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SUPREME COURT  
OF THE STATE OF WASHINGTON

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MITCH DOWLER and IN CHA DOWLER, individually and as limited  
guardian ad litem for NAM SU CHONG, *et al.*,

Appellants,

vs.

CLOVER PARK SCHOOL DISTRICT, NO. 400,

Respondent.

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BRIEF OF APPELLANTS

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A. INTRODUCTION

This case involves disturbing allegations of physical, verbal, and psychological abuse and discrimination suffered by ten developmentally disabled students at the hands of teachers and school administrators in the Clover Park School District No. 400 ("District"). Contrary to the District's claims below, this case has nothing to do with alleged deficiencies in the students' educations because the harm the students have suffered constitutes a tort rather than a violation of their educational entitlement under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1491.

The plaintiff students suffer from severe sensory, mental, and physical disabilities.<sup>1</sup> Many are nonverbal. They attend, or have attended, special education programs within the District. The disability plaintiffs' complaint against the District alleged that administrators, teachers, and staff subjected the students to verbal and physical abuse and unlawful discrimination under RCW 49.60 based on their disabilities. It also contained claims for negligence, outrage, and other common law causes of action. It did not contain any federal claims and, more particularly, no educationally-related claims because those claims were dismissed during

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<sup>1</sup> The named plaintiffs also include the natural parents, adoptive parents, and legal guardians of the students. CP 5. For ease of reading, the plaintiffs will be referred

the course of the case. The disability plaintiffs sought only general money damages for their pain and suffering and not compensatory educations or other educational remedies available under the IDEA.

Contending the foundation of the disability plaintiffs' complaint was educational in nature and within the scope of relief available under the IDEA, the District filed numerous summary judgment motions seeking to dismiss their claims for failure to exhaust administrative remedies. The trial court finally granted the District's third summary judgment motion.<sup>2</sup>

The trial court erred in dismissing the plaintiffs' claims. Unauthorized acts of abuse and discrimination are not components of a free and appropriate public education; thus, those acts do not fall within the purview of the IDEA and administrative exhaustion was not required.

#### B. ASSIGNMENT OF ERROR

##### (1) Assignment of Error

1. The trial court erred in entering an order on December 11, 2009 dismissing the disability plaintiffs' claims for failure to exhaust administrative remedies.

##### (2) Issues Pertaining to the Assignment of Error

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to collectively as "disability plaintiffs" unless the context requires otherwise. In that case, the students will be referred to by their first names for clarity.

<sup>2</sup> A copy of the trial court's order is in the Appendix.

1. Did the trial court err in summarily dismissing the disability plaintiffs' claims for failing to exhaust administrative remedies under the IDEA where the plaintiffs have not alleged deficiencies in their individualized education programs, but instead alleged that teachers and staff within the District physically and psychologically abused and discriminated against them based on their disabilities? (Assignment of Error No. 1)

2. Did the trial court err in summarily dismissing the disability plaintiffs' claims for failing to exhaust administrative remedies under the IDEA where no remedy exists under the IDEA for the disabled students' non-educational claims based on discrimination and abuse, and to require the plaintiffs to seek such remedies would be futile because they are nonexistent? (Assignment of Error No. 1)

C. STATEMENT OF THE CASE

(1) Students

At the heart of this case are ten special education students who undisputedly suffer from severe sensory, mental, and physical disabilities. Most are nonverbal. *See, e.g.*, CP 355, 420, 424-25, 440, 642, 773. Many have physical handicaps. *See, e.g.*, CP 507, 736, 1125. At the time of their complaint, they ranged in age from 15 to 23. CP 648, 541, 476-77, 769, 621, 682, 703, 570, 600.

Nam Su Chong has hypopituitarism, right-side hemiplegia,<sup>3</sup> and severe mental retardation. CP 541. He has limited verbal skills. CP 432-33. He began attending school in the District in 1994; he started at Lakes High School in 2002. CP 541. After transferring out of the District, Nam Su graduated from Franklin Pierce High School in 2009. CP 541, 3446.

Zachary Davis and Alexias Davis are siblings. CP 477, 497. Zach suffers from cerebral palsy, a seizure disorder, a heart condition, and various other physical ailments. CP 500-01. He spends much of his time in a wheelchair and can only walk short distances. CP 501, 507-08. Zach cannot speak due to his disabilities and is only able to communicate to a limited extent using sign language. CP 499. He always attended school within the District. CP 499. He graduated in 2009. CP 501, 3456.

Like her brother, Alexias has always attended school within the District. CP 478, 499. She is scheduled to graduate from Lakes High School in June 2010. CP 3456. Alexias is developmentally delayed and has Attention Deficit Hyperactivity Disorder ("ADHD"). CP 481, 516, 518. In addition to her cognitive disabilities, she suffers from Post-Traumatic Stress Disorder resulting from her sexual assault. CP 478, 484,

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<sup>3</sup> Hemiplegia is a rare neurological disorder with frequent temporary episodes of paralysis of one side of the body. *See* [www.medterms.com](http://www.medterms.com).

514. Alexias has some verbal skills, but often has difficulty expressing herself. CP 493.

Conner Schueneman has epilepsy, severe seizure disorder, partial mental retardation with autistic tendencies, and scoliosis. CP 678. He has limited verbal skills, although he can say a few words. CP 677, 683-84. Conner attended school in the District for a number of years and then transferred into the Olympia School District. CP 679. He graduated from Capital Hill High School in 2009. CP 679, 3444.

Vance Stevens is autistic and mentally disabled. CP 769. He also suffers petit mal seizures and is severely overweight. CP 771-72. He is able to communicate using a limited number of words but is otherwise nonverbal. CP 773. Sometimes Vance makes involuntary noises because of his disabilities. CP 769. He began attending school in the District in 2003; he graduated in 2009. CP 769-70, 3452.

Joshua Vollmer is autistic and bipolar. CP 622. He suffers from mild mental retardation and does not process conversations very well. CP 622-23. Because of his disabilities, he sometimes engages in repetitive and self-injurious behaviors. CP 623. He is easily over-stimulated. CP 623, 626. Although he attended Lakes High School for two years, he transferred to Graham Kapowsin High School in the Bethel School District in the eleventh grade. CP 627, 718, 722, 3448. He is scheduled to

graduate in June 2010. CP 719, 3448.

Stephanie Sullivan is autistic and mentally disabled. CP 704, 706. She is also diabetic. CP 705. Stephanie has limited cognitive abilities and verbal skills. CP 437, 704, 706. Because of her disabilities, she experiences episodes when she self-abuses and makes involuntary noises. CP 664, 704, 709. She has only attended school within the District. CP 703. She graduated from high school in 2007. CP 703, 3450.

Ralshodd Moye is autistic and mentally disabled. CP 638. He has limited verbal skills. CP 642-43, 649. Because of his disabilities, he often makes involuntary noises. CP 642-43. He needs constant supervision. CP 639, 643. Ralshodd attended Lakes High School for three years, but eventually transferred into the Bethel School District. CP 639, 649, 3454. He graduated from Spanaway Lake High School in 2008. CP 639, 3454.

Christina Echevarria appeared normal at birth, but began regressing developmentally at around 14 to 16 months of age. CP 734. Doctors suspect that she caught spinal meningitis, which affected the part of her brain that controls gross motor skills. CP 735. As a result, Christina is developmentally disabled, has limited verbal skills, and suffers from a speech disorder. CP 570-74, 735. She ambulates with a walker. CP 736. She has low muscle tone and often collapses. CP 743. Christina attended school within the District for time, but transferred into a

school in the University Place School District in 2004. CP 571, 735. She graduated in 2007. CP 735, 3458.

Joshua Lumley is developmentally disabled and requires speech therapy. CP 581, 583. He attended various schools within the District. CP 600-01, 606. Joshua eventually transferred out of the District and graduated from the Franklin Pierce School District in 2008. CP 3460.

As a result of their physical and mental disabilities, the students qualify for special education services under the IDEA; their educations are governed by their respective individualized education programs ("IEP"). See CP 504, 544, 582, 621, 640, 650, 665, 666, 685, 707-08, 735, 774.

(2) Allegations of Abuse and Discrimination

Numerous witnesses reported seeing the students suffering physical, verbal, and psychological abuse and discrimination based on their disabilities while attending school in the District. CP 3319. For example:<sup>4</sup>

Paraeducator Caren Veal ("Veal") indicated the students' general environment was horrible and "full of anger and rage and anxiety and frustration and bitterness, hatred." CP 330. She testified that teacher Deborah Mick ("Mick") was physically and verbally abusive to the

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<sup>4</sup> The examples provided are by no means exclusive; instead, they are provided as a small sampling of the verbal, physical, and psychological abuse and discrimination the students suffered and the witnesses observed.

students on a daily basis. CP 317-18, 322, 341. Even teacher Robert Barnes ("Barnes") admitted that Mick was verbally harsh with the students. CP 395.

Vance's mother, Melanie Stevens ("Stevens"), was a daily parent-observer in Barnes' class. CP 780-81. She also visited Mick's classroom on a daily basis to check on the students and to work with them. CP 781. Stevens testified that if Mick was not yelling at the students, then she was shoving them, and if she was not shoving them, then she was berating them. CP 790. Stevens also stated the students were pushed, shoved, grabbed, and snatched at every single day, all day long. CP 788-89.

Veal observed Mick attempting to trip Nam Su on three or four occasions. CP 318. More alarmingly, she also witnessed Mick throw Nam Su into a locker. CP 317. Stevens saw paraeducator Teresa Kremling ("Kremling") shove Nam Su into a locker. CP 790. Paraeducator Beverly Hart ("Hart") also witnessed this abuse. CP 1007-08.<sup>5</sup> Both Veal and Stevens saw Barnes get so angry at Ralshodd on one occasion that he threw Ralshodd onto the classroom couch and acted as if he was going to hit Ralshodd. CP 325, 785.

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<sup>5</sup> Denise Lumley, Joshua Lumley's mother, also saw Joshua's teacher shove him up against a locker three times for no apparent reason. CP 586-87. Joshua sustained bruises to his back and right side. CP 587.

Once, Stevens observed Mick push Nam Su so hard in his back that he flew into paraeducator James Bynum ("Bynum") and almost hit the floor. CP 790. On several occasions, Veal saw Mick push Conner so hard that his body buckled from the force. CP 322. Veal also witnessed Mick and Kremling feeding food to Zach that he was not permitted to eat because of his physical ailments. CP 321.

Teacher's Assistant Chazna Sledge ("Sledge") testified that Mick was extremely forceful and cruel toward Zach and Conner. CP 1083. Mick pushed and pulled on them like they were "rag dolls." CP 1083. She also observed that Mick took away Conner's food on more than one occasion simply because he was eating too slowly. CP 1083. Although Sledge complained about the students' treatment, nothing was done about it. CP 1084.

Stevens observed Bynum shoving Zach and Conner all day, every day. CP 788. Once, she even witnessed Bynum slam the washing machine lid down on Nam Su's hand and heard him call Nam Su a "little motherfucker" and comment that Nam Su needed to learn to move his hand. CP 786. Veal also witnessed this abuse. CP 841.

Many of the students, including Vance, make involuntary noises because of their disabilities. *See, e.g.* CP 341, 643, 709, 769. They also frequently experience other involuntary actions or bodily functions that

are characteristic of their disabilities. *See, e.g.* CP 321, 623, 664, 704. Yet Barnes would yell at Vance for making involuntary noises associated with his disability and punish Vance by forcing him to take long, strenuous walks. CP 327-28, 846, 1106. Veal also testified that Barnes would slam a yardstick or clipboard on Vance's desk when Vance made noise. CP 328. The noise was loud enough to cause Veal to jump. CP 328. Similarly, Bynum would berate Zach for his uncontrollable bowel movements. CP 321. Veal also noticed that when Stephanie was in the middle of a self-abusing episode, Barnes would throw things at her. CP 329, 344. This caused Stephanie to punch or slap herself even more. CP 329, 344.

Veal and Stevens both testified that Mick and Bynum called the students derogatory names, including "little devil," "faker," "little nasty ass," "motherfucker," and "faggot." CP 318, 322, 324, 335. Mick thought the students were animalistic and often compared them to her dog. CP 319, 323, 685. Mick was disgusted by the students' physical handicaps. CP 318-20. Stevens heard Bynum constantly cursing at his students. CP 782.

Veal heard Mick and Barnes making fun of Ralshodd's physical appearance, protruding teeth, and body odor. CP 324-25. She also heard Stephanie's paraeducator, Becky Blake, comment on the amount of hair

Stephanie had on her chest and legs. CP 329.

Stevens filed several Campus Safety Incident Reports with the District to report Mick's verbal and physical abuse of the students. CP 984-990. Student helper/assistant Alyssa Flores likewise reported Mick's abuse of Nam Su in her own Campus Safety Incident Report. CP 1078-79. Hart was so concerned that she reported Mick's abuse to the Lakewood Police Department. CP 931, 1005-10, 1024-28. She detailed several specific instances where she observed Mick abusing Nam Su. CP 1005-10. She also reported that she saw Mick kick one of the students to get the child moving. CP 1010.

(3) Background Facts and Procedural History

The disability plaintiffs' eventually sued the District, alleging that administrators, teachers, and staff subjected the students to verbal and physical abuse and unlawful discrimination under RCW 49.60 based on their disabilities. CP 1-19, 54-71, 74-91. They also alleged claims for negligence, outrage, and other common law causes of action. CP 4, 14-15, 55, 65-67, 75, 85-87. They did not allege any federal claims. *Id.*, CP 42. Although the disability plaintiffs originally asserted several educationally-related claims, those claims were later dismissed with prejudice. CP 1358. The District did not appeal that dismissal. The disability plaintiffs sought general money damages for their pain and

suffering and injunctive relief. CP 15-19, 67-70, 87-90.

The District filed a summary judgment motion seeking to dismiss the disability plaintiffs' claims for failure to exhaust administrative remedies, contending the foundation of their complaint was educational in nature and thus within the scope of relief available in a due process hearing under the IDEA. CP 92-118. The disability plaintiffs filed a CR 56(f) motion for continuance, contending critical depositions were still taking place. CP 207-09, 265-67. Although the District opposed the motion, the trial court granted it and ordered the District's summary judgment motion renoted for November 17, 2007. CP 254-58, 268-69.

In the interim, the disability plaintiffs filed a motion to dismiss all of their educationally-related claims, clarifying that their case was only about physical, verbal, and psychological abuse and discrimination based on their disabilities. CP 270-73, 1201-319.

The disability plaintiffs opposed the District's summary judgment motion, arguing their claims had nothing to do with their special education programs and that the claims were therefore not subject to administrative exhaustion under the IDEA. CP 1085-181. They provided the court with 40 deposition transcripts, a representative tort claim for damages, numerous statements from parents and staff concerning the ongoing abuse of the students, and police reports detailing those incidents. CP 305-1084.

The District filed a reply, which continued to focus on the students' educationally-related claims. CP 1187-97.

On November 30, 2007, the trial court granted the District's motion. CP 1355-59; RP I:28.<sup>6</sup> But the court was unable to determine which of the plaintiffs, if any, had claims not subject to its dismissal order. CP 1358; RP I:11-12, 28. The court invited a second round of summary judgment motions to determine if any individual plaintiff had any claims that were strictly tort-based claims for physical and/or verbal abuse not involving discipline or any other aspect of special education that could not be remedied through the administrative process available to special education students. CP 1358; RP I:28. The court noted that only those disability plaintiffs whose claims did not involve any aspect of education or remedies available through the administrative process survived the dismissal order. CP 1358; RP I:29-30.

At the same time, the court also granted the disability plaintiffs' motion to voluntarily dismiss all of their educationally-related claims under the IDEA or other federal laws.<sup>7</sup> CP 1355, 1358. The disability plaintiffs' remaining causes of action thus involved only discrimination

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<sup>6</sup> "RP I" refers to the report of proceedings ("transcript") from the November 16, 2007 summary judgment hearing.

<sup>7</sup> A copy of the trial court's order is in the appendix.

under RCW 49.60 and other tort claims. CP 1214, 1216. No educationally-related claims remain. CP 1358.

On December 6, 2007, the disability plaintiffs moved for reconsideration, arguing their discrimination and abuse claims were not subject to administrative exhaustion because they were not educationally-related. CP 1360-72, 1611-19. The next day, the District filed a second summary judgment motion seeking to dismiss the disability plaintiffs' abuse claims for failure to exhaust administrative remedies. CP 1528-62.

During the reconsideration hearing held on December 14, 2007,<sup>8</sup> the trial court requested that the parties treat the disability plaintiffs' discrimination claims like their abuse claims and called for an additional summary judgment motion to address the discrimination claims. CP 1625, RP II:2-3.<sup>9</sup> As a result, the District submitted a revised summary judgment motion that addressed the claims of abuse and discrimination in a single motion. CP 1626-72, 1837-61. The disability plaintiffs submitted a combined response opposing the motion. CP 1745-836.

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<sup>8</sup> The trial court did not enter an order denying the disability plaintiffs' motion for reconsideration until February 8, 2008. CP 1895-98.

<sup>9</sup> "RP II" refers to the transcript from the December 14, 2007 reconsideration hearing. "RP III" will refer to the transcript from the January 25, 2008 summary judgment hearing. "RP IV" will refer to the transcript from the February 8, 2008 presentment/reconsideration hearing. "RP V" will refer to the transcript from the December 11, 2009 summary judgment hearing.

The court heard the District's revised summary judgment motion on January 25, 2008. RP III:2-35. In its oral ruling, the court indicated it was prepared to dismiss the disability plaintiffs' claims for failure to exhaust administrative remedies. RP III:34-35. The possibility of the disability plaintiffs' future return to court remained open. *Id.*

Shortly thereafter, the disability plaintiffs initiated the administrative process for whatever relief was afforded them by the IDEA with the Office of Superintendent of Public Instruction ("OSPI"). CP 2260.

On January 31, 2008, the disability plaintiffs again moved for reconsideration and asked the trial court to stay the case while they sought administrative determinations addressing whether their claims were encompassed by the IDEA. CP 1862-65, 1883-85. Nevertheless, the court granted the District's motion for summary judgment without prejudice on February 8, 2008. CP 1892, 1895-98; RP IV:11. At the same time, the court denied the disability plaintiffs' second motion for reconsideration and they appealed.<sup>10</sup> CP 1889, 1893-94, 1899-900.

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<sup>10</sup> *Dowler v. Clover Park Sch. Dist. No. 400*, Court of Appeals Cause No. 37394-7-II.

While the case was on appeal, the disability plaintiffs filed a citizen's complaint with the OSPI to determine, among other things, whether the identified acts of physical and verbal abuse were educationally-related and whether such acts were covered by the IDEA. CP 1920, 1922-39, 2026. Douglas H. Gill, Ed.D., Director of Special Education for the OSPI, responded to the complaint, stating their claims did not address specific violations of the IDEA and asking for additional information. CP 2027, 2277-83. The disability plaintiffs provided the additional information. CP 1920, 1941-58, 2027. Dr. Gill responded and again stated that the complaint did not specify violations of the IDEA. CP 2027, 2285. Dr. Gill provided examples of the types of violations investigated under OSPI's complaint process, which include staff qualifications, improper use of behavioral supports or aversive interventions, or failure to provide services outlined in the student's individualized educational plan ("IEP"). CP 2285. Not one example related to the sorts of physical and verbal abuse or discrimination alleged in this case. CP 2285.

At about the same time, Dr. Gill was deposed in a parallel case, *Vernon v. Bethel Sch. Dist.*, Pierce County Cause No. 07-2-05140-1, and was asked whether the facts alleged by each individual student in the *Dowler* litigation could be remedied under the IDEA and whether OSPI

had the jurisdiction and authority to address them under the IDEA. CP 2027-28, 2150-2212, 2853-54. He confirmed that the disability plaintiffs' claims of verbal and physical abuse, discrimination, and other common law causes of action were not within the OSPI's jurisdiction to address. CP 2028, 2159-60, 2162, 2173-77, 2185, 2854. When asked to explain why those issues would not come under his authority, Dr. Gill testified: "[those] issues are related to professional practices. Issue of treatment of a student in a school building are not IEP-related issues as I read them." CP 2159. Dr. Gill concluded that the disability plaintiffs' allegations did not constitute violations of the IDEA and therefore could not be remedied through the OSPI. CP 2177.

Following Dr. Gill's deposition, the disability plaintiffs filed a CR 60 motion based on newly discovered evidence and asked the court to vacate its February 8, 2008 order dismissing the case. CP 1911-18, 2008-18, 2375-81. The trial court granted the motion. CP 2430-33. The court subsequently denied the District's motion for reconsideration. CP 2383-98, 2422-24. The disability plaintiffs then successfully moved the Court of Appeals under RAP 7.2(e) for an order permitting the trial court to enter the CR 60 order, and they voluntarily dismissed their appeal in Cause No. 37394-7-II.

On December 19, 2008, the disability plaintiffs served a public records request on the Office of Administrative Hearings ("OAH") requesting information relating to common law or discrimination claims and the award of compensatory damages for such claims by the OAH. CP 3069. Senior Administrative Law Judge and Public Records Officer Robert Krabill responded, stating the OAH has no authority to grant damages and that it has "no jurisdiction to consider common law tort claims, even those related to special education students." CP 3069.

After returning to the trial court, the District filed a third motion for summary judgment and again claimed the disability plaintiffs' alleged failure to exhaust their administrative "remedies" was fatal. CP 2816-30. The District continued to allege that the jurisdiction of the administrative law and federal court judges presiding over due process hearings included claims for disability discrimination, harassment, and abuse that interfere with a special education student's right to receive a free and appropriate public education ("FAPE"). CP 2817-18. The disability plaintiffs responded, arguing the IDEA did not apply because they had dismissed their educationally-related claims, they were not alleging they had been denied FAPEs, and some of the students had actually graduated. CP 2831-49. They also argued the IDEA's exhaustion requirement did not apply to their remaining common law and tort claims. *Id.* They provided

a declaration from Dr. Gill confirming that their claims could not be cured under the IDEA. CP 2850-55.

After considering the previous summary judgment motions, the disability plaintiffs' CR 60 motion, and the additional briefing, the trial court granted the District's third summary judgment motion on December 11, 2009. CP 3539-43; RP V:20-21. The disability plaintiffs timely appealed, CP 3544-45, and now seek direct review of the order dismissing their abuse and discrimination claims for failing to exhaust administrative remedies. Stmt. of Grounds for Dir. Rev.

#### D. SUMMARY OF ARGUMENT

The IDEA is a comprehensive educational scheme, conferring on disabled students a substantive right to public education. Under the IDEA, a disabled student or the parents of a disabled student may file an administrative complaint on any matter relating to the child's "identification, evaluation, or educational placement, or the provision of a [FAPE] to such child[.]" See 20 U.S.C. § 1415(b)(6)(A). The IDEA obligates the student or parent to exhaust administrative remedies before commencing suit. Relief is available under the IDEA when both the genesis and the manifestations of the student's problem are educational.

But the IDEA's exhaustion requirement is not absolute. Instead, exhaustion is not required when the administrative process would be futile

or the relief sought inadequate. If the student seeks a remedy for an injury that cannot be redressed by the IDEA's administrative procedures, then the claim falls outside § 1415(1)'s rubric and exhaustion is not required.

Resolution of this case centers on upon a single issue – whether the disability plaintiffs were required to exhaust administrative remedies under the IDEA before initiating their lawsuit against the District. They were not required to exhaust administrative remedies under the IDEA before initiating their lawsuit because their claims are for torts unrelated to their educations. The trial court thus improperly dismissed their claims based on their failure to exhaust administrative remedies.

The IDEA's exhaustion requirement does not apply to the disability plaintiffs' claims because that requirement only applies to federal claims brought pursuant to federal law. Here, the disability plaintiffs seek only state statutory and common law tort remedies.

Even if the disability plaintiffs' claims are educationally-related and the IDEA applies, administrative exhaustion would be futile. The OSPI has already rebuffed the disability plaintiffs' attempt to obtain administrative relief. Moreover, they seek money damages for their injuries. Requiring them to exhaust administrative remedies with respect to such damages would be futile because general money damages are not available under the IDEA.

The disability plaintiffs are entitled to their attorney fees and costs pursuant to RAP 18.1 and RCW 49.60.030(2).

E. ARGUMENT

(1) Standard of Review

This Court reviews summary judgment orders *de novo*. See *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). When reviewing an order granting summary judgment, this Court engages in the same inquiry as the trial court and considers the facts and the reasonable inferences therefrom in a light most favorable to the nonmoving party. See *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The Court is not entitled to weigh the evidence. See *Fleming v. Smith*, 64 Wn.2d 181, 185, 390 P.2d 990 (1964).

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. See *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). A genuine issue of material fact arises if reasonable minds could reach different conclusions considering the evidence most favorably for the nonmoving party. *Id.* If reasonable minds might reach different conclusions, then motion should be denied. *Id.*

(2) The Trial Court Erred By Dismissing the Disability Plaintiffs' Abuse and Discrimination Claims Based on Their Failure to Exhaust Administrative Remedies

(a) The IDEA's statutory scheme

The IDEA is a comprehensive educational scheme, conferring on disabled students a substantive right to public education and providing financial assistance to enable states to meet the students' unique educational needs. 20 U.S.C. § 1400(d)(1)(A). *See also, Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992) (citing *Honig v. Doe*, 484 U.S. 305, 310, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988)). To receive federal funding, states must have in effect a policy that ensures all children with disabilities receive a FAPE. 20 U.S.C. § 1412(a)(1), 1415(a). The primary mechanism for assuring a FAPE is the development of a detailed, individualized instruction plan for the disabled child known as an IEP. 20 U.S.C. § 1401(14); 20 U.S.C. § 1414.

The IDEA is designed to address the strictly *educational* concerns of students with disabilities. *See* 20 U.S.C. § 1401(22) ("related services" available under the IDEA include "psychological services . . . social work services, counseling services . . . *as may be required to assist a child with a disability to benefit from special education[.]*") (emphasis added)). This Court has summarized the IDEA's purpose as follows:

The IDEA was enacted to address the special educational needs of disabled children. The act's purpose is "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs . . ." 20 U.S.C. § 1400(d)(1)(A). One goal of the IDEA is to provide comparable education to disabled students as that provided to nondisabled students.

*Tunstall v. Bergeson*, 141 Wn.2d 201, 228, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920 (2001). The IDEA thus provides relief for *educationally-oriented* claims. *See, e.g., J.G. v. Douglas County Sch. Dist.*, 552 F.3d 786 (9th Cir. 2008) (parent's claim that district's delay in evaluating autistic twin for disability discriminated against twins by segregating them was an educationally-oriented claim because it involved the identification, evaluation, or educational placement of the child under the IDEA); *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1169 (9th Cir. 2007) (school's refusal to allow student to attend specific middle school was an educational injury under the IDEA for which administrative exhaustion was required).

To carry out its objectives, the IDEA provides procedural safeguards to permit parental involvement in all matters concerning the child's educational program and allows parents to obtain administrative and judicial review of decisions they deem inappropriate or unsatisfactory.

*See Honig*, 484 U.S. at 311-12. Under the IDEA, a disabled student or the parents of a disabled student may file an administrative complaint on any matter relating to the child's "identification, evaluation, or educational placement, or the provision of a [FAPE] to such child[.]" *See* 20 U.S.C. § 1415(b)(6)(A). If the parent or student seeks judicial relief, the IDEA obligates the student or parent to exhaust administrative remedies before commencing suit. 20 U.S.C. §1415(l).<sup>11</sup> Relief is available under the IDEA when "[b]oth the genesis and the manifestations of the problem are educational." *Robb v. Bethel Sch. Dist. # 403*, 308 F.3d 1047, 1052 (9th Cir. 2002):

At the same time, however, courts have recognized that the IDEA's administrative remedies cannot compensate for a student's injuries that are completely non-educational. *Blanchard v. Morton Sch. Dist.*, 420 F.3d 918, 921 (9th Cir. 2005) (citing *Padilla v. Sch. Dist. No. 1 of Denver*, 233 F.3d 1268, 1274 (10th Cir. 2000)). The IDEA's

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<sup>11</sup> 20 U.S.C. § 1415(l) provides, in part:

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 *et seq.*], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 *et seq.*], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

exhaustion requirement is not unyielding. *See Hoeft*, 967 F.2d at 1303. Instead, “there are situations in which exhaustion serves no useful purpose.” *Id.* Exhaustion is not required when: (1) the administrative process would be futile or the relief sought inadequate; (2) the claim challenges generally applicable policies that are contrary to law; or (3) exhaustion will work severe harm on the student. *Id.* at 1303-04 (citation omitted). If the student seeks a remedy for an injury that cannot be redressed by the IDEA’s administrative procedures, then the claim falls outside § 1415(1)’s rubric and exhaustion is not required. *See Robb*, 308 F.3d at 1050. *See also, Dioxin/Organochlorine Ctr. v. Wash. State Dep’t of Ecology*, 119 Wn.2d 761, 776, 837 P.2d 1007 (1992) (a party is not required to do a futile act).

(b) The disability plaintiffs’ claims are for non-educationally related injuries; thus, the IDEA is inapplicable and exhaustion of administrative remedies was not required

Resolution of this case centers upon a single issue – whether the disability plaintiffs were required to exhaust administrative remedies under the IDEA before initiating their lawsuit against the District. Where the disability plaintiffs’ claims are for torts unrelated to their education, the IDEA is inapplicable. The trial court thus improperly dismissed their claims based on their failure to exhaust administrative remedies.

The trial court essentially determined that it lacked subject matter jurisdiction over the disability plaintiffs' claims because they failed to exhaust administrative remedies before filing suit when it granted the District's summary judgment motion. Although the court's treatment of the issue as jurisdictional may have been consistent with Ninth Circuit precedent at the time, *see, e.g., Robb*, 308 F.3d at 1048, the issue may no longer be jurisdictional. *See Payne v. Peninsula Sch. Dist.*, \_\_\_ F.3d \_\_\_, 2010 WL 961799 n.2 (9th Cir. 2010). After *Jones v. Bock*, 549 U.S. 199 127 S. Ct. 910, 166 L.Ed.2d 798 (2007), failure to exhaust may instead be an affirmative defense. *Id.* at 216 (finding failure to exhaust to be an affirmative defense under the Prison Reform Act where there is no basis for concluding Congress implicitly meant to transform exhaustion from an affirmative defense to a pleading requirement).

Regardless, *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999), and *Blanchard v. Morton School District*, 420 F.3d 918, 921 (9th Cir. 2005), are factually analogous to this case and should control its outcome.

In *Witte*, the plaintiff was a special education student who suffered from Tourette's Syndrome, asthma, ADHD, and emotional problems. 197 F.3d at 1272. He received special education and related services from the school district and had an IEP. He filed a § 1983 action against the

district, alleging the abuses described in his complaint served no legitimate educational purpose, but instead were inflicted solely to punish and humiliate him for acts that were caused by his disabilities. *Id.* at 1273.

In particular, the student alleged that his teacher and the teacher's instructional assistant physically, psychologically, and verbally abused him. For example, the student was force-fed oatmeal mixed with his own vomit. Yet the student was allergic to oatmeal and his mother had informed the teacher of the allergy. The school's principal explained that school staff force-fed oatmeal to students as a form of punishment.

The student was subsequently diagnosed with injuries consistent with strangulation. According to the student, the teacher's assistant choked him to make him run faster when he kept falling down. Yet the student has deformed feet and is unable to run fast.

The student was also subjected to a "takedown" procedure whereby he was forced onto a mat on the ground on his stomach, and had his arms and legs forcibly restrained behind his back. The teacher or another staff person would sit on top of the student and apply pressure until the student cried or screamed. He was subjected to this procedure as punishment for actions related to his disabilities, such as involuntary body movements or tics. The student was also made to stand in a corner of the classroom for long periods, with his hands and arms behind his back. He

was deprived of meals if he was unable to cut his food using the appropriate utensils. He was sprayed in the face with water if he failed to stay on task.

In addition to enduring physical abuse, the student endured emotional abuse. For example, the teacher frequently yelled and screamed degrading remarks at the student. He was threatened with physical harm if he ever told his mother what was happening to him at school.

With the agreement of the district, the student was eventually moved to another school within the district. No abuse occurred at the new school. He filed his § 1983 claim in federal court, seeking only monetary relief, both compensatory and punitive. The district moved to dismiss, contending he failed to exhaust administrative remedies under the IDEA. The district court granted the motion.

As the Ninth Circuit observed on appeal, the abuses inflicted on the student were meted out for making noise in the classroom, not running fast enough, not staying on task, and making involuntary body movements. *Id.* at 1273. All of these actions were characteristics of his disabilities and occurred because of his disabilities. *Id.* The Ninth Circuit determined the student's allegations centered on physical abuse and injury for which he expressly eschewed any claim for monetary damages to provide, or to be measured by any cost of, remedial services. *Id.* at 1276.

Instead, the student's claim was retrospective only. *Id.* The Ninth Circuit observed that the IDEA was not well-suited to addressing past physical injuries adequately; instead, an award of monetary damages was appropriate. *Id.* at 1276. Where the student was not seeking relief that was also available under the IDEA and all of his educational issues had been resolved, he was not required to exhaust administrative remedies before filing suit. *Id.* at 1275.

In *Blanchard*, the mother of an autistic child sought 42 U.S.C. § 1983 damages for her own emotional distress caused by the conduct of the school district and its staff in providing special education services to her son. 420 F.3d at 919-20. The mother represented her son in a series of administrative actions against the district, alleging that the district failed to accommodate him under the IDEA. An administrative law judge concluded the district had not properly implemented her son's IEP and had denied him a FAPE. The district was ordered to implement the plan and to provide compensatory education to the student for its past failings. The mother was compelled to initiate four other hearings on her son's behalf, which were aimed at implementing and modifying his IEP.

The mother later filed a complaint in federal court, seeking damages due to the district's alleged "indifference and violation of rights" as well as reimbursement for the income she lost while pursuing her son's

claims. The district court granted the school district's motion to dismiss, concluding the mother failed to exhaust her administrative remedies under the IDEA.

Emphasizing that the mother had resolved the educational issues implicated by her son's disability, the Ninth Circuit decided that exhaustion was not required because her injuries and lost income could not be remedied through the educational remedies available under the IDEA. *Id.* at 921-22. In reaching that result, the Ninth Circuit determined that emotional distress damages were non-educational and outside the ambit of the IDEA. Where money damages for retrospective and non-educational injuries are not available under the IDEA, administrative exhaustion is not required. *Id.* at 922.

Like *Witte* and *Blanchard*, no educationally-related claims remain in this case. The disability plaintiffs dismissed all of their educationally-related claims *years* before the trial court ruled on the District's third and final summary judgment motion. CP 1358. This is the critical distinction that the trial court failed to make.

The abuse and discrimination the students suffered in this case is akin to that suffered by the student *Witte*; it is in no way connected to the right to receive a FAPE. Neither the genesis nor the manifestations of abuse alleged in *Witte* or in this case is educational. Instead, it centers in

both cases on punishments meted out based on the student's inability to control movements, and the impulse to move, which are common characteristics of the student's disability. Here, the abuse was also associated with the student's inability to control involuntary noises, *supra*. More alarmingly, eye witnesses reported in this case that the students were frequently shoved, jerked, and cursed at even when they were not misbehaving, *supra*. Like the student in *Witte*, the students here suffered random acts of violence and abuse that have no nexus to the IDEA. Physical and dignitary torts are not within the scope of IDEA.

In addition, the disability plaintiffs have not alleged that they were denied FAPEs or that the harm they suffered involved identification, evaluation, or placement pursuant to their IEPs. CP 2832. The abuse here, as in *Witte*, occurred *because of* the students' disabilities. Unauthorized acts of abuse and discrimination are simply not components of a FAPE; thus, those acts do not fall within the purview of the IDEA.

The disability plaintiffs have also not alleged any need for prospective educational assistance. They have made no claim that the abuse they suffered was disciplinary in nature; instead, they seek relief from what amounts to random violence perpetrated by their teachers. There is no reason to believe their injuries can be redressed to any extent

by the IDEA's remedies. Nor is there any public policy justification for allowing educators to abuse disabled students.

*Meers v. Medley*, 168 S.W.3d 406 (Ky. App. 2004), is also instructive. There, two severely disabled students alleged their teacher physically and mentally abused them and sought relief under 42 U.S.C. §1983 and tort law. They asserted similar claims against the principal and other school staff. There, as here, the central question was whether the students were required to exhaust administrative remedies under the IDEA.

In considering that question, the Kentucky Court of Appeals looked to the nature of the wrongs alleged:

Medley [the teacher] verbally threatened and harassed Joey throughout the school year. She humiliated him by telling his [sic] he ate like an animal. Medley repeatedly and abusively berated Joey for his inability to stop drooling. She threatened him with a balled fist if he could not or did not do what she told him to do. Medley also physically abused him and treated him roughly under the guise of assisting him.

...

Leslie was also subject to Medley's daily verbal and physical abuse . . . . Leslie was harassed, verbally assaulted and humiliated by Medley. Medley also repeatedly used abusive and unnecessary physical restraint with Leslie, stepping on Leslie's hair, pinching her buttocks and bending her fingers back among other things. Leslie has also come home from school with scratches and red marks on her after her mother and

guardian, Lynn Meers, complained to the school of Leslie's treatment at the High School.

*Id.* at 410. Importantly, the court did not view these claims as encompassing "general disciplinary practices" and instead characterized them as physical and mental assault and/or abuse. *Id.* at 410. As such, the students' claims of physical assault or abuse fell outside the scope of the IDEA because they were not related to the way the school provided education. *Id.* at 410. Accordingly, the students were not required to exhaust administrative remedies under the IDEA.

Here, the disability plaintiffs have alleged nearly identical claims. Accordingly, this Court should similarly characterize their claims as physical, verbal, and psychological abuse and discrimination based on their disabilities rather than as general discipline governed by the IDEA. Based on *Witte*, *Blanchard*, and *Meers*, this Court should conclude the trial court erred by dismissing the disability plaintiffs' claims for failure to exhaust administrative remedies.

The disability plaintiffs' anticipate the District will argue that *Payne*, *Kutasi*, and *Robb* control the outcome of this case and warrant affirmance. The District is mistaken because those cases are readily distinguishable. Here, neither the source nor the nature of the disability plaintiffs' injuries is *educational*. Their claims are not special education

claims. Moreover, they seek only retrospective monetary damages for past injuries and not damages measured by the cost of remedial services such as those offered under the IDEA.

In *Payne*,<sup>12</sup> the student suffered from moderate autism, which delayed his academic progress and caused, among other things, impulsive, inappropriate or aggressive responses to his environment. 2010 WL 961799. The Peninsula School District developed an IEP to address the student's limitations and provide a FAPE. The IEP also sought to address his behavioral issues through various intervention methods, including the use of time-out in a "safe room." Although the student's mother authorized his teacher to place him in the safe room as a time-out space, she did not authorize the teacher to use it for punishment or to shut the door while he was inside of it.

The teacher began locking the student in the safe room. He became fearful and routinely urinated and defecated on himself. He also experienced emotional and academic setbacks due to his time in the safe room. After the student's mother unsuccessfully consulted with the district over the teacher's use of the safe room and his outside tutoring, she requested mediation. Although the mediation resulted in the student's transfer to another school within the district, it did not address his

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<sup>12</sup> Unlike *Witte* and *Blanchard*, *Payne* was a 2-1 split decision.

emotional problems. The mother never requested an impartial due process hearing to address those problems.

The mother later sued the district on her son's behalf for negligence, outrage and 42 U.S.C. §1983 violations. She specifically claimed the teacher's use of the safe room caused her son's "significant regression in communicative and sensory functions," the diminishment of his "academic prowess and abilities," and the continuing signs of emotional trauma. She also asserted her own claims for emotional distress. She sought general damages for extreme mental suffering and emotional distress, special damages, and punitive damages. The district court granted the district's summary judgment motion, finding it lacked subject matter jurisdiction over the mother's federal claims because she failed to exhaust her administrative remedies. It declined to exercise supplemental jurisdiction over her state law claims, finding no independent basis for jurisdiction over them.

The Ninth Circuit affirmed, noting *Witte* and *Robb* were the controlling cases and the proper inquiry was whether the plaintiffs sought relief for injuries that could be redressed to any degree by the IDEA's administrative procedures. 2010 WL 961799 at ¶¶ 1-2. Importantly, the Ninth Circuit drew a factual line between *Witte* and *Robb* and determined the mother's claims in *Payne* fell somewhere between the two because

they involved disciplinary measures employed as part of a larger educational strategy. *Id.* at ¶ 2. Ultimately deciding the case was more akin to *Robb*, the Ninth Circuit concluded exhaustion was required. *Id.* at ¶ 4.

Unlike the student in *Payne*, the disability plaintiffs here were subjected to mistreatment that was part of no IEP and served no legitimate educational purpose. Not a single IEP authorized the abuse that occurred. As Circuit Judge Noonan observed in his dissent in *Payne*: “throwing, kicking . . . a student; striking a student with a closed fist; . . . or denying or delaying common hygiene care” is “manifestly inappropriate” and prohibited by WAC 392-172A-03125.<sup>13</sup>

*Payne* is further distinguishable because the claims there involved components of both education and discipline authorized, at least in part, by the student’s IEP. By contrast here, the disability plaintiffs’ claims are not educationally-related. Instead, they are limited to past physical injury and dignitary torts not remediable under the IDEA.

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<sup>13</sup> WAC 392-172A-03125 prohibits interventions that are “manifestly inappropriate by reason of their offensive nature or their potential negative physical consequences, or their legality.” These practices include: stimulating a student with electric current; throwing, kicking, burning, or cutting a student; striking a student with a closed fist; threatening a student with a deadly weapon; denying or delaying medication or common hygiene care; and submerging a student’s head in water. *See id.*

Here, the alleged conduct goes far beyond that in *Robb*, where the student was removed from her class for peer tutoring that occurred on the floor of a dim hallway. Here was neither education nor attempt at education.

In *Kutasi*, the disagreement centered on an autistic student's disputed IEP. 494 F.3d at 1165-66. The student's claims, and those of his parents, were premised on violations of his educational rights guaranteed under the IDEA. Relying on *Robb*, the Ninth Circuit held that the plaintiffs were required to exhaust their administrative remedies prior to filing suit because their educational injuries could be redressed by the IDEA. *Id.* at 1166, 1170. Although the Ninth Circuit limited *Witte* and *Blanchard*, it did not repudiate them. More importantly, the Ninth Circuit recognized that a certain class of civil rights claims brought by special education students might fall outside the holding in *Robb*.

In contrast, the gravamen of the disability plaintiffs' claims here are not educational injury or ongoing emotional trauma that can be measured by the cost of future remedial services. Instead, their claims focus past physical and dignitary torts for which the IDEA provides no remedy.

In *Robb*,<sup>14</sup> a student with cerebral palsy and her parents sought damages to compensate her for lost educational opportunities and emotional distress following her repeated removal from the classroom for extended peer-tutoring by junior high and high school students without the supervision of a certified teacher. 308 F.3d at 1048. She alleged the school's practice of removing her from the classroom for peer tutoring violated the IDEA. *Id.* The district court dismissed the case on the basis that she was barred from pursuing a judicial remedy without first exhausting her administrative remedies.

On appeal, the Ninth Circuit held that a student may not avoid the IDEA's exhaustion requirement merely by limiting a prayer for relief to money damages. *Id.* at 1049. The Ninth Circuit noted that the primary concern in determining whether exhaustion is required relates to the source and nature of the alleged injuries for which the student is seeking a remedy, not the specific remedy requested. *Id.* at 1050. The dispositive question was thus whether the student alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies. *Id.* If so, exhaustion was required. *Id.* If not, then the claim fell outside the IDEA's scope and exhaustion was unnecessary. *Id.* The Ninth Circuit determined that Robb's injury (*i.e.*, lost educational

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<sup>14</sup> Like *Payne*, *Robb* was a 2-1 split decision.

opportunities) could be remedied by procedures available under the IDEA and exhaustion was required. *Id.* at 1050, 1052. In departing from *Witte*, the *Robb* court focused on the fact that the student had not taken advantage of the IDEA's administrative procedures to secure the available remedies, she had not claimed physical injuries, and she was seeking damages to compensate for psychological and *educational* injuries the IDEA may remedy. *Id.* at 1052-54.

Unlike the Robbs, the disability plaintiffs here waived their educational claims. They made it clear that the heart of their claims was emotional distress damages for physical and psychological abuse and discrimination, and not educational damages. Their injuries are not "part and parcel of the educational process." *Robb*, 308 F.3d at 1054 n.4. The conduct alleged in this case goes far beyond that in *Robb*, where the student was removed from her class for peer tutoring that occurred on the floor of a dim hallway. Here was neither education nor attempt at education.

Moreover, contrary to the District's arguments below, *Robb* does not preclude a disabled student from segregating claims for emotional distress damages from claims for educationally-related damages by waiving the latter. Noting the district court had not considered the claim for past emotional distress discretely, divorced from its educational

context, the *Robb* court declined to “reframe [the] appeal to review what would be (in effect) a different case than the one the district court decided below.” *Robb*, 308 F.3d at 1054 n.4. The court simply declined to consider an issue of law raised for the first time on appeal. It never made the pronouncement the District urges this Court to accept.

The District fails to recognize that in *Kutasi* and *Robb*, educationally-related issues remained that could be redressed by the IDEA. Here, no educationally-related claims remain because the disability plaintiffs’ voluntarily dismissed those claims. *Kutasi* and *Robb* do not control here. The trial court erred in dismissing the disability plaintiffs’ claims.

The disability plaintiffs also expect the District to argue, as it did below, that several recent due process hearings confirm that the trial court correctly dismissed their claims for failure to exhaust administrative remedies. CP 2822-27. The District is mistaken because those cases demonstrate that the disability plaintiffs’ have no administrative remedy under the IDEA.

In *B.D. & D.D., Parents of C.D. v. Puyallup Sch. Dist.*, OAH Special Education Cause No. 2008-SE-0081, a special education student’s parents initiated a due process hearing on his behalf. CP 3485, 3492. They requested that the OAH accept jurisdiction and award

damages for civil common law and discrimination causes of action. CP 348, 3500. The parent's specifically alleged that the conduct affecting the student's FAPE and the conduct causing his civil damages were two distinct issues. CP 3485, 3494-549.

The Puyallup School District moved for summary judgment on the parent's claims for monetary damages. CP 3487. Administrative Law Judge Cindy Burdue ("ALJ Burdue") dismissed those claims for lack of jurisdiction. CP 3503, 3505. ALJ Burdue instructed the parents that the proper venue for such claims was civil court, recognizing that they could bring both an independent due process hearing alleging violation of their son's right to a FAPE or an independent action unrelated to a FAPE based on a violation of common law or RCW 49.60. CP 3487, 3504. ALJ Burdue's ruling stated, in pertinent part:

14. There is no jurisdiction under the IDEA to hear any statutory or common law tort claims. To the extent that any of the claims or remedies put forth by the Parents constitute such, they must be denied or dismissed.

15. I lack statutory authority or "jurisdiction" to award compensation of any kind for any claim of discrimination under Section 504 of the Rehabilitation Act. This also includes compensation of any kind for: lost wages; past or future; monetary damages (addressed above); out of pocket expenses; damages or compensation of any kind for mental and emotional distress, emotional anguish, loss of enjoyment of life; loss of parent/child relationship; disability discrimination; psychological pain and suffering.

16. RCW 49.60 is a state discrimination statute. Under the IDEA, I have no jurisdictional authority to hear a discrimination complaint; and under RCW 49.60, no authority to decide these discrimination complaints.

These claims must be brought before a court which has jurisdiction, such as the state Superior Court in the appropriate county or the Federal District Court where appropriate. Thus the cause of action under Chapter RCW 40.60 is dismissed, as well as any common law tort causes of action claimed.

CP 3504.

Similarly, in *D.V. v. Bethel Sch. Dist.*, OAH Special Education Cause No. 2008-SE-0086, a special education student's mother filed an action in the Pierce County Superior Court seeking monetary damages to address the district's violations of the common law and RCW 49.60. CP 3511. The trial court dismissed the civil suit. CP 2826. The mother subsequently initiated a due process hearing with the OAH to address the district's alleged violations of her son's right to a FAPE and violations of civil common law and RCW 49.60. CP 2616-43, 2661, 3509. She sought monetary damages for discrimination, physical and emotional abuse, and distress. CP 2617, 3509.

Like the Puyallup School District in *B.D.*, the Bethel School District moved to dismiss the mother's claims. CP 2655. Administrative Law Judge Wacker ("ALJ Wacker") granted the motion in part and denied it in part; but in doing so, he failed to address the mother's common law

and discrimination claims or her request for compensatory money damages. CP 2655-58, 3510. The mother requested clarification of the dismissal order, but never received it. CP 3510, 3513. She then filed a second lawsuit against the district. CP 2827, 3511.

Rather than supporting the District's likely arguments, both *B.D.* and *D.V.* confirm that the disability plaintiffs' have no administrative remedy under the IDEA for monetary damages occasioned by tortious conduct.

Finally, the District may attempt to distract the Court by quoting from the disability plaintiffs' deposition testimony relating to the students' IEPs and their parents' expectations of the school to reinforce the educational issues that it believes still exist in this case. But the District did not depose the students' parents to investigate the abuse allegations; instead, it deposed them to ask irrelevant questions on medical and educational issues. *See, e.g.*, CP 1163. But those issues are not what this case is about. The disability plaintiffs are not alleging a deficiency in their education. They are alleging physical and psychological abuse and discrimination based on their disabilities. In any event, that testimony is irrelevant where the trial court dismissed the disability plaintiffs' educationally-related claims *months before* the depositions occurred.

- (c) Even if the disability plaintiffs' claims are educationally-related and the IDEA applied, administrative exhaustion would be futile

As an initial matter, the IDEA's exhaustion requirement does not apply to the disability plaintiffs' claims because that requirement only applies to federal claims brought pursuant to federal law. *Emma C. v. Eastin*, 985 F. Supp. 940, 942 (N.D. Cal. 1997) (exhaustion requirement applies to any federal claims seeking relief that would be available under the IDEA). Here, the disability plaintiffs seek only *state* statutory and common law tort remedies for the District's discriminatory conduct.

But even if the disability plaintiffs should have exhausted their administrative remedies under the IDEA before instituting this suit, their case falls squarely within the futility exception to that requirement. *See Hoeft*, 967 F.2d at 1303-04.

The futility exception derives from the language of the IDEA itself, which limits the exhaustion requirement to cases where the plaintiff "seek[s] relief that is also available" under the IDEA. 20 U.S.C. § 1415(l). If the plaintiff seeks a remedy for an injury that could not be redressed by the IDEA's administrative procedures, the claim falls outside § 1415(l)'s rubric and exhaustion is unnecessary. *See Robb*, 308 F.3d at 1050.

Any attempt by the disability plaintiffs here to exhaust their administrative remedies would be futile. Their claims are not

educationally-oriented; instead, the claims are based on the District's tortious conduct. As *Witte* and *Blanchard* have already recognized, the IDEA's administrative remedies cannot compensate for injuries that are completely non-educational. See *Blanchard*, 420 F.3d at 921 (citation omitted); *Witte*, 197 F.3d at 1275-76. After all, tortious conduct cannot have an educational purpose.

In addition, the disability plaintiffs seek money damages for their injuries, which is the only suitable remedy available to them. Requiring exhaustion with respect to such damages is to require the disability plaintiffs to perform a futile act since general money damages are not available under the IDEA. See *Witte*, 197 F.3d at 1275. See also, *Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 918 (6th Cir. 2000) (following *Witte*; holding that exhaustion would be futile where money damages were the only remedy capable of addressing the student's injuries and such damages are unavailable under the IDEA).

Finally, it is undisputed that the OSPI rebuffed the disability plaintiffs' attempt to obtain relief. During their first appeal, the disability plaintiffs filed a citizen's complaint with the OSPI to determine whether the identified acts of physical and verbal abuse were educationally-related and whether such acts were covered by the IDEA. CP 1920, 1922-39,

2026. Dr. Gill responded, stating their complaint did not specify violations of the IDEA. CP 2027, 2285.

Dr. Gill later confirmed that their claims of verbal and physical abuse, discrimination, and other common law causes of action were not within the OSPI's jurisdiction to address. CP 2028, 2159-60, 2162, 2173-77, 2185, 2854. He concluded that the disability plaintiffs' allegations did not constitute violations of the IDEA and therefore could not be remedied through the OSPI. CP 2177.

Dr. Gill's testimony makes clear that a remand to the OSPI to hear the disability plaintiffs' abuse and discrimination claims would be futile given the OSPI's interpretation of its own jurisdiction. As OSPI's chief official on the implementation of IDEA remedies, his view must carry great weight. Dr. Gill's statements also confirm that OSPI does not believe it has jurisdiction over the disability plaintiffs' claims because the claims do not concern "implementation, evaluation, reevaluation, classification, educational placement, the provision of a free appropriate education, or disciplinary action." Hence, the disability plaintiffs have no recourse but to seek judicial relief. They should not be required to attempt to exhaust futile administrative remedies.

(3) The Disability Plaintiffs Are Entitled to Their Attorney Fees and Costs on Appeal

The disability plaintiffs are entitled to their attorney fees and costs on appeal pursuant to RCW 49.60.030(2) and RAP 18.1. RAP 18.1 provides for an award of attorney fees on review where a statute authorizes such an award. RCW 49.60.030(2) provides that “[a]ny person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction . . . to recover the actual damages sustained by the person . . . together with the cost of suit including reasonable attorneys’ fees[.]”

Although RCW 49.60.030(2) does not expressly provide for attorney fees on review, Washington courts have interpreted the statute to authorize such awards. *See, e.g., Xieng v. Peoples Nat’l Bank*, 120 Wn.2d 512, 533, 844 P.2d 389 (1993) (citing *Allison v. Hous. Auth. of City of Seattle*, 118 Wn.2d 79, 98, 821 P.2d 34 (1991)).

Where the disability plaintiffs have prevailed on appeal, they are entitled to their reasonable attorney fees and costs. RAP 18.1; RCW 49.60.030(2).

F. CONCLUSION

The abuses and discrimination the disability plaintiffs suffered at the hands of the District served no legitimate educational purpose, but

were inflicted solely to punish and humiliate the students for acts that were caused by their disabilities. Simply because the physical and dignitary torts they experienced happened to occur at school does not bring their claims within the scope of the IDEA or require them to exhaust administrative remedies before filing their lawsuit. If these torts had occurred at work or in public, there is little question they would be actionable.

Insofar as the disability plaintiffs are seeking relief that is not educationally-oriented and is not measured by future educational costs, they are not seeking relief available under the IDEA. Damages for past pain and suffering simply do not fit into the model of relief available under the IDEA and as such, requiring exhaustion with respect to such damages would be futile.

The trial court erred in granting summary judgment to the District because fidelity to the IDEA's exhaustion requirement was not required. This Court should reverse and remand the case for trial on the disability plaintiffs' abuse and discrimination claims. Costs on appeal, including reasonable attorney fees, should be awarded to the plaintiffs.

Dated this 24~~th~~ day of March, 2010.

Respectfully submitted,



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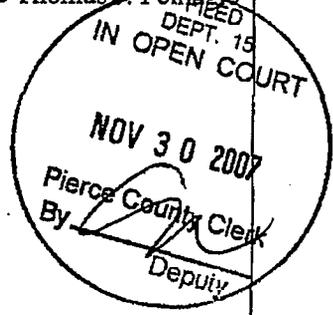
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# APPENDIX



06-2-08565-1 28749593

The Honorable Thomas J. Fairhead



*Dowler  
Appendix*

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SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

MITCH DOWLER and IN CHA DOWLER,  
individually and as limited guardian ad litem  
for NAM SU CHONG; et al.,

Plaintiffs,

v.

CLOVER PARK SCHOOL DISTRICT  
NO. 400,

Defendant.

No. 06 2 08565 1

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT  
AND PLAINTIFFS' CR 41(a)(1)(B)  
MOTION FOR VOLUNTARY  
DISMISSAL

THIS MATTER came on for hearing upon the Defendant's Motion for Summary Judgment For Failure To Exhaust Administrative Remedies and Plaintiffs' CR 41(a)(1)(B) Motion for Voluntary Dismissal with Prejudice of all Education-Related Claims, the Court having considered the following materials:

1. Defendant's Motion for Summary Judgment For Failure To Exhaust Administrative Remedies;
2. Declaration of Daniel C. Montopoli, with Exhibits A through N attached;
3. Plaintiffs' Response to Defendant's Motion for Summary Judgment;
4. Declaration of Thaddeus Martin in Opposition to Defendant's Motion for Summary Judgment, with Exhibits 1- 65 attached;
5. Plaintiffs' Motion and Declaration to Dismiss All Claims Related to Education Pursuant to CR 41(a)(1)(B), with Exhibits A to B attached;

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' CR 41(a)(1)(B) MOTION FOR VOLUNTARY DISMISSAL - 1

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ORIGINAL

- 1           6.     Defendant's Reply to Plaintiffs' Summary Judgment Response and Defendant's  
2           Response to Plaintiffs' CR 41 Motion To Dismiss Educationally-Related Claims;  
3           7.     Declaration of Administrative Law Judge Janice E. Shave;  
4           8.     Plaintiffs' Reply and Declaration on Motion and Declaration To Dismiss All  
5           Claims Related to Education Pursuant to CR 41(a)(1)(B) With Prejudice, with  
6           Exhibits 1-6 attached;  
7           9.     The pleadings, records and files herein.

8           The Court having combined the two motions for hearing and consideration, finds that  
9           under the Individuals With Disabilities and Education Act, the Washington special education  
10          statutes, and general principles of exhaustion of administrative remedies, plaintiffs are required  
11          to exhaust administrative remedies before pursuing claims in the Superior Court for all matters  
12          which in any way relate to educational services provided, or which could be provided, to special  
13          education students and any non-educational services which could be provided through  
14          administrative remedies;

15          The Court further finds that there is no genuine issue of material fact and that Defendant  
16          is entitled to judgment as a matter of law because plaintiffs have failed to exhaust their  
17          administrative remedies.

18          NOW, THEREFORE, it is

19          ORDERED, ADJUDGED AND DECREED that:

20          1.     Defendant's Motion for Summary Judgment For Failure To Exhaust  
21          Administrative Remedies is GRANTED, and all claims brought by the plaintiffs which in any  
22          way relate to educational services which were provided or which could be provided to plaintiffs  
23          or any non-educational services which could be provided to plaintiffs through administrative  
24          remedies, including all claims for discrimination under RCW 49.60, are DISMISSED for failure  
25          to exhaust administrative remedies.  
26

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT AND PLAINTIFFS' CR 41(a)(1)(B) MOTION FOR  
VOLUNTARY DISMISSAL - 2

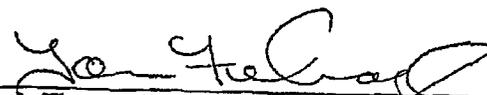
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1           2. From the record before it, the Court is not able to determine which, if any,  
 2 plaintiffs have claims that would not be subject to this Dismissal Order. Accordingly, the Court  
 3 invites a second round of summary judgment motions to determine if any plaintiff has any claims  
 4 that are strictly tort claims for physical and/or verbal abuse for which it can be shown clearly  
 5 without argument, that they do not involve the application of discipline or any other aspect of  
 6 special education or which could in any way be remedied through administrative remedies  
 7 available for special education students. Only those plaintiffs whose claims do not involve any  
 8 aspect of education or remedies available through the administrative process survive this Order.  
 9 If the plaintiffs' claims involve any mixture of claims that could be addressed by the  
 10 administrative remedies available under the special education statutes, or if the injuries or  
 11 damages alleged by plaintiffs are intertwined so that any part of the injuries or damages could be  
 12 addressed by remedies available, then those plaintiffs' claims will be dismissed.

13           3. Plaintiffs' Motion to Dismiss all Claims Related to Education pursuant to CR  
 14 41(a)(1)(B) With Prejudice is hereby granted.

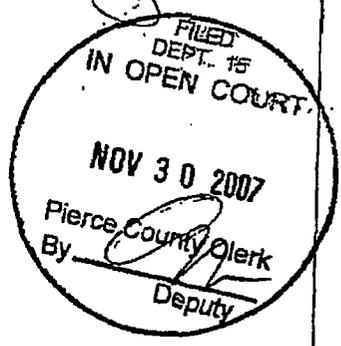
15           DONE IN OPEN COURT this 30<sup>th</sup> day of November, 2007.

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 Hon. Thomas J. Felnagle

19 Presented by:

20 VANDEBERG JOHNSON & GANDARA, LLP

21  
 22 By:   
 23 William A. Coats, WSBA # 4608  
 24 Daniel C. Montopoli, WSBA # 26217  
 25 H. Andrew Saller, WSBA # 12945  
 26 Attorneys for Defendant



ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY  
 JUDGMENT AND PLAINTIFFS' CR 41(a)(1)(B) MOTION FOR  
 VOLUNTARY DISMISSAL - 3

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1 **Approved as to Form and Notice of Presentation Waived:**

2 **LAW OFFICES OF THADDEUS P. MARTIN**

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4 **By:** Thaddeus P. Martin, WSBA No. 28175  
5 **Attorneys for Plaintiffs**  
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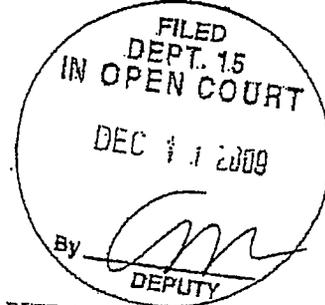
**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT AND PLAINTIFFS' CR 41(a)(1)(B) MOTION FOR  
VOLUNTARY DISMISSAL - 4**

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The Honorable Thomas J. Felnagle



SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

MITCH DOWLER and IN CHA DOWLER, individually and as limited guardian ad litem for NAM SU CHONG; KATHLEEN DAVIS, individually and as limited guardian ad litem for ZACHARY DAVIS and ALEXIAS DAVIS; NICOLE SCHUENEMAN-DOBRINSKI, individually and as limited guardian ad litem for CONNER SCHUENEMAN; MELANIE STEVENS, individually and as limited guardian ad litem for VANCE STEVENS; DERRICK and JUDITH VOLLMER, individually and JUDITH VOLLMER as limited guardian ad litem for JOSH VOLLMER; and WILLIAM STEPHEN SULLIVAN and YOLANDA SULLIVAN, individually, and WILLIAM STEPHEN SULLIVAN, as limited guardian ad litem for STEPHANIE SULLIVAN, and JEANETTE MOYE and ANTHONY MOYE, as limited guardian ad litem for RALSHODD MOYE, and LISA TITCHELL, individually and as limited guardian ad litem for CHRISTINA ESCHEVARRIA, DENISE LUMLEY, individually and HANNALORE BLACK as limited guardian ad litem for JOSHUA LUMLEY;

Plaintiffs,

v.

CLOVER PARK SCHOOL DISTRICT NO. 400,

Defendant.

No. 06 2 08565 1

ORDER GRANTING DEFENDANT'S THIRD MOTION FOR SUMMARY JUDGMENT; DENYING DEFENDANT'S MOTION TO STRIKE

ORDER GRANTING DEFENDANT'S THIRD MOTION FOR SUMMARY JUDGMENT - 1

VANDEBERG JOHNSON & GANDARA, LLP ATTORNEYS AT LAW 1201 PACIFIC AVENUE, SUITE 1900 P.O. BOX 1315 TACOMA, WASHINGTON 98401-1315 (253) 383-3791 (TACOMA) FACSIMILE (253) 383-8377

1 THIS MATTER came on for hearing upon the Defendant's Third Motion For Summary  
2 Judgment Dismissal for Failure to Exhaust Administrative Remedies, the Court having reviewed  
3 the files and pleadings herein, having heard argument of counsel and having considered the  
4 following materials:

- 5 1. Defendant's Third Motion for Summary Judgment;
- 6 2. Declaration of H. Andrew Saller, Jr. in Support of Motion with Attached Exhibits;
- 7 3. Plaintiffs' Response to Defendant's Third Motion for Summary Judgment;
- 8 4. Declaration of Thaddeus P. Martin with Attached Exhibits;
- 9 5. Declaration of Douglas Gill;
- 10 6. Declaration of Nancy Vernon;
- 11 7. Declaration of Bernard K. Dalien;
- 12 8. Declaration of Special Education Attorney Eric Grotzke;
- 13 9. Declaration of Plaintiff William Sullivan;
- 14 10. Declaration of Plaintiff Melanie Stevens;
- 15 11. Declaration of Anthony Moye;
- 16 12. Declaration of Plaintiff Lisa Titchell;
- 17 13. Declaration of Plaintiff Nicole Schueneman-Dobrinski;
- 18 14. Declaration of Plaintiff Mitch Dowler;
- 19 15. Declaration of Denise Lumley;
- 20 16. Declaration of Plaintiff Kathleen Davis;
- 21 17. Declaration of Plaintiff Judith Vollmer;
- 22 18. Defendant's Reply Brief; and

23 19. Declaration of H. Andrew Saller, Jr. Re: Transcript of Proceedings, <sup>and</sup>  
 24 20. The plaintiff motions for summary judgment and CR 60 motion and all pleadings  
 25 The Court finds that there is no genuine issue of material fact and that Defendant is <sup>and</sup> declarations  
 26 entitled to judgment as a matter of law because plaintiffs have failed to exhaust their <sup>regarding</sup>  
 administrative remedies. <sup>these</sup>  
<sup>motions.</sup>

ORDER GRANTING DEFENDANT'S THIRD  
MOTION FOR SUMMARY JUDGMENT - 2

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NOW, THEREFORE, it is  
ORDERED, ADJUDGED AND DECREED that:

Defendant's Third Motion For Summary Judgment Dismissal is GRANTED and all claims brought by Plaintiffs MITCH DOWLER and IN CHA DOWLER, individually and as limited guardian ad litem for NAM SU CHONG; KATHLEEN DAVIS, individually and as limited guardian ad litem for ZACHARY DAVIS and ALEXIAS DAVIS; NICOLE SCHUENEMAN-DOBRINSKI, individually and as limited guardian ad litem for CONNER SCHUENEMAN; MELANIE STEVENS, individually and as limited guardian ad litem for VANCE STEVENS; DERRICK and JUDITH VOLLMER, individually and JUDITH VOLLMER as limited guardian ad litem for JOSH VOLLMER; WILLIAM STEPHEN SULLIVAN and YOLANDA SULLIVAN, individually, and WILLIAM STEPHEN SULLIVAN, as limited guardian ad litem for STEPHANIE SULLIVAN; JEANETTE MOYE and ANTHONY MOYE, as limited guardian ad litem for RALSHODD MOYE; LISA TITCHELL, individually and as limited guardian ad litem for CHRISTINA ESCHEVARRIA; DENISE LUMLEY, individually and HANNALORE BLACK as limited guardian ad litem for JOSHUA LUMLEY are DISMISSED for failure to exhaust administrative remedies; and it is further

ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Strike Testimony submitted by plaintiffs in opposition to defendant's motion is DENIED.

DONE IN OPEN COURT this 11<sup>th</sup> day of December, 2009.

*Thomas J. Felnagle*  
Hon. Thomas J. Felnagle

FILED  
DEPT. 15  
IN OPEN COURT  
DEC 11 2009  
By *[Signature]*  
DEPUTY

ORDER GRANTING DEFENDANT'S THIRD  
MOTION FOR SUMMARY JUDGMENT - 3

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1 Presented by:  
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6 H. Andrew Saller, WSBA # 12945  
Attorneys for Defendant

7 Approved as to Form; And  
8 Notice of Presentation Waived:  
9 TALMADGE FITZPATRICK, P.S.

10 By: Philip A. Talmadge  
11 Philip A. Talmadge, WSBA #6973

12 LAW OFFICES OF THADDEUS P. MARTIN

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14 By: Thaddeus P. Martin  
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ORDER GRANTING DEFENDANT'S THIRD  
MOTION FOR SUMMARY JUDGMENT - 4

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DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Brief of Appellants in Supreme Court Cause No. 84048-2 to the following parties:

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Lakewood, WA 98499

William A. Coats  
Daniel C. Montopoli  
H. Andrew Saller  
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Original efiled with:  
Washington Supreme Court Clerk's Office  
415 12<sup>th</sup> Street W  
Olympia, WA 98504

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 24, 2010 at Tukwila, Washington.

  
Paula Chapler, Legal Assistant  
Talmadge/Fitzpatrick

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
10 MAR 24 AM 10: 04  
BY RONALD R. CARPENTER  
CLERK

FILED AS  
ATTACHMENT TO EMAIL

DECLARATION

ORIGINAL