not crying and testified that she "didn't get hurt." (Exhibit S, Tr. 11:21, 12:16-23; Tr. Vol I 219:11-13, 281:21-24, 282:3, Vol. II 367:23-24).

10. Gym teacher Mr. Vanslager ("Vanslager"), who was responsible for monitoring the students during the class, did not witness the altercation; he acquired no first-hand knowledge about it due to his location at the time. (Exhibit D, E, S). He came on the seen soon after, however, and interviewed students about what had happened. (Tr. Vol. I 220:3-25). Vanslager wrote a Disciplinary Referral naming Williams, checking "Fighting," and "Off Task," and explaining: "Fighting/punches exchanged in gym class playing Scoop Ball. Was hit with a wiffle [sic] ball thrown at her by Jayden." (Exhibit A). This is the Disciplinary Referral later reviewed and signed by Emmons Principal Jeffrey Sherrill ("Principal Sherrill"), a Caucasian male. (Exhibit A).

11. Williams and Jayden were sent to Principal Sherrill's office along with the Disciplinary Referral, which was "the starting point" of Principal Sherrill's investigation. When Williams and Jayden arrived at the office, Principal Sherrill and Emmons Social Worker Rose Clark, an African American female, interviewed Williams and Jayden separately about what happened. (Tr. Vol II 509:10-12; 520:12-521:5; 524:10-13).

12. Principal Sherrill and Ms. Clark subsequently interviewed seven student witnesses on the same day of the incident, one at a time. (Tr. Vol II 526:8-9). The students were Peyton Huling, Cry'shalla Toplin, Jason Foster, Tiffany Johnson, Abby LaPlace, Quinten Kindigs, and Haley Lisenko. (Exhibit D, E; Tr. 525:3-8, 467:3-6). These students were selected based on indications of their potential knowledge of the situation. (Tr. Vol. II 525:22-25 "If a student came in and told me the story about the incident, if they said someone else's name, we would note that down and we spoke with that student, too.")

13. Principal Sherrill personally took notes during the interviews. (Tr. Vol. II525:15-19). Those notes were admitted into evidence as Exhibit D and Exhibit E.

14. According to those contemporaneous notes, each of the seven students had provided affirmative statements to Principal Sherrill stating that Williams attacked Jayden physically, describing Williams' behavior with language including but not limited to:

i. "On Tuesday, if she almost got hit she (Ky'Alla) would run after people. Ky'Alla went under the net [and] knocked Jayden to the floor.";

ii. "Ky'Alla accidently hit Jayden, then [she] hit Jayden on purpose.";

iii. "Ky'Alla hit Jayden at least 10 times.";

iv. "[Ky'Alla] ran at Jayden and got on top of her and started to hit Jayden.";

v. "Ky'Alla threw a ball at Jayden accidently but it didn't hit her... Ky'Alla accused Jayden of talking about her. ... Ky'Alla went over to Jayden and Jayden tried to get away. Ky'Alla knocked Jayden down and hit her at least 5 times, [probably] a little bit more than 5."

vi. "Ky'Alla didn't understand that the ball hit her accidently. Ky'Alla began taunting Jayden. Jayden made the comment, 'Just because you're black doesn't mean you can beat people up.' Ky'Alla was...taunting Jayden. Ky'Alla was told to just, 'Shut up.' Ky'Alla said, 'If you say shut up to me again, I'll...' [and she] didn't finish [the] sentence. I walked Ky'Alla away [but] Ky'Alla kept going. Kylla*(sic)* hit Abby [while] jerking away from me. [Ky'Alla] ran to Jayden and pulled Jayden to the floor. Ky'Alla started hitting Jayden. Jayden was in the 'armadillo position.' Ky'Alla hit Jayden more than 10 times. [Ky'Alla] took Jayden to the floor by putting Ky'Alla's knee in her back. ... This was scary. [Jayden] had trouble pulling Ky'Alla off. ...Jayden's ponytail was [pulled] out."

vii. "I saw some people trying to get Ky'Alla to back off from Jayden. I saw Ky'Alla throw a scoop at Jayden. ... Ky'Alla pushed Jayden and Ky'Alla then started hitting her."

viii. "Ky'Alla kept throwing balls at Jayden and finally Jayden threw one back. Then Ky'Alla threw the [scoop] and ball at Jayden. ... [Ky'Alla] knocked Jayden down and started punching her. Prior, both [Ky'Alla and Jayden] got hit with balls."

(Exhibits D, E).

15. Per the notes, the students' descriptions of Jayden's behavior included but were not limited to:

i. "accidently hit [Ky'Alla with a ball]";

ii. "threw the ball back and hit Ky'Alla",

iii. 'threw [a ball] back";

iv. "Jayden tried to get away";

v. "Jayden was in the 'armadillo position.'"

vi. "[Jayden] had trouble pulling Ky'Alla off. ...Jayden's ponytail was [pulled] out."

vii. "Ky'Alla kept throwning balls at Jayden and finally Jayden threw one back. Then Ky'Alla threw the [scoop] and ball at Jayden."

viii. "Jayden ran into the hallway trying to get away from Ky'Alla."

(*Id.*).

16. The students' statements as recorded by Principal Sherrill corroborate students' hearing testimony about the "just because you're black" comment by Jayden. (*Id.*). The statements also show that the information in front of Principal Sherrill – and in his mind at the time of his issuing discipline – included repeated witness to disparately physically aggressive action on Williams' part.

17. Both Williams and Jayden were disciplined – both were suspended; the character of the discipline was discussed and decided upon by Principal Sherrill and Ms. Clark. (RP's Post Trial Brief, p.3).

18. Approximately around the morning time on March 3, 2010, Kelly had been notified by phone that Williams "needed to be picked up from school;" Kelly made arrangements to speak with Principal Sherrill and Ms. Clark and headed to the school after leaving work. (Tr. Vol. I 90:10-13). Williams testified that in their meeting, Principal Sherrill said "Ky'Alla went under the net and assaulted Jayden," that "Jayden was on the ground in a fetal position and Ky'Alla punched her seven to ten times," and that "[b]oth girls are going to get equal punishment because they were both fighting." (Tr. Vol. I 99:10-13).

19. A March 4, 2018 "Notice of Student Suspension" signed by Principal Sherrill and addressed to Williams' mother stated in part that Williams "was suspended from attendance at Emmons School for (2.5) school days beginning on (Wednesday, March 3, 2010)," and "this student should return to school at the beginning of the school day on (Monday, March 8, 2010). (Exhibit B). The notice described Principal Sherrill's investigation and determination that: "When the other student made the comment, 'Because you are black doesn't mean you can beat people up.'; Ky'Alla attached the other student, knocked her to the ground and repeatedly punched her...," citing Ky'Alla as having "[v]iolated the following established written rules or

provision(s) of the Indiana Code: 'Engaging in conduct that disrupts or interferes with school purposes such as the use of violence, force, noise, coercion, threat, intimidation, fear..'" (*Id.*).

20. Jayden was issued an in-school suspension for the remainder of the school day on March 3, 2010. (Exhibit B).

21. After Williams heard from a friend that Jayden was in school the next day, March 4, 2010, Kelly, her stepfather and her mother went to the school that day to meet with Principal Sherrill on a walk-in basis. (Tr. Vol. I 100-102). They met with Principal Sherrill and proceeded in contention with him, concerned with the difference in the girls' suspensions. (Tr. Vol. I 101-106). The exchange ended with Kelly providing Principal Sherrill a list of "names of other witnesses," and Principal Sherrill's saying he would interview them. (Tr. Vol. I 106).

22. Though dated March 9, 2010, subsequent to Respondent's having suspended Williams and Jayden, Vanslager made further record of the incident in an email titled "Assault Incident," stating in part that:

> "While playing, Jayden hit Ky'Alla accidentally while throwing the wiffle ball across the net and laugh about it because she said she did not mean to hit Ky'ALla (I do not think she did);" "Ky'Alla interpreted it differently and threw the ball back (with her scoop) at Jayden;" "Jayden picked up the ball and threw it back and hit Ky'Alla again;" "Kay'Alla(*sic*) came over the net to Jayden's side;" "Words were exchanged and Ky'Alla assaulted Jayden;" and "Jayden did not fight back."
> (Exhibit Y).

23. Principal Sherrill's internal investigation, based on the information he received from students and staff, yielded a race-neutral basis for different discipline – a record which differentiates between Williams and Jayden as having engaged in different behavior. Specifically, Williams appeared to Principal Sherrill as having far exceeded Jayden's physical aggression, and Jayden appears to not have returned like physical aggression.

24. There is no indication that Williams missed any of the required ISTEP tests as a result of her suspension, as Williams completed each graded section of the ISTEP test. An experimental/ungraded section of the ISTEP test was scheduled for March 4, 2010 and March 5, 2010 at Emmons Elementary School. Williams passed the Mathematics and Language Arts 2010/6th Grade ISTEP test. (Exhibit R).

The Police Report

25. Principal Sherrill filed a Police Report concerning the fight incident, entered on March 4, 2010 at 9:45:04 PM by Officer Eric Laudeman. The Report Narrative reads, "Emmons School

Principal Jeff Sherrill reports a fight at his school. Mr. Sherrill advised that at the listed time, Ky'Alla Williams (11) punched [redacted], several times. Ky'Alla was suspended for fighting and [redacted] was given detention for instigating the fight. Mr. Sherrill asked that the incident be documented in a police report." (Exhibit C).

26. Kelly did not find out about the police report filed against her daughter until she went to the police station herself regarding her police report against Connie Hoschal (discussed below). (Tr.Vol. I 122:7-123:25).

27. Principal Sherrill did not consult with Gregg Hixenbaugh, Executive Director for Human Resources and Legal Counsel ("Hixenbaugh"), or any other administrator or higher-level supervisor before filing the report. (Tr. Vol. II 350:12). Testimony indicated it is Respondent's "standard practice" for a principal to exercise his authority to suspend a student without consulting a central administrator, and it is also "within the norm" for a principal to contact law enforcement regarding student behavior at school following "overly aggressive conduct" or a "serious event." (Tr. Vol. II 350:23-351:2, 361:10-20).

28. The report was purportedly made by Principal Sherrill as "informational documentation" in case there were problems in the future. (Tr. Vol. III 696:5). No charges were made against Williams, and hearing testimony indicated the report would essentially be set aside or thrown away, or "round-filed," and it would not be contained in a student's cumulative school records. (Tr. Vol. III 692:15-17, 706-710).

29. The evidence shows a race-neutral reason for the difference in Williams' and Jayden's discipline and the preponderance of evidence does not show that Respondent's reason was pretext to obscure racially-motivated intent. Based on the information Principal Sherrill was given, it is found that his motives were non-racial in nature and that he actually viewed Williams conduct different from – and more severe than – Jayden's.

30. There are no other candidates for a similarly-situated "comparator."

31. Nothing in the record indicates that race motivated any of Respondent's conduct discussed above, or that Respondent disparately treated Williams because of her race.

III. Circumstances Underlying Harassment Claim

32. Connie Hoschal ("Hoschal"), a Caucasian female, is the mother of Alyssa Hoschal ("Alyssa") and three others. Alyssa was a fifth grade student at Emmons Elementary in 2010. (Tr. Vol. II 447:7-9, 449:21).

33. The week following Williams' return to school following her suspension, Williams reported to her mother that while Williams was walking into school, Hoschal had "stuck her tongue out" at Williams from her car. (Tr. Vol I 113:9-10). Hoschal denies this. (Tr. Vol II 452:13-16).

34. Kelly subsequently went into the school and discussed the incident with Ms. Clark. (Tr. Vol I 114:2-15:8). Ms. Clark promised that she would talk to Hoschal and "tell her to stop," yet Hoschal continued similar types of conduct. (Tr. Vol. II 115:7-8).

35. Kelly returned to the school another day and spoke with Principal Sherrill and Ms. Clark about the conduct by Hoschal, reporting that Kelly had herself witnessed "dirty looks" when she walked her daughter into the school. (Tr. Vol I 120:1-121:9). Principal Sherrill promised to talk to Hoschal.

36. At some point following Kelly's meeting with Principal Sherrill, Hixenbaugh, met with Hoschal to discuss Kelly's complaints. (Tr. Vol. II 327:4-5, 334:9-335:4). After meeting with Hoschal at that point in time, Hixenbaugh did not believe the circumstances warranted issuing a "no trespass" order against Hoschal and he indicated to Kelly that the school administration would be monitoring the situation.

37. Kelly testified that she attempted to meet with the Superintendent Mills about Hoschal's conduct, but was never contacted to schedule a meeting. (Tr. Vol I. 119:20-120:9).

38. Kelly also filed a police report against Hoschal, alleging harassing communication none of which explicitly related to race. (Tr. Vol. I 121:14; Exhibit Z).

39. Williams told her mother that Hoschal continued to give Williams dirty looks while she was entering and leaving the school every day. (Tr. Vol. I 125:12-14). Kelly met with Ms. Clark again, expressing frustration about the continued conduct and about having to miss work hours to ensure Williams was getting to school safely. (Tr. Vol I. 125:16-18). At that meeting, Ms. Clark provided Kelly with an application for a before-and-after school program with the Boys and Girls Club. (Tr. Vol. I. 125:19-25). The program would allow Williams to arrive at school early and stay later, thereby avoiding Hoschal. The School waived the enrollment fee for the program. (Tr. Vol. I 126:3-4).

40. Nothing in the record indicates that any such conduct of Hoschal's towards Williams was race-related. Furthermore, nothing in the record indicates Respondent's response to any such conduct by Hoschal or Respondent's handling of Kelly's complaint about it was based in whole

or in part on race. The preponderance of evidence does not show that Respondent denied Williams any equal educational opportunities by virtue of an environment hostile to Williams because of her race.

IV. Circumstances Underlying Retaliation Claim

41. On March 24, 2010, Kelly filed the subject complaint of discrimination, ICRC NO. EDra10040160, against Respondent alleging unlawful discrimination in education based on "race."

42. On or around the end of Williams' sixth grade school year, the sixth grade students from Emmons and other elementary school classes took a customary field trip to John Young for orientation. Principal Sherrill, as was customary for all principals of attending schools, joined the students on the trip. (RP's Proposed FFCLO, p.5, NO. 17). Williams testified that she witnessed Principal Sherrill talking with another teacher and with David Troyer ("Principal Troyer"), Principal of John Young, and that Principal Sherrill said her name to Principal Troyer and pointed to her. (*Id.*; Tr. Vol. I 309:1-311:5). Williams testified that she believed Principal Sherrill was telling the teacher and Principal Troyer about her, her disciplinary history at Emmons, and her pending civil rights complaint against the school. Principal Sherrill testified that he did not point out Williams to Principal Troyer in the cafeteria. (RP Proposed FFCLO, p.5, NO. 17).

43. During her 7th and 8th grade years at John Young, Williams' teachers filed at least seven (7) "Disciplinary Referrals" for Williams, each involving separate and distinct instances, the dates and descriptions of which are, in part:

i. 9/15/2010: "Ky'Alla has been tardy (3) times during this class period. (9/8, 9/14 & 9/15); written by "Study Lab" teacher. (Exhibit G).

ii. 1/4/2011: "Ky'Alla was spraying perfume on herself and other studnets in the hallway. While doing she sprayed the perfume in several students' faces and in one student's eyes. Student had to sent to the nurse to flush out his eyes;" written by "Mr. Allison." (Exhibit H).

iii. 2/11/11: "Ky'Alla (along w/ 5 other students) were completely rude and disrespectful to a substitute teacher.... Team was consulted + decided to write all students involved referrals;" written by "Richards." (Exhibit I).

iv. 2/18/2011: "Bullying;" written by "Crocker." (Exhibit J).

v. 8/26/2011: "Talking/Classroom Disruption;" written by "Amacher." (Exhibit K).

vi. 2/3/2012: "Got in a students face and started yelling about fighting;"(*sic*) written by "Navacki." (Exhibit L).

vii. 11/18/2011: "disruptive, arguing loudly w/ another student, refuses redirecting (had to keep arguing);" written by "Mr. Thiessen." (Exhibit M).

Each Referral was initially written by a different staff-member, and later reviewed and signed by Bradley Addison, an administrator at John Young. The assigned disciplinary action ranged from "verbal reprimand" to after-school and in-school suspension.

44. Each referral contained within it explicit description of the reasons for the referral. None of the referrals explicitly or implicitly reference race or Williams' previous complaint or are profoundly suspect on their face, rather, they each referenced actions by Williams' which correspond to the sanctioned reasons for referral such as "insubordination" when "[Williams] refused" to sit down, "potentially dangerous behavior" when she sprayed the perfume in several students' faces, "disrespectful behavior" and talking/classroom disruption" when Ky'Alla was "completely rude" and yelled at a substitute teacher. (Exhibits G, H, I, J, K, L, M). Nothing in the record disproves the reasons.

45. Kelly testified that the "accumulation" of these referrals indicates their retaliatory nature. (Tr. Vol. I 181:7).

46. Nothing in the record indicates a nexus between Williams' discrimination complaint – or race – and any or all of the disciplinary referrals; conversely, nothing in the record discredits Respondent's legitimate policy-based reasons for issuing any or all of the conduct-based disciplinary referrals coming from various teachers.

47. Heartbreaking hearing testimony regarded the emotional distress felt by Complainant following the suspension, police report, and subsequent disciplinary referrals and cannot be taken lightly.

V. <u>Ultimate Factual Issue</u>

48. The preponderance of the evidence <u>does not</u> establish that Respondent subjected Williams to disparate terms or conditions in education – including discipline or police reporting – because of her race or that Respondent's offered reasons for its actions are a pretext for race discrimination. To the contrary, the record evidence – including Complainant's testimony – shows that Williams actually violated Respondent's professional educational rules, that

Respondent perceived this, and that this – and not Williams' race – in fact motivated the Respondent's discipline and reporting. The record evidences no similarly-situated individuals treated more favorably than Williams with respect to any of the alleged disparate terms and conditions of education; the facts do not permit finding that Jayden is similarly-situated. Similarly, nothing in the record shows that Respondent subjected Williams to an environment hostile to her because of her race. Williams failed to present evidence that any of Respondent's actions were motivated by race-based animus or retaliation and amounted to unlawful discrimination as alleged. In short, substantial evidence compels the ultimate factual finding that Respondent did not deny Williams equal educational opportunities because she is African American or because she filed a discrimination complaint.

49. Any Conclusion of Law that should have been deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

The ICRC has jurisdiction over the subject matter and the Parties, and each party is a "person" as that term is defined in Ind. Code § 22-9-1-3(a). Williams' complaint against Respondent of an unlawful discriminatory practice relating to education is subject to adjudication in accordance with the provisions of the Indiana Civil Rights Law, Ind. Code § 22-9-1 *et seq.* and the Indiana Administrative Orders and Procedures Act, Ind. Code § 4-21.5.

In that the Indiana Civil Rights Law is routinely administered in consultation with cases decided under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000e, *et seq.,* the same legal analytical principals applying to equal opportunity in that context are generally appropriate guidance in Indiana's education discrimination cases. See Filter Specialists, Inc. v. Brooks, 906 N.E.2d 835, 839 (Ind. 2009) ("In construing Indiana civil rights law our courts have often looked to federal law for guidance"); See also Indiana Civil Rights Comm'n v. Culver Educ. Found. (Culver Military Acad.), 535 N.E.2d 112, 115 (Ind. 1989) ("federal cases interpreting Title 7 of the Civil Rights Act of 1964…are entitled to great weight"); See also Indiana Civil Rights Comm'n v. City of Muncie, 459 N.E.2d 411, 418 (Ind. Ct. App. 1984) ("federal decisions are helpful in construing Indiana's Civil Rights Act").

"It is the public policy of the state to provide all of its citizens equal opportunity for education," and such equal educational opportunities are "declared to be civil rights." Ind. Code

§ 22-9-1-2. It is also the public policy of this state to protect institutions from unfounded charges of discrimination. *Id.*

Not all discrimination is declared "contrary to the principles of freedom and equality of opportunity" and "a burden to the objectives of the public policy of this state." *Id.* Discrimination is simply "[t]he intellectual faculty of noting differences and similarities." DISCRIMINATION, Black's Law Dictionary (10th ed. 2014). "The dictionary sense of 'discrimination' is neutral while the current political use of the term is frequently non-neutral, pejorative." *Id.* In the "neutral" context, "*[e]*very [educational] decision involves discrimination," and an educational institution, when deciding whom to discipline, whom to reward, whom to suspend, and how to evaluate, must discriminate among students. Filter, 906 N.E.2d at 838.

While common reasons for lawful educational discrimination are behavior, attitude, and performance, other reasons might include attendance, interpersonal conflict, erroneous evaluations, and even unusual educational expectations. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977); Rose-Maston v. NME Hosps., Inc., 133 F.3d 1104, 1109 (8th Cir. 1998). In Indiana, there are myriad reasons for the lawful discretion of educational professionals.

Unlawful discrimination is discrimination based on *unlawful criteria*. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981) ("[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon *unlawful criteria*") (emphasis added). Under the Indiana Civil Rights Law, unlawful "discriminatory practices" include those denying equal educational opportunities "to properly qualified persons *by reason of* the race...of such person..." Ind. Code § 22-9-1-2(b) (emphasis added). Such discriminatory practices are "contrary to the principles of freedom and equality of opportunity" and therefore "shall be considered unlawful." Ind. Code § 22-9-1-3.

The Parties agree that Respondent took educational actions against Williams; significantly, those actions are the same discipline and reporting of which Williams' complains. Therefore, to determine as required whether Respondent "has engaged in an unlawful discriminatory practice" as alleged here, the critical inquiry is: "On what basis did the [institution] discriminate?" Ind. Code § 22-9-1-6; See Filter, 906 N.E.2d at 838–39 ("[T]he case is one of causation: What caused the adverse [educational] action..."); See also Ortiz v. Werner Enterprises, Inc., 834 F.3d 760,

763 (7th Cir. 2016) (phrasing the inquiry as "whether one fact (here, [race]) caused another (here, discipline or reporting)." Was Respondent's discipline or reporting of Williams by reason of Respondent's "illegal motivation" – namely, "race"? Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 154 (2000). Put another way, "would [Williams] have [avoided such treatment] if [s]he had a different [race], and everything else had remained the same." Ortiz, 834 F.3d at 764. In a word, the question to be answered is: "Why?"

All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). The work of adjudicating "illegal or legal motives" "obliges finders of fact to inquire into a person's state of mind." Price Waterhouse v. Hopkins, 490 U.S. 228, 260 (1989); Aikens, 460 U.S. at 716. However, "[t]he state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much as fact as anything else." Aikens, 460 U.S. at 716–17 quoting Eddington v. Fitzmaurice, 29 Ch.Div. 459, 483 (1885). Because the Indiana Civil Rights Law tolerates no unlawful discrimination – subtle or otherwise – the ICRC, with expertise and a charge to administer the Indiana Civil Rights Law, is in the best position to ascertain the matter. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 526 (1993); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

In the difficult enterprise of proving a Respondent's motive, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." St. Mary's, 509 U.S. at 507. To carry this burden of persuasion, Williams is required to "prove h[er] case by a preponderance of the evidence…" Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003).

What evidence? All of it. As in any lawsuit, Williams "may prove h[er] case by direct or circumstantial evidence," and "[t]he trier of fact should consider all the evidence, giving it whatever weight and credence it deserves." Aikens, 460 U.S. at 714; See also Ortiz, 834 F.3d at 764-766 (7th Cir. 2016) (requiring that "[a]ll evidence should be considered together to understand the pattern it reveals" and instructing that "all evidence belongs in a single pile and must be evaluated as a whole").

While all evidence is considered, the ICRC Director's previous finding of "probable cause" – other than as the warrant of the hearing in this case – is of no relevance or import; the question to

be answered now is different and the hearing on the question is *de novo:* from the beginning, without regard to previous determinations. Ind. Code § 4-21.5-3-14(d). Specifically, the question is not whether unlawful discrimination *probably* occurred, but whether unlawful discrimination *actually* occurred: "discrimination *vel non*" – discrimination "or not." Ind. Code § 22-9-1-6(j); Filter, 906 N.E.2d at 842. Therefore, the ICRC is not "erroneously focused on the question of *prima facie* case rather than directly on the question of discrimination." Aikens, 460 U.S. at 711.

The McDonnell Douglas framework is a conventional method of allocating the burden of production to parties and providing an "orderly way to evaluate the evidence" as it pertains to the ultimate question of unlawful discrimination. St. Mary's, 509 U.S. at 525. It is where the following holistic assessment of the evidence begins. David v. Bd. of Trustees of Cmty. Coll. Dist. No. 508, 846 F.3d 216, 224 (7th Cir. 2017).

Under the framework, Williams is expected to produce evidence establishing the case on its face – a *prima facie* case; this eliminates the most common nondiscriminatory reasons for the adverse actions and raises an inference of discrimination. See Teamsters, 431 U.S. at 358. Then, the common lawful motives off the table, Respondent must "clearly set forth" legitimate nondiscriminatory reasons for termination, thus putting Williams on notice of the targets for her pretext arguments and affording Williams a full and fair rebuttal opportunity; the sufficiency of Respondent's explanation is evaluated by the extent to which it fulfills these functions. Burdine, 450 U.S. at 256. Finally, Williams can proceed to rebut each of Williams' identified motives as "pretext for unlawful discrimination."

However, since affording Williams a full and fair rebuttal opportunity is the purpose of the framework, when Respondent does its part and meets its burden of production – putting Williams on notice of its explanations – "whether [Williams] made out a *prima facie* case is no longer relevant," "McDonnell Douglas drops out," and the factfinder "must decide which party's explanation of the employer's motivation it believes." Aikens, 460 U.S. at 715-716; Filter, 906 N.E.2d at 846. The factfinder "has before it all the evidence it needs to decide *not* . . . whether defendant's response is credible, but whether the defendant intentionally discriminated against the plaintiff." St. Mary's, 509 U.S. at 519.

Since Respondent's burden is one of production – and not persuasion – Respondent has "only to state a legitimate reason" for the adverse action. Bd. of Trustees of Keene State Coll. v.

Sweeney, 439 U.S. 24, 24 (1978); Kephart v. Inst. of Gas Tech., 630 F.2d 1217, 1222 (7th Cir. 1980). Determining whether Respondent carried its burden "can involve no credibility assessment." St. Mary's, 509 U.S. at 509. Respondent need not even establish that it was actually motivated by its proffered reasons. Burdine, 450 U.S. at 254. Respondent may state as its reasons subjective requirements and motives. Jayasinghe v. Bethlehem Steel Corp., 760 F.2d 132, 135 (7th Cir. 1985).

Here, Respondent carried its burden. On this there is no dispute, rather, Williams, in her Proposed Findings of Fact, Conclusions of Law, and Order, indeed suggests the ICRC find as a matter of fact that Respondent, in part, "claimed to justify the more stringent discipline of Williams on the thought that Williams had been the aggressor." (CP's Proposed FFCLO, p. 4, NO.11). In fact, in explaining what it has done, Respondent clearly set forth its reasons for its discipline of Williams:

> "The difference in discipline between Williams and Starks was because of the difference in the students' actions. [citation omitted]. Williams aggressively assaulted Starks; Starks made an inappropriate comment to Williams. [citation omitted]. There is a reasonable, race-neutral reason for the disparity in punishment."
>
> (RP's Post Trial Brief, p.3).

Respondent also set forth as its basis for the police report: "Principal Sherrill found the incident to be one of a serious nature" and it was an exercise of his "professional judgment" in deciding the "incident [was] severe enough to contact the Mishawaka Police Department." (*Id.*)

On their face, such reasons are legitimate, inherently non-race related, and sufficient to retire the McDonnell Douglass framework. The ICRC is therefore "in a position to decide the ultimate factual issue in the case," which is "whether the defendant intentionally discriminated against the plaintiff." St. Mary's, 509 U.S. at 519. On the state of the record at the close of evidence, the ICRC proceeds to this specific question directly. See Aikens, 460 U.S. at 715 (1983).

Williams claims Respondent's motivation was her race. In making her case, Williams seeks to rebut Respondent's proffered reasons as pretext for discrimination. Proving that Respondent's proffered reasons are "pretext for discrimination" entails proof of the component parts: "pretext" and "discrimination." See St. Mary's, 509 U.S. at 515 ("[A] reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason"); See also Radentz v. Marion Cty., 640 F.3d 754, 757, 2011

WL 1237931 (7th Cir. 2011) ("In order to demonstrate that the reason for [Respondent's action] was pretextual, the plaintiffs must demonstrate that the nondiscriminatory reason was dishonest and that the defendants' true reason was based on discriminatory intent."); See also Reeves, 530 U.S. at 147 ("[i]t is not enough ... to *dis* believe the [institution]; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.")

In Williams' showing of falsity on Respondent's part, Williams "must specifically rebut *each* legitimate, non-discriminatory reason given" for the alleged adverse actions. Reed v. Lawrence Chevrolet, Inc., 108 Fed. Appx. 393, 398 (7th Cir. 2004) (original emphasis). Three possible ways Williams may demonstrate the untruthfulness of a reason are "through evidence showing: (1) that the proffered reason had *no basis in fact*, (2) that the proffered reason *did not actually motivate* the adverse [educational] action or (3) that the proffered reason was *insufficient to motivate* the adverse [educational] action." Filter, 906 N.E.2d at 847. (emphasis added).

Williams fails to show that any of Respondent's reasons are imagined, irrelevant to Respondent's actions, or insufficient to motivate them. With respect to Respondent's reason of "the difference in the students' actions" – the record evidence does not demonstrate falsity. To the contrary, substantial record evidence – including Principal Sherrill's notes from student interviews and Complainant's own testimony – corroborates the existence, nexus, and sufficiency of Respondent's reasons for suspending Ky'Alla as it did while suspending Jayden as it did.

Williams' argument sounded largely under the "no basis in fact" approach in claiming that the alleged difference in treatment was contrived and was in fact the other way around – that Jayden was the aggressor and therefore deserved at least equal punishment. However, as explained above, the factual record does not sufficiently liken Jayden's conduct to Williams' so as to nullify the nexus between (i) the out of school suspension and police report and (ii) Respondent's sufficient professional reasons, reasons which were corroborated by testimony and shown to have existed in the Principal Sherrill's mind at the time of the adverse action. The record contains no confounding variable in time or space unhitching the nexus between Respondent's reasons and Respondent's treatment of Williams.

While suspect practices or behavior can also be relevant to a showing of pretext, and Williams alludes to these also, they do not transform the record in this case. Williams complains that Williams' suspension is suspect in its deviation from both (i) Vanslager's comments in the

Disciplinary Referral to the effect that "punches exchanged in gym class"(*sic*) and Williams "was hit with a wiffle ball thrown at her by Jayden,"(*sic*) and (ii) Principal Sherrill's alleged comment in the March 3, 2010 meeting with Kelly to the effect that both girls would receive equal punishment. However, it is already established that through the course of Respondent's investigation, Principal Sherrill obtained substantial student and staff testimony leading to and corroborating the sincerity of his belief that Williams' conduct was different than Jayden's and that it was serious enough to warrant a police report. The Indiana Civil Rights Law only warrants inquiry into the veracity – not the wisdom – of a school's reasoning, no matter how "high-handed," "mistaken," or "irrational." See Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 560 (7th Cir. 1987); See also Zick v. Verson Allsteel Press Co., 644 F. Supp. 906, 911 (N.D. Ill. 1986), aff'd, 819 F.2d 1143 (7th Cir. 1987). None of Respondent's conduct is availingly suspicious or contributes to a preponderance of evidence pointing to discriminatory motives. In sum, Williams' presentation falls short of demonstrating that Respondent's reasons for discipline, reporting, or any other treatment are unworthy of credence.

Neither does the record substantiate the "discrimination" component of the alleged "pretext for discrimination." Simply stated, the instant record does not evidence actions related to education taken against Williams based on her race. A full and fair opportunity to be heard yielded no indications of race-based animus or intentional race-based adverse actions or treatment. It is not possible to infer intentional race discrimination from this record as a whole. Nothing in the record indicates that, had Williams not been African American and all else remained the same, she would have avoided discipline or enjoyed any better treatment.

To prevail on her harassment claim based on hostile educational environment, Williams generally needed to establish that: (1) she was subjected to unwelcome conduct; (2) the conduct was severe or pervasive enough to create a hostile educational environment; (3) the conduct was directed at her because of her race; and (4) there is a basis for Respondent's liability. See Quantock v. Shared Mktg. Servs., Inc., 312 F.3d 899 (7th Cir. 2002). Given the facts about Hoschal's conduct, the record does not support a conclusion that race motivated Hoschal's conduct, Respondent's handling of the complaint, or Respondent's efforts to remediate the situation. Respondent is not liable for racial harassment.

To prevail on her retaliation claim, Williams generally needed to demonstrate that (1) she engaged in statutorily protected activity; (2) she suffered an adverse action that a reasonable

individual would have found materially adverse, and (3) there was a causal link between the two. *Burlington Northern and Santa Fe Ry, Co. v. White*, 548 U.S. 53 (2006); *Jajeh v. Cty of Cook*, 678 F.3d 560 (7th Cir. 2012).

50. No doubt Williams engaged in protected activity in filing her complaint and participating in the ICRC's investigation. But there is no evidence that staff at John Young wrote the Disciplinary Referrals during Williams' 7th and 8th grade academic years as retaliation against Williams for filing her discrimination complaint. The mere fact that the reference disciplinary actions occurred after the complaint or in the same school under the supervision of Respondent's staff does not establish a nexus in this case. This is especially true when the evidence indicates without refutation the legitimacy of Respondent's reasons for discipline.

51. The Indiana Civil Rights Law promises equal opportunity in education and remedy for the denial thereof based on one's race. Williams failed to carry her burden of demonstrating by a preponderance of evidence that – because of race or because of filing a discrimination complaint – she was denied equal opportunity. Respondent set forth unrebutted proofs of legitimate nondiscriminatory motives in each instance. Therefore, according to the record and applicable law, it is ultimately found and concluded that Respondent did not commit an unlawful discriminatory practice as alleged.

Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

ORDER

1. The above-referenced Complaint of Discrimination is **DISMISSED**, with prejudice.
2. This order becomes the final order disposing of the proceedings immediately upon affirmation under Ind. Code § 4-21.5-3-29. Ind. Code § 4-21.5-3-27(a).

Administrative Review

Before these Findings of Fact, Conclusions of Law, and Order become the final order in this case pursuant to Indiana law, administrative review may be obtained by parties not in default by the filing of a writing identifying with reasonable particularity each basis of each objection **within fifteen (15) days after service of this order**. Ind. Code § 4-21.5-3-29(d). Subject to Ind. Code § 4-21.5-3-1, the filing of a document in proceedings before the ICRC can be completed by mail, personal service, fax, or electronic mail to:

Docket Clerk
c/o Indiana Civil Rights Commission
100 North Senate Avenue, N300
Indianapolis, IN 46204
Fax: 317-232-6580
Email: aneromosele@icrc.in.gov

A party shall serve copies of any filed item on all parties. Ind. Code § 4-21.5-3-17(c).

SO ORDERED this 16th day of August,

Hon. John F. Burkhardt
Administrative Law Judge
Indiana Civil Rights Commission
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255
Anehita Eromosele, Admin Asst.
317-234-6358

Certificate of Service

Served this 20 day of August by United States Mail on the following:

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