

File Number: 16 EN 234

AMELIA HAMPTON

Complainant,

- and -

GOVERNMENT OF MANITOBA
(MANITOBA HEALTH, SENIORS AND ACTIVE LIVING),
(MANITOBA FAMILIES) &
THE WINNIPEG REGIONAL HEALTH AUTHORITY

Respondents.

Re: COMPLAINT OF DISCRIMINATION UNDER *THE HUMAN RIGHTS CODE*
REGISTERED JULY 22, 2016.

REPLY OF THE RESPONDENT MANITOBA FAMILIES

1.0 Background

- 1.1 Disability supports and services are provided to persons with disabilities by Manitoba Families primarily through the Children's disABILITY Services program, the Community Living disABILITY Services program, the Employment and Income Assistance program, and the Disability Health Supports Unit. The following is a brief description of each program.

Children's disABILITY Services

- 1.2 Children's disABILITY Services ("CDS") is a non-statutory, voluntary program that provides assistance to families to help them meet some of the disability related needs of their children who have developmental and/or lifelong physical disabilities. Services and supports are intended to strengthen families and reduce stress so that costly out-of-home placements are prevented or delayed.
- 1.3 CDS provides families with a variety of supports that respond to their unique circumstances and the assessed needs of their child. Staff use a family-centered approach to assist families with identifying and accessing the formal and informal resources they require. These supports may include respite care, child development services, supplies, equipment, transportation, summer skills support, after-school care for adolescents, behavioural services, and home and vehicle modifications.
- 1.4 In collaboration with the Departments of Health, Seniors, and Active Living; and Education and Training, CDS provides policy direction and financial support for the implementation of the Children's Therapy Initiative ("CTI"), which includes children's occupational therapy, physiotherapy, speech and language therapy and audiology services. CTI provides a coordinated approach to the delivery of therapy services so that services for children are maximized. Therapy services are delivered through the regional health authorities, school divisions, and service agencies.

Community Living disABILITY Services

- 1.5 Section 9 of the *The Vulnerable Persons Living with a Mental Disability Act* (the "VPA") authorizes the Minister of Families to provide and arrange support services for vulnerable persons.

Support services provided

9 The minister may provide or arrange for the provision of support services for a vulnerable person.

Definitions

1(1) In this Act,

"**support services**" means those services which may be provided for a vulnerable person under section 9;

"**vulnerable person**" means an adult living with a mental disability¹ who is in need of assistance to meet his or her basic needs with regard to personal care or management of his or her property.

- 1.6 The Minister's authority to provide or arrange for the provision of support services is exercised through the Community Living disABILITY Services ("CLDS") program. Except in the exercise by CLDS of duties pursuant to matters of protection and emergency intervention under Part 3 of the VPA, the provision of support services are voluntary, discretionary and prioritized based on individual need and available resources.
- 1.7 As CLDS services are provided to eligible individuals based on the availability of resources and the priority of need; program eligibility alone does not result in guaranteed service provision. Depending on the assessed needs of the individual, CLDS supports may include: residential services, day services, transportation to and from a day service, respite, crisis intervention and clinical services.
- 1.8 Subsection 11(1) of the VPA provides that an individual plan must be developed for every vulnerable person who receives support services. Through the individual planning process, support services are identified. The vulnerable person, members of that person's support network, and the substitute decision maker or committee (if any) work with a community service worker to identify the person's strengths, needs and dreams for the future. The vulnerable person and the planning team can then begin to determine what services and supports are required. Services may include those provided through Manitoba Families as well as those available in the larger community.
- 1.9 CLDS has recently implemented the Supports Intensity Scale ("SIS") as a standardized assessment tool to assist in the determination of the support needs for program participants, and is now working with an external organization to develop a funding allocation model linking the SIS assessment tool to the CLDS program.
- 1.10 The implementation of the SIS has factored in several important considerations including upholding the principles of the VPA while making responsible fiscal decisions that maximize available resources. The adoption of a standardized assessment tool for all participants requesting CLDS services is critically important to ensure Manitoba creates a transparent, equitable and sustainable

¹ Pursuant to subsection 1(1) of the VPA, "**mental disability**" means significantly impaired intellectual functioning existing concurrently with impaired adaptive behaviour and manifested prior to the age of 18 years, but excludes a mental disability due exclusively to a mental disorder as defined in section 1 of *The Mental Health Act*;

"**[M]ental disorder**" is defined in section 1 of *The Mental Health Act* as means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life, but does not include a disorder due exclusively to a mental disability as defined in *The Vulnerable Persons Living with a Mental Disability Act*.

program. To date over 3,100 SIS assessments have been completed across the province.

- 1.11 Section 13 of the VPA provides that disputes arise about eligibility for service or about the support services provided to a vulnerable person, Manitoba Families may appoint a mediator to try to settle the dispute. Regardless of whether mediation is attempted, a vulnerable person may appeal such disputes to the Social Services Appeal Board. Disputes that are not eligible for appeal are those involving increased funding or changes to policy.

Employment and Income Assistance

- 1.12 Adults living with disabilities, regardless of their eligibility for CLDS, may apply to Employment and Income Assistance ("EIA") to determine eligibility to receive financial benefits. The eligibility criteria for enrolment in the EIA (Persons with Disabilities case category) is found in subsection 5(1) of *The Manitoba Assistance Act*, as follows:

Income assistance

5(1) The director shall provide income assistance, in accordance with this Act and the regulations, to or in respect of a person who, in the opinion of the director is a person

- (a) who, by reason of age or by reason of physical or mental ill health, or physical or mental incapacity or disorder that is likely to continue for more than 90 days
 - (i) is unable to earn an income sufficient to meet the basic necessities of himself and his dependants, if any; or
 - (ii) is unable to care for himself and requires to be cared for by another person or in an institution or home for the aged or the infirm;

- 1.13 Schedule A, clause 8(f) of the *Assistance Regulation* (404/88 R) provides participants enrolled in the Persons with Disabilities case category, who are not residing in a hospital, with additional monthly assistance. CLDS participants, persons eligible for Canada Pension Plan-Disability, or persons whose affairs are being administered by the Public Guardian and Trustee are automatically eligible for enrolment in the Persons with Disability case category where EIA financial eligibility is established.
- 1.14 Eligibility under EIA for medical reasons includes medical supports through the program's Disability and Health Supports Unit. These may include diet and nutritional supplements, medical and disability related items, supplies and equipment including but not exclusive to custom orthopedics, wheelchair seating, walker or transfer aids, and incontinence products. EIA may also fund home modifications such as wheelchair ramps, door widening and ceiling tracking depending on the individual's circumstance.

Disability and Health Supports Unit

- 1.15 EIA, CSD, and CLDS program participants may receive additional support for health related supplies, equipment, nutritional or diet supplements based on a diagnosed medical need. The Disability and Health Supports Unit ("DHSU") offers a streamlined, one-stop-shop to help eligible clients access these supports in a consistent, fair and efficient manner. The DHSU reviews and assesses all requests submitted by health professionals on behalf of EIA, CSD, and CLDS program participants. Each program's medical supply and equipment policies and legislation (where applicable) are followed by the DHSU when assessing and approving requests.

2.0 Response to Written Statement of Amelia Hampton

- 2.1. Unless specifically admitted herein, the Respondent, Manitoba Families, denies the allegations contained in the complaint.
- 2.2 In response to paragraph 3 of the Written Statement, the Respondent can confirm that the Complainant is a 24 year-old women with cerebral palsy and scoliosis.
- 2.3 In response to paragraphs 4 and 5, the Respondent can confirm that the Complainant is a full-time wheelchair user who is non-verbal and communicates through facial gestures, signs and sounds. The Respondent can also confirm that the Complainant requires assistance with all aspects of daily living, including eating.
- 2.4 In response to paragraph 6, the Respondent can confirm that the Complainant has been a participant of the EIA program since she turned 18 years old. Prior to the age of 18 the Complainant and her family received supports from CDS, including special equipment to assist them with their disability; specifically, an overhead lift system, communication device, and a van lift.
- 2.5 In response to paragraph 7, the Respondent can confirm that the Complainant receives benefits from the EIA program and is eligible to receive health related supplies and equipment, etc. from the DSHU.
- 2.6 In response to paragraph 8, the Respondent notes that in addition to the CDS and CLDS, Manitoba Families provides support to eligible persons with disabilities through the EIA program.
- 2.7 In response to paragraphs 9 and 10, the Respondent submits that the Complainant has conflated the services that are provided by CDS with those provided by the public school system. First, eligibility for CDS ends at age 18. The in-school services provided to the Complainant after she turned 18 would have been provided by the school board. Second, "Special Needs Categorical Funding" is provided through the school system and not CDS. Third, the supports that are described in paragraph 10, (except for medical supplies, equipment, and respite, which are provided by CSD until an individual turns 18 and by the DHSU afterward) would have been supplied to the Complainant through the educational or health systems.
- 2.8 The Respondent takes no issue with paragraph 11.
- 2.9. In response to paragraph 12, the Respondent takes no issue with the Complainant's statement regarding "receiving a full suite of supports" in her youth. The Respondent does take issue, however, with the Complainant's assertion regarding the receipt of an "inadequate patchwork of services" as an adult, as **the Complainant has not availed herself of the full complement of disability supports and services that the Respondent provides as her family withdrew her application to CLDS in March 2010 and never re-applied.**
- 2.10 In response to paragraph 13, the Respondent notes, as above, that the Complaint's description and characterization of supports and services available to her as an adult is greatly misleading as she, at the choosing of the Complainant and her family, has not been assessed for CLDS eligibility. Furthermore, since being an EIA participant the DHSU has provided supports for the Complainant including extensive wheelchair seating components, a Stealth Swing Lateral (an accessory for a stander or walker to provide postural supports), and custom insoles.
- 2.11 In response to paragraph 14, the Respondent asserts that the DHSU did not receive a request to modify the van that the family had purchased.

- 2.12 In response to paragraph 15, the Respondent advises that the Family Services Worker (CDS case manager) had a phone conversation with the Complainant's mother in October of 2009 about the referral to self-managed Home Care and about EIA eligibility upon turning 18 years old.
- 2.12 The Respondent further advises in response to paragraph 15 that on December 15, 2009, the Family Services Worker met with the Respondent, the Respondent's mother, and the WRHA Case Coordinator. The Case Coordinator completed her assessment and determined that the Respondent met the eligibility criteria for Home Care and a family-managed plan. The Family Services Worker reviewed with the Complainant's mother, the remaining self-administered respite budget and supplies needed until the end of January 2010. The Family Services worker provided the Complainant's mother with the EIA Intake contact (John Morrison; 938-5638) and indicated that she should speak to Mr. Morrison about supplies needed, transportation, room and board with care, and the possibility of other needs repairs to equipment.
- 2.13 The Respondent further advises that prior to October 2009 there may have been further meetings between the Complainant, her mother and the Family Services Worker, regarding transitioning. The Respondent, however, is unable to confirm such at this point as use of the computer-mediated inFACT case-note system began only part way through 2009.
- 2.14 The Respondent has no knowledge of the Complainant's assertions in paragraphs 16 and 17.
- 2.15 The Respondent takes no issue with paragraph 18.
- 2.16 In response to paragraph 19, the Respondent takes no issue with the Complainant's characterization of the DSM IV and the DSM V, except for the statement that the DSM V "does not refer to the IQ test." In fact, IQ tests are used in the DSM V to measure intellectual functioning.
- 2.17 Further to the response above and in response to paragraphs 20 and 21, as previously noted, the Respondent takes issue that IQ testing is contrary to the VPA's legislative intent. As noted in earlier, to receive services and supports under the VPA one must exhibit "significantly impaired intellectual functioning." As noted above, the DSM V incorporates IQ tests to be used to measure intellectual functioning.
- 2.18 The Respondent disputes the claim in paragraph 22 that the Complainant is not eligible for CLDS. **The Complainant and her family voluntarily withdrew her application to CLDS in March 2010. As a result, an assessment was not completed to determine her eligibility for CLDS.** Furthermore, if the Complainant was "untestable" then CLDS would have required a letter from a qualified clinician (i.e. the school psychologist or other psychologist) confirming that the Complainant has significantly impaired intellectual functioning. The following is an excerpt from the relevant CLDS policy:
- If an individual is determined to be "untestable" by the assessing clinician due, for example, to level of impairment, physical disability or uncooperativeness, an opinion of the assessing clinician on the presence or absence of significantly impaired intellectual functioning may be considered acceptable for the purposes of eligibility determination for CLDS. These opinions must be reviewed by the Departmental psychologist.*
- 2.19 The Respondent has no knowledge of the Complainant's assertions in paragraphs 23, 24, 25, and 26 and denies the validity of the Complainant's allegations in paragraphs 27, 28, 29, 30, and 31, in reference to a contravention of *The Human Rights Code*.

3.0 Response to the allegations of Individual and Systemic Discrimination Based on Disability and Age

- 3.1 The Respondent submits that there is no merit in the Complainant's allegation of "individual discrimination" based on age and disability, and as such requests that that the Commission dismisses this complaint pursuant to subsection 29(1) of the Code.

The Complainant asserts that "[d]uring her transition from youth to adulthood, [she] went from receiving a full suite of supports to inadequate patchwork of services" (paragraph 12). Respectfully, this is a frivolous allegation and should be viewed by the Commission as such. The Complainant argues that she has been inadequately served since she reached the age of majority, yet, by refusing to be assessed by the CLDS program she has refused to accept the services that would be offered from the service provider. Differential treatment cannot be found if the Complainant refuses to be treated.

- 3.2 The Complainant also alleges that "other adults with severe physical disabilities find themselves in a legislative and policy gap of services" (paragraph 27). The Respondent submits *if* systemic differential treatment exists then that discrimination is legislatively based² (as the Complainant, herself, argues) and as such **the Commission does not have the jurisdiction to consider the validity of allegedly discriminatory legislation.** The Manitoba Human Rights Commission Board Policy # P-6³ (Subject: Jurisdiction – Legislation) provides the following in respect to this submission:

The Code is paramount legislation, which means that it takes precedence over other laws (section 58). The Commission does not however have the power to strike down or declare ineffective a law that does not appear to comply with The Code.

The Manitoba Court of Appeal has held that allegedly discriminatory legislation must be challenged through the courts under section 15 of the *Canadian Charter of Rights and Freedoms*. In *Gale Estate v. Hominick* [1997] M.J. No. 154 (C.A.) ("Gale"), the Court expressly stated:

[...] Human Rights legislation does not create and does not pretend to create a mechanism to determine the validity of or to strike down allegedly discriminatory provincial legislation. In other words it is not a provincial Charter of Rights and Freedoms with the potential to limit the ability of the legislature to enact laws of general application. [...] [at paragraph 15]

In *Tranchemontagne v. Ontario (Director Disability Support)*, [2006] 1 S.C.R. 513, the Supreme Court of Canada considered *Gale* and clarified that a human rights statute is a quasi-constitutional document:

It has been described as quasi-constitutional, and as more important than all others (save for the constitutional laws), but it falls short of being a constitutional document entitling the Tribunal or the Courts to disallow legislation or require changes to it. [at paragraph 36].

Policy # P-6 further provides that although the Commission will not consider the validity of allegedly discriminatory legislation, it will continue to consider whether the actions of any "person" in applying the provisions of any law are discriminatory. In answer, the Respondent submits that there has been no violation of the Code in the application of the VPA. For instance in terms of eligibility assessment, the CLDS program relies on the internationally accepted DSM-V standards in assessing intellectual disability and standardized, individually administered intelligence tests administered by qualified clinicians. Furthermore, as referenced in response to paragraph 22 of the complaint, in

² Services provided under the VPA to adults with a mental disability

³ http://www.manitobahumanrights.ca/publications/policy/policy_jurisdiction_legislation.html

situations where individuals are "untestable" then an accommodation is made in that a letter from a qualified clinician (i.e. the school psychologist or other psychologist) confirming significantly impaired intellectual functioning (manifested prior to the age of 18 years) would be sufficient to establish that individual as a "vulnerable person" under the VPA.

- 3.3 Additionally, the Respondent submits that the CLDS program is a "special program" as referred to in section 11 of the Code, and as such the provision of services to adults living with a mental disability who are in need of assistance to meet their basic needs with regard to personal care or management of property, is not to be seen as discrimination. Section 11 of the Code is as follows:

Affirmative action, etc. permitted

11 Notwithstanding any other provision of this Code, it is not discrimination, a contravention of this Code, or an offence under this Code

(a) to make reasonable accommodation for the special needs of an individual or group, if those special needs are based upon any characteristic referred to in subsection 9(2); or

(b) to plan, advertise, adopt or implement an affirmative action program or other special program that

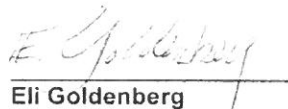
(i) has as its object the amelioration of conditions of disadvantaged individuals or groups, including those who are disadvantaged because of any characteristic referred to in subsection 9(2), and

(ii) achieves or is reasonably likely to achieve that object.

The CLDS program is intended to and does ameliorate the conditions of a distinct set of disadvantaged individuals (as the challenges faced by those with mental disabilities are distinct from those encountered by individuals with physical disabilities). For instance, the existence of the residential services aspect of the CLDS program has led to the de-institutionalization of scores of vulnerable persons from developmental centres⁴.

- 3.4. Given the foregoing, it is respectfully submitted, therefore, that this complaint should be dismissed.

All of which is respectfully submitted this 21st day of October, 2016.


 Eli Goldenberg
 Crown Counsel

⁴ See Complaint of Association For Community Living v. Government of Manitoba (File No. 06 EN 404).