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A. Argument in Reply

1. Misapplication of the IDEA's statute of limitations

While the lower court in the first action may have found that the issues before it were at least intertwined with issues that could *possibly* be dealt with under the IDEA, the ALJ did not decide any issues of discrimination under RCW 49.60 *et seq.* Nowhere in the ALJ's findings of fact and conclusions of law did the ALJ even consider discrimination causes of action under RCW 49.60 *et seq.* CP 45-66. The issues that the ALJ considered related *only* to whether Drew received a free appropriate public education ("FAPE"), whether Drew obtained an educational benefit, and whether Drew was entitled to an award of compensatory education. CP 46. None of these issues are relevant to plaintiffs' discrimination claims under RCW 49.60 *et seq.*

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)). Non-educational injuries and claims were not considered by the ALJ in this case. CP 45-66. Nor did the ALJ have jurisdiction to consider such claims. Senior Administrative Law Judge and Public Records Officer Robert Krabill stated that the plaintiffs' discrimination and tort claims

would not be proper in a due process setting under the IDEA.

The Office of Administrative Hearings has no authority to grant damages to aggrieved students. See WAC 392-172A-05080.

And third, OAH has no jurisdiction to consider common law tort claims, even those related to special education students.

CP 406 (*See also* Douglas Gill's statement at CP 303-06).

Collateral estoppel does not apply in this situation because its application would work an injustice. Four requirements must be met for collateral estoppel to apply: (1) the issue decided in the prior adjudication must be identical to the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of collateral estoppel must not work an injustice. *World Wide Video of Washington, Inc. v. City of Spokane*, 125 Wn. App. 289, 305, 103 P.3d 1265 (2005).

The court's decision in the first action that the plaintiffs must present their claims under the IDEA penalized plaintiffs and forced them to undertake an act that served no useful purpose. "[T]here are situations in which exhaustion serves no useful purpose." *Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992). 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). Application of collateral estoppel would work an injustice in this situation because the requirement of exhaustion has *proven* to be futile with respect to plaintiffs' discrimination claims. The ALJ had no jurisdiction to hear them and now the lower court has applied the IDEA's statute of limitations to discrimination claims that could not be considered *both* because of a lack of jurisdiction and because they fell outside the IDEA's statute of limitations before the ALJ. The District should not be allowed to hide behind a statute of limitations that applies to claims that are NOT being brought in this case. Plaintiffs' causes of action are governed by the statute of limitations applicable to RCW 49.60 and Washington common law causes of action, not the more restrictive two year statute of limitations applicable to claims brought under the IDEA. The lower court should have denied the District's motion.

2. Nancy Vernon's injury to the parent/child relationship.

RCW 4.24.010 provides that a parent may bring an action for injury to or destruction of the parent-child relationship. Nancy Vernon may recover for mental anguish caused by injury to Drew. In *Wilson v. Lund*, 80 Wn.2d 91, 491 P.2d 1287 (1971) the Supreme Court interpreted

RCW 4.24.010 and held:

We construe the language ‘loss of love . . . and . . . injury to or destruction of the parent-child relationship’ To provide recovery for parental grief, ***mental anguish and suffering*** as an element of damages intended by the legislature to be recoverable under appropriate circumstances ***in cases involving*** the wrongful death of or ***injury to a child***.

Wilson at 96 (emphasis added). There is no doubt that Nancy Vernon may pursue a cause of action under RCW 4.24.010 seeking damages for mental anguish/emotional distress. The Restatement (Second) of Torts explains:

Emotional distress passes under various names, such as mental suffering, ***mental anguish***, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea...

Restatement (Second) of Torts § 46 cmt. j, at 77-78 (1965) (emphasis added).

Plaintiffs presented sufficient evidence to, at the very least, create issues of fact for a jury regarding whether Drew suffered injury as a result of the District’s conduct (e.g. bruising on his arms, eye poking, etc.). Nancy also provided first-hand testimony regarding Drew’s behavioral changes and how her interactions with her were affected, supporting her damages claim. As explained above and in Appellants’ Opening Brief, the IDEA’s statute of limitations should not limit this claim.

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3. Drew was discriminated against because of his disability – a violation of RCW 49.60 *et seq.*

RCW 49.60.030 recognizes a right to be free from discrimination because of the presence of any sensory, mental, or physical disability. This right includes the right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement. RCW 49.60.030(1)(b). “Full enjoyment of” includes the right to “the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons...with any sensory, mental, or physical disability...*to be treated as not welcome, accepted, desired, or solicited.*” RCW 49.60.040(14) (emphasis added).

Drew was treated as not welcome, accepted, or desired within the schools of the Bethel School District. Drew was treated differently from students who did not share his disability. Drew was singled out by teachers, staff, and administrators and physically grabbed and harmed causing bruising, ignored for hours in an empty room, ignored for hours in the corner of a room while teachers and staff discussed their personal lives, led around by his food on a fork like an animal, driven to lash out and poke at his own eyes and pick at his penis, all of which occurred over

a period of years. Drew clearly felt unwelcome at school and displayed his frustration after school when he would run into his house and throw things behind his back.

The District's argument that the WLAD should not apply to special education students in school is without merit. While the court in *Pace v. Bogalusa City School Bd.*, 403 F.3d 272 (5th Cir. 2005) did hold that the standards under the IDEA are substantially similar to those under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, the court reached that conclusion by looking at "...the equivalent standards for *accessibility* in schools under the IDEA on the one hand and the ADA/504 on the other." *Pace* at 292 (emphasis added). In the instant case, the standard under the IDEA for ensuring FAPE and the standard under RCW 49.60 for discrimination in places of public accommodation are significantly different. Drew's discrimination claim does not center on accessibility, but on abuse, neglect, humiliation – being made to feel unwelcome when non-disabled students were not.

The District repeatedly misconstrues plaintiffs' claims, attempting to frame them as educational claims when the plaintiffs in this action did not raise educational claims. The ALJ dealt with the educational claims and lacked jurisdiction to decide plaintiffs' discrimination claims. Plaintiffs are not seeking special services or special education services in

this action. Plaintiffs' WLAD claim is not predicated upon the education provided to Drew but instead on abuse and discrimination that happened to occur in the school setting. There is no doubt that had a student who was not a special education student been treated as unwelcome in the ways that Drew was, that student would have a cause of action under the WLAD.

4. Drew's emotional distress

The District's breach caused Drew's damages in the form of severe emotional distress. Drew is unable to communicate with psychologists, but Nancy, his mother, the person who knows him best, recognized symptoms that two doctors saw as the symptoms of one who has suffered post traumatic stress, including panic attacks. In a case such as this where it would be extremely difficult for a doctor to make a definitive diagnosis of emotional distress due to Drew's inability to communicate his own symptoms, it would be unjust to apply a harsh standard for proving emotional distress. A jury should be able to decide, based upon all of the evidence, whether Drew suffered emotional distress.

5. Outrage

To prevail on a claim of outrage, the plaintiff need not show objective symptomatology, a diagnosable disease or illness, or any bodily injury. *Brower v. Ackerley*, 88 Wn.App. 87, 99-100, 943 P.2d 1141, *rev.*

denied, 134 Wn.2d 1021 (1998). The symptoms testified to by Nancy should be sufficient to create an issue of fact as to whether Drew suffered severe emotional distress.

Likewise, issues of fact exist related to the outrageousness of the District's conduct, making summary judgment improper. Nancy testified that District employees led Drew down the hallways with his food on a fork like an animal; that they would leave Drew sitting in the hallway and then drag him back into the classroom in front of others; that staff installed an electronic button to lock the door to Drew's classroom and then used tape to hold the button down to lock Drew into the room for hours; that Drew would be placed in a corner for several hours at a time while staff socialized; that staff grabbed and pulled Drew on a daily basis; that staff would leave Drew in the hallway masturbating and they would not contact Nancy; and that District employees would not let Drew use a cane to assist with his ability to walk without running into objects left in the hallway at school. CP 262-301. Reasonable minds could differ as to whether this conduct is sufficiently outrageous, so this question should be left to a jury. *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989).

B. Conclusion

For all of the reasons stated above and in Appellants' Opening Brief, this matter should be reversed and remanded to the trial court so that

plaintiffs' claims may be tried before a jury.

RESPECTFULLY SUBMITTED at Lakewood, Washington this
1st day of July, 2011.

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