BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

Tifonie Schilling o/b/o G.S. Charging Party/Appellant -v- Great Falls Public School District #1 Respondent	HRB Case # 0094013798 REMAND ORDER

Charging Party, Tifonie Schilling o/b/o G.S. (Schilling), filed a complaint with the Department of Labor and Industry (Department) on June 10, 2009, which alleged discrimination in education on the basis of disability by the Great Falls Public School District #1 (School District). The case went before the Hearings Bureau of the Department of Labor and Industry, which held a contested case hearing. The hearings officer issued a Decision on May 19, 2011.

The hearings officer determined that G.S. is a severely disabled student who has a genetic condition on the autism spectrum, which significantly limits his ability to communicate. *Finding of Fact Nos. 1-2.* By failing to act on a report to the Special Education Coordinator of abuse in the special education classroom at North Middle School on February 17, 2009, the hearing officer determined the School District was liable for "discriminatory indifference." *Decision, p. 28.* The hearing officer further determined that the charging party failed to prove G.S. experienced any harm due to the School District's failure to act after receiving actual notice of the classroom abuse. *Decision, pp. 29-30.* Therefore, the hearing officer found that emotional distress damages were not warranted in this case. *Decision, p. 30.* The hearing officer permanently enjoined the School District from discriminating against any person with a disability and ordered the School District to strengthened its reporting policy and ensure that all

staff who interact with disabled students are trained in proper procedures for reporting the suspected abuse of students. *Decision pp. 30-31.*

Schilling filed an appeal with the Montana Human Rights Commission (Commission). The Commission considered the matter on September 14, 2011. Randy Tarum, attorney, appeared and presented oral argument on behalf of Schilling. Dave C. Dalthorp, attorney, appeared and presented oral argument on behalf of Great Falls Public School District #1.

After careful consideration of the entire record and the arguments made, a majority of the Commission affirms, in part, and reverses, in part, the Decision of the hearing officer. Specifically, the Commission reverses the hearing officer's legal conclusion that the School District bears no liability for the discrimination against G.S. under the doctrine of *respondeat superior*. The Commission also reverses the factual determination that G.S. suffered no harm and deserves no damage award as a result of the abusive treatment he received from two paraprofessionals in his classroom. Consequently, the Commission remands this case to the Hearings Bureau for reconsideration in light of the legal analysis presented by this Order and for a determination of appropriate monetary damages.

The Commission appreciates that this case is particularly disturbing because the disabled child, who was subjected to discriminatory and abusive treatment by School District employees, was unable to report the abuse and, thereby, put a stop to it. By necessity, G.S. depended upon school administrators, his assigned teacher and the classroom paraprofessionals to care for and protect him.

STANDARD OF REVIEW

The Commission may reject or modify the conclusions of law and interpretations of administrative rules in the hearing officer's decision but may not reject or modify the findings of fact unless the Commission first reviews the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the

proceedings on which the findings were based did not comply with essential requirements of law. *Admin. Rules of Mont. 24.9.123(4).* A factual finding is clearly erroneous if it is not supported by substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence, or if a review of the record leaves the Commission with a definite and firm conviction that a mistake has been made. *Denke v. Shoemaker*, 2008 MT 418, ¶ 39, 347 Mont. 322, ¶ 39, 198 P.3rd 284, ¶ 39. The Commission reviews conclusions of law to determine whether the hearing officer's interpretation and application of the law is correct. *See, Denke*, ¶ 39.

DISCUSSION

The Montana Human Rights Act prohibits discrimination by an education institution in the terms, conditions or privileges enjoyed by a student on the basis of mental disability, unless based on reasonable grounds. *Mont. Code Ann. § 49-2-307(1).* Pursuant to the Governmental Code of Fair Practices, all services of a school district must be performed without discrimination based upon a child's mental disability. *Mont. Code Ann. § 49-3-205(1).* A school district facility may not be used in the furtherance of any discriminatory practice, nor may the school district become a party to an arrangement or plan that has the effect of sanctioning discriminatory practices. *Mont. Code Ann. § 49-3-205(2).* Under Title II of the Americans with Disabilities Act (ADA), "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *42 U.S.C. § 12132.*

The hearing officer found that Schilling proved a prima facie case of disparate treatment based on G.S.'s mental disability. *Decision, p. 20.* By a preponderance of the evidence, the hearing officer determined that paraprofessionals Kristi Kallies and Julie Parish repeatedly ran water over G.S.'s head as a method to wake him up. *Decision, p. 20.* This abusive treatment

was not carried out against non-disabled students at the North Middle School. *Decision, 20.* The hearing officer found the testimony of the School District's witness, Julie Parish, lacked credibility. *Decision, p. 20.* Consequently, the School District offered no legitimate, non-discriminatory reason for the conduct of its paraprofessionals and classified the dunking of G.S.'s head under the faucet as "a punishment carried out in frustration and not as an educational exercise." *Finding of Fact No. 80; Decision, p. 20.*

The hearing officer determined that the School District was not liable for the unlawful discriminatory acts of the paraprofessionals because the unauthorized conduct occurred outside the scope of employment. *Decision, p. 19-24.* Adopting a test for analyzing liability from case law related to a school's failure to address disability-based, peer-on-peer student harassment, the hearing officer concluded the School District was liable for "discriminatory indifference." See, e.g. *Davis v. Monroe*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed. 2d 839 (1999); *SS v. Eastern Kentucky University*, 532 F.3d 445 (2008). The hearing officer concluded that liability attached on February 17, 2009, when the Special Education Coordinator failed to take corrective action after being informed that paraprofessionals had dunked G.S.'s head under running water to wake him up. *Decision, pp. 27-28.*

The Commission concludes the hearing officer incorrectly applied the law in this case. For reasons outlined by this Order, the Commission determines the School District is vicariously liable for the discriminatory acts of its employees under the doctrine of *respondeat superior.*

Under the Montana Human Rights Act, the definition of employer encompasses the agent of an employer. *Mont. Code Ann.§ 49-2-101(11).* Further, the Act defines an "educational institution" to include the "agent of an educational institution." *Mont. Code Ann. § 49-2-101(9).* Therefore, the Commission applies the concepts of agency law to claims of unlawful discrimination when employment relationships are implicated in the determination of liability.

The doctrine of *respondeat superior* creates an incentive for employers to choose employees and structure work within an organization so as to reduce the incidence of tortious conduct by employees. An employer is liable for the conduct of an employee when the employee acts "within the scope of his or her duties to the employer." *Denke v. Shoemaker*, 2008 MT 418, ¶ 74, 347 Mont. 322, ¶ 74, 198 P.3d 284, ¶ 74 (2008) ¶ 74 (citing *Bowyer v. Lofius*, 2008 MT 332, ¶ 8, 346 Mont. 182, ¶ 8, 194 P.3d 92, ¶ 8). School districts may be liable for the harm experienced by students resulting from the unlawful acts of employees. *Hedges v. Sch. Dist. No. 73*, 253 Mont. 188, 832 P.2d 775 (1992) (teacher's negligent injury of a student with shot put); *Koch v. Billings Sch. Dist. No. 2*, 253 Mont. 261, 833 P.2d 181 (1992) (physical education teacher's negligent instruction to student to squat press 360 pounds). Whether an act is within the scope of employment is generally a question of fact. See, *Kornec v. Mike Horse Mining & Milling Co.*, 120 Mont. 1, 5, 180 P.2d 252, 255 (1947). However, when only one legal inference may reasonably be drawn from the facts, scope of employment is a question of law. *Bowyer*, ¶ 8.

Whether in a public or private setting, unlawful discriminatory conduct is unlikely to be expressly authorized by an employer. However, the responsibility of an employer is not restricted by the instructions given to an employee. *Kornec*, 120 Mont. at 9, 180 P.2d at 256. Conduct not authorized by the employer may be so similar to or incidental to the conduct authorized as to be encompassed within an employee's scope of employment. *Restatement (Second) of Agency, §229(2) (1957).*

In limited circumstances, the law of agency imposes liability on an employer even when the employee commits an intentional act of discrimination outside the scope of employment. The Restatement (Second) of Agency §219(2) sets forth the following common law principles:

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or consequences, or
(b) the master was negligent or reckless, or
(c) the conduct violated a non-delegable duty of the master, or
(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency §219(2).[1]

The United States Supreme Court provided specific guidance for determining employer liability for the discriminatory acts of supervisors, which occurred outside the scope of employment, by applying the agency principles of §219(2). *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 758, 118 S. Ct. 2257, 2267, 141 L.Ed. 2d 633 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). Subsection (b) of §219(2) holds an employer liable when the tort is attributable to the employer's own negligence.[2] *Burlington Industries,* 524 U.S. at 758, 118 S. Ct. at 2267. Alternatively, subsection (d) of §219(2) holds an employer vicariously liable when an employee exploits her apparent authority in committing the unlawful act or when the employee was aided in accomplishing the tort by the existence of the agency relationship. *Burlington Industries*, 524 U.S. at 759, 118 S. Ct. at 2267. Apparent authority is relevant where the agent purports to exercise a power which she does not have, as distinct from where the agent threatens to misuse actual power. *Burlington Industries*, 524 U.S. at 759, 118 S. Ct. at 2267. Apparent authority exists only to the extent it is reasonable

[1] The common law principles of §219(2), are updated as follows: "A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission." *Restatement (Third) of Agency § 7.08 (2006).*

[2] The "knows or should have known" standard of review of §219(2)(b) corresponds with the hearing officer's analysis pertaining to the "discriminatory indifference" of Great Falls School District # 1 for failing to take action following actual notice.

for the third person dealing with the agent to believe that the agent is authorized. *Burlington Industries*, 524 U.S. at 759, 118 S. Ct. at 2267.

The Commission concurs that a classroom worker's abusive and discriminatory conduct toward a disabled student does not fit comfortably within the notion of scope of employment. Therefore, the Commission defers to the hearing officer's Finding of Fact No. 90 regarding the specific determination that the scope of employment of the School District's paraprofessionals did not encompass the dunking of G.S.'s head under running water. As the hearing officer noted, "No employee was authorized to punish any student through abuse." *Finding of Fact No. 18.*

That said, the Commission finds the common law concepts expressed by the Restatement (Second) of Agency § 219(2)(d) aptly characterize the agency relationship between the School District and its classroom employees. The discriminatory acts against G.S. occurred during the course of the regular school day, in G.S.'s regular classroom, and were carried out by paraprofessionals working under the supervision of the classroom teacher. The agency relationship between the classroom workers and the School District allowed the paraprofessionals proximity to and daily contact with disabled students. The organization of the school into separate classrooms under the control of the assigned teachers served to shield the discriminatory acts against G.S. from discovery by parents and school administrators. While the School District may not have condoned the conduct of the paraprofessionals, mere disapproval does not construct a bar to vicarious liability. The Commission determines that the paraprofessionals exercised apparent authority, absent any limitation established by the classroom teacher or school administrators, when dunking G.S.'s head under running water to wake him up.

The Commission concludes that Great Falls School District # 1 is vicariously liable for the discriminatory conduct of the paraprofessionals, despite the hearing officer's finding that this egregious conduct was not within the scope of their employment. The Commission further finds that the heightened vulnerability of a disabled child, who is unable to clearly express his feelings or needs, renders necessary the imposition of vicarious liability on the School District for the discriminatory acts of the poorly supervised paraprofessionals. Accordingly, the Commission modifies Finding of Fact No. 90 by reversing the hearing officer's determination of the School District's liability under the doctrine of *respondeat superior*.

As an affirmative defense to vicariously liability, the School District must show that it exercised reasonable care to avoid the discrimination against disabled students and took reasonable care to eliminate the discrimination against G.S. when it occurred. See, *Faragher,* 524 U.S. at 805, 118 S.Ct. at 2292.

In accordance with State law and Great Falls School District policy, "all school district employees are required to report suspected abuse" of students to both state officials and the school principal. *Finding of Fact No. 17.* The hearing officer found that school employees witnessed or were informed about specific incidents of alleged abuse, but failed to timely report to supervisory staff who were authorized to investigate and stop the abusive practices. *Finding of Fact Nos. 36-44-46, 48, 51-55, 61-62, 66, 68-70.* The Commission notes that, as mandated by the School District's reporting procedures, the duty to report suspected abuse squarely rests within the scope of employment of all School District employees. However, the record does not explain the breakdown in communication that occurred between School District administrators and other staff, which allowed the mistreatment of G.S. at the hands of the paraprofessionals to continue for months.

The teacher assigned to G.S.'s classroom for the 2008-2009 school year was Heidi Budeau, who was assisted by three paraprofessionals, including Kristi Kallie and Julie Parish. *Finding of Fact No. 35.* As early as October 2008, concerns regarding Budeau's ability to appropriately supervise the paraprofessionals in G.S.'s classroom were raised to the Special Education Director, Sharon Lindstrom, and the Special Education Coordinator, Rosie Comes. *Finding of Fact Nos. 23, 46.* On February 17, 2009, Comes was directly informed that G.S. had been abused by the paraprofessionals. *Finding of Fact No. 70.* Still, the School District took no action to investigate or address the allegations until Tifonie Schilling telephoned Comes on April 27, 2009, to complain about the paraprofessionals' mistreatment of her son. *Finding of Fact No. 78.*

The hearing officer found that in May 2008 the Great Falls School District assigned Kristi Kallies to be a regular paraprofessional substitute in G.S.'s classroom. *Finding of Fact No. 29.* On May 28, 2008, the school principal investigated a complaint that Kallies had humiliated a disabled student in the school library. *Finding of Fact. No 30.* On June 5, 2008, a paraprofessional who previously had worked with Kallies emailed the Paraprofessional Substitute Coordinator, Lousie Saltz, and complained that Kallies was "mean and verbally abusive to disabled students." *Finding of Fact No. 31.* Saltz also served as the assistant to District's Director of Special Education, Sharon Lindstrom. *Finding of Fact No. 26, 31.* The hearing officer noted that there was no evidence presented at the hearing to indicate that Saltz reported the information regarding Kallies' alleged abusive treatment of disabled students to Lindstrom. *Finding of Fact No. 31.*

The Commission is troubled by the fact that the June 5, 2008 email report was submitted to the very administrative office of the School District that is specifically charged with ensuring

the quality of the educational experience of disabled children. The failure of Saltz to immediately inform the Director of Special Education of the substantive allegations in the email report points to an apparent failure on the part the School District to adequately train all employees in the School District's own mandatory reporting procedures. A timely investigation of Kallies' past history of abusive treatment of disabled students may have prevented the subsequent mistreatment of G.S. by this same employee. The Commission affirms the hearing officer's findings recounting the litany of unreported suspected abuse of disabled students witnessed by school employees, which includes Saltz's failure to forward the June 5, 2008 email to her supervisor.

The breakdown of the School District's mandatory reporting procedures directly contributed to the School District's failure to exercise reasonable care to prevent the discrimination against G.S. and failure to timely eliminate that discrimination when it occurred. Based on the findings of the hearing officer, the Commission determines the School District failed to exercise reasonable care. Consequently, the affirmative defense provides the School District no refuge.

The primary objective of the Montana Human Rights Act is to avoid harm caused by discrimination. The Govermnental Code of Fair Practices mandates that a school facility may not be used in the furtherance of any discriminatory practice. An affirmative obligation of the School District is to prevent the kind of abuse that occurred in G.S.'s classroom. Consequently, the Commission is left with the firm and definite conviction that the hearing officer misapprehended the effect of the evidence when the hearing officer determined that G.S. experienced no harm as a result of the abusive treatment he received from two paraprofessionals in his classroom. Therefore, the Commission remands for reconsideration of damages in light of

the corrected legal analysis, with direction to the hearing officer to consider whether the liability of the School District for the discriminatory acts against G.S. extends back to June 5, 2008, when the office of the Director of Special Education was alerted to the past and future potential for employee abuse of disabled students.

ORDER

IT IS HEREBY ORDERED, the Commission AFFIRMS, in part, the hearing officer's Findings of Fact, and MODIFIES, in part, Finding of Fact No. 90, as outlined by this Order.

IT IS FURTHER ORDERED, the Commission REVERSES the hearing officer's Conclusions of Law, as detailed by this Order;

IT IS FURTHER ORDERED, the Commission AFFIRMS and ADOPTS the hearing officer's order of affirmative relief;

IT IS FURTHER ORDERED, the Commission REMANDS this matter to the Hearings Bureau for further proceedings consistent with this Order to determine the harm experienced by G.S. as a result of the discriminatory acts committed by School District employees and to determine an appropriate monetary award for emotional distress damages. The hearing officer shall have the discretion to conduct any additional fact-finding deemed necessary.

DATED this 10th day of November 2011.

L.M. Minich

L.M. Minich, Chair
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 10th day of November 2011.

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