BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0094013798:

TIFONIE SCHILLING O/B/O GS,	) Case No. 1207-2010
	)
Charging Party,	)
	) HEARINGS OFFICER DECISION
vs.	) AND NOTICE OF ISSUANCE OF
	) ADMINISTRATIVE DECISION
GREAT FALLS PUBLIC SCHOOL DISTRICT #1,	)
	)
Respondent.	)

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I. PROCEDURE AND PRELIMINARY MATTERS

Tifonie Schilling as next friend of GS filed a human rights complaint against the Great Falls School District alleging that the district discriminated against GS in the provision of educational services in violation of Mont. Code Ann. § 49-2-307.

Hearings Officer Gregory L. Hanchett held a contested case hearing in this matter on November 15, 16, 17, 18, 22 and 23, 2010 in Great Falls, Montana. Randy Tarum, attorney at law, represented the charging party. David Dalthorp and Julie Johnson, attorneys at law, represented the respondent. Tifonie Schilling, Jennifer Wasilewski, Tammy Lacey, Dr. Susan Dixon, Dr. Gilbert Kliman, Gretchen Watkins, Laurie Hoff, Jeff Brainard, Sherri Widhalm, HH, Jennifer Gundlach, Jenny Gooldy, Yvette Jordan, Rosie Comes, Jane Gregoire, DJS, Julie Parish, Pam Kampfer, Bobbie Sue Talmage, Sharon Patton-Griffin and David Sergent all testified under oath. In addition, the depositions of Tom Considine and Dr. Sam Goldstein were admitted into evidence for the hearings officer to consider as hearing testimony. Charging Party's Exhibits 2, 3, 4-5, 4-12, 4-31, 5-49 through 5.54, 5-61, 5-51, 6-1 through 6-3, 7-46, 7-47, 16-23, 16-24, 23-1 and Respondent's Exhibits 101, 102, 110, 119 through 138, 141 through 149 and 155 were admitted into evidence.

The parties filed post-hearing briefs, the last of which was timely received on February 22, 2011. On May 11, 2011, the school district filed a motion to reopen

the evidence to permit additional testimony from Julie Parish regarding an incident involving GS purportedly smiling at her from a car and, in Parish's perception, mouthing the words "Miss Julie." This information was reported to the school district's counsel on March 17, 2011 but the school district's motion was not filed until almost two months after the information was received. While this tribunal most likely has the authority to reopen the hearing, the hearings officer declines to do so. The evidence, even if taken at face value, is essentially cumulative and would have minimal if any impact on the case. Such evidence cannot serve as a basis for reopening the hearing. Cf., Bushnell v.Cook, 221 Mont. 296, 718 P.2d 665 (1986)(Cumulative evidence does not provide a proper basis for granting a new trial).

Based on the arguments and evidence adduced at hearing as well as the parties' post-hearing briefing, the hearings officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUES

1. Did Great Falls School District discriminate against GS in the terms, conditions or privileges of education because of his disability in violation of Mont. Code Ann. §49-2-307(1)?

2. If discrimination occurred what are the proper remedies?

III. FINDINGS OF FACT

1. GS has Fragile X which is a genetic condition on the autism spectrum. GS has limited means of communication and a very low level of functioning. GS lives with his mother and father and two younger brothers. GS's youngest brother also has Fragile X. GS is currently 16 years old and has the cognitive abilities of a 3-year old.

2. GS is severely disabled and a member of a protected class under the Montana Human Rights Act.

3. GS's doctor, Dr. Dixon, has been involved with treating GS since GS was three years old. Dixon's first visits with GS occurred in 1998. After a five-year hiatus, the Schillings brought GS back to Dixon for treatment in 2004. Dr. Dixon is a Behavioral and Developmental pediatrician.

4. By May of 2004, GS was integrating into some regular education classes. GS exhibited behaviors for a child with Fragile X that would wax and wane. These behaviors included, tiredness, crying, whimpering, obsessive compulsive behaviors, tantrums, occasional aggression, stimming behaviors and biting his finger. They also included lack of bladder and bowel control.

5. During an office visit in 2004, Dixon noted that GS "seems to have defecation in response to stress." Exhibit 121. Dixon also noted at that visit that GS was "extremely busy" and that he needed to be removed from the office in order to have any conversation at all." Dixon's description included the facts that GS "hides under the table, does some flapping behaviors, toe walking and crouches down to defecate."

6. In 2004, GS had angry outbursts and started hitting himself regularly. He did a lot more hand flapping and started hitting himself regularly when he was angry.

7. On September 24, 2004, Schilling contacted Dixon to report that GS's behavior had changed since he started a new school (not North Middle School). Dixon further reported that "there has been a lot of changes and it has been a difficult transition for [GS]." Exhibit 125.

8. During Dixon's visit with GS on September 20, 2005, Dixon noted that GS "has a little bit of reduction of toenails and fingernails because of his picking and a little bit of swelling of the PIP joint relative to where he has been biting it on the first index finger of his right hand." Exhibit 126.

9. On December 15, 2005, Schilling called on two occasions to complain about deteriorations in GS's behavior. Specifically, Schilling noted that GS was wearing ten pairs of underwear and ten pairs of socks which "created problems in terms of toileting accidents." Dixon further noted that Schilling reported that GS wanted to change clothes at school and that when he was not allowed to do so, "he intentionally urinated on himself." Exhibit 127.

10. During GS's visit with Dixon on May 25, 2006, Dixon noted that GS was"much more oppositional overall," and he was "a bit more aggressive." Dixon also noted that "GS's compulsive behavior about putting on multiple clothes layers, as well as changing clothes frequently was reported in the school and he managed to get around that by wetting himself." Dixon went on to note that GS "had been doing more biting of himself as well as hitting of himself most recently." Exhibit 129.

11. On September 13, 2006, GS's medical progress note indicated that GS came into the doctor "for urinary frequency during the day, " noting that he was having increasing episodes of incontinence . . ." Exhibit 130.

12. GS was apprehensive about going to any school. When he was frustrated, GS had episodes of tantrums, screaming and hitting himself.

13. GS had the stimming behaviors of hand flapping and grimacing and he would bite his knuckle. GS would experience substantial increase in his disruptive behaviors during transitions into new environments.

14. The Great Falls School District No. 1 is an educational institution as defined by the Montana Human Rights Act. At all pertinent times hereto, GS was enrolled as a special education student in the Great Falls School District.

15. The school district employees involved in the instant matter are as follows:

Tammy Lacey, human resources officer for the Great Falls School District

Rosie Comes, special education coordinator for Great Falls Public Schools

Drew Uecker, special education coordinator for Great Falls Public Schools

Sharon Lindstrom, special education director, Great Falls Public Schools

Louise Saltz, secretary to special education director Sharon Lindstrom

Jane Gregoire, principal at North Middle School

Sharon Patton-Griffin, vice-principal at North Middle School

Jennifer Gundlach, special education teacher/department chair for special education at North Middle School

Heidi Budeau, Room 311 special education teacher at North Middle School

Lori Hoff, teacher on special assignment at North Middle School

Jodi McGaugh, special education teacher at East Middle School

Bobbie Sue Talmage, special education teacher at Great Falls High School

Kristie Anderson, special education teacher at Great Falls High School

Lynn Coons, speech therapist at North Middle School

Sue Naperstek, speech therapist at North Middle School

Pam Kampfer, school counselor at North Middle School

Jeff Brainard, special education paraprofessional substitute at North Middle School

Kristie Kallies, paraprofessional in Room 311 at North Middle School

Julie Parish, paraprofessional in Room 311 at North Middle School

Tom Considine, paraprofessional in Room 311 at North Middle School

Gretchen Watkins, substitute paraprofessional at North Middle School

Jennifer Wasilewski, substitute paraprofessional at North Middle School

Sharon Widhalm, speech therapist intern at North Middle School

16. Of the above named persons, Lacey, Comes, Uecker, Lindstrom, Gregoire and Patton-Griffin are the only administrators. They alone have the power to discipline subordinate employees for misconduct. They also share the responsibility for investigating complaints regarding employees.

17. Under state law, any teacher or administrator suspecting abuse is required to report such abuse to the Department of Child and Family Services Division of the Montana Department of Health and Human Services (CFS). The Great Falls School District has incorporated this requirement into its policies for reporting abuse that it distributes to its teaching employees. Under this policy, all district employees are required to report suspected abuse (1) to CFS and (2) to the principal of the school. The reporting policies expressly state that reporting abuse or suspected abuse to the principal is not enough and abuse needs to be reported to an outside agency.

18. The school district provides a document to its teachers and paraprofessionals entitled "Reporting Child Abuse and Neglect Procedures." Exhibit 155. Each teacher and paraprofessional is required to sign a document indicating that they have reviewed the procedures. All of the teachers and assistants involved in this case were aware of the reporting requirements at all times material to this case. In addition, Great Falls School District Board policy (as demonstrated by the testimony of the witnesses) specifically prohibits harassment or abuse by students or staff. No employee was authorized to punish any student through abuse.

19. In the Fall of 2007, GS was enrolled at East Middle School.

20. GS's medical progress note from October 18, 2007, prior to his transfer to North Middle School, indicated that GS's transition to East Middle School was 'extremely difficult. . . and [GS's] behavior was extremely out of control." Exhibit 133. His behavior included stripping his clothes in hallways." He was also "crying and extremely resistant to going to school." Indeed, Schilling had to negotiate for a bus parking spot in order to get GS into the school building. Dr. Dixon noted that during the office visit, GS's behavior was "really quite disruptive." Id.

21. Schilling felt that GS's teacher at East was inexperienced and not able to work effectively with GS. As a result, Schilling requested that GS be transferred to teacher Heidi Budeau's special education classroom at North Middle School, Room 311. Budeau was the classroom teacher and also the Department Chair for Special Education for North Middle School. Julie Parish and Maxima Cox were paraprofessionals that were assigned to Room 311 to assist Budeau with the students.

22. GS experienced some increase in his typical behaviors after beginning to attend classes in Room 311. In October 2007, GS's behaviors were noted as being "moderately under good control."

23. Budeau had been recognized as a good teacher when she was at East. However, after she transferred to North, and most significantly in the Fall of 2008, her personal and professional life began to deteriorate and she stopped being an effective teacher, giving more of the classroom responsibilities to the para-professionals.

24. By January 10, 2008, GS began suffering from endocrinisis (soiling his pants), having tantrums, and refusing to do work in school. Budeau was reporting that he was vomiting at school to get out of doing his school work.

25. On January 31, 2008 GS's Individual Education Plan (IEP) meeting was held at North. His parents listed his strengths as being a happy kid, with a sense of humor, who is energetic, and a social bug. District employees indicated that GS transitioned well to his new school, but had difficulty complying with adult direction and had an unwillingness to work. It was noted that his speech was progressing so well that they were able to decrease his speech therapy time from 1 hour to 30 minutes.

26. On February 11, 2008, the principal of North, Jane Gregoire, received a parent complaint that her daughter was hurt by the staff in Room 311 and that there were issues with lifting. Gregoire investigated the incident by speaking to the parents, Budeau, Parish, Sharon Lindstrom, the Director of Special Education and Drew Uecker, the (then) Coordinator of Special Education.

27. On February 14, 2008, GS exhibited disruptive behaviors in school. Dr. Dixon began adjusting GS's medications to help manage the increase in disruptive behaviors.

28. On February 19, 2008, Jeff Brainard, a substitute para-professional, was substituting in Room 311 for Parish. While in the room, he smelled something and Budeau told him it was GS - "Mr. Poopy Pants." Brainard asked Budeau if GS 's soiled pants should be changed. Budeau told Brainard, "no he gets to live with it." GS was left in his soiled in pants for two hours.

29. In May 2008, para-professional Kristie Kallies became a regular para-professional substitute in Room 311.

30. On May 30, 2008, Gregoire received a complaint from a non-disabled student that a para-professional from Room 311 was verbally mean to a Down Syndrome student in the library. Gregoire investigated the complaint by speaking to the non-disabled student, the librarian, Budeau, Parish and Kallies. The non-disabled student indicated only that she felt Kallies was too stern in the way she asked the disabled student to sing and that she had hurt the student's feelings by taking something out of his hand. No one could identify either the student at whom the conduct was directed. There was no suggestion that the perpetrator employed any physical force.

31. Gretchen Watkins, a para-professional who worked with Kallies, observed that Kallies treated the disabled students poorly. On June 5, 2008, Watkins e-mailed Louise Saltz, the Paraprofessional Substitute Coordinator and Sharon Lindstrom's

assistant, and told her that Kallies was mean and verbally abusive to disabled students. There is no evidence that Staltz passed this information onto Lindstrom.

32. On July 29, 2008, GS took part in an educational program with the University of Washington in conjunction with his treatment with Dr. Dixon. GS's medical progress note indicates that during this program, GS made "repeated bids to leave." Exhibit 137. At that time his behavior was moderately under control. Based on this meeting, within the month, GS's Prozac was increased.

33. During the summer of 2008, Budeau was removed from her position as Department Chair for Special Education Department. Jennifer Gundlach, a special education math teacher, took over the position.

34. In August of 2008, GS returned to Room 311 after an uneventful summer in a different classroom. Budeau was still the teacher in the Room 311. Budeau began experiencing significant difficulties in her personal and professional life.

35. Parish continued working in Budeau's classroom. In addition to Parish, Kristi Kallies and Tom Considine also worked as paraprofessionals. HH was an 8th grader who volunteered during her last period study hall to help in Room 311.

36. In the Fall of 2008, speech therapy assistant, Sherri Widhalm witnessed students being denied therapy for varying reasons by the staff of Room 311.

37. In the Fall of 2008, student aide HH witnessed Kallies tell GS that he had to eat his lunch that was now hours old and that if he threw up on it he would still have to eat it.

38. In the Fall of 2008, Widhalm went into Room 311 to get GS and his shirt was soaking wet. Parish told her that he had vomited on purpose and they had rinsed out his shirt, but that he had to wear it as punishment for vomiting. Widhalm reported the incident to Coons and documented it.

39. In the Fall of 2008, Tifonie Schilling witnessed Kallies screaming at GS over his inability to find his things. Kallies had GS come to her and grabbed him by the arm - yanking on his arm until he was bent down to her level where she was sitting. Schilling later complained to Budeau about this event.

40. On September 30, 2008, Widhalm went to get GS from Room 311. He was standing by his cubicle. Parish informed Widhalm that he stunk and said that

he had soiled his pants in defiance and that he was going to stay in them all day. Widhalm took GS to the speech room and reported to Coons what Parish had told her. Coons told Widhalm to return GS to Room 311 and document the event. Widhalm documented the incident in her notes.

41. Widhalm continued to report incidents she noticed in Room 311 to Sue Naperstek. Widhalm did not report what she had documented regarding the abuse of children in Room 311 to Gundlach. If that had been reported to Gundlach, Gundlach would have reported it to CFS.

42. On September 30, 2008, Mrs. Schilling found GS with a sore bottom and dried excrement in his pants and called Dr. Dixon reporting that GS soiled his pants in school and she suspected, based upon the condition of his bottom, that they were "making him sit in it all day." Schilling also told Dr. Dixon that she was upset about the situation. She did not report this to school officials.

43. HH witnessed Kallies and Parish tell GS that they were not going to change him when he had soiled pants. They insisted that they had already changed him once and that it was his mother's responsibility. HH, however, never saw GS in soiled pants while she was in the classroom.

44. At the end of September 2008, Jordan came into Room 311 and witnessed Parish yelling at GS from across the room, threatening him with a "consequence" if he did not work as she had asked. Parish took a wet towel and draped it across GS's neck.

45. In October 2008, Jordan reported to Gundlach that she was "very uncomfortable with the negativity in the room." She said she didn't like the negativity of Parish and Kallies.

46. In October 2008, Gundlach reported to Comes and Lindstrom that Budeau was negative under Parish's influence and that visiting para-professionals were uncomfortable in Room 311. During this time, Gundlach noticed a change in Budeau. She was very worried about Budeau's partying. Budeau, Parish, Kallies and others were often out together drinking.

47. In October, 2008, Schilling wrote a letter to Budeau indicating that the Schillings thought the world of her and Parish. Schilling also mentioned that Budeau and Parish were her closest allies.

48. Widhalm documented the persistent yelling that the instructors in Room 311 directed at their students.

49. In December 2008, Parish got into a confrontation with an outside service provider at the school. This confrontation was reported to Gregoire and she and Parish discussed it.

50. In December 2008 GS began significant self harming behaviors. Parish witnessed GS hitting himself when he was in the back room closet with her.

51. During the Fall of 2008, HH witnessed Kallies and Parish grab GS, take him to the sink and place his hands under the faucet and turn on the water. GS resisted and said "I'm a good boy."

52. Early in December 2008, Jennifer Wasilewski was substituting in Room 311 when she witnessed Parish take GS to the sink. Parish was frustrated that GS was not doing his work. She had him lean over. Parish had her hand on GS's back, between his shoulder blades, and put his head under the running water. GS resisted and exclaimed "I'm a good boy." Parish asked GS if he was awake now and when he answered yes she let him out from beneath the running water. Parish explained to Wasilewski that was "what they do" with GS when he does not do his work.

53. Approximately 30 minutes later, Parish brought GS back to the sink and put his head under the running water a second time.

54. On December 8, 2008, Gretchen Watkins came to visit Budeau in Room 311. While Watkins was standing in the doorway talking with Budeau an angry and agitated Kallies dragged GS by the arm to the sink. At the sink, Kallies pinned GS to the sink with her body. GS exclaimed 'no, no, no' and 'I be good boy.' GS also physically resisted by placing his hands on the counter in front of the sink and pushing back against Kallies. Kallies put her left hand on the back of GS's neck and turned the water on with her right hand. Kallies then forced GS head under the running water and with her right hand splashed water into his face. GS suffered this "consequence" for about 30 seconds. GS was saying "no, no, no" and "go home." Kallies was saying "can't sleep" "lazy" "wake up." Parish explained to Watkins that forcing GS's head under the running water was necessary because GS always slept in class and was lazy.

55. On December 9, 2008, Watkins told Jodi McGough that she observed Kallies force GS's head under the water in the classroom sink in Room 311 to Jodi McGough.

56. Watkins was present on one occasion when GS vomited. GS was not forced to eat it.

57. Watkins did not note any changes in GS's behavior between the Spring of 2008 and December, 2008, the times that she was present in the classroom.

58. In December, 2008, HH told Kampfer that she was upset with some of the language from the adult aides. Specifically, HH told Ms. Kampfer that they were using cuss words. Kampfer told her HH needed to report that to Gregoire and took her to Gregoire's office. Gregoire was not available at that time, so Kampfer sent HH back to her classroom as she did not want HH to miss anymore class. Kampfer told HH that Gregoire would be in touch with her later.

59. Kampfer spoke to Gregoire about what HH had told her.

60. Later in December, Gregoire talked with HH about her complaint. HH complained about Kallie's inappropriate language in the class room but made no other complaints. Had HH made any complaint regarding anything about abuse or mistreatment of students in Room 311, Gregoire would have investigated that. Gregoire followed up on HH's complaint by talking to Kallies about it. Kallies told Gregoire that she did not recall making any inappropriate comments but that if she did, she was sorry about it.

61. On December 19, 2008, Watkins spoke with McGough a second time about how Kallies had forced GS's head under the water. Watkins thought that McGough would report the mistreatment up the chain of command to Rosie Comes, the Special Education Coordinator, and that the matter would be corrected. McGough did not report the conduct to Comes.

62. Charles Walsh substituted in Room 311 as a paraprofessional during September or October, 2008. On May 21, 2009, he told Comes that he witnessed Parish take GS to the sink and put water on his head. He felt that Considine was "great with the kids." Prior to May 21, 2009, Walsh never told anyone about what he witnessed.

63. On January 9, 2009, Gregoire received a parent complaint about burns on their daughter, a student in Room 311. Gregoire notified Lindstrom. Gregoire investigated the incident which included meeting with the parents. Gregoire determined that the burn was actually an abrasion that resulted from the student when the student slipped and fell up against a brick wall in the bathroom during a toileting incident.

64. Gregoire also received a complaint from the same student's parents when the student was not allowed to go bowling. She investigated that incident by talking to the parents.

65. On January 12, 2009, North Middle School office staff witnessed Parish in a confrontation with a teacher's aide. Gregoire was notified and discussed the event with Parish. This was the second report she had received about Parish's interaction with adults.

66. On January 22, 2009 GS's parents complained to Kampfer that they felt that the staff in Room 311 were wrongfully punishing GS by not letting him go to music class which resulted in him getting an F in music.

67. In February 2009, Parish got into a second confrontation with the same outside service provider as she had in December. Gregoire was informed and she spoke with Parish about it.

68. On February 13, 2009, while bowling, Wasilewski told Bobbi Sue Talmage and Kristie Anderson, that she had witnessed Parish place GS's head under running water in December of 2008.

69. On February 13, 2009, Talmage and Anderson reported to Lori Hoff that Wasilewski saw Parish place GS's head under running water in December of 2008.

70. On February 17, 2009, immediately prior to attending a meeting with Comes, Hoff asked Comes "Have you heard about [GS's] head being placed under water?" Hoff reported the information to Comes "because it needed to be reported." Comes did not take any action regarding the report.

71. There is no evidence that GS was subjected to any type of abusive conduct after February 17, 2009.

72. On February 25, 2009, Budeau did not show up for work. Parish and Kallies did not report Budeau's failure to show up for work that day. Office staff at the school, however, noticed Budeau's absence. The office staff reported Budeau's absence and the attempts to cover it up to Gregoire who notified Lindstrom. Gregoire then discussed the matter with Budeau and Parish.

73. During the 2007/2008 and 2008/2009 school years, Gregoire and Patton-Griffin would walk by the room several times each day. In addition, they were frequently at the classroom at the beginning and the end of the day. Gregoire walked past Room 311 up to six times per day. When she would walk by, the door to the classroom was typically open. If it were shut, she would open the door and walk in. Neither Gregoire nor Patton-Griffin saw anything occurring in Room 311 that gave them cause for concern. Had they made any such observations, they would have immediately intervened and investigated.

74. In February or March of 2009, Widhalm noticed that GS's speech had deteriorated. On March 3, 2009, Widhalm complained to Gregoire that Parish pushes co-workers around and that Budeau was often not in Room 311.

75. On March 3, 2009, Gregoire received a parent complaint that Parish was making degrading remarks to their child. The parent also complained that his child was not allowed to go to Walmart and that the lights in the isolation room were turned off while there child was in it.

76. On March 5, 2009, speech therapist, Sue Naperstek sent an e-mail to Gregoire noting that Naperstek was very uncomfortable with Parish in Room 311 and that speech therapist, Becky Schlund was uncomfortable in Room 311 as well.

77. On March 24, 2009, Brainard was substitute teaching in Room 311. He caught the tail end of what appeared to be Parish grabbing a disabled student by her forearms and both wrists and lashing out at the student. Brainard did not feel that Parish's conduct amounted to reportable abuse. Brainard felt that it was "quite possible" that what he saw was "the tail end of a snapshot on a lesson on faces." He did not report this incident to anyone in the administration.

78. Mrs. Schilling learned of the conduct of placing GS's head under water after she received an e-mail from Watkins during the weekend of April 24, 2009. At approximately 8:00 a.m. on Monday morning, April 27, 2009, Schilling called Comes to complain about the paraprofessional's conduct. Comes immediately commenced her investigation. After speaking with Mrs. Schilling, Comes immediately called

Tammy Lacey, who is the director of Human Resources for the Great Falls School District. Comes and Lacey developed a plan to investigate Mrs. Schilling's complaint immediately. Ms. Comes scheduled to meet and did meet with Mrs. Schilling that same day and found out the names of individuals who may have information regarding Mrs. Schilling's allegations. (Comes, p. 904).

79. Comes interviewed 19 people, some of them several times. Lacey also interviewed several witnesses.

80. On May 4, 2009, the District, after conducting a thorough investigation that involved talking to numerous witnesses and considering Parish's explanations, issued a letter of reprimand to Parish. In the letter, the district concluded that Parish placed GS's head under the running water in the classroom sink as "a punishment carried out in frustration and not as an educational exercise." Exhibit 5-52. On that same day, the district issued a letter of reprimand to Kallies, concluding in the letter that Kallies placed GS's head under the running water in the classroom sink as "a punishment carried out in frustration and not as an educational exercise" Exhibit 5-53.

81. School administration removed both Julie Parish and Kristi Kallies from North Middle School and put one at East Middle School and one at Chief Joseph Elementary school with higher functioning students and teachers who were asked to be very vigilant in watching their conduct.

82. On Monday, April 27, 2009, Schilling took GS out of North Middle School, and placed him at Great Falls High School in Bobbi Sue Talmage's class.

83. GS's January 10, 2008 medical progress note indicates that GS was initially doing well at North Middle School but that changed. The change included "a series of disruptive behaviors including encopresis, taking off clothes in the classroom, refusing to do work and having temper tantrums." Exhibit 135. Dixon concluded that "these events are completely situational when he has been asked to sit down and behave and do work." Dixon also noted that "he has been doing some inducing of vomiting when he does not want things." Id.

84. In July, 2008, GS participated in an educational program at the University of Washington. The medical progress note indicates that during this program, GS made "repeated bids to leave." Exhibit 137.

85. On November 5, 2008, GS had an office visit with Dr. Dixon. During that visit, Dixon noted that GS's mood was good. She also noted that Schilling reported that "things seem to be on an even keel." Exhibit 140. At GS's visit on January 27, 2009, Schilling reported that GS's bowel control, "which is of particular concern, has also improved." Furthermore, she stated that GS's behavior was "very, very good" and he "is not having any of the disruptive behavior we were so concerned about last September." Exhibit 141. Dr. Dixon confirmed that during this time period, GS's behavior had improved.

86. Dr. Sam Goldstein's testimony was provided through a stipulated deposition. Dr. Goldstein noted that GS is "emotionally and behaviorally sensitive, and that is to little changes in his life, entering a new classroom, some change in routine, typically invokes more anxiety and more of a reaction from him than it might from other individuals." Deposition transcript, page 17, lines 13 through 19. Dr. Goldstein further opined that the behavior patterns exhibited by GS (as described to him by Mrs. Schilling) were not beyond what would be expected for a "youth with his diverse set of developmental challenges." His opinion was based on his review of GS's records "relative to his waxing and waning behavioral problems over a long period of time, including records of his current behavioral issues even from this year in school." Deposition transcript, page 15, lines 3 through 6.

87. Based on all of the facts in this case, and taking into consideration the expert medical testimony, the hearings officer concludes as a matter of fact that there is no causal link between the conduct of the paraprofessionals in Room 311 and GS's alleged regression in his behavior. GS's behavior both before, during and after the paraprofessional's conduct has not changed. Throughout his pertinent medical history, his behavior has, as Dr. Goldstein noted, waxed and waned.

88. As Dr. Goldstein further noted, and the hearings officer finds, it is unlikely that GS will progress beyond the developmental level of a three to five-year old. Deposition transcript, page 24, lines 18 through 23. This finding corroborates the lack of causation between any conduct by the paraprofessionals at North Middle School and GS's alleged regression in his behavior.

89. GS's behavior after he switched over to Great Falls High School corroborates the continuing up and down behavior he has experienced since before he went to North Middle School. As Bobbi Sue Talmage reported, and the hearings officer finds, GS had no toileting issues during the summer of 2009. In the fall of that year, however, he again began to have toileting issues. This was true even though he initially appeared to have smoothly transitioned into Great Falls High

School. His behavior has included throwing repeated fits. He has also begun barking like a dog and has repeatedly kicked paraprofessionals at the school. He has also thrown up. His encopresis is behavioral. He engages in that conduct to avoid situations such as doing his classroom work.

90. The Great Falls School district is not liable under the theory of respondeat superior for the conduct of the paraprofessionals in forcing GS's head under the faucet. The conduct of the paraprofessional was so egregious that it was outside the scope of their employment as it was not reasonably foreseeable by the school district.

IV. OPINION[1]

A. The ParaProfessional's Yelling and Allegedly Placing GS in A Closet Cannot Form A Separate Basis For Liability.

As a result of the respondent's motion for summary judgment, the hearings officer long before the trial granted partial judgment with respect to whether the paraprofessional's abusive language directed at GS could form the basis of liability. The reasons for granting the motion for summary judgment on this issue were fully stated in this tribunal's September 30, 2010 order on the pending motions for summary judgment. The basis was the failure to present competent evidence to respond to the respondent's motion on that issue and the fact that such conduct had not been alleged in the complaint. The charging party now claims, without citation to authority, that the evidence was "improperly excluded from the hearing." Charging Party's opening brief, page 10. While this assertion is factually incorrect (such evidence was discussed several times during the hearing), the evidence cannot now be considered as a separate basis for liability since the motion for summary judgment on the issue was granted.

B. GS Being Forced to Sit in Soiled Pants Cannot Serve As Basis For Liability In This Case as It Is Barred By The Statute of Limitations.

There is evidence that prior to September 30, 2008, the paraprofessional in Room 311 forced GS to sit in soiled pants for up to two hours as a form of punishment. The only evidence regarding soiled pants after that time is the highly circumstantial evidence of Mrs. Schilling's testimony that GS had a red bottom. By September 30, 2008, Mrs. Schilling was plainly aware that GS had been forced to sit

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[1] Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. Coffman v. Niece (1940), 110 Mont. 541, 105 P.2d 661.

in soiled pants as she reported to Dr. Dixon that she was upset about the fact that GS was required to do so. She did not file a human rights complaint within six months of discovering that conduct. She waited until June, 2009 to file her complaint on that issue. In addition the facts do not establish that GS's head was placed under water or that he was in any way abused after abused December, 2008. The action regarding the soiled pants, therefore, cannot serve as a basis for finding liability.

Mont. Code Ann. §49-2-501 requires a person aggrieved by any discriminatory conduct to file a complaint within 180 days of the Mont. Code Ann. §49-2-501(4)(a). Mont. Code Ann. §49-2-501(1) permits a person to file a complaint on behalf of an incapacitated person. Nothing in Mont. Code Ann. §49-2-501indicates that a person who has notice of discriminatory conduct and who nonetheless fails to timely file a complaint (as is true here where Schilling was aware of the soiled pants situation and ascribed it to the district as early as September, 2008) is exempted from the limitation because the person on whose behalf the complaint is filed could not appreciate the wrongfulness of the alleged conduct.

As this tribunal noted in its order on the summary judgment motions, the charging party's assertion that the 180-day time limit is essentially permanently tolled because of GS's age and disability is not persuasive. The charging party has cited no case that supports his proposition. The Montana Supreme Court has repeatedly held that the 180-day limitation contained in the human rights statute does not violate a charging party's due process rights. Harrison v. Chance, 244 Mont. 215, 225, 797 P.2d 200, 205-06, (1990); Romero v. J&J Tire, JMH, Inc., 238 Mont. 146, 777 P.2d 292 (1989). Indeed, a Montana federal district court has reached the same conclusion in rejecting the minor plaintiff's argument that the 180-day limitation in the act violated the minor's equal protection rights by failing to accord him the right to toll the statute of limitations accorded to minor plaintiff's who are alleging other types of injuries. Johnson v. Dodson Public Schools and Newby, 463 F. Supp. 2d 1151, 1161 (D.C. Montana, 2006) Moreover, the Montana Supreme Court has repeatedly held that where the legislature provides for a specific statute of limitations outside of Title 27, Chapter 2, the tolling provisions of Mont. Code Ann. § 27-2-401(1) do not apply. See, e.g., State v. Placzkiewicz, 2001 MT 254, ¶17, 307 Mont. 189, 36 P.3d 934. The hearings officer can find no basis in law for holding that the statute of limitations is tolled in this case because of GS's disability.

Mrs Schilling, who has brought this case on behalf of GS, discovered the issue of the soiling of the charging party's pants as early as September, 2008. She took no

action and, unless there is some conduct that falls within 180 days prior to the filing of the complaint, the conduct noted by Brainard in February, 2008 or by Widhalm in September, 2008 is not actionable. To overcome this, the charging party relies on the testimony of DJS and Mrs. Schilling's observations that GS would come home from school with a red bottom during the Spring of 2009. This evidence does not demonstrate that the paraprofessionals in Room 311 were leaving GS in soiled pants during the 180 days prior to the filing of the complaint. For the reasons noted below (See Section C (1)), DJS is not a credible source for observations and his testimony is rejected. Mrs. Schilling's testimony that GS would come home with a red bottom proves at most that GS soiled himself during the day, a problem which preceded his tenure at North and which continues to this day. Moreover, the medical records in this case for the period of January to June, 2009, do not support any notion that GS was continuing to soil himself. Those records show the very opposite: that GS had his bowel movement issues under control during that time. Mrs. Schilling also candidly testified at hearing that GS has sensitive skin in his buttocks area which could explain the red that she might have seen on his bottom. The preponderant evidence fails to show that any abusive conduct directed at GS occurred during the 180 days preceding the filing of the complaint. Therefore, leaving GS in soiled pants in September, 2008 cannot serve as a basis for finding liability in this case.

The charging party has also asserted (with no citation to authority) that if the statute of limitations is construed to place any restriction on a minor disabled child's rights to sue, that construction creates an unconstitutional application of the statute. This tribunal does not agree with that interpretation. However, whether it does or not is of no consequence since this tribunal has no power to review the constitutional application of a statute. A judicial body, not an administrative body, is the proper forum to decide constitutional questions. Schneeman v. Dept of Labor & Industry, 257 Mont. 254,259, 848 P.2d 504, 507(1993).

C. Ths School District is Liable for Discrimination.

Montana law prohibits discrimination in the terms, conditions or privileges of education against persons with physical disabilities. Mont. Code Ann. §49-2-307(1). In order to prove unlawful discrimination based upon disparate treatment, a charging party must present a prima facie case of discrimination. Admin. R. Mont. 24.9.610(1). A prima facie case can be proven by either direct evidence or indirect evidence. Admin. R. Mont. 24.9.610(3),(5). A prima facie case is made out by proving (1) that the charging party is a member of a protected class, (2) the charging party was qualified for the service he sought, and (3) that the charging party was subjected to discriminatory treatment by the respondent under circumstances giving

rise to a reasonable inference that he was treated differently because of his membership in a protected class. Admin. R. Mont. 24.9.610(2)(a).

In a direct evidence case, when the charging party makes out a prima facie case, then the respondent bears the burden to show by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not worthy of belief. Admin. R. Mont. 24.9.610(5). In an indirect evidence case, once the charging party has made out a prima facie case, the respondent must present evidence to show that its actions were undertaken for only legitimate reasons. Admin. R. Mont. 24.9.610(3). If the respondent can do so, the burden then shifts back to the charging party to show that the respondent's proffered reasons were mere pretext. Admin. R. Mont. 24.9.610(4). Mrs. Schilling bears the ultimate burden of persuasion to demonstrate that the conduct which amounted to unlawful discrimination. Hearing Aid Institute v. Rasmussen, 258 Mont. 367. 852 6P.2d 28.

Aside from the soiled pants issue, Schilling's complaint also alleges that the school district discriminated against her son based on his disability when paraprofessionals in Room 311 subjected him to discipline which included forcing his head under water and forcing him to eat his own vomit as a punishment for vomiting. Schilling has sought to pin the paraprofessional's conduct on the school district by various contentions that boil down to two main arguments:(1) the school district is liable under respondent superior and (2) the school district knew or should have known about the conduct but that it failed to act to either remedy or stop the discrimination and thus discriminated against Schilling's son. The school district contends that Kallies and Parish never engaged in any abuse of GS and that even if they did, the school district, upon learning of the conduct, took timely action to remedy the situation.

1. By placing GS under the faucet, the Paraprofessionals Subjected GS to Improper Treatment Based on his Disability.

The first issue to consider is whether there is evidence of disparate treatment based on the conduct of the paraprofessionals. To make out a prima facie case of discrimination, GS must show (1) that he has a disability, (2) he was otherwise qualified for the benefits he was denied, and (3) that he was denied the use of those benefits by reason of his disability. K.M. v. Hyde Park Central School District, 381 F. Supp. 2d 343, 357 (S.D. N.Y. 2005) (a disabled student was subjected to repeated abusive conduct at the hands of his peers and who presented a prima facie case that the school district took no effective action to stop the peer abuse made out a prima

facie case that survived the school district's motion for summary judgment. The substantial evidence in this case demonstrates such conduct. HH, Wasilewski and Watkins all testified that Kallies and Parish ran GS's head under water as a method to wake him up. As the school district itself noted in the May 4, 2009 letters of reprimand to Parish and Kallies, they did this as "a punishment carried out in frustration and not as an educational exercise." This type of conduct was not carried out on the non-disabled children. Moreover, this conduct was plainly abusive as the testimony of Gundlach demonstrates. This type of punishment, carried out against a disabled student while not undertaken against non-disabled students, evinces a prima facie case of disparate treatment based solely upon the student's disability.

In response, the school district has primarily relied on the testimony of Julie Parish. While the testimony is sufficient to present a showing that the conduct was undertaken for legitimate reasons, the hearings officer finds Parish's testimony to not be credible. HH, Wasilewski and Watkins testimony with regard to placing GS's head under the sink is credible and rebuts the school district's evidence on this issue. The hearings officer finds, therefore, that Schilling has proven preponderantly that the paraprofessional's conduct was discriminatory.

The substantial evidence does not show that GS was forced to eat vomit. While student DJS made such claims, other persons (such as Wasilewski and Watkins) who were in a position to have observed such conduct never saw it occur. While DJS was competent to testify, his testimony is not credible in light of his demonstrated lying to teachers in the school. Therefore, the hearings officer rejects DJS' testimony in its entirety and finds that it does not provide a basis in fact for believing that GS was forced to eat his own vomit or to sit in soiled pants.

2. The School District Is Not Liable Under Respondeat Superior.

Charging Party's counsel argues that the conduct of the paraprofessionals can be imputed to the school under principles of respondeat superior. The school district has all along contended that it has no liability under respondeat superior for the tortious conduct of the paraprofessionals in Room 311 because their conduct was outside the scope of employment. Given the egregious nature of the paraprofessionals' conduct and the nature of the school's function in educating disabled students, respondeat superior can not be used to impute liability to the school district.

In Montana, a party may be held vicariously liable for damages caused by another on the theory of respondeat superior. Maguire v. State of Montana, 254

Mont. 178, 182-83, 835 P.2d 755,_____ (1992). Montana courts look to the Restatement (Second) of Agency §228 to determine when an employer can be held vicariously liable under respondeat superior. Id. See also, Kornec v. Mike Horse Mining, 102 Mont. 1, 8, 180 P.2d 252, 256 (1947). Respondeat superior is not a separate tort but rather is a concept of agency by which one person's actions can be imputed to an employer. Saucier v. McDonald's Corp. 2008 MT 63, ¶64, 342 Mont. 29, 179 P.3d 481. Normally, an employer will not be held liable for the acts of its employee conducted outside the scope of employment. Id.

The restatement provides:

(1) Conduct of a servant is within the scope of employment, but only if:

> (a) it is the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master, and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

The school district relies on Maguire to support its argument that the school district has no liability. The charging party relies on Kornec and Rocky Mountain Enterprises v. Pierce Flooring, 286 Mont. 282, 951 P.2d 1326 (1997) to support her theory that the school district is liable under respondeat superior. The parties have cited no other cases to support their respective positions. After carefully considering the cases, the hearings officer concludes that Maguire is controlling here and that Kornec and Rocky Mountain are distinguishable.

In Maguire, a severely mentally disabled (autistic) woman at Montana Developmental Center was raped by a male nurse on more than one occasion. The nurse was entrusted with cleaning and caring for the woman and his employment position allowed him to be alone with the woman at various times during his work shift. The nurse pled guilty to rape. In the plaintiff's lawsuit against the employer based upon the nurse's conduct, the trial court granted summary judgment and directed a verdict in favor of the plaintiff finding that the employer was vicariously

liable under respondeat superior for the criminal act of the employee. On appeal, the supreme court reversed the trial court's determination and held that the employer had no liability as the rape "was clearly outside the scope of employment." Id. at 183,

In Kornec, the plaintiff was assaulted by the foreman of the respondent mining company. The assault itself was preceded by a long standing dispute between the plaintiff and the mine over the mine's business creating flooding on the plaintiff's property. The assault itself occurred when the mining company sent the foreman and two other employees to repair a breached dam. The plaintiff approached them and began to protest their repairing the dam. The foreman then chased and beat the plaintiff with a shovel as the plaintiff kept protesting that the foreman had come onto his property. In response, the foreman told the plaintiff "I don't care whose ground -- boss told me to kill you." Kornec, 120 Mont at 8, 180 P.2d at 256. In reaching its conclusion that the jury's verdict holding the employer liable for the foreman's conduct was supported by substantial evidence, the court noted that "the existence of the controversy was well known to the officials of the defendant company. They might reasonably have apprehended that [the foreman] might become involved in an altercation with the plaintiff when they dispatched [the foreman] to repair the dam. This being the case the employment was one that was likely to bring [the foreman] into contact with [the plaintiff]. Id. at 13, 180 P.2d at 257.

In Rocky Mountain, the Montana Supreme Court upheld a jury verdict finding an employer, Carpet Barn, liable under respondeat superior for the criminal conduct of its employee. The perpetrating employee had slashed tires and engaged in other destruction of the plaintiff's property. The plaintiff was the owner of a business that competed with the respondent employer. In reaching its conclusion, the supreme court noted that substantial evidence to uphold the jury verdict existed because there was evidence that the perpetrating employee met the plaintiff through business, the perpetrating employee discussed the plaintiff with the owner of the respondent business, some of the criminal conduct took place during the respondent business' hours of operation and that the perpetrating employee understood that his conduct could harm the plaintiff's business activities. Id. at 306, 951 P.2d 1341.

Considering these cases in light of the factors enumerated in the restatement, it is not sufficient to simply show that the opportunity to commit the act arose during the employment or even that the circumstances of employment (i.e., the ability to be alone with the victim) fostered the opportunity to commit the tortious conduct. Rather, as the restatement indicates, to find the conduct within the scope of employment, where intentional conduct is involved, the force "must not be

unexpected by the employer." In other words, there must be some evidence that the employer could have reasonably foreseen the wrongful conduct of the employee emanating from the scope of employment. In Kornec, the evidence demonstrated such forseeability because the respondent mining company had a long running feud with the plaintiff, the foreman and employer were aware of the feud when the foreman was sent to do work which resulted in the assault on the plaintiff, and the foreman specifically stated to the plaintiff "boss told me to kill you." In Rocky Mountain, the evidence, while not as direct as that in Kornec, still created an inference that the employer could reasonably have foreseen the wrongful conduct of its employee. The animosity that resulted in the criminal conduct by the perpetrating employee was engendered by the business competition between the plaintiff's business and the respondent employer and the perpetrating employee discussed the plaintiff with the respondent employer.

In the case before this tribunal, the facts demonstrate that the paraprofessionals engaged in conduct of forcibly placing GS's head under water in order to wake him up. This conduct clearly was not within the scope of employment. The credible witnesses for both the charging party and the school district were virtually unanimous in testifying that the conduct of placing GS's head under water would clearly be out of the scope of discipline that the school district would condone. Gundlach, for example, stated unequivocally that such conduct was abuse and that if she had seen it, she would have contacted CFS immediately to report the abuse. This type of abusive conduct is not so closely aligned with the paraprofessionals' duties that the school district should have reasonably foreseen, in the absence of prior notice of such conduct, that the paraprofessionals would engage in such conduct in carrying out their paraprofessionals duties. The conduct clearly exceeded the scope of the interests of the employer as the school district specifically forbade any employee from abusing students, staff, or third parties. Kallies and Parish's conduct with respect to GS was so far out of the bounds of appropriate punishment that the school district could not have foreseen that it would be undertaken. See, e.g., Tall as parent and next friend of Tall v. Board of School Commissioners of Baltimore City, 120 Md. App. 236, 258-60, 706 A.2d 659, 671-72 (1998) (holding that teacher's physical assault of Down's Syndrome student as punishment for urinating pants did not subject the school district to liability under respondeat superior).

Counsel for the charging party argues stridently that the school district's May 4, 2009 letters of reprimand to Parish and Kallies confirm that the paraprofessional's conduct was foreseeable as the district concluded after investigation that placing GS's head under the sink was "a punishment carried out in frustration and not as an educational exercise." To the contrary, the hearings officer

perceives that this language only confirms that the conduct was outside the scope of the paraprofessional's conduct. This finding by the school district does not demonstrate forseeability on the part of the district. Under the facts of this case, respondeat superior does not create vicarious liability for the school district.

3. The School District Discriminated in Failing to Take Proper Steps to Correct the Discrimination Once It Had Notice of The Abuse.

The charging party's counsel has melded several arguments together as to why liability should attach to the school district, some of them aimed at the notion of liability through respondeat superior (which has been considered and rejected as noted above) and some of them aimed toward the failure of the school district's chain of command to find out about the conduct and to take action. With respect to the latter argument, counsel contends (1) there is a significant problem with the school district's "ability to anticipate a supervisors's [participation] in the discriminatory conduct," (2) that the district in any event had sufficient knowledge that should have put it on notice of the problem and that its failure to do so demonstrates discrimination because it failed to take sufficient actions to correct the situation, and (3) that knowledge of non-management administrators can be imputed to the district and thereby fulfill the knowledge requirement. The school district contends that it had no notice of the conduct until the charging party contacted the school on April 27, 2009 to report the allegations that she had heard from Gretchen Wilson, that upon learning of the conduct it took immediate action to investigate and to stop the situation. In conjunction with its argument, the school district argues that any knowledge of the non-administrators cannot be imputed to the district such that the district could be considered to have been on notice of the abuse.

With respect to the first argument, the charging party's counsel has cited no authority to show that the school district's method of dealing with abuse –which it applies to both disabled and non-disabled students –is so inherently unreliable or flawed that its mere implementation demonstrates discrimination against disabled students. Counsel has not referenced, for example, any comparator information from other school districts to show that other school districts follow a different course of reporting suspected abuse. The Great Falls school district has complied with state law in its requirement that educators report suspected abuse to CFS. It has also provided a second requirement that the suspected abuse be reported to school administrators. Any failure of the reporting system in GS's case proves only that it failed in this particular circumstance, not that it is inherently subject to failure such that its implementation is alone sufficient to prove discrimination.

With respect to Schilling's second argument, the parties have cited no Montana authority which is factually similar to the instant case. In analyzing this issue, it is important to keep in mind that this is not a tort case, it is a discrimination case. If liability is to attach to the school district in this forum through a demonstration that the school district was or should reasonably have been on notice but failed to act, there must be some showing that the failure to act is in and of itself discrimination. The fact that conduct may be a tort without some showing that the tortious conduct can be considered discrimination will not confer jurisdiction on this tribunal to redress the wrong. See generally, Saucier v. McDonalds, 2008 MT 63, 342 Mont. 29, 179 P.3d 481 (noting that while some tortuous conduct constitutes discrimination, only discriminatory conduct can be remedied under the Montana Human Rights Act).

The hearings officer's own research has discovered no Montana case law that is factually similar to the instant matter. However, there are several federal cases emanating from the Americans With Disabilities Act (ADA) and from Title IX (education) cases (the framework of which the federal courts have applied to ADA cases) that are somewhat useful to resolution of the matter before this tribunal. The Montana Supreme Court has long recognized the utility of using ADA cases to interpret Montana's Human Rights Act and its application to any given set of facts. Johnson v. Bozeman School District, 226 Mont. 134, 139, 734 P.2d 209, 212 (1987).

To prove discrimination under the ADA due to a failure to take corrective action to stop harassment involving peer-on-peer harassment, a charging party's prima facie case must show that a respondent school district reacted with at least indifference to the alleged discriminatory conduct directed at the charging party. S.S. v. Eastern Kentucky University, 532 F.3d 445, 453 (6th Cir. 2008), citing Davis v. Monroe County Board of Education, 526 U.S 629, 645-47 (1999). See also, Werth v. Bd. Of Directors of the Pub. Sch. Of Milwaukee, 472 F. Supp. 2d 113, 1127 (E.D. Wis. 2007; K.M. v. Hyde Park Central Sch Dist., supra; Biggs v. Bd. Of Educ. Of Cecil County, 229 F. Supp. 2d 437445 (D. Md. 2002).[2] Under this line of cases, a

[2]In S.S., the parents of a minor physically disabled student sued the school district for its alleged failure to take action to investigate and stop a student's peers from creating a harassing school environment through pervasive bullying and the use of epithets directed at the student because of his disability(known as peer-on-peer harassment). While the case before this tribunal involves a school district employee's conduct toward a student and not harassment by peers, the analogy, while not perfect, appears apt. As noted above, the charging party's respondent superior argument has been rejected and the charging party has not pointed out any other legally plausible principle of agency (her analogy to the case of Kimbro v. Atlantic Richfield, infra, is rejected for the reasons discussed below)

charging party makes out a prima facie claim of discrimination when the charging party shows that (1) he is an individual with a disability, (2) he was harassed based on that disability, (3) the harassment was sufficiently severe or pervasive that it altered the condition of his education and created an abusive educational environment, (4) the defendant knew about the harassment, and (5) the defendant was deliberately indifferent to the harassment.

The charging party's counsel has made several arguments to show that the school district should be found liable. These arguments include that Budeau acted within her scope of authority as a teacher in permitting GS's head to be placed under water (page 62), that Budeau was the paraprofessionals' supervisor and her conduct as such "binds the district directly," (page 63) and that Come's decision to "NOT to act on a report of discrimination binds the district directly." (Page 64). The charging party also argues that the district is not credible in arguing that it had no notice and that in fact it had or should have been on notice from the fall of 2008 that other acts of abuse were being carried out in Room 311. In response, the school district argues that non-management employees knowledge of the paraprofessional's conduct can not be imputed to the school district, that only those things that the administrators knew or should have known can create the basis for liability and that the district did not and reasonably could not have known prior to April 27, 2009 (the date that Schilling called Comes to report what Watkins had told her) that the conduct was occurring.

Relying on 3 Am. Jur. 2d Agency, §273 and Kimbro v. Altlantic Richfield Inc., 889 F. 2d 869 (9th Cir. 1989), the charging party's counsel argues that Budeau's alleged knowledge of the conduct can provide a basis for imputing knowledge to the school district. The hearings officer does not agree. As the respondent correctly points out, "discrimination is about actual knowledge, and real intent, not constructive knowledge and assumed intent." Respondent's brief, page 29, citing Cordoba v. Dillard's Inc., 419 F.3d 1169, 1183 (11th Cir. 2005). When a non-management employee is the alleged harasser, an employer is liable for failing to remedy or prevent a hostile environment of which management level employees knew, or in the exercise of reasonable diligence, should have known. EEOC v. T.R. Orr, 2007 U.S. Dist. LEXIS 10955 (D.C. Ariz. 2007), citing Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991)(emphasis added). Kimbro does nothing to advance the charging party's contention because in Kimbro, the person with knowledge of the

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that applies to make the district vicariously liable for the paraprofessional's conduct. Indeed, the charging party has directed this tribunal to a title IX case for that case's "discussion about notice and indifference." Charging Party's brief, page 63.

employee's disability was himself a management level employee. It is clear that to hold the school district liable, there must be evidence that the school district knew of or reasonably should have known of the conduct in the classroom but that it failed to take action.

Utilizing the analysis from S.S., there is no question in the hearings officer's mind that factors one through three have been established. The question here is whether the fourth and fifth factors have been proven.

In the absence of Hoff's comment to Comes, the hearings officer would have no problem in saying that the school district had no notice of the situation that would have required the district to have taken action earlier than it did in April, 2009. Hindsight, of course is "20/20" and the proper analysis of the school's conduct is what the school district should reasonably have known under the circumstances that existed at the time without the benefit of that hindsight. Gregoire and Patton-Griffen at all times took reasonable steps to investigate the allegations of abuse that they received.

However, Hoff's comments to Comes on February 17, 2009 placed the school district on notice for the first time of conduct that needed to be investigated. Hoff was unequivocal in her testimony that an allegation regarding placing a student's head under water would, if true, create a situation that needed to be investigated and reported to CFS. Hoff asked Comes if she had heard about an allegation that GS's head was being placed under water. Hoff did this because she thought that Comes would look into the matter. Given this context, the school district was at that time put on notice that an investigation of some sort needed to be undertaken. Inexplicably, the school district failed to take any action.

Comes should have done something to investigate the matter but she did nothing. Comes was an administrator chargeable with the responsibility of looking into these matters. The school district's collective knowledge of the earlier additional allegations, coupled with Hoff's comments, created a situation which the school district should have investigated the comments made to Hoff. Failing to undertake an investigation after Hoff's comments to Comes creates a prima facie case of indifference that amounts to discrimination.

To rebut this evidence, the school district argues that Hoff's comment was made to Comes in an off-hand manner, and, if made at all, made under such circumstances that further investigation at that point in time would not be warranted. Hoff's own testimony, however, rebuts the school district's position. Hoff was

unequivocal that the conduct was reportable abuse and that she made the comment to Comes thinking that something would be done about it. Nothing was done. The school district's failure to do anything after it was put on notice of the conduct related to GS demonstrates indifference that amounts to discrimination.

The charging party's counsel has gone to great lengths to suggest that the school district was essentially complicit in some type of cover up of the paraprofessionals' conduct. The hearings officer does not agree. There was no attempt by the district at all to cover up the conduct of the paraprofessionals. The finding that discrimination resulted due to the school district's failure to take action when it should have demonstrates at most indifference which amounts to discrimination. As courts have recognized, Title II of the ADA was designed to protect persons from both intentional and unintentional discrimination. K.M., supra, 381 F. Supp at 357. Cf., Alexander v. Choate, 469 U.S. 287, ____ (1985) (noting that "Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather thoughtlessness and indifference – of benign neglect.").

Here, the finding of discrimination should not be construed as the hearings officer agreeing with the charging party's counsel that the school district had any intention to cover up the paraprofessional's conduct in this case. It is a case of discriminatory indifference, not invidious discrimination. That indifference, however, is still actionable.

D. Damages

The department may order any reasonable measure to rectify any harm GS has suffered as a result of the illegal discrimination to which he was subjected. Mont. Code Ann. § 49-2-506(1)(b). The purpose of awarding damages in a discrimination case is to make the victim whole. E.g., P. W. Berry v. Freese (1989), 239 Mont. 183, 779 P.2d 521, 523; see also Dolan v. School District No. 10 (1981), 195 Mont. 340, 636 P.2d 825, 830; accord, Albermarle Paper Co. v. Moody (1975), 422 U.S. 405.

The charging party seeks almost $2,000,000.00 in future expenses that she says GS will incur as result of the school district's conduct. The charging party has not proven, however, that the damages she seeks are causally related to either the paraprofessional's conduct or the school district's indifference. A substantial amount of testimony was procured from the three experts in this case. In the final analysis, only Dr. Goldstein's testimony 'jibes" with the long history of GS's extreme disability. Contrary to the testimony of Dr. Dixon and Dr. Kliman, GS has had a long history of

wildly divergent behaviors and symptomatology occurring both before and after the events at North Middle School. He has progressed and regressed both before and after his attendance at North Middle School. As tragic as it is, Dr. Goldstein's assessment of GS's severe disability and prognosis is clearly supported by the medical documentation in this case and it is Dr. Goldstein's assessment that the hearings officer finds as fact in this case.

The hearings officer questions the credibility of Dr. Dixon's testimony. After the incidents that led to this situation, Dr. Dixon obviously became very upset with the Great Falls School District over what she perceived as the failure of the Great Falls School District to take what she believed to be adequate measures to protect disabled students in the Great Falls Public School. Her anger lead her to go to the media to proclaim the complicity of Great Falls School District in the conduct. She has an axe to grind with the school district and this affects the credibility of all her testimony. Because Dr. Dixon's and Dr. Kliman's testimony is not supported by the contemporaneous medical history and because Dr. Dixon has an obvious resentment toward the Great Falls School District, the testimony of the charging party's experts is rejected.

Likewise, there has been no showing that GS suffered any damages as a result of the school district's indifference as found in this case. As stated above, the actionable indifference came after the school's failure to investigate as a result of Hoff's report to Comes. The facts as found in this case do not support a finding that GS suffered any acts of abuse or any untoward consequences after that time.

The charging party has also asked for emotional distress damages in the amount of $2,000,000.00. The hearings officer does not see how emotional distress damages can be awarded under the facts as found by this tribunal. Civil rights claims, such as discrimination claims, are intended to compensate injuries caused by the deprivation of a plaintiff's civil rights. Bolden v. Southeastern Penn. Transp. Auth., 21 F.3d 29, 34 (3rd Cir. 1994). It is true that proof of emotional distress damages in discrimination claims need not meet the higher levels of proof required to recover emotional damages in a tort claim. Vortex Fishing Sys. v. Foss, 2001 MT 312, 308 Mont. 8, 38 P.3d 836. However, there must be some proof that emotional distress damages emanate from the alleged discrimination. The facts as found by the hearings officer do not support any finding that abuse upon GS was inflicted as a result of the school district's indifference toward the reported abuse. The discriminatory indifference occurred when the school failed to take action after Hoff's report to Comes in February, 2009. There is no evidence that any abuse of GS took place after

that point or that prior to that time the school district engaged in any discriminatory indifference. Emotional distress damages, therefore, cannot be awarded in this case.

Lastly, upon a finding of illegal discrimination, the law requires affirmative relief that enjoins any further discriminatory acts and may further prescribe any appropriate conditions on the respondent's future conduct relevant to the type of discrimination found. Mont. Code Ann. § 49-2-506(1)(a) and (b). The charging party seeks substantial affirmative relief which includes requiring the school district to retain an outside expert to evaluate the Great Falls special education program and to require the school district to implement all recommendations necessary to protect disabled students from discrimination, hire an outside expert to evaluate special education staff and administrators and determine the education and training that each individual needs to properly perform his/her job, that the district implement an anonymous reporting system and that the district inform all parents and students in the district of the reporting system, that the district place camera monitors in the classroom and that the district be prohibited from retaliating against GS and his family. The thrust of the argument stems from the charging party's perception that the discrimination here came as a result of a systemic effort on the part of the school district to cover up the abuse and the charging party's implicit and unproven theory that the abuse occurs at other schools. As stated above, the hearings officer does not find that the school district engaged in any attempt to cover up the conduct. Moreover, the problems in this case stemmed from the unfortunate incidents in Room 311. There is no evidence that any other school in the district has encountered such problems.

The affirmative relief must be appropriate in light of the discrimination found. Here, that discrimination was indifference, not some grand scheme on the part of the school district to cover up and thereby propagate discrimination. Under these circumstances, it is proper to (1) enjoin the Great Falls School District from similar conduct in the future, (2) require it to adopt a policy to ensure that reports of discrimination are immediately reported to and investigated by the administration (3) require that all special education employees, including teachers, paraprofessionals and administrators be trained in the implementation of the policy and (4) that prior to the implementation of the policy, that such policy be approved by the Human Rights Bureau and, if found necessary by the Human Rights Bureau due to a lack of the Bureau's expertise, that an education expert (nominated by the Bureau in its sole discretion) be retained at the district's expense to review and approve the policy.

E. This Tribunal Has No Power to Award Attorney's Fees and Costs.

The charging party's counsel also asks this tribunal to award it attorney's fees and costs. This administrative tribunal has no power to do so as that power under the Montana Human Rights Act is specifically relegated to the district court. Mont. Code Ann. § 49-2-505(8).

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).

2. The Great Falls School District discriminated against GS by failing to timely investigate reports of abuse after Hoff's comment to Comes.

3. GS has failed to prove that any damages he seeks are the result of discrimination.

4. Affirmative relief as described above is appropriate.

VI. ORDER

1. The department grants judgment in favor of Schilling and GS and against respondent Great Falls School District.

2. The department permanently enjoins Great Falls School District from discriminating against any person with a disability.

3. Within 60 days of the entry of this order, Great Falls School District shall submit to the Human Rights Bureau for review its present policies regarding reporting of abuse in the school district, any additional policies it develops regarding reporting of abuse and its present methodology of any additional training it will implement for ensuring that all staff interacting with disabled students are aware of and utilizing appropriate abuse reporting procedures. The Great Falls School District will implement all policy changes and training procedures required by the Human Rights Bureau. In the event that the Human Rights Bureau determines that an outside expert is needed to review the policies and training procedures and/or to recommend policies and training procedures, Great Falls School District shall employ the expert chosen by the Human Rights Bureau and will pay the expenses of such expert.

DATED: May 19, 2011

/s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearings Officer
Hearings Bureau, Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Randy Tarum, attorney for Tifonie Schilling on behalf of GS; and David Dalthorp, attorney for Great Falls Public School District #1:

The decision of the Hearings Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearings Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(c)

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission
c/o Katherine Kountz
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The parties each have a copy of the transcript. The Hearings Bureau has an electronic copy of the transcript but does not have a hard copy of the transcript.