STATE OF MINNESOTA

COUNTY OF BROWN

IN DISTRICT COURT
FIFTH JUDICIAL DISTRICT
JUVENILE DIVISION
Court File No. JV-09-68
Judge John R. Rodenberg

In the Matter of the Child of:

Colleen Hauser and Anthony Hauser,

Parents/Legal Guardian.

STATE'S MEMORANDUM OF LAW

Daniel Hauser is a child in need of protection or services, as defined in Minnesota Statutes § 260C.007, subd. 6 (2008), because of his parents' refusal to provide chemotherapy or radiation treatment for his Hodgkin's Lymphoma and his refusal to have the treatment. Because this was proven at trial by clear and convincing evidence and Respondents have failed to establish that their constitutional free exercise or due process rights have been violated by the present action, the state respectfully requests that Daniel Hauser be adjudicated a child in need of protection or services.

I. THE STATE HAS PROVEN THE STATUTORY GROUNDS OF THE PETITION BY CLEAR AND CONVINCING EVIDENCE.

The petition in the above-entitled matter alleges that Daniel Hauser is a child in need of protection or services on three statutory grounds: (1) that he was without necessary food clothing, shelter, education or other required care for the child's physical or mental health or morals because the child's parent, guardian or custodian is unable or unwilling to provide that care; (2) that he was medically neglected, and (3) that Daniel's behavior, condition or environment are such as to be injurious or dangerous to the child or others. Petition at 2-3 (citing

Minn. Stat. § 260C.007, subd. 6(3), (5), (9) (2008). These statutory grounds have been proven by clear and convincing evidence.

Daniel Hauser was diagnosed with Hodgkin's Lymphoma Type IIB on January 21, 2009. Trial Ex. 1, p. 64. Evidence was presented at trial that Hodgkin's Lymphoma is life-threatening, but highly curable. Drs. Bruce Bostrom and Vilmarie Rodriguez, both pediatric oncologists and hematologists, testified with a reasonable degree of medical certainty that Daniel Hauser's Hodgkin's Lymphona IIB was highly treatable, with a 90% survival rate when treated with chemotherapy and radiation. Drs. Bostrom and Rodriguez also testified that without the recommended course of chemotherapy and radiation, Daniel Hauser had only a 5% chance of surviving. Dr. Bostrom also testified about some of the side effects of chemotherapy, and explained that although the side effects can be harsh, a study about the long-term side effects of chemotherapy involved chemotherapy received in the 1970s, and the current chemotherapy drug protocols have been refined and are expected to have less long-term side effects.

Daniel has been without necessary care required for his physical care, he has been medically neglected, and his current condition or environment is injurious or dangerous to him. Daniel received his first cycle of chemotherapy on February 5, 2009. Trial Ex. 1, p. 30. Daniel was supposed to receive a second round of chemotherapy on March 6, 2009, and did not. Trial Ex. 1, p. 30. Testimony at trial established that Daniel has approximately a 5% chance of surviving without the recommended chemotherapy and radiation protocol as recommended by Dr. Bostrom. However, Respondents have refused to continue with Daniel's chemotherapy protocol and have not returned to the care of an oncologist or any other physician with the intention of monitoring the current state of Daniel's cancer or any possible progression or regression of the tumor. At the time of trial, Respondents had not secured any treatment for

Daniel from a licensed physician or received any recommendation that did not include chemotherapy as a method for treating Daniel's cancer. Dr. Kotulski, who testified that he was providing complementary therapy for Daniel's cancer, stressed that he had explained to Respondents that his recommended treatments were not a replacement for chemotherapy.

Colleen Hauser testified that Daniel is receiving treatment for his cancer in the form of a special diet, various vitamin and herbal supplements, and pH water. But the Respondents' current treatment of Daniel does not relieve them of their duty to seek necessary medical care. Minnesota law does not relieve a parent obtaining complementary or alternative health care for the parent's minor child from the duty to seek necessary medical care. *See* Minn. Stat. § 146A.025 (2008).

Colleen Hauser testified that the current treatment she was providing for treatment of Daniel's cancer was primarily compiled from information she found on the internet. Colleen Hauser testified that she believed those treatments would be successful in curing Daniel's cancer. Although Respondents called witnesses who testified that alternative and complementary methods can be used in treating cancer, not one of Respondents' witnesses had treated Daniel. Respondents received Daniel's cancer diagnosis in January 2009 and the only treatment protocol being followed at the time of trial, as testified to by Colleen Hauser, is unsubstantiated treatment claims from the internet.

The Petitioner has established by clear and convincing evidence that Daniel Hauser is in need of protection or services because he is without the necessary required care for his physical health due to his parents' unwillingness to provide that care, he is medically neglected, and Daniel's current environment is injurious or dangerous to him.

II. THE STATE HAS A COMPELLING STATE INTEREST IN PROTECTING THE HEALTH AND SAFETY OF CHILDREN THAT OVERRIDES ANY RIGHT TO FREE EXERCISE OR DUE PROCESS RIGHTS OF RESPONDENTS.

A. Respondents have failed to establish that the state action violates their constitutional right to free exercise.

Respondents have asserted that this proceeding violates their constitutional right to free exercise of religion. The Minnesota Supreme Court has established a four-prong test to determine if a state action violates a party's constitutional right to free exercise: "whether the objector's belief is sincerely held; whether the state regulation burdens the exercise of religious beliefs; whether the state interest in the regulation is overriding or compelling; and whether the state regulation uses the least restrictive means." *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 864-65 (Minn. 1992). Prior to trial, all parties stipulated to the genuineness of Respondents' religious beliefs. Respondents have failed to show that proceeding here violates their constitutional right to free exercise.

a. Respondents have failed to show that adjudication will burden the exercise of their religious beliefs.

Colleen Hauser testified at trial that a Nemenhah principle is to "do no harm." Colleen Hauser also testified that the Nemenhah beliefs do not preclude a follower from using conventional medical care in all situations, and stated that conventional medical care is appropriate in a situation such as a broken leg or heart attack. Daniel had one cycle of chemotherapy, and Colleen Hauser testified that she would consider another cycle of chemotherapy if she believed Daniel's condition was getting worse to bring the chemotherapy under control. In February 2009, Colleen Hauser also permitted doctors to surgically insert a chest tube into Daniel's chest to drain fluid from his lungs when Daniel was having difficulty breathing. Trial Ex. 1, p. 30.

Colleen Hauser's testimony indicates that she will disregard her Nemenhah principles if it results in an immediate health benefit to Daniel. Colleen Hauser testified that the Nemenhah principle under which she and Daniel refuse chemotherapy treatment is "do no harm." Colleen Hauser has not testified to any differentiation in the Nemenhah principle for an immediate health benefit as opposed to a long-term life-saving procedure. Respondents have failed to show that adjudication in the present case will burden the exercise of their religious beliefs.

b. A compelling state interest in protecting the health and safety of Daniel Hauser has been shown.

One is free to believe what one will and to teach and preach consistent with those beliefs; but when those beliefs lead to conduct, and the conduct endangers a child's life, the government may restrict the conduct. *Lundman v. McKown*, 530 N.W.2d 807, 817-18 (Minn. App. 1995), *rev. denied* (Minn. May 31, 1995). "The right to hold one's own religious beliefs cannot include the right to persist to act in conformity with those beliefs to the point of imminent danger to a child. *Id.* at 828. Minnesota case law has acknowledged that the state has a compelling state interest in protecting the welfare of children. *Id.*, *see also State v. Hamilton*, 657 S.W.2d 425, 429 (Tenn. App. 1983) (state has compelling interest in chemotherapy for child over parents' religious objections). Indeed, the Minnesota Supreme Court has stated: "Religious practices must bend to the state's interest in protecting the welfare of a child whenever the child might die without the intervention of conventional medicine." *Id.* In *Hamilton*, the court found that when a child is dying with cancer, humane considerations and life-saving attempts outweigh unlimited practice of religious beliefs. 657 S.W.2d at 429.

Here, the testimony of Dr. Bostrom and Rodriguez has indicated that Daniel will almost certainly die without chemotherapy. While Respondents' witnesses testified that other alternatives to chemotherapy and radiation have been successful in treating cancer, those

witnesses were unable to testify to the success rates of any treatments in the treatment of Hodgkin's Lymphoma. Respondents' witness, Dr. Robert Irons, confirmed that research has shown that over 90 percent of children and adolescents with Hodgkin's disease can become survivors of the disease. Trial Ex. 8. Daniel faces an almost certain death if he does not have chemotherapy and radiation as recommended by Drs. Bostrom, Rodriguez, Kotulski and Joyce. Respondents were unable to present any experts who could establish that the current treatment being provided to Daniel would have any modicum of success in curing his cancer. Because Daniel is very likely to survive Hodgkin's Lymphoma with chemotherapy and very likely to die without chemotherapy, the state has shown a compelling state interest in Daniel's health and welfare.

c. The state's action uses the least restrictive means of protecting Daniel Hauser's health and safety.

Granting the state's petition is the least restrictive means of protecting Daniel Hauser's health and safety. The testimony of Drs. Bostrom and Rodriguez indicated that the only way to save Daniel Hauser's life was through the recommended chemotherapy and radiation treatment, and without that treatment, Daniel Hauser had a 5% chance of survival. Although Respondents presented evidence of other alternative treatments for cancer, the evidence and testimony presented by Respondents was merely anecdotal and unsupported by any clinical trials demonstrating effectiveness in curing Hodgkin's Lymphoma.

The present case is distinguishable from *In re Hofbauer* 393 N.E.2d 1009 (N.Y. 1979), on which Respondents' rely. In *Hofbauer*, the court found that the state had not shown a compelling state interest. But in *Hofbauer*, the child was being treated by a licensed physician, had already received treatment, and the physician testified that in his opinion the child was responding well to nutritional therapy. *Id.* at 1012. The doctor had consulted with other doctors

about the child's therapy, and had not ruled out conventional treatment if the child's condition deteriorated beyond control. *Id.* at 1012. The court specified that "a parent, in making the sensitive decision as to how the child shall be treated, may rely upon the recommendations and competency of the attending physician if he or she is duly licensed to practice medicine in this State." *Id.*

In the present case, Daniel has not been treated by a licensed physician; according to Colleen Hauser's testimony, Daniel is being treated with a diet that "starves" the tumor and pH water. Ms. Hauser's testified that she had not found a doctor for Daniel because of the expedited nature of the proceedings. But Daniel was diagnosed with cancer at the end of January 2009. Ms. Hauser initially sought conventional medical care for Daniel. Ms. Hauser had over three months to seek a medical professional who would provide care for Daniel. Instead, Ms. Hauser chose to treat Daniel with treatments she discovered on the internet, and for which she had no empirical evidence of effectiveness.

Dr. Bostrom testified that Hodgkin's Lymphoma type IIB has a 90 percent cure rate when treated with the chemotherapy protocol that was suggested for Daniel. Dr. Bostrom also testified that Hodgkin's Lymphoma had a five percent chance of survival if chemotherapy treatment was not administered. Witnesses called by the Hausers also agreed that the chemotherapy protocol Dr. Bostrom suggested for Daniel was the acceptable method for treating Hodgkin's Lymphoma. Because the evidence at trial indicates that chemotherapy and radiation have proven success with cancer, and the alternative methods proposed, but not yet in use by Daniel, have no proven efficacy against Hodgkin's Lymphoma, the state has used the only means available to ensure Daniel's health and welfare.

B. Respondents' due process rights to parent their child must yield to the state's interest in protecting the health and welfare of a child.

Respondents due process rights to parent their child does not grant them an absolute unfettered right to dictate their child's medical treatment. As the United States Supreme Court has stated: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full legal discretion when they can make that choice for themselves." *Prince v. Mass.*, 321 U.S. 158, 170 (1944). In *In re Custody of a Minor*, the child was diagnosed with a type of leukemia that was considered very treatable with chemotherapy. 379 N.E.2d 1053, 1063 (Mass. 1978). After briefly treating the leukemia with chemotherapy, the parents discontinued treatment. *Id.* The court concluded that the parents loved their child, but no evidence of a viable alternative treatment to chemotherapy was presented, and because of the progression of the cancer, the longer the parents sought alternative treatment, the longer the child went without effective treatment and the his condition deteriorated. *Id.* at 1065. Therefore, the state's interest in protecting the child by treating him with chemotherapy overrode the parents' interest in alternative treatments. *Id.* at 1067

Dr. Bostrom, Dr. Rodriguez and Dr. Kotulski all testified to a reasonable degree to the generally accepted treatment in the medical community for Hodgkin's Lymphoma II B – chemotherapy and radiation. Although Colleen Hauser may believe that her medical treatments involving pH water and an immune-boosting diet can successfully treat Daniel 's Hodgkin's Lymphoma, Dr. Bostrom and Dr. Rodriguez both testified that Daniel will die without the conventional medical treatment of chemotherapy and radiation. No testimony was presented on the effectiveness of the current treatment that Colleen Hauser is providing for Daniel. Like the minor in *Custody of a Minor*, Daniel Hauser is very likely to survive Hodgkin's Lymphoma with prompt administration of chemotherapy, and delay while the parents search and attempt

alternative treatments is very detrimental when time is of the essence. Therefore, the state has a compelling interest justifying overriding the parents' due process rights in this case.

III. Daniel Hauser is not sufficiently mature to make his own medical decisions

At 13 years of age, Daniel Hauser does not have the required level of maturity to make his own medical decisions. The Supreme Court has held that States may limit a child's freedom to choose in the making of important choices with serious consequences, "in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Belotti v. Baird*, 443 U.S. 622, 635 (1979). In *Belotti*, the Supreme Court recognized that a minor may have a fundamental right to choose to have an abortion without consulting her parents, but that right arises only if the minor "satisfies a court that she has attained sufficient maturity to make a fully informed decision." 443 U.S. at 650.

The state's responsibility under parens patriae is protecting the minor and deciding whether to consent or refuse medical treatment on the minor's behalf to protect the minor from his or her own inexperience. *In re Thomas B.*, 574 N.Y.S.2d 659, 660 (Family Court, Cattaraugus County 1991). Factors courts have used to evaluate experience and degree of maturity include a minor's age, ability, training, and judgment, as well as the circumstances and gravity of the minor's situation, together with the minor's understanding of the risks and consequences of the treatment. *Cardwell v. Bechtol*, 724 S.W.2d 739, 748 (Tenn. 1987). Courts have previously found experience and maturity lacking in minors who have limited employment experience, limited experience in living away from home, limited experience in handling personal finances, and those who consult their parents before making decisions. *In re*

Anonymous 2, 570 N.W.2d 836, 839 (Neb. 1997); *In re Application of L.I. Jewish Med. Ctr.*, 557 N.Y.S.2d 239, 242 (N.Y. Sup. Ct.1990).

In contrast, courts have found a minor to have adequate experience and a high degree of maturity when the minor demonstrates responsibility and independence and testimony of others indicates the minor has the maturity level of an adult. In *Cardwell*, the minor qualified as sufficiently mature when she was only five months from turning eighteen and testimony described her as mature and someone who acted older than her age. 724 S.W.2d at 743. She had adequate experience as a result of significant responsibility in driving the family car and using her father's signed checks as spending money. *Id.* at 741-42. Similarly, the court in *In re E.G.* found the minor to be sufficiently mature when a psychiatrist testified that E.G. had a maturity level of an eighteen to twenty-one year old, even though she was only seventeen years, six months at the time of the evaluation, and was determined to have adequate experience because of her full awareness of the risks of the treatment. 549 N.E.2d 322, 324 (Ill. App. 1989). General responsibility and independence, financial responsibility and independence, and testimony of others all indicate whether a minor has adequate experience and a high degree of maturity to be deemed sufficiently mature.

Daniel is not sufficiently mature to make his own medical decisions. He has a learning disability and cannot read. Drs. Bostrom and Joyce both testified that it does not appear that Daniel understands the severity of his diagnosis. Drs. Bostrom and Joyce, as well as the guardian ad litem, testified that Daniel is a quiet boy who often looks to his mother when answering questions posed by the doctors. No evidence was presented that Daniel has ever lived away from home or had any responsibilities outside of the home. The Hausers argue that Daniel is considered to be a "medicine man" and to have achieved the age of accountability in the

Nemenhah church. However, Daniel's testimony indicated that he does not have a complete understanding of what it means to be a medicine man or an elder in the Nemenhah church. In addition, although Daniel is considered to be a medicine man and an elder of the Nemenhah church, these titles are bestowed on every member of the church who is over 13 years of age. Daniel did not have to complete any training or demonstrate any capabilities to achieve these titles. Furthermore, in those cases where a minor has been determined to be sufficiently mature to make his or her medical decisions, the minor was commonly close to the age of majority, as opposed to only 13 years of age, as is the case here.

Because it has been established by clear and convincing evidence that conditions giving rise to the petition establish that Daniel Hauser is a child in need of protection or services, and the state has a compelling state interest in protecting the health and safety of Daniel Hauser, the state respectfully requests that the court adjudicate Daniel Hauser a child in need of protection or services, as defined in Minnesota Statutes Section 260C.007, subd. 6 (3), (5), (9) (2008), because he has been medically neglected.

IV. THE STATE REQUESTS IMMEDIATE DISPOSITION THAT WILL EXPEDIENTLY PROVIDE TREATMENT FOR DANIEL.

The state respectfully requests that the Court order the parents to have Daniel comply with the treatment regimen as indicated by the treating pediatric oncologists and comply with the time frames in the guardian ad litem's recommended disposition. If the parents refuse to comply, the state requests that Daniel be placed in immediate foster care in order to undergo treatment.

Dated: May 12, 2009

JAMES R. OLSON
BROWN COUNTY ATTORNEY

By: James R Olson

James R. Olson, #8198X
Brown County Attorney
Tricia M. Niebuhr #388352
Assistant County Attorney
519 Center Street
New Ulm, MN 56073
Ph. No. (507) 354-3163

AFFIDAVIT OF SERVICE BY MAIL

State of Minnesota)
) ss.
County of Brown)

Tammy Domeier, being first duly sworn on oath, deposes and says that on the **12th** day of **May, 2009** she served the attached **State's Memorandum of Law** by mailing a true and correct copy thereof, by first class mail with postage prepaid and facsimile transmission thereon to:

Mr. Philip J. Elbert
Attorney at Law
P.O. Box 26
St. Peter, MN 56082

Mr. Calvin P. Johnson
Attorney at Law
P.O. Box 3665
Mankato, MN 56002-3665

Mr. Thomas Sinas
Robins, Kaplan, Miller, Ciresi
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402

Tammy Domeier

Subscribed and sworn to before me
this 12th day of May, 2009.

Notary Public

JESSICA FAYE ZUPFER
Notary Public-Minnesota
My Commission Expires Jan 31, 2012