

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 72-2019:

|                         |   |                                  |
|-------------------------|---|----------------------------------|
| CARY JONES,             | ) |                                  |
|                         | ) |                                  |
| Charging Party,         | ) |                                  |
|                         | ) | <b>HEARING OFFICER DECISION</b>  |
| vs.                     | ) | <b>AND NOTICE OF ISSUANCE OF</b> |
|                         | ) | <b>ADMINISTRATIVE DECISION</b>   |
| BRIDGER PUBLIC SCHOOLS, | ) |                                  |
|                         | ) |                                  |
| Respondent.             | ) |                                  |

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**I. PROCEDURAL AND PRELIMINARY MATTERS**

Charging Party Cary Jones (Jones) has alleged that his employer and Respondent herein, Bridger Public Schools (the School District), violated its duty to engage in the interactive process in good faith with Jones as a result of his mental disability.

Prior to hearing, the school district filed a motion for summary judgment. The School District argued that it had at all times acted in good faith with regard to the interactive process. The Hearing Officer found that, based on the facts set forth by Jones, he had shown genuine issues of material fact were in dispute, and the motion was denied.

Hearing Officer Chad R. Vanisko convened a contested case hearing in the matter on December 20-21, 2018, in the law offices of Felt, Martin, Frazier & Weldon, P.C., in Billings, Montana, with the parties represented by counsel. Jones was represented by Craig Hensel of Hensel Law, PLLC, and the School District was represented by Jeana Lervick of Felt, Martin, Frazier & Weldon, P.C.

At hearing, Colin Gerstner, Lisa Hjemstad, Marcelle Jones, Cary Jones, Bill Phillips, Jim Goltz, and Marilee Duncan all testified under oath. Exhibits 1-83 were

agreed to by stipulation of the parties prior to hearing, and were admitted in full at the start of the hearing.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief, which was timely received by the Office of Administrative Hearings. Based on the evidence adduced at hearing and the arguments of the parties in their closings at time of hearing and in their post-hearing briefing, the following Hearing Officer decision is rendered.

## **II. ISSUES**

1. Whether the School District failed to engage in the interactive process in good faith with Jones in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.

2. If the School District failed to engage in the interactive process in good faith with Jones as alleged, what harm, if any, did he sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If the School District failed to engage in the interactive process in good faith with Jones as alleged, in addition to an order to refrain from such conduct, what should the Department require to correct and prevent similar discriminatory practices?

## **III. FINDINGS OF FACT**

1. Respondent Bridger Public Schools, also known as Bridger Public School District No. 2, Carbon County (the School District or District), is a public-school system organized and operated under Montana law.

2. At the time in question, the School District served approximately 184 students pre-kindergarten through 12th grade and had approximately 40 employees, including 23 certified teachers. The District is governed by a five-member elected Board of Trustees.

3. The School District's Superintendent for all relevant periods was Bill Phillips (Phillips). The Principal was Jim Goltz (Goltz).

4. Jones is a science teacher for the School District, and has held that position since 2013. Jones was hired by Phillips.

5. On or about September 24, 2016, a high school student (“the Student”) who attends school in the District was accused of sexually molesting Jones's preschool daughter who attended daycare at the home of the Student.

6. Jones' daughter was taken to the doctor for evaluation on September 26, 2016. On that same day, both Jones and his wife, Marcell Jones (M. Jones) asked to meet with School District personnel.

7. On September 26, 2016, Jones met with School District administrators to inform them of his belief that his 4-year-old daughter had been sexually molested by a current School District high school student (the Student).

8. Phillips and Goltz attended the September 26, 2016 meeting, at which time they first became aware of the sexual assault and Jones' issues surrounding the same.

9. Both Phillips and Goltz noted that Jones was upset at the September 26, 2016, meeting, and Goltz also observed that Jones was having a hard time.

10. Jones did not inform the School District of any medical condition or disability at the September 26, 2016, meeting, nor did he ask for any accommodations at the meeting.

11. After the September 26, 2016, meeting, the School recognized that Jones needed some help, and that he was frustrated and concerned for his own safety. The School District began taking steps to both protect Jones from the Student and assist him personally. Those steps included some of the following examples:

- a. Allowed Jones to take time off and counted it as professional development and not discretionary leave;
- b. Removed both the Student and his sibling from Jones's class;
- c. Appointed individuals, including Phillips, to monitor the Student in the high school, at lunch, and when leaving the school premises;
- d. Took steps to limit contact between elementary and older students;
- e. Goltz personally provided transportation for Jones's daughter to meet up with her mother and/or a babysitter.

- f. Permitted Jones to leave the school at 11:45 a.m. to take his daughter to the babysitter.
- g. A paraprofessional who had other duties with the School District was assigned to watch Jones's daughter for 30 minutes between the end of pre-school and when Jones was able to take his daughter to her babysitter.
- h. Jones's daughter was allowed to ride a team bus to provide transportation back to Jones.
- i. Although she was an out-of-district student, Jones' daughter was allowed to remain in the School District to attend school, in spite of the additional burden related to keeping her separated from the Student;
- j. Attempted to keep staff from gossiping about the situation or those involved;
- k. Both Phillips and Goltz began doing walkthroughs by Jones' classroom; and
- l. Philips reached out to M. Jones about her husband's well-being.

12. Jones believed that the School District was not genuinely interested in making things better for him and that the School District's actions were unsubstantial.

13. Both Jones and the Student filed for protective orders against each another. In December, 2016, Jones called both Phillips and Goltz to testify on his behalf at the hearing for the order the Student filed against him. Jones was frustrated by their testimony.

14. Jones began seeing Lisa Hjelmstad ("Hjelmstad") for counseling in December, 2016. Hjelmstad is a licensed clinical social worker, licensed marriage and family therapist, and licensed addiction counselor. Her primary practice focus is trauma, anxiety, posttraumatic stress, and co-occurring addictions.

15. Hjelmstad has been admitted as an expert in Montana State District Court in Yellowstone County, Big Horn County, Stillwater County, and Carbon

County, and was tendered and admitted as an expert witness to attest to clinical diagnosis and treatment of Jones.

16. Hjelmstad testified that she diagnosed Jones with posttraumatic stress disorder (PTSD) and prominent anxiety during his first counseling session in December, 2016. She noted that Jones was experiencing hypervigilance.

17. Hjelmstad opined that what Jones perceived as inaction on the part of the School District was a driving force of his anxiety, and that it would have benefitted him to have some written accommodations in place.

18. Hjelmstad also opined that one of things that caused Jones' PTSD was "being in the situation where he is having to deal with [the Student] on a daily basis." (Hearing Tr. Vol. 1 at pp. 113-114.) Hjelmstad also stated that it would have been beneficial for Jones to have the School District's accommodations in writing. (Hearing Tr. Vol. 1 at pp. 135-36.) She described how Jones "needed a pathway" and "needed to know the lay of the land and what he could expect and what was expected of him." (Hearing Tr. Vol. 1 at pp. 136-37.)

19. In or around January, 2017, Jones determined that he did not want to have to avoid the Student. The School District was not aware of his change of tactic, however, and the accommodations in place remained the same as they had been.

20. Jones and Hjelmstad began the paperwork for requesting formal accommodations and FMLA in January, 2017. (Jones did not, however, bring his PTSD to the School District's attention until over two months thereafter.)

21. Hjelmstad faxed documents to the School District on March 21, 2017, which identified Jones as experiencing hypervigilance, anxiety, avoidance, negative conditions and indicated that Jones was unable to do his job at times due to these conditions. (Ex. 28.) The documents also included a list of possible accommodations and information about PTSD. (Ex. 28.)

22. Jones hoped "[t]hat we would get some kind of accommodation that would help me deal with things that I was going through" and that the school would "provide me with accommodations in a reasonable fashion." (Hearing Tr. Vol. 1 at p. 226.)

23. Phillips had notified Cary on March 21st that the School District had received Hjelmstad's FMLA paperwork, and that they were working on it and would follow up shortly. (Ex. 2; Hearing Tr. Vol. 2 at pp. 34-35.)

24. On April 11, 2017, a meeting was held and attended by Jones, Hjelmstad, Phillips, Goltz, and the School District's attorney Marilee Duncan ("Duncan"). (Hearing Tr. Vol. 2 at pp.107-08.) While possible accommodations were discussed and generally agreed upon, nothing was formally put in a document for the parties' signatures.

25. It was understood that Duncan would create a memorandum of understanding (the "MOU") based on the agreed-upon accommodations resulting from the April 11, 2017, meeting.

26. The MOU was not, in itself, intended to be an accommodation, but rather a formal recitation of Jones' accommodations.

27. Regardless of the status of the MOU, Phillips and Goltz agreed it was their duty to start making sure the School District was immediately administering the agreed-upon accommodations.

28. Duncan had hoped to complete the MOU in a week to 10 days, which she verbalized at the April 11, 2017, meeting. (Hearing Tr. Vol. 2 at p. 212.)

29. After the April 11, 2017 meeting, Jones did not have an MOU that expressly laid out his accommodations. (Hearing Tr. Vol. 2 at p. 246.)

30. Jones was excited after the meeting because he believed he was going to get the MOU in the next week.

31. The letter did not arrive within the time frame given to Jones. Jones repeatedly e-mailed Phillips asking for the finalized, written MOU. Phillips was aware Jones wanted a written document, and knew of his frustration when Jones started sending him e-mails asking for updates.

32. Phillips e-mailed Jones on April 21, 2017, and informed him he had just received word from Duncan regarding the MOU, and anticipated being able to present something to Jones early the following week. Jones was eager to receive the MOU and to go over it with Hjelmstad.

33. Jones e-mailed Phillips again on May 2, 2017, asking about the MOU, which he referred to as “FMLA paperwork.”

34. Jones e-mailed Phillips again on May 11, 2017, asking about the MOU, which he now referred to as “FMLA accommodations.”

35. Phillips responded to Jones each time indicating he was attempting to contact Duncan for updates.

36. Phillips e-mailed Jones on Tuesday May 23, 2017, and informed him, "Your paperwork was mailed to your home address yesterday. I would imagine you would receive it no later than tomorrow." (Ex. 7.) Jones received the letter on May 24, 2017.

37. For Jones, receiving Duncan's letter on May 24, 2017, when there were two days left in the school year, was frustrating, upsetting, and exhausting. He perceived that he was being treated poorly like a “second rated citizen who has no feelings” over and over again by the School District and being ignored day after day. (Hearing Tr. Vol. 1 at p. 241.) Jones felt that, with the school year ending, receipt of paperwork at that point defeated the purpose of what he believed whole process was about for the school year. Jones described this period of time was the most difficult time of his life.

38. The school year adjourned for the year on Friday, May 26, 2017.

39. Duncan's letter acknowledged there had been a "delay" in sending the letter, and further stated "I had expected to write this summary within a week or two of our meeting." (Hearing Tr. Vol. 2 at p. 217; Ex. 29.) Duncan's letter offered that there were "no excuses" for the delay in providing the letter. (Hearing Tr. Vol. 2 at p. 217; Ex. 29.)

40. Duncan acknowledged that the School District, “accept[ed] your health care provider's conclusion that you have a physical or mental impairment that substantially affects one or more major life activities. This means that you have a disability as defined by the ADA.” (Hearing Tr. Vol. 2 at p. 218; Ex. 29.) In other words, Duncan acknowledged that the School District was not contesting Jones’ assertion that he had a disability under the ADA. (Hearing Tr. Vol. 2 at p. 221.)

41. Jones e-mailed his union representative, Scott McCullough (“McCullough”), on August 7, 2017, asking if he had time to contact administration

about a meeting to get guidelines for all parties, expressing that it would be hard for him to return to work due to feeling uncomfortable about the present situation.

42. Phillips and Goltz had a meeting with Jones on August 17, 2017. Phillips wrote notes at the meeting, acknowledging that Jones wanted the administration to check up on him once in a while, and that he feared being accused of wrongful acts that he did not commit.

43. Phillips was aware that Jones was experiencing frustration and anxiety from not having his accommodations formalized and reduced to writing in the form of the MOU.

44. On or about August 15, 2017, Jones retained attorney Colin Gerstner ("Gerstner") to help secure his written work accommodations. Gerstner sent Duncan an e-mail and letter on August 18, 2017 identifying himself as counsel for Jones.

45. Gerstner sent a letter dated August 18, 2017, which stated in relevant part that, "Mr. Jones wants to be sure that Bridger Schools is on board for the remaining accommodations. To that end I am asking that the School work with Lisa Hjelmstad to get a plan in place so that Bridger School can meet these reasonable accommodations." (Ex. 30.)

46. Duncan and Gerstner exchanged e-mails on August 18, 2017. Duncan offered that "perhaps you and I can hammer something out and then present it to our clients." (Ex. 7.)

47. Gerstner sent another letter on August 30, 2017, identifying proposed accommodations. The letter listed the accommodations requested by Jones and agreed to by all parties the previous spring, including:

Being allowed to close his door when necessary, as long as no students are alone with him behind closed doors.

Being allowed to stretch, walk, and take breaks when necessary as long as there was someone to watch the class and the breaks were not excessive.

Being allowed to use stress management techniques as long as they did not interfere with classroom management.



Being allowed to make telephone calls during work hours to his therapist and others for support.

Being allowed to use leave for counseling appointments.

Being allowed to walk away from frustrating situations and confrontations as long as it did not interfere with classroom management.

Being allowed to close the classroom door during breaks as long as there were no students alone with him.

Being allowed to take breaks and go places where he felt comfortable.

(Hearing Tr. Vol. I at pp. 54-55; Ex. 31.)

48. Gerstner stated in his August 30, 2017, letter that the only accommodations not discussed or agreed upon at this time were the following:

Jones wanted the School District to develop a plan so that Mr. Jones did not encounter the Student.<sup>[1]</sup>

Jones understood that the School District could not force another person to be his support person, but several teachers were willing to help him and he wanted to be able to reach out to them.

Jones wanted a plan in place for a mentor/supervisor or administrator to answer questions if both Jim Goltz and Bill Phillips were not available.

Jones wanted to discuss restructuring his job to include only essential functions during times of stress.

Jones wanted a plan for backup coverage when he needed to take a break.

Jones wanted to modify the School District's attendance policy to count one occurrence for all PTSD-related absences.

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<sup>1</sup> This request would later become moot after Jones determined it was better that he no longer avoid the Student.

(Hearing Tr. Vol. I at pp. 54-55, Ex. 31.)

49. The letter concluded by stating, “As you can see, we are not really that far apart on this. I just think the final details need to be ironed out.” (Ex. 31.)

50. Gerstner sent another e-mail to Duncan on September 13, 2017, stating “I’m just following up on my previous letter regarding accommodations for Cary. Cary has had some hard times recently teaching, and he needs the accommodations and procedures in place. He cannot wait any longer for the School’s response. Please respond by next Wednesday.” (Ex. 8.)

51. Gerstner called Duncan to follow up and left her a voicemail during the week of September 18-22, 2017.

52. Gerstner sent another e-mail to Duncan on September 25, 2017, stating, “I left a voicemail last Wednesday or Thursday following up on this. We have not heard anything from the school on this. I think we are close to resolution, but Cary needs confirmation that the school is onboard with all of his counselor’s proposals. Please let me know when we can expect a response to our letter dated August 30, 2017. I don’t want this to drag on any longer than necessary.” (Ex. 9.)

53. Gerstner spoke with Duncan on the phone on September 26, 2017, wherein they discussed the August 30, 2017, letter. During this conversation they discussed formalizing the agreement and reducing it to writing.

54. Gerstner followed up with Duncan via e-mail on October 9, 2017 and asked if there was any update on the School District’s response. Gerstner did not receive a response.

55. Gerstner followed up with Duncan via e-mail on October 12, 2017, and asked if there was any word from her client (*i.e.*, the School District). Gerstner did not receive a response.

56. Gerstner again followed up with Duncan via e-mail on October 16, 2017, asking for an update and indicating that Jones would like to get the matter resolved soon. Gerstner did not receive a response.

57. Gerstner again followed up with Duncan via e-mail on October 19, 2017, asking for any updates and the status. Gerstner did not receive a response.

58. Gerstner again followed up with Duncan via e-mail on October 24, 2017, asking that Duncan please let him know how things were going, and stating that Jones “really wants this wrapped up as soon as possible.” (Ex. 15.) Gerstner did not receive a response.

59. Gerstner again followed up with Duncan via e-mail on October 27, 2017, noting that he had left a voicemail a few days prior and requesting that she provide him with an update. Gerstner stressed that, “Cary has some stressful situations coming up in relation to the criminal proceeding, and he wants to be sure that the procedures are in place. We agreed on practically everything, so I think we can wrap this up very quickly. At the very least, please let me know what's going on.” (Ex. 16.) Gerstner did not receive a response.

60. Gerstner again followed up with Duncan via e-mail on November 2, 2017, and wrote, “Please provide me with an update regarding Cary’s accommodations. It’s been awhile since we agreed to most of the accommodations in principle. I really hate sounding like a jerk, but if Bridger Schools doesn't get back to us we have to explore our options, including a possible HRB action. I really don't want to do that, but we haven’t heard anything since our last phone conversation on September 26.” (Ex. 17.)

61. Duncan responded shortly after Gerstner’s November 2, 2017, e-mail which threatened legal action and wrote, “Many apologies. I promise you will have it tomorrow.” (Ex. 17.)

62. Duncan sent a draft MOU to Gerstner on November 6, 2017. Duncan acknowledged in her November 6, 2017, letter to Gerstner that there had been a “delay” in sending this letter which she characterized as “unexpected and ridiculous.” (Hearing Tr. Vol. 2 at pp. 221-22; Ex. 29.)

63. Gerstner responded on November 9, 2017 with proposed edits.

64. Gerstner again followed up via e-mail on November 15, 2017, and noted he wished to move quickly to close the file because the Student had recently been outside Jones’ classroom, which triggered severe anxiety.

65. The parties continued to make edits and negotiate the terms of the MOU until the School District gave its final approval on November 20, 2017.

66. Jones and Gerstner signed and executed the MOU and returned it to Duncan on November 27, 2017. An agent for the School District had not, at that point, signed the MOU.

67. On the whole, the accommodations set forth in the MOU were markedly different than the actions undertaken by the School District as set forth in Finding of Fact. No. 11 above.

68. Gerstner again followed up with Duncan via e-mail on December 21, 2017, writing:

We still don't have the signed MOU. Nor has Cary received the student's schedule. The uncertainty of the situation has caused Cary's anxiety to go sky high. Cary is preparing to file a complaint before the HRB. He understands that any action will likely have to be dismissed if Bridger Schools completely executes the MOU and complies with all of the requirements. However, he's not sure why it has taken this long to wrap this thing up. Frankly, I don't have a good answer for him. We've been more than patient with Bridger Schools, and I don't understand why we still don't have a completed MOU and why they haven't met all the requirements.

(Ex. 24.)

69. The executed MOU was signed by 4 out of the 5 proposed signatories, excluding McCullough. The MOU was sent by Duncan to Gerstner on December 21, 2017. (Exs. 24, 32.)

70. The MOU reads as follows:

MEMORANDUM OF UNDERSTANDING: ADA ACCOMMODATION

Cary Jones and Bridger Public Schools ("School District") have shared information and ideas for purposes of managing and accommodating Mr. Jones's anxiety and post-traumatic stress disorder. Taking into consideration the recommendations of his counselor (Lisa Hjelmstad) and the functional limitations of the school and its operations, the parties have reached the following agreements:

1. Mr. Jones has requested that the School District assist in reducing distractions or triggers in the work area by allowing him to work behind closed doors when necessary, including during breaks. The School District agrees to this accommodation provided that no students are alone with Mr. Jones behind closed doors, to which Mr. Jones agrees.
2. The School District understands that it is desirable that interactions and encounters between Mr. Jones and the Student be limited to the extent possible. The parties agree to the following:
  - Mr. Jones will be given the Student's schedule (school and sports) so that he is aware where the Student will be.
  - The Student will not go down the hallway past the math room. If he needs to do so for some reason, he will ask for an administrative escort. This will allow for administration to attempt to provide notice to Mr. Jones as well.
  - The Student will be reminded from time to time to "steer clear" of Mr. Jones and his classroom.
3. Mr. Jones occasionally needs to stretch, walk, or take breaks to manage his anxiety. He may need to go to a place where he feels comfortable to use relaxation techniques or contact a support person. He also needs the flexibility to walk away from frustrating situations and confrontations.

The School District will allow this, provided that Mr. Jones notifies administration so that his class or other duties are not unattended and the breaks are not excessive. Mr. Jones will call Mr. Phillips, Mr. Goltz, an assistant to Mr. Phillips or Mr. Goltz, or other designee agreed upon by administration and Mr. Jones to cover his class if needed. See #9 below.

4. To the extent other teachers are willing to help Mr. Jones when he needs to talk to a support person, he is allowed to

do so; the School District will not interfere with the communications between Mr. Jones and his supportive friends, provided no classrooms are left unattended and duties are being met. Both parties understand the School District cannot force other teachers to help Mr. Jones.

5. Mr. Jones is allowed to use stress management techniques to deal with emotions (i.e., phone apps, etc.) as long as doing so does not interfere with classroom duties and management.
6. Mr. Jones is allowed to make telephone calls during work hours to his therapist and others for needed support, with the usual understanding that he will not leave his classroom unattended and will fulfill his teaching duties.
7. Mr. Phillips and/or Mr. Goltz will be available to confer with Mr. Jones as needed, will answer any questions he may have, and will alert him if there are any situations that may lead to anxiety or undue stress. Mr. Jones understands that one or both are in the school at all times. If there are any times or dates that both will be absent, they will appoint an acting administrator and will notify Mr. Jones accordingly.
8. The School District supports Mr. Jones' need for counseling and will allow for appointments as necessary. See #9 below.
9. If a break (as described in #3 above) lasts less than 30 minutes, it will not be logged. Otherwise, Mr. Jones must track the amount of time spent on a break or leaving school premises for an appointment and will provide that log to administration each pay period. The time will be logged as "sick leave" in accordance with the school policy and the Master Agreement. If sick leave is exhausted, then the break time will be considered "personal leave" in accordance with the Professional Agreement and Policy 5321. The School District waives the forty-eight (48) hour

notice requirement for personal leave for Mr. Jones as an ADA accommodation unique to his situation.

10. This MOU is unique to Mr. Jones and the District's accommodation of his disability. The MOU and accommodations provided to Mr. Jones do not extend to others covered by the Professional Agreement to waive any provisions of policies or the Professional Agreement except as specifically stated herein as to Mr. Jones. This MOU does not create a binding past practice of the parties to the Professional Agreement.

Dated this 27th day of November, 2017.

[Signed by Cary Jones; Colin Gerstner, Counsel for Mr. Jones; Bill Phillips, Superintendent; Mary E. Duncan, School District Counsel; and *not* signed by Scott T. McCullough, on behalf of the Bridger Education Association.]

(Ex. 32.)

71. Jones testified that he had not been allowed to leave his classroom without it counting against sick accruals prior to his receipt of the MOU, but no evidence was presented other than his testimony.

72. Through Goltz, the School District admitted that it had not provided Jones with a copy of the Student's sports schedule for the 2017-2018 school year, nor had it notified Jones that the Student was not participating in sports for the 2018-2019 school year, as it had agreed to do under the terms of the MOU.

73. The School District never asked Jones for his input on a "designee . . . to cover his class" as required in the MOU. (Hearing Tr. Vol. 2 at p. 177; Exs. 3, 32.)

74. The MOU required Goltz to alert Jones any time the Student's parents were in the school, to which Goltz admitted he "messed up" and failed to do on at least one occasion. (Hearing Tr. Vol. 2 at p. 178.)

75. Duncan e-mailed Gerstner on December 21, 2017, and agreed to remind the School District to give Jones the Student's schedule, and that the School District

had still not agreed on a “point person” for days when both administrators would be absent. (Ex. 24.)

76. Gerstner e-mailed Duncan on January 3, 2018, and reminded her that Jones had not yet received a copy of the Student’s schedule and proposed a designated “point person” in the event both administrators were absent.

77. Jones was never given the Student's academic schedule for the 2017-2018 school year, and was also never given the Student's sports schedule for the 2017-2018 and 2018-2019 school years.

78. Although the School District had individuals available who could potentially cover classes, it never designated a mutually agreed upon designee to cover Jones’ class if needed.

### **Emotional Distress**

79. With Jones’ consent, Hjelmstad sent his confidential treatment and diagnosis information to the School District. He hoped that doing so would assist in removing his triggers and provide him with accommodations. After the April 11, 2017 meeting, Jones was hopeful that the School would provide him with accommodations in a reasonable amount of time.

80. The School District believed it should be implementing what was discussed in the April 11, 2017 meeting immediately, but there is no evidence it could fully do so absent specific duties and explicit accommodations which had yet to be determined without the MOU.

81. Jones was disappointed that the School District did not provide the letter within one week after the April 11, 2017 meeting, as he had hoped to discuss it with Hjelmstad, and became very frustrated during this time period and emailed the School on several occasions.

82. The delay in the MOU caused Jones to experience anticipation and uncertainty as to the status of the School District’s support of his disability and lack of finality, as well as frustration, resentment and a feeling he could not count on being protected in the school environment and had been abandoned. According to Hjelmstad, Jones needed to have specific steps that he could take with regard to accommodation issues and to know that he would be okay in the school environment.



83. Jones was also experiencing a lack of sympathy and connection with his work environment, which was attributed to the School District's administration.

84. M. Jones described how Jones was adversely affected by the School District's inactions, and how baffled by what he perceived as the School District's unresponsiveness and failure to honor some of the MOU conditions.

85. Jones did not believe the School District would provide accommodations absent the MOU because, in his opinion, there was no mutual understanding of the parties without the MOU in place. Jones' position on pre- versus post-MOU circumstances is summed up in the following statement:

My contention is that after April 11th, there was no such thing as an accommodation list or agreed-upon accommodation list. And so prior to the signing of the Document on November 27th, that wouldn't have even had an effect.

(Hearing Tr. Vol 2 at pp. 58-59.)

86. The delay in providing the MOU made Jones feel that the School District was uncaring, unconcerned, and unresponsive, which made it difficult to go to work every day. It would have greatly reduced Jones' anxiety if he had gotten the written MOU finalized when it was promised, as it would have provided him with a written set of boundaries for the parties' actions in accommodating Jones. The uncertainty of the situation was one of the most frustrating things to Jones.

#### IV. DISCUSSION<sup>2</sup>

Montana law prohibits discrimination against employees based on a physical or mental disability. Mont. Code Ann. § 49-2-303(1)(a). Montana looks to guidance from federal anti-discrimination law under the Americans with Disabilities Act (ADA) when construing provisions of the Montana Human Rights Act (MHRA). *BNSF Ry. Co. v. Feit*, 2012 MT 147, ¶ 8, 365 Mont. 359, 281 P.3d 225. It is an unlawful discriminatory practice for an employer to either fail to make reasonable accommodations to the known physical limitations of an otherwise qualified employee with a disability or deny equal employment opportunities to a person with

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<sup>2</sup> Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

a physical disability because of the need to make a reasonable accommodation. Mont. Code. Ann. § 49-2-101(19)(b); Admin. R. Mont. 24.9.604(3)(c), 24.9.606(1)(a)-(b); *accord* 29 C.F.R. § 1630.9(a). A person with a physical disability is qualified to hold an employment position if the person can perform the essential functions of the job with or without a reasonable accommodation for the person's physical disability. Admin. R. Mont. 24.9.606(2). “If a person suffers from a disability, the employer has a duty to provide a reasonable accommodation if, with such accommodation, the person could perform the essential job functions of the position.” *Pannoni v. Bd. of Trs.*, 2004 MT 130, ¶ 27, 321 Mont. 311, 90 P.3d 438 (citing Mont. Code Ann. § 49-2-101(19)(b) and Admin. R. Mont. 24.9.606(2)). “This duty to make reasonable accommodations is an essential part of Montana's anti-discrimination statutes.” *Borges v. Missoula Cnty. Sheriff's Office*, 2018 MT 14, ¶ 31, 390 Mont. 161, 415 P.3d 976 (quoting *McDonald v. Dep't of Env'tl. Quality*, 2009 MT 209, ¶ 40, 351 Mont. 243, 214 P.3d 749).

The School District does not dispute that, because of his PTSD, Jones was disabled within the meaning of the MHRA and has met all criteria necessary to trigger the School District's duty to provide reasonable accommodations.<sup>3</sup> (Ex. 29.) The hearing officer will therefore not belabor the issue of Jones' disability and need for accommodation, and will only address the issue Jones has raised: the School District's role in the interactive process. To that end, Jones has not claimed disparate treatment or any other form of discrimination in that regard. Rather, Jones' argument is that the School District failed to engage in the interactive process in good faith. As stated in his opening brief:

The School spent much of the hearing focusing on whether the School ever denied Jones the right to use any accommodations. However, the School misses the thrust of Jones' claim. The School violated the ADA and MHRA by outright refusing to engage in the interactive process.

(Jones Open. Br. at 3.) Jones' arguments are sound insofar as a refusal to engage in the interactive process can itself be a violation of the MHRA and ADA. It should be

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<sup>3</sup> For the School District to have been required to provide reasonable accommodations to Jones, he had to meet the following criteria: (1) he was both disabled within the meaning of the MHRA and an otherwise qualified individual able to perform the essential functions of the job with or without reasonable accommodations; (2) the School District was aware of his disability and he requested accommodations related to the disability; (3) a reasonable accommodation exists that would have been effective; and—if he was alleging a failure to accommodate—(4) the School District failed to provide a reasonable accommodation. Admin. R. Mont. 24.9.606(1)(a)-(4); *see also Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 284 (3d Cir. 2001) (citations omitted).

noted that claims regarding failure to accommodate are “qualitatively different” from claims regarding failure to engage in the interactive process. *Borges*, ¶ 34 (citations omitted). “An interactive dialogue violation may be defined as a failure by the employer to communicate with the employee about potential accommodations . . . whereas a reasonable accommodation violation refers to the employer's ultimate failure to take action that would permit an otherwise-qualified employee to perform his essential job functions. . . .” *Id.*

### A. The Interactive Process

In order to identify reasonable accommodations, an employer is required to engage in good faith in the “interactive process” with an employee, which is essentially opening up a line of communication regarding possible accommodations. *See McDonald*, ¶ 80; *see also* 29 C.F.R. § 1630.2(o)(3). An employee can demonstrate that an employer breached its duty to provide reasonable accommodations because it failed to engage in good faith in the interactive process by showing that: **“1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.”** *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 319-20 (3d Cir. 1999) (emphasis added) (citations omitted). Because a failure to engage in the interactive process and associated failure to provide a reasonable accommodation for a known disability is inherently “on the basis of the disability,” there is no need to probe the subjective intent of the employer or show discriminatory animus. *See Punt v. Kelly Servs.*, 862 F.3d 1040, 1048-49 (10th Cir. 2017) (quoting 42 U.S.C. § 12112(a)) (specifically regarding failure to provide reasonable accommodations).

Of the foregoing bolded criteria, the School District does not dispute either of the first two elements. The only voiced dispute concerns whether there was a good faith effort to engage in the interactive process. Although not significantly debated by the parties, an associated and necessary issue to reach is the fourth element—whether a failure in the interactive process resulted in accommodations not being offered to Jones. *See Taylor*, 184 F.3d at 319-20.

The interactive process, which is mandatory, was described by the Montana Supreme Court in the *McDonald* case. As the Court explained:

. . . [E]mployers are required to engage in an “interactive process” with disabled employees to identify and implement appropriate reasonable accommodations. *Barnett v. U.S. Air*, 228 F.3d 1105, 1111-14 (9th Cir. 2000) (*en banc*), judgment vacated on other grounds, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002); 29 C.F.R. § 1630.2(o)(3), app. § 1630.9. The interactive process, which is triggered by the employee's request for an accommodation or the employer's recognition of the need for one, requires good-faith exploration of possible accommodations. *Barnett*, 228 F.3d at 1112, 1114. The employer should meet with the employee, request information about the condition and what limitations the employee has, ask the employee what she specifically wants, show some sign of having considered her request, and offer and discuss available alternatives when the request is too burdensome. *Barnett*, 228 F.3d at 1115. Both sides must communicate directly and exchange essential information, and neither side should delay or obstruct the process. *Barnett*, 228 F.3d at 1114-15. Since the duty to accommodate is a continuing duty which is not exhausted by one effort, the employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed. *Humphrey v. Memorial Hospitals*, 239 F.3d 1128, 1138 (9th Cir. 2001).

*McDonald*, ¶ 80. In a nutshell, “[t]he interactive process requires ‘(1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and effective.’” *Alexander*, ¶ 13 (citing *United States EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1110-11 (9th Cir. 2010)).

“[N]either party should be able to cause a breakdown in the [interactive] process for the purpose of either avoiding or inflicting liability.” *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996). A party's obstruction, delay, or failure to communicate signals the party may be acting in bad faith. “In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.” *Beck*, 75 F.3d at 1135.

*Alexander*, ¶ 14. It is the alleged breakdown and delay of the interactive process that is at issue in the present case.

**1. Delay in the Interactive Process may be Evidence of Bad Faith Where it Results in Failure to Provide a Reasonable Accommodation.**

Although there is no specific time limit on the interactive process or providing a reasonable accommodation, unreasonable delay in granting an accommodation may amount to a failure to provide a reasonable accommodation. “A party's obstruction, delay, or failure to communicate signals the party may be acting in bad faith.” *Alexander*, ¶ 14; *see also Stringer v. N. Bolivar Consol. Sch. Dist.*, 727 F. App'x 793, 801-02 (5th Cir. 2018) (citing and quoting *Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 737 (5th Cir. 1999)). As stated by the 7<sup>th</sup> Circuit, however:

The regulation's direction to the parties to engage in an interactive process is not an end . . . [in] itself—it is a means to the end of forging reasonable accommodations. And the regulations direct an employer to engage in an informal process. Indeed, as the interpretive guidelines and courts have recognized, there may be some situations in which the reasonable accommodation is so obvious that a solution may be developed without either party consciously participating in an interactive process. *See* 29 C.F.R. pt. 1630 app. § 1630.9 at 360 (1998); *see also Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 514 (1st Cir. 1996) (upholding jury verdict for employer on the grounds that while [the] employer may not have initiated interactive process, a reasonable jury could find that process was not necessary to determine reasonable accommodation). The process must thus be viewed on a case-by-case basis. *See Beck [v. University of Wisconsin Bd. Of Regents]*, 75 F.3d 1130, 1136 (7th Cir. 1996) (“The determination must be made in light of the circumstances surrounding a given case.”).

Under the circumstances of this case, where the employee would not be faced with the problematic job duties immediately [. . . n]othing in the regulations or the cases indicates to us that an employer must move with maximum speed to complete this process and preempt any possible concerns.

*Loulseged*, 178 F.3d at 736-37.

As mentioned above in the elements of a claim regarding the interactive process, the failure to engage in an interactive process is not sufficient in itself to establish a claim. *See Taylor*, 184 F.3d at 319-20; *see also Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 193 (3d Cir. 2009) (failure to engage in interactive process with an employee who is not a “qualified individual” does not violate the ADA). In order to recover, there must be some showing that a reasonable accommodation was possible but not made because of the failure to engage in the interactive process. *See Taylor*, 184 F.3d at 319-20; *Williams v. 306 Philadelphia Hous. Auth. Police Dep’t*, 380 F.3d 751, 772 (3d Cir. 2004).

## **2. There was a Breakdown in Communications with the School District’s Counsel.**

Jones argues that the breakdown in the interactive process occurred not with the School District per se, but rather with its attorney. Jones did not present any evidence that the School District itself, through either Phillips or Goltz, failed to speak with either Jones or Hjelmstad to identify and implement reasonable accommodations, even in Duncan’s absence. The only alleged breakdown in the interactive process concerns inability to communicate with the School District’s counsel, Duncan, and her failure to timely provide an MOU as promised regarding accommodations. As argued by Jones, Duncan was an agent of the School District. The acts of an attorney are imputed to the client when the attorney is acting within the scope of the client's representation. *See Bury v. Bury*, 69 Mont. 570, 576-77, 223 P. 502, 503 (1924). Therefore, Duncan’s actions (or inactions, as the case may be) may be attributed to the School District.

Here, Jones has provided evidence there was a communications breakdown with Duncan due to her unresponsiveness, and that this unresponsiveness led to a delay in finalization of the MOU. As an initial matter, however, there is nothing which dictates that an attorney is a necessary part of the interactive process. *Cf. Ammons v. Aramark Unif. Servs.*, 368 F.3d 809, 820 (7th Cir. 2004) (finding that, in the situation of an employee’s counsel who wished for an additional meeting, the interactive process had already been satisfied by an earlier meeting with the employee and his union steward which resolved accommodation issues):

We find no support . . . for the conclusion that an interactive process must include an employee’s counsel or other persons including a rehabilitation counselor. Although there may be cases where an attorney or a vocational expert would be of considerable assistance in the interactive process, there is no requirement that an attorney and/or

vocational expert need to participate. The ADA envisions no more than “a flexible, interactive process by which the employer and employee determine the appropriate reasonable accommodation.” *Rehling v. City of Chicago*, 207 F.3d 1009, 1015 (7th Cir. 2000).

*Id.* While *Ammons* involved an employee’s counsel, there is no reason to think its reasoning and emphasis on the flexible, informal nature of the interactive process would not equally apply to an employer.

The facts show that Duncan’s only role in the interactive process was to advise the School District regarding legal matters and draft the MOU. Independent of the MOU and her legal advice to the School District, Duncan did not have any role in implementing the accommodations sought by Jones. Hence, Duncan’s unresponsiveness is only an issue if it can be shown the MOU was a necessary part of implementing accommodations. To that end, however, it was apparent from the evidence presented by the parties that both sides were dependent on Duncan’s MOU in order to identify the specific nature of the accommodations being implemented and the duties of the parties related thereto. Furthermore, many of the accommodations set forth in the MOU were different from those things which the School District asserted it had already been doing to accommodate Jones. Thus, in spite of Duncan’s limited role, Jones has shown she was an integral part of the interactive process.

### **3. The School District’s Lapses in Fully Implementing Certain Accommodations were in Part the Result of the MOU’s Delay.**

In addition to showing there was a breakdown of the interactive process, Jones is required to prove that the breakdown causally led to a reasonable accommodation not being provided him which otherwise would have. *See Taylor*, 184 F.3d at 319-20. Jones presented a great deal of testimony about the anxiety caused him by the absence of the MOU, but both parties were vague as to exactly what accommodations were and were not provided before versus after the presence of the MOU.

The MOU was not in itself an accommodation, and the evidence shows that both parties agree the MOU was merely intended to memorialize what the parties had talked about and agreed to with regard to accommodations. What was apparent from the testimony and evidence, however, is that while the School District was attempting to accommodate Jones, until the MOU was actually drafted, neither Jones nor anyone in the School District fully knew exactly what accommodations had been agreed to and what form they would take. This was evidenced in part by the

difference between the accommodations in the MOU and what the School District said it had previously done to accommodate Jones. As such, it is impossible for the School District to argue the delay of the MOU did not delay accommodations.

There were also certain failures to follow through on agreed-upon accommodations, even after the MOU was in place. For example, Goltz admitted the School District failed to provide Jones with a copy of the Student's sports schedule for the 2017-2018 school year. Goltz also admitted the school District did not provide Jones with a copy of the Student's sports schedule or notification that the Student was not participating in sports for the 2018-2019 school year. Goltz further admitted that Jones had never agreed to a "designee agreed upon by administration and Mr. Jones to cover his class" as set forth in the MOU (although this did not necessarily mean there was someone available to cover Jones' class, simply not one that Jones agreed upon with administration). Similarly, Goltz admitted to failing to notify Jones that the Student's parents were in the school on at least one occasion, as he was supposed to do under the MOU.

In light of the foregoing, Jones has met his burden of proof. As stated above, in order to prevail on his claim, in addition to showing that he had requested accommodations for a known disability (which no one disputes), Jones was required to show both that the School District did not make a good faith effort to assist him in seeking accommodations (*i.e.*, that it did not engage in the interactive process in good faith) and that he could have been reasonably accommodated but for the School District's lack of good faith. *See Taylor*, 184 F.3d 319-20. Jones offered evidence necessary to prove all the elements of such a claim. The only remaining issue is damages.

## **B. Damages and Affirmative Relief.**

With regard to Jones' damages, the Hearing Officer is empowered to take any reasonable measure to rectify any harm, pecuniary or otherwise, to Jones as a result of the illegal discrimination. *See* Mont. Code Ann. § 49-2-506(1)(b); *Vainio v. Brookshire*, 258 Mont. 273, 280-81, 852 P.2d 596, 601 (1993)(the Department has the authority to award money for emotional distress damages). The freedom from unlawful discrimination is clearly a fundamental human right. *See* Mont. Code Ann. § 49-1-102. Violation of that right is a per se invasion of a legally protected interest. Montana does not expect a reasonable person to endure any harm, including emotional distress, which results from the violation of a fundamental human right, without reasonable measures to rectify that harm. *See Vainio*, 258 Mont. at 280-81, 852 P.2d at 601. The severity of the harm governs the amount of recovery. *See*



*Vortex Fishing Sys. v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.3d 836 (citations omitted). However, because of the broad remunerative purpose of the civil rights laws, the tort standard for awarding damages should not be applied to civil rights actions. *Id.*

Jones' prayer for recovery is limited solely to the emotional distress suffered by him as a result of the breakdown of the interactive process. He does not seek damages specifically related to failure to accommodate, nor any damages related to wages. In total, Jones has requested \$100,000.00 for emotional distress, and has not requested any affirmative relief. Jones did not provide any underlying basis or breakdown for requesting \$100,000.00.

Because the purpose of the interactive process is to put reasonable accommodations in place, the damages suffered should have some bearing on failure to accommodate. Jones presented uncontroverted testimony that the absence of the MOU and, more specifically, the accommodations therein caused him great anxiety from approximately April through November of 2017. As Hjelmstad testified, it would have been beneficial for Jones to have the School District's accommodations in writing, as he needed a pathway forward and to know what he could expect and what was expected of him. Without the MOU, however, there were roughly seven-to-eight months when not all accommodations were in place and Jones suffered severe anxiety. During this time, in spite of Gerstner's constant requests, Duncan—as an agent of the School District—was essentially non-responsive. The non-responsiveness was mitigated to some extent by the School District administration's attempts to positively work with Jones, but did not wholly make up for the fact that not all accommodations were in place absent the MOU. This was a case of nonfeasance, not malfeasance, and the Hearing Officer therefore finds that damages for emotional distress of \$25,000.00 are appropriate under the circumstances.

The law requires affirmative relief enjoining further discriminatory acts and may further prescribe any appropriate conditions on DPHHS's future conduct relevant to the type of discrimination found. Mont. Code Ann. §49-2-506(1)(a). In this case, appropriate affirmative relief is an injunction and an order requiring the School District's administration and any persons assigned to handle interactive process and accommodation issues on behalf of the School District to consult with HRB to identify appropriate training regarding accommodations for disabilities to ensure that the organization does not commit, condone, or otherwise allow further acts of discrimination.

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## V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-505.

2. Jones is a member of a protected class within the meaning of the MHRA on the basis of mental disability. Mont. Code Ann. § 49-2-101(19)(a).

3. The MHRA prohibits discrimination in employment based upon mental disability. Mont. Code Ann. § 49-2-303(1)(a).

4. In order to identify reasonable accommodations, the School District was required to engage in good faith in the interactive process with Jones. *McDonald*, ¶ 80; 29 C.F.R. § 1630.2(o)(3).

5. Duncan was an agent of the School District. *Bury v. Bury*, 69 Mont. 570, 576-77, 223 P. 502, 503 (1924).

6. The School District knew about Jones' disability and Jones requested accommodations for his disability, and the School District violated the MHRA when it failed to engage in the interactive process in good faith, resulting in a delay in providing accommodations. *Alexander*, ¶ 14; *Taylor*, 184 F.3d at 319-20.

7. The circumstances of the discrimination in this case mandate imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1).

8. For purposes of Mont. Code Ann. § 49-2-505(8) and recovery of attorneys' fees and costs, Jones is the prevailing party.

## VI. ORDER

1. Judgment is granted in favor of Jones against the School District.

2. The School District must pay Jones the sum of \$25,000.00 for emotional distress.

3. The School District's administration and any persons assigned to handle interactive process and accommodation issues on behalf of the School District are to consult with HRB to identify appropriate training regarding accommodations for

disabilities to ensure that the organization does not commit, condone, or otherwise allow further acts of discrimination.

DATED: this 7th day of February, 2020.

/s/ CHAD R. VANISKO  
Chad R. Vanisko, Hearing Officer  
Office of Administrative Hearings  
Montana Department of Labor and Industry

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**NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION**

To: Cary Jones, Charging Party, and his attorneys, Colin Gerstner, Gerstner Law, PLLC, and Craig Hensel, Hensel Law PLLC; and Bridger Public Schools, Respondent, and its attorneys, Jeffrey A. Weldon and Jeana R Lervick; Felt Martin Frazier & Weldon, PC:

The decision of the Hearing 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 Hearing Officer becomes final and is not appealable to district court.** Mont. Code Ann. § 49-2-505(3)(C) and (4).

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, Mont. Code Ann. § 49-2-505 (4), WITH ONE DIGITAL COPY, with:

**Human Rights Commission  
c/o Annah Howard  
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 ONE DIGITAL COPY 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 Office of Administrative Hearings, 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. Please contact Bray Reporting, Vonni R Bray, RDR, CRR, at (406)-670-9533 for the original transcript.