

**BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY**

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| <hr/> Russell Pannoni,) | HRA Case No. 0001009127 |
| Charging Party,) | |
| vs.) | <i>Final Agency Decision</i> |
| Board of Trustees,) | |
| Browning School District No. 9,) | |
| Steve Smyth and Ken Werner,) | |
| <hr/> Respondents.) | |

I. Procedure and Preliminary Matters

Russell Pannoni filed a complaint with the Department of Labor and Industry on June 6, 2000, alleging that Browning School District No. 9, acting through its Board of Trustees, Superintendent Steve Smyth and District Personnel Director Ken Werner discriminated against him because of his disability (depression) by taking adverse employment action against him because of his disability and retaliating against him. On January 10, 2001, the department gave notice of contested case hearing and appointed Terry Spear hearing examiner.

The contested case hearing proceeded on April 12-13 and 26-28, 2001, in Glacier County, Montana, part in Browning and in part in Cut Bank, by agreement of the parties. Pannoni appeared with counsel, Michael Dahlem. Respondents appeared through counsel, Catherine M. Swift and Ronald Waterman, Gough, Shanahan, Johnson and Waterman. The hearing examiner's exhibit, witness and file dockets accompany this decision. The parties waived further argument and submitted the case on April 28, 2001.

II. Issues

The issues under the Montana Human Rights Act in this case are whether Pannoni suffered from a disability, whether he was otherwise a qualified person and whether the respondents had legitimate business reasons for their adverse employment actions. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

I. Russell Pannoni is a teacher by profession. He has lived in Babb, Montana, within Browning Public School District No. 9 (the district), since 1972, with his wife and children. He was born in Massachusetts and attended

Bristol Community College in Fall River, Massachusetts, Westfield State College in Western Massachusetts and the University of Montana in Missoula. He has a bachelor's of science in early elementary education and a master's degree in school administration.

2. At all times pertinent to this case, Pannoni has held both a Class III Level 3 Administrative Certificate (K-12) and a Class I Level 1 Teaching Certificate (K-8). Pannoni is certified to teach all subjects in grades K-8 and was certified to be an elementary principal (K-8) or a superintendent (K-12). He has never held a high school level teaching certification (9-12).

3. Browning School District No. 9 is a public school district located in Glacier County, Montana, in and around Browning. The district operates a high school, a middle school, three elementary schools and two rural schools with students in grades K-12. An elected board of trustees operates the district. The district is an isolated rural school district located near the Canadian border on the Blackfeet Indian Reservation. Its students are “at risk,” i.e., the district has lower proficiency and achievement levels and higher drop out rates than are normal or acceptable.

4. The district has difficulty recruiting qualified teachers. Like other public schools around Montana, the district ordinarily seeks to identify and fill openings for teachers during the school year before the openings actually exist. The district’s difficulty recruiting teachers increases when it has to recruit teachers to fill openings during the school year in which the openings occur, rather than hiring new teachers during the previous school year. A teacher shortage existed in Montana generally that exacerbated the difficulties of recruiting for this and other isolated rural school districts.

5. Since 1997, the district has taken steps to improve its teacher recruitment, including recruiting in the spring every year, sending its administrators to spring job fairs in Montana and out of state, preauthorizing contracts so that its administrators can make immediate offers to interested candidates, offering signing bonuses and moving expenses to candidates, and attempting to negotiate higher teacher salaries and insurance benefits.

6. Browning has few, if any, medical and shopping services. Teachers often live in neighboring towns and seek medical attention, as well as places to shop, in other towns, either in Montana or to the north into Canada. The isolation and sparse population are daunting for many newcomers, particularly those who are unfamiliar with the area before moving there to take a teaching position. The at risk student population also makes teaching more difficult. Over the years the district has lost new teachers who quit and leave during the school year. This creates further recruitment needs at the most difficult time.

The district made it a priority to fill all of its openings before the beginning of each school year, preferably with candidates who appeared likely to adjust to the district and its surroundings without difficulty.

7. The district hires teachers to work as assigned, with no permanent assignments to individual schools. The district regularly reassigns teachers and administrative staff throughout the district based on student need and efficient operation. Teacher positions at the district are usually full-time. The district usually cannot usually find certified teachers to fill part-time positions. Likewise, the district has difficulty finding local certified teachers to serve as substitutes, and often has to resort to uncertified substitutes.

8. Attendance is an essential function of a teacher's job at the district. Teacher attendance is a priority at the district. The district views teacher attendance as critical to student achievement. The district stresses this priority in its policies and practices. Improvement of instruction, higher expectations of staff (including better attendance), and staff development have been strategic goals of the district. Unauthorized absences are grounds for discipline and termination at the district. The district has fired employees for excessive absenteeism.

9. The district has a collective bargaining agreement with teachers' union. In general those contracts had similar terms for work days and time off as the contract applicable during the 1998-99 and 1999-2000 school years. Under those contracts, the district's teachers contracted to work a total of 187 days per years, including 180 teaching days on which students were present and seven pupil-instruction-related days, or PIR days, on which students were not present but teachers either were present or took leave and made up the days, with district approval. The pertinent collective bargaining agreements between the teachers and the district allowed each teacher 14 days of sick leave each school year, out of which each teacher could elect to take up to 10 days of personal leave without justification.

10. The district recognized the right of teachers to utilize their personal leave days each year. The district preferred that teachers not exercise those rights because of the importance of continuity in instruction for the "at risk" student population and the difficulties the district had in obtaining quality substitute teachers. The district viewed the first months of each school year and the last months of each school year as particularly important for teacher attendance. The district viewed absenteeism beyond the 10 days of personal leave to be a serious problem requiring good cause on the absentee's part. When a teacher had good cause to be absent for more than 10 days during a single school year (such as family problems or life-threatening disease), the

district tried to accommodate the absentee. The district sometimes did so for a prolonged absence, when it was able with, adequate notice, to plan to replace the absentee with a qualified substitute for a defined period of time.

11. Pannoni worked for the district for a total of 16 years as a teacher. He originally worked for the district in the early 1970s at the Babb Elementary School in Babb, for several years. Pannoni then left employment with the district and worked at Cayuse Prairie, near Lake Blaine, Montana, as principal/teacher, in 1978-79. He was principal of the elementary school in Lame Deer, Montana, for two years. He also worked one year as an administrator and instructor at the Blackfeet Community College.

12. Pannoni returned to work for the district at Babb from 1989 through 1994. In 1994, the district transferred Pannoni to the K.W. Bergen Elementary School in Browning, Montana. Pannoni wanted to continue to teach in Babb. He fought his transfer from Babb to Browning, filing a grievance. In 1995-96, he taught both at the K.W. Bergen school and at Babb. In 1996, the district transferred him back to Babb. Pannoni hoped to stay at Babb Elementary thereafter, teaching younger more tractable students at a smaller school much closer to his residence.

13. Pannoni was absent more than his contracted 14 days of personal and sick leave in 8 of his last 11 years of employment. During the 1997-98 school year, after his transfer back to Babb, Pannoni was absent 23 days. Seven of those days were in May 1998.

14. Through the 1997-98 school year, the district had neither cautioned Pannoni about excess absenteeism nor took any disciplinary action regarding it. During 1997-98, the district's superintendent, Steve Smyth, directed Babb principal Wilma Mad Plume to discipline Pannoni for excessive absenteeism. Smyth told Mad Plume that he believed Pannoni was abusing his leave entitlement and taking excessive leave. Mad Plume did not discipline Pannoni, because she believed Pannoni had provided her with adequate documentation of his need for leave.

15. In March 1998, during contract negotiations, the district and the teachers' union agreed to the implementation of a leave committee for the purpose of reducing leave abuse by employees. In negotiations, the district emphasized the importance of teacher presence without interruption, because of the importance of continuity in instruction for the "at risk" student population and the difficulties the district had in obtaining quality substitute teachers. The agreement, effective March 10, 1998, empowered the leave committee to oversee suspected or alleged abuse of the exercise of contract leave rights by district employees. The leave committee procedures were

inconsistent with Montana law in denying representation to the parties to a leave abuse hearing.

16. At the end of the 1997-98 school year, Mad Plume recommended Pannoni for the head teacher position at Babb. The district elected instead to transfer Pannoni from Babb to the Browning Middle School for the 1998-99 school year. Pannoni did not want to leave his position in Babb, and particularly did not want to teach at the Browning Middle School. Middle school students at Browning were much more difficult to work with than the elementary students at Babb, and the overcrowded Middle School was a stressful environment for Pannoni. Pannoni was fearful and depressed about the transfer.

17. Pannoni attended teacher orientation on Monday, August 31 and Tuesday, September 1. No students were present. Pannoni came to work on the first two days of school for students on September 2 and 3. Before midday on September 3, Pannoni left work and did not return until the following Monday, September 7. He was absent beginning the following Monday, September 14, and did not return to work until mid-November.

18. On September 21, 1998, Pannoni requested a Family and Medical Leave Act (FMLA) leave based on a medical disability. This was the first formal indication Pannoni had given the district that he might have a disability that affected his ability to perform his job. On September 25, 1998, Pannoni's treating physician, Dr. K. J. Taylor, a family practitioner in Cardston, Alberta, wrote a letter to the district, stating that Pannoni had suffered from intermittent depression for several years, controlled in the past by counseling and medication, and that as a result of Pannoni's transfer to Browning Middle School that fall the depression had worsened and that Pannoni was "almost totally dysfunctional." Dr. Taylor recommended that the district transfer Pannoni to the Babb school, stating that otherwise he expected Pannoni to become totally disabled.

19. On October 6, 1998, the district sent Pannoni a Certification of Health Care Provider form for Dr. Taylor to complete. The form is a federal Department of Labor form. The district asked that Pannoni return the form to the school by October 21 and advised Pannoni that the district wanted a second medical opinion. The district acted reasonably.

20. The district selected Dr. Michael Newman, a Whitefish psychiatrist, for the second opinion. Dr. Newman saw Pannoni on October 20, 1998 and reported his findings by letter on October 23. Dr. Newman concluded that Pannoni did not suffer at that time from a serious medical condition that rendered him unable to perform his job duties. He based his conclusion upon

Pannoni's statements. Dr. Newman reported that Pannoni was upset and depressed about his transfer to the Browning Middle School, but that Pannoni was ready to return to work if he could work at the Babb School. Dr. Newman also reported that Pannoni had not received counseling and had taken prescription antidepressant and/or anti-anxiety drugs for only two or three days on two instances, before ceasing to use the medication.¹ Dr. Newman concluded that Pannoni was not suffering from debilitating depression but instead was angry with the district for transferring him.

21. During the last week of October 1998, Browning Middle School Principal Laura Gervais received another letter from Dr. Taylor stating that Pannoni's condition had not improved and suggesting that he not work for another month. Gervais hired Ruth Shea, a certified substitute teacher from Cut Bank, to work until after the Thanksgiving break in Pannoni's place. On November 3, 1998, Pannoni notified the district that Dr. Taylor had released him to return to work on November 9, and asked that he be considered for jobs other than the Middle School assignment.

22. On November 11, 1998, the district wrote to Pannoni and pointed out the discrepancy between Dr. Taylor's suggestion of another month off work and Pannoni's report that he could return to work within a week, providing Pannoni with a copy of Dr. Newman's report and reiterating the district's request that Dr. Taylor complete an FMLA medical certification form. The district identified three doctors acceptable to the district to provide a third evaluation of Pannoni's condition, due to the conflict between Dr. Taylor's recommendations and Dr. Newman's evaluation. The district advised Pannoni that it could not finally decide about his FMLA request until the medical questions were resolved. The district acted reasonably.

23. On November 12, 1998, Pannoni gave the district a medical release from Dr. Taylor. Dr. Taylor indicated that Pannoni was fit to return to work. Both because of Dr. Taylor's prior medical reports and because the district had agreed to employ Shea, the substitute, until the Thanksgiving break, the district refused immediately to return Pannoni to work. On November 18, the district returned Pannoni to work after his attorney wrote demanding that he be returned to work. Pannoni's attorney asserted that the medical release "supersedes any previous letter from his physician regarding his fitness to return to work." The district paid Pannoni from the date he requested to return to work through November 17. The district acted reasonably.

¹ Abbreviated use of the anti-depressants is significant, because the efficacy of these drugs is uncertain until the patient has taken the medication consistently for a period of weeks or months.

24. Pannoni did not respond to the district's request for a third evaluation, despite his pending request that his absences be treated as FMLA leave, and the district's notice that it required the third evaluation to decide upon his request.

25. Pannoni worked from November 18, 1998 through April 13, 1999, with 10 absences. In February he received a positive evaluation from Principal Gervais. In March 1999, the board of trustees voted to offer Pannoni a teaching contract for the 1999-2000 school year, and on March 11, the parties entered into a teaching contract for 1999-2000.

26. Pannoni was absent on April 14 and 15, 1999. On April 15, 1999, Pannoni made a written request for FMLA leave because of a recurrence of his condition. He also requested a transfer back to Babb as an accommodation for his depression. He enclosed a handwritten note from Dr. Taylor indicating that he could not return to work until May 3, 1999.

27. The district responded in writing on April 19, reiterating the need for Dr. Taylor to complete an FMLA medical certification form. The district advised Pannoni that the new note from Dr. Taylor was inadequate to establish a serious health condition, just as the doctor's letters of the previous fall had been. The district warned that it would not treat Pannoni's absence as FMLA leave if his treating physician failed to provide a completed certification form. The district acted reasonably.

28. Pannoni was suffering from depression. Because of his depression, he considered the district's conduct toward him to be hostile and accusatory. He avoided contact with the district's administrators as much as possible. He rarely responded to telephone messages and usually would not talk to district administrators who called his home seeking information. He had difficulty responding in writing to district communications. The district began to send its personnel to Pannoni's residence to deliver letters, to assure that he received the letters, since he did not return phone calls and sometimes did not respond to letters. He considered this harassment.

29. The district required its regular teachers to have lesson plans prepared in advance for each pupil instruction week, and to have "emergency" generic lesson plans to cover unexpected absences. One of the purposes for the advance lesson plans as well as the emergency lesson plans was to provide a substitute with information about the appropriate class activities, to preserve as much classroom continuity as possible. Pannoni had received a written warning for failure to prepare such lesson plans for the second school week in January 1999.

30. The district telephoned Pannoni at his home on April 20, 1999 because the Middle School principal and Pannoni's substitute were unable to locate his lesson plans for that week. Pannoni did talk with a district administrator in this instance. He agreed to fax the lesson plans to the district, but he did so solely to end the conversation. He did not provide any lesson plans. On April 22, 1999, the district formally reprimanded him for a second failure to provide those lesson plans. The written reprimand warned that the district might withhold his pay as disciplinary action, and could terminate his employment. The district's actions were reasonable.

31. On April 27, 1999, Pannoni advised the district in writing that because of his disability he could not provide lesson plans, and that his emergency lesson plans were in his desk. He also requested that the district not send personnel to his residence. Pannoni requested that all further contacts be through the mail or through his attorney. He told the district that it would be illegal to withhold his pay to discipline him for not working while he was taking leave without pay due to illness.² The district made no further efforts to obtain lesson plans from Pannoni.

32. On April 29, 1999, Pannoni notified the district in writing that Dr. Taylor was on vacation until May 6. Pannoni wrote that he would not return to work until Dr. Taylor released him, which would not be until May 6 at the earliest. He also indicated that he would ask Dr. Taylor to complete the FMLA forms when he returned from his vacation.

33. On May 3, 1999, the district awarded Pannoni special recognition for outstanding teaching at the Browning Middle School. On May 6, Pannoni obtained Dr. Taylor's release to return to work on May 10, 1999, and a partially completed certification form, and forwarded these to the district.

34. On May 13, 1999, Pannoni came to the school and reported that he could not yet return to work. On May 14, the district wrote to Pannoni, with copies of the letter to his physicians, telling him that the FMLA form had not been completed and that a complete form was needed. The district again warned Pannoni that failure timely to provide the necessary information would result in the district declining to treat his absence as FMLA leave. The district also noted the discrepancy between Dr. Taylor's release effective May 10 and Pannoni's report that he could not return to work. The district acted reasonably.

² The district had not yet decided whether to treat Pannoni's absences as FMLA unpaid leave, so both parties were at this time being reasonable about the propriety of further disciplinary action for a second failure to provide lesson plans during the same school year.

35. On May 17, 1999, Pannoni made a written request for an extension of his leave. On May 18, he responded to the district's May 14 letter, indicating that Dr. Taylor would provide a complete FMLA certification form but asserting that the district had failed to provide another copy of the form with the letter. He asked that the district give another copy of the form to his wife, who worked as a teacher for the district. There is no evidence whether the district included a copy of the form with the copy it sent to Dr. Taylor of its May 14 letter to Pannoni.

36. On May 28, 1999, Dr. Taylor wrote that Pannoni was totally "ineffective" in school and most of the time at home. Dr. Taylor indicated that after he had released Pannoni to return to work on May 10, Pannoni had told him that he needed at least another two weeks off. Dr. Taylor reported that Pannoni might need to be off work until the end of the school year. After April 13, 1999, Pannoni did not return to work during the 1998-99 school year. Pannoni was absent more than 87 days during the 1998-99 school year at Browning Middle School, out of the 187 workdays,³ or about 47% of the school year. The district maintained Pannoni's health insurance coverage throughout the 1998-99 school year.

37. On July 1, 1999, the district wrote to Pannoni, enclosing another copy of the FMLA certification form and again requesting that Dr. Taylor complete the entire form. The district again warned that failure to provide the requested information could result in the district treating Pannoni's prolonged absence as unauthorized. The district also explained that it needed the medical information from Dr. Taylor and perhaps additional information before it could decide whether Pannoni suffered from a disability, for purposes of any accommodations.

38. The district adopted a specific goal of 95% attendance by teachers for the 1999-2000 school year. This goal was consistent with the district's preference that teachers not use their entire personal leave entitlements. A teacher who used one sick day and 10 ten personal leave days would have 94.2% attendance.

39. By the beginning of the 1999-2000 school year, the district had not received a completed FMLA form from Dr. Taylor. The district did not assign Pannoni to Babb. Instead, in August 1999 the district assigned Pannoni to teach full-time in the Middle School Reading Lab for the 1999-2000 school year. Although the district had not confirmed that Pannoni suffered from a disability, the district believed that the smaller numbers of students involved in

³ That figure included 14 sick/personal leave days under the employment contract.

reading lab teaching might present Pannoni with an acceptable teaching environment so that he would accept the assignment and regularly come to work. By not assigning Pannoni to a classroom, the district also hoped to reduce the impact upon students of any continued pattern of absences. The district acted reasonably.

40. The district changed Pannoni's assignment on September 13, 1999. Due to increased enrollment at the Middle School, the district needed teachers to instruct additional classes. Language arts are essential for successful schooling and living. Communication arts programs have a high priority under the OPI Montana School Accreditation Standards and Procedures. The district assigned Pannoni to teach two regular classes, social studies and language arts, at the Middle School in addition to part-time work in the reading lab. The district acted reasonably.

41. Commencing September 13, 1999, Pannoni had approximately half the student contacts of the other middle school teachers. He had one class every day and one class every other day, plus a 25-minute "home room" period of no more than 12 students for four days a week. Pannoni had the smallest student and class load of any teacher at the middle school that year.

42. Pannoni was absent Monday, September 13 and Tuesday, September 14. Middle School Principal Marion Daley met with Pannoni on September 16, and relieved him of reading lab duties and substitution for absent teachers. Daley did not assign Pannoni to committees or other teaching related duties. After September 16, Pannoni's only assignments were his two classes and his home room period.

43. Pannoni was absent 5 of the first 20 days of his teaching assignment. He was absent 17 days in the first nine weeks of school. His absences were disruptive for the students and for the orderly conduct of school business. In addition to the lost time and lack of continuity that occurred with changes of teachers, the district sometimes had to retain a non-certified person to teach the classes.

44. On September 29, 1999, Dr. Taylor sent the district a summary of the history and nature of Pannoni's depression, and endorsed Pannoni's request for transfer from Browning to Babb as a proper accommodation. Dr. Taylor acknowledged that Pannoni had ceased taking his prescribed antidepressant prior without medical advice. In his letter, Dr. Taylor addressed most of the items in the FMLA certification form. Dr. Taylor never provided the completed form to the district. He advised the district that when he last saw Pannoni, on September 13, Pannoni reported that he was starting

to slip back into his depression, because he could not handle a regular classroom with the kind of students he was encountering in Browning.

45. On October 18, 1999, by letter, the district denied Pannoni's requests that his leaves in the fall and spring of the 1998-99 school year be treated as FMLA leaves. The district relied upon Dr. Newman's report, contradictory reports from Pannoni and Dr. Taylor, and failure to provide prompt medical reports from Dr. Taylor. The district termed Pannoni's absences excessive and "extremely detrimental to the students." The district gave Pannoni notice of excessive unauthorized and unjustified leave during the prior school year and warned that any further leave abuse might be referred to the collective bargaining agreement leave committee. The district required Pannoni to provide a written doctor's excuse within three days of every absence other than personal leave. Noting that Pannoni had already taken 4.875 of his 14 sick leave days in the current school year, the district warned Pannoni it would not give him leave without pay except as required by law or contract, with a prior medical certification at the beginning of any such leave. The district further noted that Pannoni had worked insufficient hours during the previous school year to qualify for FMLA leave in the current year. The district warned Pannoni that any further unauthorized absences would subject him to disciplinary action up to and including discharge from employment.

46. In the same letter, the district notified Pannoni that Dr. Taylor's opinion (that Pannoni could teach in Babb but not Browning) was in conflict with Dr. Newman's evaluation the previous year, justifying seeking a third opinion at the district's expense. The district again identified three physicians it considered acceptable for such a third opinion, and asked Pannoni to provide, within five days, a written statement of his current health and his suggestions about getting a third opinion. The district actions (described in findings 45 and 46) were reasonable.

47. On October 21 and 22, Pannoni failed to attend teacher workshops (PIR days) without meeting the conditions of the district's October 18 letter. On October 25, 1999, Pannoni was involved in a dispute with unruly students at the Middle School. Upset and wanting to go home, he started to write a leave report and left after Mad Plume (again his immediate supervisor)⁴ told him to go home. She thought he had completed the leave report, but he had not. Pannoni advised the Middle School he would not be back at work during the week of October 25-29. On October 26, Principal Daley prepared a leave investigation report based upon the absences starting on October 21, and

⁴ The district had transferred Mad Plume from Babb to Browning Middle School (as vice-principal) for the 1998-99 school year.

referencing Pannoni's prior absences during the current school year and the two previous school years. The district sent Pannoni a letter (certified, regular mail and hand-delivered) reprimanding him for taking unauthorized leave on October 21-22, failing to complete the proper leave form on October 25⁵ and proposing to remain off work without proper authorization for the rest of the week. The district required Pannoni to provide medical documentation by October 29 for his absence on October 25 through October 29. The district gave Pannoni notice it was now referring him to the collective bargaining agreement leave committee. The district acted reasonably.

48. On October 29, 1999, the district notified Pannoni in writing that a leave committee hearing on whether Pannoni had abused his leave entitlement would convene on November 2, 1999, pointing out that in accord with the leave committee agreement reached between the district and the union, no representation of parties to the dispute was permissible during the hearing. Since the district relied upon the terms of the addendum to the collective bargaining agreement that implemented the leave committee procedures, the district's actions were reasonable.

49. On October 29, Pannoni responded to the district in writing, requesting that the district return him to his original Middle School assignment in the reading lab, and that his hours be 9:00 a.m. to 3:00 p.m. Tuesday through Friday. He also objected to the leave committee hearing as unreasonable and a violation of his rights. He named three doctors for a third opinion, none of whom were included in the district's list.

50. On October 29, Dr. Taylor wrote a letter on Pannoni's behalf stating that an "extremely severe disturbance" in Pannoni's classroom on October 25 upset Pannoni greatly, "necessitating that he leave the classroom" and causing him to have panic attacks and anxiety rendering him unable to return to work the rest of the week. Dr. Taylor also stated that Pannoni believed he might be able to handle a modified work week with shorter days or a decreased workload but that Pannoni was "certainly unable to continue at his present pace in the present condition." Pannoni did not return to work the week of November 1-5, 1999.

51. On November 1, 1999, the district hand-delivered a written response to Pannoni. The district rejected Pannoni's three proposed doctors because they were "not Montana certified" and had no identified expertise in depression and anxiety disorders. The district suggested either of two Montana psychiatrists, Dr. Victor Hauser in Kalispell or Dr. Nathan Munn in

⁵ Mad Plume had not documented her directions to Pannoni to go home.

Helena. The district reprimanded Pannoni, suspended him without pay for one day and gave him notice it would withhold his pay for his unauthorized absences on October 21 and 22. The district reasoned, in taking this disciplinary action, both that the PIR days did not involve classroom work and therefore could not have caused anxiety or depression, and that Pannoni had not timely provided medical documentation of illness for those days. The district required Pannoni to submit a detailed written report of the October 25 classroom incident by November 4. The district postponed the leave committee hearing, for later discussion after the third medical evaluation. The district declined to consider the accommodation request for no classroom work, a four-day work week and shorter hours until after the third medical evaluation. The district acted reasonably.

52. On November 3, 1999, Pannoni wrote a letter to the district agreeing to evaluation by either of two psychiatrists suggested by the district. He also asserted that his absences on October 21 and 22 were the result of his medical condition,⁶ and asked the district to reconsider its disciplinary action. Finally, he identified two other district employees to whom he reported the October 25 incident, but he did not provide any details about the incident.

53. On November 8, the district sent Pannoni written notice that he had an appointment with Dr. Hauser in Kalispell on Monday, November 22. Pannoni returned to work the week of November 8-12, 1999. He did not work the week of November 15-19, 1999. On Wednesday, November 17, Dr. Taylor notified the district that Pannoni was too ill to work that week.

54. After November 12, 1999, the only work time the district credited to Pannoni for the rest of the 1999-2000 school year was PIR time on November 24, 1999, for parent-teacher conferences and two school-related days for appointments with psychiatrists at the district's expense.

55. During November and early December, Pannoni avoided Principal Daley's calls. When he called the school and she asked to speak to him, he declined to do so and hung up or (in one instance) hung up before she could come to the phone. When she called him, he neither answered nor returned her calls. The district continued its practice of mailing, faxing and hand-delivering documents to Pannoni, as well as sometimes giving them to his wife who taught for the district, in an effort to assure that Pannoni timely received documents it sent to him. The district acted reasonably.

⁶ Pannoni throughout his dealings with the district and in his testimony at hearing preferred to call his depression his "condition." He was extremely uncomfortable in talking directly about his feelings of depression or anger, and whenever possible he avoided describing or showing any of his feelings.

56. On November 22, Pannoni drove to Kalispell, but Dr. Hauser's office had no appointment scheduled for him, due apparently to a mistake by the district in failing to confirm the appointment. The resulting delay in obtaining a third opinion was due to administrative inadvertance on the district's part. The district credited Pannoni with a school-related work day.

57. The district subsequently arranged for Dr. Alan Quint, another Kalispell psychiatrist, to evaluate Pannoni on December 17, 1999. Before the appointment, Pannoni contacted Dr. Quint by telephone, and Dr. Quint subsequently declined to perform the evaluation. The resulting delay in obtaining a third opinion resulted from Pannoni's contact with Dr. Quint, which apparently caused Dr. Quint's subsequent unwillingness to proceed.

58. On December 15, 1999, Dr. Taylor submitted a statement stating that he had advised Pannoni not to return to work until that date. Pannoni did not return to work.

59. On December 22, 1999, the district hired Dr. Munn, a competent and experienced psychiatrist licensed to practice in Montana, to evaluate Pannoni. On December 26, 1999, Pannoni signed a release authorizing Dr. Munn to obtain information from Dr. Taylor and Dr. Newman. Pannoni and his wife met with Dr. Munn on January 5, 2000, after Dr. Munn had obtained the medical records. Dr. Munn interviewed Pannoni and separately interviewed his wife. Dr. Munn reported that Pannoni suffered from recurring major depression and anxiety most likely associated with his depression. He confirmed that Pannoni suffered from a serious health condition under the FMLA, and that as of January 2000 Pannoni was incapacitated and unable to work due to his depression. Dr. Munn concluded that Pannoni needed treatment for his depression and that a transfer back to Babb would not suffice.

60. Dr. Munn did not consider the course of treatment from Dr. Taylor to be effective and sufficient to address Pannoni's major depressive episode. Sporadic meetings with a family practitioner and short interrupted trials with antidepressants were not standard adequate methods to treat major depression. Dr. Munn's experience with properly treated recurring major depression led him to believe that the long-term prognosis for Pannoni returning to teaching was good, if Pannoni obtained proper sustained treatment.

61. During his prolonged absences from the Middle School, on and after January 2000, Pannoni worked in a family-operated cabin rental. His limited ability to work in that business was representative of his ability to function in a workplace other than a school. As of January 5, 2000, Pannoni suffered from a mental impairment that substantially limited his ability to work productively

in any teaching job. His depression substantially limited his ability to work in a broad range of jobs outside of teaching as well as limiting his ability to work in the broad class of teaching jobs.

62. On January 11, 2000, Pannoni requested an accommodation consisting of return to his original 1999-2000 reading lab assignment, with no other duties except to serve as a short-term substitute teacher for absent teachers at the Middle School. Pannoni offered no new medical documentation that he could perform such a job, instead requesting that the district contact Dr. Munn if it had any questions about accommodation.

63. After the January 11 request, District Personnel Director Ken Werner and Principal Daley met with Pannoni to discuss an accommodation. On January 19, 2000, the district proposed a temporary accommodation which it believed was consistent with what Pannoni had discussed with Werner and Daley. Pannoni rejected the temporary accommodation, stated his reasons, and again proposed the accommodation he had requested on January 11. The district responded on January 28, explaining why it could not reasonably return Pannoni to his original pre-September 13 assignment, and raising the question of medical verification that Pannoni could currently perform any teaching job. The district asked Pannoni to notify Daley or Werner if he was willing to consider a non-teaching job. The district offered Pannoni either the morning half or the afternoon half of his post-September 13 assignment, as a half-time position. The district requested that Pannoni provide documentation to verify that he was commencing the treatment recommended by Dr. Munn, that the treating physician agreed with Dr. Munn's prognosis for recovery and that Pannoni would authorize the treating physician to provide regular reports of progress and prognosis.

64. On January 30, 2000, Pannoni proposed that he work part-time from 8:00 a.m. to the end of third period (around 2:00 p.m.) as a "3/4 time" position. The district responded on February 2 that the proposal would only address the morning class portion of Pannoni's post-September 13 assignment, so that the district would still have to hire a substitute to cover the afternoon class portion of that assignment. The district reoffered the half-time morning accommodation, as a temporary accommodation while Pannoni began treatment. The district again included the verifications it had proposed on January 28 as a condition upon the half-time morning accommodation.

65. On February 4, Pannoni rejected the accommodation, asserting that the requirement that he receive treatment at least twice a month from a psychiatrist to maintain the temporary accommodation was illegal, and that it was not an undue hardship for the district to cover Pannoni's afternoon class

with another teacher or aide. Pannoni requested an additional leave to the end of the school year.

66. The district responded on February 11, disagreeing with Pannoni's assertions and offering the "3/4 time" position Pannoni had proposed on January 30. The district qualified its offer by defining the position as temporary, available only while Pannoni was beginning treatment. The district again conditioned the offer upon the same verifications previously required. The district offered the accommodation for one month, with reevaluation on March 10 to determine whether to maintain the accommodation or amend it to expand Pannoni's duties. The district also proposed that Pannoni begin to pay 1/4th of his health insurance premium, which the district had continued to pay through the end of January.

67. On February 14, Pannoni responded that he accepted the 3/4 time position, except that the district was not entitled to require the verifications. Pannoni also argued that unless the cost of two party health insurance coverage for Pannoni and his wife exceeded one and 3/4ths the amount the district contributed for health insurance coverage for each full-time teacher, Pannoni should not pay any part of the coverage. Pannoni requested authorization to return to work as soon as his present health care provider released him.

68. On February 18, 2000, the district responded that according to Dr. Munn, without ongoing treatment Pannoni could not perform the essential functions of teaching in the district. The district explained that its proposed temporary accommodation was intended to provide Pannoni a chance to get treatment and resume work activities until he was able to perform all of the essential functions of his job. The district argued that such an accommodation would not be measured by the law governing an employee with a disability who could perform all of the essential job functions with an accommodation, and that therefore it was properly insisting upon the information regarding ongoing treatment. The district also requested that Pannoni provide "whatever information" he was "willing to submit in order to assist" the district in determining his current condition (including fitness to teach) and when he would be able to resume all the essential functions of his job.

69. On February 22, 2000, Pannoni requested leave without pay for the remainder of the school year. He asserted that Dr. Munn's recommendation did not specifically require psychiatric treatment, but merely treatment by an appropriate mental health care provider, and that he was obtaining such treatment. He enclosed a note from Chris Sunderland, a clinical social worker in Alberta, confirming that he was treating Pannoni, had seen him three times and that Pannoni was receiving ongoing medication. Sunderland's letter

supported a leave of absence for Pannoni for the balance of the school year, with an evaluation in September regarding his fitness to return to work.

70. On March 2, 2000, the district responded by proposing (and subsequently authorizing) an additional leave of absence for Pannoni through April 7, 2000. The district told Pannoni that a longer leave would make it virtually impossible for the district to hire a replacement certified teacher if Pannoni were not able to return to work in September. The district also provided a job description, asking that Pannoni provide the treating health care professional's statement of Pannoni's ability to perform the essential functions of his job (with or without accommodation) by March 31, 2000. The district also gave notice that Pannoni's insurance coverage terminated on February 29, 2000, and that he had the right to continue the coverage at his own expense (the district would resume making the payments upon his return to work).

71. During the entire interactive process in which Pannoni and the district attempted first to verify his disability and then to identify and to implement appropriate reasonable accommodations, the district acted reasonably.

72. On April 7, 2000, Pannoni requested a continuation of his leave to the end of the school year. He enclosed a letter from Sunderland, confirming that Pannoni had seen a psychiatrist in Cardston, Alberta, had continued with medication and psychotherapy, should continue to be absent from work for "the next couple of months," and that Pannoni should be fully able to work in August 2000. Sunderland's letter ended with an invitation to call if the district had any questions.

73. On April 14, 2000, Werner telephoned Sunderland, without Pannoni's knowledge or consent. Werner reasonably concluded that since Pannoni had provided medical documentation, including the letter in which Sunderland invited such a call, that Pannoni had already consented to the district contacting Sunderland. Also, Pannoni had previously asked the district to contact his doctor (Taylor) directly if it had further questions about his condition. Werner asked Sunderland about Pannoni's status, and understood Sunderland to confirm that Pannoni could return to work in May or June, but that Pannoni preferred to wait until August. On April 20, 2000, the district faxed to Pannoni a letter denying his further leave request and requesting him to return to work on May 1, based upon what Werner understood Sunderland to say. The district gave Pannoni notice that failure to report for work as requested on May 1 would result in a recommendation to the district's board for termination of Pannoni's employment. That same day, Sunderland wrote to Pannoni and stated that he had told Werner that his recommendation was

that Pannoni return to work in August 2000, not May 1, 2000. Pannoni provided that letter to the district.

74. On April 26, 2000, Pannoni received confirmation that his wife's insurance would cover him.

75. On May 1, 2000, Pannoni provided Sunderland's April 20 letter to the district and renewed his request for leave through the remainder of the school year. The district responded on May 2, reasserting that Sunderland's comments to Werner justified a request for Pannoni to return to work at the beginning of May, in order to give Pannoni every opportunity to come back to work. The district noted that it still had no documentation of what job functions Pannoni could not presently perform nor of what accommodations he might seek to be able to perform the essential functions of his job.

76. On May 8, 2000, Pannoni responded and disagreed with the district's position on whether contact with Sunderland was proper, what Sunderland said, whether the district had the information it needed and whether the district had the right to disclose any of Pannoni's medical information to the school board.

77. Pannoni was absent more than 137 days of the 1999-2000 school year, out of 178 workdays.

78. On May 10, 2000, Superintendent Smyth recommended that the school board terminate Pannoni's employment because of excessive absence during the current school year. Smyth advised the board that Pannoni asserted a medical condition was preventing him from working, and that his therapist and Pannoni both expected he would be able to return to work in August. Smyth noted that Pannoni and his doctor had expressed the same views at the end of the previous school year. Smyth went on to explain to the board that Pannoni's absences during the past two years at the Middle School had resulted in coverage of his classes by a non-certified teacher and that Smyth believed the district needed a permanent certified teacher in Pannoni's position and could not wait longer for his return to his position. On May 11, the district delivered to Pannoni a notice of the recommendation for termination.

79. On May 16, 2000, Pannoni waived his right to a hearing before the school board and submitted a seven-page letter to the board in opposition to Smyth's recommendation. Pannoni told the board that his health care providers supported his request for a leave of absence and predicted that he could return to work in August 2000. He also told the board it need not terminate his employment at that time in order to recruit a replacement for the 2000-01 school year, since it could hire a new teacher now and, if it had no

other openings after Pannoni's return, it could lay off the non-tenured new teacher.

80. On May 23, 2000, the board of trustees voted four to two, with one abstention and one absence, to terminate Pannoni's employment. The district's administrative employees, including Smyth and Werner, reasonably provided the board with appropriate information to decide the question. They did not provide the board with any confidential medical information about Pannoni. The board did not act out of discriminatory animus, and reasonably relied upon the information provided.

IV. Opinion

Montana law prohibits discrimination against employees based on a physical or mental disability. §49-2-303(1)(a) MCA. A disability is a physical or mental impairment that substantially limits one or more of a person's major life activities. §49-2-101(19)(a), MCA. If Pannoni suffered from a disability, then the district had a duty to provide a reasonable accommodation if with such an accommodation Pannoni could perform the essential job functions of position.⁷ §49-2-101(19)(b), MCA; 24.9.606(2) A.R.M.⁸

Pannoni suffered, at least from January 2000 through the termination of his employment, from major depression. Although Pannoni suffered from recurrent depression before he saw Dr. Munn, Dr. Newman's report from October 1998 leaves a question about the degree to which Pannoni was depressed rather than angry with the district at some earlier points in time.⁹ The time during which he was more likely than not suffering from major disabling depression apparently started after Dr. Newman's evaluation and probably did not begin sooner than April 1999 or the fall of 1999. *See* Findings of Fact Nos. 25 and 59-61. Whenever this episode of major depression began, there is no doubt that by January 2000, Pannoni's depression disabled him.

⁷ A term of law, drawn from federal law, to describe a person with a disability who can perform the essential functions of his job, with or without a reasonable accommodation, is "an otherwise qualified individual," often shortened to "qualified individual," as discussed *infra*.

⁸ The provisions of sub-chapter 6 of the Commission's rules, including section 603, apply to this contested case before the department. 24.9.107(1)(b) A.R.M.

⁹ The hearing examiner admitted (over hearsay objections) medical records whose authors (the treating professionals) did not testify, to prove notice of the reports. Since the reports cannot prove the truth of their contents, they do not establish when Pannoni first suffered from a disabling recurrence of his depression.

Work is one of the major life activities. *Martinell v. Montana Power Co.*, 268 Mont. 292, 304, 886 P.2d 421, 428 (1994). A mental impairment can be a mental or psychological disorder, including an emotional or mental illness such as major depression. *Id.* at 303, 886 P.2d at 428, *citing and applying* 29 C.F.R. 1613.702(b)(2) (1993); *see also*, *Walker v. Montana Power Co.*, 278 Mont. 344, 349, 924 P.2d 1339, 1342 (1996) (affirming jury verdict of no disability but recognizing that depression can result in a disability). Pannoni's depression did prevent him from working as a teacher, and even interfered with his ability to clean and maintain rental cabins, a job that he probably could only have performed for his own family business. Pannoni suffered from a disability.

A key question in this case is whether Pannoni was a qualified person. A person with a disability is qualified to hold an employment position if he can perform the essential job functions of that position with or without a reasonable accommodation. 24.9.606(2) A.R.M. If Pannoni was unable to perform the essential job functions of teaching in the district, even with a reasonable accommodation, he was not a qualified person. He had the burden to prove he could perform the essential job functions for his position, as part of his burden to prove that he was a qualified person. *Heiat v. East. Mont. College*, 275 Mont. 322, 327, 912 P.2d 787, 791 (1996).

The district's business was to provide a basic system of free quality education to its students, in compliance with the dictates of the legislature. Art. X, §1, Mont. Constitution (1972). An essential job function for the teachers the district hired to provide this education was regular attendance. Without regular teacher attendance, the quality of education provided could be compromised. The efforts the district made to improve teacher attendance were clear and uncontroverted. The willingness of the district to work with a teacher with a long-term attendance problem resulting from injury or disease or other good cause was well defined. So long as the absence could be defined in advance and scheduled (within one or more school years, within one or more school terms) for coverage that allowed continuity of instruction for the students, the district would try to provide the teacher an opportunity to come back. But nonetheless, the district reasonably and properly viewed showing up consistently for work as an essential job function for its teachers. A teacher who could not regularly show up for work, and who was unpredictably absent for indefinite and sometimes prolonged periods of time was not performing one of the critical functions of the job—providing continuity and consistency to the students that teacher was assigned to instruct.

Regular attendance at work is generally an essential job function, for obvious reasons. *E.g.*, *Jovanovic v. In-Sink-Erator*, 201 F.3d 894, 899-900

(7th Cir. 2000); *Waggoner v. Olin Corp.*, 169 F.3d 481, 484-85 (7th Cir.1999); *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445 (8th Cir.1998); *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir.1996); *Lyons v. Legal Aid Society*, 68 F.3d 1512, 1516 (2d Cir.1995); *Tyndall v. Nat'l Educ. Ctrs.*, 31 F.3d 209, 213 (4th Cir.1994); *Carr v. Reno*, 23 F.3d 525, 530 (D.C.Cir.1994).¹⁰ In this case, the district presented convincing evidence that for its teachers, regular attendance was even more critical than it ordinarily would be. A prolonged, erratic pattern of numerous absences was impossible for the district to accommodate. A defined prolonged absence for good cause was difficult but potentially workable. Pannoni presented the district with the former problem.¹¹

Pannoni's depression rendered it impossible for him regularly to show up and teach. His health care providers repeatedly provided return to work dates and projected dates, and even releases to work, but Pannoni often was unable to come to work despite the medical releases and information. The district went several extra miles to work with Pannoni to provide a means for him to return to work. Unfortunately, the very nature of his disability sometimes paralyzed him and forced him into an isolation that frustrated the district's efforts to communicate with him. He saw the district's efforts as persecution, and retreated further. He saw the district's insistence that he get effective treatment if he was to return to teaching as an invasion of his privacy. In his fight to protect himself from the district's perceived hostility, Pannoni delayed his own treatment and may have prolonged his depression. His depression continued to prevent his regular, or eventually even irregular, attendance at the district. Pannoni's genuine inability to keep showing up every school day rendered him unqualified, and thereby outside of the scope of any duty to provide reasonable accommodation.

Pannoni did not prove that he could have shown up for work every day if he had been transferred back to Babb. Dr. Munn did not recommend that the district do so. Given the earlier conflicting opinions of Dr. Taylor and Dr. Newman, and the progression of Pannoni's depression and absenteeism, it is not probable (more likely than not) that Pannoni could have shown up for work every day with such a transfer. Without a finding that he could have,

¹⁰ Montana follows federal law if the same rationale applies. *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813 (1988); *Johnson v. Bozeman School District*, 226 Mont. 134, 734 P.2d 209 (1987).

¹¹ *See Kluesner v. St. Matthews School*, HRC Case No. 9501007057 (April 2000) for a case involving a time frame similar to Pannoni's during the 1999-2000 school year. Kluesner had neither a history of prior absences, nor repeated prior work releases that the teacher then did not follow.

which the evidence does not support, Pannoni failed to establish an entitlement to any accommodation because, once more, he was not a qualified individual.

A leave of absence can be a reasonable accommodation in other fact situations. Here, Pannoni had already established a pattern of excessive absences extending well beyond return to work dates provided by his health care professionals. The district reasonably concluded that it could not rely upon yet another assurance from such providers that this time Pannoni would likely be able to return to a full teaching load if only once more the school would extend his leave until the fall of 2000. The district also reasonably concluded that it could not without undue hardship to its students continue to provide interim coverage for Pannoni's classes, with no assurance that he would return and maintain his attendance in the fall of 2000. The district could have done what it ultimately did (terminate Pannoni's employment during the 1999-2000 school year and hire a new teacher for the next year) without offering what it termed a "temporary accommodation." It chose to go beyond its legal obligations in an effort to reclaim a teacher who had performed well for the district in the past. Going beyond its legal obligations did not extend those obligations. The district dealt reasonably with Pannoni.

Because Pannoni was not a qualified individual, a number of hotly contested issues are not relevant to his claim of discrimination due to refusal to accommodate. The reasonableness of the district's efforts to accommodate is at best marginally relevant, for example, because it had no obligation to do so, but it did do so reasonably. The argument, from EEOC regulations, that the district could not require Pannoni to document on-going treatment in order to maintain a temporary accommodation is irrelevant, because Pannoni was not entitled to any accommodation.

The reasonableness of Werner's assumption that since Sundland invited further inquiries, Pannoni had consented to such further contact is also irrelevant to the accommodation issue. It is relevant to Pannoni's claim of retaliation and arguably to his general claim of discrimination due to disability.

Montana law bans retaliation against a person who opposes discrimination the Human Rights Act prohibits, files a discrimination complaint under the Act or participates in a proceeding under the Act. §49-2-301 MCA; *Mahan v. Farmers Union Central Exch., Inc.*, 235 Mont. 410, 422, 768 P.2d 850, 857-58 (1989). The elements of a retaliation claim are (1) proof that Pannoni engaged in activities the Human Rights Act protects; (2) proof that the district subjected him to significant adverse acts and

(3) proof of a causal connection between the significant adverse acts and the protected activities under the Act. 24.9.603(1) A.R.M.

Pannoni's requests for accommodation arguably constitute protected activity, and the reason Werner contacted Sunderland was the accommodation requests. However, even if Pannoni proved the first and third elements of a retaliation claim, Werner's contact was not *per se* an adverse employment action. The district should have obtained written consent from Pannoni for the contact, however it reasonably relied upon Sunderland's invitation for the contact. In the context of Pannoni's prior requests that the district contact his doctor if had further questions about his condition, the district did not take *per se* adverse employment action by contacting Sunderland.¹² Because any alleged invasion of privacy was not in the context of illegal discrimination, Smyth and Werner were not liable because of the input they provided to the board on Pannoni's proposed termination. They did not violate Pannoni's privacy with the information they did provide. They gave little weight to Pannoni's arguments against termination, but they were correct in so doing. All of the district's actions, including those of Werner and Smyth, were proper and reasonable.

The hearing examiner also need not address Pannoni's argument that the department has jurisdiction over his ADA claim. Even if the department could somehow exercise jurisdiction beyond that accorded under the Montana Human Rights Act, it would not alter the outcome here, since the ADA analysis would also result in a finding that Pannoni was not otherwise qualified, which would then lead to the same result.

The district may have contributed to the delay in obtaining a third medical opinion. The district did deny Pannoni's requests for FMLA leave treatment of his absences in the 1998-99 school year before obtaining that third opinion. However, Pannoni's failure to pursue the third medical opinion question after he returned to work on November 18, 1998, left him primarily responsible for the delay in pursuit of the third opinion until he again requested leave in April. Pannoni specifically told the district that Dr. Taylor's release for work in November superseded Dr. Taylor's previous opinions. He took no action to select a physician from the three the district had offered, or to identify other physicians. Had Pannoni given the district any reason to

¹² The district took adverse actions, such as disciplining Pannoni, refusing the specific accommodations he sought and terminating his employment, but for each of those actions the district presented a legitimate non-discriminatory business reason—the need for teacher attendance—which negated the causal connection between protected activity and adverse employment action.

believe he still wanted to resolve the conflict between Dr. Taylor's opinions and Dr. Newman's opinions, the district would have proceeded with the third evaluation.

Ultimately, the question of the delay in obtaining the third opinion is irrelevant. Even if the district had treated some of Pannoni's absences during 1998-99 as FMLA leave without pay, no different outcome would result, because he still was not a qualified individual. The district paid its employer's share of his health insurance for that year. No significant adverse consequences arose for Pannoni because of the delay in obtaining Dr. Munn's evaluation.

The tragedy of this case is that Russell Pannoni, on this record, was a good teacher. Good teachers are far too rare to squander. Despite making efforts that went well beyond its legal duties, the district could not find common ground with Pannoni to work him back into teaching. Pannoni lost as a result. But the district and its students also lost a teacher, and that is a loss that they can ill afford.

V. Conclusions of Law

1. The Department of Labor and Industry has jurisdiction over this case. §49-2-509(7) MCA.

2. Pannoni did suffer from a disability, however, he was not otherwise a qualified person and the district had legitimate business reasons for its adverse employment actions, including the acts of Werner and Smyth. §§49-2-301 and 49-2-303 MCA.

3. Respondents did not illegally discriminate against Pannoni by reason of his disability in denying his requests for leaves of absence, refusing the accommodations he proposed, offering alternative accommodations and ultimately terminating his employment effective on May 23, 2000. §49-2-509(7) MCA.

VI. Order

1. Judgment is found in favor of the Board of Trustees, Browning School District No. 9, Superintendent Steve Smyth and District Personnel Director Ken Werner and against Russell Pannoni on the charge that the

respondents illegally discriminated against Pannoni by reason of his disability and retaliated against him.

2. The complaint is dismissed.

Dated: November 15, 2001.

/s/ TERRY SPEAR
TERRY SPEAR, HEARING EXAMINER
Montana Department of Labor and Industry