

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

ELIZABETH ADAMS, Complainants

v.

**THE BOARD OF DIRECTORS OF THE DELCO PHANTOMS YOUTH HOCKEY PROGRAM
and GEORGE SCHERBAK, PAST PRESIDENT, Respondents**

DOCKET NO. P-6117

STIPULATIONS OF FACT

1. The Complainant herein is Elizabeth Adams ("Complainant"), an adult female.
2. The Respondents herein are The board of Directors of the Delco Phantoms Youth Hockey Program ("Delco Phantoms") and George Scherbak ("Scherbak"), collectively "Respondents" hereinafter.
3. The Delco Phantoms is registered as a private, non-profit corporation organized under the laws of Delaware. It is tax exempt under Section 501(c)(3) of the Internal Revenue Code. Its members consist of the Board of Directors and the parents or legal guardians of players registered and in good standing with the Delco Phantoms.
4. George Scherbak, founded the DelCo Phantoms in 1997, and served as its president from 1997 to 2000. During its inception year, Mr. Scherbak organized the first Board of Directors.
5. The Board of Directors of the DelCo Phantoms is the governing body that oversees the overall operations of the program.
6. The Delco Phantoms was organized for the purpose of providing an opportunity for area youths to learn and play the game of ice hockey in a competitive environment.
7. The DelCo Phantoms is a member of the Delaware Valley Hockey League ("DVHL").
8. Complainant is an ice hockey player who, as a youth, participated in the DelCo Phantoms Youth Hockey Program during the 1997-98, 1998-99 and 1990-00 seasons.
9. For each of the seasons that Complainant played for the DelCo Phantoms she played on the Midget "B" boys team.
10. Since its inception in 1997, the DelCo Phantoms has purchased ice time for its practices and games from IceWorks, an ice rink located in Aston, Pennsylvania.
11. Complainant entered the University of New Hampshire in September 2000 and was a full-time student at the University during the 2000-2001 and 2001-2002 academic years.
12. The University of New Hampshire has a Division I female ice hockey program.
13. Complainant is a registered participant in the University of New Hampshire female ice hockey program, and entered the program in September 2000.
14. The University of New Hampshire's female ice hockey program must comply with the NCAA's Bylaws concerning recruitment, eligibility, and financial assistance for each of the participants in its program.
15. On or about August 31, 2000, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at docket number P6117. A copy of the complaint will be included as a docket entry in this case at the time of hearing.

16. On or before December 26, 2000, Respondent filed an Answer in response to complaint. A copy of the Answer will be included as a docket entry in this case at the time of hearing.
17. On or about January 5, 2001, Respondent filed an Amended answer in response to the complaint. A copy of the amended Answer will be included as a docket entry in this case at the time of hearing.
18. In correspondence dated April 30, 2002, Commission staff notified the Complainant and Respondent via Finding of Probable Cause that probable cause existed to credit the allegations found in the complaint.
19. Subsequent to the determination of probable cause, Commission staff attempted to resolve the matter in dispute between parties by conference, conciliation and persuasion but was unable to do so.
20. In subsequent correspondence, Commission staff notified the Complainant and Respondent that a public hearing had been approved.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Pamela Darville, Assistant Chief Counsel
(Counsel for the Commission on behalf of the Complainant)

J. Freedley Hunsicker, Jr., Esquire
Julianne Peck, Esquire
Drinker Biddle & Reath LLP
(Counsel for the Respondent)

Barbara E. Ransom
(Counsel for the Complainant)

FINDINGS OF FACT*

1. The Complainant, Elizabeth Adams, (hereinafter “Elizabeth”) is an adult female, who at all times relevant to this action was a minor residing in Philadelphia with her mother, Bette Adams.
2. The named Respondents are the Board of Directors of the Delco Phantoms Youth Hockey Program, (hereinafter the “Board”), and George Scherbak, (hereinafter “Scherbak”), at all times relevant to this action, the President of the Delaware County Phantoms Youth Ice Hockey Club, Inc., (hereinafter either the Delco “Phantoms or the “Club”), a 501(c) tax exempt, non-profit Club, incorporated under the laws of the State of Delaware. (N.T. 1 – 146; N.T. 2 – 9, 11,12 13, 55; (R.E. 1).

* The foregoing “Stipulations of Facts” are hereby incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. 1 Notes of Testimony - Volume 1 - 5/27/03

N.T. 2 Notes of Testimony - Volume 2 - 5/28/03

N.T. 3 Notes of Testimony - Volume 3 - 5/29/03

N.T. 4 Notes of Testimony - Volume 4 - 5/30/03

C.E. Complainant’s Exhibit

R.E. Respondent’s Exhibit

S.F. Stipulation of Fact

3. In late 1996 to early 1997, Scherbak contemplated forming a youth ice hockey club. (N.T. 2 - 8, 50).
4. Scherbak decided to form the club because, Ice Works, a new ice skating rink was being built in Aston, Pennsylvania, and there was a need to provide a greater opportunity for children to play ice hockey since other existing area ice hockey clubs were full. (N.T. 2 - 9, 50; N.T. 3 – 226, 227).
5. Once formed, the Club was open to anyone who applied to play. (N.T. 2 – 9).
6. The level of play of the Delco Phantoms was Tier II, a middle level within the Delaware Valley Hockey League, (hereinafter “DVHC”). (N.T.1 - 59; N.T. 2 - 26, 121, 123).
7. Tier I clubs were a higher level of play where both boys and girls teams played more intense ice hockey. (N.T. 2 - 83,121).
8. After forming the Club, Scherbak commenced a phone solicitation campaign seeking ice hockey players. (N.T. 2 - 10).
9. In September 1997, Scherbak also placed an ad in the Delaware County Daily Times seeking both ice hockey players age 7 to 17, and coaches. (N.T. 1 - 137; N.T. 2 - 10, 50; C.E. 53).
10. Additionally, a sign-seeking players was placed outside the newly built Ice Works skating rink. (N.T. 1 - 165; N.T. 2 - 50).
11. The only requirement for a child to apply to the Delco Phantoms was to possess “some skating ability”. (N.T. 2 – 51, 52).
12. The Board was established to run the Delco Phantom’s program. (N.T. 1 - 146; N.T. 2 -15).
13. Scherbak appointed members to the Delco Phantom’s inaugural Board. (N.T. 1 - 147, 207; N.T. 2 -12).
14. Inaugural year Board members were appointed for one-year terms. (N.T. 1- 147).
15. In the fall of 1997, the first Board included:

Scherbak – President

Rich Hribal – Vice President
Doug Hein – Treasurer
Lisa Dadown – Secretary
Stanley Terwilliger – Scheduler
Karen Yiambilis – Registrar
John Wynn – General Manager

(N.T. 1- 146-148, 200; N.T. 2 – 13, 55, 56, 200; N.T. 3 - 453; R.E. 2).

16. A Delco Phantom year encompasses a playing season, (approximately September- February), making the Delco Phantom’s first year, 1997-1998. (N.T. 1 – 211, 212; N.T. 2 - 103, 114; C.E. 13).
17. Beginning in the Delco Phantom’s 1998-1999 season, the Club’s general membership voted for board members. (N.T. 1 - 207).
18. The general membership consisted of parents and guardians of the youth selected to play on a Delco Phantom team. (N.T. 2 -15).
19. In its first year, the Club formed ten teams: two teams in each of five separate levels (Mite, Squirt, Pee-Wee, Bantam, and Midget). (N.T. 1 - 59; N.T. 2 18, 24).
20. Members of the Midget level teams ranged in age from 15 to 18. (N.T. 1 - 59).
21. As a Tier II Club within the DVHL, Delco Phantom team levels were divided into A and B teams. (N.T. 1 -184; N.T. 2 – 26, 57, 121; N.T. 4 - 149).
22. In the Midget level, better players were put on the A team, and anyone not selected for the “A” team, was put on the “B” team. (N.T. 1 - 184; N.T. 2 - 57).
23. There are two ice surfaces at the Aston Ice Works. (N.T. 1 - 163).
24. At all open hours, Aston Ice Works was open to the public. (N.T. 2 - 59).
25. In addition to ice-skating, members of the public could enter Ice Works and watch either practice sessions or ice hockey games, purchase items from a concession stand, or play video games. (N.T. 1 - 79, 104, 164, 211; N.T. 2 - 54, 59, 60).
26. Through purchase contracts, the Club buys ice time from Ice Works for team practices, and games. (N.T. 1 - 148, 159; N.T. 2 - 22).
27. The Club holds both general meetings of the membership and Board meetings at Ice Works. (N.T. 1 - 208).
28. Ice Works owns the name Delco Phantoms and leases the right to use the name to the Club. (N.T. 1 - 159).
29. The Club draws players from Southeastern Pennsylvania, Delaware, and New Jersey. (N.T. 2 - 9).
30. The Club is principally financed through membership dues but the Club also conducts fundraisers which are open to the public. (N.T. 2 - 18, 19, 59).
31. The Club is also affiliated with the Atlantic Amateur Hockey Association of the United States, (hereinafter “U.S. Hockey”). (R.E. 1).
32. In the school year 1994-1995, Elizabeth was in 7th grade in Tampa Bay, Florida. (N.T. 2 - 155).
33. It was at that time that Elizabeth first played ice hockey as part of a developmental program with an in-house instructional league in Florida. (N.T. 2 - 155; N.T. 3 - 241, 242).
34. After Elizabeth’s 8th grade year she made the decision that she wanted to play Collegiate, Division I, women’s ice hockey. (N.T. 2 - 156; N.T. 3 - 242).
35. The New England Area of the United States is the hot bed for ice hockey because their competition level is at its highest. (N.T. 2 - 156; N.T.3 - 243).
36. In September 1996, wanting to facilitate her daughter’s goals but being unable to afford to move to the New England area, Bette Adams moved to the Philadelphia area where she was from and where she still had family. (N.T. 2 - 155, 156; N.T. 3 - 225).

37. Upon arriving in Philadelphia, Bette Adams enrolled Elizabeth in Cardinal O’Hara High School, the school Bette Adams had attended. (N.T. 2 - 157).
38. Bette Adams also selected Cardinal O’Hara because it was a co-ed parochial school with a reputation for good ice hockey. (N.T. 2 – 157).
39. Elizabeth did not play club hockey in 1996-1997 because there were no openings on area teams. (N.T. 2 - 157).
40. Other clubs had long waiting lists. (N.T. 3 - 226, 227).
41. Learning of the creation of the Delco Phantoms from another Cardinal O’Hara parent, and seeing Scherbak’s ad in the Delaware County Daily Times, Bette Adams called Scherbak. (N.T. 2 - 158; N.T. 3 - 423).
42. Chronologically, since coming to Philadelphia until her graduation from high school in 2000, Elizabeth played Ice Hockey as follows.
 - a. 1996 - 1997 - Cardinal O’Hara Junior Varsity “A” and “B”;
 - b. Summer 1997 - Tampa Bay Florida Skating Academy;
 - c. 1997 - 1998 - Delco Phantom Midget “B” boys team;
 - d. 1997 - 1998 - Cardinal O’Hara Junior Varsity “A”;
 - e. Spring 1998 - Delco Phantom girls tournament team;
 - f. Summer 1998 - Ice Works TSSHL league Midget elite team;
 - g. Summer 1998 - Cardinal O’Hara summer varsity program;
 - h. Summer 1998 - Atlantic and New England District ice hockey camps, and USA Hockey camp;
 - i. 1998 - 1999 - Delco Phantom midget “B” boys teams;
 - j. 1998 - 1999 - Cardinal O’Hara junior varsity “A” team;
 - k. Spring 1999 - Delco Phantom’s girls tournament team;
 - l. Summer 1999 - Cardinal O’Hara varsity summer team;
 - m. Summer 1999 - Delco Phantom’s girls summer team;
 - n. Summer 1999 - USA Select Camp;
 - o. Summer 1999 - Hockey night in Boston;
 - p. Summer 1999 - Junior College League (men 18 to 25 years old);
 - q. Summer 1999 - Atlantic District Development Camp;
 - r. 1999 - 2000 - Delco Phantom Midget “B” boys team;
 - s. 1999 - 2000 - Cardinal O’Hara Varsity 2 team;
 - t. 1999 - 2000 New Jersey Colonials Women’s Team;
 - u. 1996 - 2000 approximately every other week played regularly scheduled games on team with a family friend - (10% of team high school age boys; 80% - men 21 - 30; reminder men up to 50 years old).
(N.T. 1 - 216, 219, 220, 232, 233, 234, 239; N.T. 2 - 159, 171, 172, 197; N.T. 3 - 158, 159, 177, 212, 225, 244, 252, 260, 294, 367, 368, 369, 370, 371; C.E. 30, 46).
43. Under a DVHL rule, Delco Phantom Midget teams could have up to 20 players. (N.T. 2 - 12).
44. An ice hockey game is normally played in three 15-minute periods. (N.T. 1 - 121; N.T. 4 - 215).
45. A team at full strength has six players on the ice 3 forwards, 2 defensemen, and a goalie). (N.T. 1 - 128).
46. Midget boy players average 6” tall, 180 pounds. (N.T. 2 - 147).
47. Elizabeth was 5’ 3” tall and weighed approximately 130 pounds. (N.T. 2 - 147).
48. A team usually has 6 defensemen, two of whom are on the ice at one time. (N.T. 3 - 350, 381, 382).
49. With 6 defensemen on a team, there would be three lines. (N.T. 3 - 382).

50. In a game, a defense line is on the ice for a shift, which is a period of approximately 30 seconds to a minute. (N.T. 4 - 215, 325).
51. For the Delco Phantom midget level the Club has an equal ice time policy. (N.T. 2 - 26; N.T. 4 - 254, 255).
52. In effect, that policy states that over the course of a season, each player on a team should get approximately the same amount of ice time. (N.T. 2 - 26).
53. At the beginning of each season the Club's equal ice time policy was explained to parents and at separate coaches meetings to coaches. (N.T. 2 - 124, 125, 126; C.E. 3).
54. Delco Phantom coaches are strictly volunteers, however, they must be certified with USA Hockey. (N.T. 2 - 21; N.T. 4 - 169).
55. Each year applications for spots on a Delco Phantom team are limited. (N.T. 2 - 113).
56. After enough registrants submit their applications for a given team level, additional children are turned away and placed on a waiting list. (N.T. 2 - 48; N.T. 4 - 239).
57. In 1997-1998, the Delco Phantom midget level did not have a waiting list, but in subsequent seasons, children who wanted to play ice hockey were turned away. (N.T. 2 - 111; N.T. 4 - 198, 239).
58. For the Delco Phantom's 1997-1998 season, Elizabeth was selected for the midget B boys team. (N.T. 11 - 28, 150).
59. The son of the coach of the midget A team, Ron Bouchard, was selected to play on the midget B team. (N.T. 2 - 145).
60. Elizabeth was the only female Delco Phantom midget level player in the 1997-1998 season. (N.T. 2 - 26, 28; N.T. 3 - 245).
61. Steve Ferraro, coach of the Delco Phantom midget B team, treated Elizabeth the same as the boys on the B team. (N.T. 2 - 26, 151, 181; N.T. 3 - 249, 251, 380).
62. At Bette Adams' request, coach Ferraro wrote Elizabeth a recommendation to help market Elizabeth Adams. (N.T. 1 - 252, 256, 267, 272; C.E. 2).
63. Coach Ferraro considered Elizabeth to be an average player and exaggerated her skills in his recommendation to help spark interest in Elizabeth. (N.T. 1 - 252, 256, 267).
64. In the Spring of 1998, Kathy Hein approached the Board with the concept for a girls team. (N.T. 2 - 117; N.T. 4 - 89, 98).
65. Two Delco Phantom girls teams 19 and under, were created. (N.T. 2 - 111, 199).
66. Kathy Hein had been the head coach of the woman's volleyball team at West Chester University, a Division II School. (N.T. 4 - 88).
67. In February 1998, Women's Hockey became a winter Olympic sport for the first time. (N.T. 4 - 90).
68. The Board designated Kathy Hein as Director of the Delco Phantom's women's program. (N.T. 3 - 29; N.T. 4 - 89, 96).
69. The Phantom's women's program began as a learn-to-play clinic playing non-league games. (N.T. 1 - 88).
70. Recognizing that Elizabeth could offer the newly created women's team leadership and the opportunity to be a role model for others, Kathy Hein asked Elizabeth to play on one of the girls teams. (N.T. 1 - 95, 96; N.T. 4 - 90).
71. Unlike the boys midget A and B teams structure, the two newly formed girls teams equally divided the talent levels of players. (N.T. 4 - 94).
72. Bette Adams informed Kathy Hein that she preferred that Elizabeth play on a midget boys team for the 1998 - 1999 season. (N.T. 4 - 95, 130).
73. Kathy Hein informed Bette Adams that she would be sending a newsletter about the female team members to college coaches and of the female tournament opportunities for women players to showcase their abilities. (N.T. 4 - 97).

74. The boys had no newsletter. (N.T. 4 - 97).
75. The tryouts for the 1998 - 1999 midget boys teams was a 2 to 3 day event. (N.T. 3 - 261, 433, 443).
76. The coach for the Midget A team was Steve Jenkinson, and the Midget B coach was Howard Moyer. (N.T. 3 - 264).
77. The Midget A team coach selected who he perceived to be the best players and all remaining tryouts members went to the B team. (N.T. 2 - 57).
78. The 1998 - 1999 midget B team had an assistant coach, Bill Crawford. (N.T. 4 - 65, 172).
79. Following the tryouts, Coach Jenkinson and Coach Moyer met with each player individually to inform them whether they would be on the A or B team. (N.T. 3 - 375, 441; N.T. 4 - 10, 11).
80. Several parents complained to Scherbak that Elizabeth was taking a spot on the boys team. (N.T. 2 - 32, 73).
81. Scherbak responded that Elizabeth is a member of the Delco Phantoms, there is no policy against girls playing on a midget boys team, she has the right to play and she is playing. (N.T. 2 - 32, 74, 76; N.T. 3 - 195).
82. During a hockey season, there are both league and non-league games and playoff games at the end of a season. (N.T. 1 - 212; N.T. 2 - 114).
83. There are also tournaments available to teams and whether a team goes to a tournament is at the discretion of the parents of players and the coach. (N.T. 2 - 115).
84. If players want to participate in tournament play, they pay extra money above the cost of season play. (N.T. 4 - 168).
85. In 1998-1999, Coach Moyer, coach of the midget B boys team, had the philosophy to generally play all his players equally in the first period. (N.T. 4 - 151, 218).
86. As a game progressed, Coach Moyer would play his better players when the game was close and in specialty situations (power plays or short handed plays). (N.T. 4- 151, 152, 222).
87. When less skilled male players and Elizabeth were played less in one game they were played more in another game to try to even things out.(N.T.1 - 83, 106; N.T. 3 - 278, 281; N.T. 4 - 153, 227).
88. Moyer understood the club's equal ice time policy to mean approximately equal ice time over the course of a season. (N.T. 4 - 153).
89. In the 1998-1999 season, George Kelly, (hereinafter "Kelly"), the father of a Delco Phantom midget B team member, voluntarily kept statistics during games. (N.T. 3 - 23, 28, 34, 35).
90. Part of the statistics Kelly kept recorded the approximate time individual players were on the ice during games. (N.T. 3 - 14, 35).
91. Kelly's son was normally paired with Elizabeth as both were defensemen on the team. (N.T. 3 - 65).
92. Over the season, Elizabeth and Kelly's son had approximately the same ice time. (N.T. 3 - 65).
93. The statistics Kelly kept were given to Coach Moyer after each game. (N.T. 3 - 25, 35, 37).
94. Coach Moyer combined Delco Phantom midget A and B team players and took that team to a Christmas tournament. (N.T. 3 - 280, 391; N.T. 4 - 167, 168).
95. Wanting to win the first tournament game, Coach Moyer did not play some players towards the end of the game, including Elizabeth. (N.T. 4 - 175, 176).
96. After the game Bette Adams complained to both Coach Moyer and assistant Coach Crawford about Elizabeth's short ice time. (N.T. 1 - 30; N.T. 4 - 201).
97. Bette Adams also called Scherbak at his home to complain about Elizabeth's ice time in the first game of the tournament. (N.T. 2 - 31, 93, 109).
98. Scherbak informed Bette Adams that he would look into it. (N.T. 2 - 31).
99. Scherbak called Coach Moyer to get his version of Bette Adams' complaint. (N.T. 2 - 31, 91, 109).

100. Scherbak also reiterated the Club's equal ice time policy to Coach Moyer. (N.T. 2 - 109).
101. Moyer told Scherbak he understood the Club's policy. (N.T. 2 - 31).
102. After Bette Adams' complaint, Elizabeth played more in the second and third games of the tournament. (N.T. 2 - 195; N.T. 3 - 281).
103. Assistant Coach Crawford was not on the team bench for the remainder of the tournament. (N.T. 3 - 281; N.T. 4 - 66).
104. After Bette Adams' complaint, Coach Moyer monitored Kelly's statistics in an effort to insure Elizabeth would receive equal ice time. (N.T. 4 - 181).
105. During the 1998-1999 season, Coach Moyer was periodically informally approached by parents of male players on the midget B's boys team about the equal ice time policy as it related to their sons. (N.T. 2 - 27, 28, 127; N.T. 4 - 154, 156, 240).
106. Elizabeth recognized that, skill wise, she was not an all-star defenseman on the 1998 - 1999 midget B boys team. (N.T. 4 - 67, 68).
107. Coach Moyer also coached a local high school ice hockey team. (N.T. 4 - 178).
108. After 1998-1999 regular season, Coach Moyer hand picked Delco Phantom A and B players along with players from his high school team and played in a level A- B tournament in Virginia Beach, Virginia. (N.T. 2 - 98, 99; N.T. 4 - 177, 178).
109. Elizabeth was not invited to play in the Virginia Beach tournament. (N.T. 3 - 329, 330).
110. Ultimately the team Coach Moyer took to Virginia did not play as a Delco Phantom team. (N.T. 4 - 177).
111. Towards the end of a season, parents are given the opportunity to evaluate the coaches. (N.T. 2 - 36).
112. Bette Adams complained to the Board in her end of 1998-1999 season evaluation of Coach Moyer. (N.T. 2 - 35, 194; C.E. 3).
113. On approximately March 1999, the Board considered the issue of girls playing on a boys team when there were girls teams available. (N.T. 2 - 32; C.E. 13).
114. The Board developed a policy that any girl who wanted to play on a boys' team had to petition the Board for prior approval. (N.T. 2 - 33).
115. After the vote was taken, Board members expressed concern and it was decided that before the policy was implemented, the issue should be posed to the Atlantic District, USA Hockey. (N.T. 2 - 33).
116. The Atlantic District responded that such a policy was not a good idea and, upon hearing this, the Board did not implement the policy. (N.T. 2 - 34, 80, 120).
117. Elizabeth did not have to petition the Board to play on a boys team in the 1999 - 2000 season. (N.T. 2 - 34, 80, 132).
118. In approximately July 1999, Scherbak spoke with Bette Adams in an effort to encourage Bette Adams to have Elizabeth play on a Delco Phantom girl's team. (N.T. 2 - 34, 37; N.T. 3 - 196).
119. Scherbak told Bette Adams that while in Minneapolis he had the opportunity to speak with Ben Smith, the U.S. women's olympic ice hockey team coach, and that Scherbak spoke about Elizabeth's circumstance with Coach Smith. (N.T. 2 - 38, 41; N.T. 3 - 197).
120. Scherbak informed Bette Adams that Coach Smith advised that for exposure to college coaches, the best place for Elizabeth was on a girls team. (N.T. 2 - 41).
121. Scherbak also told Bette Adams that college women's team coaches normally would not travel to a boys' tournament to see one woman but did travel to see girls' tournaments. (N.T. 2 - 41).
122. Scherbak encouraged Bette Adams to place Elizabeth on a girls team for both Elizabeth's sake and also for the sake of the benefits Elizabeth could bring to a girls team. (N.T. 2 - 42).

123. Scherbak offered to take 50% off the registration fee for the 1999 - 2000 season if Elizabeth played for a girls team. (N.T. 2 - 19, 60, 201; N.T. 3 - 207, 208, 287).
124. Scherbak also informed Bette Adams that Elizabeth had to play on either the boys' team or a girls' team but that Elizabeth would not be allowed to play on both because the Club would likely experience a waiting list for the boys' team. (N.T. 2 - 84, 87, 200; N.T. 3 - 207, 208, 287; N.T. 4 - 100).
125. Knowing Elizabeth would help other girls improve, Kathy Hein also wanted Elizabeth to play on a girls' team. (N.T. 2 - 41, 42; N.T. 4 - 99, 130).
126. Kathy Hein informed Bette Adams that she would attempt to get the Board to overturn their decision not to allow Elizabeth to play on both the boy's and girls' teams. (N.T. 2 - 204).
127. Kathy Hein told Bette Adams that she thought the Board would grant Elizabeth an exception. (N.T. 3 - 153; N.T. 4 - 101, 111).
128. Knowing Bette Adams was contemplating registering Elizabeth to play for the New Jersey Colonials, a women's team, Kathy Hein asked Bette Adams not to commit Elizabeth until the Board made a decision. (N.T. 4 - 111).
129. Kathy Hein submitted a proposal to the Board to make an exception in Elizabeth's case. (N.T. 2 - 86; R.E. 36).
130. Elizabeth did not research how best to position herself to obtain a Collegiate Division I scholarship to play women's ice hockey. (N.T. 3 - 425).
131. Elizabeth's only consideration was her belief that she could best develop as a player by playing on a boy's team. (N.T. 3 - 425).
132. The Board approved Kathy Hein's proposal to allow Elizabeth to play on both the boys' and girls' teams. (N.T. 3 - 152).
133. The day after Kathy Hein learned of the Board's exception for Elizabeth, she informed Bette Adams, however, Bette Adams had already committed Elizabeth to play for the New Jersey Colonials. (N.T. 3 - 153; N.T. 4 - 103, 106, 108, 112, 140).
134. Elizabeth had learned of the New Jersey Colonial girls team in the Summer of 1999 while attending Hockey Night in Boston. (N.T. 3 - 228).
135. In the 1999-2000 season, Elizabeth played approximately 10 games with the New Jersey Colonials, just enough to qualify her to play in a "Nationals" tournament. (N.T. 2 - 246; N.T. 3 - 308).
136. The coaches for the Delco Phantom Midget 1999-2000 teams were Coach Moyer, A team Coach, and Bob Scales, B team coach. (N.T. 2 - 44; N.T. 3 - 294; N.T. 4 - 182, 253).
137. After 3 days of tryouts for the 1999-2000 season, Coach Moyer selected players for the A team. (N.T. 4 - 12, 182, 183, 253).
138. At the conclusion of tryouts Coach Moyer and Coach Scales informed all players who had been selected for which team. (N.T. 3 - 291; N.T. 4 - 11, 12, 191).
139. Elizabeth was informed she would again play on the midget B boy's team. (N.T. 3 - 291).
140. Elizabeth had no problem with the choice to put her on the B team. (N.T. 3 - 291).
141. Schedule conflicts between Delco Phantom games and New Jersey Colonial games caused Elizabeth to miss Delco Phantom games. (N.T. 3 - 395; N.T. 4 - 73).
142. Of 34 games in 1999 - 2000, Elizabeth played in 26 Delco Phantom games. (N.T. 4 - 271).
143. Similar to statistics kept the previous year for Coach Moyer, George Kelley again voluntarily kept statistics for the 1999-2000 midget B boy's season. (N.T. 4 - 262, 264; R.E. 21).
144. Players on the midget B boy's team averaged between 4 to 18 shifts per game. (N.T. 3-49 to 56; R.E. 21).

145. On average, some male players played more than Elizabeth and some played less. (R.E. 21).
146. Kelly observed that Coach Scales tried to give equal ice time to all players over the course of the entire season. (N.T. 3 - 48).
147. Similar to the past season, Bette Adams again perceived that Elizabeth was being given less ice time during a tournament and lodged a complaint. (N.T. 2 - 44, 45).
148. Scherbak called Coach Scales and reminded him of the equal ice time policy over a season. (N.T. 2 - 45; N.T. 4 - 310).
149. Coach Scales informed Scherbak about Kelly's statistics. (N.T. 4 - 311).
150. Elizabeth again recognized that she was not an all-star defenseman on the B team in 1999 - 2000. (N.T. 4 - 68).
151. Compared to male players on the Delco Phantom B teams on which Elizabeth played, Elizabeth was much smaller, less strong, and slower. (N.T. 1 - 255, 263; N.T. 2 - 147; N.T. 3 - 249, 391, 392; N.T. 4 - 161).
152. Elizabeth recognized that her skill level merited being placed on B teams for the three years she played Delco Phantom ice hockey. (N.T. 1 - 262, 263; N.T. 3 - 376).
153. In the winter of 1999 - 2000, Elizabeth played for the New Jersey Colonials in the Polar Bear tournament, the largest girls ice hockey tournament in the United States. (N.T. 1 - 116; N.T. 2 - 252, 253; N.T. 3 - 405; C.E. 32).
154. Kathy Hein advised and assisted girls on the Delco Phantom girls' teams regarding college scholarships. (N.T. 1 - 98).
155. After the 1998 -1999 season one female high school senior on a Delco Phantom girls' team was placed into RIT's ice hockey program, a Division III School. (N.T. 4 - 99, 116).
156. After the 1999-2000 season one female high school senior was placed into Minnesota University's ice hockey program, a Division I School. N.T. 4 - 99).
157. Vicky Graham, another female who played on a Delco Phantom girls' team was awarded a 2/3rds scholarship to Qurnnepiac University, another Division I college. (N.T. 1 - 96).
158. Division III colleges do not award scholarships to play women's ice hockey but Division I colleges do. (N.T. 1 - 97; N.T. 2 - 260).
159. Kevin Cunningham, USA Hockey's Atlantic Director of Girls Player Development, testified about a young woman's chance of getting a Division I scholarship to play ice hockey. (N.T. 4 - 333).
160. For seven seasons, Cunningham had been a Division I women's ice hockey coach. (N.T. 4 - 333).
161. Cunningham revealed that there are seventeen Division I schools, each of which has a total of 18 women's Ice Hockey scholarships available. (N.T. 4 - 337, 339).
162. If five freshmen get scholarships each year at the 17 schools, a total of 85 scholarships are available each year. (N.T. 4 - 339, 340).
163. In the year 2000, Division I women's hockey programs had a total of 128 freshmen on their teams: 77 Americans and 51 non-American players. (60% American and 40% non American), (N.T. 4 - 342, 341).
164. A considerable number of Canadian women are recruited to play in Division I women's ice hockey programs. (N.T. 342).
165. 60% of the 85 available scholarships equals 51 scholarships available to U.S. women freshmen players. (N.T. 4 - 342).
166. In the United States in the 1999-2000 season, 4,124 girls 19 and under were registered with U.S. Hockey. (N.T. 4 - 344).

167. Estimating ½ of those to be high school seniors equals 2,062 girls with only 51 available scholarships or approximately a 2.47% chance of a female ice hockey player getting a Division I scholarship. (N.T. 4 - 346, 355, 357).
168. Elizabeth made an unofficial visit to Providence College, a Division I program, however, Elizabeth was not accepted at Providence. (N.T. 2 - 258; N.T. 3 - 414).
169. Elizabeth was accepted at Northeastern College but never pursued what, if anything, Northeastern may have offered by way of scholarship. (N.T. 3 - 15).
170. Sacred Heart University, a then Division III program that was known to Elizabeth to soon become a Division I program, looked at Elizabeth but, Elizabeth did not pursue that opportunity. (N.T. 3 - 413).
171. Instead, knowing she would not be offered a scholarship, Elizabeth went to the University of New Hampshire, a Division I program. (N.T. 3 - 416).
172. Elizabeth made an official visit to the University of New Hampshire. (N.T. 2 - 261, 261; N.T. 3 - 163, 350).
173. In or about March 2000, the UNH coach contacted Elizabeth and informed her that he had already recruited Canadian and prep-school players and that Elizabeth was kind of a last minute change as a UNH defenseman had been injured. (N.T. 3 - 416; N.T. 4 - 77, 78).
174. Elizabeth decided to attend UNH thinking that possibly she might get a scholarship in either her sophomore, junior, or senior years. (N.T. 3 - 417).
175. Elizabeth conceded that the level of play of both Canadian and prep school women was much higher than her own. (N.T. 3 - 418).
176. In her freshman year, Elizabeth suited up for the first several games, however, on or about October 27, 2000, Elizabeth was diagnosed with mononucleosis. (N.T. 3 - 213, 361, 410).
177. Effectively, mononucleosis knocked Elizabeth out for her entire freshman year. (N.T. 3 - 214, 220, 223, 362).
178. Elizabeth has been on the UNH women's Ice Hockey team but has only played in one pre-season non-league game in her junior year. (N.T. 3 - 411).
179. Elizabeth has been receiving a partial scholarship of approximately \$2,500 per year. (N.T. 3 - 168, 169, 343, 344, 345).

CONCLUSIONS OF LAW

1. The Delco Phantoms is a public accommodation.
2. Elizabeth failed to establish by a preponderance of evidence that not making the A team was based on anything other than an honest evaluation of her skills compared to other players.
3. Elizabeth failed to show by a preponderance of evidence that sex, as opposed to the coaches' evaluation of the relative skills of the players and how those skills lent themselves to the team's success in particular game situations, was the basis for any decision with respect to her selection and participation in the Delco Phantoms ice hockey program.

OPINION

This case arises on a complaint filed by Elizabeth Adams, (hereinafter "Elizabeth"), in or about August 31, 2000, at PHRC Docket No. P-6117, against the Board of Directors of the Delco Phantoms Youth Hockey Program, (hereinafter either "Delco Phantoms" or the "Board"), and George Scherbak, past president, (hereinafter "Scherbak"). Generally, Elizabeth's complaint alleges sex-based discrimination in the form of denials of the advantages, facilities, or privileges of a public accommodation. More specifically Elizabeth's complaint alleges, because of her sex, she was denied equal ice time to play in ice hockey games, not selected to play at the highest level of competition, given an ultimatum to either

play on the boys team or girls team, denied the opportunity to play in a tournament, and harassed at games and tryouts by evaluators and coaches. Elizabeth's complaint alleges § 5 (i) violations of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§ 951 et seq. (hereinafter "PHRA").

Pennsylvania Human Relations Commission (hereinafter "PHRC"), staff conducted an investigation and found probable cause to credit Elizabeth's allegations of discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. The efforts were unsuccessful, and this case was approved for public hearing.

The Public Hearing was held in Media, Pennsylvania on May 27, 28, 29 and 30, 2003, before Carl H. Summerson, Permanent Hearing Examiner. J. Freedly Hunsicker, Jr., Esquire, appeared on behalf of the Respondents, Barbara E. Ransom, Esquire appeared on behalf of Elizabeth, and Pamela Darville, Esquire, represented the State's interest in the matter.

The Respondents' post-hearing brief was received on September 3, 2003, and the joint post-hearing brief on behalf of Elizabeth and the State's interest in the complaint was received on September 4, 2003.

When the Public Hearing began, several procedural issues were raised including the resolution of an outstanding Motion for Summary Judgment filed by the Respondents shortly before the Public Hearing began. In their Motion, the Respondents argued that the Delco Phantom Youth Hockey Program is not a public accommodation under the PHRA because it is a distinctly private organization. At commencement of the Public Hearing this threshold issue was, in effect, set aside until the parties had an opportunity to present evidence on this basic issue.

In the post-hearing briefs of the parties, the argument remains whether the hockey program is or is not distinctly private. Accordingly, the first issue in this case to be resolved is whether the Delco Phantom Youth Hockey Program is a public accommodation as defined under the PHRA. Section 5(i) of the PHRA states in pertinent part:

"It shall be an unlawful discriminatory practice . . . [f]or any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any public accommodation . . . to . . . [r]efuse, withhold from, or deny to any person because of . . . [her] . . . sex . . . either directly or indirectly, any of the accommodations, advantages, facilities or privileges of such public accommodation . . ."

Section 4(l) of the PHRA defines the term "public accommodation" as ". . . any accommodation . . . which is open to, accepts or solicits the patronage of the general public, including but not limited to . . . skating rinks . . . but shall not include any accommodations which are in their nature distinctly private."

Section 12(a) of the PHRA indicates that these provision "shall be construed liberally for the accomplishment of the purposes of the [PHRA] . . ."

It is readily apparent that the extensive definition of "public accommodation found in the PHRA includes the Delco Phantom Youth Hockey Program as a public accommodation. The program almost exclusively takes place at locations specifically identified by the PHRA as a public accommodation: skating rinks. As a lessor of a skating rink, the Respondent Board must not discriminate against any individual by refusing or denying, because of an individual's sex, "either directly or indirectly the

accommodations, advantages, facilities or privileges . . .” of the skating rink. Clearly, one of the privileges offered by the youth ice hockey program is playing in ice hockey games.

Here, the evidence is fundamentally clear that all of the program’s ice hockey home games are open to any member of the public who wants to be a spectator. Also, the location where ice hockey home games are played has a concession stand and a video arcade area which are also open to members of the public.

In the Respondents’ post-hearing brief they submit for consideration and principally rely on the case of U.S. v. Lansdowne Swim Club, 713 F. Supp 785 (E.D. Pa. 1989), aff’d 894 F. 2d 83 (3d Cir. 1990). In Lansdowne, the court generally observed that courts interpreting Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a – 2000a-6, do not rely on a single test to determine if an establishment is a private club. Id at 796.

In Lansdowne, as here, the question was whether an organization that provides entertainment is a public accommodation subject to civil rights laws. Lansdowne involved a swimming facility, this case involves ice-skating and playing ice hockey. The burden of demonstrating that it is distinctly private rests with the party claiming shelter of the PHRA’s exception. Lansdowne citing, Anderson v. Pass Christian Isles Golf Club, Inc., 488 F.2d 855, 857 (5th Cir. 1974); and U.S. v. Richberg, 398 F.2d 523, 529 (5th Cir. 1968).

Legislative history of Title II, § 2000a (e) provides a broad guiding principle. The private club exemption “must be examined in the light of the Act’s clear purpose of protecting only the genuine privacy of private clubs . . . whose membership is genuinely selective . . . “ Nesmith v. YMCA, 397 F.2d 96 (4th Cir. 1968), citing remarks of Sen. Humphrey, 110 Cong. Rec. 13,697 (1964).

The factors found relevant in Lansdowne on the question of whether a club is distinctly private include:

1. The genuine selectivity of the group in the admission of its members;
2. the membership’s control over the operations of the establishment;
3. the history of the organization;
4. the use of the facilities by non-members;
5. the purpose of the club’s existence;
6. whether the club is profit or nonprofit; and
7. the formalities observed by the club.

The Respondents’ argue that most, if not all, of these factors resolve in favor of the Delco Phantoms not being considered a public accommodation. We disagree.

First, the most important of the factors listed is the genuine selectivity of the membership process. The U.S. Supreme Court concluded that genuine selectivity is an integral characteristic of a private club. Tillman v. Wheaton – Haven Recreational Association, 410 U.S. 431 (1973).

The Respondents submit that the Delco Phantoms are selective because it has defined age limits, it requires members to have hockey experience and skating ability, and it turns away applicants when teams are full. The Respondents’ post-hearing brief cites the case of Roman v. Concharty Council of Girl Scouts, 195 F. Supp. 2d 1377 (M.D.Ga.2002) for the purported principle that a group is “selective” if there are age limits.

While the Roman case generally observes that participation in the Girl Scouts is available only to girls between the ages of 5 to 17 years old, the issue of “selectivity” in that case went much deeper. The reason the Girl Scouts were found to be selective rested not on the age of participants but on the fact that participants in Girl Scouts are required to live by the Girl Scout Promise and abide by the Girl Scout Law. Further, the Girl Scouts is only available to girls.

Unlike the requirements of the Girl Scouts, the Delco Phantoms was open to both boys and girls. Further, although there are age requirements to join the Delco Phantoms, there are no similar organizational values a member must embrace to become a Delco Phantom. Basically, all a participant needs to become a Delco Phantom is a desire to play ice hockey and payment of a registration fee. As far as a requirement to have hockey experience and skating ability, in its first year, the Delco Phantoms literally accepted all interested applicants. A requirement that an applicant must have some degree of athletic ability simply does not equate to genuine selectivity. Lastly, the numerical limits placed on membership are not the result of selectivity but are merely the result of the capacity of the teams formed by those fortunate enough to have applied first. The facilities of all accommodations, public or private, are limited in the number of persons who can be effectively served, and this limitation cannot act to change an otherwise public accommodation into a private one. See Clover Hill Swimming Club, Inc. v. Goldsboro et.al., 219 A.2d 161 (Sup Ct. N.J. 1966).

For these reasons, the Respondents are unable to meet the first and most significant factor used by many to access whether an entity is exempt from obligations of a public accommodation because they are distinctly private. The club’s restrictions are minimal, otherwise they openly invite an unselected public to join. Here, the club sought to attract new members from the public at large. Indeed the very existence of the club is not owed to the associational preferences of its members, but to the coincidence of their interest in the athletic program offered.

The Respondents’ list six additional factors in their quest to have the Delco Phantoms declared exempt as distinctly private. They submit that (1) the club is run by a board of directors with parents as members; (2) the club required experience and skating ability; (3) non-members did not participate in events; (4) the purpose of the club relates only to hockey and not to any public welfare objective; (5) the club only advertised for members the first year; and (6) the club is a non-profit organization.

While Respondents have submitted that the Club is run by a board of directors, the Delco Phantoms are indirectly guided by the Delaware Valley Hockey League and U.S.A. Hockey. Well beyond the internal policies and rules created by the Delco Phantoms, the club has obligations to and must adhere to standards and practices of two larger organizations. Accordingly, it cannot be said that the club is controlled exclusively by the memberships.

The issue of the club requiring some hockey experience and skating ability of players was generally addressed above on the question of selectivity. Additionally, even when the level of athletic performance required is at the highest possible level, restricting membership because of a level of athletic ability does not turn a public accommodation into a distinctly private entity. See PGA Tour, Inc. v. Casey Martin, 532 U.S. 661 (2001).

The Respondents contend that non-members did not participate in events, however, this argument is fundamentally flawed. Clearly, those actually playing ice hockey were members of the club, however, members of the public were invited to watch ice hockey games. Also, the facility in which home games were played was open to the public at large. By opening the watching of ice hockey competition to the public, effectively the club became a place of exhibition or entertainment.

As to the purpose of the club, the Respondents suggest the only purpose was the playing of ice hockey. This simply was not the case. Clearly, two significant purposes of the club were educational and recreational. Article II of the club's bylaws declares the purpose as:

The purposes of the Phantoms shall be to (1) teach skating and skill development to youths in the Pennsylvania, Delaware and New Jersey area; (ii) provide the opportunity for youths to learn and play the game of ice hockey in a competitive environment under established rules and regulations; (iii) promote and improve amateur ice hockey in the aforementioned area; (vi) develop and encourage sportsmanship and team play among participants; and (v) take any and all actions deemed necessary or advisable in connection with the foregoing.

Contrary to the Respondents' argument, such purposes do have public welfare objectives.

Another heavily weighted factor is whether the club advertised for members. Clearly, in this instance the club did advertise both in a local newspaper and on a sign prominently displayed outside the Ice Works ice skating rink. Such advertising clearly extended an invitation to the public generally.

The only factor which falls on the club's side, is that it is a non-profit organization. Standing alone, this factor does not help the Respondents. Instead, in view of all of the evidence relevant to Delco Phantoms status, the Delco Phantoms fail to sustain their burden to establish that the club is distinctly private. For this reason the Delco Phantoms is not entitled to an exception from the Act's coverage of public accommodations.

Accordingly we turn to the next main issue presented in this case: whether there is sufficient evidence to support a determination that either the Delco Phantoms or Scherbak violated section 5(i) of the PHRA by refusing, withholding or denying Elizabeth participation in the club's ice hockey programs because of her sex.

Elizabeth's post-hearing brief specifically points to Scherbak's 1999 scholarship offer, a March 1999 Board action regarding requiring girls to petition the Board if they wanted to play on a boys team and alleged refusals to implement and enforce both an equal ice time policy and tournament policy. Respondents' post-hearing brief also addresses Elizabeth's assertion that in 1998-1999 and 1999-2000, she was improperly assigned to the B team.

Each of these components of Elizabeth's claim will be addressed separately. First, although Elizabeth played three seasons with the Delco Phantoms, at the Public Hearing, Elizabeth effectively abandoned any claim of disparate treatment for the 1997- 1998 season. Thus, we begin by looking at Elizabeth's claim that in both the 1998-1999 and 1999-2000 seasons, she was assigned to the B team because she is a female.

For the 1998-1999 season Elizabeth points to her mother's testimony that for a period of approximately two weeks in June 1998, Bette Adams and Doug Hein, the club's treasurer, spoke by telephone several times. Generally, those telephone conversations dealt with the issue of whether Elizabeth would play for one of the two newly formed girls teams for the upcoming season. Bette Adams testified that both Doug Hein and Steve Ferraro were telling her that if Elizabeth wanted to play college hockey, it would be better for her to be involved in the girls program. (N.T. 2 - 177). Bette Adams then testified that when she informed Doug Hein that Elizabeth was going to stay with the midget boys program, Doug Hein informed her that Elizabeth would be playing for the midget B team. (N.T. 2 - 187). Doug Hein denied

either telling this to Bette Adams; (N.T. 3 – 454, 455), or attempting to influence anyone regarding which team Elizabeth would be placed on. (N.T. 3 – 455).

While the testimony of Bette Adams and Doug Heim directly contradict one another, the record is clear that Elizabeth participated in a several day try-out for the 1998-1999 season. The process of selection for A and B teams involved a skill assessment of prospective players by evaluators including the A and B coaches and other selected evaluators. Prospective players were taken through a series of drills and rated on such relevant factors as skating ability, speed, strength, size, and passing acumen. (R.E. 14).

When tryouts concluded, each prospective player's scores were tallied and the A team coach selected to the A team those players considered to possess the highest skill levels. All remaining prospects automatically were placed on the B team.

Revealingly, at the Public Hearing, Elizabeth conceded that her skill level merited placement on the B team, (N.T. 3 – 376), and that she was not even one of the stronger B team players. (N.T. 3 – 391) Elizabeth fully participated in the try-outs, (N.T. 2 – 30), but by all appearances, belonged on the B team. When she was asked to name all-star defenseman on the 1998-1999 B team, Elizabeth named three of the six defensemen on her team and conceded that she was not an all-star. (N.T. 4 – 67, 68). It seems that Elizabeth simply felt that everyone deserved a chance to play on the A team despite their skill levels. (N.T. 4 – 68).

Considering the evidence as a whole, it became clear that Elizabeth and her mother were of the opinion that by playing ice hockey with players more skilled than herself, Elizabeth's skills would improve. With this in mind, Elizabeth was understandably disappointed when selected for the B team, while at the same time she objectively realized those selected to play on the A team and many on the B team had greater skills than herself.

Elizabeth was not pre-selected to be on the B team 1998–1999. Instead, the A team coach rightfully selected more skilled players to be on the A team leaving Elizabeth to play on the less skilled B team.

As to the 1999–2000 season, Elizabeth points to an August 16, 1999 letter from Scherbak to her mother. This letter begins “I understand that you have decided to play midget B boys versus the girls 19 – under team.” (R.E. 33). Elizabeth again argues that prior to the season's try-outs, she was pre-selected to be on the B team.

Scherback's testimony was that the reference to the B team in his August 16, 1999 letter was a mistake and was, in no way, intended to tell Elizabeth a decision was pre-made that she would again be on the B team. Once again, Elizabeth concedes that she was rightfully selected for the B team. (N.T. 3 – 291). Further, when asked to name all-star defensemen for the 1999–2000 season, Elizabeth offered the names of two male defensemen.

As with the previous year, Elizabeth fully participated in the three-day long try-outs. Following the evaluation of players by four individuals, the A team coach again selected the A team members. After the tryouts, when both the A and B coaches met with individual players to inform them who would be on what team, Elizabeth and others assigned to the B team registered their disappointment. (N.T. 4 – 193).

The simple fact is that Scherbak's letter was not intended to reflect that Elizabeth was already slated to play for the B team. Instead, the evaluation scores and A team coach assessment of players was the basis for the determination of who would and who would not make the A team. (R.E. 17).

The next circumstance Elizabeth challenges was a March 2, 1999 action of the Board in initially adopting a policy that would require any girl who wished to play on a boys team to first petition the Board for approval. The evidence reveals that several factors prompted the Board to initially adopt such a measure. First and foremost, the Club had created two girls teams. Second, there was a limited number of players allowed per team and when the Club had potential registrants in excess of the established limit, a waiting list was necessary. On this factor, Scherbak testified that he received complaints from parents that, in effect, expressed concern that by not playing on the newly created girls team Elizabeth was taking a spot away from a boy. (N.T. 2 – 32, 73). Scherbak's response to such complaints was that Elizabeth is a member of the Delco Phantoms, there was no policy that girls cannot play on a boys team, and Elizabeth is playing, she has the right to play and she's going to play. (N.T. 2 – 32, 74, 76; N.T. 3 – 195).

A final factor in considering and initially passing the pre-approval policy was a general paternalistic concern about the safety of smaller female players who would be playing against much larger and stronger male players. Of course, such paternalistic desires to protect females are undisputedly embraced by some. However, freedom of choice and the expansion of equal opportunity outweigh paternalistically based values and ideas.

After initially approving the policy, several Board members wisely expressed concerns noting they were uncomfortable with the policy. Because of those concerns, a decision was made to have the policy reviewed by the Atlantic District of USA Hockey. After that review, the Delco Phantoms was advised not to adopt the policy because girls should have the right to play on a boys team without being required to petition for that right. Accordingly, the Board never implemented the policy. Neither Elizabeth nor any other girl ever had to petition the Board to play on a boys team. Thus, although the initial adoption of the policy was unjust, the Board timely corrected their error before any actual disparity occurred.

Next, we turn to Elizabeth's argument that Scherbak's offer of a scholarship was designed to exclude Elizabeth from participation on the boys team. Indeed, in the summer of 1999, Scherbak offered Bette Adams 50% off the girls team fee if Elizabeth would play on a girls team. The question is what motivated Scherbak?

Considering the evidence as a whole, Scherbak's motivation was not an attempt to get Elizabeth off the boys team. On the contrary, Scherbak had earlier discussed Elizabeth's circumstance with the head coach of the U.S. Women's Olympic Ice Hockey Team. Scherbak testified and Bette Adams agreed that Scherbak related to Bette Adams that the Olympic coach told him that a young woman's best chance to be seen by college coaches would be to play on a women's team. Bette Adams testified that she did not believe Scherbak, however, it is apparent that what Scherbak told Bette Adams was in fact true.

The fall of 1999 would be only the second year of play for the two Delco Phantoms girls teams and Elizabeth was convinced that the midget boys team offered her greater challenges and the opportunity to grow as a hockey player because there she would be playing with players with greater skill levels. This very idea of skill development was also part of Scherbak's offer to Elizabeth. Kathy Heim, Scherbak, and others recognized that Elizabeth's skill could be of tremendous aid to the development of less skilled players on the girls teams. Elizabeth's leadership and experience would surely have been an asset to a girls team.

Rather than trying to keep Elizabeth off the boys team, Scherbak's offer can easily be viewed as an effort to strengthen a newly created girls program. Scherbak was clear that Elizabeth was free to choose to play on a boys team, he simply saw a benefit for both Elizabeth and the Club's girls program if Elizabeth would play on a girls team.

As to Scherbak's telling Bette Adams that Elizabeth would not be permitted to play on both a boys and a girls team, Scherbak already had unjust complaints from parents. To permit one player to play on both teams could very well result in someone being denied the opportunity to play ice hockey. Only so many potential players were registered each year and once the magic number was reached, all others went on a waiting list and unless an opening occurred, those on a waiting list did not play.

Despite this circumstance, the evidence is clear that Kathy Heim was persistent in her effort to get a Board exemption which would allow Elizabeth to play on both a boys team and a girls team. Ultimately the Board granted the requested exception.

Under all of the circumstances present, Elizabeth has not shown by a preponderance of the evidence that Scherbak's action of offering a reduced fee for the 1999-2000 season was not legitimately based on a concern for both Elizabeth's future and the continued growth of the girls program.

We thus turn to the heart of Elizabeth's claim of disparate treatment. Elizabeth claims that in the 1998-1999 and 1999-2000 seasons, she was not given equal ice time in regular season games and also treated unfairly with respect to tournament play. In effect, Elizabeth argues that disparate treatment resulted in her not being able to fulfill her athletic potential and being unable to reap the full extent of the social and physical benefits offered by the Delco Phantoms ice hockey program.

The basic question that must be answered is whether Elizabeth's sex was the criteria for the alleged disparate treatment or whether ability and physical characteristics were used as the criteria for participation. Clearly, the Delco Phantoms had an equal ice time policy. This policy was designed to allow each Delco Phantom player to have approximately the same time opportunity to play in games over the course of a season. Obviously, such a broad policy left room for a variety of methods to achieve the goal of equal ice time. In this regard, different coaching philosophies came into play. One coach might not be as interested in winning while another coach might try to do anything they felt necessary in an attempt to win as often as they could.

Before specifically turning to the two seasons in question it is worthy to observe Elizabeth's stated view of the meaning of equal ice time. On the boys B teams, Elizabeth played the position of defenseman. In regular play two defensemen are on the ice at one time. The team had six defensemen. Accordingly, one would expect to play approximately $1/3^{\text{rd}}$ of the time as a defenseman. Elizabeth testified that in order to receive equal ice time, she should have played 50% of the time. (N.T. 3 - 383). She also agreed that it is hard to give the exact same time to each player and that a player's time on the ice is situational. (N.T. 3 - 386). Importantly, Elizabeth testified that she does not know if others on the B team received less time than her. (N.T. 3 - 388).

In the 1998-1999 season, Elizabeth testified that she had no complaint about equal ice time until playing at a Christmas tournament. (N.T. 3 - 389). Actually, tournament play is very different from scheduled season games. Those participating in tournament play pay additional money to do so. Also, tournament teams are not the same as the season's teams.

The Christmas tournament about which Elizabeth complains combined players from the A and B teams. The nature of Elizabeth's complaint was that she was not given equal ice time in the first game of the tournament. The coach did not dispute that Elizabeth was not played as much as others, but also reveals that other male players also were not played as much. The coach simply played better players in an effort to win the first game to advance in the tournament.

Interestingly, Scherbak responded to Bette Adams' complaint by immediately speaking with the coach and reminding him of the club's equal ice time policy. Elizabeth conceded that she received equal ice time for the remainder of the tournament.

Importantly, the evidence in this case reveals that parents other than Bette Adams also complained to Scherbak about the playing time their sons were being given. The over-the-season picture painted is that of weaker players, Elizabeth included, being used more in games where the final result was not in question, whereas, stronger players were used in an effort to win games. Elizabeth simply has not proven that the amount of ice time a player received was not related to ability and physical attributes but to a player's sex.

Following the 1998–1999 season, Elizabeth also complained that she was not invited to a post-season tournament in Virginia. The coach of the boys B team also coached ice hockey at a local high school. It is apparent that Howard Moyer, who had been the B team coach for the 1998–1999 season, put together a tournament team comprised of interested Delco Phantom A and B players and players from his high school team. When Bette Adams learned that non-Delco Phantom players were invited and Elizabeth was not, she complained to Scherbak.

Scherbak took action to prohibit this pick-up team from representing itself as a Delco Phantom team. The season was over and Coach Moyer was free to create a tournament team on his own for which players paid to participate outside of Delco Phantom involvement. Understandably, Elizabeth was disappointed she had not been invited, but this slight cannot be attributable to the named Respondents, the Board and Scherbak. Responsibility for not inviting Elizabeth was solely related to Coach Moyer.

Turning to the 1999–2000 season, Elizabeth again has the ultimate burden of showing that she was treated unfairly because of her sex. Once again, the equal ice time policy was to be applied across the entire season and cannot be measured by looking at the participation level of any single game.

The Respondents' post-hearing brief accurately described Elizabeth's testimony as "vague" regarding her feeling that she received less ice time than others. In both the previous season and in the 1999–2000 season, George Kelly, the father of one of the defensemen on the B team, attempted to keep statistics of the games played by the B team. Kelly's voluntary efforts were not specifically designed to track ice time, however, such information can be generally extracted from his records.

Interestingly, at the Public Hearing, efforts were extended to try to bar the introduction of Kelly's 1999–2000 records, however, such records are the closest thing available to an unbiased objective observation of B team member participation. When Kelly's records are carefully reviewed, Elizabeth's vague allegation is dealt a serious blow. Kelly's records do show that not all B team members received exactly the same ice time, however, they show that there were male players who received less playing time than Elizabeth.

What is apparent in this instance is that the 1999–2000 season coach used his better players more frequently, not because of their sex, but because of the chance to win was greater when his better players

were used. The less skilled players, both male and female, appear to have been used more in situations where the outcome of a game was not in question.

When Bette Adams again complained to Scherbak in the 1999–2000 season about ice time, once again, Scherbak consulted with the coach to remind him of the club’s equal ice time policy. When this occurred, coach Scales offered to share Kelly’s statistics with Scherbak.

As a whole, Elizabeth’s participation was substantially equal to other B team players when considered over the course of the season. As such Elizabeth fails to meet her burden of proof that she was treated unfairly because of her sex

Accordingly, an order dismissing Elizabeth’s case follows:

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

ELIZABETH ADAMS, Complainants

v.

**THE BOARD OF DIRECTORS OF THE DELCO PHANTOMS YOUTH HOCKEY PROGRAM
and GEORGE SCHERBAK, PAST PRESIDENT, Respondents**

DOCKET NO. P-6117

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Complainant has failed to prove discrimination in violation of Section 5(i) of the Pennsylvania Human Relations Act. It is therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

By: Carl H. Summerson, Permanent Hearing Examiner

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

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DOCKET NO. P-6117

FINAL ORDER

AND NOW, this 24th day of March 2004, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion as its own findings in this matter and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby.

ORDERS

That the complaint in this case be, and the same hereby is, dismissed.

By: Stephen A. Glassman, Chairperson
Attest: Sylvia A. Waters, Secretary

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CONCURRING OPINION

This unanimous concurring opinion is offered by the ten PHRC Commissioners who participated in the March 22, 2004 PHRC monthly meeting in order to acknowledge that the Pennsylvania Human Relations Commission is mindful that in order to support a finding, there must be evidence in the record. However, it should also be known that the PHRC is fully aware that there is a wealth of research available that could partially explain how Elizabeth Adams responded to numerous inquiries during the course of this Public Hearing. See i.e. Fredricks, J.A. & Eccles, J.S. (2002). Children's Competence and Value Beliefs From Childhood Through Adolescence, Growth Trajectories in Two Male-Sex-Typed Domians. *Developmental Psychology*, 38, No. 4, 519-533; Branta, C.F., Painter, M, & Kiger, J.E. (1987). Gender differences in play patterns and sport participation of North American youth. (In D. Gould & M.R. Weiss (eds.), *Advances in pediatric sport sciences: Vol. 2. Behaviorial issues* (pp. 25-42); Burstad, R. (1992). Integrating socialization influences into the study of children's motivation in sport. *Journal of Sports and Exercise Psychology*, 14, 59-77; Eccles, J.S. (1987). Gender roles and women's achievement-related decisions. *Psychology of Women Quarterly*, 11, 135-172; Eccles, J.S., & Harold, R.D. (1991). Gender differences in sports involvement: Applying the Eccles' expectancy-value model. *Journal of Applied Sport Psychology*, 3, 7-35; Eccles, J.S., Wigfield, A., & Schiefele, U. (1998). Motivation to succeed. (In W. Damon (Series Ed.) & N. Eisenberg (Vol.Ed.), *Handbook of child psychology: Vol 3. Social, emotional and personality development* (5th ed., pp 1017-1094). New York:Wiley.); and Lirgg, C.D. (1991). Gender differences in self-confidence in physical activity: A meta-analysis of recent studies. *Journal of Sport and Exercise Psychology*, 13, 294-310; See also, *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997).

During the Public Hearing, Elizabeth Adams offered, when asked, that she belonged on the B team and that she had weaknesses in her game. Additionally, in response to whom she believe were the B team all-stars for several of the years, rather than indicating she was an all-star, she generally offered that a number of boys of the B team were the team's all-stars.

Let it be known, that there is a general awareness that there are national psychological studies that hypothesize that developmental differences between young boys and young girls contribute to the way certain situations are viewed by young boys versus young girls and the way in which members of each group might respond. These differences are cultural, environmental, psychological, and physiological. From childhood to adolescence, a youth's motivation and participation decisions may very well be

influenced by society's messages about their abilities and the value of participation in sports activities with regard to whether the recipient of these messages is a young boy or a young girl.

In recent years, there has been a growing increase in girls' participation in sports. However, some commentators suggest that the sports domain generally remains dominated by more masculine involvement. As a consequence, some believe that girls still participate much less in most sports than do boys. This seems to be especially true in the arena of ice hockey.

Since participation is a voluntary activity, fewer boys and girls have the experience of seeing that young girls can perform well in the sports arena. This can have an adverse affect on how a young girl develops self-confidence in her own abilities. Thus, this may well have contributed to Elizabeth Adams' ostensibly self deprecating remarks about her perception of her physical ability as an ice hockey player or her unwillingness to speak out on behalf of her own status on the team.

A variety of theories about gender differences make variable predictions about when and how gender differences affect a child's beliefs in their ability and self-image. In the arena of sports activity, these gender differences are hypothesized to increase with the onset of puberty because pubertal changes are likely to elicit an increased awareness of gender differences as well as socialization pressures.

Perhaps, Elizabeth Adams' comments about her ability and her skill level were influenced more by the difference between how she as a young woman perceived her self and how the young men on the team perceived their ability and skill level rather than by the reality of the situation.