

ORIGINAL

NO. 84048-2

SUPREME COURT
OF THE STATE OF WASHINGTON

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.

STATEMENT OF GROUNDS FOR DIRECT REVIEW

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A. NATURE OF THE CASE AND DECISION

This case arises from the physical and psychological abuse and blatant discrimination suffered by ten developmentally disabled students at the hands of teachers and school administrators in the Clover Park School District No. 400 ("District").

The plaintiff students suffer from severe sensory, mental, and physical disabilities.¹ 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 for the students and parents. It did not contain any federal claims and, more particularly, no educationally-related claims because those claims were dismissed in the course of the case. The disability plaintiffs sought only monetary damages for pain and suffering and not compensatory education or other educational remedies.

Contending that the foundation of the disability plaintiffs' complaint was educational in nature and thus within the scope of relief

¹ The named plaintiffs also include the natural parents, adoptive parents, and legal guardians of the students. For ease of reading, the plaintiffs will be referred to collectively as "disability plaintiffs" unless the context requires otherwise.

available in a due process hearing under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1491, the District filed a summary judgment motion seeking to dismiss the disability plaintiffs' claims for failure to exhaust administrative remedies. On November 30, 2007, the trial court granted the District's motion. But the court was unable to determine which plaintiffs, if any, had claims not subject to its dismissal order. 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 not involving discipline or any other aspect of special education that could not be remedied through the administrative process available to special education students. The court noted that only those plaintiffs whose claims did not involve any aspect of education or remedies available through the administrative process survived the dismissal order. 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. The disability plaintiffs' only remaining causes of action involve discrimination under RCW 49.60 and other tort claims. No educationally-related claims remain.

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. The next day, the District filed a second summary judgment motion again seeking to dismiss the disability plaintiffs' claims for failure to exhaust administrative remedies. The District later submitted a revised summary judgment motion addressing the disability plaintiffs' allegations of abuse and discrimination. The court heard the motions on January 25, 2008. In its oral ruling, the court indicated it was prepared to dismiss the disability plaintiffs' claims for failure to exhaust administrative remedies and that it was going to deny their motion for reconsideration. The possibility of the disability plaintiffs' future return to court remained open.

Shortly thereafter, the disability plaintiffs began the paperwork to start the administrative process with the Office of Superintendent of Public Instruction ("OSPI").

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. The court granted the District's motion for dismissal without prejudice on February 8, 2008. At the same time, the Court denied the disability plaintiffs' second motion for reconsideration and they appealed.

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. 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. The disability plaintiffs provided the additional information. Dr. Gill responded and again stated that the complaint did not specify violations of the IDEA. Dr. Gill provided examples of the types of violations investigated under OSPI's complaint process, which included staff qualifications, improper use of behavioral supports or aversive interventions, or failure to provide services outlined in the student's individualized educational plan ("IEP").

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. 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. In at least one instance, he recommended the police be called to investigate.

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. The trial court agreed to grant the motion on July 18, 2008. The court subsequently denied the District's motion for reconsideration. 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.

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. 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"). The disability plaintiffs responded, arguing the IDEA did not apply because they had dismissed their educationally-related claims, some of the students had actually graduated, and the IDEA's exhaustion requirement did not apply to their remaining common law and tort claims.

After considering the previous summary judgment motions, the disability plaintiffs' CR 60 motion, and the additional briefing, the trial court granted the District's motion on December 11, 2009. The disability plaintiffs timely appealed, and now seek direct review of the order dismissing their claims for failing to exhaust administrative remedies. A copy of that order is in the Appendix.

B. ISSUE PRESENTED FOR REVIEW

Should this Court accept review of a case involving an issue of first impression and vacate the trial court order dismissing the special education students' claims for failing to exhaust administrative remedies under the IDEA where no remedy exists under the IDEA for the students' non-educational claims based on discrimination and abuse, and to seek such remedies would be futile because they are nonexistent?

C. DIRECT REVIEW IS APPROPRIATE

RAP 4.2(a) establishes the criteria governing this Court's decision to grant or deny direct review of a trial court order. Here, the trial court's dismissal order presents an issue of first impression involving a fundamental and urgent issue of broad public import that ultimately must be decided by this Court. RAP 4.2(a)(4).² Direct review is appropriate.

² RAP 4.2(a)(4) states that a party may seek direct review in this Court of trial court decision "involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination."

This Court has never definitively analyzed the cases that satisfy the elements of RAP 4.2(a)(4); however, the cases in which direct review has been granted are revealing. For example, the Court has granted direct review when a public agency is involved. *See, e.g., Boeing Co. v. State*, 89 Wn.2d 443, 572 P.2d 8 (1978) (State as defendant); *Seattle Seahawks, Inc. v. King County*, 128 Wn.2d 915, 913 P.2d 375 (1996) (contract dispute between county and professional football team over construction of new football stadium). The Court has also granted direct review when issues of first impression are presented for review. *See, e.g., Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009) (whether a city's response to a public records request was a proper claim of exemption sufficient to trigger the applicable statute of limitations); *York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 303, 178 P.3d 995 (2009) (constitutionality of random and suspicionless drug testing programs for student athletes); *Bohme v. PEMCO Mut. Ins. Co.*, 127 Wn.2d 409, 411-12, 899 P.2d 787 (1995) (interpretation of insurance policy excluding government-owned vehicles from the definition of underinsured motor vehicles); *Wagenblast v. Odessa Sch. Dist. No. 105-157-166J*, 110 Wn.2d 845, 846, 758 P.2d 968 (1988) (legality of exculpatory clause required of student athletes as a prerequisite to student participation in certain school-related activities);

State v. Gunwall, 106 Wn.2d 54, 56, 720 P.2d 808 (1986) (admissibility of evidence obtained from a pen register).

Clearly, this case involves a public agency. *Mead School Dist. No. 354 v. Mead Ed. Ass'n (MEA)*, 85 Wn.2d 140, 143 n.2, 530 P.2d 302 (1975) (noting school districts are "public agencies"). Direct review would thus be appropriate under *Boeing* and *Seattle Seahawks*. More importantly, this case involves an issue of first impression as did *Rental Housing* and the other cases identified above in which the Court granted direct review.

Here, the trial court determined the disability plaintiffs failed to exhaust administrative remedies and dismissed their lawsuit. In doing so, the court apparently agreed with the District that the IDEA was the appropriate forum to address claims for discrimination, harassment, and abuse because the District's misconduct allegedly interfered with the students' right to receive FAPEs. The trial court misconstrued the IDEA's exhaustion requirement. Equally as important, the court failed to make a critical distinction between the disability plaintiffs' claims and the types of claims traditionally addressed through the IDEA administrative process. The disability plaintiffs' claims are not predicated on a violation of the IDEA or on an inability to receive a FAPE; instead, they are based on state

common law and state discrimination and tort laws for which administrative exhaustion is not required.

This case is one of first impression because no Washington decision has addressed the IDEA or its exhaustion requirement in the context of abuse and discrimination claims having no impact on a special education student's right to a FAPE. Special education students, their parents, and the school districts where those students are enrolled would benefit from an immediate and definitive interpretation of the IDEA in this context by this Court. Direct review is therefore appropriate.

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 focuses on restoring educational services to special education students by providing compensatory special education services to remedy past denial of such services, *Miener v. Missouri*, 800 F.2d 749, 754 (8th Cir. 1986), and on reimbursing parents for the funds they have expended for covered specialized educational services. *School Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370-71, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985).

First, the trial court here missed the implications surrounding the disability plaintiffs' dismissal of their educationally-related claims. The trial court confused the recovery of compensatory educational services under the IDEA with compensatory damages for personal injuries and civil rights violations not governed by the IDEA. The IDEA provides relief for *educationally-oriented* claims. *See, e.g., J.G. v. Douglas County School 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).

The disability plaintiffs have not alleged that they were denied a FAPE or that the harm they suffered at the hands of the District impacted their education. Instead, they have only alleged that they were verbally and physically assaulted, harassed, and discriminated against by the District. As a result, they suffered personal and dignitary torts that stand apart from the IDEA.

Second, the plain language of 20 U.S.C. §1415(i)³ obligates students receiving services under the IDEA to exhaust administrative remedies only when “seeking relief that is also available” under the IDEA. The exhaustion 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). The disability plaintiffs

³ 20 U.S.C. § 1415(i) 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.

here seek *state* statutory and common law tort remedies for the District's discriminatory conduct.

Finally, the IDEA's administrative exhaustion requirement is not absolute. *See Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992). 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 unnecessary. *See Robb v. Bethel School Dist. # 403*, 308 F.3d 1047, 1050 (9th Cir. 2002). *See also, Dioxin/Organochlorine Center v. Washington 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).

Most critically, as the disability plaintiffs have demonstrated below from the testimony of OSPI officials and similar authorities in other states, the IDEA does not apply to non-educational tort claims for damages. The Office of Administrative Hearings indicated in numerous decisions that it had no jurisdiction to award tort damages in IDEA hearings.

The IDEA does not address claims for physical and verbal abuse and discrimination cognizable under RCW 49.60 or the common law. *See Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999) (where student's claims were centered on physical abuse, and because the remedy sought was monetary damages only, student was not required to exhaust administrative remedies before filing suit). *See also, Blanchard v. Morton School District*, 420 F.3d 918, 921 (9th Cir. 2005) (holding that mother seeking emotional distress and lost wage damages arising from school's failure to provide special education services to her son was not required to exhaust IDEA administrative remedies because no administrative remedy was available for mother's non-educational damages claims).

The disability plaintiffs' claims are not educationally-oriented; instead, they are based on the District's abusive behavior. They seek monetary 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).

This Court needs to review the question of whether the IDEA applies to non-educationally based claims such as those alleged here and determine whether a special education student bringing such claims is required to exhaust administrative remedies prior to filing suit. This case presents the classic example of a case meriting direct review by this Court.

D. CONCLUSION

Unauthorized acts of abuse and discrimination, such as those alleged in the complaint here, are not components of a FAPE. The disability plaintiffs should not be required to exhaust illusory administrative remedies before filing suit when they have not alleged that they were denied a FAPE and their claims are not predicated on a violation of the IDEA. Their remaining claims do not fall within the purview of the IDEA. Such an exhaustion requirement would impose an extreme hardship for cases under RCW 49.60 that merely happened to originate in a school.

The disability plaintiffs respectfully request that the Court grant direct review. RAP 4.2(a). This case presents an issue of first impression involving a fundamental and urgent issue of public significance that must ultimately be decided by this Court.

DATED this 14th day of January, 2010.

Respectfully submitted,



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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 Statement of Grounds for Direct Review in Supreme Court Cause No. 84048-2 to the following parties:

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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: January 14, 2010 at Tukwila, Washington.


Paula Chapler, Legal Assistant
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