**BEFORE THE HUMAN RIGHTS COMMISSION**
**OF THE STATE OF MONTANA**

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| **Les Johnson, o/b/o Amanda Johnson**, Charging Party, versus **Great Falls Public Schools**, Respondent. | **HRC Case No. 9504007138** *Hearing Examiner's Findings of Fact, Conclusions of Law and Proposed Order* |

## I. Procedure and Preliminary Matters

Les Johnson (Johnson), for his minor daughter, Amanda Johnson (Amanda), filed a verified complaint with the Montana Human Rights Commission on June 14, 1995. He alleged that Amanda was discriminated against in education based upon her disability (uses a wheelchair) because the respondent, Great Falls School District (the district) failed to provide an accessible building. He alleged violation of §§49-2-307(1), 49-2-308, 49-3-203 and 49-3-205, MCA.[1] On August 1, 1996, the Commission certified the complaint for a contested case hearing. The Commission appointed Terry Spear as hearing examiner.

On March 3, 1997, the hearing examiner, counsel for both parties, Amanda, her mother, Johnson, and many persons from the district's administration and staff, toured both of Great Falls' public high schools. The purpose of the tour, to which both sides had stipulated, was to familiarize the hearing examiner with the physical premises involved here. The tour accomplished its purpose. Observations during the tour, coupled with witness testimony, inform the decision regarding particular barriers to access in both high schools.

This contested case hearing began on March 4, 1997, in Great Falls, Cascade County, Montana. Amanda, her mother, Johnson and the family's attorney, Mary Gallagher, Montana Advocacy Program attended. The district did not designate a single representative[2]. The

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[1] Johnson abandoned his claims of violations of the Governmental Code of Fair Practices, Title 49, Chapter 3. Charging Party's Responses to Discovery, p. 8, lines 23-27, Answer to Interrogatory No. 17 (October 9, 1996). Copy attached to Respondent's Motions in Limine and Supporting Memorandum, February 2, 1997).

[2] Various district officials, including superintendent Larry Williams and both high school principals, attended much of the hearing, although their duties prevented them from attending the entirety of the hearing.

district's attorney, Charles R. Johnson, Marra, Wenz, Johnson & Hopkins, P.C., attended. Witnesses and exhibits are listed on the attached dockets.

The district made six motions in limine. The parties filed briefs addressing all six motions. After argument at the beginning of hearing, the hearing examiner ruled on those motions. The opinion section of this decision addresses the hearing examiner's rulings on the motions in limine and the district's prehearing motions.

Hearing proceeded on March 4, 5 and 6, 1997, concluding on March 7, 1997. Johnson filed his written closing argument on March 26, 1997. The district filed its closing argument on April 24, 1997. Johnson filed his reply closing argument on May 6, 1997.

## II. Issues

A full statement of issues appears in the final prehearing order (dated February 26, 1997). The determinative issue of fact is whether the district has provided a reasonable accommodation to Amanda. The determinative legal issue is whether the program access Amanda receives is adequate, although she does not have complete site access. Of the plethora of procedural issues raised, only one, the issue of adequate disclosure in discovery, is pertinent to the decision.

## III. Findings of Fact

1. At hearing, Amanda Johnson was a sophomore in the Great Falls Public School system, and lived at 3625 3rd Avenue South in Great Falls.

2. The district has two public high schools--Great Falls High School (GFHS) and Charles M. Russell High School (CMR). The district constructed GFHS in 1928-1929. The school opened in 1930. The district constructed an addition in the early 1950's. The main floor of the school, the cafeteria and the Bison Field house are wheelchair accessible. The second and third floors are not wheelchair accessible. The district constructed CMR in 1963. It added to CMR in 1986 and 1990. All floors of CMR are accessible to individuals with wheelchair mobility.

3. The district obtained an ADA survey of its facilities in 1992. Exhibit CP 4. Marina Maria Little worked on the survey, and testified about it. The survey identified many

architectural barriers in both GFHS and CMR. From the completion of that survey to the present, the district knew of these barriers to accessibility for wheelchair mobile students. Removal of all barriers in existing buildings is not easily accomplishable and would be expensive. When permanently disabled students have requested, or district staff has recommended, removal of barriers, the district has removed the barriers when it believed it could afford and readily accomplish the removal.

4. The district did not develop in-depth contingency planning, but chose to address access problems as they arose, and to address modifications in three ways--(1) on an ad hoc basis when actual access problems arose, (2) when funding for building projects became available, or (3) when necessary maintenance work overlapped identified modification needs. The district assigned fact-finding regarding modification for access to an internal committee. The committee used the survey, and other information available to committee members as administration or faculty members, to identify possible modifications within existing budgets and projects. The dispute is not about what the district did, but whether it did enough.

5. GFHS has a "maximum student capacity" of 1,800 students. The unrebutted testimony of the Larry Williams, the district's superintendent (Williams) and both district high school principals establishes that a high school at or near "maximum student capacity" is overburdened and faces increased administrative and financial strain in scheduling and delivering educational services. For 1996-97 and 1997-98, the district was and expected to continue to be at or beyond maximum capacity at GFHS.[3] GFHS uses all its classrooms to their practical maximum capacity, and schedules classes in the old gymnasium, in hallways, and in other rooms not intended as classrooms.

6. The district changes districting boundaries periodically, but decided it could not obtain voter approval for a boundary change to alleviate overcrowding at GFHS. The district's witnesses testified without rebuttal that obtaining such approval was simply not possible. No evidence challenges the reasonableness of this decision.

[3] There was some conflicting testimony about precise enrollment projections. No matter whose figures are accurate, the enrollment was and likely continues to be near or above maximum capacity.

7. The district has discouraged wheelchair mobile students from attending GFHS. While only CMR had an elevator, access to all floors at CMR (impossible at GFHS) made CMR a more feasible school for wheelchair mobile students. Until it installed an elevator at GFHS, the district offered enrollment at CMR to students permanently unable to use stairs.

8. The district allows and encourages voluntary transfers from GFHS to CMR, because of the capacity enrollment at GFHS. In the spring 1996, to ease overcrowding at GFHS, the district requested volunteers among students attending GFHS to transfer to CMR. A total of 147 students elected to transfer, not enough to ameliorate the overcrowding.

9. The district's board appointed a committee in May 1995 to evaluate high school facility expansion. In September 1995 the board, relying upon the committee's report and recognizing the overcrowding problem at GFHS, voted to submit to the voters a bond issue for building improvements adding classrooms and installing an elevator at GFHS. On April 2, 1996, too few voters turned out to establish the requisite quorum. The bond issue failed again due to low voter turnout on June 4, 1996. The bond issue passed on the third election on November 5, 1996.

10. The bond revenue financed 13 additional classrooms at GFHS and the construction of a student elevator. The elevator shaft will occupy one-half of one small classroom and one-third of a second classroom, eliminating those two rooms from use as classrooms. The elevator will also reduce present cafeteria space by approximately 40 seats. The 13 new classrooms will be available in summer 1998.

11. The installation of the planned elevator without the addition of the planned classrooms would reduce available classroom space at GFHS. Installation of an elevator before construction of additional classrooms would increase the burden upon the student body at GFHS and perhaps upon the entire high school population in the district. Loss of two classrooms would significantly burden the already strained scheduling and delivery of educational services to students at GFHS. The district considered these and other factors before deciding against pursuing possible elevator installation at GFHS before other expansion.

12. The district let bids for the expansion of both high schools the addition of an

elevator to GFHS after hearing, in spring 1997. Construction began in summer 1997. The elevator will be near the administration office in the main building. The new GFHS classrooms are at the school's perimeter. These two projects might have been separated, but only if the district accepted the additional administrative and educational burdens attendant upon prior installation of the elevator.

13. Amanda lives within the GFHS rather than CMR districting boundaries. Both GFHS and CMR are within a 15 minute commute of her residence. Most of her classmates from grade school attend GFHS, particularly those who still live near her.

14. Amanda has spina bifida. She has Campomelic Syndrome, which is associated with multiple physical anomalies, including long-bone disorders. She has retroactive airway disease for which she requires oxygen. She also has T-4 quadriparesis secondary to surgery for scoliosis. The surgical spinal injury at age 5 has rendered her paralyzed from the mid-back down. She has no active control over most of her trunk, parts of her hands and all of her legs. She wears a body jacket at all times to prevent further spinal damage. She requires adapted wheelchairs to accommodate her bracing and to prevent pressure sores on her skin. She must use a power wheelchair for mobility.

15. Amanda attends regular education classes in the district and receives accommodations for her mobility impairment. She entered GFHS in the fall 1995. Long before she entered, the district knew that Amanda's neighborhood school was GFHS and that she wanted to attend that high school with others from her grade school. Her parents testified that Johnson made complaints to the district regarding the inaccessibility of GFHS as early as March 1994, when Amanda was in eighth grade, so that the school would have time to make necessary accommodations. In March 1995 Amanda made a written request that the district install an elevator in GFHS to allow Amanda to reach all floors of the school.

15. The district formed a committee to develop annual Individualized Education Programs (IEPs) to accommodate Amanda's needs. Amanda and her parents had input into the IEPs dated March 30, 1994, March 30, 1995, and March 29, 1996, and approved them.

16. Under the IEP dated March 30, 1995 (Exhibit CP 18), Amanda attended GFHS

during the 1995-1996 school year. The district rearranged classroom sites to schedule all of her classes on the first floor of GFHS.

17. Under the IEP dated March 29, 1996 (Exhibit CP 17), Amanda attended GFHS and CMR during the 1996-1997 school year, with the district providing transportation to and from the schools. All her classes met on the first floor of GFHS except one, a biology lab. All science laboratories at GFHS are on the second or third floors. The district cannot readily or inexpensively move labs to the first floor due to plumbing and gas requirements. Pursuant to the IEP, Amanda attended a biology lab at CMR for one period each day and had access to the CMR library.

*Amanda's Access Problems at GFHS*

18. Because GFHS had no elevator during Amanda's first three years of attendance, she has been unable to attend any class at GFHS that cannot meet on the main floor of the main building. She has unable to join in any activity off the main floor of the main building, except restricted access to the cafeteria and the gym, with assistance. Amanda cannot attend all her classes at GFHS (science labs, some band and orchestra classes, and other classes and activities, cannot convene on the main floor of GFHS). She cannot use the library at GFHS. Amanda cannot participate in the full range of educational activities available to her classmates, or she must leave her classmates to enjoy a greater range of educational experiences and opportunities.

19. Amanda can attend GFHS only in a vehicle transporting both her and her powered wheelchair. GFHS has limited disability access parking. The spots beside the building (designated for public and faculty disability parking) are sometimes blocked. Paula Paul, Dean of Students at GFHS (Paul), testified to weekly contacts with Amanda's parents, during which the family mentioned problems with parking access. As Amanda and her parents have identified these problems, the district has worked to assure that she can arrive and use the closest disability parking. The district's actions were reasonable efforts to accommodate Amanda.

20. The district has offered Amanda driver's education with all accommodations.

Amanda would like to begin to drive to school soon but the GFHS Student Handicapped Parking slots can be accessed only by stairs. From the testimony of the district witnesses, it appears the district will provide her access to the disability parking next to the building. When there are problems with that parking, the district will continue to respond with efforts to identify drivers of encroaching vehicles and have the vehicles removed.

21. Amanda also has problems accessing the buildings at GFHS. Sidewalk travel is difficult and dangerous in snow. The simple problem of snow removal is much more critical for a student who can only access the building in a power wheelchair. Paul also testified that when she heard of this problem, she responded as promptly and effectively as possible with available staff (snow removal is up to the maintenance staff at GFHS). She also testified that other students also experienced this problem, during at least one heavy snow day. The district's foresight and recognition of the seriousness of this problem seem somewhat limited, suggesting more access problems will result in the future.

22. From inside GFHS, Amanda must go back outside to reach the cafeteria. She must reenter through a service entrance with a heavy door (triggering anew the snow and entrance problems), then enter the cafeteria itself through the kitchen. She must then make the return trip by the same route. She cannot always make this trip unassisted. Snow or ice on the sidewalk can either block her or put her safety at risk. The service door must be unlocked, and is still difficult, if not impossible, for her to open reliably without help. The district ordinarily assigns a staff member to accompany Amanda. Sometimes a staff member is not immediately available. Sometimes a kitchen staff member helps her. Paul testified that change in staff to assist Amanda is how the district responded to this problem. The adequacy of the response depends upon the diligence of the newly assigned staff, and the priority given to assisting Amanda.

23. Fire alarm pull mechanisms are inaccessible to Amanda. She finds most doors difficult to open safely or easily. Amanda has no wheelchair locations in the assembly area or old gym, although the district, according to Paul, arranged placement in both locations for her. In 1996-97, Amanda's wheelchair blocked the aisle where her sophomore class sat, so she was

located with the freshmen. The problems of door opening and seating in assembly areas are more serious to Amanda than the district has, to date, recognized.

24. The district provided a changing room, locked storage and changing assistance for Amanda, who cannot use standard toilet facilities. Amanda still needs the rest rooms for washing her hands, combing her hair, and the rest of the normal range of sanitary and cosmetic purposes besides body waste elimination. The student rest rooms at GFHS contain barriers to use of sinks, mirrors and fixtures. Height and clearance are the key factors.

25. Amanda cannot use most water fountains, because of clearance. Clearance bars her from using most of the vending machines and the one public phone lowered to within her reach. The phone booth still blocked her entry until shortly before hearing. Amanda can use a cellular phone (something the district prohibits other students from doing), so the telephone access problem has been alleviated.

26. The counter tops in the main office are too high for access. Amanda can enter the office, but cannot be seen from behind the counters. Amanda is soft-spoken. She must sometimes come around the counters, and sometimes go behind the immediate office area to the individual offices to get the attention of a staff member. The district encouraged her to do this. Paul not only testified that she was available for day to day contact with Amanda, but also testified that she told Amanda to come to her in her office anytime with any problem. Amanda could go to Paul's office with any concern or access problem she had. Amanda did not feel free to do this, and did not perceive the encouragement and willingness to listen that Paul testified was offered.

*Amanda's Access Problems at CMR*

27. Transportation to and from CMR has sometimes been a problem. Late taxis, late vans and long delays have resulted in lost class time and tardiness. Such problems are inherent in splitting a school day between two high schools. Amanda and her parents elected to split her schooling to remain at GFHS as much as possible. The district's action regarding transportation delays has been reasonable.

28. Amanda also struggles at CMR with the lack of accessible van spaces in the

handicap parking area. When she arrives at CMR, particularly when the lot is snowy, she needs additional assistance to get from the van across the lot and onto the sidewalk. The district has attempted to deal with this problem by targeting snow removal before Amanda's arrival, but sometimes this solution fails. A less than satisfactory stopgap solution has been help from the driver or from persons who happen to be in the lot. On rare occasions, Amanda has been helped from the van and left in the lot, to make her own way to and into the building. This continues to be a problem of serious concern to Amanda.

29. The CMR elevator is a very tight fit for Amanda's wheelchair. She has to back into it to get out safely because it is too small to turn around inside. The elevator is locked and operates on a key. Getting in position to back into the elevator and then insert the key is difficult. The controls are difficult to reach. The door opens before the elevator floor is flush with the ground. With the installation of an elevator at GFHS, these problems may become moot for Amanda, but during the first years of high school, the problems interfered with her access, slowing and making more difficult her physical progress to and from classes at CMR.

30. At CMR as at GFHS, many doors--both outside doors and interior doors--are too heavy and have hardware difficult for Amanda to operate. Because other students and staff can open and close doors, Amanda can usually obtain access. Still, she has been left without control over access. The district does not perceive this as a severe barrier. Amanda struggles with her lack of control over entry and departure, to and from classes and buildings.

31. CMR had no accessible drinking fountains that Amanda can use. One she used to wash her hands in (because of sink access problems) was removed and a pipe left sticking out of the wall at that location. Now aware of the problem, the district worked to replace the removed fountain and install more accessible fountains.

32. The CMR bathrooms are generally accessible to Amanda. Hardware, mirrors, exposed pipes and unreachable dispensers are problematic, including mirrors installed in places identified as accessible. The district has attempted to address some of these problems. For example, the district installed tilting brackets on a mirror. Either janitorial staff or other students sometimes returned the mirror to the upright position, from which Amanda could not

reach the mirror to tilt it. The district apparently was unaware of this problem until the tour by the parties, counsel and the hearing examiner the evening before this hearing began.

33. Although Amanda attends one class in a lab science room, the lab is not accessible in many respects. She depends on her lab partner to accomplish tasks such as anything that uses the sink. She can access neither the entire room, nor the entire array of storage cabinets and drawers containing instruments and equipment needed for the labs. How much awareness the district (at any level above the science teacher of that class) had of these problems before the tour is still unclear.

34. Public telephones at CMR were not accessible to Amanda. As already noted, the district permits Amanda to use a cellular phone, so the telephone access problem has been alleviated. Paul, from her testimony, appeared quite satisfied that the cellular phone solved the problem.

35. The CMR library does not have a computer hookup comparable to that of GFHS's library, so Amanda cannot conduct class research but with the help of fellow students or by accessing through a separate computer hookup in a faculty room. She has been reluctant to make the special request necessary to access through the separate hookup, but the district considered this problem solved by the separate computer hookup.

*Additional District Action to Provide Access*

36. The district has made a good faith effort to assure access for Amanda. All classrooms Amanda uses have desks fitted to Amanda's needs. All classes Amanda attends offer her seating choices to provide good visual and aural access. The district has given Amanda's scheduling needs priority. The district has made multiple changes to meet her scheduling needs as much as possible.

37. The district has given priority to Amanda's transportation needs and schedules. The district s has sometimes made multiple changes on request. The district is working to improve Amanda's parking access. The disability access door at CMR that malfunctioned has been repaired. A disability access pay phone has been provided and modified.

38. The district's physical therapist has been called and has made numerous visits to

ensure correct positioning of Amanda in her wheelchair. The district has reallocated staff time to meet Amanda's needs. Appropriately, all accommodations for Amanda have been free to her and her parents.

*District Knowledge and Notice of Barriers Amanda Faced*

39. In essence, every barrier identified in these findings is referenced in the district's ADA survey. From the beginning, the district had notice that these precise barriers would likely face Amanda.

40. Amanda is not outspoken. She is bright, articulate and strongly motivated, but she is not forthcoming about problems she experiences with access. Amanda did not take full advantage of Paul's invitation to communicate all problems she experienced.[4] Her perception that the district was not always responsive to her and did not always want to hear about more problems, was one reason for this.

41. Paul herself testified that Amanda was "a little distant," and "not really comfortable talking to me." Paul also testified that on "smaller" needs, Amanda's parents, or school staff assisting Amanda, or even observation, *rather than direct communication with Amanda*, identified the problems. Paul also testified that Amanda, during her freshman year, became "tearful" when Paul told her "please let me know if you have a problem." Paul testified that Johnson later contacted her, unhappy because Paul had upset Amanda, and that Paul then apologized to Johnson for upsetting Amanda.

42. Despite this experience with Amanda, Paul relied upon Amanda to give notice of problems. The district, in essence, relied upon Paul to find out about problems. Problems readily observed by touring the buildings with Amanda were sometimes unknown to the district until the tour. The district, at the administrative level, decided to provide accommodation. In carrying out that decision, the district assigned tasks (helping Amanda, checking with Amanda to identify further problems, and so on) to individual employees, such as Paul. Neither Paul nor any other of those employees deliberately neglected or shirked their tasks. Yet usually the

[4] Paul was not the only person in the district to whom Amanda could go. However, because Paul considered herself the appropriate primary contact, she is a proper reference person by whom to judge the level of communication and contact between the family and the district.

district, acting through its employees, left Amanda with the responsibility to speak up if a problem existed. She did not always speak up, and problems went unnoticed and unaddressed.

43. Amanda has continued, in high school, the excellence in academics she had achieved before high school. Her high school grade point average (3.73) is almost as high as her primary school grade point average (around 3.9). Despite the problems she confronts, and the emotional upsets and fears triggered by those problems, she is a young person of exceptional accomplishment and extraordinary promise. It is impossible, from this record, to predicate a dollar figure to award to the family to remedy Amanda's harm.[5]

## IV. Opinion

Amanda does suffer from physical disabilities. The district is an educational institution, and a political subdivision of the state. Clearly, the statutory prohibitions against discrimination in education apply. The only legal issue is whether the district has provided a reasonable accommodation, given the resources and limitations it has. Put another way, the only question is whether the district is legally obligated to go further in accommodating Amanda's disabilities in order to schedule and deliver educational services to her without illegal discrimination.

### A. The district must do the best it can to accommodate Johnson without undue hardship.

School districts are "governmental entities," *District No. 55 v. Musselshell County*, 254 Mont. 525, 802 P.2d 1252, 1253-54 (1990), and "political subdivisions of the state," 802 P.2d at 1254.[6]

The district must comply with the nondiscrimination provisions of the Human Rights Act. §§49-2-307(1) and 49-2-308 MCA. "It is the policy of the state to encourage and enable

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[5] Johnson has never sought financial recovery. Rather, the whole thrust of his suit has been to obtain affirmative relief--the elevator sooner and improved access--for Amanda and others similarly situated.

[6] "[A] school district is a political subdivision and instrumentality of the State. *Longpre v. District No. 2*, 151 Mont. 345, 443 P.2d 1; *Fitzpatrick v. State Bd. of Examiners*, 105 Mont. 234, 70 P.2d 285; *State v. Cooney*, 102 Mont. 521, 59 P.2d 48; *State v. Holmes*, 100 Mont. 256, 47 P.2d 624." *Teamsters et al. v. Cascade County School District*, 162 Mont. 277; 511 P.2d 339, 341 (1973), ***citing also***, 31 Op.Atty.Gen. 31 (1966); 28 Op.Atty.Gen. 133 (1960); 27 Op.Atty.Gen. 184 (1958); 25 Op.Atty.Gen. 123 (1954); 23 Op.Atty.Gen. 345 (1950); ***see also***, 43 Op.Atty.Gen. 56 (1990); 42 Op.Atty.Gen. 80 (1988); 38 Op.Atty.Gen. 71 (1979); 38 Op.Atty.Gen. 56 (1979).

the . . . physically disabled to participate fully in the social and economic life of the state and to engage in remunerative employment." 49-4-201, MCA.

The Montana Supreme Court often resorts to federal law in reviewing state discrimination cases. *Harrison v. Chance*, 244 Mont. 215, 797 P.2d 200, 204 (1990); *Snell v. Montana Dakota Util. Co.*, 198 Mont. 56, 643 P.2d 841 (1982). The Montana Human Rights Commission also follows federal guidelines for discrimination against members of the same protected classes extant under the Montana Act. *Auchenbach v. Community Nursing, Inc.*, HRC#9401006303 (March 17, 1997).

Montana looks to federal civil rights law and court decisions for guidance in applying the state's prohibition against unlawful discrimination because of disability and based on disparate impact. *Martinez v. Yellowstone County Welfare Department*, 192 Mont. 42, 626 P.2d 242, 245 (1981); *Hafner v. Conoco*, 268 Mont. 396, 402, 886 P.2d 947 (1994), ***quoting*** *McCann v. Trustees*, 249 Mont. 362, 816 P.2d 435 (1991) ("[R]eference to pertinent federal case law is both useful and appropriate" as a guide to interpretation of the Montana Human Rights Act). Montana demands an absence of less discriminatory alternatives as part of the measure of a reasonable accommodation, just as federal law mandates consideration of all available resources in deciding how to redress program inaccessibility.

Satisfaction of program accessibility requirements under the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, should satisfy the Human Rights Act. Also, failure to comply with Title II of the ADA or Section 504 usually justifies a finding that a respondent also violated the disability protections of the Human Rights Act. This opinion uses federal guidelines that address discrimination where the purpose and intent of the federal law, case holding or regulation is consistent with the Montana Human Rights Act.

The ADA and Section 504 are to assure "equality of opportunity, full participation [and] independent living" for persons with disabilities. 42 U.S.C. §12101(a)(8). "Integration is fundamental to the purposes of the Americans with Disabilities Act." *Helen L. v. DiDario*, 46 F.3d 325 (3rd Cir. 1995), ***quoting*** 28 C.F.R. Part 35, App. A 35.130.

The district is a "public entity" under Title II of the Americans with Disabilities Act, 42 U.S.C. §12134, and a "recipient of federal financial assistance" under Section 504. Federal regulations implementing Title II of the ADA and Section 504 parallel each other regarding to the obligations of a public entity or federal financial recipient not to discriminate based on disability in public programs, services or activities. A good reference is 28 C.F.R. Part 35, "Nondiscrimination on the Basis of Disability in State and Local Government Services," July 26, 1991 (56 F.R. 35694).

One of the district's two high schools, CMR, has an elevator, for wheelchair access to all floors. GFHS is at least partially inaccessible to Amanda, and other students with similar mobility disabilities. The barriers to equal access that result from lack of an elevator at GFHS should now be temporary. The architectural barriers within both schools are, for the most part, fixable. Meanwhile, the actions the district took to accommodate Amanda have assured to her services, benefits, and methods of participation in the district's programs.

Clearly, the main question is not whether Amanda's access as of hearing have a significant adverse effect on her. The current levels of access have such an effect. Amanda has far less access to GFHS than her classmates. The district cannot integrate Amanda with her peers, particularly the students with whom she has progressed through primary education to high school. Those students attend GFHS, and Amanda must go across town to CMR for some of her classes. She has less immediate access to some classes and activities, even including lunch, than students who do not share her disabilities. In day-to-day activities--using the washrooms, using the telephones, getting to and from school--Amanda faces far greater challenges, even with the district's accommodations, than other students who are her peers.

The main question is, given the barriers to doing more sooner, has the district, by providing as many classes as possible at GFHS and transportation to CMR for the balance of Amanda's participation, offered reasonable access to the district's programs, services and activities? Public entities and recipients of federal aid have affirmative duties under federal civil rights laws to assure that persons with disabilities are not subject to discrimination. An agency must operate each service, program or activity so that, when viewed in its entirety, the

program or service or activity is readily accessible to and useable by persons with disabilities. 28 C.F.R. §35.150(a)(1). The agency must administer its "services, programs, and activities *in the most integrated setting appropriate to the needs of qualified individuals with disabilities*." 28 C.F.R. §35.130(d), ***emphasis added***. The agency must not subject persons with disabilities to discrimination nor impair "accomplishment of the objective" of the program with respect to those persons by the way it schedules and delivers its programs. 28 C.F.R. §35.130(b)(3). The agency's program must give opportunities to persons with disabilities that are equally effective as those provided to others, without limiting the enjoyment of "any right, privilege, advantage or opportunity" by a disabled person compared with others receiving the same aid, benefit or service. 28 C.F.R. §35.130(b)(1). If necessary, the agency must reasonably modify its usual policies, practices, or procedures to avoid engaging in discrimination based upon disability. 28 C.F.R. §35.130(7).

In making facilities readily accessible to and useable by persons with disabilities, a public entity is not required to take any action "that it can demonstrate would result in a fundamental alteration in the nature of a service, program or activity *or would result in undue financial and administrative burdens*." 28 C.F.R. §35.150(a)(3) (emphasis added). The public agency must make a determination that an action would result in such an alteration or such burdens "after considering all resources available for use in the funding and operation of the service, program or activity . . . ." ***Id.***

The district made this determination. Funding limitations and attendance levels together dictated delay in elevator installation at GFHS. The elevator would cost the district classroom space. GFHS already served more than the optimum number of students for its size. Changing boundaries between GFHS and CMR was not an option the board considered feasible, so reducing the student population at GFHS was not an option. Putting in an elevator before expanding the physical plant would have increased the administrative burden on the district. It would also have adversely affected the services and functions of the district.

An agency may comply with the federal program accessibility requirements through such means as "reassignment of services to accessible buildings . . . alteration of existing

buildings and construction of new facilities . . . or any other methods that result in making its services, programs and activities readily accessible to and usable by individuals with disabilities." 28 C.F.R. §35.150(b)(1).[7] The agency is not required to make structural changes in existing buildings. 28 C.F.R. 35.150(b)(1). In choosing among alternative methods for accomplishing program accessibility, the agency must give "priority to those methods that offer services, programs and activities to qualified individuals with disabilities in the most integrated setting appropriate." ***Id.***

Public administration of all programs must be in the most integrated setting appropriate. 28 C.F.R. §35.130(d). A public agency cannot provide separate or different services "unless such action is necessary" to provide to the disabled services that are as effective as those provided to others. 28 C.F.R. 35.130(b)(1)(iv).[8]

Reasonable fear the voters would reject funding necessary to prevent discrimination is not necessarily a defense. Even an express legislative mandate requiring administrative action with an unlawful discriminatory effect does not justify the illegal discrimination. ***See, e.g.***, *Helen L. v. DiDario*, ***op. cit.*** at 338-39; ***citing*** *Del. Valley Citizens C'ncil v. Comm. of Penn.*, 678 F.2d 470 (3rd Cir. 1982); *Conc'd Parents v. W. Palm Beach*, 846 F.Supp. 986, 991-992 (S.D. Fla. 1994). But here, until the district had funding for the expansion of GFHS, elevator installation of the elevator would damage the district's ability to schedule and deliver services.

Amanda and her parents accepted the district's offer to provide as much of Amanda's daily schooling as possible at GFHS, in tandem with transportation to and attendance at CMR for specialized classroom work (science labs, for example) not available on the first floor at GFHS. The district went forward with a coordinated plan to expand GFHS (relieving the

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[7] *Tyler v. City of Manhattan, Kansas*, __ F.3d __ (10th Cir. 1997), 1997 U.S. App. Lexis 16799 (affirming: failure to provide accessible restroom facilities at municipal court building, failure to provide means of access to attend City Commission meetings, and failure to relocate city sponsored baseball games from inaccessible to accessible fields violated Title II of ADA). ***Cf.***, *Dees v. Austin Travis County*, 860 F.Supp. 1186 (W.D. Texas 1994) (county's decision to change times of center's regular board and committee meetings violated ADA because of disparate impact on persons with disabilities). ***See also***, *NAACP v. Medical Center, Inc.*, 657 F.2d 1322 (3rd Cir. 1981).

[8] *Paxton v. West Va. Dept. of Tax and Revenue*, 413 S.E. 2nd 779, 785 (1994) (holding that when a state commission allows its services "to be provided on premises which are inaccessible to individuals with disabilities, it violates its obligations under" 28 C.F.R. §35.130(b)(1) and Title II of the ADA).

impasse of overcrowding) and to install an elevator. The district did provide a free quality public education in the "most integrated setting appropriate" given its funding and census limitations. In terms of sites for attendance, the district reasonably accommodated Amanda, as best it could without undue hardship.

This case does not present facts posing the question of whether requiring Amanda to attend CMR for all classes would have been a reasonable accommodation. Both the ADA and Section 504 intend to "eradicate the invisibility of the [disabled]" and classify "separate but equal services" as unacceptable. *Helen L. v. DiDario*, ***supra*** at 338 (ADA claim), ***citing*** *ADAPT v. Skinner*, 881 F.2d 1184, 1191 n. 6 (3d Cir. 1989) (Section 504 claim). Neither management preference nor convenience justifies such separation. 28 C.F.R. §35.150(a)(3). "The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under Section 504 of the Rehabilitation Act, or under [Title II of the ADA]." *DiDario,* ***supra***. Using 20-20 hindsight, since the district's solution in this case could work and will work, a less integrated alternative (forced transfer to CMR) probably would not have satisfied the requirements of the Human Rights Act.

The accommodation provided, viewed in terms of access to programs, services and activities, was reasonable, given the capacity of the district to accommodate. For this student at this time, attendance at GFHS with some speciality classes at CMR satisfies the requirements of the Montana Human Rights Act in terms of program access as it relates to where she attends classes.

**B. The district has failed adequately to monitor the accommodation.**

Amanda does have adequate overall access to programs, but the question remains whether the district has diligently met its obligations to provide access within the buildings where Amanda attends classes. The district attempted to defend its failure to provide that access by placing the entire responsibility for identifying continuing problems on Amanda. The district knew, from the ADA survey it obtained in 1992, that significant barriers to access existed. The district knew, when it encouraged Amanda to transfer to CMR, that its ad hoc

approach to modification of existing barriers left many problems unconsidered until an actual student presented an actual problem. After commissioning a survey to identify problems, and assigning modification strategy to a staff committee, the district could not reasonably entrust to the student the whole responsibility for reporting continuing problems.

It was not unreasonable for the district to ask Amanda to identify additional problems as they arose. It was unreasonable to rely entirely upon her. Had the district undertaken, a year before hearing, the very tour the parties and the hearing examiner took the day before hearing, a number of problems unknown to the district (according to the motions presented here) would immediately have been known. It was not reasonable for the district to fail to take regular affirmative action to verify that problems were being resolved.

The district's ad hoc strategy worked until a wheelchair mobile student elected to attend GFHS to the greatest extent possible. Until then, the district could attack access modifications only when funding for building projects became available, or when necessary maintenance work overlapped identified modification needs. But once Amanda began attending, the district had an obligation to be aggressive in identifying, with her, the problems she faced daily. The district failed to meet this obligation. Having failed to meet this obligation, the district has chosen, in defending its failure, to argue that it needed to do nothing unless and until Amanda came into the office, around the high counter, into Paul's office, and specifically identified each of the problems she faced. These problems were already identified in the ADA survey or readily ascertainable by touring around the school with Amanda. The district may not delegate to the student the entire burden of identifying problems and requesting, for each, a solution.

**C. The district's exhaustion defense fails.**

Relying upon the parallels between federal and state anti-discrimination laws, the district argued that Amanda and her family could not pursue a Human Rights Act claim because they did not exhaust remedies available under Montana's special education law. §20-7-402 MCA. Montana law regarding equal educational opportunities for students with disabilities does largely parallel federal law and regulation under the "Individuals with Disabilities Education Act" (IDEA) of 1990, Public Law 94-142, formerly the "Education of

All Handicapped Children Act" of 1975. The district argued for the application of federal case holdings that a litigant must exhaust IDEA remedies before advancing a discrimination claim. ***See*** *Hope v. Cortines*, 872 F.Supp. 14, 24 (E.D.N.Y. 1995) ***and*** *Schulde v. Northeast Central School District*, 892 F.Supp. 560 (S.D.N.Y. 1995). However, these federal cases rely upon a statute which is not mirrored in Montana's special education laws. Thus, the federal holdings requiring exhaustion are not applicable here.

IDEA contains an express exhaustion provision.

> Nothing . . . shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children and youth with disabilities, *except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.*

20 U.S.C. §1415(f) (emphasis added).

The federal court in *Hope* relied upon this exhaustion statute. 872 F. Supp. at 17. The federal court in *Schulde* relied upon this exhaustion statute. 892 F. Supp. at 564.

Montana has no comparable exhaustion statute in its state educational laws. There is limited Montana case law addressing the issue. The Montana Supreme Court has required exhaustion for both IDEA claims and Montana Human Rights Act claims before civil litigation, without suggesting any overlap in the exhaustion requirements. That court decision cannot be cited as authority. *Shields v. Helena School District*, 96-471 (Aug. 7, 1997). At least in *Shields*, the Court read the two statutes to apply independently of each other, with both exhaustion requirements applying to the plaintiff's efforts to sue. It may give some indication of the Court's thinking.

The Montana Supreme Court has also ruled that an independent tort action for "negligent misclassification" can arise outside of IDEA exhaustion if a school misclassifies a student as a special education student and assigns the student accordingly. If an IDEA due process hearing has finally concluded the student has received a free appropriate public education, res judicata would bar the tort claim. *Parini v. Missoula County High School*, __ Mont. ___, ___ P.2d ___, 54 St.Rep. 711 (1997). The implication of *Parini* is that the

litigant can pursue an independent tort action either by winning the IDEA due process case or by not pursuing the IDEA due process case. If by not pursuing the IDEA due process case the litigant leaves open the door for the tort action, the "negative pregnant" would be that IDEA exhaustion statute does not bar state causes of action.

Montana's Human Rights Act is the exclusive remedy for state discrimination claims.

> The provisions of this chapter establish the exclusive remedy for acts constituting an alleged violation of this chapter, including acts that may otherwise also constitute a violation of the discrimination provisions of Article II, section 4, of the Montana constitution or 49-1-102. No other claim or request for relief based upon such acts may be entertained by a district court other than by the procedures specified in this chapter.

§49-2-509(7) MCA.

IDEA exhaustion requirements address federal claims, but not state claims arising under independent legal theories. That federal exhaustion requirement can not apply here, to the derogation of the express exclusive remedy provisions of the Montana Human Rights Act. Johnson is not precluded from pursuit of his remedies under the Human Rights Act because the family did not pursue IDEA and OPI remedies.

**D. Motions in Limine and Prehearing Motions**

*1. Prehearing Procedures and Motions to Dismiss or Remand*

The district's motions in limine and prehearing motions largely involved exhaustion of remedies issues. However, the district also argued for dismissal, remand and preclusion of issues and evidence based upon the prehearing procedures and discovery responses of Johnson. A discussion of the prehearing procedures is appropriate, to place the motions in context.

Johnson filed his complaint of discrimination on June 14, 1995. He alleged Amanda's disability, the inaccessibility of GFHS, the district's offer to schedule classes on the first floor of GFHS and transport Amanda to CMR for specialty classes, the refusal to install an elevator in GFHS and the failure to accommodate. Complaint of Discrimination, p. 2, Secs. III.A. through III.D. The complaint was in investigation and mediation until August 1996. The administrator of the Montana Human Rights Commission staff certified Johnson's complaint for contested case hearing on August 1, 1996. The district acknowledged service of that notice August 19, 1996. Johnson was served with the notice on August 25, 1996. Sheriff's Return

of Service, August 26, 1996. Each party had to file an appearance and preliminary prehearing statement within twenty days of service of notice. 24.9.317(3) A.R.M.[9]

On August 27, 1996, the hearing examiner set this case for a November 12, 1996, hearing. Order Setting Hearing Date and Prehearing Schedule, August 27, 1996. In that order, the hearing examiner required the parties to complete discovery by October 11, 1996, to file final witness and exhibit lists by October 23, 1996, and to file their contentions by October 28, 1996. ***Id.***, p. 2, lines 19-27.

Johnson filed his appearance and preliminary prehearing statement on September 13, 1996. He alleged that both GFHS and CMR were not fully accessible. Appearance and Preliminary Prehearing Statement, p. 2, lines 2-5. He sought an order requiring the district to provide access in 27 separate particular ways at GFHS and 9 separate particular ways at CMR. ***Id.***, p. 5, lines 10-28, p. 6, lines 1-18.

The district served its initial discovery requests, Respondent's Requests for Admissions and Interrogatories, on September 12, 1996. Notice of Service of Discovery.[10] In those initial requests, the district asked Johnson to admit it had accommodated Amanda by scheduling her classes for both the 1995-96 and 1996-97 school years on the first floor at GFHS, and asked him to state the factual and legal bases for any denial of these requests. Respondent's Requests for Admissions and Interrogatories, Request for Admission Nos. 8-9 and Interrogatory Nos. 9-10, p. 3, lines 27-28, p. 4, lines 1-11. The district asked Johnson to admit that CMR was fully accessible to students requiring a wheelchair for mobility, and to state the legal and factual bases for any denial. ***Id.***, p. 2, line 28, p. 3, lines 1-6 (9-12-96), Request for Admission No. 4, Interrogatory No. 4. The district also asked Johnson for all the facts and legal authority supporting his contention that the district had violated the Montana Human Rights Act. ***Id.***, p. 5, lines 18-20, Interrogatory No. 16.

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[9] Both parties had attorneys by the end of the investigation and mediation. The administrator mailed copies of the certification to counsel. Counsel then stipulated, before Johnson had been served, that the appearances and preliminary prehearing statements would be due on September 11, 1996. Stipulation for Extension of Time, August 20, 1996.

[10] Eventually, these discovery requests were filed, as one of the attachments to Respondent's Motions in Limine and Supporting Memorandum, February 2, 1997.

Johnson responded to these discovery requests on October 9, 1996. Notice of Completion of Discovery, October 10, 1996.[11] He denied the district had accommodated Amanda by scheduling her classes for both school years on the first floor at GFHS, and explained why, in both interrogatory answers.

> Accommodating an individual's disability requires more than merely moving her classes to one accessible floor. Amanda cannot access the library at GFHS, she cannot participate in band or orchestra, she cannot watch a football game with her peers, she cannot drink out of drinking fountains, she cannot reach light switches or the buttons on the vending machines, and she is denied most of the services offered to non-disabled students at GFHS. Respondent has not properly accommodated Amanda's disability. Amanda relies on ADAAG [Americans with Disabilities Act Accessibility Guidelines] (34 C.F.R. Part 36 Appendix A) and statutes referred to in Amanda's Preliminary Prehearing Statement for this answer.

Charging Party's Responses to Discovery, p. 5, lines 6-28, p. 6, lines 1-7.

Johnson also denied CMR's full accessibility. Charging Party's Responses to Discovery, p. 3, lines 4-7. The basis for the denial was set forth in answer to the district's interrogatory 4, in which Johnson asserted that CMR "does not comply with the ADAAG in many areas including but not limited to the elevator, water fountains, bathrooms, counters, pay phones, library access, seating in the auditorium, doors, seating in the band and orchestra rooms, etc." ***Id.***, p. 3.

Johnson responded to the district's interrogatory 16 by saying that "all facts and legal authority" supporting his claim of violations of the Human Rights Act were in his preliminary prehearing statement. ***Id.***, p. 8, lines 20-22.

On October 9, 1996, the district objected to Johnson's first discovery requests. Objection to Discovery Requests and Motion for Protective Order. The district asserted that Johnson served his discovery requests on October 7, 1996, far too late under the discovery deadline of October 11, 1996. The district asked either a protective order or a continuance.

On October 9, 1996, the district also moved for dismissal, continuance or remand to the Commission staff. Motion to Dismiss Complaint, Motions for Continuance, and Motion to Remand Issues Back to Informal Settlement Procedure. The motions for continuance or

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[11] As already noted in Footnote 1, the actual discovery responses are in the file. Charging Party's Responses to Discovery, (October 9, 1996), ***copy attached to*** Respondent's Motions in Limine and Supporting Memorandum, February 2, 1997.

remand were expressly "in the alternative" to the dismissal motion. ***Id.***

The district argued that it could not afford an elevator and was entitled to place Amanda in CMR. Brief in Support of Motion to Dismiss Complaint, Motions for Continuance, and Motion to Remand, pp. 2-4 (October 9, 1996). On this basis, the district sought dismissal.

The district argued for continuance on multiple grounds. The district said it needed more time to "investigate and respond to the vast array of new allegations" raised by Johnson in his preliminary prehearing statement. ***Id.***, p. 4-5. The district also asked for a continuance until after the vote on the November 1996 bond issue, since passage of the building bond would fund installation of an elevator at GFHS. ***Id.***, p. 5. The district also asked, again as an alternative to dismissal, that the "new issues" (i.e., every claim except that GFHS should have an elevator) be remanded to the Commission staff for investigation and mediation. ***Id.***, p. 5.

Johnson agreed to a continuance of the hearing. The hearing examiner extended discovery until January 21, 1997, and required the filing of exhibit and witness lists and contentions by February 7, 1997. Order Resetting Hearing Date and Prehearing Schedule, October 16, 1996.[12] By separate order, the hearing examiner set December 1, 1996, as the deadline for filing responses to motions, and requiring notice of motions withdrawn by that same date. Order Setting Date for Responding to Pending Motions, October 16, 1996.

The district withdrew its objections to Johnson's discovery, its motion for a protective order and its two motions for continuance. Notice of Withdrawal of Objections and Motions, October 25, 1996. The motions to dismiss and to remand remained pending.

Johnson filed his brief in opposition to those two motions on December 2, 1996. Charging Party's Brief in Opposition to Respondent's Motions to Dismiss and Remand. He argued at length that he had stated a claim, under both the Americans with Disabilities Act and Section 504 of the 1973 Rehabilitation Act as well as the Montana Human Rights Act, then

[12] Due to the parties' scheduling conflicts, the hearing examiner later changed both the ultimate hearing date and the date of the final prehearing conference, but the prehearing deadlines remained as set in the scheduling order of October 16, 1996.

briefly argued that remand was not required under the Human Rights Act.[13]

The district filed a reply brief, to which it attached exhibits. The district invited the hearing examiner to convert its motion to dismiss to a summary judgment motion, and to rely in deciding the summary judgment motion upon matters presented outside of the pleadings. Reply Brief to Johnson's Brief in Opposition to Respondent's Motions to Dismiss and Remand, p. 2, lines 18-21 (December 17, 1996).[14] The hearing examiner denied the district's motions. Order Denying Motion to Dismiss and Remand, January 14, 1997.

Adequate program accessibility is a fact-driven determination. The sweeping assertion that alternative access through another facility always satisfies the Human Rights Act is simply not true, for the reasons discussed elsewhere in this opinion. The district's attempt to present its fact case through unsworn documents attached to its reply brief necessarily failed in foundation. Even if the district had presented admissible evidence to support its converted summary judgment motion, it did not meet the standard for a summary judgment in a Human Rights Act case. *Heiat v. Eastern Montana College*, 275 Mont. 322, 912 P.2d 787 (1995), ***cited and explained***, *Reeves v. Dairy Queen, Inc.*, __ Mont. __, __ P.2d __, 1998 MT 13, ¶13-15 (1998).

Regarding remand, the final prehearing order governs the proceedings at hearing, and amends the complaint. 24.9.323(5) and 24.9.324(3) A.R.M. By adding Johnson's additional contentions to the prehearing order, the hearing examiner granted leave for the amendments.

The district argued the amendments could not be part of the case without prior investigation, mediation and certification.[15] The Commission rule regarding amendment after certification mirrors Rule 15, M.R.Civ.P. regarding amended pleadings. 24.9.324(4) A.R.M. The courts freely grant permission to amend complaints, absent extraordinary reasons--dilatory

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[13] The district did not receive this brief until December 6, 1996, so it asked for a summary ruling on December 5, 1996. The district abandoned this request as soon it received a copy of Johnson's brief.

[14] The district also attacked Commission jurisdiction over ADEA and Rehabilitation Act claims. Johnson abandoned any effort to obtain recovery under laws other than the Montana Human Rights Act.

[15] A charging party can amend a complaint, during investigation, to add a new claim, which is far more substantive than a new factual basis for the same claim. *Simmons v. Mountain Bell*, 246 Mont. 205, 806 P.2d 6 (1990). The district contends, in substance, that this amendment right ends with certification.

motive, undue delay or bad faith. ***E.g.***, *Lien v. Murphy Corp.*, 201 Mont. 488, 656 P.2d 804 (1982, ***reh. den.***, 1983) (amendment allowed nine years after complaint filed). The key is the impact upon the opponent's rights.

> Defendants cite *McGuire v. Nelson*, 162 Mont. 37, 42, 508 P.2d 558, for the proposition a plaintiff is denied the right to amend his complaint when the amendments materially change the theory of recovery and prejudice defendant by denying defendant sufficient time for preparation of a defense. *McGuire* held:
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> > "Although Rule 15(a) M.R.Civ.P., establishes that leave to amend shall be freely granted, amendments should not be allowed where the theory presented by the amendments is totally 'inapplicable to the case. . . .'" 162 Mont. 42, 508 P.2d 560.
>
> In *McGuire* plaintiff initially sought recovery on a negligence theory. Shortly before trial plaintiff sought to amend his complaint seeking recovery on a breach of warranty theory. This Court reversed the district court and denied plaintiff leave to amend his complaint because of the basic inconsistency between a negligence action and a breach of warranty action and the prejudice incurred by defendant as a result of the amendments.
>
> The facts in the present action do not present a case of substantial prejudice incurred by defendants. The motion to amend the amended complaint was filed on January 19, 1976, one week prior to the date of trial, and defendants were duly notified of plaintiff's intent to amend. The effect of the amendments was to change the basis of recovery on particular claims from tort to contract. However, some of the claims had previously been plead on the theory of recovery based on contract and no additional facts or agreements between the parties were interjected by the amendments. Defendants' recourse to any prejudicial effect from the late filing of the amendments was to seek a continuance for the purpose of preparing their case. The trial record fails to disclose any motion by defendants for a continuance and the element of surprise is clearly absent. ***See*** *Mitchell v. Mitchell*, 169 Mont. 134, 545 P.2d 657.
>
> Therefore, we hold the district court's granting of plaintiff's motion to amend the amended complaint was not an abuse of discretion.

*Kearns v. McIntyre Construction Co.*, 173 Mont. 239, 248-49, 567 P.2d 433 (1977).

Of course, when the legal theory is simply inapplicable to the facts, a trial court can properly refuse an amendment. *Fry v. Heble*, 191 Mont. 272, 623 P.2d 963 (1981). Here, unlike *Fry*, nothing precludes the additional factual contentions as a matter of legal theory. Whether Johnson's added contentions prejudiced the district, to such an extent that remand is necessary, is a question of discovery and notice, rather than a question of investigation and mediation.[16]

By withdrawing its motions to continue, the district relied entirely upon its theory that investigation and mediation were necessary preconditions to contested case hearing on each

[16] As noted, the district withdrew its motions to continue the hearing after a continuance was granted. In terms of time to investigate and attempt settlement, the district and Johnson had ample time before hearing.

factual allegation within a claim of disability discrimination due to inadequate access. The district cannot, on the one hand, agree to proceed to trial unless remand is granted, while on the other hand insist it will be prejudiced in hearing (due to lack of preparation time) if the new issues are presented.

The district had no right to a remand on Johnson's additional contentions, for three reasons. First, the filings in this proceeding gave adequate notice of the nature and particulars of Johnson's claims, in most instances. This is explained further in the discussion of the motions in limine.

Second, for those factual assertions not timely disclosed with particularity, the district's duty to accommodate required it to investigate itself to ascertain what barriers to access existed. The district itself knew, or at least had an obligation to ascertain, what barriers Amanda faced under the accommodation provided.

Third the complainant here did not seek monetary relief. Fault-finding among the lawyers regarding procedure is a valid basis for the Commission to deny monetary relief to Johnson. Fault-finding among the lawyers regarding procedure is not a valid basis for the Commission to frustrate the public policy of the Act by refusing injunctive relief.

*2. Motions in Limine*

The district made six motions in limine. For the sake of clarity, this opinion treats each motion separately, after this brief discussion of a legal standard applicable to all six. The motions were resolved after the hearing officer had denied the motion to remand. The district had withdrawn its motions for continuance. For its motions in limine, the district took the position that procedural due process required exclusion of the evidence, contention or witness.

The district's due process argument was premised on lack of notice that the issue (or evidence, contention or witness) would be part of this proceeding. But the underlying issue remained whether a reasonable accommodation of Amanda was in place. The district had years of notice of her disability, of her desire to attend GFHS, and of the limitations of its physical facilities. The district had undertaken its own survey of its physical barriers. How Amanda was denied access was a question the district could have and should have answered at

any time, without the need for resort to formal discovery at all.

Procedural due process is critical. But because it is critical, procedural due process can readily become a lawyers' game. The district knew or could readily have discovered that Amanda had problems with transportation to and from CMR. The district knew or could readily have discovered that the sidewalks at GFHS posed unusual problems for Amanda, particularly when snow-covered. The same statement can be made about every particular contention to which the district objected.

For an easy example, the mirror in the rest room, designed to tilt downward for use by a student confined to a wheelchair, was being put in its upright position (from which Amanda could not readjust it herself) by other students or janitors. The informal tour of the two high schools revealed this fact, and many others, within two hours. Any district official, teacher, counselor or aide could have discovered the same facts by, again for this example, going with Amanda to the rest room, at any time after the mirror was installed.

The district had better direct access to the facts about inaccessibility than its lawyers or Johnson's lawyers. Yet, much of the prehearing motion practice in this case addressed what the lawyers had asked each other and answered each other. Much of the district's defense--not on the fundamental issue of program access, but on the myriad factual issues of problems with the actual access within the buildings--centered upon whether Johnson's lawyers were sufficiently detailed in describing to the district's lawyers what both Amanda and the district had in front of them every day. Despite the fact that the district knows or can readily find out for itself where and how its program access is lacking, the district argued that unless Johnson's lawyers specifically told the district's lawyers in formal discovery that he was making each such lack an issue in this case, the district need not defend the specific lacks as failures to accommodate.[17]

In terms of avoiding the imposition of affirmative relief to remove the barriers, the district's position is not convincing. The Montana Legislature did not enact the Human Rights

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[17] In terms of monetary relief to Johnson, the district's position would be valid. A party seeking compensation for harm has an obligation to identify with specificity the contentions, the facts and the theories for that compensation. The potential for prejudice when that obligation is breached is substantial.

Act to test the shrewdness of lawyers. The Act's purpose is to prohibit discrimination. In ruling upon what evidence Johnson could offer, the hearing examiner followed the purpose of the Act. The district is *accountable* for any continued lack of adequate communication and monitoring of accommodations. The lack of a more effective and vigorous effort to verify successful accommodation and remedy any lacks therein is the district's failing.

*a. Motion to bar evidence of discrimination against anyone but Amanda*

First, the district moved to bar Johnson from offering evidence that it had discriminated against persons other than Amanda. Because such evidence could be relevant to the district's knowledge of barriers to access, the hearing examiner denied the motion without prejudice. The district was free to interpose the relevance objection to particular evidence during the hearing. The district did, and some evidence regarding alleged discrimination against others was excluded. No blanket ruling on this motion could issue, because Johnson had to present the actual evidence and the context of that evidence before the hearing examiner could rule on the relevance of the evidence (as well as the timeliness of disclosures). However, the evidence Johnson offered largely involved disparate situations--temporary inability to use stairs because of injury, for example. Very different legal questions as well as factual issues arise from such disparate situations. Evidence involving other particular students has been largely irrelevant to this decision.

*b. Motion to limit evidence to the lack of an elevator at GFHS*

Second, the district moved to limit Johnson to evidence pertaining, directly or indirectly, to the factual allegations of his initial complaint. The district argued that Johnson had, without amending his complaint, expanded his allegations of discrimination beyond the single issue of inaccessibility due to the lack of an elevator at GFHS. The district argued that these expanded allegations could not be heard before the district, the Commission investigators and the Commission mediator addressed them. This argument was simply a reiteration of the motion to remand, that the hearing examiner had already denied.

The district also argued that Johnson had to first make these expanded allegations in the special education context (the exhaustion defense). The inapplicability of the exhaustion

defense has already been discussed.

Finally, the district also argued that hearing these expanded allegations violated its due process rights. This argument related, in part, to the issues of exhaustion and remand. But the argument also related to Johnson's discovery responses.

The district could not credibly argue in February that it was denied due process because all issues except lack of an elevator were new issues at hearing beyond those identified in discovery. Contentions regarding accessibility at both high schools were disclosed in both Johnson's prehearing statement and in her discovery responses. The district cannot claim surprise at contentions that Amanda was denied access on any basis fairly identified in either filing. The motion to limit Johnson's evidence to the elevator issue was denied.

*c. Motion to preclude evidence on certain specific issues.*

The district moved to preclude Johnson from offering evidence of specific accessibility problems at the two high schools, that the district argued were not disclosed prior to the filing of Johnson's contentions[18] on February 7, 1997. To the extent the district argued other bases for the preclusion, this opinion has already discussed and rejected those arguments (exhaustion, remand, jurisdiction). The district targeted the following contentions:[19]

> a. Johnson's 13(a): Some barriers at GFHS that are or have been problematic to Amanda are: (a) The exterior accessible route in and to GFHS including sidewalks, parking areas, entrances, doors, lack of access to all but ground floor; sidewalk travel is difficult and dangerous when covered with snow; frequent access problems arise such as late buses causing tardiness to classes and cars blocking handicapped access areas;
> b. Johnson's 13(b): lack of connected accessible spaces within the facility; lack of fire alarm pull mechanisms;
> c. Johnson's 13(c), 13(f), 18: "mirrors";
> d. Johnson's 13(d): Assembly area and old gym have no wheelchair locations available to Amanda.
> e. Johnson's 13(e): Counter tops in the main office are too high to access
> f. Johnson's 13(g): Travel to CMR via taxi or bus is time-consuming and undependable. Two class periods a day are used up with traveling to and from CMR to get to an accessible science lab. Late buses cause tardy class attendance for Amanda. At

[18] Charging Party's Contentions of Fact, Contentions of Law and Claim for Relief.

[19] These contentions are taken from the Final Prehearing Order (March 4, 1997).

times, taxis have failed to show up to pick her up as scheduled. Amanda would like to begin to drive to school soon but the GFHS Student Handicapped Parking slots can be accessed only by stairs.

g. Johnson's 20(a) Some barriers at CMR that are or have been problematic are: The lack of accessible van spaces in the handicap parking area.

h. Johnson's 20(f): mirrors

i. Johnson's 20(g): Although Amanda is in a lab science room for one class, the lab is not accessible in many respects and she is dependent on a lab partner to accomplish tasks such as anything that uses the sink.

Problems with sidewalks, entrances, late buses and fire alarm pull mechanisms were not adequately identified in the preliminary prehearing statement and discovery responses. The hearing examiner has considered evidence regarding such problems, but only for affirmative, prospective relief. If the district had no opportunity to prepare and to defend regarding these access issues, it is because the district never used its own survey and its own resources to find out what access problems Amanda experienced. Without proof of those problems, Johnson still established the inadequate consultation and monitoring that flawed the accommodation. Since the only relief accorded is affirmative, the district has no liability to Johnson resulting from evidence of access problems about which Johnson gave inadequate notice. Since that relief would be accorded without evidence of these problems, and since the affirmative relief involves full oversight by the Human Rights Bureau, the outcome is precisely as it would be without this evidence. There is therefore no denial of due process.

The rest of the targeted contentions are sufficiently related to the information timely provided by Johnson, and there is no merit to the district's contention that it was denied due process. A close review of Johnson's preliminary prehearing statement and his responses to discovery requests verifies that problems with high counter tops in the main office, time-consuming and unreliable travel to CMR, lack of accessible van space in the CMR parking lot, and science lab problems at CMR were within the ambit of the allegation, in discovery responses, that Amanda "is denied most of the services offered to non-disabled students at GFHS." Johnson also alleged that attendance in speciality classes at CMR did not fully accommodate Amanda. These alleged problems were adequately identified in the prehearing discovery process. Answers to Interrogatories 9 and 12, Charging Party's Responses to Discovery.

*d. Motion to bar evidence of ADA compliance surveys*

The district moved to bar evidence of ADA compliance surveys the district purchased. Because of the close parallels between ADA and the Montana Human Rights Act, this evidence is relevant. It proves the district's knowledge. It proves the district's status. It establishes the views of an agent hired by the district to identify problem areas for disability access. The district's argument that since no ADA claim is properly before the Commission, no ADA standards are relevant is without merit. The motion was denied.

*e. Motion to Exclude 8 Untimely Identified Witnesses*

Three of the eight witnesses were called: Linda Brown, whose daughter, a GFHS student, had a temporary mobility limitation following a broken leg; Tammie Dwyer, whose child experienced the same situation (for a longer period of time) as Brown's daughter; and Elaine Tews, whose son is wheelchair mobile and resides in the GFHS area. Johnson was barred from presenting much of the proposed testimony of these witnesses, and the testimony that was presented was not pertinent to, and therefore not used for, this decision (see comments on the first in limine motion). Tews' testimony is an exception. Her testimony (essentially cumulative) regarding her son's situation and problems confirmed elevator size and control problems at CMR, the district's honest encouragement of wheelchair students to transfer to CMR, the overcrowding at GFHS, the access problems at GFHS for the cafeteria, and the initial difficulties in transferring to CMR (and leaving friends behind at GFHS). Excluding this testimony would not change the decision.

*f. Motion to Exclude Evidence Supporting Johnson's Supplemental Contentions*

The district argued the supplemental fact contentions Johnson filed February 24, 1996, were so untimely that the hearing examiner should exclude them. These factual contentions address Amanda's attendance dates at district high schools, access to the library at GFHS and to the computer in the library at CMR, whether installation of the elevator at GFHS decreases available classrooms, what the attendance at GFHS has been, is and will be, the size of Amanda's classes, whether the elevator could reasonably be a separate project from the expansion, how overcrowded GFHS is or would be if the elevator were a separate project done

first, the existence of the ADA survey from 1992 and its contents, and whether Amanda, after two years in district high schools, still faces barriers to access. Charging Party's Supplemental Contentions of Fact and Contentions of Law, February 24, 1997, pp. 1-3, Contentions of Fact.

Johnson did not first raise the ADA compliance survey's existence and relevance in these supplemental contentions. The survey was asserted in Johnson's February 7, 1996, contentions. The survey was asserted in Johnson's original appearance and initial prehearing statement, in September of 1996. This new issue was not new.

The other new issues or fact contentions either fall within the contentions already resolved in the previous motions in limine, or involve rebuttal issues of fact. For example, the district defended not installing the elevator earlier because enrollment of GFHS was and is at capacity, straining the district's ability to schedule and deliver educational services, so loss of even two additional classrooms (for the elevator) would be an undue hardship. In response, by his new fact contentions, Johnson asserted GFHS was not that crowded, and could afford to lose two classrooms (if two would indeed be lost) for an elevator.

This motion was properly denied because the new factual contentions were either more detailed statements of the contentions already raised in the complaint or rebuttal contentions. Under the commission's rules, contentions are treated as proposed findings and conclusions. 24.9.324, A.R.M. Filing rebuttal contentions before hearing is one way a party can present proposed findings in response to the opponent's contentions.

**E. Monetary Relief and Prospective Relief**

Johnson made no specific request for monetary relief, and offered no proof of any particular dollar figure to compensate for harm. Affirmative relief is necessary in this case. §49-2-506(1)(a) MCA. The district failed adequately to monitor the accommodations provided. It must pay closer attention, in order to refrain from engaging in any further unlawful discriminatory practices.

Because Dean Paula Paul's role in this matter commanded considerable attention in the findings, it would be unfair not to comment upon her role, particularly since the dilemma she faced is at the heart of the proposed prospective relief. Paul found herself in an very difficult

situation. On the face of it, she had a free choice of how to assure that the accommodation was working. But in reality, the inquiries she undertook upset Amanda. That upset, in turn, triggered a complaint from the family. Paul made probably the only choice she could see--to wait and let Amanda come to her with problems. Amanda didn't. The district's discrimination resulted, at least in part, from the ignorance spawned by this lack of communication.

How does a school district, in this instance a single administrative employee of that district, force communication from a reticent student who receives an accommodation? The best answer now will be, the district is required by the Commission to adopt a formal policy defining how often and by what means it will go to the student and review exactly how well or how poorly the accommodation is working, and how it will document those reviews. For Paul, or any other administrator, there will be an externally-imposed model of how to force communication, so it cannot again be a choice between relying upon the student to complain or becoming the cause of controversy by forcing communication without any outside impetus.

In implementing the affirmative relief, the district can and should consult with the Human Rights Bureau staff before adopting the mandated policies. It may be that most, if not all, of the paperwork to document monitoring and consultation either will fall within existing IEP practice, or can be addressed in future IEP practice. Since the purpose of the affirmative relief is require the district to define how it will pay closer attention to accommodation outcomes (to save district employees from the Hobson's choice Paul faced), close communication between the district and the Human Rights Bureau staff could save considerable time and expense in compliance. It is also for the Bureau staff to decide how long, and in what depth, Bureau staff will examine and direct the district's compliance with the policies adopted.

## V. Conclusions of Law

1. Amanda Johnson has a physical disability. §49-2-101(15) MCA (1995).

2. Great Falls Public Schools is an educational institution. §49-2-101 MCA(6) (1995).

3. The district made reasonable accommodations to prevent Amanda Johnson from being excluded, limited or otherwise discriminated against in the terms, conditions or privileges that the school offered, and the district integrated her into its programs, services and

activities, given its current financial and census limitations. §49-2-307(1) MCA. The reasonable accommodation included the construction of an elevator at the soonest date possible without reducing the number of classrooms available, a reduction that would have a negative affect upon educational services scheduled and delivered by the district.

4. The district violated the provisions of the Montana Human Rights Act when it relied upon Amanda Johnson to give notice of barriers she faced within both high schools, rather than aggressively monitoring and consulting with her to verify accommodation and/or identify problems and address them as they arose. The district's reliance upon Amanda Johnson illegally discriminated against her in the context of the accommodation offered to her by excluding, limiting, or otherwise discriminating against her in the terms, conditions, or privileges accorded her as opposed to other students because of her physical disability. §49-2-307(1) MCA.

5. Discrimination on the basis of physical handicap or disability includes the failure to make reasonable accommodations that are required by an otherwise qualified person who has a physical handicap or disability. §49-2-101(15)(b) MCA. By failing to aggressively monitor and consult with Amanda Johnson to verify accommodation and identify problems and address them as they arose, which the district could have done and still could do without undue administrative or financial burden, the district rendered its accommodation unreasonable.

6. Pursuant to §49-2-506(1)(b) MCA, Amanda Johnson has not proved harm for which financial award is an appropriate remedy.

7. Affirmative relief is necessary in this case, to eliminate the risk of further discrimination in the future. §49-2-506(1)(a) MCA. The district must refrain from engaging in any further unlawful discriminatory practices.

8. For purposes of §49-2-505(4) MCA, Les Johnson, on behalf of his minor daughter, Amanda Johnson, is the prevailing party at the hearing of this matter.

## VI. Proposed Order

1. Judgment is found in favor of the Charging Party, Les Johnson on behalf of his minor daughter, Amanda Johnson, against the Respondent, Great Falls Public Schools, on the

charge that Amanda Johnson was discriminated against in education based upon her disability because Respondent has failed to provide a reasonable accommodation for accessibility.

2. Charging Party is not entitled to any monetary recovery to remedy the harm caused by the Respondent's illegal discrimination.

3. Respondent is enjoined from any further failure to monitor accommodations provided to students with physical disabilities in violation of the Montana Human Rights Act.

4. Respondent is ordered to take the following affirmative actions to minimize the likelihood of future violations of the Human Rights Act:

a. Within 30 days of the date of the final order in this case, the respondent shall prepare written policies identifying actions to be taken and frequency of actions, as well as names and job titles of the persons responsible, for Amanda Johnson and all other students with physical disabilities for whom accommodations are being provided, to monitor (at least twice every month) and consult (at least four times every month) to confirm the success of the accommodations and/or identify with particularity any problems to address regarding the accommodations and shall furnish copies of the draft policies to the staff of the Human Rights Bureau for review and comment;

b. Within 30 days after receipt of the comments of the Human Rights Bureau and after revision of the draft policies in conformance with those comments, the respondent shall adopt those nondiscrimination policies and shall then distribute a copy (deleting identities of all other matriculating students except the one to whom each copy is distributed) to each matriculating student identified in the policies;

c. Within 30 days of adopting the described nondiscrimination policies, the respondent shall post appropriate notices in conspicuous places informing all employees and employment applicants that the school district does not discriminate on the basis of physical disability in violation of state or federal law and that further information concerning their rights to be free from unlawful employment discrimination may be obtained from the offices of the Montana Human Rights Bureau or other appropriate government offices.

5. The respondent shall, as directed by the Human Rights Bureau for as long as the Human Rights Bureau directs, provide documentation and information regarding accommodations, modifications and monitoring and consulting to verify the efficacy of accommodations. The Bureau shall determine the sufficiency as well as the efficacy of existing and proposed accommodations.

Dated: March 24, 1998.

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Terry Spear, Hearing Examiner for the
Montana Human Rights Commission
Hearings Bureau, Montana Department of Labor and Industry