STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
HUMAN RIGHTS COMMISSION
1321 Plaza East, Room 108A
Charleston, WV 25301-1400
Telephone:(304) 558-2616 Fax: (304) 558-0085
TDD:(304) 558-2976 Toll-free: 1-888-676-5546

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

Via Certified Mail –
Return Receipt Requested

September 3, 2009

Harry Walter Robinson
308 Roane Street, Apt. A
Charleston, WV 25302-2135

Tyleemah M. Edwards
1316 Red Oak Street
Charleston, WV 25302-2560

Paul R. Sheridan
Deputy Attorney General
Jamie S. Alley
Senior Assistant Attorney General
P.O. Box 1789
Charleston, WV 25326-1789

Cherie Bishop, Instructor
Charleston School of Beauty Culture
210 Capitol Street
Charleston, WV 25301-2206

Judy Hall, Owner
Charleston School of Beauty Culture
210 Capitol Street
Charleston, WV 25301-2206

Stephen L. Hall, Esquire
3215 Bradley Road
Huntington, WV 25704-2725

Re: *Harry Walter Robinson v. Charleston Academy of Beauty Culture, Inc. d/b/a Charleston School of Beauty Culture, Inc., & Judy Hall, Owner and Cherie Bishop, Instructor, in their Individual Capacities*
Docket No.: PAR-351-04

And

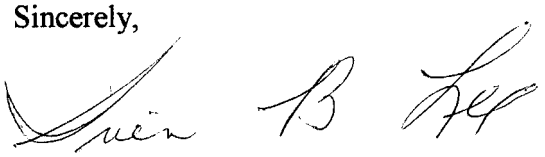
Tyleemah Edwards v. Charleston Academy of Beauty Culture, Inc. d/b/a Charleston School of Beauty Culture, Inc., & Judy Hall, Owner and Cherie Bishop, Instructor, in their Individual Capacities
Docket No.: PAR-454-04

Dear Parties:

Enclosed please find the Commission's Final Order in the above-referenced matter, which incorporates the Final Decision of Chief Administrative Law Judge Phyllis H. Carter and a Notice of Right to Appeal.

Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 2006, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached Notice of Right to Appeal for more information regarding your right to petition a court for review of this Final Order.

Sincerely,



Ivin B. Lee
Executive Director

IBL/mst

Attachments

cc: The Honorable Natalie Tenant
Secretary of State

EXHIBIT A

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this Order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This **must** be done **within 30 days** from the day you receive this Order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the Clerk of the West Virginia Supreme Court naming the West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, person or entity against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the Commission awards damages other than back pay exceeding $5,000.00; (2) cases in which the Commission awards back pay exceeding $30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed **within 30 days** from the date of receipt of this Order.

For a more complete description of the appeal process see **West Virginia Code** § 5-11-11 and the **West Virginia Rules of Appellate Procedure.**

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

HARRY WALTER ROBINSON,

Complainant,

v. **Docket Number: PAR-351-04**
EEOC Number: 17J-2006-01798E

CHARLESTON ACADEMY OF BEAUTY CULTURE, INC. D/B/A CHARLESTON SCHOOL OF BEAUTY CULTURE, INC. AND JUDY HALL, OWNER, AND CHERIE BISHOP, INSTRUCTOR, IN THEIR INDIVIDUAL CAPACITIES

Respondent,

AND

TYLEEMAH EDWARDS,

Complainant,

v. **Docket Number: PAR-454-04**
EEOC Number: 17J-2006-01849F

CHARLESTON ACADEMY OF BEAUTY CULTURE, INC. D/B/A CHARLESTON SCHOOL OF BEAUTY CULTURE, INC. AND JUDY HALL, OWNER, AND CHERIE BISHOP, INSTRUCTOR, IN THEIR INDIVIDUAL CAPACITIES

Respondent

FINAL ORDER

On the 3th day of September 2009, the West Virginia Human Rights Commission reviewed the consolidated Final Decision in the two, above-styled

cases, which have been consolidated for purposes of a public hearing. This consolidated Final Decision was issued by Chief Administrative Law Judge Phyllis H. Carter.

After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Administrative Law Judge's Final Decision, the Commission decided to, and does hereby, adopt said Chief Administrative Law Judge's Final Decision as its own, without modification or amendment.

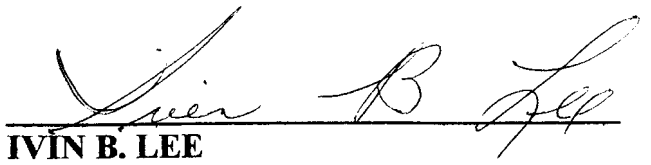
It is, therefore, the Order of the Commission that the Chief Administrative Law Judge's Final Decision, be incorporated into this Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto as Exhibit A.

It is so **ORDERED.**

Entered for and at the direction of the West Virginia Human Rights Commission this 3 day of September 2009, in Charleston, Kanawha County, West Virginia.

WV HUMAN RIGHTS COMMISSION



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Joe Manchin III
Governor

Martha Yeager Walker
Secretary

May 29, 2009

VIA CERTIFIED MAIL- RETURN RECEIPT REQUESTED

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Judy Hall, Owner
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Huntington, West Virginia 25704
Counsel for Respondents

Re: *Harry Walter Robinson v. Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc., Judy Hall, Owner and Cherie Bishop, instructor, in their individual capacities,*
Docket No.: PAR-351-04

Tyleemah Edwards, v. Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc., Judy Hall, Owner and Cherie Bishop, instructor, in their individual capacities.
Docket No.: PAR-454-04

Dear Parties:

Enclosed please find the Final Decision of the undersigned Chief Administrative Law Judge in the above-captioned matter. Rule 77-2-10, of the recently

promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective January 1, 1999, sets forth the appeal procedure governing a final decision as follows:

§77-2-10. Appeal to the Commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the administrative law judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before an administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before an administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the administrative law judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.a. In conformity with the Constitution and laws of the state and the United States;

10.8.b. Within the commission's statutory jurisdiction or authority;

10.8.c. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from an administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact Ivin B. Lee, Executive Director of the Commission at the above address.

Yours truly,

Phyllis H. Carter
Chief Administrative Law Judge

PHC/rl

Enclosure

cc: Ivin B. Lee, Executive Director
Dr. Darrell Cummings, Chairperson

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

WALTER ROBINSON,

Complainant,

v. **DOCKET NO. PAR-351-04**

CHARLESTON ACADEMY OF BEAUTY CULTURE, INC., d/b/a CHARLESTON SCHOOL OF BEAUTY CULTURE, INC., JUDY HALL, Owner, and CHERIE BISHOP, Instructor, in their individual capacities,

Respondents.

TYLEEMAH EDWARDS,

Complainant,

v. **DOCKET NO. PAR-454-04**

CHARLESTON ACADEMY OF BEAUTY CULTURE, INC., d/b/a CHARLESTON SCHOOL OF BEAUTY CULTURE, INC., JUDY HALL, Owner, and CHERIE BISHOP, Instructor, in their individual capacities,

Respondents.

GLOSSARY OF KEY PEOPLE

Tyleemah Edwards	Complainant
Henry Walter Robinson	Complainant
Judy Hall	Respondent, owner and instructor at CABC
Cherie Bishop	Respondent and instructor at CABC
Stephen Hall	Counsel for Respondents and Financial Aid Officer for CABC
Jack Donta	Third owner of CABC

Cleo Morgan	Former instructor at CABC
Karen Booker Joyce	Former instructor at CABC
Carolyn Bond	Former instructor at CABC
Toni Brown	Secretary at CABC
Betty Pullen	Instructor at CABC
Virginia Doss	Instructor at CABC
Wanda Carter	Instructor at CABC
Sandra Richardson	Instructor at CABC
Kelley Gene Nelson, Jr.	Former student and employee of CABC
James Edward Brady, Jr.	Witness for Respondents
Veronica L. Davis	Witness for Respondents
Ralph Reed	State Cosmetology Inspector with the Division of Barbers and Cosmetologists
Stephanie Ward	Student at CABC
Tamika Garner	Student at CABC
Kenneth Coston	Former employee at CABC, character witness for Respondents Hall and Bishop,and a member of an executive committee whose purpose included mediating complaints
Michelle Penn	A nail technician student at CABC who sought to intercede in the confrontation and stepped in between Complainant Edwards and Respondent Hall
Edwin Stubbs	Employee of CABC and a Respondent's witness
Lisa Bryant	A former CABC student
Elizabeth Faye Robertson	Respondent Hall's niece by marriage

GLOSSARY OF ACRONYMS

CABC	Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc.
WVBBC	West Virginia Board of Barbers and Cosmetologists
NACCAS	National Accrediting Commission of Cosmetology Arts & Sciences
SSAC	West Virginia Secondary Schools Activities Commission
ADA	Americans with Disabilities Act
WVHRA	West Virginia Human Rights Act

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

WALTER ROBINSON,

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CHARLESTON ACADEMY OF BEAUTY CULTURE, INC., d/b/a CHARLESTON SCHOOL OF BEAUTY CULTURE, INC., JUDY HALL, Owner, and CHERIE BISHOP, Instructor, in their individual capacities,

Respondents.

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BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

WALTER ROBINSON,

Complainant,

v.

DOCKET NO. PAR-351-04

CHARLESTON ACADEMY OF BEAUTY CULTURE, INC., d/b/a CHARLESTON SCHOOL OF BEAUTY CULTURE, INC., JUDY HALL, Owner, and CHERIE BISHOP, Instructor, in their individual capacities,
Respondents.

TYLEEMAH EDWARDS,
Complainant,

v.

DOCKET NO. PAR-454-04

CHARLESTON ACADEMY OF BEAUTY CULTURE, INC., d/b/a CHARLESTON SCHOOL OF BEAUTY CULTURE, INC., JUDY HALL, Owner, and CHERIE BISHOP, Instructor, in their individual capacities,

Respondents.

CHIEF ADMINISTRATIVE LAW JUDGE'S FINAL DECISION

A public hearing in the above captioned-matter was convened on April 23-26, 2007, at the offices of the West Virginia Human Rights Commission in Charleston, Kanawha County, West Virginia.

The Complainants, Walter Robinson and Tyleemah Edwards, appeared in person and their case was presented by Paul R. Sheridan, Deputy Attorney General and Jamie S. Alley, Senior Assistant Attorney General, for the State of West Virginia Civil Rights Division.

The Respondents, Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc., Judy Hall, and Cherie Bishop, appeared in person and their case was presented by, Stephen L. Hall, Esquire.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as the applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the Chief Administrative Law Judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

Litigation of this matter has been very contentious. Numerous Motions have been submitted throughout the life of this case to the original Administrative Law Judge assigned to hear the matter, Elizabeth Blair, and subsequently Chief Administrative Law Judge Phyllis H. Carter. At one point, the case was stayed pending a decision as to whether Mr. Hall could be counsel for the Respondents since he is the Financial Aid Officer at Charleston Area Beauty College and works for his mother, who is co-owner of the beauty school.

Attorney Stephen Hall filed an ethics violation against Jamie Alley, Senior Assistant Attorney General, approximately July 5, 2005. Stephen Hall filed a petition for Writ of Mandamus in the Circuit Court of Kanawha County of West Virginia in September 2006. This Writ was filed against Judge Blair, Judge Carter and the WV Human Rights Commission. Civil Action No: 06-MISC-366. Risk and Insurance Management appointed private counsel to represent the Commission. As well as a lawsuit against the West Virginia Human Rights Commission.

More than thirty (30) Motion and Responses, as well as Orders, were filed in this matter.

Adding to the amount of time needed to complete this decision: numerous continuances were requested, and granted, by the original Administrative Law Judge;

Respondents and Complainant Robinson submitted change of counsel requests; and the Complaint was amended three (3) times. Additionally, there were times when Mr. Hall, counsel for Respondent, would not accept service of process.

I. BACKGROUND

Complainant Robinson and Complainant Edwards are former students at the Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc. [hereinafter referred to as "CABC"]. Complainant Robinson and Complainant Edwards each assert that during their respective enrollments at CABC they experienced race discrimination in the form of disparate treatment, a racially hostile environment, and segregation with respect to the assignment of customers to students. Complainant Edwards also asserts that Respondents Hall and CABC engaged in unlawful reprisal when they suspended and subsequently expelled her from the cosmetology program in retaliation for her complaints of race discrimination.

The Commission issued a finding of probable cause in connection with each of the Complainants' claims. Complainant Robinson and Complainant Edwards were consolidated for the purpose of public hearing. Complainant Edwards' complaint was initially and erroneously docketed as an employment case. The error was corrected and a public accommodations complaint was issued. These matters matured to a public hearing before the undersigned on April 23-26, 2007, at the offices of the West Virginia Human Rights Commission in Charleston, Kanawha County, West Virginia.

At the hearing, the Complainants appeared in person. The Commission's case was presented by Deputy Attorney General Paul R. Sheridan and Senior Assistant Attorney General Jamie S. Alley. Respondent Judy Hall and Respondent Cherie Bishop appeared in person. Respondent Charleston Academy of Beauty Culture, Inc., d/b/a/ Charleston School of Beauty Culture, Inc. (Tr. Vol. III, p. 721) appeared in person and by its representatives, Judy Hall and Jack Donta. Mr. Donta attended the public hearing for part of the day on April 25, 2007. Respondents' case was presented by counsel, Stephen L. Hall, Esquire, who is currently employed at CABC.

Throughout this Final Decision, African American and black are to have the same meaning and reference. The use of the word ethnic includes African American and black.

II. BRIEF SUMMARY OF THE CASE

Complainant Robinson attended CABC between 2002 and 2004. Complainant Edwards was first enrolled as a student in 2001, but voluntarily withdrew sometime thereafter. She later re-enrolled on October 2003 and continued her studies until May 18, 2004, when she was expelled from CABC. While the experiences and allegations of Complainant Robinson and Complainant Edwards are distinct, both complaints assert similar allegations and rely upon common facts.

Both Complainant Robinson and Complainant Edwards, African Americans, experienced a lack of instruction in how to style ethnic hair. The record establishes that this was a problem, and that the problem was evident to students and staff alike. Rather than teach students how to style African American hair, CABC would assign African American customers to African American students who were believed to already have knowledge of these services from personal experiences. During the period of time when Complainant Edwards was on the clinic floor, she was only assigned to work with African American customers.

CABC failed to maintain an adequate supply of hair products that are formulated specifically for use on black hair or for use in predominately ethnic requested services. Students and staff at CABC were aware of these shortages and complained to the Respondent CABC about this. African American students would sometimes have to bring their own supplies to school in order to work on ethnic hair.

CABC's practice with regard to customer assignment had the effect of segregating customers and students on the basis of race. While CABC's written policy prohibits the assignment of customers to students on the basis of race, CABC and its instructors routinely used race as the determining factor in customer assignment. The credible evidence of the record overwhelmingly establishes that Respondents steered customers on the basis of race. Respondents also honored unlawful race-based customer preferences with regard to the race of the student assigned to perform the service.

Complainant Robinson and Complainant Edwards were expected to style the hair of African American customers without prior instruction on methodology, and often with a limited availability of appropriate products. Respondents' practices with regard to segregation significantly compromised the quality of the instruction provided to the Complainants. The lack of instruction and products with which to service their assigned customers constituted disparate treatment and public accommodation discrimination based on race.

The Complainants also experienced a racially hostile environment which infringed upon their enjoyment of the accommodations, privileges, advantages and services which are available to students at CABC. This environment was exacerbated by the beauty school's continued employment of Respondent Bishop. Respondent Bishop engaged in discriminatory practices by using racial slurs, steering black customers to black students, refusing to style and/or teach the styling of black hair and generally treating the African American students in a disparate manner.

Complainant Robinson was the subject of a racially motivated threat of assault by Respondent Bishop. The Respondents did not act to prevent the discrimination and harassment or to protect Complainant Robinson from it.

Respondent Bishop's racially motivated threat with regard to Complainant Robinson was not the only racial remark she made while employed at CABC. Prior to this incident, CABC admits that students complained that she used the racial slur "nigger" with regard to another student. Complainant Edwards also heard Respondent Bishop use the racial slur "nigger" with regard to Complainant Robinson. Complainant Edwards also observed Respondent Bishop perpetuate negative racial stereotypes about African Americans to students during the course of her instruction of CABC courses.

Other CABC staff also perpetuated a racially discriminatory environment for African American students. Complainant Robinson received a note at his station which read "faggot nigger." Although Complainant Robinson requested an investigation, Respondents failed to adequately investigate this incident.

Respondent Hall perpetuated demeaning racial stereotypes. When questioned about the lack of ethnic products for use and sale at the school, Respondent Hall indicated

that she did not keep them out in the display cabinets because African American students steal the products.

After Complainant Edwards complained of her disparate treatment to the West Virginia Board of Barbers and Cosmetologists, Complainant Edwards' disparate treatment escalated and ended in her retaliatory dismissal from the beauty school.

Complainant Robinson, Complainant Edwards and several of their peers took exception to the segregated practices of the school, and filed complaints with the West Virginia Board of Barbers and Cosmetologists (herein after WVBBC) regarding the lack of instruction on the styling of ethnic hair and other concerns. These complaints were made despite stern warnings from Respondent Hall and other CABC staff that students should not cooperate with the WVBBC. Students were also told that it would hurt them more than it would hurt CABC if they attended a WVBBC meeting associated with the complaints.

Complainant Edwards made her complaint and attended the WVBBC meeting. Subsequently, she experienced escalated discrimination and retaliation. After Complainant Edwards had been enrolled for enough hours that she became responsible for tuition to cover the entire program, she was expelled from CABC. Prior to this expulsion, Complainant Edwards and Respondent Hall engaged in a heated verbal exchange that resulted in CABC keeping Complainant Edwards personal property and refusing to give Complainant Edwards a transcript of her hours and grades so that she could complete the course at another school.

The Respondents' discriminatory conduct infringed upon the Complainants' enjoyment of the accommodations, privileges, advantages and services which are available to students at CABC and deprived Complainant Robinson and Complainant Edwards of the educational opportunities to which they were entitled.

III. FINDINGS OF FACT

Background

1. Complainant Robinson is a resident of Kanawha County, West Virginia. He is African American. Complainant Robinson is a former student at the Charleston

Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc. [hereinafter sometimes referred to as "CABC" and/or "Respondent beauty school."].

2. Complainant Edwards is a resident of Kanawha County, West Virginia. Complainant Edwards is African American, and she is a former student at CABC. (Tr. Vol. I, p. 238).

3. Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc. operates a school of beauty culture. (Commission's Exhibit No. 28). CACB is located on Capitol Street in Charleston, West Virginia. (Joint Exhibit No. 1, Stipulation 1).

4. CABC is approved to participate in federal financial aid programs, including the Pell grant program. (Joint Exhibit No. 1, Stipulation 4).

5. Some students at the Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc. have their tuition paid through programs and grants associated with the West Virginia Department of Health and Human Resources. (Joint Exhibit No. 1, Stipulation 5).

6. CABC has enrollment criteria, but offers admission to unselected, unscreened members of the public. (Commission's Exhibit No. 28).

7. CABC is a place of public accommodation and a person within the meaning of the West Virginia Human Rights Act. (See this Chief ALJ's Order Denying Respondents' Motion to Dismiss For Lack of Jurisdiction, dated September 26, 2006).

8. Respondent Hall owns one third of CABC. She is also the manager and an instructor at the school. (Commission's Exhibit No. 20). Respondent Hall is a person within the meaning of the West Virginia Human Rights Act.

9. Respondent Bishop is currently employed by CABC, and she was employed by CABC during at least part of the time that the Complainants were students at CABC (Commission's Exhibit No. 20). Respondent Bishop is a person within the meaning of the West Virginia Human Rights Act. Respondent Bishop testified that Complainant Edwards was a student in her class. Respondent Bishop interacted with Complainant Robinson on the clinic floor. (Tr. Vol. II, p. 222).

10. Witnesses Cleo Morgan and Karen Booker Joyce are former instructors at CABC.

11. Witness Jack Donta owns one third of CABC.

12. As of the date of the public hearing in this matter, witnesses Betty Pullen, Virginia Doss, Wanda Carter, Sandra Richardson, Edwin Stubbs and Toni Brown were employed by Respondent CABC. (Tr. Vol. III, p. 333). Ms. Carter is an instructor and the admissions officer. Ms. Richardson is an instructor and assistant manager. (Tr. Vol. III, p. 401). Toni Brown is the secretary. Betty Pullen, Virginia Doss, Wanda Carter, and Sandra Richardson are instructors at CABC. Edwin Stubbs is a former student at CABC. Kelley Gene Nelson, Jr. is a former student of CABC. Stephen Hall, counsel of Respondents, is the Financial Aid Officer for CABC.

The Cosmetology Program at CABC

13. The CABC cosmetology program consists of 2000 hours. (Joint Exhibit No. 1, Stipulation 3). At the time the Complainants were enrolled at CABC, the 2000 hours were scheduled over fourteen months to create a sixty week program. (Tr. Vol. III, p. 375).

14. Respondent's cosmetology program was designed to include both academic type work and practical experience. (Tr. Vol. I, p. 45; Tr. Vol. II, p. 32). The first 300 hours is lecture based. Then students are put on the clinic floor to apply what they have learned. (Tr. Vol. I, p. 47; Tr. Vol. II, p. 32). By the time a student finishes the program, with 2000 hours, he or she should have accomplished all of their practical as well as their academic studies. (Tr. Vol. II, pp. 32-33).

15. Each student must accomplish a minimum designated number of each of several types of services and procedures. (Tr. Vol. I, pp. 47-48).

16. If a student requires additional time to complete the program, there are additional costs to the student. (Tr. Vol. III, pp. 335-336, 375). CABC charges a fee to students who need to make up work due to absenteeism. This fee is in addition to any tuition owed. (Commission's Exhibit No. 13 and Tr. Vol. III, pp. 375-376). These charges for additional instruction is part of Respondent's Enrollment Agreement.

17. As part of the cosmetology program, CABC cosmetology students pay for a student kit. The kit fee is part of the total cost of enrollment. (Commission's Exhibit Nos. 1 and 13). The kit then becomes the property of the student.

18. A kit consists of the basic tools and equipment used by cosmetology students during practical assignments. Student kits include, but are not limited to, the following items: clippies, brushes, combs, shampoo cape, hair styling-coloring kit, perm rods, rollers, roller clips, scissors, hair dryer and curling iron. (Tr. Vol. I, pp. 254-255; Commission's Exhibit No. 19, p. 62).

19. Complainant Robinson was charged $400.00 for his kit. (Commission's Exhibit No. 1). During her second period of enrollment, Complainant Edwards was charged $500.00 for her kit. (Commission's Exhibit Nos. 1 and 13).

20. First distributions of Pell grant awards for CABC students are used, in part, to cover the cost of the student kit. (Tr. Vol. III, p. 341).

21. The Enrollment Agreement indicates that the kit is non-returnable after three days. (Commission's Exhibit Nos. 1 and 13).

22. Three days after signing the Enrollment Agreement, and beginning school, all kits, books and supplies, after any usage and for health reasons, shall not be subject to return to the school, and shall be charged to the student at a cost of $500.00. It is further understood and agreed by the student that said charges shall not be subject to refund. (Commission's Exhibit No. 13, p. 1).

23. Each cosmetology student obtains a mannequin, which is a model head with hair. Students use the mannequin for practical work. (Tr. Vol. I, p. 264).

24. The Cosmetology Program was set up to provide its students with training in hair cutting, hair relaxing, coloring, facials, eye line arching, and nails. (Tr. Vol. I, pp. 34-35).

25. CABC's asserted objective is "to provide prime education and training to our students, which will enable them to successfully pass their state board exam, obtain licensure and become successfully employed in the industry. . . . Each student will not only receive instruction and exposure to essential technical skills and equipment, but also the opportunity for hands on, supervised work with the public." (Commission's Exhibit 19, p. 3).

Complainant Robinson's Enrollment and Tenure at CABC

26. Complainant Walter Robinson attended the public hearing and provided credible testimony regarding his experiences at CABC. (See Tr. Vol. I, pp. 31-234).

27. Complainant Robinson was a student at the Charleston School of Beauty Culture from August 2002 to March 2004. (Tr. Vol. I, pp. 21-32; Commission's Exhibit No. 47, p. 2, ¶ 4).

28. The Respondents assisted Complainant Robinson in financing his cosmetology education, first through a Pell Grant, and then with a student loan. (Tr. Vol. I, pp. 36-37). In all, he borrowed $6,625.00 (Tr. Vol. I, p. 37), which he is obligated to repay.

29. Complainant Robinson graduated on March 17, 2004. (Tr. Vol. I, pp. 37-38).

30. Cleo Morgan's impression of Complainant Robinson was that he was willing to learn if he was taught, and that he wanted to learn. (Tr. Vol. II, p. 206).

31. Respondents' witness Betty Pullen did not dispute that, at times, Complainant Robinson was eager to learn. (Tr. Vol. III, p. 44).

32. While Complainant Robinson was enrolled in CABC, poor vision caused him some difficulty. Glasses helped him in his studies. (Tr. Vol. II, p. 206). After he got his glasses, Ms. Morgan recalls that he consistently wore them. (Tr. Vol. II, p. 233).

33. The evidence clearly reflects that Complainant Robinson did not receive the type of practice opportunities which are mandated by the WVBBC and which are promised by the Respondents' curriculum. (Respondents' Exhibit No. 13).

34. According to Respondents' records, Complainant Robinson performed eleven clinical colorings as of January 10, 2004 (Respondents' Exhibit No. 10, p. 4). But the Respondents produced records of Complainant Robinson only receiving four opportunities to do colors. The race of only two of the patrons could be identified. The race was African American. And for these reasons, I find the Respondent's records on this issue on the number of colorings Complainant Robinson performed not credible. However, Complainant Robinson credibly testified that he did not do eleven colorings while at the beauty school. (Tr. Vol. I, pp. 67-68).

35. Complainant Robinson credibly testified that he did not do eleven colorings while he was a student at CABC. Furthermore, he stated he had no more than five patrons for hair colors, two of whom were related to him. (Tr. Vol. I, p. 150). Complainant

Robinson is certain he did not have as many as 10 colors. (Tr. Vol. I, p. 221; Respondents' Exhibit No. 6).

36. I find Complainant Robinson's testimony regarding his opportunities to do hair colorings credible.

37. There were several compelling indicators that Respondents' records are not reliable, particularly as they relate to the practical training opportunities Respondents provided to Complainant Robinson. (Tr. Vol. I, pp. 216, 222-226; Commission's Exhibit Nos. 8, 9 and 10; Respondents' Exhibit Nos. 2, 3, 4, 5 and 12).

38. It was only a select few of the instructors who attempted to assist Complainant Robinson. (Tr. Vol. I, p. 48).

39. Cleo Morgan observed interaction between Respondent Bishop and Complainant Robinson on the clinic floor; however, she never observed Respondent Bishop help Complainant Robinson. In fact, Complainant Robinson would seek assistance from Respondent Bishop, but "[s]he would not go directly to him at the time that he needed it. She would go and help another student at the time, and then she'd get back there, but by that time someone else had taken care of it." (Tr. Vol. III, p. 205-206).

40. Virginia Doss testified that she helped Complainant Robinson with a haircut on one occasion. She did not stay with him while he completed the haircut. (Tr. Vol. III, pp. 170-171).

41. Sandra Richardson testified that she helped Complainant Robinson with hair-cutting. She did one-on-one mannequin work with him on the third floor. She has no specific recollection of helping him with clients on the clinic floor. (Tr. Vol. III, p. 449). Ms. Richardson testified that Complainant Robinson may have been slower than other students, but he did pick up techniques. (Tr. Vol. III, p. 449).

42. Respondents called Kelley Gene Nelson, Jr. to establish that Mr. Robinson received an advanced hair cutting class. Mr. Nelson is a former student and employee of CABC.

43. Mr. Nelson testified that he owns his own barber shop in Poca, West Virginia, and that he had no current affiliations with CABC. However, on cross-examination, Mr. Nelson revealed a continuing relationship with the school. He recently

sat on an annual suggestive board which reviewed the school curriculum. (Tr. Vol. III, p. 97).

44. Mr. Nelson testified that he started the barber program in 2002, and estimates that he would have taken advanced hair cutting approximately eight months into his course of study. (Tr. Vol. III, pp. 93-94).

45. Mr. Nelson testified that he and Complainant Robinson were in the same advanced hair cutting class. (Tr. Vol. III, p. 90). According to Mr. Nelson, Complainant Robinson participated in the class discussion. The class met for two weeks in the afternoon in a third floor classroom. (Tr. Vol. III, pp. 91, 94). There were twenty-five to thirty students in the class and there was a written test. (Tr. Vol. III, pp. 94-96). Sandra Richardson recalled that both Gene Nelson and Complainant Robinson were enrolled in her advanced hair-cutting class. She could not recall if they took the same class. (Tr. Vol. III, pp. 438-439).

46. Sandra Richardson testified that Complainant Robinson was enrolled in her advanced hair-cutting class three times. (Tr. Vol. III, pp. 428-429).

47. When students receive grades for written tests in a subject, the score appears on the progress report in front of the subject matter. A dash in lieu of a number means no score had been entered. (Tr. Vol. III, pp. 99-100). If a student takes a class, but does not take the exam, Ms. Richardson enters a zero. (Tr. Vol. III, p. 429).

48. The January 10, 2004, Progress Report on Complainant Robinson (Commission's Exhibit 10, p. 4) shows a dash next to Advanced Hair-cutting, reflecting no score had been entered for him.

49. Ms. Morgan prepared a written statement, at the behest of the CABC office staff, indicating that she had instructed Complainant Robinson in hair-cutting class. (Tr. Vol. II, p. 234; *see* Respondents' Exhibit No. 32).

50. Ms. Carter assisted Complainant Robinson with a mannequin haircut on one occasion. Part way through, Complainant Robinson set his mannequin aside and went to lunch. Ms. Carter never finished the haircut with Complainant Robinson.

51. Students are given assigned lunch times and are only allowed to deviate from their scheduled time for client reasons. "Students must go to lunch at their assigned times unless they have a client or have special permission from the instructor working the

front desk. If you take a lunch time either later or earlier than scheduled, it must be approved by an instructor or it will be taken in addition to your assigned lunch time" (Commission's Exhibit No. 19, Rule 7 numbered p.11 and (Tr. Vol. III, p. 346). Mrs. Carter did not dispute that it was, in fact, his lunchtime. (Tr. Vol. III, p. 392). She only works on the clinic floor when needed. (Tr. Vol. III, p. 352).

52. The Respondent CABC maintained some records related to the Complainant Robinson. These included a Satisfactory Progress Check Form issued by the Respondent CABC periodically, and signed by the Respondent Hall and counsel for the Respondents, Stephen Hall. Each of these forms reflected an evaluation as to whether the student was "maintaining satisfactory progress" or not.

53. The Respondents' records reflect that at the beginning of his time at CABC, during the calendar year 2002, Respondent Hall and Stephen Hall evaluated the Complainant Robinson as "maintaining satisfactory progress." (Commission's Exhibit No. 8).

54. The Respondents' records reflect that during the entire calendar year 2003, Respondent Hall and Stephen Hall evaluated the Complainant Robinson as "not maintaining satisfactory progress." (Commission's Exhibit No. 9; Respondents' Exhibits Nos. 2, 3 and 4). This was during the period when Complainant Robinson was complaining about not getting the same opportunities as white students. This was also the period of time when he was attending school less regularly.

55. During 2003, some of the periodic evaluation reports on Complainant Robinson that were filled out by his instructor, Ms. Morgan, were positive, notwithstanding the negative ratings by Respondent Hall in the same report. The May 2003 and the July 2003 reports reflected that even though Complainant Robinson was not doing well regarding attendance, he did have "strength in all areas," (Respondents' Exhibit No. 3, p. 2), and "making progress in all areas." (Commission's Exhibit No. 9, p. 2).

56. In October 2003, Respondent Hall and Stephen Hall evaluated Complainant Robinson as "not maintaining satisfactory progress;" however, in this report, they did not include the evaluation of Complainant Robinson's instructor. (Respondents' Exhibit No. 4). A lack of Complainant Robinson's signature on the report, it appears Complainant Robinson was never shown the progress report.

57. Respondent Hall acknowledged that some of Respondents' progress checks for Mr. Robinson had not been signed by him, reflecting that he might never have been shown them. (Tr. Vol. III, pp. 700-701; Respondents' Exhibit No. 4). She acknowledged that this would have placed Complainant Robinson at a disadvantage. (Tr. Vol. III, pp. 700-701).

58. The Respondents' records reflect that during the calendar year 2004, Respondent Hall and Stephen Hall evaluated the Complainant Robinson as "maintaining satisfactory progress." (Commission's Exhibit No. 10; Respondents' Exhibit No. 5).

59. The January 2004 report (Commission's Exhibit. No. 10) reflects that instructor Cleo Morgan's evaluation of Complainant Robinson appears to be given more consideration in this report. In addition to noting "satisfactory" attendance and "good progress," Ms. Morgan notes that his strengths are "press/curl." His noted "weaknesses" are hair-cutting, perms and colors."

60. Respondents' records from March 2004, also reflect that Complainant Robinson was maintaining satisfactory progress and that Complainant Robinson has graduated. (Respondents' Exhibit No. 5). There are no other substantive comments on this report, which is signed only by attorney Stephen Hall.

61. A total of $2,213.25 of the tuition money paid to the Respondent CABC on behalf of Complainant Robinson was paid for extended enrollment. (See Respondents' Exhibit No. 19, showing two overtime charges of $1,924.81 and $288.44).

62. After Complainant Robinson graduated he passed the state licensing exam, but when he went to work, he discovered that he had not been well prepared to cut hair. (Tr. Vol. I, pp. 39-141, 43). Complainant Robinson had difficulty holding a job as a cosmetologist, and keeping clients. (Tr. Vol. I, p. 144).

63. James Edward Brady, Jr. was called as a witness by Respondents. He owned a hair salon in Dunbar where Complainant Robinson had worked. Mr. Brady could not recall when Complainant Robinson had worked there. (Tr. Vol. III, pp. 69-70).

64. Mr. Brady testified to alleged "tardiness, lack of professionalism, the not paying attention, lack of dressing appropriately" by Complainant Robinson. (Tr. Vol. III, p. 72). This testimony is in the nature of character evidence and not an issue in this case. (Tr. Vol. III, pp. 71, 73-74).

65. On cross-examination, Mr. Brady admitted that Complainant Robinson was not actually Mr. Brady's employee, but a subcontractor, who rented a booth in his shop. (Tr. Vol. III, p. 75). While on direct, he implied that Complainant Robinson had been terminated for "tardiness" and "lack of professionalism," (Tr. Vol. III, p. 72), on cross-examination he admitted that Complainant Robinson had quit. (Tr. Vol. III, p. 79). Mr. Brady's testimony is inconsistent and therefore lacks credibility.

66. Veronica L. Davis, who works at Dudley Cosmetology University in North Carolina, was called as a witness by Respondents. Ms. Davis testified that she took a telephone call from Complainant Robinson while she was at Dudley, and had a conversation with him about the Dudley School, about the inadequacy of the training at "Charleston Beauty Culture," and about his discrimination case against CABC. (Tr. Vol. II, pp. 245-248).

67. Ms. Davis admitted that calls like Robinson's came in "every day" (Tr. Vol. II, pp. 267-268), yet she testified in detail to the supposed content of the conversation, which allegedly took place years before, and from which she admitted she had taken no notes. (Tr. Vol. II, pp. 244-247, 256). She could provide no useful information as to when the alleged call from Complainant Robinson was received. (Tr. Vol. II, p. 257).

68. Ms. Davis' testimony was not material to the issues in this case.

69. Ms. Davis' testimony is biased and not reliable because under cross-examination, Ms. Davis disclosed that she had come to testify on less than a week's notice, based on a telephone call from attorney Stephen Hall. (Tr. Vol. I, p. 265). She also disclosed that she was seeking work at CABC. (Tr. Vol. I, pp. 265, 260-261).

Complainant Edwards' Enrollment and Tenure at CABC

70. Complainant Edwards was first enrolled in the cosmetology program at CABC on or about April 3, 2001. (Tr. Vol. I, p. 245; *see also* Commission's Exhibit No. 13, pp. 3-4). Consistent with the school's cosmetology program requirements, Complainant Edwards' contract for the April 2001 enrollment specified a course term of 2000 clock hours of classroom work and practical instruction. (Commission's Exhibit No. 13, pp. 3-4).

During her first enrollment, Complainant Edwards recalls being eligible for a Pell Grant. (Tr. Vol. I, p. 250).

71. Complainant Edwards' instructor during this first enrollment was Respondent Bishop. Complainant Edwards does not recall experiencing problems during this brief period of enrollment. (Tr. Vol. I, pp. 265-266).

72. At some point after her initial enrollment, Complainant Edwards voluntarily left the cosmetology program at CABC. (Tr. Vol. I, p. 246). While she has no specific recollection of when she left, Complainant Edwards does recall that she had not yet completed 300 hours of enrollment, and she had not performed any services on the clinic floor. (Tr. Vol. I, p. 248).

73. Complainant Edwards eventually returned to cosmetology school, and contacted CABC in September 2003 to determine if she could re-enroll. (Tr. Vol. I, pp. 249, 251).

74. Respondent Hall initially expressed concern that Complainant Edwards may not qualify for financial aid; however, she ultimately advised her that she was eligible for a Pell Grant, and that she could re-enroll with the new class that was scheduled to begin in October 2003. (Tr. Vol. I, p. 252).

75. Complainant Edwards' second period of enrollment began on October 21, 2003. (Joint Exhibit No. 1, Stipulation 8). Complainant Edwards' second Enrollment Agreement, dated October 21, 2003, specifies an enrollment period of 1935 clock hours of classroom and instruction, for a total cost of $6,287.13. (Tr. Vol. I, pp. 258-259; Commission's Exhibit No. 13, pp. 1-2). Presumably, the sixty-five clock hour differential is related to hours of instruction completed by Complainant Edwards' during her initial period of enrollment.

76. After she had been a student at CABC for a month or so, Respondent Hall instructed Complainant Edwards to fill out pre-enrollment forms. Complainant Edwards had not been asked to fill out these forms upon her initial return to school. Respondent Hall told Complainant Edwards to back date the pre-enrollment forms to September 2003, prior to her re-enrollment. (Tr. Vol. I, pp. 263-264).

77. Initially, she was again in Respondent Bishop's theory class. During the fall

and early winter of 2003, Complainant Edwards' experiences with Respondent Bishop changed. (Tr. Vol. I, pp. 264-266).

78. After Respondent Bishop's termination, Complainant Edwards had no steady theory teacher for a period of time, and was shuffled around before landing in Ms. Bond's class. (Tr. Vol. I, p. 289).

79. CABC could not find Complainant Edwards' grades for work she completed with Respondent Bishop. (Tr. Vol. I, p. 290).

80. Complainant Edwards stated "[W]e'd get a progress report and my progressive report would be empty on certain subjects that I knew we had covered with Ms. Bishop, and I'll say like, 'I know I did that. I know I did that,' and Ms. Richardson and Ms. Carter told me like, 'Well, you know, we haven't been able to receive Ms. Bishop's grades,' so you know, 'if we don't receive Ms. Bishop's grades in a timely fashion or whatever, you're just going to have to do the chapters over,' so." (Tr. Vol. I, p. 290).

81. Complainant Edwards admitted that she did not have perfect attendance. She missed school for a variety of reasons. (Tr. Vol. I, p. 288). However, when she would receive reports of her hours, she was concerned that she was not receiving credit for all of her hours and all of her completed course work.

82. Complainant Edwards credibly testified that she could never get CABC to provide her with an accurate accounting of her hours. At the public hearing, Complainant Edwards stated " I was like even if we need to get - me and you get together and go through all the time cards, I need to know exactly how many hours I'm missing." (Tr. Vol. I pp 285-286).

83. In addition to problems with the reporting of hours earned during her second enrollment, Complainant Edwards never received credit for the hours she completed during her first period of enrollment. (Tr. Vol. III, p. 638).

84. Complainant Edwards went to the CABC office on numerous occasions in an effort to resolve the disparity in her hours and grades to no avail. This delayed Complainant Edwards' eligibility to move to the clinic floor as students must complete 300 hours prior to working with patrons. (Tr. Vol. I, pp. 275, 287).

85. Complainant Edwards stated "sometimes they'd be – they'd have all the

doors locked to the office, and they'd tell us just do – find something to do, you know, and I expressed that I'm here for a reason, and Ms. Hall would tell us like, well, I can't deal with it right now. I have much more important stuff that I have to deal with at the time." (Tr. Vol. I, p. 288).

86. As of January 17, 2004, Complainant Edwards' progress report failed to include grades and credit for activities and practical work that she had completed. (Tr. Vol. I, pp. 291-293, *see also* Commission's Exhibit No. 51).

87. On February 10, 2004, CABC Instructor Wanda Carter discussed Ms. Edwards' progress with her. The documents that were presented during this conversation included narrative statements suggesting a need for Complainant Edwards to bring her attendance and grades up. (Tr. Vol. I, p. 290; Commission's Exhibit Nos. 14, 50, 51).

88. In response, Complainant Edwards raised concerns that her hours and grades had not been entered into the system properly. Complainant Edwards credibly testified that Ms. Carter acknowledged the lack of grades for Complainant Edwards was a result of Respondent Bishop not turning in grades. Carter told Complainant Edwards that she and Respondent Hall would seek to obtain Complainant Edwards' hours and grades from Respondent Bishop. (Tr. Vol. I, pp. 290-304, 341). To Complainant Edwards' knowledge, that was never accomplished.

89. As of April 10, 2004, when she received a progress report identifying her hours as 359.75, Complainant Edwards continued to believe that her hours were not properly recorded. (Tr. Vol. I, p. 350; Commission's Exhibit Nos. 53-54).

90. The substantial evidence in this record demonstrates lax documentation and a lack of accurate record-keeping on the part of CABC. With particularity, Complainant Edwards' address was incorrect on her second Enrollment Agreement; Complainant Edwards was never credited with her hours from her first enrollment; Edwards could not obtain a reliable and complete accounting of her hours and grades; Respondents overcharged Edwards on her final bill.

91. When Complainant Edwards discussed the April progress report with CABC, the Complainant learned that Respondent Hall had not obtained her grades from Respondent Bishop. (Tr. Vol. I, p. 352). Complainant Edwards was required to make up the work.

92. Even though CABC failed to obtain Complainant Edwards' records, the lack of hours and grades entered on Complainant Edwards' behalf resulted in her being given a notice of a 30 day suspension that CABC ultimately did not enforce. (Tr. Vol. I, pp. 354-355; Commission's Exhibit Nos. 53-54).

93. No one ever met with Complainant Edwards about make-up work until April 10, 2004. (Tr. Vol. I, p. 356).

94. On Tuesday, May 18, 2004, Complainant Edwards was expelled from the cosmetology program at CABC.

IV. RACE DISCRIMINATION

Race Discrimination With Respect to Instruction, Equipment and Products

95. Substantial testimony was elicited with regard to the fundamental differences in Caucasian and ethnic hair.

96. Ralph Reed is a Health Inspector II with the Division of Barbers and Cosmetologists (Tr. Vol. II, p. 30), where he has worked for eight years. (Tr. Vol. II, p. 30). He has been a licensed hair dresser for twenty-nine years and has worked in the industry and managed salons. (Tr. Vol. II, p. 30).

97. Ralph Reed testified that on average there are physiological differences in the hair of black and white persons. These differences are the basis for different types of hair products. (Tr. Vol. II, pp. 33-37, 121-122).

98. Jack Donta owns one third of CABC. (Tr. Vol. III, pp. 12, 22). Mr. Donta acknowledged that, in general, there is a difference between the hair of black persons and white persons. (Tr. Vol. III, pp. 19, 23).

99. Differences in white and black hair include texture, curl pattern, elasticity, porosity and the amount of oil in the scalp in the hair. (Tr. Vol. III, p. 405). Advanced hair-cutting instructor Sandra Richardson admitted that cutting techniques differ for Caucasian hair and ethnic hair:

> Ethnic hair a lot of time is very fragile. You need to cut it dry because if it's wet, wet hair will stretch a lot farther than dry hair will, and you can cause some more damage so we will most of the time cut ethnic hair dry.

(Tr. Vol. III, pp. 457-458).

100. Caucasian hair is typically cut wet. (Tr. Vol. III, p. 458).

101. Cleo Morgan has worked in the cosmetology industry since 1987. She is a licensed master instructor by the West Virginia Board of Barbers and Cosmetologists. She has more than ten years experience teaching cosmetology students at various institutions. (Tr. Vol. II, p. 194).

102. Ms. Morgan credibly testified that the students at CABC did not receive adequate and appropriate instruction in the styling of ethnic hair, and that the equipment and products needed for ethnic services were not always available. (Tr. Vol. II, pp. 197-198).

103. Ms. Morgan heard students complain about the lack of instruction in the styles and services typically performed on ethnic hair, and believed that this was a legitimate complaint. (Tr. Vol. II, p. 200).

104. Complainant Edwards and Complainant Robinson and other students did complain about the lack of education about ethnic hair. (Tr. Vol. I, pp. 330-331; see generally Commission's Exhibit No. 32).

105. There was very little offered in terms of course work or teaching relative to the styles and services typically performed on ethnic hair. Ms. Morgan characterized this as a "definite" problem. (Tr. Vol. II, p. 199).

106. During the period of time that Complainant Edwards was a student at CABC, the school did not offer any instruction in how to do corn rows, which are braids tight to the head. (Tr. Vol. I, p. 317).

107. Rather than teaching these techniques, CABC customers were steered to students who were perceived to have knowledge and skills in the type of service requested. (Tr. Vol. I, pp. 316-17).

108. On her employment application, Respondent Bishop identified herself as

qualified to work in a salon whose clientele predominately serviced any kind of hair other than "black." (Commission's Exhibit No. 48).

109. There were limitations on Respondent Bishop's ability to style ethnic hair. (Tr. Vol. II, p. 15). Respondent Bishop told Complainant Robinson that she did not do ethnic hair. (Tr. Vol. I, pp. 61-62). By her own testimony, Respondent Bishop confirmed that she was less qualified than other instructors to teach techniques for ethnic hair. (Tr. Vol. III, pp. 245, 279).

110. Respondent CABC's employment application supports the assertion that there are differences inherent in styling various types of hair. On Respondent Bishop's 1999 application for employment, CABC solicited information from applicants about their qualifications to work with "Black, Caucasian, Oriental and Other" types of clientele. (See Commission's Exhibit No. 48).

111. The employment application utilized by CABC, in October 1999, solicited health and disability information from applicants in violation of the West Virginia Human Rights Act. W.Va. Code R. § 77-1-5 (1994). Questions asked of job applicants include: "What is your personal health?" and "Do you have any disabilities or allergies?" These inquiries are not permitted pursuant to the West Virginia Human Rights Act. (See Commission's Exhibit No. 48).

Availability for Products Formulated for Use on Ethnic Hair and Related Trade Shows

112. Other than one trade show, Complainant Edwards received no instruction related to the styling of ethnic hair. (Tr. Vol. I, pp. 307, 326).

113. One issue students complained about was the lack of trade shows, or expos, involving products designed for use with ethnic hair. (Tr. Vol. I, pp. 330-331).

114. CABC brought trade groups and companies in to perform product demonstrations for students. Complainant Edwards recalled that the trade shows for Caucasian products were typically scheduled for Tuesdays through Saturdays, days when students were already at CABC for class. (Tr. Vol. I, p. 327).

115. Wanda Carter's testimony that CABC tried to bring in expos on Mondays,

when there were no scheduled classes so students could attend these show and make up missed hours, is not credible, (Tr. Vol. III, pp. 334-335) because on cross-examination, Ms. Carter admitted that the trade shows at CABC in 2004 could have been scheduled on other days. (Tr. Vol. III, p. 374).

116. Complainant Robinson testified credibly that the Respondent did not feature black hair shows at CABC until Ms. Bond was hired. (Tr. Vol. I, p. 78).

117. Cleo Morgan confirmed that during her tenure at CABC, the majority of trade shows were geared toward products and services typically performed on Caucasian hair. (Tr. Vol. II, p. 208).

118. Prior to the arrival of Ms. Bond, none of the trade shows Cleo Morgan could recall focused on products typically used in the styling of ethnic hair. (Tr. Vol. II, p. 208).

119. Former instructor Carolyn Bond organized a trade show with Design Essentials, a product line formulated for use with ethnic hair. (Tr. Vol. I, p. 331).

120. The Design Essentials trade show was held on a Monday, an occasion when the school was normally closed, and attendance was not mandatory. (Tr. Vol. I, p. 79; Tr. Vol. I, pp. 327-328).

121. At the conclusion of the trade show, Design Essentials agreed to leave the demonstration products it brought at the school for student use. Rather than allowing the students to use the products as intended, Respondent Hall sold most of them. (Tr. Vol. I, p. 332).

122. Karen Joyce has a beauty salon and has been working in the cosmetology field for twenty-seven years. She worked as an instructor at the Respondent's school on two occasions for fifteen to eighteen months each. (Tr. Vol. II, p. 8). One period was in the late 1990s and the other in the early 2000s. (Tr. Vol. II, p. 10). Complainant Robinson was a student at the school during her second period of employment there, and was still enrolled when Ms. Joyce left. (Tr. Vol. II, pp. 10-11).

123. Karen Joyce testified credibly that there are some differences in the hair products, such as shampoos and conditioners, designed for African American hair versus those designed for Caucasian hair. (Tr. Vol. II. p. 19).

124. Karen Joyce observed product shortages during her tenure at CABC.

(Tr. Vol. II, p. 16). With respect to these shortages, it was more common for African American students, who typically were assigned African American customers, not to have the products they needed. (Tr. Vol. II, p. 17). Students brought their own products to CABC to use on customers. (Tr. Vol. II, pp. 17-18).

125. Ralph Reed testified that he observed differences in the amount of supplies in the back room in relation to the race of the patrons (Tr. Vol. II, pp. 39-40, 43-60) which confirmed what he had been told (Tr. Vol. II, pp. 42, 58) and what he had seen in photographs which had been supplied to him. (Tr. Vol. II, pp. 41-43, 59, 61, 67-70; Commission's Exhibit No. 55).

126. Betty Pullen admitted that students sometimes brought in products, she asserted that "[s]tudents will bring in products not because we don't have them. They just bring them in from home to use their self." (Tr. Vol. III, p. 49). Her testimony in this regard is not credible in light of the overwhelming evidence that CABC did not provide products for the students to use for ethnic hair.

127. CABC has a display cabinet in the front with products for sale, however; products used on ethnic hair are in large measure absent from this display. The Design Essentials products that weren't sold were locked in the basement. (Tr. Vol. I, pp. 333-334; Commission's Exhibit No. 55).

128. On one occasion, Complainant Edwards asked Respondent Hall why all of the black products were locked in the basement. Respondent Hall responded that when she put ethnic products on display in the front of the school, black students tended to steal them. Complainant Edwards reasonably considered this comment by Respondent Hall to demonstrate a racist attitude towards her and the other black students at the school. (Tr. Vol. I, p. 334).

129. When Complainant Robinson complained to Respondents about the lack of products for African American patrons, he was also told that when the school buys these type of products people steal them. (Tr. Vol. I, pp. 70-71).

Pricing of Services Predominately
Requested by African American Customers

130. Respondent CABC's fee practice had a disparate impact upon black

customers. An ordinary shampoo and set, which includes styling, was charged one rate, while persons who required the use of a flat iron were charged a separate fee. Flat iron use is more common with ethnic hair. (Tr. Vol. I, pp. 320-21). The testimony of Cleo Morgan corroborates Complainant Edwards' recollection. (Tr. Vol. II, p. 200).

131. Complainant Edwards observed customers being charged as much as ten dollars per braid for corn rows. (Tr. Vol. I, p. 321).

132. Complainant Robinson stated that CABC charged higher rates for the curling procedures typically used on ethnic hair than the techniques typically used by Caucasians. (Tr. Vol. I, pp. 75-76).

133. Respondents' Exhibit No. 40 is the current price list, not the list from 2003 when Complainant Robinson and Complainant Edwards were in Respondents' school. (Tr. Vol. III, pp. 729-730).

Racial Steering in Customer Assignment

134. The State Board's expectation is that, to the extent that clinical patrons are available to a school, the school will provide equal opportunities for students to work on those clinical patrons, without regard to race. (Tr. Vol. III, p. 326).

135. CABC has a written policy about how students are to be assigned customers. This policy suggests a race-neutral process for the assignment of customers and indicates that senior students have priority for customers who seek chemical services. Paragraph five of this policy states that "[c]lients are never assigned based on sex or race of a student." (Commission's Exhibit No. 21). The policy also contains a way to circumvent the supposed proscription on race-based assignments – a customer can request a student by name. So, while the policy says that a customer can't request a white stylist, it does permit a customer to ask the white student his or her name, and then seek services from the white student by name or vice versa.

136. Student/customer assignments are made at the front desk. (Tr. Vol. III, p. 43). According to the policy and the testimony of witnesses, the front desk at CABC kept a list of students who were available to provide services to customers. Instructors were supposed to go down the list and assign customers to the next available student on the list,

bearing in mind that senior students had priority for chemical services. (Tr. Vol. I, p. 312; Tr. Vol. III, p. 356; Commission's Exhibit No. 21).

137. Despite CABC's written policy to the contrary, customers were assigned to students based upon race.

138. The Respondent did not follow its policy. (Tr. Vol. I, p. 230).

139. Complainant Edwards credibly testified that if a customer walked into the beauty school and told the staff that he or she did not want a black student working on their hair, that the staff would send the customer to a white student. (Tr. Vol. I, p. 311).

140. It appeared to Complainant Robinson that most of students were assigned by race. (Tr. Vol. I, pp. 50-51). White students would get white patrons, and black students would get black patrons. (Tr. Vol. I, p. 51).

141. Sometimes patrons expressed racial preferences with regard to the students who were assigned to provide them services. Complainant Robinson objected to these requests being honored, but he was ignored. (Tr. Vol. I, pp. 51-52).

142. As a result, African American students received a lot of experience doing weaving and braiding, and some procedures which the school did not teach. (Tr. Vol. I, p. 52). These were procedures that CABC perceived were already known to black students. (Tr. Vol. I, p. 54).

143. Complainant Robinson knew of two occasions where he perceived a patron objection to him because of his race. (Tr. Vol. I, pp. 59-61).

144. When Complainant Robinson was in line for clinic assignments, he sometimes experienced being skipped over. (Tr. Vol. I, p. 50). This was the reason he started complaining. (Tr. Vol. I, p. 50). Complainant Robinson complained to Respondent Hall about the racial steering of patrons to students of the same race (Tr. Vol. I, p. 74), and eventually he took his complaint to the WVBBC. (Tr. Vol. I, p. 74).

145. Respondent Bishop was aware of Complainant Robinson's complaints about not getting to work on white patrons. (Tr. Vol. III, p. 244).

146. Complainant Robinson filed a complaint with the WVBBC. Part of the complaint was that African American students were only working on "ethnic hair" and white students were working on Caucasian hair. (Tr. Vol. I, pp. 45-46).

147. Complainant Edwards personally experienced race-based customer

assignment both in the persons whose hair she was assigned to style, and those that she was deprived of the opportunity to style.

148. On one occasion, Complainant Edwards was called to work with an older white customer. As she approached the customer, the woman said that she did not want a black student working on her hair. Rather than following the policy, and explaining to the customer that the school is not allowed to assign students based upon race, CABC assigned the customer to a white student. The instructor in this instance was Ms. Bond, an African American. (Tr. Vol. I, pp. 312-314).

149. Complainant Edwards was upset by Ms. Bond's actions in this instance, on cross-examination, Complainant Edwards believed that Ms. Bond was following previous directives from Respondent Hall. On another occasion, Complainant Edwards observed Ms. Bond speak with Respondent Hall about a customer's refusal to be assigned to a black student. Contrary to instructing Ms. Bond to follow the written policy of the school, Complainant Edwards heard Respondent Hall direct Ms. Bond to assign the customer to a different student. (Tr. Vol. I, pp. 421-422).

150. CABC's failure to follow its policy on assigning students upset Complainant Edwards. She expressed her concern to an instructor, Cleo Morgan, who told the Complainant that she could have the next customer.

151. The next customer who came into the school was a white male who wanted a haircut. He indicated that he did not want a black woman cutting his hair, and when Ms. Morgan did not offer him a white student, he elected to leave. The next customer was a black woman. Complainant Edwards was assigned to work with her. (Tr. Vol. I, pp. 314-315).

152. During the period of time when she was on the clinic floor, Complainant Edwards was never assigned a white customer. (Tr. Vol. I, p. 307). She stated "[A]ll I really did when I was on the clinic floor was braids. I did braids. I did up-dos. I did a relaxer." (Tr. Vol. I, p. 307). Complainant Edwards was never instructed in how to do a relaxer. (Tr. Vol. I, pp. 325-26).

153. Former instructor Karen Joyce also observed a pattern of black students not being given the opportunity to perform cuts or color services on white patrons. (Tr. Vol. II, pp. 11-12).

154. Cleo Morgan also observed a pattern that revealed black students being assigned patrons of their own race. Ms. Morgan credibly testified that the written policy of CABC with respect to the assignment of patrons to students was not routinely followed. (Tr. Vol. II, pp. 196-197).

155. Ms. Morgan admitted that the educational experience of students and their ability to work post-graduation would be substantially affected by the practice of assigning patrons based upon race. (Tr. Vol. II, pp. 193-194, 197).

156. Betty Pullen is a current instructor at CABC, and worked for the Respondent beauty school during the tenures of both Complainants. When asked on direct examination "[d]o you assign clients to students of the same race," Ms. Pullen answered "No, sir. Not always now. It depends on how their name comes up on our list." (Tr. Vol. III, pp. 32-33 emphasis added). Ms. Pullen then asserted that CABC follows its policy on patron assignments. (Tr. Vol. III, p. 33-36). However, her answer very clearly implies that there was a period of time when that was not the case. Ms. Pullen also conceded that she could not speak for other instructors. (Tr. Vol. III, p. 44).

157. Betty Pullen admits there was a period of time when it appeared customers who were black were assigned to black students and customers who were white were assigned to white students. (Tr. Vol. III, p. 44).

158. Ms. Pullen admitted that if a black student was assigned lots of black customers, the student could wind up doing certain styles and not getting experience in others. (Tr. Vol. III, p. 45).

159. The practice of racial steering was common enough that African American students left the cosmetology program with limited experience working on Caucasian patrons. (Tr. Vol. II, p. 12).

Racially Hostile Environment

160. Complainants Robinson and Edwards experienced several instances of racial discrimination, including the use of racially charged threats and negative stereotyping during their respective tenures at CABC. Many, but not all, of these instances involved Respondent Bishop.

Racially Discriminatory Conduct
of Respondent Cherie Bishop

161. Respondent Cherie J. Bishop was called to testify by the Respondents. At the time of the hearing, she was a master cosmetologist instructor CABC. (Tr. Vol. II, p. 221).

162. During the period of time when Complainant Edwards was a student at CABC, there were occasions upon which patrons would book the school for birthday parties. At these events, services for guests can include manicures and hair styling. Complainant Edwards credibly testified that at one such Saturday birthday party, Respondent Bishop engaged in racially motivated steering to pair the only African American cosmetology student with the only non-white party-goer. (Tr. Vol. I, p. 267).

163. On the day of the birthday party in question, Complainant Edwards was the only African American cosmetologist who was assigned to work on hair styles for the party guests. (Tr. Vol. I, p. 269).

164. Respondent Bishop paired the students with guests, and Complainant Edwards was initially assigned to style the hair of a white guest at this particular birthday party. (Tr. Vol. I, p. 267).

165. One girl arrived to the party with her hair up under a cap. When the guest removed her cap, it became apparent that she was a bi-racial child with hair that displayed predominately African American characteristics. (Tr. Vol. I, p. 267).

166. Respondent Bishop reassigned Complainant Edwards to work with the bi-racial child. (Tr. Vol. I, p. 267).

167. Complainant Edwards reminded Respondent Bishop that she had already been assigned a party guest. Despite her prior assignment to a white guest, Respondent Bishop told Complainant Edwards that she could "handle" the child with the ethnic hair. (Tr. Vol. I, p. 268).

168. During this birthday party, a complimented Complainant Edwards on her own hair and asked about the styling.

169. Respondent Bishop told the parent that Complainant Edwards' hair was a

weave. (Tr. Vol. I, p. 271). A hair weave is a form of hair extensions. Complainant Edwards was embarrassed because of the manner in which Respondent Bishop made the comment . (Tr. Vol. I, p. 271).

170. Respondent Bishop told Complainant Robinson she did not do ethnic hair. (Tr. Vol. I, pp. 61-62).

171. On one occasion during class, Complainant Edwards heard Respondent Bishop declare that all of the black people she knew wore hair weaves "because they don't look right without them." (Tr. Vol. I, p. 272).

172. In or around December 2003, Respondent Bishop's wallet went missing. In front of Complainant Edwards' class, which she was instructing, Respondent Bishop asserted that her missing wallet was stolen by "a black person cause white people don't steal." (Tr. Vol. I, p. 273). Complainant Edwards stated at the public hearing: "It made me feel bad because I'm like, why do only black steal, that's not true." (Tr. Vol. I, p. 274).

173. Complainant Edwards reported Respondent Bishop's racial comment to another instructor at CABC. (Tr. Vol. I, p. 274).

174. Respondent Bishop made additional racially derogatory remarks while an instructor in CABC's classrooms. Complainant Edwards credibly testified that Respondent Bishop told her class that all black kids have hair like Don King. (Tr. Vol. I, p. 281). Don King is an African American entertainer or boxing promoter with an unruly afro. (Tr. Vol. II, p. 21-22).

175. Ms. Joyce heard Respondent Bishop remark that a young African American customer looked like Don King. (Tr. Vol. II, pp. 15-16). Ms. Joyce took the remark to be racially derogatory and was offended by that remark. While she does not recall the specifics, Ms. Joyce believes she said something to Respondent Bishop about the remark. (Tr. Vol. II, pp. 21, 23). When Respondent Bishop was asked on direct whether she referred to an African American child as a "little Don King," she replied, "Not that I can remember. (Tr. Vol. III, p. 241).

176. Cleo Morgan heard Respondent Bishop make a racial statement and physical threat concerning Complainant Robinson:

> It came to be used when there was a client who was to receive service would come through the door, and Walter was the next student to receive a

> client, and Ms. Bishop had come back on towards me. I was in the middle of the clinic, and she had come back to me and she says, "You need to assign this client to Walter," and I said, "Why?" She said, "Because I'm not going to assign him anything. I'll take his black ass out on Capitol Street and stomp him." And I said, "Ms. Bishop!" She said, "I mean it." I said, "Ms. Bishop!" She says, "I mean it." So I said, "Okay."

(Tr. Vol. II, p. 202; Commission's Exhibit No. 11). Ms. Morgan's testimony is credible.

177. This statement was made in a public area on the clinic floor. (Tr. Vol. II, p. 202).

178. Students Stephanie Ward and Tamika Garner approached Complainant Robinson and told him of the incident. (Tr. Vol. I, pp. 84-86).

179. Complainant Robinson went to see Respondent Hall. He told her his understanding of the incident, that Respondent Bishop had called him a name. (Tr. Vol. I, p. 80).

180. At the public hearing, Ms. Morgan testified that she neither recalled when Respondent Bishop made the statement about Complainant Robinson nor when she prepared a written memorialization of the same. However, she did corroborate that she prepared a written statement at the request of Complainant Robinson. (Tr. Vol. II, p. 204, see Commission's Exhibit No. 11). The written statement is not dated, and does not identify the date upon which Respondent Bishop made this deplorable remark. (Commission's Exhibit No. 11).

181. Complainant Edwards credibly testified that she heard Respondent Bishop refer to Complainant Robinson in a threatening and racially derogatory manner. On one occasion after using the restroom, Complainant Edwards exited to find Respondent Bishop and an instructor, Cleo Morgan, in conversation. Complainant Edwards heard Respondent Bishop make a racial comment and physical threat against Complainant Robinson. (Tr. Vol. I, p. 280).

182. Students at CABC are typically discouraged from using the first floor restroom. However, during a period of time when racial graffiti ("hate all niggers") was present in the upstairs bathroom, students were given permission to use the main floor restroom. (Tr. Vol. I, pp. 275, 280). Complainant Edwards complained about the racial graffiti to Respondent CABC. (Tr. Vol. I, p. 436).

183. Complainant Edwards very clearly indicated on cross-examination that the racial graffiti incident occurred after she observed Respondent Bishop make threats of violence against Robinson to Cleo Morgan.

184. Cleo Morgan spoke with Respondent Hall about Respondent Bishop's comment. Ms. Morgan told Respondent Hall exactly what Respondent Bishop had said. Ms. Morgan does not recall having been asked by Respondent Hall to provide a written statement. (Tr. Vol. II, pp. 204-205).

185. Respondent Bishop said that she had had only a few interactions with Complainant Robinson. (Tr. Vol. III, pp.74, 242). She said she got along well with him. (Tr. Vol. III, p. 274).

186. Respondent Bishop testified that what she said to Cleo Morgan regarding Mr. Robinson was "you handle this. I'm in no mood to handle him today, because if I do, I am liable to tie his skinny ass into a pretzel and throw him in the middle of Capitol Street." (Tr. Vol. III, pp. 240, 280-281).

187. Respondent Bishop acknowledged that Complainant Robinson is a fairly large man. (Tr. Vol. III, p. 284), and she acknowledged that apart from involving a "bad word" (Tr. Vol. III, pp. 280-281) "skinny ass" was not an accurate way to describe Complainant Robinson. (Tr. Vol. III, p. 284).

188. In explaining, Respondent Bishop could not point to anything that Complainant Robinson had done to trigger this response from her. (Tr. Vol. III, pp. 282-283). She says that she got along well with Complainant Robinson (Tr. Vol. III, p. 274) in the few interactions she had with him. (Tr. Vol. III, pp. 242, 274). The substantial evidence in the record does not support Respondent Bishop's statements.

189. Respondent Hall confirmed that it was reported to her on January 14, 2004, that Respondent Bishop had said inappropriate things about Complainant Robinson. (Tr. Vol. III, p. 497). Respondent Hall was too busy to investigate that day, but the next day she did investigate, and learned that Respondent Bishop had engaged in inappropriate treatment of and made a "threatening statement" about Complainant Robinson. (Tr. Vol. III, pp. 502-503).

190. Respondent Hall questioned Cleo Morgan after the incident and learned

what Ms. Morgan had heard Respondent Bishop say. (Tr. Vol. III, pp. 647-649). But Respondent Hall could not recall whether Ms. Morgan told her at the time about racial terms used by Respondent Bishop, (Tr. Vol. III, p. 649), but Ms. Morgan told Respondent Hall exactly what she heard. (Tr. Vol. II, pp. 204-205). Respondent Hall continued to deny being aware of the racial aspect until the hearing. (Tr. Vol. III, p. 650).

191. When Respondent Bishop was asked on direct whether she had used any racial words to refer to Complainant Robinson, she replied "not that I know of." (Tr. Vol. III, pp. 240-241).

192. Shortly after the incident outside the bathroom, Complainant Edwards heard Respondent Bishop use a racial slur presumably toward Complainant Robinson. Complainant Edwards heard the following:

> You could - it was like you could sense the tension between – you could feel the tension in the air because I was sitting – we was on the first floor, and it's the elevators – it's a elevator right here, and then it's stations over here, and I didn't have a station over there, but I remember being over there, and I remember Ms. – I remember Walter walking to the front of the – he was walking to the front of the school, and Ms. Bishop seen him walking by, and she was like, 'I hate that nigger.' Just like that, 'I hate that nigger.' . . . . [i]f I'm not mistaken, Walter was passing around forms. He was passing forms around to be signed . . . like have you ever observed any racism in school or anything like that."

(Tr. Vol. I, pp. 282-283).

193. While Respondent Bishop did not specifically mention Complainant Robinson by name, it was clear to Complainant Edwards that the comment was directed at him: "We know they just had an altercation and she's walking through saying, 'I hate that nigger.' So, you know, either she's talking to him [Robinson] or she's talking to all of the black people that's in the school." (Tr. Vol. I, p. 284).

194. At the public hearing, Complainant Edwards stated "you tell them and it's like it goes in one ear and it comes out of the other, so you think like why should I even bother." (Tr. Vol. I, p. 275).

195. Respondent Bishop was terminated in January 2004, but not for the use of racially offensive language. (Joint Exhibit No. Stipulation 9). She was subsequently rehired by CABC in 2006 (Tr. Vol. III p. 302) and was employed there at the time of the public hearing. (Tr. Vol. III p. 305).

196. Although Respondent Hall rehired Respondent Bishop, at the public hearing, Respondent Hall testified that she believed that Respondent Bishop's conduct on that occasion warranted terminating her. (Tr. Vol. III, p. 640).

197. The record reflects that this was not the first time Respondent Bishop had been accused of making racial slurs to or about students. (Tr. Vol. III, pp. 256-261).

198. In 2000 or 2001, a student complained to Respondent Hall that Respondent Bishop used the word "nigger." Respondent Hall asked the student to put the complaint in writing, which Respondent Hall claims she never did. (Tr. Vol. III, p. 695). Respondent Hall claims that she spoke to Respondent Bishop about it, and Respondent Bishop wanted to "bring them up and . . . let me confront them." (Tr. Vol. III, p. 696). But by this time, the student had left school. Respondent Hall claims she gave Respondent Bishop a verbal warning at the time that the school would not tolerate racially disparaging remarks about anybody. (Tr. Vol. III, pp. 695-696).

199. In Respondent Hall's testimony, she repeatedly denied that she had warned Respondent Bishop about complaints from students. (Tr. Vol. III, p. 694). However, when confronted with an inconsistency (Commission's Exhibit No. 31), she shifted her story (Tr. Vol. III, p. 697), and only when it was clearly unavoidable, acknowledged that her previous testimony had not been true. (Tr. Vol. III, pp. 697-698). She changed her testimony when it served her needs to do so. (Tr. Vol. III, pp. 723-726). Her testimony in this regard is not credible.

200. Respondent Bishop told a confused story about her allegedly having made racial slurs to two other students. She could not recall when and gave conflicting details. (Tr. Vol. III, pp. 256-259).

201. Respondent Hall and CABC declined to thoroughly investigate this incident of racial slurs after the offended students left the program. (Tr. Vol. III, pp. 258-259).

202. Respondent Bishop had good evaluations, even after these students complained to Respondent Hall about Respondent Bishop's use of racial comments. She never received any reprimands, warnings or other written or oral notices concerning her work performance during her CABC employment or about the racial comments she made to and about African American students. (Commission's Exhibit No. 46, p. 7).

203. When Respondent Bishop applied to the Department of Employment Security for unemployment, the application reflected that she had been discharged for using "vulgar and racial language." (Commission's Exhibit No. 39, p. 2).

204. Complainant Robinson specifically testified that he was hurt and felt bad as a result of the discriminatory treatment of him by the Respondents. (Tr. Vol. I, pp. 89, 90). In addition, it was clear from Complainant Robinson's demeanor that it was painful to describe events which transpired while he was at CABC, both what had occurred and his efforts to make changes.

Other Incidents of Racial
Discrimination Involving Complainant Robinson

205. On one occasion, someone left a note on Complainant Robinson's station which referred to him as a "Faggot Nigger." He reported this to Sandra Richardson. (Tr. Vol. III, p. 462). Complainant Robinson gave Ms. Richardson the note, which read "faggot nigger," and told Ms. Richardson that he wanted to file a complaint. (Tr. Vol. III, pp. 462-463). Complainant Robinson followed Respondents' policy in making this complaint. (Commission's Exhibit No. 22).

206. Initially, Ms. Richardson claimed that she did not recall what the note said:

Q: Do you recall a time when Walter Robinson brought you a note that someone left for him in his station?
A: Yes, Ma'am, I do.
Q: Do you recall what that note said?
A: Right now, no, I don't.
Q: Did it say "faggot nigger"?
A: I believe that's what it said.

207. Ms. Richardson told Complainant Robinson that she would take his complaint to Respondent Hall. (Tr. Vol. III, p. 463).

208. Ms. Richardson believes that there was a written complaint related to the racial note, but doesn't recall if she prepared it. She does not know what happened with the complaint, however she recalls speaking with Respondent Hall about the incident. Ms. Richardson gave Respondent Hall the note. (Tr. Vol. III, pp. 463-464).

209. Complainant Robinson complained to Respondent Hall, and she claims that she understood this to be a racial complaint. (Tr. Vol. III, p. 665).

210. Respondent Hall claimed she conducted an investigation of this incident, but she kept no records. She did not even keep a copy of the offensive note. She is not sure what happened to the note. (Tr. Vol. III, pp. 667-668 and pp 777-778).

211. Respondent Hall's testimony is not credible because she declined to list Mr. Robinson's complaints when asked in discovery to identify each complaint of racial discrimination or harassment. (Tr. Vol. III pp 670-671; Commission's Exhibit No. 47). And when asked specifically about the note left at his station which referred to him as a "Faggot Nigger", Respondent Hall explained that she "had forgotten about that." (Tr. Vol. III p. 671).

212. Respondent has a written policy on harassment. It provided that it is the "responsibility of the Charleston School of Beauty Culture management to create an environment free for discrimination in any form, including harassment based on sex, race, age, religion, national origin, color or other reasons." (Commission's Exhibit No. 22).

213. On at lest one occasion, Wanda Carter stopped Complainant Edwards and a group of friends of diverse races from having lunch together. (Tr. Vol. I, pp. 345-346).

Complaints to CABC and WVBBC

214. Complainant Robinson made complaints of race discrimination to CABC and the WVBBC. Complainant Robinson made his complaints about a lack of equal opportunity based on race known to CABC as early as April 2002, and then to the WVBBC. (Commission's Exhibit Nos. 2, 3 and 4; Tr. Vol. I, pp. 98-102).

215. Complainant Robinson consistently put forward his complaints of discrimination. (Commission's Exhibit Nos. 4 and 5). He complained to Respondent Hall repeatedly about being mistreated by the Respondents because of his race. (Tr. Vol. III, p. 643).

216. Some time before May 7, 2003, Complainant Robinson delivered a letter to Respondent Hall which detailed some of the discrimination which he believed was occurring. (Tr. Vol. III, p. 654; Commission's Exhibit No. 6). On May 7, 2003, the

Respondents held a staff meeting. Respondent Hall claimed that she "addressed in [Robinson's] complaints at the meeting." (Tr. Vol. III, pp.659, 655). However, it is clear from her testimony and from the minutes that what she actually did was merely deny the existence of the discrimination. (Tr. Vol. III, pp. 660-661). The tone of the "minutes" is very defensive, and almost appears to have been written in anticipation of formal discrimination charges. There is no indication that the issues were ever addressed with Complainant Robinson, or that any changes were made in response to the complaints.

217. Complainant Robinson wrote Respondent Hall in September 2003 to again raise his complaints of discrimination. (Commission's Exhibit No. 3; Tr. Vol. III, p. 661).

218. The Respondents have a grievance policy for handling student complaints, which is mandated by NACCAS, the organization which accredits the Respondents. This policy calls for complaints to be in writing. To comply with this policy, the Respondents maintain complaint forms. (Tr. Vol. III, pp. 664-665). Yet, Ms, Hall did not make any effort to take Complainant Robinson's complaints as grievances. (Tr. Vol. III, pp. 665-666).

219. Despite warnings not to complain, Complainant Edwards and Complainant Robinson filed complaints with the WVBBC. (Tr. Vol. I, p. 360).

220. Ralph Reed, investigator, of the WVBBC conducted an investigation. As part of that process, he came to CABC and talked with students who had complaints.

221. The majority of the complaints were not within the Board's jurisdiction and those were forwarded to the proper agencies. Some of the complaints were jurisdictional and did have merit. (Tr Vol. III, p. 325). Those complaints which fell within the WVBBC jurisdiction were corrected and ultimately dismissed. (Tr. Vol. III, pp. 315-325).

222. Some allegations fell within the jurisdiction of the West Virginia Human Rights Commission. (Tr. Vol. III, pp. 315-316, 322-323). Complainant Robinson and Complainant Edwards ultimately went to the West Virginia Human Rights Commission to file their complaints.

223. Respondent Hall and other instructors at the school told students not to cooperate with the WVBBC. (Tr. Vol. I, pp. 360-361).

224. Wanda Carter discouraged students from cooperating with the WVBBC investigation. (Tr. Vol. II, pp. 53-54).

225. Both Ms. Carter and Respondent Hall told Complainant Edwards not to answer any questions about the school. (Tr. Vol. I, pp. 360-361).

226. Complainant Edwards recalls that her initial complaint to the Board was about CABC's lack of instruction in ethnic hair styling techniques and the lack of products available for use on ethnic hair. (Tr. Vol. I, p. 362).

227. On another occasion, when a meeting with the Board of Barbers and Cosmetologists was to convene at CABC, Respondent Hall advised Complainant Edwards and other students that if they attended the meeting they were doing so at their own risk. (Tr. Vol. I, p. 361).

228. Despite the warning of reprisal, Complainant Edwards attended the meeting at CABC that included a panel of the WVBBC and Mr. Reed. At least two CABC instructors were present. (Tr. Vol. I, pp. 60, 363-364).

229. Cleo Morgan heard Respondent Hall say that students could go to the Board (WVBBC), but it would hurt the students more than it would hurt Hall. (Tr. Vol. II, p. 216).

230. The credible evidence adduced at the hearing is persuasive that Respondent Hall made threats of reprisal against students for their complaints to and cooperation with the WVBBC.

231. Ralph Reed's investigation found evidence that there were students very close to graduation who had not received the requisite number of opportunities to practice certain procedures. (Tr. Vol. II, p. 46). This was particularly true of Complainant Robinson. (Tr. Vol. II, p. 48). For instance, when he had completed 1995 of his 2000 hours, he had not done a single bleach. Bleach is used rarely on African American hair, but commonly on Caucasian hair. (Tr. Vol. II, p. 48).

232. CABC and Respondent Hall were aware of the WVBBC complaints no later than mid-April 2004, when they submitted written responses to the WVBBC associated with these complaints. (Joint Exhibit No. 1, Stipulation 7).

233. Despite CABC's awareness of these complaints it did not convene its advisory committee to mediate the complaints. (Tr. Vol. II, pp. 283-284).

234. Kenneth Coston, an African American, was a character witness for

Respondents Hall and Bishop who did not personally experience discrimination at the hand of the Respondents. A former employee of CABC, Mr. Coston had left that employment by the time Complainant Edwards and Complainant Robinson were students at the school. (Tr. Vol. II, p. 282). However, he was a member of an executive committee whose purpose included mediating complaints. (Tr. Vol. II, p. 283). Mr. Coston was not brought into CABC in 2004 to mediate any discrimination complaints of Complainant Robinson or Complainant Edwards. (Tr. Vol. II, pp. 283-284).

REPRISAL

235. On one Saturday after Complainant Edwards complained to the WVBBC, She was unable to make it in to class. CABC has a policy requiring students to call in on Saturday morning if they won't be able to come in. (Tr. Vol. I, p. 368). Students who miss a Saturday and fail to call in are not allowed to attend school the following two school days. (Commission's Exhibit No. 19, p. 23).

236. On that Saturday, Complainant Edwards called in twice. On the first occasion, Complainant Edwards' instructor was not available to come to the phone and discuss her absence. Complainant Edwards called back and ultimately spoke with Ms. Bond, informing her that she would not be able to come in that day. During the course of this conversation, the instructor approved the absence and indicated that she would see Complainant Edwards on Tuesday. Nothing was said or done to suggest that Complainant Edwards had not complied with the policy. (Tr. Vol. I, pp. 376-77).

237. When Complainant Edwards arrived at CABC the following Tuesday, her time card was not in its normal location. She asked her instructor about her time card, and was advised to go to the office and ask Respondent Hall about her card. (Tr. Vol. I, pp. 377-378).

238. Complainant Edwards' testimony at the public hearing with regard to the timing of these events is clear: She missed a Saturday, she was suspended from school for two days even though she had called in; she was assigned to the dispensary for two weeks; thereafter she was assigned dispensary duty again; and on the day she was re-assigned to the dispensary she was expelled. Complainant Edwards' testimony in this

regard was credible and consistent on direct examination and cross-examination. (See Tr. Vol. I, pp. 375-385, 440, 444, 452, 496-498). Counsel for Respondent is the one who appears to be confused over the testimony on this issue. Contrary to his assertion, Complainant Edwards never testified that she was terminated on the Thursday she returned from suspension. However, the Commission's previously provided discovery responses omit reference to Complainant Edwards' two weeks in the dispensary prior to her expulsion, and inadvertently refer to her last day at CABC as a Thursday. This was clearly an error inasmuch as May 18, 2004 was, in fact a Tuesday. Any confusion created by the Commission's discovery responses was clarified by Complainant Edwards' credible testimony on the timing of events. (Respondents' Exhibit 22).

239. Complainant Edwards met with Ms. Carter and Respondent Hall about her time card. Ms. Carter alleged that Complainant Edwards had not called in on Saturday, and would not be allowed to attend school for two days. Complainant Edwards testified that Ms. Bond, with whom she spoke, came up to the office and told Ms. Carter and Respondent Hall that Complainant Edwards had called in. Regardless, she was sent home for two days. (Tr. Vol. I, pp. 378-379).

240. When Complainant Edwards returned to school after that suspension, she was assigned to work in the dispensary. The dispensary is an area in the back of the beauty school where items such as towels and some products are maintained. Students are assigned to work two weeks in the dispensary during their enrollment in the cosmetology program. (Tr. Vol. III, p. 181). In this assignment, students stock and maintain the dispensary area. While students are supposed to remain in the dispensary throughout the day, Complainant Edwards credibly testified that other students would leave the dispensary without discipline or incident. (Tr. Vol. I, pp. 379, 394).

241. During the time that Complainant Edwards was assigned to work in the dispensary, instructors pulled her out to perform services for customers. She would advise them that she was on dispensary duty, but would be told to leave to perform services anyway. (Tr. Vol. I, p. 381). Virginia Doss indicated that Complainant Edwards had to come out of the dispensary to do students hair as well as her own. (Tr. Vol. III, p. 177).

242. Complainant Edwards never spent a full day in the dispensary because she

was "constantly" pulled out to perform services on African American customers. (Tr. Vol. I, p. 382).

243. Despite contentions that Complainant Edwards left the dispensary to do hair without authorization, Respondents have provided no evidence that Complainant Edwards was ever formally disciplined for doing hair while assigned dispensary duties. Virginia Doss is familiar with CABC's procedures and policy on discipline. While she claims that she verbally warned the Complainant about being out of the dispensary, she did not recommend that Complainant Edwards be formally disciplined for doing hair while being assigned dispensary duty. (Tr. Vol. III, p. 196).

244. On Tuesday, May 18, 2004, after Complainant Edwards had completed two weeks of dispensary duty, she arrived to the beauty school and learned that Respondent Hall had assigned her to the dispensary again. (Tr. Vol. I, p. 383). Respondent Hall told the Complainant that she was back in the dispensary because she did not do two weeks during the last assignment. Complainant Edwards indicated that she wasn't in the dispensary full time because Respondent Hall allowed the instructors to pull Complainant Edwards out to provide services to customers. (Tr. Vol. I, p. 395).

245. Complainant Edwards went to the dispensary area, which was already fully stocked. (Tr. Vol. I, p. 384).

246. Complainant Edwards spoke with Ms. Bond, who was working on her own hair at the shampoo bowls. Complainant Edwards told Ms. Bond that she had been assigned to the dispensary again. Ms. Bond tried to minimize the assignment by observing that the dispensary was in good order and the assignment would take little effort on Complainant Edwards' part. (Tr. Vol. I, p. 384).

247. Knowing that Complainant Edwards was assigned to the dispensary, Ms. Bond still asked Complainant Edwards to help wash and rinse out the back of Ms. Bond's hair. Complainant Edwards agreed to help, but first advised Ms. Bond that she needed to remove some of her jewelry. (Tr. Vol. I, p. 398).

248. Each student has an assigned station with an area that can be locked. Students can store and secure items at their personal stations. (Tr. Vol. III, p. 116).

249. Complainant Edwards went to her station, located at the front of the student area, and secured three of her rings. One of these rings was a three-stone diamond ring Complainant Edwards received as a gift from her boyfriend. After completing this task, Complainant Edwards assisted Ms. Bond in washing her hair. (Tr. Vol. I, pp. 398-399).

250. Complainant Edwards then walked over to one of her classmates and the classmate's daughter and picked up a comb to pull her own hair back in a pony tail. Before she could complete this action, she looked up and saw Respondent Hall looking at her from the mezzanine. Complainant Edwards credibly testified that Respondent Hall looked at her and said, "Tyleemah, didn't I tell you to get in the F'ing dispensary." (Tr. Vol. I, p. 385).

251. Respondent Hall denies having used a curse word. Respondent Hall spent a significant amount of time explaining why she could not bring herself to say the word "fuck," (the word Complainant Edwards alleges that she used with her) even when it was for the purpose of testifying to what she had heard other people say, and even when directed to be explicit by the ALJ. (Tr. Vol. III, pp. 498-499). However, Respondent Hall had no similar difficulty or hesitation using the term "nigger" in the same way, that is, when it was attributed to someone else. (Tr. Vol. III, p. 695).

252. Complainant Edwards' testimony regarding her interaction with Respondent Hall on her last day at school was filled with emotion. Three years after the fact, Complainant Edwards' recall and distress support a finding that Respondents' act of reprisal had a substantial impact upon her. Her recollection is consistent with the testimony of many other witnesses, and was highly credible.

253. Complainant Edwards stated that Respondent Hall approached her and said the following:

> When she came down the steps, she grabbed me by my arm and she said, "You were to have been in the dispensary, and I don't want to see you outside of the dispensary." I'm like, "Ms. Hall, look at the towels." I said, "Everything is packed." I said, "There's not even no clients. There's really nobody here." I said, "There's nothing to do." I'm like, "I'm just over there conversating," you know. It never before was a problem with you conversating, you now, so I'm trying to figure out what's going on.

> So when she pulled me back into the dispensary area, she was like you want call – "you want to write a report to the board stating how we treat you so bad." She was like, "If you feel we treat you so bad, why don't you tell them about this?" and I'm asking her like, "Get out my" – well, I'm not asking her. Now, I'm to the point where I'm telling her like, "Get out of my face."

(Tr. Vol. I, pp. 393-394).

254. In taking such action, Respondent Hall violated the CABC policy on student and client relations: "Any time a disciplinary problem arises with a student, take the student to the office. Never reprimand a student in front of another student or client." (Commission's Exhibit No. 25) (emphasis in original)

255. When Complainant Edwards challenged the second assignment in the dispensary Respondent Hall told Complainant Edwards that she was suspended. This was the second suspension imposed upon Complainant Edwards after her race discrimination complaint to the WVBBC. Complainant Edwards pointed out to Respondent Hall that this was the second time she was wrongfully suspended. (Tr. Vol. I, p. 395).

256. In response to Complainant Edwards' efforts to point out the unfairness of Ms. Hall's actions, Respondent Hall expelled the Complainant: "Since you want to argue with me, you can get your stuff and you could leave and not return to my school period." (Tr. Vol. I, pp. 395-96).

257. Once Complainant Edwards was expelled, she reached for her book bag. Respondent Hall kept grabbing Complainant Edwards' upper arm, and the Complainant would try and pull away. The Complainant told Respondent Hall that she did not need to touch her. (Tr. Vol. I, p. 397).

258. During this exchange Respondent Hall was yelling at Complainant Edwards. Complainant Edwards recalled that "She was yelling. She was, I mean, red in the face and just going off." (Tr. Vol. I, p. 396).

259. Respondent Hall's testimony regarding this incident lacks credibility. Ms. Hall claims that she observed Complainant Edwards outside the dispensary and said "Tyleemah, honey, you know you're not supposed to be here. You're supposed to be back in the dispensary." (Tr. Vol. III, p. 520). Respondent Hall alleges that in response to being told the dispensary involved more than keeping towels stocked that Complainant Edwards,

who Respondent Hall characterized as generally quiet "really went off" and that her alleged outburst was "totally unprovoked." (Tr. Vol. III, pp. 520-21, 720). Respondent Hall claims she told the Complainant to get her things and leave. (Tr. Vol. III, p. 521). However, she prevented Complainant Edwards from doing that very thing.

260. Respondent Hall admits that she does not recall everything that was said. (Tr. Vol. III, p. 523).

261. At one point in the exchange, Respondent Hall was waving around a bottle filled with an unknown liquid. Her manner was such that it prompted Complainant Edwards to say, "Ms. Hall, you better not spray me in the eyes with whatever you've got in that bottle." (Tr. Vol. I, p. 396).

262. Complainant Edwards became aware that Respondent Hall was causing a visible scene, and that others were beginning to watch. (Tr. Vol. I, p. 397). She was embarrassed and was crying. (Tr. Vol. I, p. 399).

The Incident at Complainant Edwards Station

263. Complainant Edwards told Respondent Hall that as soon as she was allowed to collect her things, she would leave. (Tr. Vol. I, p. 397). Complainant Edwards' station and the front door were in the same general direction relative to the dispensary.

264. Complainant Edwards headed toward her station and asked another student to go and get Calvin, a barber student on the fourth floor. She asked that he be told to call the police. (Tr. Vol. I, p. 399).

265. Complainant Edwards finally made it to her station, and reached for her keys in her smock. Respondent Hall continued to grab at Complainant Edwards as she unlocked her work station. Complainant Edwards told her to stop. (Tr. Vol. I, p. 400).

266. The lock fell to the floor. When Complainant Edwards moved to lift the lid of her station's storage area Respondent Hall and Betty Pullen pulled the lid down on her fingers. (Tr. Vol. I, p. 400).

267. Respondent Hall admitted at the public hearing that she and Ms. Pullen

barred Complainant Edwards from retrieving her things even though Respondent Hall testified that she told Edwards to collect them. (Tr. Vol. III, p. 522). Respondent Hall asserted that even though she was physically stopping Complainant Edwards from claiming her possessions it was "never my intention at that time really to terminate her." (Tr. Vol. III, p. 520).

268. At this point, Complainant Edwards was very upset and was audibly crying. While Respondent Hall admitted that Complainant Edwards was saying "don't hit me" (Tr. Vol. III, p. 521), she denied touching the Complainant. After some equivocation at the public hearing, Respondent Hall even denied laying a hand on Complainant Edwards' back as other witnesses observed. (Tr. Vol. III, pp. 541-542, 723-724).

269. Complainant Edwards' fingers were red after they were caught in the station, but they did not bleed or bruise. (Tr. Vol. I, p. 461).

270. Complainant Edwards told Respondent Hall and other members of the CABC staff that they were being unprofessional, and that while she knew that Respondent Hall wanted to provoke her into hitting her, it wasn't going to work. (Tr. Vol. I, p. 401).

271. Michelle Penn, a nail technician student at CABC, sought to intercede in the confrontation and stepped in between Complainant Edwards and Respondent Hall. (Tr. Vol. I, p. 401).

272. Respondent Hall acknowledged at the public hearing that Complainant Edwards made it very clear that all she wanted before she left the premises was her things. (Tr. Vol. III, pp. 770-771). Respondent Hall acknowledged that if she had allowed Complainant Edwards to take her things, all indications were that she would have left without disruption. (Tr. Vol. III, pp. 770-771).

273. The police arrived. Complainant Edwards spoke with the officer and left the premises. (Tr. Vol. I, pp. 401-402).

274. Complainant Edwards left without her purse, her kit, her rings or the other personal property she kept in her station. These items were never returned to her. (Tr. Vol. I, pp. 402, 404-405).

275. Respondent Hall's testimony that Complainant Edwards took her kit with her

when she left is not credible because it contradicts the testimony of Complainant Edwards, Michelle Penn, Cleo Morgan, Respondents' own witness Sandra Richardson and the Amended Answer Respondent Hall verified on behalf of herself and CABC . (Tr. Vol. III, p. 627). (See Commission's Exhibit No. 35, p. 3, ¶ 28).

276. Complainant Edwards was bruised as a result of the assault she sustained from Respondent Hall. She was not bruised by her boyfriend. (Tr. Vol. I, p. 456). She provided a photocopy of this bruising to the WVBBC when she filed her second complaint with that agency subsequent to her expulsion. (Tr. Vol. I, pp. 418-419; Commission's Exhibit No. 37).

277. During Complainant Edwards' interaction with and assault by Respondent Hall, there were other students, teachers and customers on the floor. The testimony of the witnesses is generally not probative with regard to the issue of how the incident began because none of them were able to definitely testify as to how the incident began.

278. It is clear that both Complainant Edwards and Respondent Hall were yelling. It is also clear that Complainant Edwards wanted Respondent Hall to refrain from touching her, and to allow her to get her personal belongings and go.

279. Michelle Penn was on the clinic floor when the incident involving Ms. Edwards and Respondent Hall occurred. She first became aware of the incident when she "heard words" from the back. (Tr. Vol. II, p. 180). Ms. Penn recalls both Complainant Edwards and Respondent Hall speaking loudly. Ms. Penn's impression was that Respondent Hall was not being professional. (Tr. Vol. II, p. 180).

280. Ms. Penn recalled hearing Complainant Edwards repeatedly ask Respondent Hall to let her go as they traveled from the dispensary area in the back of the clinic floor towards the front of the building. (Tr. Vol. I, p. 181).

281. Ms. Penn corroborates Complainant Edwards' testimony that the station was slammed on her fingers:

> A. Complainant Edwards kept crying and saying, "Just let me get my stuff and leave," and Ms. Hall just kept nagging at her and nagging at her and nagging at her, and Complainant Edwards just turned around and said, "I just want to get my stuff and leave," and Ms. Hall said, "No, this is not your stuff. This is the Charleston School of Beauty Culture's stuff." And she was

like, "No." Complainant Edwards had a bag on her arm. The bag fell. I seen Ms. Hall grab the bag.

Q. Were there any other persons on the floor when this was happening?

A. Students and clients.

Q. Were there any other person involved in the situation other than Complainant Edwards and Ms. Hall that you observed?

A. Ms. Pullin was behind Ms. Hall.

Q. Did you observe anything at the station between any of those persons?

A. Complainant Edwards went to stick her keys into her station to unlock her station to try to get her belongings. The station was slammed by Ms. Hall on Tyleemah Edwards' hands.

Q. You saw that happen?

A. Yes.

Q. Where were you?

A. I was standing at Tyleemah Edwards' station.

Q. So at one point, you moved from the middle of the floor?

A. I moved from the middle.

Q. All right.

A. I moved from the middle of the floor close to Tyleemah Edwards' station. I was telling them, "Just let her go. You can just solve this; just let her go. I don't know what happened; just let her go."

Q. Who did you say that to?

A. Ms. Hall.

Q. Did you get any response?

A. No, ma'am.

Q. What happened next?

A. Then that's when the station got slammed down on her hands. Then I was – the police came in, and he whispered to Tyleemah. I don't know what he said, and she just left. She's like, "I'll be back to get my stuff," and she just left.

(Tr. Vol. II, p. 183-184).

282. Michelle Penn stepped between Complainant Edwards and Respondent Hall and told Respondent Hall to let Complainant Edwards get her stuff and go. (Tr. Vol. II, p. 189).

283. Respondent Hall corroborated that Penn told Hall not to hit Complainant Edwards. (Tr. Vol. III, p. 523).

284. According to Michelle Penn, Complainant Edwards did not take any items from her station with her, nor did she return to the building that day. (Tr. Vol. II, p. 185).

285. At some point after Complainant Edwards left, Ms. Penn observed other students filling out incident reports about the events of May 18, 2004. (Tr. Vol. II, p. 187). No one ever asked Michelle Penn to fill out an incident report. (Tr. Vol. I, pp. 186-187).

286. Cleo Morgan was on the third floor in class when students came and told her there was an incident on the clinic floor. (Tr. Vol. II, p. 209). Ms. Morgan headed downstairs and observed Complainant Edwards and Respondent Hall arguing. Ms. Morgan recalls that both parties were using very loud voices:

> A. I recall Tyleemah, all she wanted was her stuff out of her station that she had went and bought personally with her money. All she wanted was her personal stuff out of there, and they wouldn't allow her to get it out.
>
> Q. Who wouldn't allow her to get it out?
>
> A. There was -- Mr. Pullin [sic] was body guarding her station, holding it down so she couldn't get in it, and then when she attempted to get in it, then the station went up, slammed down, up, slammed down.

(Tr. Vol. II, pp. 209-210).

287. The credible testimony of Complainant Edwards, Ms. Penn and Ms. Morgan conflicts with the account of Betty Pullen. Ms. Pullen claims that she never slammed the station and that it wasn't moving at all, Complainant Edwards never having had the opportunity to unlock it. Ms. Pullen asserts she "kindly laid my hand on top of the desk over the lock so she couldn't unlock it." (Tr. Vol. III, p. 53).

288. Cleo Morgan told Ms. Pullen and Respondent Hall to let Complainant Edwards get her things. She got no response. (Tr. Vol. II, p. 211).

289. Ms. Morgan recalls that the situation concluded after the police arrived. (Tr. Vol. II, p. 211). The only contact she had with the police officer was to tell him that Complainant Edwards would leave if the school allowed Complainant Edwards to take her belongings. (Tr. Vol. II, p. 214).

290. Cleo Morgan observed Complainant Edwards leave the building without her things. (Tr. Vol. II, p. 212).

291. Ms. Pullen's testimony that Complainant Edwards had her kit bag and

returned to the school screaming for her station contents (Tr. Vol. III, p. 53) is inconsistent with Respondents' position on this issue is contrary to the credible and substantial evidence on this point.

292. Ms. Morgan explained that she was speaking to Complainant Edwards as a black woman to a black woman and letting Complainant Edwards know that "once you've been provoked, then they want you to act out in a way to show your anger in a loud tone of voice, basically just show off and just go wild and just tear up the place, you know." (Tr. Vol. II, p. 214).

293. Ms. Morgan believed that Complainant Edwards had been provoked. At one point, Ms. Morgan spoke with the Complainant and told her to calm down because "this is how they want you to act." (Tr. Vol. II, p. 212).

294. Despite the fact that Ms. Morgan witnessed the events at Complainant Edwards' station, she was not asked to write a statement. Ms. Morgan was aware that others had been asked by CABC to provide witness statements. (Tr. Vol. II, p. 214).

Additional Witnesses to the Incident Involving Complainant Edwards and Respondent Hall

A. Edwin Stubbs

295. Respondents' witness Edwin Stubbs is employed by CABC. On May 18, 2004, he was a student at the school working with a client on the clinic floor. (Tr. Vol. III, pp. 80-81). Mr. Stubbs heard Complainant Edwards and Respondent Hall arguing about Complainant Edwards trying to get her stuff out of her station. Respondent Hall refused to allow Complainant Edwards to get her things. (Tr. Vol. III, p. 81).

296. He did not recall anyone cursing, but he did recall that Complainant Edwards and Respondent Hall were yelling. (Tr. Vol. III, pp. 84-85).

B. Lisa Bryant

297. Respondents' witness Lisa Bryant is a former CABC student. (Tr. Vol.

III, p. 104). She was present on the day the incident between Complainant Edwards and Respondent Hall occurred. (Tr. Vol. III, p. 105). CABC asked Ms. Bryant to write a statement about what she observed on that day. Ms.Bryant prepared her statement on July 9, 2004. (Tr. Vol. III p. 120).

298. Ms. Bryant was at her station with a client at all times when the events between Complainant Edwards and Respondent Hall transpired. (Tr. Vol. III, p. 114). Her station was in the middle, but back toward the dispensary area and shampoo bowls. (Tr. Vol. III, p. 113). Complainant Edwards' station was toward the front. (Tr. Vol. III, p. 114).

299. Ms. Bryant recalled that Complainant Edwards was working in the dispensary that day. (Tr. Vol. III, p. 107). Ms. Bryant was working on a customer and became aware of hollering and saw that Complainant Edwards was very upset. (Tr. Vol. III, p. 107).

300. Ms. Bryant agreed that Complainant Edwards wanted to get her things from her station, and that Respondent Hall would not let her have her things. She also recalled hearing Complainant Edwards say "don't hit me." (Tr. Vol. III, pp. 111, 116).

301. Ms. Bryant acknowledged that things could have been said that she did not hear, as she was working with a client at the time. (Tr. Vol. III, pp. 120-121).

302. Ms. Bryant characterized Respondent Hall as trying to calm Complainant Edwards down and testified that Respondent Hall never raised her voice. (Tr. Vol. III, pp. 105-106). However, Ms. Bryant admitted that she could not hear what Respondent Hall was saying to Complainant Edwards at the front of the building from her vantage point in the middle of the building. (Tr. Vol. III, p. 115).

303. Ms. Bryant recalled seeing a nail tech named Michelle near the Complainant's station. (Tr. Vol. III, p. 121). She also characterized Michelle's actions as "trying to get Complainant Edwards to calm down, too." (Tr. Vol. III, p. 121). This characterization is inconsistent with the testimony of Ms. Penn, whose testimony was that her actions were more in the nature of seeking to prevent Respondent Hall from striking or touching Complainant Edwards. (See Tr. Vol. II, pp. 177-192).

C. Elizabeth Faye Robertson

304. Elizabeth Faye Robertson is Respondent Hall's niece by marriage. (Tr. Vol. III, p. 128).

305. Ms. Robertson was at CABC on May 18, 2004, along with Respondent Hall's sister, getting her hair done. (Tr. Vol. III, p. 129). She testified that she observed some of the interaction between Complainant Edwards and Respondent Hall. (Tr. Vol. III, pp. 129-130).

306. At the public hearing, Ms. Robertson admitted that the details of that morning are sketchy in her mind. Her initially vague testimony suggested that there was a dispute over work assignment. (Tr. Vol. III, p. 130).

307. Ms. Robertson indicated that she observed Complainant Edwards talking to others, indicating that she was going to fix her hair, and expressing that she's tired of being discriminated against. (Tr. Vol. III, p. 134).

308. While Ms. Robertson was having her hair shampooed, her aunt, Respondent Hall, was upstairs in the mezzanine. (Tr. Vol. III, pp. 159-160). Although she initially testified that her hair was not dried after being shampooed, Ms. Robertson subsequently testified that her aunt returned to the floor while her hair was being dried. (Compare Tr. Vol. III, p. 142 and p. 162). Because she was reclined at a shampoo bowl, she did not know where exactly on the second floor Respondent Hall was. (Tr. Vol. III, p. 165).

309. She returned to the student station and was sitting in a swivel chair facing the front of the beauty school when she claims to have become aware of the incident between Respondent Hall and Complainant Edwards. (Tr. Vol. III, p. 143). She recalls hearing her aunt tell Complainant Edwards to get back in the dispensary. (Tr. Vol. III, p. 158).

310. Ms. Roberston's testimony is not credible regarding what she saw and heard because her testimony is inconsistent.

311. First, Ms. Robertson said she could hear what Respondent Hall was saying "cause they were loud." (Tr. Vol. III, p. 145). She then claimed that Respondent Hall was talking in a normal voice. (Tr. Vol. III, p. 146). Ms. Robertson was twenty to twenty-five feet away from Complainant Edwards' station when this occurred. (Respondents' Exhibit

No. 35). Ms. Robertson claims that the area where she was seated was closer to the dispensary than it was to Complainant Edwards' station. (Tr. Vol. III, p. 146). However, she could not hear what Respondent Hall was saying when she was at the dispensary, but she claimed she could hear what Respondent Hall was saying (in a normal voice) when Respondent Hall was at the front near Complainant Edwards' station. (See Tr. Vol. III, pp. 145-147).

312. Since Ms. Robertson could not hear what was said by Respondent Hall at the dispensary, she cannot testify from personal knowledge about what Respondent Hall said to the Complainant at that point in time. This testimony is also contradictory compared to Ms. Robertson's written statement, where she claims to have heard Respondent Hall suspend and then expel Complainant Edwards. (*See* Respondents' Exhibit No. 35). Another contradiction exists in this testimony, because subsequent to reviewing that particular section of her statement, Ms. Robertson claimed that she recalls Complainant Edwards quitting. The written statement contains no mention of Complainant Edwards' alleged resignation. The totality of the inconsistencies in Ms. Robertson's statement and testimony, coupled with her familial relationship with Respondent Hall, make her an unreliable witness.

313. Second, Ms. Robertson initially claimed that "she watched the whole thing and she never lay a hand on her." (Tr. Vol. III, p. 139). However, upon subsequent questioning, it became clear that Ms. Robertson did not "watch the whole thing," and she admitted that she could hear only parts of the incident. (Tr. Vol. III, p. 167).

314. Respondent Hall's son and legal counsel, Stephen Hall contacted Ms. Robertson and asked her to prepare a written statement about what she observed. (Tr. Vol. III, pp. 150-151). Ms. Robertson prepared a statement and forwarded it to Mr. Hall, but she does not recall when she prepared it. She asked him why he wanted the statement, and he told her "it's always safe." (Tr. Vol. III, pp. 154-156).

D. Sandra Richardson

315. Sandra Richardson testified that she was at the front of the clinic when she

heard "loud voices." (Tr. Vol. III, p. 412). She walked to the back of the clinic near the dispensary and saw Respondent Hall and Complainant Edwards. Ms. Richardson testified that "[t]hey moved to the front of the clinic. I do remember Tyleemah saying, 'Don't touch me.'" (Tr. Vol. III, p. 413). Ms. Richardson saw Respondent Hall holding the strap of Complainant Edwards' bag. (Tr. Vol. III, p. 465).

316. Ms. Richardson recalled Complainant Edwards trying to get her personal belongings, and testified that she did not have anything with her when she left CABC. (Tr. Vol. III, p. 413).

E. Virginia Doss

317. On direct examination, Ms. Doss provided a brief summary of events she claimed to witness on May 18, 2004. Ms. Doss claimed that she was on the clinic floor and walking to get towels for a student when the incident between Complainant Edwards and Respondent Hall began. She claimed that: (1) she heard Respondent Hall tell Complainant Edwards to go into the dispensary; (2) that Complainant Edwards raised her voice and used foul language; (3) that Respondent Hall told her not to use profanity on the clinic floor; (4) that Complainant Edwards continued to be loud and Respondent Hall asked her to leave; (5) that Complainant Edwards wanted to get her things out of her station; (6) the police were called; and (7) "that she could just get her personal stuff out of the station." (Tr. Vol. III, pp. 172-173).

318. Ms. Doss prepared a written statement at some time after Complainant Edwards left CABC. (Tr. Vol. III, p. 186). She claims that she hand wrote a statement that she later typed, and indicated that the statement was probably written on May 18, 2004, or the next day. (Tr. Vol. III, pp. 187-188). The Commission introduced a typed statement purporting to be Ms. Doss' statement. (Commission's Exhibit No. 58). Ms. Doss indicated that the document introduced as Commission's Exhibit No. 58 bore her signature, and looked like the statement she typed. She agreed that she prepared the typed statement on May 18, 2004. (Tr. Vol. III, p. 189).

319. Upon additional questioning, Ms. Doss denied that she typed Commission's Exhibit No. 58. (Tr. Vol. III, p. 192). She subsequently claimed that she wasn't present when it was typed, but that she believed that Respondents' counsel Stephen Hall typed it.

(Tr. Vol. III, pp. 192-193). Later in her testimony, Ms. Doss said she was present when Mr. Hall typed the statement. (Tr. Vol. III, p. 204). She claimed she gave him the statement verbatim, but then recanted that testimony when asked about specific passages of the statement. (Tr. Vol. III, pp. 204-205).

320. Ms. Doss' assertion that she typed a statement herself on her home computer, which she never printed out, and that her computer subsequently went down. (Tr. Vol. III, pp. 189, 193, 203-205).

321. Ms. Doss' statement is inconsistent with her public hearing testimony. She is not a credible witness.

322. In the written statement, Ms. Doss claims that she was on the second floor applying a mask to "the lady Alee" when she heard loud noises. Ms. Doss claims that she followed Cleo Morgan downstairs and Complainant Edwards and Respondent Hall were at Complainant Edwards' station. (Commission's Exhibit No. 58).

323. Based upon the typed statement claimed by Ms. Doss, she would not have been on the first floor to hear Respondent Hall tell the Complainant that she was supposed to be in the dispensary. Ms. Doss would not have been on the clinic floor to hear Complainant Edwards raise her voice and say foul words in the dispensary area. Nor would Ms. Doss have been present on the clinic floor to observe Respondent Hall and Complainant Edwards traverse the floor from dispensary to the front. Ms. Doss' memory is unreliable and her testimony cannot be credited. (Compare (Tr. Vol. III, pp. 172-173; Commission's Exhibit No. 58).

BRUISING ON COMPLAINANT EDWARDS' ARM

324. Ms. Doss observed a bruise on Complainant Edwards' arm shortly before her expulsion. She could not recall which arm was bruised, and could only say with certainty that she saw a bruise sometime before Complainant Edwards' last day at CABC. (Tr. Vol. III, pp. 202-203).

325. On redirect examination, Ms. Doss did say she believed that she observed the bruise about a week prior to Complainant Edwards' expulsion. (Tr. Vol. I, p. 207). Complainant Edwards was expelled on Tuesday, May 18, 2004. If this recollection is

accurate, and Ms. Doss saw a bruise on a Friday or Saturday, as she claims (Tr. Vol. III, p. 202), then the bruise would have been observed more than ten days prior to Complainant Edwards' last day at school. Ms. Doss' written statement, prepared a month after the fact, purports that Ms. Doss observed the alleged bruise on May 15, 2004. (Respondents' Exhibit No. 37), which is three days before Complainant Edwards was expelled from CABC. In this regard, Ms. Doss' testimony is inconsistent and not credible.

326. Ms. Doss' testimony that Complainant Edwards claimed to have been bruised by her boyfriend was not credible because there is no corroborating testimony or evidence aside from this statement by Ms. Doss. (Tr. Vol. III, pp. 174-175).

327. Ms. Doss prepared a statement more than one month after allegedly seeing the bruise. (Respondents' Exhibit No. 37). When asked what compelled her to prepare the statement a month after the "occurrence," She was unable to provide a credible answer. She claims she must have been busy. (Tr. Vol. III, p. 216).

328. In her statement, dated June 17, 2004, Ms. Doss claims that she saw a bruise on Complainant Edwards' arm and asked her about it: "I asked her what happened. She said 'She hit it or something.'" (Respondents' Exhibit No. 37). This statement contradicts Ms. Doss' testimony that Complainant Edwards was bruised by her boyfriend.

329. Ms. Doss initially testified that her written statement was consistent with her testimony. When directed to the inconsistency with regard to how Ms. Doss claimed Complainant Edwards became bruised, she claimed she was being a friend to Complainant Edwards and not "blabbing" about Complainant Edwards' personal business to everyone. (Tr. Vol. III, p. 218).

330. Toni Brown's testimony that she saw a bruise on Complainant Edwards the Saturday before her last day at school is not credible. (Tr. Vol. III, p. 476). While testifying about the bruise, she gestured to her left arm, but could not recall on which arm she allegedly saw the "huge," "four inches long, two-to-three inches wide," "good-sized" bruise that she testified too. (Tr. Vol. III, pp. 478-479).

INVENTORY OF COMPLAINANT EDWARDS' STATION

331. It is CABC's policy that inventories of student stations are to be conducted by two instructors. (Tr. Vol. III, p. 53).

332. The inventory of Complainant Edwards stations was not conducted according to CABC policy. Toni Brown is a secretary, not an instructor at the beauty school.

333. After Complainant Edwards left CABC on May 18, 2004, her possessions remained in her station. Respondents assert that her station was inventoried by Toni Brown and Cleo Morgan.

334. Respondent Hall testified that Ms. Brown watched over the inventory. (Tr. Vol. III, p. 772). But as Respondent Hall acknowledged, she was not in a position to observe whether Office Brown watched over the inventory. (Tr. Vol. III, pp. 722-723). She explained this error in accuracy, by saying it was not intentional. (Tr. Vol. III, pp. 741, 746, 756).

335. Toni Brown is the secretary at CABC. She and Respondents' counsel, Stephen Hall, have a personal relationship. (Tr. Vol. III, pp. 468-469). Ms. Brown and Mr. Hall were involved in a personal relationship at the time Complainant Edwards attended CABC. (Tr. Vol. III, pp. 476-477). At the time Complainant Edwards attended CABC, Ms. Brown and Mr. Hall were involved in a personal relationship. (Tr. Vol. III, p. 477).

336. Cleo Morgan assisted Toni Brown in bagging the contents of Complainant Edwards' station; however, the process had begun before Ms. Morgan joined Ms. Brown. Ms. Morgan did not observe the entire inventory. (Tr. Vol. II, pp. 213, 237).

337. Toni Brown personally removed items from the station, bagged the items and wrote a list which purports to be an inventory of Complainant Edwards' station. Ms. Morgan did not remove items from the station. (Tr. Vol. II, pp. 213, 237). Toni Brown's testimony that she did not remove (or touch) any items from the station, and that Ms. Morgan removed and bagged the items was not credible. (Tr. Vol. III, pp. 472, 482).

338. Respondents called Toni Brown to testify on their behalf at the public hearing. Throughout her testimony, Ms. Brown was fidgety and discernibly uncomfortable. She appeared reluctant to answer some questions, seemed to have difficulty focusing, and was at times visibly angry with Commission's counsel. Her personal relationship with

Stephen Hall, her personal relationship with Respondent Hall and her demeanor on the witness stand make her testimony unreliable.

339. Cleo Morgan does not know what happened to Complainant Edwards' possessions after they were bagged and taken to the office. (Tr. Vol. II, pp. 213, 237). Ms. Morgan testified "I can recall Toni and I was bagging her stuff in front of her station, and once it was bagged, it went up to the office. After that, I don't know." (Tr. Vol. II, p. 213). She did not observe anyone coming in and picking up Complainant Edwards' items. (Tr. Vol. II, p. 213).

340. Respondents proffered a document which purports to be an inventory of Complainant Edwards' station. (*See* Respondents' Exhibit No. 44). Ms. Brown admitted to writing some of the information contained in the document.

341. Cleo Morgan credibly denied having written any of Respondents' Exhibit No. 44 other than the one occasion of her signature. (Tr. Vol. II, pp. 217-219, 236).

342. A portion of Respondents' Exhibit No. 44, which reads "Inventory from Tyleemah Edwards Station - 5/18/04 Given to Policeman Toni Brown Stephen Hall Cleo Morgan" was created by someone other than Cleo Morgan or Toni Brown. (Respondents' Exhibit No. 44; Tr. Vol. III, p. 488).

343. Ms. Brown characterized the writing as "printed very neatly." (Tr. Vol. III, p. 486). She initially seemed to identify the writing as "Stephen's," (referring to Stephen Hall) seeking affirmation from Respondents' counsel. The witness was admonished for seeking direction from counsel. (Tr. Vol. III, p. 486). Ms. Brown then provided the following testimony regarding who printed that portion of the text: "I might be able to recognize it, but I cannot honestly swear, so not, my question is absolutely not." (Tr. Vol. III, p. 487). Ms. Brown subsequently allowed that it might be Attorney Hall's, but she did not think that it was. (Tr. Vol. III, p. 488).

344. The word "witnessed" on Respondents' Exhibit No. 44 also appears to be a third person's work. (Tr. Vol. III, pp. 489-490). Although Ms. Brown claimed not to recognize the handwriting for the work printed, she claims to have been present when that word was placed on the exhibit. (Tr. Vol. III, p. 490). This testimony is inherently inconsistent and therefore not credible.

345. Respondents produced no witnesses who could speak to the totality of Respondents' Exhibit No. 44. It contains information from unknown and/or unidentified sources. It is uncertain as to whether Complainant Edwards' items were released to the police.

COMPLAINANT EDWARDS IS ENTITLED TO THE KIT

346. Wanda Carter provided contradictory testimony regarding what happens to kits when students leave CABC. When asked about CABC's practice, Ms. Carter indicated that if a student leaves school within their first 500 hours, the kit belongs to the school "because it hasn't been paid for yet." (Tr. Vol. III, p. 341). If a student with a Pell grant finishes their first 500 hours, the student owns the kit and can pick it up within thirty days of the completion of withdrawal forms. (Tr. Vol. III, p. 341).

347. On cross-examination, Ms. Carter indicated that "[f]or that increment – for the increment, if everything has been paid for during that 500 hour increment and nothing has been refunded and everything is taken care of, the student gets the kit, but if it's not, then we keep the kit." (Tr. Vol. III, p. 377). Ms. Carter clarified this testimony to say that if the first 500 hours have been paid for, the student gets to keep the kit. (Tr. Vol. III, p. 377).

348. The kit belonged to Complainant Edwards because she had completed more than 500 hours. The Complainant, according to CABC records, had completed 1006 hours.

349. With respect to Complainant Edwards, Ms. Carter testified that she would have to pay her entire outstanding balance within thirty days to receive her kit. (Tr. Vol. III, pp. 383-384). This testimony is inconsistent with CABC's alleged policy regarding retention of the kit and the school's policy on equipment, books, supplies, and registration fees.

350. CABC's alleged policy with regard to retaining the kit is confusing, particularly in light of their assertion that it cannot be reused due to health concerns:

SCHOOL POLICY ON EQUIPMENT,
BOOKS, SUPPLIES & REGISTRATION FEES

> Three days after signing the enrollment agreement, and beginning school, all kits, books and supplies, after any usage and for health reasons, shall not be subject to return to the school, and shall be charged to the student at a cost of $500.00. It is further understood and agreed by the student that said charges shall not be subject for refund.

(Commission's Exhibit No. 13, p. 1).

351. Respondent Hall acknowledged some inconsistencies regarding what was done with Complainant Edwards' kit. (Tr. Vol. III, pp. 740-741).

352. Credible evidence supports a finding that Complainant Edwards received neither her kit nor her personal items after she left CABC.

COMPLAINANT EDWARDS' ATTEMPT TO ENROLL AT ANOTHER COSMETOLOGY SCHOOL

353. After her expulsion from CABC, Complainant Edwards wanted to explore other options for completing her cosmetology training elsewhere. (Tr. Vol. I, p. 406). Complainant Edwards called CABC to speak with Respondent Hall about what, if any, outstanding financial obligation she had to CABC and how she could obtain certification of her hours completed at CABC. (Tr. Vol. I, p. 406).

354. When Complainant Edwards called, she was continually told that Respondent Hall was not in. On May 27, 2004, Complainant Edwards wrote a letter to Respondent Hall seeking information consistent with her efforts to finalize her relationship with CABC and move forward at another school. (Tr. Vol. I, pp. 406-408; Commission's Exhibit No. 38).

355. On June 18, 2004, thirty-one days after Complainant Edwards' unlawful expulsion, Respondent Hall prepared a final bill and letter of withdrawal to Complainant Edwards. This letter advised Complainant Edwards that she had been withdrawn from CABC as of May 18, 2004, and that based upon CABC's refund policy, Complainant Edwards owed one hundred percent of the tuition and fees associated with her enrollment.

However, no federal funds were returned to the government associated with Complainant Edwards' expulsion. (Commission's Exhibit No. 17).

356. The final bill overcharged Complainant Edwards. Evidently, Respondents Hall and CABC failed to review Complainant Edwards' Enrollment Agreement when calculating her bill. The bill was calculated based upon the tuition and fees charged for a 2000 hour contract. Complainant Edwards's Enrollment Agreement specified a contract period of 1934.5 hours. (Compare Commission's Exhibit No. 13 with Commission's Exhibit No. 17).

357. Respondents Hall and CABC expelled the Complainant as soon as she became responsible for one hundred percent of her tuition and fees. Respondents' records demonstrate that Complainant Edwards had been scheduled for 1006 hours at the time of her unlawful expulsion. (Commission's Exhibit No. 17, p. 5). Respondent CABC's Enrollment Agreement includes a refund schedule which indicates that students who leave the program before fifty percent of their enrollment time has elapsed are entitled to pay pro-rated amounts of tuition and fees.

358. For those students who enroll and begin classes the following schedule of tuition adjustment is authorized

PERCENTAGE OF ENROLLMENT TIME TO TOTAL TIME OF COURSE	AMOUNT OF TOTAL TUITION OWED
0.1% to 4.9%	20%
5% to 9.9%	30%
10% to 14.9%	40%
15% to 24.9%	45%
25% to 49.9%	70%
50% and over	100%

****

H. Enrollment time is defined as the time elapsed between the actual starting date and the date of the students last day of physical attendance in the school.

(Commission's Exhibit No. 13, p. 1).

359. As of May 18, 2004, Complainant Edwards had been scheduled for 1006 of 2000 hours. (Commission's Exhibit No. 17, p. 5).

360. On cross-examination, Respondent Hall acknowledged that as of the date

of her discharge from the program, Complainant Edwards was only six hours over the half-way mark, and this was only if she were charged for the entire day on which she was thrown out. (Tr. Vol. III, pp. 633-634). The substantial evidence in the record does not support a find that Complainant Edwards attended a full day or six hours on May 18, 2004, the day she was expelled.

361. In addition, on cross-examination, Respondent Hall acknowledged a billing error, never previously acknowledged, which involved Complainant Edwards being overcharged $212.73 even if the contract terms were followed (Tr. Vol. III, pp. 631-632), which Respondent Hall claimed was merely an error which she would eventually have caught and corrected. (Tr. Vol. III, p. 652). The testimony was that even through all of the litigation preparation, the errors were not noted by Respondents. (Tr. Vol. III, p. 653).

362. Upon receipt of the final bill, Complainant Edwards contacted Respondent Hall about how she could obtain certification of the hours she completed as a student at CABC. Complainant Edwards asked Respondent Hall if she would release her transcript if she paid the amount Respondent Hall contended that she owed. Respondent Hall told Complainant Edwards that regardless of whether she paid or not, the hours completed would not be released. This is inconsistent with Respondents' policy on transfers. (See Commission's Exhibit No. 19). Respondent Hall asserted that she was not legally required to release the hours, and only had to do so if she wanted to. (Tr. Vol. I, pp. 409-410).

363. Complainant Edwards contacted the West Virginia Human Rights Commission regarding racial discrimination at CABC during the time when she was enrolled and subsequent to her expulsion. She advised the Commission that she was a student at the beauty school, not an employee. She never intended for an employment complaint to be issued on her behalf against CABC, and she endorsed complaints that were prepared for her by the West Virginia Human Rights Commission. She always intended her complaint to relate to her status as a student at CABC. (Tr. Vol. I, pp. 410-415). And the agency did correct the complaint. *See* Complainant's Amended Complainant.

364. Complainant Edwards submitted her allegations to the Commission, trusted

the Commission to prepare her complaint, and signed the erroneous employment complaints which were substantively accurate, but pled as employment rather than public accommodation. (Tr. Vol. I, p. 500). She did not realize that the distinction between public accommodation and employment mattered, but she agreed with the error being corrected by the agency. (Tr. Vol. I, pp. 469, 501).

365. Complainant Edwards was adversely affected by her experience at CABC: I was unhappy. I was like - I was kind of mad because I had got to the point . . where, you know, I was really getting into it. You know, I was really getting into going. I was really getting into being on the clinic floor. . . It really hurt my feelings a whole lot. (Tr. Vol. I, p. 416).

III. ARGUMENT

A. THE WEST VIRGINIA HUMAN RIGHTS ACT PROHIBITS RACE DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION

In West Virginia, equal opportunity with regard to the use and enjoyment of places of public accommodation is a human or civil right. The denial of equal opportunity in places of public accommodation because of race "is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society." W. Va. Code § 5-11-2.

The prohibitions against unlawful discrimination by a place of public accommodation are set forth in the West Virginia Human Rights Act. W. Va. Code §§ 5-11-1 to -21. West Virginia Code § 5-11-9(6)(A) provides that it is an unlawful discriminatory practice for any place of public accommodation to:

> Refuse, withhold from, or deny to any individual because of his or her race, . . . either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of the place of accommodations.

The Human Rights Act defines discriminate as "to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, . . . and includes to separate or segregate." W. Va. Code § 5-11-3(h). Discrimination also encompasses harassment and

conduct which "has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." While developed in the context of an employment case, these principles are equally applicable to a public accommodation such as an educational setting. *See West Virginia Human Rights Commission's Legislative Rules Regarding Sexual Harassment*, W. Va. Code R. § 77-4-2.2.3 (1994).

The fundamental nature of this human right has been recognized, not only by the West Virginia Legislature, but also by the West Virginia Supreme Court of Appeals.

> The Legislature has declared it "the public policy of the State of West Virginia to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property." In defining the parameters of this fundamental concept of equal opportunity, the Legislature has stated that "equal opportunity" is the "human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or handicap" to employment, housing, and public accommodations. This concept of equality is so basic to our system of government that the Legislature has declared, "The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness or handicap is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society." Therefore, every act of unlawful discrimination in employment, housing, or public accommodations is akin to an act of treason, undermining the very foundations of our democracy.

Allen v. State of West Virginia Human Rights Commission, 174 W. Va. 139; 324 S.E.2d 99, 108-109 (1984) (internal citations omitted).

> Equal opportunity in this State is a fundamental principle which has its foundation in. . .constitutional provisions. The Human Rights Act breathes life into these constitutional provisions which mandate equal opportunity, imbuing administrative procedure before the Human Rights Commission with the same constitutional aura attendant to any other procedure which can culminate in a judicial proceeding.

Allen, 324 S.E.2d at 109.

Because of the fundamental nature of the right to be free from discrimination in places of public accommodation, the Human Rights Act "shall be liberally construed to accomplish its objectives and purposes." W. Va. Code § 5-11-14; *Stone v. St. Joseph's Hospital of Parkersburg*, 208 W. Va. 91, 538 S.E.2d 389 (2000); *Bailey v. Norfolk & Western Railway Co.*, 206 W. Va. 654, 527 S.E.2d 516 (1999); *Williamson v. Greene*, 200

W. Va. 421, 480 S.E.2d 23 (1997); *Skaff v. West Virginia Human Rights Commission* , 191 W. Va. 161, 444 S.E.2d 39 (1994); *May Dep't Stores Co. v. West Virginia Human Rights Commission*, 191 W. Va. 470, 446 S.E.2d 692 (1994); *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990).

In West Virginia, human rights protections are not intended to be narrow or hollow. The legal protections encompass not only the right of access in the physical sense, but the right of full participation in the accommodations, advantages, facilities, privileges or services of a place of public accommodations that are associated with physical access. In a sense, the kind of access compelled by the Human Rights Act requires places of public accommodation not only to open their doors without regard to race, but to foster equal access to all of the opportunities which exist beyond the threshold, and which make entry attractive to members of the public.

In both employment discrimination and public accommodation discrimination, it is necessary for a complainant to establish that he/she was denied an equal opportunity; that is, that he/she suffered some type of cognizable adverse action which can be connected to the discriminatory motive. In the context of employment discrimination, the courts have recognized and applied various theories which may be employed to prove unlawful discrimination. The West Virginia Supreme Court of Appeals has made it clear that the same proof formulas are applicable to the analysis of discrimination in public accommodation. While the *McDonnell Douglas* test is most often applied in the context of employment discrimination, it is significant to note that the West Virginia case which adopted the test, *Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission*, 172 W. Va. 627, 309 S.E.2d 342 (1983), was not an employment case, but rather a case of discrimination by a place of public accommodation. *See also K-Mart Corp. v. West Virginia Human Rights Commission*, 181 W. Va. 473, 383 S.E.2d 277 (1989).

Since those who discriminate usually hide their biases and stereotypes, by making direct evidence unavailable, a complainant may show discriminatory intent by the three-step inferential proof formula first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and adopted by the West Virginia Supreme Court of Appeals in *Shepherdstown Volunteer Fire Dep't. See Barefoot v. Sundale Nursing Home*, 193 W. Va.

475, 457 S.E.2d 152, 169 n.19 (1995). Cases analyzed under the *McDonnell Douglas* test often turn on the credibility of the explanation offered by the respondent for its conduct. The term "pretext," as used in the *McDonnell Douglas* formula, has been held to mean "an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense." *West Virginia Institute of Technology v. West Virginia Human Rights Commission*, 181 W. Va. 525, 383 S.E.2d 490, 496 (1989), *citing Black's Law Dictionary*, 1069 (5th ed. 1979). A proffered reason is pretext if it is not "the true reason." *Conaway v. Eastern Associated Coal Corp.*, 174 W. Va. 164, 358 S.E.2d 423, 430 (1986).

There is the "mixed motive" analysis. This analysis may be applied where the decision is motivated by several reasons. Where an articulated legitimate, nondiscriminatory motive is shown by the respondent to be non-pretextual, but co-exists with a lawful motivation for the adverse action, a complainant may still prevail under the "mixed motive" analysis. This analysis flows from the legal requirement that covered conduct must not be motivated, even in part, by discriminatory intent. The mixed motive analysis was adopted by the United States Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and first recognized by the West Virginia Supreme Court of Appeals in *West Virginia Institute of Technology v. West Virginia Human Rights Commission*, 181 W. Va. 525, 383 S.E.2d 490, 496-497 n.11 (1989). If the complainant proves that one or more impermissible motives played some role in the decision or conduct of the respondent, the respondent can avoid liability only by proving that it would have acted the same even if it had no discriminatory motives. *Barefoot*, 457 S.E.2d at 162 n.16; 457 S.E.2d at 164 n.18; *Bailey v. Norfolk & Western Railway Co.*, 206 W. Va. 654, 527 S.E.2d 516 (1999).

A complainant or the Commission may also prove a disparate treatment claim by evidence of discriminatory intent. Proof of this type by a preponderance of the evidence shifts the burden to the respondent to prove by a preponderance of the evidence that it would have engaged in the same conduct toward the complainant even if it had not had a discriminatory motive. *Trans World Airlines v. Thurston*, 469 U.S. 111, 36 Fair Empl. Prac. Cas. 977 (1985); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

1. The Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc., Respondent Bishop and Respondent Judy Hall Are All Proper Respondents in These Human Rights Complaints

Complainant Robinson and Complainant Edwards have named the Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc., Judy Hall and Respondent Bishop as Respondents in their respective complaints. Respondent Hall and Respondent Bishop are named in their official and individual capacities. Each named Respondent is an appropriate Respondent pursuant to the West Virginia Human Rights Act.

a. CABC is a place of public accommodation

In reaching the determination that CABC falls within the legislative definition of a public accommodation, the following factors and considerations previously established by the West Virginia Supreme Court of Appeals were applied.

A place of public accommodations is "any establishment or person, as defined herein, including the state, or any political or civil subdivision thereof, which offers its services, goods, facilities or accommodations to the general public, but shall not include any accommodations which are in their nature private." W. Va. Code § 5-11-3(j). This definition is both broad and liberally construed to meet the policy objectives of the West Virginia Human Rights Act.

A review of public accommodation cases decided by the West Virginia Supreme Court of Appeals reveals some key factors that should be considered in determining whether an entity is a place of public accommodation. These factors include the entity's purpose, source of funding and whether the entity offers opportunities to participate in its function to unscreened, unselected members of the public.

In *Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission*, 172 W. Va. 627, 309 S.E.2d 342 (1983), the Court considered whether volunteer fire departments constitute places of public accommodations. The underlying issue involved allegations that the volunteer fire department in question denied membership to individuals based upon their gender. The Court analyzed the funding, purpose and membership of

volunteer fire departments and concluded that volunteer fire departments are public accommodations. *Id.* at 350-351. Key in the Court's decision was the fact that volunteer fire departments are subject to regulatory control by the government, and that the departments were funded, at least in part, by public monies. *Id.* at 351.

The Court has unwaveringly found that educational systems, and entities related thereto, are places of public accommodations. Pursuant to Title III of the ADA, a place of public accommodation includes "[a] nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education." 42 U.S.C. § 12181(7)(J); *see also* 28 C.F.R. Part 36. While not controlling, the examples cited pursuant to the ADA are consistent with the WVHRA definition of public accommodation. For example, county boards of education are places of public accommodations. *Board of Education of Lewis County v. West Virginia Human Rights Commission*, Syl. pt. 2, 182 W. Va. 41, 385 S.E.2d 637 (1989). The West Virginia Secondary Schools Activities Commission ("SSAC") is also a place of public accommodations. *Israel v. West Virginia Secondary Schools Activities Commission*, 182 W. Va. 454, 388 S.E.2d 480 (1989).

In *Israel,* the SSAC asserted it was not a place of public accommodation because participation in interscholastic sports was limited to secondary school students who meet certain eligibility requirements. The SSAC argued that participation was not really open to the general public. *Israel,* 388 S.E.2d at 488. The Supreme Court of Appeals declined to accept this argument, indicating that "[w]e do not believe that this statute [HRA] is that narrowly confined." *Id.* In articulating its finding that the SSAC is a place of public accommodations, the Court expanded upon the characteristics of places of public accommodations:

> In reaching this conclusion in *Shepherdstown,* we identified two factors to determine whether an entity is a place of public accommodations: (1) if it is created and operated pursuant to the laws of the State of West Virginia, and (2) whether it receives funding from public sources. This definition is, of course, not exclusive. Certainly, as other courts have indicated, establishments receiving no public funds can also be places of public accommodations.
>
> In *National Org. for Women v. Little League Baseball, Inc., supra,* the court determined that a place of public accommodations is dependent upon whether the organization engages in activities in places in which an unselected public is given an open invitation. It also concluded that this result obtained even though the entity was a "nonprofit or membership

> organization rather than a commercial enterprise, or [did] not have exclusive use or possession of the site of its operations." 127 N.J.Super. at 531-32, 318 A.2d at 38.
>
> A similar result was reached in *United States Jaycees v. McClure,* 305 N.W.2d 764 (Minn.1981), where the court held that under the Minnesota Human Rights Act, the question whether an entity was a place of public accommodations turned ultimately on whether the organization invited only a screened and selected portion of the public, or whether instead it engaged in activities in places in which an unscreened, unselected, and unlimited number of persons from the general public was invited.
>
> A volunteer group of power boat enthusiasts was found to meet the public accommodations definition in *United States Power Squadron v. State Human Rights Appeal Bd.,* 59 N.Y.2d 401, 465 N.Y.S.2d 871, 452 N.E.2d 1199 (1983). New York's highest court concluded that the group conducted its activities at public schools, public buildings, public waterways, public parks, and public marinas. Thus, the place where the petitioner's meetings and activities occurred was a place of public accommodations. Other courts have also concluded that lack of control or possession of a particular meeting site does not preclude an organization from being a place of public accommodations. *See Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights & Opportunities, 204 Conn. 287, 528 A.2d 352 (1987). Cf. Isbister v. Boys' Club of Santa Cruz, Inc.,* 40 Cal.3d 72, 219 Cal.Rptr. 150, 707 P.2d 212 (1985) (Boys' Club which operated a community recreational facility was a "business establishment" under the Civil Rights Act).
>
> Because we find the foregoing authority persuasive, we reject the SSAC's argument that because the general public does not participate in interscholastic sports and because it does not operate any facility that is open to the public, it does not fall within the public accommodations definition. The critical point is that the SSAC regulates interscholastic athletics and its membership, all of which have a direct impact on the public school system. Thus, this entire activity is permeated with a general public interest through open spectator invitation to the sporting event which is generally conducted at a public facility. This is sufficient to meet the public accommodations definition.
>
> Moreover, because the SSAC was legislatively created and endowed with powers legislatively prescribed to provide services in supervising interscholastic athletics, it also falls within the ambit of the Human Rights Act definition of public accommodations. Finally, the SSAC receives membership dues from the public schools, as well as gate receipts from the athletic events.

Israel. 388 S.E.2d at 489-490 (footnotes omitted).

CABC meets the definition of a place of public accommodations because it is an educational institution and performs an important public function. First, CABC is a vocational school that promotes the public interest by educating citizens and preparing people to provide goods and services to the public. This particular school combines

education and public service by operating a student clinic where students get hands-on experience performing cosmetology services on members of the public.

Although, CABC has eligibility criteria (Tr. Vol. I, p. 241; Commission's Exhibit No. 28, p. 5), this eligibility criteria does not shield the school from the purview of the West Virginia Human Rights Act. First, CABC offers admission to unscreened and unselected members of the public who meet the eligibility requirements of the Act. *Israel*, 388 S.E.2d at 488.

Second, the WVBBC regulates CABC. The Legislature has conferred the WVBBC with the "power to promulgate rules generally regarding the practice and conduct of barbering and beauty culture, including, but not limited to, the procedures, criteria and curricula for examination and qualifications of applicants for licensure, and for the licensing of instructional personnel for schools of barbering and beauty culture, and the practice and conduct of aestheticians." W. Va. Code § 30-27-1(g).

In addition, the mission of the Board to protect the health and welfare of West Virginians who receive barber and beauty culture services by promulgating and enforcing regulations, investigating consumer complaints and inspecting licensed barber/beauty/nail establishments as well as schools of barbering and cosmetology, and establishing and regulating beauty culture curriculum.

Barber and beauty culture schools such as CABC must be licensed by the Board, and are subject to various rules and regulations of the Board with respect to school operation and the licensure of instructors. W. Va. Code §§ 30-27-8; 30-27-10. Pursuant to the authority conferred by the Legislature, the Board has promulgated rules governing the licensure of beauty culture schools, school instructors, minimum curriculum, and operational and sanitary standards for schools. W. Va. Code R. §§ 3-3-1 to 3-3-6 (1992); §§ 3-4-1 to 3-4-10 (1992).

Third, although public funding is not a prerequisite for places of public accommodations, CABC does receive public funds through its financial aid program. The school is an eligible educational institution for federal financial aid. (*See* Joint Exhibit No. 1, Stipulation 4). Some CABC students have their tuition paid through programs and grants

associated with the West Virginia Department of Heath and Human Services. (*See* Joint Exhibit No. 1, Stipulation 5).

Therefore, I find that the CABC is a place of public accommodation with respect to its students and its customers because of the public function it plays in educating persons to provide services to members of the public, its regulation by the West Virginia Board of Barbers and Cosmetologists, its admission policy and its receipt of public funding. As such, it has a duty not to discriminate on the basis of race. The CABC is a proper Respondent and the Commission has jurisdiction to hear the Complaint against the CABC.

Places of public accommodations must conduct operations consistent with the public policy objectives of the West Virginia Human Rights Act. In the context of this case, the Respondents had a duty to provide Complainant Robinson and Complainant Edwards equal educational opportunities regardless of their race, an opportunity to provide services to white customers and to maintain an environment free from racial harassment and intimidation by CABC staff.

b. Respondents Hall and Bishop are agents of CABC and persons within the meaning of the West Virginia Human Rights Act.

Respondents Hall and Bishop are agents of CABC and therefore are subject to the jurisdiction of the West Virginia Human Rights Act. W. Va. Code § 5-11-9(6) provides that it is an unlawful discriminatory practice

> [f]or any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodations to (A) Refuse, withhold from or deny to any individual because of his or her race . . . either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of the place of public accommodations[.] (Emphasis supplied).

They are also persons within the meaning of the W. Va. Code, which defines the term "person" as one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups or persons. At all times relevant to the conduct alleged with respect to each in the subject complaints, both Respondent Hall and Respondent Bishop were instructors and/or administrators for CABC. Their actions vis-a-vis

the Complainants were taken both as employees and as agents of CABC. Furthermore, W. Va. Code § 5-11-9(7)(A) provides that it is an unlawful discriminatory practice

> (7) For any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to:
>
> (A) Engage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section[.]

The evidence in the record taken as a whole establishes that Respondent Hall and Respondent Bishop, directly and indirectly denied Complainant Robinson and Complainant Edwards the advantages, facilities, privileges, and services of CABC as a place of public accommodations and that CABC and the Respondent Hall engaged in acts of reprisal in retaliation for Complainant Edwards complaints of race discrimination. In *Holstein v. Norandex, Inc.* 194 W. Va. 727, 461 S.E.2d 473 (1995), the West Virginia Supreme Court of Appeals held that a cause of action under the Human Rights Act "may properly be based upon an allegation that the defendant employee aided or abetted an employer engaging in unlawful discriminatory practices." *Holstein*, 461 S.E.2d at 478; *see also Marshall v. Manville Sales Corp.*, 6 F.3d 229 (4th Cir. 1993).

Clearly Respondent Hall and Respondent Bishop are proper respondents and can be held responsible for their own actions. I find that the Commission has jurisdiction to hear the complaints against each one of them. Under the Human Rights Act, Respondent Hall and Respondent Bishop can be held responsible for their own actions. Accordingly, they are proper Respondents and the Commission has jurisdiction to hear the complaints against each of them.

2. Complainants, Robinson and Edwards, Experienced Unlawful Racial Discrimination While Students at CABC.

Complainant Robinson and Complainant Edwards have each established, through circumstantial evidence, a prima facie case of race discrimination. Establishment of a prima facie case raises an inference that the Respondents discriminated against complainant on

the basis of an impermissible motive or motives. *Barefoot v. Sundale Nursing Home,* Syl. pt. 6, 193 W. Va. 475, 457 S.E.2d 152, 169 n.19 (1995).

In sustaining the prima facie burden, "a complainant raises an inference of discrimination through direct or circumstantial evidence because we presume the acts complained about, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *O.J. White Transfer & Storage Co. v. West Virginia Human Rights Commission*, 181 W. Va. 519, 522, 383 S.E.2d 323, 326 (1989), *citing Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577 (1978). The rationale supporting this inference has been that "people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting . . . " *Furnco*, 438 U.S. at 577.

A prima facie case of discrimination in public accommodation parallels that used in employment cases.

> In order to make a prima facie case of discrimination in a place of public accommodation, the complainant must prove the following elements: (a) that the complainant is a member of a protect class; (b) that the complainant attempted to avail himself of the "accommodations, advantages, privileges or services" of a place of public accommodation; and (c) that the "accommodations, advantages, privileges or services" were withheld, denied or refused to the complainant.
>
> The complainant's prima facie case can be rebutted if the respondent presents a nondiscriminatory reason for the action in question sufficient to overcome the inference of discriminatory intent.
>
> The complainant may still prevail if it can be shown that the reason given by the respondent is merely a pretext for a discriminatory motive.

K-Mart Corp. v. West Virginia Human Rights Commission , Syl. pts. 1, 2 & 3, 181 W. Va. 473, 383 S.E.2d 277 (1989).

The prima facie case "is designed to allow a plaintiff with only minimal facts to smoke out a defendant--who is in control of most of the facts--and force it to come forward with some explanation for its action." *Barefoot,* 457 S.E.2d at 162.

It is clear the first two prongs of the prima facie case, with regard to Complainant Robinson and Complainant Edwards, are easily established. The first prong is that they are members of a protected class under the Human Rights Act. That is the Complainants are African American. The second prong is that the complainants attempted to avail

themselves of the accommodations, advantages, privileges or services of a place of public accommodations. The evidence in the record taken as a whole establishes that Complainant Robinson and Complainant Edwards were discriminated against when the respondents failed to provide them with equal educational opportunities and when it allowed its staff to foster an environment of racial harassment and intimation. The third prong is that the accommodations, advantages, privileges or services were withheld or refused to the complainants. Complainant Robinson and Complainant Edwards were treated significantly different than white students and suffered an cognizable adverse action which deprived them of the same educational advantages of their white counterparts.

a. Complainants, Robinson and Edwards, received disparate treatment in educational instruction and opportunities because of race.

A significant impediment to equal opportunity at the beauty school was the lack of instruction and training on the styling of ethnic hair and a deficit of products with which to work on African American customers on the clinic floor. The lack of training and products are important because there are typically fundamental differences in the characteristics of "black" and "white" hair.

Ralph Reed, who has almost thirty years of cosmetology experience and who has been an inspector of beauty culture schools for the WVBBC for eight years, credibly testified that on average there are physiological differences in the hair of black and white persons. Differences in the hair of black and white persons include texture, curl pattern, elasticity, porosity and the amount of oil in the scalp in the hair. (Tr. Vol. III, p. 405). CABC advanced hair cutting instructor Sandra Richardson testified at the hearing "Ethnic hair a lot of time is very fragile. You need to cut it dry because if it's wet, wet hair will stretch a lot farther than dry hair will, and you can cause some more damage so we will most of the time cut ethnic hair dry." (Tr. Vol. III, pp. 457-458). Caucasian hair is typically cut wet. (Tr. Vol. III, p. 458).

Former CABC instructor Cleo Morgan credibly testified that CABC students did not receive adequate and appropriate instruction in the styling of ethnic hair. (Tr. Vol. II, pp.

197-198). There was very little offered in terms of course work or teaching relative to the styles and services typically performed on ethnic hair. Ms. Morgan characterized this as a "definite" problem. (Tr. Vol. II, p. 199).

During the period of time that Complainant Edwards was a student at CABC, the school did not offer any instruction in how to do braids tight to the head, commonly called corn rows. This is a styling technique predominately requested by African Americans. (Tr. Vol. I, p. 317).

Moreover, some of the instructors had limited facility with styling black hair. On her employment application, Respondent Bishop identified herself as qualified to work in a salon whose clientele predominately serviced any kind of hair other than "black." (Commission's Exhibit No. 48). Respondent Bishop told Complainant Robinson that she did not do ethnic hair. (Tr. Vol. I, pp. 61-62). By her own testimony, Respondent Bishop confirmed that she was less qualified than other instructors to teach ethnic hair. (Tr. Vol. III, pp. 245, 279). Complainant Edwards, Complainant Robinson and other students complained. (Tr. Vol. I, pp. 330-331).

Cleo Morgan credibly testified that the equipment and products needed for ethnic services were not always available. (Tr. Vol. II, pp. 197-198). The hair products that white patrons sought were available at the school (Tr. Vol. I, p. 70), but the hair products desired by African American patrons were less available, and to make them available to African American patrons they were commonly purchased personally by Complainant Robinson and Complainant Edwards (Tr. Vol. I, p. 69) and by other students. (Tr. Vol. II, pp. 17-18).

Former CABC instructor Karen Joyce has a beauty salon and has been working in the cosmetology field for twenty-seven years. She worked as an instructor at the Respondent's school on two occasions for fifteen to eighteen months each. (Tr. Vol. II, p. 8). One period was in the late 1990s and the other in the early 2000s. (Tr. Vol. II, p. 10). Complainant Robinson was a student at the school during her second period of employment there, and was still enrolled when Ms. Joyce left. (Tr. Vol. II, pp. 10-11).

Karen Joyce testified credibly that there are some differences in the hair products, such as shampoos and conditioners, designed for African American hair versus those designed for Caucasian hair. (Tr. Vol. II. p. 19). Ms. Joyce observed product shortages

during her tenure at CABC. (Tr. Vol. II, p. 16). With respect to these shortages, it was more common for African American students, who typically were assigned African American customers, to not have these products. (Tr. Vol. II, p. 17). African American students brought their own. (Tr. Vol. II, pp. 17-18).

Investigator Ralph Reed confirmed the lack of ethnic products at CABC. He testified that he observed differences in the amount of supplies in the back room in relation to the race of the patrons (Tr. Vol. II, pp. 39-40, 43-60) which confirmed what he had been told (Tr. Vol. II, pp. 42, 58) and what he had seen in photographs which had been supplied to him. (Tr. Vol. II, pp. 41-43, 59, 61, 67-70; Commission's Exhibit No. 55).

Betty Pullen admitted that students sometimes brought in products, but incredibly asserted that "[s]tudents will bring in products not because we don't have them. They just bring them in from home to use their self." (Tr. Vol. III, p. 49).

While the school has a display cabinet in the front with products for sale, products used on ethnic hair are in large measure absent from this display. The Design Essentials products that weren't sold were locked in the basement. (Tr. Vol. I, pp. 333-334; Commission's Exhibit No. 55). On one occasion, Complainant Edwards asked Respondent Hall why all of the black products were locked in the basement. Respondent Hall responded that when she put ethnic products on display in the front of the school, black students tended to steal them. Complainant Edwards considered this comment by Respondent Hall to demonstrate a racist attitude towards her and the other black students at the school. (Tr. Vol. I, p. 334). When Complainant Robinson complained to Respondents about the lack of products for African American patrons, he was also told that when they buy these types of products, people steal them. (Tr. Vol. I, pp. 70-71).

The evidence offered at the public hearing demonstrates that CABC students and staff were aware of the race-based problems at the school. The credible and substantial evidence supports a finding that the school did not instruct students in styling techniques necessary to provide services to African American customers, nor did the school maintain sufficient quantities of products formulated for use with African American hair.

Complainants Robinson and Edwards enrolled at CABC to receive a comprehensive cosmetology education. They were deprived of this opportunity because CABC failed to

educate its students on styling techniques associated with ethnic hair and it failed to stock the products they needed to work with African American hair on the clinic floor. This deprivation denied Complainant Edwards and Complainant Robinson the accommodations, advantages, facilities, privileges or services of CABC. This deprivation is magnified when coupled with the fact that they were predominately, and in Complainant Edwards' case exclusively, assigned to work on the hair of African American patrons.

b. Complainants Robinson and Edwards experienced unlawful segregation because of race.

The credible and substantial evidence on the record demonstrates that Respondent CABC engaged in unlawful segregation by steering customers to students of the same race. The educational opportunities of the Complainants were limited by CABC's lack of instruction on the styling of ethnic hair, coupled with its practice of steering customers to students of a similar race. As a consequence, Complainant Robinson, Complainant Edwards and other African American students were expected to work on non-white customers without training and adequate supplies. White students predominately worked with white customers, and the educational instruction and product availability was readily available for them.

The WVBBC expects that, to the extent that clinical patrons are available to a school, the school will provide equal opportunities for students to work on those clinical patrons, without regard to race. (Tr. Vol. III, p. 326). CABC has a written policy about how students are to be assigned customers. This policy suggests a race-neutral process for the assignment of customers and indicates that senior students have priority for customers who seek chemical services. Paragraph five of this policy states that "[c]lients are never assigned based on sex or race of a student." (Commission's Exhibit No. 21). However, a customer can request a student by name. So, while the policy states that a customer can't request a white stylist, it does permit a customer to ask the white student his or her name, and then seek services from the white student by name or vice versa. Student/customer assignments are made at the front desk. (Tr. Vol. III, p. 43). According to the policy and the testimony of witnesses, the front desk at CABC kept a list of students who were available

to provide services to customers. Instructors were supposed to go down the list and assign customers to the next available student on the list, bearing in mind that senior students had priority for chemical services. (Tr. Vol. I, p. 312; Tr. Vol. III, p. 356; Commission's Exhibit No. 21). Despite CABC's written policy to the contrary, customers were assigned to students based upon race.

The Respondents did not follow CABC's policy. (Tr. Vol. I, p. 230). Complainant Robinson testified that when he was in line for clinic assignments, he sometimes experienced being skipped over. (Tr. Vol. I, p. 50). Complainant Robinson testified that it appeared to him that most of students were assigned by race. (Tr. Vol. I, pp. 50-51). White students would get white patrons, and black students would get black patrons. (Tr. Vol. I, p. 51). Complainant Robinson credibly testified that sometimes patrons expressed racial preferences with regard to the students who were assigned to provide them services. Complainant Robinson testified that he objected to these requests being honored, but that he was ignored. (Tr. Vol. I, pp. 51-52).

As a result, African American students received a lot of experience doing weaving and braiding, procedures which the school did not teach. (Tr. Vol. I, p. 52). These were procedures that CABC perceived were already known to black students and for which there was little or no instruction. (Tr. Vol. I, p. 54).

Complainant Robinson testified to two occasions where he perceived patrons objections to him because of his race. (Tr. Vol. I, pp. 59-61). Complainant Robinson complained to Respondent Hall about the racial steering of patrons to students of the same race (Tr. Vol. I, p. 74), and eventually took his complaint to the State Board. (Tr. Vol. I, p. 74).

Complainant Edwards credibly testified that if a customer walked into the beauty school and told the staff that he or she did not want a black student working on their hair, that the staff would send the customer to a white student. (Tr. Vol. I, p. 311). Complainant Edwards personally experienced race-based customer assignment, both in the persons she was assigned to work with, and those that she was deprived of the opportunity to style.

On one occasion, Complainant Edwards was called to work with an older white customer. As she approached the customer, she heard the woman say she did not want

a black student working on her hair. Rather than following the policy, and explaining to the customer that the school is not allowed to assign students based upon race, CABC assigned the customer to a white student. The instructor in this instance was Ms. Bond, an African American. (Tr. Vol. I, pp. 312-314).

Complainant Edwards observed Ms. Bond speak with Respondent Hall about a customer's refusal to be assigned to a black student. Complainant Edwards heard Respondent Hall direct Ms. Bond to assign the customer to a different student. Complainant Edwards perceived Ms. Bond was aware of the unwritten racial steering practices of CABC, and followed orders accordingly. (Tr. Vol. I, pp. 421-422). These practices were contrary to CABC's written policy.

Complainant Edwards was upset with CABC's failure to follow its policy on assigning students to customers. She expressed her concern to an instructor, Cleo Morgan, who told the Complainant that she could have the next customer. The next customer who came into the school was a white male who wanted a haircut. He indicated that he did not want a black woman cutting his hair, and when Ms. Morgan did not offer him a white student, he elected to leave. The next customer was a black woman. Complainant Edwards was assigned to work with her. (Tr. Vol. I, pp. 314-315).

During the period of time when she was on the clinic floor, Complainant Edwards was never assigned a white customer. (Tr. Vol. I, p. 307). In Complainant Edwards own testimony at the hearing, she credibly testified "[A]ll I really did when I was on the clinic floor was braids. I did braids. I did up-dos. I did a relaxer." (Tr. Vol. I, p. 307). Complainant Edwards was never instructed in how to do a relaxer." (Tr. Vol. I, pp. 325-26).

Former instructor Karen Joyce also observed a pattern of black students not being given the opportunity to perform cuts or color services on white customers. (Tr. Vol. II, pp. 11-12). She testified that lots of the African American students did not get to do haircuts and hair colors on white patrons. (Tr. Vol. II, pp. 11-12). African American students left the cosmetology program with limited experience working on Caucasian patrons. (Tr. Vol. II, p. 12).

Instructor Cleo Morgan also observed a pattern of students predominately being assigned customers of their own race. Ms. Morgan credibly testified that the written policy

of CABC with respect to the assignment of customers to students was not routinely followed. (Tr. Vol. II, pp. 196-197). Ms. Morgan credibly testified that the educational experience of students and their ability to work post-graduation would be substantially affected by the practice of assigning customers based upon race. She said "Well, you have no idea how to style the customer of the other race. They would be kind of lost, you know, new to it and not know how to begin and start, you know, what they need to use, what product they would need to use to do that type of hair." (Tr. Vol. II, p. 197).(Tr. Vol. II, pp. 193-194, 197).

Betty Pullen, a current instructor at CABC, worked for CABC during the tenures of both Complainants. When asked on direct examination "[d]o you assign clients to students of the same race," Ms. Pullen answered, "No, sir. Not always now. It depends on how their name comes up on our list." (Tr. Vol. III, pp. 32-33). Betty Pullen admitted that there was a period of time where it appeared that customers who were black were assigned to black students and customers who were white were assigned to white students. (Tr. Vol. III, p. 44). Ms. Pullen admitted that if a black student was assigned lots of black customers, the student may wind up doing certain styles and not getting experience in others. (Tr. Vol. III, p. 45). She then asserted that CABC follows its policy on customer assignment. (Tr. Vol. III, pp. 33-36). Her earlier answer very clearly admits that there was a period of time when that was not the case. She also conceded that she could not speak for how other instructors assigned customers to students. (Tr. Vol. III, p. 44). Sandra Richardson does not recall seeing such a pattern, but she admits she never looked for one. (Tr. Vol. III, p. 408).

Customers were steered to students of the same race, thereby depriving Complainant Robinson and Complainant Edwards the opportunity to practice the skills they were actually taught with respect to Caucasian hair, and requiring them to perform services on customers that they were not taught at the school. By limiting their education and tools, and then assigning Complainant Robinson and Complainant Edwards customers they never learned how to style and little or no products with which to work, CABC set the Complainants up for failure. More importantly, the educational opportunities for Robinson and Edwards were stifled by CABC, depriving them of clinical experience working with white

patrons, a practice readily available to the white students. Accordingly, the Complainants' educational experiences were separate and unequal.

c. Complainants Robinson and Edwards were subjected to a racially hostile environment at CABC which included threats and acts of physical violence.

The Commission has established its prima face case of discrimination. It is now well recognized that when racially or sexually motivated harassment is sufficiently severe to affect the "terms and conditions of employment," it constitutes an adverse employment action. The same is true for places of public accommodations, including vocational schools.

The West Virginia Human Rights Commission has regulations which describe the test for analyzing claims of sexual harassment. Although these rules speak most specifically to sexual harassment in the context of employment, by their own terms they also apply to places of public accommodation. *See West Virginia Human Rights Commission's Legislative Rules Regarding Sexual Harassment*, W. Va. Code R. § 77-4-1 *et seq.* (1994). It has also been held that the standards for establishing a claim of racial harassment are parallel to those of a claim of sexual harassment. *Fairmont Specialty Services v. West Virginia Human Rights Commission*, 206 W. Va. 86, 522 S.E.2d 180 (1999). Under the Commission's rules, conduct constitutes actionable harassment if it "has the purpose or effect of unreasonably interfering with an individual's [performance] or creating an intimidating, hostile or offensive [environment]." W. Va. Code R § 77-4-2.2.3. (1994).

Courts have recognized the parallels between harassment in the workplace and harassment in schools. "There is no meaningful distinction between the work environment and school environment which would forbid such discrimination in the former context and tolerate it in the latter." *Doe v. Taylor Independent School District*, 975 F. 2d 137, 149 (5th Cir. 1992) (applying Title VII analysis to sexual harassment in a school context).

Other courts have spoken more specifically about a "hostile educational environment." It has been said that a hostile educational environment exists where a complainant can show 1) that he/she suffered intentional discrimination because of his/her protected status; 2) that the discrimination was pervasive and regular; 3) that the discrimination detrimentally affected the complainant; and 4) that the discrimination would

detrimentally affect a reasonable student of the same protected status in his/her position. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990).

Clearly the evidence establishes that Respondents created a hostile educational environment for the Complainants. Complainants Robinson and Edwards experienced several instances of racial discrimination, including the use of racially charged threats and negative stereotyping, during their respective tenures at CABC. Many, but not all, of these instances involved Respondent Bishop.

Respondent Bishop perpetuated negative racial stereotypes, engaged in race-based steering and used racial slurs to refer to black students.

During the period of time when Complainant Edwards was a student at CABC, there were occasions upon which patrons would book the school for birthday parties. At these events, services for guests could include manicures and hair styling. Complainant Edwards credibly testified that at one such Saturday birthday party, Respondent Bishop engaged in racially motivated steering to pair the only African American cosmetology student with the only non-white party-goer. (Tr. Vol. I, p. 267).

On the day of the birthday party in question, Complainant Edwards was the only African American cosmetologist who was assigned to work on hair styles for the party guests. (Tr. Vol. I, p. 269). Respondent Bishop paired the students with guests, and Complainant Edwards was initially assigned to style the hair of a white guest at this particular birthday party. (Tr. Vol. I, p. 267). One girl arrived to the party with her hair up under a cap. When the guest removed her cap, it became apparent that she was a bi-racial child with hair that displayed predominately African American characteristics. (Tr. Vol. I, p. 267). When Respondent Bishop realized that the unassigned guest was bi-racial, she reassigned Complainant Edwards to work with the bi-racial child. (Tr. Vol. I, p. 267). Complainant Edwards reminded Respondent Bishop that she had already been assigned a party guest. Despite her prior assignment to a white guest, Respondent Bishop told Complainant Edwards in a very aggressive manner that Complainant Edwards could "handle" the child with the ethnic hair. (Tr. Vol. I, p. 268).

This incident stood out in Complainant Edwards' mind: "I instantly thought why do I have to tackle her hair, you know, when you just gave me somebody else. But I just went on and did my work so I didn't get in trouble[.]" (Tr. Vol. I, p. 270).

During this birthday party, Respondent Bishop exhibited additional conduct that contributed to the racially hostile environment at CABC. At one point, a parent associated with the birthday party complimented Complainant Edwards on her own hair and asked about the styling. Respondent Bishop told the parent that Complainant Edwards' hair was a weave. (Tr. Vol. I, p. 271). A hair weave is a form of hair extensions. The manner in which Respondent Bishop made this comment was intended to, and did, cause embarrassment to Complainant Edwards. (Tr. Vol. I, p. 271).

Complainant Edwards was well aware of Respondent Bishop's attitude towards ethnic hair, as she had made similar comments in Complainant Edwards' presence on other occasions. On one occasion during class, Complainant Edwards heard Respondent Bishop declare that all of the black people she knew wore hair weaves "because they don't look right without them." (Tr. Vol. I, p. 272).

In or around December 2003, Respondent Bishop's purse was missing. In front of Complainant Edwards' class, which she was instructing, Respondent Bishop asserted that her missing purse was stolen by "a black person cause white people don't steal." (Tr. Vol. I, p. 273). This comment demonstrates Respondent Bishop's attitude toward her non-white students and added to the disenfranchisement experienced by Complainant Edwards because of her race: "It made me feel bad because I'm like why do only black steal, that's not true." (Tr. Vol. I, p. 274). Complainant Edwards reported Respondent Bishop's racist comment to another instructor at CABC. (Tr. Vol. I, p. 274).

Respondent Bishop made additional racially derogatory remarks while an instructor in CABC's classrooms. Complainant Edwards credibly testified that Respondent Bishop told her class that all black kids have hair like Don King. (Tr. Vol. I, p. 281). Don King is an African American entertainer or boxing promoter with a large afro haircut. (Tr. Vol. II, p. 21-22).

Complainant Edwards is not the only person who heard Respondent Bishop make a reference to Don King in relation to the hair of African American children. Karen Joyce

heard a similar comment. Ms. Joyce was asked if she ever witnessed anything that reflected upon Respondent Bishop's attitude with regard to race. In response, Ms. Joyce related that she heard Respondent Bishop remark that a young African American customer looked like Don King. (Tr. Vol. II, pp. 15-16). Ms. Joyce was offended by that remark, and while she does not recall the specifics, Ms. Joyce believes she said something to Respondent Bishop about the remark. (Tr. Vol. II, pp. 21, 23). When Respondent Bishop was asked on direct whether she referred to an African American child as a "little Don King," she did not deny making the statement, but claimed she could not remember. (Tr. Vol. III, p. 241).

Respondent Bishop made a racial statement and physical threat concerning Complainant Robinson. On this particular occasion, Complainant Robinson was the next student scheduled to receive a client, and Respondent Bishop refused to assign the client to him. Respondent Bishop told Ms. Morgan, "you need to assign this client to Walter." When Ms. Morgan asked why, Respondent Bishop replied, "Because I'm not going to assign him anything. I'll take his black ass out on Capitol Street and stomp him." (Tr. Vol. II, p. 202; Commission's Exhibit No. 11). This racist statement was made in a public area on the clinic floor. (Tr. Vol. II, p. 202). Respondent Bishop told a significantly different story about what she said on this occasion, (Tr. Vol. III, pp. 240, 280-281), but her account was patently not credible. (Tr. Vol. III, pp. 240-241). This incident was reported to Ms Hall. (Tr. Vol. I, pp. 84-86; Tr. Vol. II, pp. 204-205; Tr. Vol. III, pp. 497, 502-503, 647-649). Respondent Bishop was eventually terminated, but according to Respondents it was not for the use of racially offensive language. (Joint Exhibit No. 1, Stipulation 9). Respondent Bishop was subsequently rehired by CABC.

On another occasion, Complainant Edwards also heard Respondent Bishop use a racial slur presumably toward Complainant Robinson:

> You could - it was like you could sense the tension between – you could feel the tension in the air because I was sitting – we was on the first floor, and it's the elevators – it's a elevator right here, and then its stations over here, and I didn't have a station over there, but I remember being over there, and I remember Ms. – I remember Walter walking to the front of the – he was walking to the front of the school, and Ms. Bishop seen him walking by, and she was like, 'I hate that nigger.' Just like that, 'I hate that nigger.' . . . . [i]f I'm not mistaken, Walter was passing around forms. He was passing forms around to be

signed . . . like have you ever observed any racism in school or anything like that.

(Tr. Vol. I, pp. 282-283).

While Respondent Bishop did not specifically mention Complainant Robinson by name, it was clear to Complainant Edwards that the comment was directed at him: "We know they just had an altercation and she's walking through saying, 'I hate that nigger.' So, you know, either she's talking to him [Robinson] or she's talking to all of the black people that's in the school." (Tr. Vol. I, p. 284). After her complaint about the denigrating comment Respondent Bishop made about the propensity for black people to steal, Complainant Edwards came to the conclusion that subsequent internal complaints about racial discrimination would have no effect: "You tell them and it's like it goes in one ear and it comes out of the other, so you think like why should I even bother." (Tr. Vol. I, p. 275).

Mr, Robinson and Complainant Edwards experienced racially charged comments and discriminatory conduct initiated by persons other than Respondent Bishop. For instance, on one occasion, someone left a racist note on Complainant Robinson's station which referred to him as a "Faggot Nigger." Complainant Robinson reported this and gave the note to Sandra Richardson, (Tr. Vol. III, pp. 462-463), who in turn reported it to Respondent Hall. Respondent Hall claims that she conducted an investigation of this incident, but she kept no records. She did not even keep a copy of the offensive note. (Tr. Vol. III, pp.665, 667-668, 777-778). In addition, Respondent Hall declined to list this complaint when asked in discovery to identify each complaint of racial discrimination or harassment. (Tr. Vol. III, pp. 670-671; Commission's Exhibit No. 47). When asked specifically about the note left at Complainants Robinson's station which referred to him as a "Faggot Nigger," Respondent Hall explained that she "had forgotten about that." (Tr. Vol. III, p. 671).

At one point during Complainant Edwards' tenure, racist graffiti ("hate all niggers") was present in the upstairs bathroom at CABC. Students were given permission to use the main floor restroom. (Tr. Vol. I, pp. 275, 280). Complainant Edwards complained about the racist graffiti to CABC. (Tr. Vol. I, p. 436).

During the time Complainant Edwards was enrolled at the beauty school, she was a smoker. During her first enrollment, students were allowed to smoke in the basement or outside in front of the school. (Tr. Vol. I, p. 335). When she re-enrolled in 2003, students

were still allowed to smoke in the basement, but no longer allowed to smoke in front of the building. (Tr. Vol. I, p. 336).

It is Complainant Edwards' credible, unrebutted testimony that she experienced disparate treatment at the hand of Respondent's financial aid officer and counsel, Stephen Hall. On one occasion during her second enrollment, Complainant Edwards was sitting in the basement on her lunch break with two white students. They ate lunch and then moved from the lunch table to a lounge area with an ashtray where they proceeded to smoke. At some point, Stephen Hall entered the basement area and observed the Complainant and two other students smoking. Mr. Hall directly approached the Complainant and told her that he did not want her smoking in the school, and that she could not smoke in the school. Mr. Hall did not address the white students. Complainant Edwards brought to Mr. Hall's attention that he was singling her out, and asked why he was not addressing the two white students also. Mr. Hall told the Complainant that "I'm not talking to them. I'm talking to you. Go to class." Mr. Hall followed the Complainant up the steps and out of the basement. There is no evidence in the record that Mr. Hall similarly stopped white students from smoking or treated them in such a hostile manner. (Tr. Vol. I, pp. 337-338). Attorney Hall, in his proposed findings of fact on this issue, proposes to supplement the record with information that is not a part of the evidentiary record from the hearing. This effort at supplementing the record is throughout Attorney Hall's findings of fact. He made no motion to supplement the record at the end of the hearing, in any matter, that was brought up at the hearing. Therefore, it is improper for him to do so now in this particular finding of fact or any other finding of fact.

In his capacity as Financial Aid Officer of CABC, Attorney Hall's singling out of Complainant Edwards, the lone African American in the group, along with the other discriminatory actions against Complainant Edwards constitute disparate treatment.

Complainant Edwards reported the discriminatory treatment she experienced from Mr. Hall to Cleo Morgan. (Tr. Vol. I, p. 339). Ms. Morgan's advice to the Complainant was essentially not to rock the boat. (Tr. Vol. I, pp. 339-340). Shortly after Complainant Edwards' complaint to Ms. Morgan, the smoking policy at the school changed, and students had to step out into the alley to smoke. (Tr. Vol. I, p. 340).

Because of these practices, Complainant Robinson and Complainant Edwards were denied the accommodations, advantages, privileges and services they were due as students at CABC.

3. Respondents' Failed to Articulate a Legitimate Non-Discriminatory Defense to Complainant Robinson and Complainant Edwards Claims of Discrimination.

A prima facie case has been established. However, the Respondents may still avoid liability if they articulate a legitimate, nondiscriminatory defense. The establishment of a prima facie case creates a "presumption that the employer unlawfully discriminated against" the Complainant. *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission*, 172 W. Va. 627, 309 S.E.2d 342, 352 (1983). "[T]he burden then shift[s] to the defendant . . . to rebut the presumption of discrimination by producing evidence that the [complainant] was rejected, or someone was preferred, for a legitimate, nondiscriminatory reason." *Burdine*, 450 U.S. at 254.

The burden on a Respondent under this test is only one of production, not persuasion. The Respondent "must clearly set forth through the introduction of admissible evidence the reason for the [complainant's] rejection." *Id.* at 254. The employer's stated reason should "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.* at 255-256. The explanation provided "must be clearly and reasonably specific," *id.* at 258, "must be legally sufficient to justify a judgment for the defendant," and it must be both legitimate and nondiscriminatory. *Id.* at 254.

Even if the Respondents can articulate a legitimate, nondiscriminatory reason for its conduct towards the Complainants, the Complainants may still prevail if they establish that the articulated reason is pretext. If the Complainants fail to show pretext, they still may prevail if it was established that impermissible motives played some role in the adverse action. If there was a mixture of motives and the Complainants' race was at least a factor,

then the Respondents can avoid liability only if they carry the burden of proving that they would have taken the same adverse action even if race had not been given any consideration. *Barefoot*, 457 S.E.2d at 162 n.16; 457 S.E.2d at 164 n.18; *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Credibility plays a very important role in this case, as it does in virtually every discrimination case. "[I]t is incumbent upon [the factfinder] to make the ultimate determination whether there was intentional discrimination on the part of respondent." *Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission*, 172 W. Va. 627, 309 S.E.2d 342, 353 (1983). In short, the factfinder "must decide which party's explanation of the employer's motivation it believes." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478 (1983). "In this regard, the trier of fact should consider all the evidence, giving it whatever weight and credence it deserves," *Aikens*, 103 S. Ct. at 1481 n.3, and decide whether, in the final analysis, Respondents treated Complainants "less favorably than others" because of their race. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978). In determining which side to believe, it is up to the factfinder to assess the credibility and the persuasiveness of the evidence as a whole. *Westmoreland Coal Co.. West Virginia Human Rights Commission*, 181 W. Va. 368, 382 S.E.2d 562, 567, n.6 (1989).

Rather than articulating defenses to the allegations of the Complainants, Respondents merely deny that the allegations are true. Respondents assert that "hair is hair," and that there is no difference in instructing its students on the cutting and styling of ethnic hair, nor is there a need to stock products formulated for use with ethnic hair. Because they refuse to acknowledge any distinction between black and white hair, Respondents claim that they have in stock all of the products their students need. Respondents also deny that customers are steered to students on the basis of race. They claim that the school follows its written policy and CABC does not accommodate race-based customer preferences.

Respondents further contend that a racially hostile environment does not exist at CABC. Respondent Bishop admits to verbalizing a desire to harm Complainant Robinson, but she denies using a racial slur with regard to him. While Respondent Hall does admit

that Complainant Robinson found a note at his desk that read "faggot nigger," she claims that she properly investigated the incident. The substantial evidence in the record does not support Respondent Hall's claim.

The defenses of Respondents are unreliable and are not credited. The substantial evidence on the record supports the Complainants' contentions and not Respondents' contentions.

Respondents' assertions that "hair is hair," and that there is no difference in cutting or styling of ethnic hair, are propositions disputed by the Commission's witnesses and several of the Respondents witnesses. State Cosmetology Inspector Ralph Reed, who is both an expert and an independent source of information, testified at the public hearing that there are physiological differences in the hair of black and white persons. He also explained that these differences are a legitimate basis for the use of different types of hair products. CABC hair instructor Sandra Richardson confirmed that differences in hair texture, curl pattern, elasticity, porosity and oil were racially correlated. (Tr. Vol. III, p. 405). She also confirmed that these differences warranted different cutting techniques. (Tr. Vol. III, pp. 457-458). Even CABC part owner Jack Donta acknowledged the differences between "white" and "black" hair. (Tr. Vol. III, pp. 19, 23).

Respondents' claim that they had in stock all the products their students needed was not only credibly refuted by Complainant Edwards and Complainant Robinson (Tr. Vol. I, pp. 17-18, 69-71, 333-334), but also by former instructors Cleo Morgan (Tr. Vol. II, pp. 197-198) and Karen Joyce (Tr. Vol. II, pp. 16-18), and by State Inspector Ralph Reed. (Tr. Vol. II, pp. 39-40, 41-43, 59-61, 67-70; Commission's Exhibit No. 55).

The credible evidence clearly established that CABC frequently did <u>not</u> follow its written policy (Commission's Exhibit No. 21) of race-neutral clinical assignments.

Complainant Robinson testified credibly that based on his experience, the Respondent CABC did not follow its own policy. (Tr. Vol. I, p. 230). He observed white students assigned white patrons, and black students assigned black patrons. (Tr. Vol. I, pp. 50- 51). Complainant Robinson recounted instances where patrons' racial preferences or racially-based objections were honored in student assignments. (Tr. Vol. I, pp. 51-52, 59-60).

Complainant Edwards also credibly testified that if a customer walked into the beauty school and told the staff that he or she did not want a black student to work on their hair, the staff would send the customer to a white student. (Tr. Vol. I, p. 311). She recounted how she personally experienced race-based customer assignment both in the persons she was assigned to work with, and those that she was deprived of the opportunity to style. (Tr. Vol. I, pp. 312-314, 421-422). During the period of time when she was on the clinic floor, Complainant Edwards was never assigned a white customer. (Tr. Vol. I, p. 307).

Respondents' claim that it followed its policy of race-neutral assignments is not credible. Former instructor Karen Joyce observed a pattern of black students not being given the opportunity to perform cuts or color services on Caucasian customers. (Tr. Vol. II, pp. 11-12). She confirmed that many of the African American students did not get to do haircuts and hair colors on white patrons. (Tr. Vol. II, pp. 11-12). Likewise, Cleo Morgan observed and recognized the pattern of students being assigned customers of their own race. Ms. Morgan credibly testified that the written policy of CABC with respect to the assignment of customers to students was not routinely followed. (Tr. Vol. II, pp. 196-197). Ms. Morgan also testified that the educational experience of students and their ability to work post-graduation was substantially affected by the practice of assigning customers based upon race. (Tr. Vol. II, pp. 193-194, 197). Even Betty Pullen, who is a current instructor at CABC, and who was called as a witness by the Respondents, admitted that there was a period of time where it appeared that customers who were black were assigned to black students and customers who were white were assigned to white students. (Tr. Vol. III, pp. 32-33, 44).

Respondents' denial of a racially hostile environment was unconvincing. There was credible evidence which established that offensive comments and stereotyping by instructors were common (Tr. Vol. I, pp. 268, 272, 273, 281; Tr. Vol. II, pp. 15-16, 21-23), and that incidents of open and explicit racial hostility by instructors occurred as well. (Tr. Vol. I, pp. 280, 282-283; Tr. Vol. II, p. 202; Tr. Vol. III, p. 695; Commission's Exhibit No. 11). In contrast, Respondents' witnesses either could not deny the events, or offered explanations, excuses or revised versions, which were transparent and unconvincing.

For instance, Respondent Bishop did not deny the comments she made about patrons "looking like Don King." (Tr. Vol. III, p. 241). At the public hearing Respondent Bishop attempted to recast her "black ass" comment about Complainant Robinson when she testified that what she really said was that she would "tie his skinny ass into a pretzel" (Tr. Vol. III, pp. 240, 280-281).

When Complainant Robinson was left a note calling him a "faggot nigger," Respondent Hall admitted that her alleged investigation did not even include making any kind of record of the event and that she did not even keep a copy of the note. (Tr. Vol. III, pp. 667-668, 777-778). Regarding an incident in which two students complained about Respondent Bishop using the term "nigger," Respondent Hall and Respondent Bishop acknowledged that the matter was not investigated because the students left school. (Tr. Vol. III, pp. 258-259, 695). When the Commission asked during discovery about previous complaints related to Respondent Bishop, Respondents declined to disclose the incident because, it was argued, offending students by using the term "nigger" did not have anything to do with "work performance." (Tr. Vol. III, pp. 260-265).

B. THE WVHRA PROHIBITS CABC FROM ENGAGING IN ANY FORM OF REPRISAL OR OTHERWISE DISCRIMINATING AGAINST EDWARDS FOR COMPLAINING ABOUT RACE DISCRIMINATION.

It is a violation of the West Virginia Human Rights Act for an employer or a person to retaliate against any individual for engaging in a protected activity, such as filing a complaint with the West Virginia Human Rights Commission. The Act specifically provides that it is unlawful for any person or employer to "[e]ngage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss. . . ." W. Va. Code § 5-11-9(7)(A). Subpart (C) of the same section provides that it is unlawful for any person or employer to "[e]ngage in any form of reprisal or otherwise discriminate against any person because he has opposed any practices or acts forbidden under this article. . . ." W. Va. Code § 5-11-9(7)(C).

"The legislative purpose in including the anti-retaliation provision was obviously to encourage people to come forward and expose unlawful employment practices and to do

so without fear of reprisal." *Hanlon v. Chambers*, 195 W. Va. 99, 112, 464 S.E.2d 741, 754 (1995).

To establish a retaliation claim by circumstantial evidence, Complainant Edwards must offer facts sufficient to raise an inference that retaliatory motive played a part in her removal. *Hanlon,* 464 S.E.2d at 753. In addition to circumstantial evidence, the Commission may also prove discrimination by direct evidence of discriminatory intent. Proof of this type shifts the burden to the Respondents to prove by a preponderance of the evidence that it would have taken the actions complained of against the Complainants even if it had not considered the illicit reason. *Trans World Airlines v. Thurston,* 469 U.S. 111, 36 Fair Empl. Prac. Cas. 977 (1985). The Commission established inferential, direct and circumstantial evidence of Respondents' reprisal actions.

1. The HRC has established a prima facie case of reprisal on behalf of Complainant Edwards.

The West Virginia Supreme Court first addressed the issue of retaliation in *Frank's Shoe Store v. West Virginia Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986). The Court, adopting the standard of proof scheme established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), set out the prima facie standard for retaliation claims. A complainant must prove by a preponderance of the evidence (1) that the complainant engaged in a protected activity; (2) that the complainant's employer was aware of the protected activity; (3) that the complainant was subsequently discharged and (absent other evidence tending to establish retaliatory motivation); and (4) that respondent's adverse action followed her protected activities within such period of time that the court can infer retaliatory motivation. *Frank's Shoe Store*, 365 S.E.2d at 259; *Conrad v. ARA Szabo*, 198 W. Va.362, 480 S.E.2d 801 (1996); *Hanlon v. Chambers*, 195 W. Va. 288, 464 S.E.2d 741 (1995); *West Virginia Dep't of Natural Resources v. Myers*, 191 W. Va. 72, 443 S.E.2d 229 (1994); *Brammer v. West Virginia Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1990).

The Complainants presented credible evidence of each of the elements of the prima facie case for reprisal.

a. Complainant Edwards engaged in protected activity when she complained of race discrimination to the West Virginia Board of Barbers and Cosmetologists.

The first element of the reprisal prima facie case is that Complainant Edwards was engaged in a protected activity. Pursuant to the West Virginia Human Rights Act, "protected activity:"

> includes opposition to a practice that the plaintiff reasonably and in good faith believes violates the provisions of the Act. This standard has both an objective and a subjective element. The employee's opposition must be reasonable in the sense that it must be based on a set of facts and a legal theory that are plausible. Further, the view must be honestly held[.]

Syl. pt. 7, *Conrad v. ARA Szabo*, 198 W. Va.362, 480 S.E.2d 801 (1996).

Complainant Edwards was engaged in a protected activity when she opposed practices of the Respondents' that she considered to be racially discriminatory. The substantial evidence in the record substantiates the testimony from Complainant Robinson and Complainant Edwards about their efforts to complain about racially discriminatory treatment to CABC staff. Complainant Edwards testified that once those complaints fell on deaf ears, further complaints to CABC did not seem worthwhile: "You tell them and it's like it goes in one ear and it comes out of the other, so you think like why should I even bother." (Tr. Vol. I, p. 275).

In addition, Complainant Edwards' complained of racially discriminatory practices to the WVBBC. Complainant Edwards' testimony that she subsequently attended a WVBBC board meeting relating to her complaint (among other complaints) at CABC is uncontested. Respondents do not dispute that Complainant Edwards made a race discrimination complaint to the WVBBC. (Joint Exhibit No. 1). However, at the public hearing, counsel for Respondents suggested that this complaint would not trigger the anti-retaliation provisions of the West Virginia Human Rights Act because it was made to the WVBBC and not the Human Rights Commission. This assertion is contrary to the provisions of the Act. Section 5-11-9(7) protects any person who has " opposed any practices or acts forbidden under this article." Certainly Complainant Edwards' WVBBC complaint qualifies as such opposition.

Complainant Edwards' credibly testified that she believes the discriminatory and harassing conduct which she experienced at CABC was related to her race and was unlawful. There is no basis to dispute that her complaint to WVBBC was made in good faith. Her efforts in opposition to racially discriminatory CABC practices satisfies this prong of the prima facie case.

b. Respondents CABC and Hall were aware of Complainant Edwards' race discrimination complaint.

Respondents have stipulated that Respondents CABC and Respondent Hall were aware of Complainant Edwards' race discrimination complaint no later than mid-April 2004. (*See* Joint Exhibit No. 1, Stipulation 7).

c. Respondents CABC and Hall took the adverse action of suspending and expelling Complainant Edwards.

After engaging in the protected activity, Complainant Edwards was expelled from the school. *Frank's Shoe Store*, 365 S.E.2d at 259. This formulation was developed in the context of an employment discharge case. *Id.* The anti-retaliation provisions of the West Virginia Human Rights Act do not limit reprisal actions to employment cases. The clear language of the Act prohibits anyone from engaging in "any form of threats or reprisal." W. Va. Code §§ 5-11-(9)(7)(A)&(C) (emphasis added).

Subsequent to her complaint, Complainant Edwards' disparate treatment escalated. She was assigned more dispensary time than any of the other students even though she was pulled out of the dispensary to perform services on African American patrons. Complainant Edwards was suspended for two days after missing a Saturday class even though she called in pursuant to policy. Finally, in an inexplicable outburst, Respondent Hall expelled Complainant Edwards from CABC, telling her that if she thinks CABC treated her badly enough that she needed to complain to WVBBC, she could tell the WVBBC about her treatment that morning. [S]he was like you want call, you want to write a report to the board stating how we treat you so bad.' She was like, 'If you feel we treat you so bad, why don't you tell them about this?'" (Tr. Vol. I, p. 394). This particular incident resulted in an

assault of Complainant Edwards by Respondent Hall significant enough to leave a bruise. Once Complainant Edwards was expelled, she reached for her book bag. Respondent Hall kept grabbing Complainant Edwards' upper arm, and the Complainant would try and pull away. The Complainant told Respondent Hall that she did not need to touch her. (Tr. Vol. I, p. 397). The lock fell to the floor, and Complainant Edwards moved to lift the lid of her station's storage area and was assaulted by CABC staff. The lid to her station was pulled down on her fingers. (Tr. Vol. I, p. 400). At this point, Complainant Edwards was very upset and was audibly crying. Respondent Hall admits that she and Ms. Pullen barred Complainant Edwards from retrieving her things, even though Respondent Hall testified that she told Edwards to collect them. (Tr. Vol. III, p. 522). As a further act of reprisal, Respondents Hall and CABC retained Complainant Edwards' personal property and student kit. The credible evidence on the record supports this finding.

Moreover, Respondent Hall told Complainant Edwards that she would not release her transcripts even if Complainant Edwards took care of her final bill. Upon receipt of her final bill, Complainant Edwards contacted Respondent Hall about how she could obtain certification of the hours she completed as a student at CABC. Complainant Edwards asked Respondent Hall if she would release her transcript if she paid the amount Respondent Hall contended that she owed. Respondent Hall told Complainant Edwards that regardless of whether she paid or not, the hours completed would not be released. Respondent Hall asserted that she was not legally required to release the hours, and only had to do so if she wanted to. (Tr. Vol. I, pp. 409-410). This is inconsistent with CABC's policy on transfers. A transfer fee of $20.00 (for transcript of hours and grades) will be charged to any student "with good and sufficient reason for transferring to another school." (Commission's Exhibit No. 19, p. 16). (*See* Commission's Exhibit No. 19, p. 16). Respondent Hall's actions clearly were retaliatory and a blatant violation of the West Virginia Human Rights Act.

d. As soon as Complainant Edwards was no longer eligible for any pro-rating of tuition costs, Respondents expelled her in retaliation for her complaints to the Board of Barbers and Cosmetologists.

Frequently, the crucial component of the prima facie case in a retaliatory discharge action is the identification of a causal connection, or linkage, between the protected activity and the adverse action. The causal link between the protected activity and the adverse employment decision "can be proven by direct or circumstantial evidence, or by inferential evidence, or by a combination of evidence." *Fourco Glass Co. v. West Virginia Human Rights Commission*, 179 W. Va. 291, 367 S.E.2d 760, 762 (1988). Typically, the most obvious causal connection between the retaliatory conduct and impermissible motive is a temporal proximity. *Conrad v. ARA Szabo*, 198 W. Va. 362, 375, 480 S.E.2d 801, 814 (1996). However, as established in the prima facie case, temporal proximity is not the only method of establishing a causal connection. The Commission can meet its burden with respect to this element through direct, inferential and circumstantial evidence.

The timing of events supports Complainant Edwards' allegation of reprisal in two ways. First, after she complained to the WVBBC, Complainant Edwards experienced an escalation of poor treatment. Second, as soon as Complainant Edwards became responsible for one hundred percent of her CABC tuition, she was expelled from CABC in reprisal for her WVBBC complaint. She was expelled the very first moment when it would not "cost" Respondent CABC to do so.

After her complaint, Respondent Hall would avoid Complainant Edwards. Complainant Edwards perceived that Respondent Hall didn't want to answer Complainant Edwards' questions about problems with her hours and grades. (Tr. Vol. I, p. 367).

In mid-April 2004, Respondents suspended Complainant Edwards for missing a Saturday, despite the fact that she followed CABC protocol, and called in to advise her instructor of her absence. On one Saturday after she had complained to WVBBC, Complainant Edwards was unable to make it in to class. CABC has a policy requiring students to call in on Saturday morning if they won't be able to come in. (Tr. Vol. I, p. 368). Students who miss a Saturday and fail to call in are not allowed to attend school the following two school days. (Commission's Exhibit No. 19, p. 23). Complainant Edwards called in twice. On the first occasion, Complainant Edwards' instructor was not available to come to the phone and discuss her absence. Complainant Edwards called back and ultimately spoke with Ms. Bond, informing her that she would not be able to come in on that

day. During the course of this conversation, the instructor approved the absence and indicated that she would see Complainant Edwards on Tuesday. Nothing was said or done to suggest that Complainant Edwards had not complied with the policy. (Tr. Vol. I, pp. 376-77).

When Complaint Edwards arrived at school the following Tuesday, her time card was not in its normal location. She asked her instructor about her time card, and was advised to go to the office and ask Respondent Hall about her card. (Tr. Vol. I, pp. 377-378). Complainant Edwards met with Ms. Carter and Respondent Hall about her time card. Ms. Carter alleged that Complainant Edwards had not called in on Saturday, and would not be allowed to attend school for two days. Ms. Bond, with whom she spoke, came up to the office and told Carter and Respondent Hall that, indeed, Complainant Edwards had called in. Regardless, she was sent home for two days. (Tr. Vol. I, pp. 378-379).

The cosmetology program consists of 2000 hours of classes and practical work. According to Respondents, including the hours scheduled for May 18, 2007, Complainant Edwards had been enrolled in CABC for 1006 enrollment hours. (Commission's Exhibit No. 17, p. 5). "Enrollment time is defined as the time elapsed between the actual starting date and the date of the student's last day of physical attendance in the school." (Commission's Exhibit No. 13, p. 1). This is significant because of CABC's tuition policy. Persons who are enrolled for less than 1000 enrollment hours are not responsible for tuition for the entire 2000 hour program. The tuition cost is pro-rated:

For those students who enroll and begin classes the following schedule of tuition adjustment is authorized:

PERCENTAGE OF ENROLLMENT TIME TO TOTAL TIME OF COURSE	AMOUNT OF TOTAL TUITION OWED
0.1% to 4.9%	20%
5% to 9.9%	30%
10% to 14.9%	40%
15% to 24.9%	45%
25% to 49.9%	70%
50% and over	100%

(Commission's Exhibit No. 13, p. 1).

On cross-examination, Respondent Hall acknowledged that as of the date of Complainant Edwards' discharge from the program, she was only six hours over the half-way mark, and this was only if she were charged for the entire day on which she was thrown out. (Tr. Vol. III, pp. 633-634). It became clear during the course of the public hearing that the final bill sent to Complainant Edwards was incorrect, and that Complainant Edwards had not been credited with the hours from her previous period of enrollment. However, as of May 18, 2004, the day of her expulsion, Respondents' records reflected that she passed the enrollment half-way mark on that date. This was the very day that she could be assessed the entire cost of tuition. This is powerful evidence of reprisal.

Respondents' warnings not to talk to the WVBBC further support Complainant Edwards' assertion that her expulsion was retaliatory. The credible evidence adduced at hearing is persuasive that Respondent Hall made threats of reprisal against students for their complaints to and cooperation with the WVBBC. Respondent Hall and other instructors at the school told students not to cooperate with the WVBBC. Both Ms. Carter and Respondent Hall told Complainant Edwards not to answer any questions about the school. (Tr. Vol. I, pp. 360-361). Cleo Morgan heard Respondent Hall say that students could go to the Board (WVBBC), but it would hurt the students more than it would hurt Hall. (Tr. Vol. II, p. 216). Certainly, Complainant Edwards was injured by her suspension, expulsion, assault and Respondents' retention of her personal property.

The causal connection is clear. Respondents warned Complainant Edwards not to complain to WVBBC. After she did so, she was treated differently. Ultimately, and as soon as Complainant Edwards was responsible for one hundred percent of her tuition, the Respondents expelled her in retaliation for her complaint. The Complainants have established by a preponderance of the evidence a prima facie case of reprisal.

2. The Explanations Offered by Respondents Are Not Credible.

Even if the Complainants establish a prima facie case, the Respondents may still avoid liability if they articulate a legitimate, nondiscriminatory defense. *Brammer v. West Virginia Human Rights Commission*, 183 W. Va. 108, 394 S.E.2d 340 (1994).

Here, the Respondents have clearly articulated one alleged legitimate, nondiscriminatory reason to support their expulsion of Complainant Edwards: they allege she engaged in an unprovoked outburst on the clinic floor that disrupted the school.

3. Even if the Articulated Reason Played a Role in the Expulsion Decision, the Complainants Remain Entitled to Prevail.

Even if the Respondents can articulate a nondiscriminatory reason for their treatment of Complainant Edwards, Complainants Robinson and Edwards may still prevail if they establish that the articulated reason is pretext. *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995); *Skaggs v. Elk Run Coal Co.,* 198 W. Va. 51, 479 S.E.2d 561 (1996). The credible evidence of record establishes that the Respondent's articulated reasons are, in fact, pretext.

Respondents' legitimate, nondiscriminatory reason for expelling Complainant Edwards is not supported by the record. Complainant Edwards and Respondent Hall are the only witnesses who testified at the public hearing who actually know how the May 18, 2004, incident began. While Virginia Doss claimed to have seen the beginning, her written statement makes it clear that she was not even on the clinic floor when the situation began. (Compare Tr. Vol. III, pp. 172-173 and Commission's Exhibit No. 58). The testimony of Complainant Edwards is far more credible than that of Respondent Hall.

Complainant Edwards credibly asserted that Respondent Hall confronted her in a hostile manner, yelled at her and expelled her from school. Many of the witnesses who heard the events on the clinic floor agree that Complainant Edwards was telling Respondent Hall not to touch her or hit her. They all agree that Complainant Edwards just wanted to collect her personal belongings before she left. Most of the witnesses observed Respondent Hall touching Complainant Edwards or her bag in some fashion. Most of the witnesses observed Complainant Edwards crying. The majority of witnesses who saw Complainant Edwards leave the school say she was not allowed to take any of her things with her.

Respondent Hall's testimony regarding this incident lacks credibility. Respondent Hall claims that she observed Complainant Edwards outside the dispensary and said "Tyleemah, honey, you know you're not supposed to be here. You're supposed to be back

in the dispensary." (Tr. Vol. III, p. 520). Respondent Hall alleges that in response to being told the dispensary involved more than keeping towels stocked, Complainant Edwards, who Respondent Hall characterized as generally quiet, "really went off" and that her alleged outburst was "totally unprovoked." (Tr. Vol. III, pp. 520-21, 720). Respondent Hall claims she told the Complainant to get her things and leave. (Tr. Vol. III, p. 521). However, she prevented Complainant Edwards from doing that very thing.

The testimony of witnesses and the timing and manner of her expulsion overwhelmingly support a determination that Respondents' proffered explanation is pretextual.

It is not necessary to establish that Complainant Edwards' protected activity was the only factor considered in the determination to expel her. The law recognizes that respondents may have mixed motives for making decisions. *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 479 S.E.2d 561 (1996). In order to prevail, it is only necessary that the discriminatory motive be a motivating factor in the expulsion decision. When, as here, the Commission has shown that Respondents were motivated at least in part by such an unlawful motive, i.e. the Commission having established all elements of the prima facie test for retaliation as articulated in *Frank's Shoe Store*; the Respondents have the burden of proving that they would have suspended Complainant Edwards and ultimately expelled her even in the absence of the protected activity. *See Bailey v. Norfollk & Western Ry. Co.*, 206 W. Va. 654, 666-667, 527 S.E.2d 516, 528-529 (1999), *citing Skaggs*, 198 W. Va. at 78, 479 S.E.2d at 586; *Barlow v. Hester Industries, Inc.*, 198 W. Va. 118, 138, 479 S.E.2d 628, 648 (1996); *Page v. Columbia Natural Resources, Inc.*, 198 W. Va. 378, 390, 480 S.E.2d 817, 829 (1996).

Respondent Hall's admission of retaliatory motive makes this a burden which the Respondents cannot carry. Complainant Edwards credibly testified that Respondent Hall told her that since she thought she was treated so badly by the school that she needed to complain to WVBBC, she could tell the Board about the events of that morning. (Tr. Vol. I, pp. 393-394.) This is direct evidence that retaliation was a motivating factor in the expulsion decision. Even if Complainant Edwards' response to the unprofessional behavior of Respondent Hall contributed to Complainant Edwards' expulsion, the way in which the

expulsion was handled and Respondent Hall's admission of retaliatory motive make it clear reprisal was at least a motivating factor.

IV. DAMAGES

The Complainants are entitled to such relief as will effectuate the purpose of the Human Rights Act and "make persons whole for injuries suffered on account of unlawful . . . discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The injured party is to be placed, as near as possible, in the situation which he or she would have occupied had he or she not been discriminated against.

Here, Complainant Robinson and Complainant Edwards have suffered losses which cannot be restored or adequately compensated. Because of the discriminatory conduct of the Respondents, Complainant Robinson and Complainant Edwards were deprived of equal opportunity and equal educational experience as compared to white classmates. They both sought to learn in an environment filled with racial bias, harassment and discrimination. They have each clearly been injured.

A. INCIDENTAL DAMAGES

The Complainants are each entitled to incidental damages. *Pearlman Realty Agency v. West Virginia Human Rights Commission*, 161 W. Va. 1, 239 S.E.2d 145 (1977); *Bishop Coal Co. v. Salyers*, 181 W. Va. 71, 380 S.E.2d 238 (1989). *Bishop Coal* provides that the $2,500 cap on incidental damages may be adjusted from time to time to conform to the Consumer Price Index. *Bishop Coal*, 380 S.E.2d at 247. In keeping with this language, the Commission has periodically raised the cap on incidental damages. In keeping with this language, the Commission has raised the cap on incidental damages to $5,000.00. Complainant Robinson and Complainant Edwards are entitled to the maximum award of incidental damages from the Respondents.

There has in the past been some confusion as to how to calculate incidental awards since the establishment of a cap on incidental damages in Human Rights Commission proceedings. It is very important to point out that the limit on incidental damages is nowhere designed or construed to be the point at which the Commission sets its scale, with every

case but the most outrageous falling somewhere below this figure. The cap was established as a ceiling on awards by the Commission in cases heard without a jury. *Bishop Coal Co. v. Salyers*, 181 W. Va. 71, 380 S.E.2d 238 (1989). Appraisal of damages should be unaffected by the cap, with every appraisal over the maximum being reduced automatically.

To do otherwise seriously undermines the West Virginia Human Rights Act. The Act is a make whole statute. It should be a rare case of discrimination indeed where a complainant does not suffer damages worth most or all of the maximum. The Commission takes the position that in virtually all cases where discrimination is held to have occurred, the complainant will have suffered at least the maximum worth of damages. Indeed, this conclusion was probably a major factor in the Supreme Court's decision in *Bishop Coal* to permit such awards.

Certainly this record establishes that the Complainants here have suffered injury well in excess of the available damages with respect to each of their individual claims. Accordingly, Respondents should be charged with the maximum available award for Docket No. PAR-351-04, and the maximum available award for Docket No. PAR-454-04.

B. RETURN OF COMPLAINANT EDWARDS' PERSONAL BELONGINGS AND RELEASE OF TRANSCRIPT

Complainant Edwards received a Pell grant in the amount of $2,025. (Commission's Exhibit No. 17, p. 4). According to Wanda Carter, this payment covered the cost of her kit. Ms. Carter indicated that if a student leaves school within their first 500 hours, the kit belongs to the school "because it hasn't been paid for yet." If a student with a Pell grant finishes her first 500 hours, the student owns the kit and can pick it up within thirty days of the completion of withdrawal forms. (Tr. Vol. III, p. 341). However, when Complainant Edwards was expelled from CABC, the school retained her kit. CABC could not reuse the kit for health reasons, and the kit was paid for by the Complainant. CABC's alleged policy

with regard to retaining the kit is confusing, particularly in light of their assertion that it cannot be reused due to health concerns:

> SCHOOL POLICY ON EQUIPMENT,
> BOOKS, SUPPLIES & REGISTRATION FEES
>
> Three days after signing the enrollment agreement, and beginning school, all kits, books and supplies, after any usage and for health reasons, shall not be subject to return to the school, and shall be charged to the student at a cost of $500.00. It is further understood and agreed by the student that said charges shall not be subject for refund. (Commission's Exhibit No. 13, p. 1).

Respondents also retained the personal items of Complainant Edwards which were in her work station. The record supports a finding that these items were wrongfully withheld from Complainant Edwards in reprisal for her complaint of discrimination.

Respondents Hall and CABC have refused, under any circumstances, to release Complainant Edwards' transcripts. (Tr. Vol. I, pp. 409-410). However, the written policy of the school is that when all financial obligations to the school are met, and if sufficient reason for transfer exists, CABC will provide students with a transcript of hours and grades for a fee of $20.00. (*See* Commission's Exhibit No. 19, p. 16). Complainant Edwards' decision to seek education elsewhere is most definitely sufficient. Given the discriminatory and retaliatory treatment Complainant Edwards has suffered, CABC can not deprive her of the opportunity to continue her education elsewhere.

C. TUITION

Although CABC's records indicate Complainant Edwards was only enrolled for only 1006 hours, she was charged full tuition, if you count the day she was expelled as a full day. (Commission's Exhibit No. 17). The reprisal actions of CABC and Respondent Hall deprived Complainant Edwards of access to the accommodations, advantages, facilities, privileges or services of the CABC program. Complainant Edwards essentially was required to pay full tuition but limited to attending school for half of the enrollment term. CABC

should not be enriched as a result of its own discriminatory conduct. Accordingly, Complainant Edwards is entitled to a refund of half the tuition charged to her. Complainant Edwards' final bill included a tuition charge in the amount of $6500.00. It took Complainant Robinson longer than it should have to graduate because the instruction and the learning opportunities made available to him were not effective. He was discriminated against and unlawfully frustrated in his efforts to learn. (Tr. Vol. I, p. 38). A total of $2,213.25 of the tuition money paid to the Respondent CABC on behalf of Complainant Robinson was paid for extended enrollment, which would have been unnecessary if CABC had not discriminated against Complainant Robinson.

D. CEASE AND DESIST ORDER

The Complainants Robinson and Edwards are entitled to a cease and desist order. The greatest priority in civil rights law enforcement is the elimination of discrimination, and virtually every statute and ordinance provides for authority to issue cease and desist orders. Therefore, as a part of the remedy to each charge where discrimination is found, the Respondents should be prevented from initiating or continuing a discriminatory policy or practice. This cease and desist authority is always consistent with a make whole remedy, because the charging party is never made whole when the real possibility of future discrimination remains following resolution of the individual charge.

In addition to the make whole remedy available to the Complainants Robinson and Edwards , the cease and desist order may make provisions which will aid in eliminating future discrimination. A cease and desist order may require an affirmative action program and a sworn affirmation from a responsible officer of the Respondent CABC that the Commission's order has been implemented and will continue to be implemented. *Whittington v. Monsanto Corp.,* Docket No. ES-2-77, and *Pittinger, et al. v. Shepherdstown Volunteer Fire Dep't*, Docket No. PAS-48-77; *see also Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission*, 172 W. Va. 627, 309 S.E.2d 342 (1983).

In either a public accommodation discrimination claim or a reprisal case, future discrimination may be eliminated by an agreement, or order, that the Respondents will in the future apply its standards and policies in a nondiscriminatory manner. This portion of

the remedy should never be compromised because, regardless of the remedy as it affects an individual charging party, Respondents should never be allowed to continue a policy or activity which has been found to be discriminatory.

The evidence, taken as a whole, establishes that the Respondents have violated the West Virginia Human Rights Act. The record of Respondents' misconduct is significant. A cease and desist order against CABC is appropriate to protect present and future employees, students and patrons of CABC from discrimination. In addition, a cease and desist order ensures that CABC's actions of reprisal against Complainant Edwards do not have a chilling effect upon instituting complaints of discrimination by CABC other students and invitees.

E. LITIGATION COSTS

The general rule provides that each party bears his own attorney's fees unless there is an express statutory authorization to the contrary. Where there is an express statutory provision to the contrary then that provision must be followed.

The West Virginia Human Rights Act at W. Va. Code §5-11-13 modifies the general rule because it provides that where actions are brought under the Act and a court finds that Respondent engaged in or is engaging in an unlawful discriminatory practice charged by the Respondent, a court in its discretion can award reasonable attorney fees. *See also, the Commission's Rules of Practice and Procedure* at W. Va. Code State R. tit. 77 § 9.3.

In making discretionary fee awards the Court must find that the party seeking to have the fees and costs shifted is the prevailing party and that the requested fees and costs are reasonable. See *Hensley v. Eckerhart* 461 U.S. 424,433, 103 S. Ct. 1933 (1983).

The Complainants Robinson and Edwards have prevailed totally and are entitled to attorney fees and costs associated with prosecuting this Complaint.

The Complainants Robinson and Edwards and the Human Rights Commission are entitled to a reimbursement of their costs and expenses associated with the prosecution of this claim. The Human Rights Commission has incurred or expended a total of $5,215.75 in hearing transcript costs and witness fees.

V. CONCLUSIONS OF LAW

1. The Complainant Robinson is an individual aggrieved by an unlawful discriminatory practice, and is a proper Complainant under the West Virginia Human Rights Act, W. Va. Code § 5-11-10.

2. The Complainant Edwards is an individual aggrieved by an unlawful discriminatory practice, and is a proper Complainant under the West Virginia Human Rights Act, W. Va. Code § 5-11-10.

3. The Respondent Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc. is a person within the meaning of the West Virginia Human Rights Act, W. Va. Code § 5-11-3(a), and is a place of public accommodations within the meaning of the West Virginia Human Rights Act, W. Va. Code § 5-11-3(j).

4. The Respondent Judy C. Hall is a person within the meaning of the West Virginia Human Rights Act, W. Va. Code § 5-11-3(a). At all times relevant hereto, she was a partial owner of and an instructor for the Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc., and as such an employee and agent of the CABC, a place of public accommodations.

5. The Respondent Bishop is a person within the meaning of the West Virginia Human Rights Act, W. Va. Code § 5-11-3(a). At all times relevant hereto, she was an instructor for the Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc., and as such an employee and agent of the CABC, a place of public accommodations.

6. The complaints in this matter was timely filed in accordance with W. Va. Code § 5-11-10.

7. The Complainant Robinson sought full access to the accommodations, privileges, advantages and services of CABC.

8. The Complainant Edwards sought full access to the accommodations, privileges, advantages and services of CABC.

9. The Commission has established by a preponderance of the evidence that the Respondent Hall and CABC infringed upon the Complainants' enjoyment of the accommodations, privileges, advantages and services which are available to students at

CABC by perpetuating discriminatory practices at CABC including: failing to provide instruction in the styling of ethnic hair; failing to adequately stock and make available products for the styling of ethnic hair; and by facilitating segregation through the use of racial steering in customer assignment.

10. The Commission has established by a preponderance of the evidence that the Respondent Hall and CABC infringed upon Complainant Robinson's enjoyment of the accommodations, privileges, advantages and services which are available to students at CABC by failing to conduct a meaningful investigation into Complainant Robinson's allegations of race discrimination and by facilitating the existence of a racially hostile environment.

11. The Commission has established by a preponderance of the evidence that the Respondents Hall and CABC infringed upon Complainant Edwards' use and enjoyment of the accommodations, privileges, advantages and services which are available to students at CABC by engaging in acts of reprisal against Complainant Edwards after she made a good-faith complaint of race discrimination to the West Virginia Board of Barbers and Cosmetologists, fostering a racially hostile environment at CABC, by unlawfully expelling Complainant Edwards, retaining her kit and personal property, and by billing her for 1000 clinic hours of education which she did not receive.

12. The Respondents Hall and CABC discriminated against Complainant Robinson by charging him $2,213.25 for extra time he attended school in an effort to mitigate the harm caused by the Respondents' deficient and discriminatory education.

13. The Commission has established by a preponderance of the evidence that the Respondent Bishop infringed upon the Complainants' enjoyment of the accommodations, privileges, advantages and services which are available to students at CABC by engaging in racial threats, harassment and discrimination toward Complainant Robinson and Complainant Edwards based upon race.

14. The nondiscriminatory defenses asserted by Respondents in response to the allegations of these complaints are pretextual.

15. The Commission has met its ultimate burden of proof by a preponderance of the evidence that the Respondents Bishop, Hall and CABC discriminated against the

Complainant Robinson by denying him equal access to the accommodations, advantages, privileges and services of cosmetology school because of his race.

16. The Commission has met its ultimate burden of proof by a preponderance of the evidence that the Respondents Bishop, Hall and CABC discriminated against the Complainant Edwards by denying her equal access to the accommodations, advantages, privileges and services of cosmetology school because of her race.

17. The Commission has met its ultimate burden of proof by a preponderance of the evidence that the Respondents Hall and CABC discriminated against the Complainant Edwards by engaging in acts of reprisal against Complainant Edwards in response to her good-faith complaint of race discrimination.

18. As a result of the discriminatory and racially motivated conduct of the Respondents, the Complainant Robinson suffered humiliation, embarrassment and indignity and is therefore entitled to the maximum award of incidental damages.

19. As a result of the discriminatory and racially motivated conduct of the Respondents, the Complainant Edwards suffered humiliation, embarrassment and indignity and is therefore entitled to the maximum award of incidental damages.

20. As a result of the discriminatory actions of the Respondents, Complainant Edwards is entitled to further relief as set forth herein below.

21. As a result of the discriminatory actions of the Respondents, Complainant Robinson is entitled to further relief as set forth herein below.

22. Respondent CABC should be required to hold Complainant Edwards harmless for $3,250 of the tuition fee it claims she owes.

VI. RELIEF

Pursuant to the above findings of fact and conclusions of law, this Chief Administrative Law Judge orders the following relief:

1. It is **ORDERED** that the above-named Respondents, Cherie Bishop, Judy Hall and the Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture, Inc., shall cease and desist from engaging in unlawful discriminatory practices. Within 60 days of receipt of this Final Decision, Charleston Academy of Beauty

Culture, Inc., d/b/a Charleston School of Beauty Culture is **ORDERED** to undergo training related to race discrimination and the requirements of the West Virginia Human Rights Act and its implementing legislative regulations and to file with this Commission an affidavit signed by the individual or entity providing the training verifying that the training is completed. The affidavit shall be mailed to the Commission's Compliance Director, Mr. Jackie Heath at the following address, West Virginia Human Rights Commission, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400.

It is further **ORDERED** that Respondent Cherie Bishop, Respondent Judy Hall and all current employees of Respondent CABC attend a comprehensive anti-discrimination training, conducted by an instructor approved by counsel for the West Virginia Human Rights Commission, in the anti-discrimination requirements of the West Virginia Human Rights Act. This training shall be conducted at the expense of Respondent CABC, and shall consist of no less than three hours of instruction;

2. It is **ORDERED** that Respondent Cherie Bishop cease all racial harassment and/or discrimination against CABC students;

3. Respondent Judy Hall is **ORDERED** to cease all discrimination against CABC students;

4. Respondent Judy Hall is **ORDERED** to cease all acts of reprisal against CABC students;

5. Respondent Charleston Academy of Beauty Culture, Inc., d/b/a Charleston School of Beauty Culture is **ORDERED** to cease all acts of race discrimination, segregation, racial harassment and reprisal against CABC students;

6. As a result of Respondent's unlawful discriminatory conduct, Respondent is **ORDERED** to pay Mr. Robinson $1,213.25 for tuition charged him for extended sessions;

7. As a result of Respondent's unlawful discriminatory conduct, Respondent is **ORDERED** to pay Complainant Edwards $3,250, or to hold her harmless, for the portion of her final bill which charges for the1006 hours of education denied to her as a result of her unlawful expulsion;

8. Respondents are **ORDERED** to pay Complainant Robinson $5,000 in