

COURT OF APPEALS
DIVISION II

No. 41510-1-II

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STATE OF WASHINGTON
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**IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON**

NANCY VERNON, individually as limited guardian ad litem for DREW
VERNON,

Appellants,

v.

BETHEL SCHOOL DISTRICT, a municipal corporation;

Respondents.

APPELLANTS' OPENING BRIEF

LAW OFFICES OF THADDEUS P. MARTIN & ASSOCIATES

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ORIGINAL

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A. Introduction

This case involves allegations of physical and psychological abuse and discrimination suffered by a disabled student at the hands of teachers, paraeducators, and staff in the Bethel School District (“District”). This case has nothing to do with alleged deficiencies in the student’s education because the harm the student has suffered constitutes a tort rather than a violation of his educational entitlement under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1491.

The plaintiffs’ complaint against the District alleged that teachers, paraeducators, and staff subjected the student to physical and psychological abuse and unlawful discrimination under RCW 49.60 based on his 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. The plaintiffs sought only general money damages for their pain and suffering and not compensatory educations or other educational remedies available under the IDEA.

Plaintiffs’ claims do not fall under the IDEA. The plaintiffs have already gone through a full administrative due process hearing where they called witnesses, presented evidence, and received an order from an administrative law judge. The IDEA claims are fully adjudicated and over

and the plaintiffs are now prosecuting the compensatory monetary damage portion of their claims; claims that everyone agrees cannot be resolved through the IDEA. The plaintiffs' allegations against the District are unrelated to the resolved IDEA claims. The only remedy that the plaintiffs are seeking is civil monetary damages, which every person in America is entitled to for similar claims. The claims plaintiffs are pursuing in this action are not education claims, but are claims of abuse and discrimination that cannot be pursued administratively. This is based on the sworn testimony of the State's highest authority on special education, Douglas Gill, who is in charge of special education in Washington State. This case is not a matter of first impression and the Vernons' right and choice to proceed with their claims in civil court has already been established in case law.

The clear consensus of OSPI Special Education authority Douglas Gill, every Administrative Law Judge that has ruled on this issue, and the "OSPI equivalents" from most every State in America are in concert that a special education student alleging common law civil claims that are not requesting educational remedies should and must take those claims to Civil Court. There is no authority that forces parents of special education students to engage in a due process hearing if they are seeking monetary damages only, as is the case of the Vernons.

The plaintiffs are not alleging that the harm done to the student incorporates the identification, evaluation or placement of the student pursuant to his IEP. Rather, the plaintiffs are alleging that their child was physically and emotionally assaulted and neglected, none of which have to do with his education or have any educational benefit, but rather have impacted him as it would any other person – the student experienced just plain inhumane treatment and a breach of his basic civil rights. These are the exact same rights and treatment expected by every parent of a child in regular education classes, that basic expectation that their child would not be physically and emotionally assaulted by staff members. There would not be any procedural statute or “hoop” to jump through prior to bringing a suit other than filing a tort claim form. This student should not be treated any differently because he was assaulted while having an IEP.

The Vernons requested and completed a due process hearing and then the defendant used the time consumed to complete that hearing to limit their claims due to the IDEA’s statute of limitations. The defendants, and the lower court, have placed an unconstitutional obstacle in the way of the Vernons’ day in court that should not be allowed.

B. Assignments of Error

1. First Assignment of Error

The trial court erred by dismissing plaintiffs’ claims for events that

occurred prior to August 7, 2006 through application of the IDEA's statute of limitations.

2. Issues Pertaining to the First Assignment of Error

Did the trial court err by dismissing plaintiffs' claims for events that occurred prior to August 7, 2006 through application of the IDEA's statute of limitations when plaintiffs' claims are not subject to the IDEA's exhaustion requirements or its statute of limitations?

3. Second Assignment of Error

The trial court erred by dismissing plaintiffs' claims for discrimination against Drew Vernon when plaintiffs were able to present a *prima facie* case of disability discrimination under RCW 49.60 *et seq.*

4. Issues Pertaining to the Second Assignment of Error

Did the trial court err by dismissing plaintiffs' claims for discrimination against Drew Vernon when plaintiffs established a *prima facie* case of disability discrimination under RCW 49.60 *et seq.*?

5. Third Assignment of Error

The trial court erred by dismissing plaintiffs' claims for negligent infliction of emotional distress when plaintiffs were able to present evidence of a diagnosable emotional disorder in Drew Vernon that was proximately cause by acts and omissions of defendant.

6. Issues Pertaining to the Third Assignment of Error

Did the trial court err by dismissing plaintiffs' claims for negligent infliction of emotional distress when plaintiffs were able to present evidence of a diagnosable emotional disorder in Drew Vernon, a deaf and mostly blind child who has severe limitations on his ability to communicate?

7. Fourth Assignment of Error

The trial court erred by dismissing plaintiffs' outrage claims.

8. Issues Pertaining to the Fourth Assignment of Error

Did the trial court err by dismissing plaintiffs' outrage claims when plaintiffs presented evidence that the District's treatment of Drew Vernon, a particularly vulnerable child, was extreme and outrageous and resulted in severe emotional distress?

9. Fifth Assignment of Error

The trial court erred by dismissing Nancy Vernon's claim for injury to child where plaintiffs presented evidence that Drew Vernon was physically and emotionally injured, causing Nancy Vernon to suffer emotional distress and other damages.

10. Issues Pertaining to the Fifth Assignment of Error

Did the trial court err by dismissing Nancy Vernon's claim for injury to child where plaintiffs presented evidence that Drew Vernon was

physically and emotionally injured, causing Nancy Vernon to suffer emotional distress and other damages?

11. Sixth Assignment of Error

The trial court erred by dismissing plaintiffs' claims of negligent hiring and supervision and assault and battery.

12. Issues Pertaining to the Sixth Assignment of Error

Did the trial court err by dismissing plaintiffs' claims of negligent hiring and supervision and assault and battery where plaintiffs presented sufficient evidence to establish a *prima facie* case on these causes of action?

C. Statement of related case/issue

This Court should be aware that one of the primary issues on appeal in this case – the issue of exhaustion of administrative remedies under the IDEA – is currently before the Washington Supreme Court in *Dowler v. Clover Park School Dist. No. 400*, Supreme Court of Washington No. 84048-2. Oral argument is scheduled for May 17, 2011.

D. Statement of the Case

1. Drew Vernon was discriminated against based upon his disability while he attended school in the District. This discrimination caused him to suffer emotional distress.

Drew Vernon was affected by the cytomegalovirus in utero and was born profoundly deaf in both ears. CP 208. He is also visually

impaired in both eyes, but his right eye has better vision than his left. *Id.* Drew has epilepsy with associated seizure disorders, and because of his physical limitations, Drew has been unable to complete testing to determine if he also has developmental delays. CP 208-09. During the 2005-2006 school year Drew was 12 years old, but placed in the fifth grade. CP 219.

Drew's mother, Nancy Vernon, has been closely involved in his education. She participated in the development of Drew's IEP ("Individualized Education Program") that was used during the 2005-2006 school year. CP 220. Although Nancy had some concerns about the IEP, she addressed them by contacting school staff to request IEP meetings and later initiated a citizen's complaint through the State. CP 220-21. In Nancy's view, her educational concerns were **resolved** through the administrative procedures provided under state regulation. *See* WAC 392-172A-05030. CP 221, 237, 239.

In spite of Nancy's involvement with Drew's education and her belief that he had an appropriate IEP in place to address his needs, on or about October 13, 2005, Drew came home with bruises on both of his arms. CP 240-41. There was a single "indentation" near each of Drew's armpits, then a series of three elongated bruises on the backs of Drew's arms. CP 242. Nancy called the police, took pictures of the bruises, and

notified the District of the injuries. CP 243-44. *See also* Photograph of Bruises, CP 260. Nancy also took Drew to a doctor, who determined that the bruises were likely caused by a person holding Drew by the arms and applying pressure. CP 245-46.

Nancy began attending school with Drew, and was shocked to see that the 8' x 12' class room that Drew's teachers were supposed to use to limit his sensory input (to reduce the likelihood of distractions) had been converted to a "prison"—Drew was being kept in the room 4 out of every 5 hours with very little human contact. CP 235-36. The room had nothing in it except for a bean bag and there was a lock on the door. CP 222. Nancy also discovered that Drew was being made to eat lunch by himself, before other students ate. CP 254. Drew's teachers were observed making comments that caused other students to be fearful of Drew. CP 252-53. Nancy later learned that although Drew's teachers were not authorized to use physical restraint as a disciplinary method, they were regularly forcing him to the ground. CP 238, 251.

After seeing the conditions in Drew's classroom, Nancy concluded that the aggressive behaviors Drew had been exhibiting at home starting in September 2005, including throwing objects and serious eye-poking behavior, confirmed that he was suffering extreme distress as a result of his treatment at school. CP 233-34, 247-48, 250-51.

With respect to the discrimination that Drew endured prior to the 2006-2007 school year, and the emotional distress that he suffered as a result, Nancy specifically testified: that Drew was provided with a tricycle with no brakes and no helmet; that school administrators threatened to call the police when she arrived at Drew's school to address issues with Drew's treatment; that an administrator physically pushed and grabbed Nancy; that Drew would be locked in a isolation room for hours at a time; that hallways were cluttered with debris and other items such that Drew, with extremely limited vision, eventually hit his head on a metal mailbox that had been left in the hallway; that Drew was attacked regularly by staff; that Drew was isolated from other children because District employees claimed that other students were afraid of him; that District employees left Drew to lay on the floors of the hallways at school; that an administrator would shadow Drew, following him around and causing him distress; that Drew began demonstrating clear signs of emotional distress by poking at his eyes; that Drew was restrained and isolated in a room and then left hanging halfway over a half door to the room while staff looked on; that Drew would come home and attempt to communicate his frustration to Nancy by throwing things and breaking things when he got home; that Drew became more and more withdrawn; and that Drew began to cry and physically cling to Nancy when she would attempt to leave him

at school. CP 210-18, 222-34, 247-51, 255-58 (*See also* CP 144-66).

Unfortunately, Drew continued to be discriminated against based on his disability when he went to Cougar Mountain Junior High for the 2006-2007 and 2007-2008 school years and continued to display emotional distress. Nancy testified: that Drew had a panic attack when he went to school; that Drew would wake in a panic in the middle of the night; 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.

2. The Senior Administrative Law Judge in Washington State from OAH confirms that plaintiffs' claims were properly before the lower court. His court has no jurisdiction.

Plaintiffs' counsel wrote to the Office of Administrative hearings requesting any history of an Administrative Law Judge in Washington

State that addressed issues related to common law or discrimination claims and the award of compensatory damages for such claims. Senior Administrative Law Judge and Public Records Officer Robert Krabill wrote back to plaintiffs' counsel in response, affirmatively stating that the Vernon plaintiffs' claims would not be proper in a due process setting under the IDEA. Judge Krabill's explicit edicts in this letter are spot on:

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.

3. Washington State Special Education Director Douglas Gill has signed a declaration that puts this matter to rest – plaintiffs' claims belong in the Superior Court.

The person that is in charge of Special Education for Washington State's 295 individual public school districts, Douglas Gill, has testified conclusively that the Vernons' claims belong in Superior Court and NOT in an administrative Due Process Hearing before an Administrative Law Judge. Mr. Gill's recent testimony is conclusive.

. . . I previously testified that a parent of a special education student who believes that his or her child has been harassed may initiate a due process hearing if the remedy that he or she is seeking is related to the identification, evaluation or placement of their children pursuant to their IEP or FAPE

(Free and Appropriate Public Education).

The claims and remedies under the IDEA, to my knowledge, do not cover claims for damages related to common law, discrimination law or support the recovery of monetary civil damages when those claims are not with regard to educational matters. A parent seeking claims for damages related to common law, discrimination law or to support the recovery of monetary civil damages unrelated to educational matters must bring their claims in a court of competent jurisdiction, whether that is Superior Court or Federal Court. I am not aware of any authority that holds that a parent of a special education student must first bring claims before an Administrative Law Judge in a special education due process hearing or to OSPI before initiating a civil action.

CP 303-06 (emphasis added).

Dr. Gill's testimony supports the Vernons' argument that their claims are properly before the Superior Court and not subject to dismissal for failure to exhaust administrative remedies because there was no administrative remedy available through the OSPI to begin with. The Vernon plaintiffs in this case are not seeking any educational remedies and will not be presenting any educational issues in this trial. The fact that the injuries took place in a school building or at the hands of school personnel is not relevant and does not make the claims educational, just as they would not if a teacher assaulted a regular education student. The only claims that plaintiffs are seeking are monetary damages for common law and discrimination claims.

4. The other states in America confirm that there is no jurisdiction to bring common law claims or statutory claims for civil damages under the IDEA.

Plaintiffs went even further to prove that the lower court is the proper forum for their claims. Plaintiffs' Counsel asked each State in America and the United States Department of Education whether their understanding of the jurisdictional limits of IDEA were the same as they were in Washington, including the precise edict of Judge Krabill. Plaintiffs asked each of the 50 States in America how common law/discrimination claims were handled in their State. The consensus of the responses supports the Vernons' position in this case, as does the other evidence, that a parent of a special education student who has suffered assault, abuse and/or discrimination may bring a tort action for this harm in civil court, or could bring a due process hearing if the remedy sought relates to an IEP or FAPE or could do both. CP 330-404. The law is not mutually exclusive and does not require parents to bring a due process hearing first if the remedy sought is compensatory monetary damages.

E. 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.

Plaintiffs’ discrimination claims against the District are not barred by the IDEA’s statute of limitation because plaintiffs were not required to exhaust administrative remedies under the IDEA before initiating their lawsuit – their claims are for torts unrelated to Drew’s education. The trial court thus improperly dismissed their claims based on their failure to exhaust administrative remedies and its application of the IDEA’s statute of limitations.

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

Even if the plaintiffs' claims were educationally-related and the IDEA applies, administrative exhaustion would be futile. 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. Plaintiffs are also able to satisfy the elements of their prima facie cases for discrimination and common law torts.

F. 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 the motion should be denied. *Id.*

2. The Trial Court Erred By Dismissing the Plaintiffs' Abuse and Discrimination Claims Based on Applying the IDEA's Statute of Limitations

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). 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 exhaustion requirement is not unyielding. *See Hoefl*, 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 plaintiffs' claims are for non-educationally related injuries; thus, the IDEA is inapplicable and exhaustion of administrative remedies was not required and the IDEA's statute of limitations does not apply

Where the 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 and its application of the IDEA's statute of limitations.

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 abuse and discrimination that Drew 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 fully control movements, communicate and follow directions, and the impulse to move, which are common characteristics of Drew's disability.

Like the student in *Witte*, Drew 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, plaintiffs have not alleged in this suit that Drew was denied FAPE or that the harm he suffered involved identification, evaluation, or placement pursuant to his IEP. The abuse here, as in *Witte*, occurred *because of* the Drew's 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.

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.

As in *Meers*, this Court should similarly characterize plaintiffs' claims as physical, verbal, and psychological abuse and discrimination based on Drew's 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 plaintiffs' claims for failure to exhaust administrative remedies and therefore applying the

IDEA's statute of limitations to plaintiffs' claims.

Plaintiffs' claims are brought under RCW 49.60 *et seq.* and State common law. CP 7-8 (Causes of action for: violation of RCW 49.60 *et seq.*; negligence; negligent hiring, retention, and supervision; negligent/intentional infliction of emotional distress; assault and battery; unlawful imprisonment; and action for injury to child – RCW 4.24.010). The statute of limitations for causes of action under RCW 49.60 *et seq.* is three years. *Antonius v. King County*, 153 Wn.2d 256, 261-62, 103 P.3d 729 (2004); RCW 4.16.080(2). The three year statute of limitations for causes of action under RCW 49.60 is therefore tolled for minors until they reach the age of majority. RCW 4.16.190(1). The same tolling provision applies to all of Drew Vernon's claims as they are actions "mentioned in this chapter." RCW 4.16.190(1); RCW 4.16.080(2) (injury to the person); RCW 4.16.100 (assault and battery, false imprisonment). Therefore, Drew's claims are not barred by any statute of limitations and Nancy's claims are subject to the three year statute of limitations applicable to RCW 49.60, not the IDEA's two year statute of limitations.

The IDEA's two year statute of limitations does not apply in this situation because plaintiffs' claims that arose prior to the 2006 school year are not for denial of FAPE but are instead for physical injuries and violations of RCW 49.60 *et seq.* As defendant pointed out in its motion

for summary judgment, the ALJ “dismissed all claims *for any alleged denial of FAPE* prior to August 7, 2006.” CP 128 (emphasis added). Plaintiffs’ claims for injuries occurring prior to August 7, 2006 do not involve a denial of FAPE. Plaintiffs were barred from raising any of those issues at the due process hearing, amounting to an exhaustion of administrative remedies or futility/impossibility of having those issues heard.

Section 1415(l) of the IDEA reads in pertinent 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.

20 USC § 1415 (l) (emphasis added.) The plain language of the statute makes its exhaustion requirement applicable **only to federal claims brought pursuant to federal law**. This conclusion is supported by federal decisions interpreting the statute. *See, e.g., Emma C. v. Eastin*, 985 F. Supp. 940, 942 (E.D. Cal. 1997) (exhaustion requirement applies to any federal claims seeking relief that would be available under the IDEA); *R.K. v. Hayward Unified School District*, 2007 WL 2778702 (N.D. Cal.

2007) (slip copy) (court noted that IDEA itself restricted exhaustion requirement to claims arising under federal law).

Even in cases where **federal** claims were dismissed for failure to exhaust administrative remedies, courts have declined to exercise supplemental jurisdiction to dismiss **state** claims with prejudice. *See, e.g., M.M. v. Tredyffrin/Easttown School District*, 2006 WL 2561242 at *13 (E.D. Pa. 2006) (slip copy) (federal claims under IDEA, Section 504 of the Rehabilitation Act of 1973, 14th Amendment, and Section 1983 dismissed for failure to exhaust administrative remedies, but court declined supplemental jurisdiction and dismissed state law claims without prejudice); *S.M. v. West Contra Costa County Unified School District*, 2007 WL 108456 at *4-*5 (N.D. Cal. 2007) (federal claims dismissed for failure to exhaust, but court did not have supplemental jurisdiction over state claims and thus dismissed without prejudice to refile in state court).

The Washington Supreme Court has already held that the doctrine of exhaustion **does not apply to tort claims**:

But Bates' argument ignores the fundamental distinction between a wrongful discharge action **based in tort** and an action based upon an alleged violation of an employment contract or a CBA. . . . Because the right to be free from wrongful termination in violation of public policy is independent of any underlying contractual agreement or civil service law, we conclude Smith **should not be required to exhaust her contractual or administrative remedies**.

Smith v. Bates Technical College, 139 Wn.2d 793, 809, 991 P.2d 1135

(2000) (emphasis added).

In the present case, the plaintiffs are not bringing any claims that could relate to educational remedies available under the IDEA or other federal law. Additionally, plaintiffs have exhausted their administrative remedies for education-related issues at a due process hearing. On the other hand, they have alleged and provided evidence of state discrimination and tort claims, and requested monetary damages. Under these circumstances, no exhaustion requirement applies and summary judgment dismissal on that basis was error.

The exhaustion requirement under the IDEA is “not absolute.” *Hoefl v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992). Rather, “there are situations in which exhaustion serves no useful purpose.” *Id.* Such was the situation in this case.

Exhaustion of administrative remedies 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. *Hoefl*, 967 F.2d at 1303-04, *citing* H.R. Rep. No. 296, 99th Cong., 1st Sess. 7 (1985). **If the remedy the student is seeking is not available under the IDEA, exhaustion of administrative remedies is futile and inadequate.** *W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995). *See also Kerr Ctr. Parents Ass'n v.*

Charles, 897 F.2d 1463, 1470 (9th Cir. 1990) (the administrative process is not equipped to effectively address all issues); *Wilson v. Marana Unified Sch. Dist.*, 735 F.2d 1178, 1181 (9th Cir. 1984) (“where administrative procedures cannot afford adequate relief, the remedy need not be exhausted”). The relevant inquiry in determining whether administrative proceedings would be futile or inadequate is “whether the administrative process is adequately equipped to address and resolve the issues presented.” *Hoelt*, 967 F.2d at 1309.

The plain language of 20 U.S.C. § 1415(l) requires students receiving services under the IDEA to exhaust administrative remedies only when “seeking relief that is also available” under the IDEA. The IDEA focuses on restoring educational services to students by providing compensatory special education services to remedy past denial of the services, *Miener v. Missouri*, 800 F.2d 749, 754 (8th Cir. 1986), and for reimbursement of funds which parents have expended for covered specialized educational services. *School Comm. v. Department of Educ.*, 471 U.S. 359, 370-71, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985). The recovery of compensatory educational services and reimbursement of expended funds is not to be characterized as “damages” and cannot be confused with compensatory damages for personal injury or civil rights violations. *See id.* The IDEA allows students receiving services under the

IDEA to “catch up” or “keep up” in their education by receiving additional educational services. However, **there is no provision in the IDEA which authorizes monetary damages for abuse of a student.** *Witte v. Clark County School District*, 197 F.3d 1271, 1275 (9th Cir. 1999).

Furthermore, courts reviewing claims based on physical and emotional abuse of students have found that the claims themselves do not come within the scope of the IDEA:

By contrast, allegations of physical assault or sexual abuse of a student by a school staff member or administrator would fall **outside the scope of the IDEA since they are not related to the way that a school provides education.**

Meers v. Medley, 168 S.W.3d 406, 409-110 (Ky. Ct. App. 2005)
(emphasis added).

[T]he allegations are sufficiently clear that plaintiff’s claim is not based on the failure to comply with the requirements of the IDEA but rather on the failure of defendants to protect plaintiff Victor from harassment and assault which prevented plaintiff Victor from taking advantage of the IEP plan. These allegations are sufficiently like those involved in *Witte* and *Blanchard* to negate dismissal for failure to exhaust administrative remedies.

Walden v. Moffett, 2006 WL 2520291 at *9 (E.D. Cal. 2006) (slip copy).

In Eron’s case, his complaint asserts that he suffered permanent physical injuries that will reduce the quality of his life—and perhaps even shorten it. The nature of his claim is not educational; no change to his IEP could remedy, even in part, the damage done to Eron’s body. **By adding an intentional infliction of emotional distress claim to his complaint, Eron only seeks to recover for the arguably outrageous actions of Neterer, the**

physical education instructor. He does not allege any ongoing emotional difficulties that might be addressed through IDEA. After closely examining the “theory behind the grievance” in Eron’s complaint, we are convinced that it would be futile for Eron to exhaust the administrative process under the circumstances of this case because **IDEA does not provide a remedy for his alleged injuries, which are non-educational in nature.**

McCormick v. Waukegan School District #60, 374 F.3d 564, 567-68 (7th Cir. 2004) (emphasis added).

So far as we can tell in the instant case, Plaintiff seeks damages solely to redress the fractured skull and other physical injuries she suffered allegedly as a result of the school district’s and board of education’s purported ADA violations. Plaintiff makes no complaints regarding her current educational situation. Indeed, she expressly attests that her new school “meets her educational needs” and that she presently receives “the full benefits of a free and appropriate education in an integrated, least restrictive educational environment.” Under these narrow circumstances, **we fail to see how the IDEA’s administrative remedies, oriented as they are to providing prospective educational benefits, could possibly begin to assuage Plaintiff’s severe physical, and completely non-educational, injuries.** . . . We affirm the district court’s denial of Defendants’ motion to dismiss for failure to exhaust administrative remedies.

Padilla v. School District No. 1, 233 F.3d 1268, 1274 (10th Cir. 2000) (emphasis added).

Plaintiff’s allegations center around physical abuse and injury. The remedies available under **the IDEA would not appear to be well suited to addressing the past physical injuries adequately**; such injuries typically are remedied through an award of monetary damages.

Witte, 197 F.3d at 1276 (emphasis added).

Additionally, the defendant's actions were not done for purposes of "discipline," as opposed to abuse. The concept of "discipline" presumes that a student misbehaves **voluntarily**. In the case of a disabled student, what would otherwise be considered inappropriate behaviors (such as body movements, noises, or failure to follow direction) may be **involuntary** due to the student's disability. "Discipline" of such a student serves no educational purpose because the student cannot make any different behavioral choices. The student may not even be capable of making a cognitive connection between the "discipline" and the misbehavior. In such a situation, the discipline becomes abuse. That is precisely what occurred in this case. Drew Vernon's ability to communicate with others and to follow direction was extremely limited due to his disabilities.

Undoubtedly, if plaintiff Drew Vernon was a student without disabilities but suffered the same physical, psychological, and verbal abuse alleged in this action, he would have civil rights and common law claims and remedies, *i.e.*, compensatory damages for pain and suffering, available to him without first exhausting administrative remedies. Federal courts across the country have accepted the premise that students may directly bring a cause of action against teachers, administrators, and school districts for physical and verbal abuse, especially when discrimination is

involved. See *P.B. v. Koch*, 96 F.3d 1298 (9th Cir. 1996) (student without disabilities brought action against school principal and other school officials under 42 U.S.C. § 1983 alleging force against students including slapping, punching, and choking students). Accord *Wise v. Pea Ridge Sch. Dist.*, 855 F.2d 560 (8th Cir. 1988); *Metzger v. Osbeck*, 841 F.2d 518 (3rd Cir. 1988); *Webb v. McCullough*, 828 F.2d 1151 (6th Cir. 1987); *Garcia by Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987), *cert. denied* 485 U.S. 959, 108 S. Ct. 1220, 99 L. Ed. 2d 421 (1988); *Jefferson v. Ysleta Independent Sch. Dist.*, 817 F.2d 303 (5th Cir. 1987); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980).

Because this case is exactly like *Witte*, *supra*, and involves physical, verbal, and emotional abuse and a request for monetary damages only, the lower court should have found that the IDEA exhaustion requirement (and the IDEA's statute of limitations) did not apply. This Court should find, like the *Witte* court, that the abuse suffered by the plaintiff was in no way connected to his free appropriate education. The plaintiffs respectfully request that the Court reverse and remand so that all of the plaintiffs' state discrimination and tort claims can be presented to the jury.

- c. **Even if plaintiffs' claims are educationally related and the IDEA applied, administrative exhaustion would be futile and application of the**

IDEA's statute of limitations inappropriate.

As an initial matter, the IDEA's exhaustion requirement does not apply to the 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 plaintiffs seek only *state* statutory and common law tort remedies for the District's discriminatory conduct.

But even if the 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 Hoelt*, 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(I). 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(I)'s rubric and exhaustion is unnecessary. *See Robb*, 308 F.3d at 1050.

Any attempt by the plaintiffs here to exhaust their administrative remedies would be, and proved to 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 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 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).

The plaintiffs should not be penalized for being forced to undertake an act that served "no useful purpose." The defendant 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 defendant's motion.

3. Nancy Vernon's claims are for injury to the parent/child relationship.

RCW 4.24.010 provides, in pertinent part:

A mother or father, or both, who has regularly contributed to the support of his or her minor child...may maintain or join as a party an action as plaintiff for the injury or death of the child.

...

In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

Plaintiff Nancy Vernon pled in her Complaint an "Action for Injury to Child – RCW 4.24.010" (CP 8) and alleged that she, "sustained damages, including damages for injury to and destruction of the parent/child relationship as more fully set forth in RCW 4.24.010, such damages including, but not limited to, medical, hospital, medication expenses, loss of services and support, grief, and mental anguish" and further alleged that she suffered, "emotional distress, loss of enjoyment of life, humiliation, and wage loss." CP 8-9. This statute clearly authorizes Nancy Vernon to seek damages in this action based upon injury to Drew. So while Ms. Vernon's claims are not for negligent infliction of emotional distress, she is able to recover for emotional distress caused by injury to Drew as well

as under RCW 49.60 *et seq.* Defendant's motion for summary judgment on this issue should, therefore, have been denied.

4. Drew was discriminated against because of his disability – a violation of RCW 49.60 *et seq.* His claims are not for “educational malpractice.”

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).

The elements of a prima facie case of discrimination in public accommodation under RCW 49.60.215 are:

- (1) they have a disability recognized under the statute;
- (2) the defendant's business or establishment is a place of public accommodation;
- (3) they were discriminated against by receiving treatment that was not comparable to the level of designated services provided to individuals without disabilities by or at the place of public accommodation; and,

(4) the disability was a substantial factor causing the discrimination.

Fell v. Spokane Transit Authority, 128 Wn.2d 618, 637, 911 P.2d 1319 (1996). The first three elements are mixed questions of fact and law. *Id.* The fourth element “is strictly a question of fact.” *Id.*

There is no question that Drew Vernon has a disability recognized under the statute. As defendant recognizes, Drew is deaf and blind and suffers from epilepsy. “Disability’ means the presence of a sensory, mental, or physical impairment that...[i]s medically cognizable or diagnosable...” RCW 49.60.040(7)(a).

There is also no question that the schools within the Bethel School District are places of public accommodation. RCW 49.60.040(2).

The third element is satisfied because Drew Vernon was treated as not welcome, accepted, or desired within the schools of the Bethel School District. As the facts presented in section D.1., *supra*, make clear, 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. Clearly, defendant did not treat non-disabled students in this way. This is obviously treatment that would make Drew feel unwelcome, accepted, or desired.

The fourth element – again, strictly a question of fact – is also satisfied here. The evidence presented in section D.1., *supra*, shows that Drew was treated harshly, harassed, neglected, and physically assaulted because of disability. Drew's behavior was a result of his disabilities and his inability to communicate and a result of defendant's employees treating him in a way that caused him great distress. District employees deliberately triggered Drew's behavior because they were not willing to use communicative tools, such as the use of vinegar, to direct him. Given the facts presented by plaintiffs, at the very least a genuine issue of material fact exists with respect to this element making it improper for determination on summary judgment. The defendant's motion for summary judgment should have been denied and Drew's discrimination claim should go to the jury.

5. Drew and Nancy have suffered emotional distress as a result of defendant's discrimination.

A plaintiff alleging negligence, including negligent infliction of

emotional distress, must establish duty, breach, proximate causation, and damage or injury. *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976).

The threshold determination of whether a duty exists is not a question of fact, but a question of law. *Coleman v. Hoffman*, 115 Wn. App. 853, 858 (2003) (citing *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994)).

Whether a defendant owes a duty to a plaintiff “depends on mixed considerations of ‘logic, common sense, justice, policy, and precedent.’” *Caulfield v. Kitsap County*, 108 Wn. App. 242, 248, 29 P.3d 738 (2001) (quoting *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985)).

Whether the defendant owed the plaintiff a duty turns on the foreseeability of injury. *Rikstad v. Holmberg*, 76 Wn.2d 265, 268, 456 P.2d 355 (1969). “The hazard that brought about or assisted in bringing about the result must be among the hazards to be perceived reasonably and with respect to which defendant's conduct was negligent.” *Rikstad v. Holmberg*, 76 Wn.2d at 268.

The issue of breach is one for the trier of fact.

The issues of negligence and proximate cause are generally not susceptible to summary judgment. *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975). The question of proximate cause is a mixed

question of law and fact. *Bell v. McMurray*, 5 Wn. App. 207, 213, 486 P.2d 1105 (1971) Bell. Proximate cause has two elements. The first, cause in fact, requires some actual connection between the act and the injury. *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 862-63, 5 P.3d 49 (2000). The second element of proximate cause involves legal causation, which is a policy consideration for the court, whether the ultimate result and the defendant's acts are substantially connected, and not too remote to impose liability. *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. at 862-3. This is a legal question involving "logic, common sense, justice, policy, and precedent". *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. at 862-3.

The Bethel School District had a duty to its students to anticipate reasonably foreseeable dangers and take measures to protect students from such harm. *Rhea v. Grandview School District*, 39 Wn.App. 557, 560, 694 P.2d 666 (1985); *Carabba v. Anacortes School District 103*, 72 Wn.2d 939, 955, 435 P.2d 936 (1967); *Tardiff v. Shoreline School District*, 68 Wn.2d 164, 170, 411 P.2d 889 (1996). Defendant also had a duty to use reasonable care to determine if an employee was incompetent or unfit before hiring or retaining a teacher and a duty to use reasonable care in supervising its teachers. *Peck v. Siau*, 65 Wn.2d 285, 288-92, 827 P.2d 1108 (1992).

Defendant Bethel School District breached these duties by not

taking sufficient measures to protect Drew from foreseeable dangers at the hands of his teachers, paraeducators, and other staff when the District was aware of ongoing abuse by District employees against Drew. The District also clearly breached the duty to use reasonable care in supervising its teachers. The District was aware that Drew was being harmed by teachers and/or staff as early as the 2005-2006 school year but did nothing to stop the abuse. Drew continued to be neglected, assaulted, and humiliated.

The District's breach caused Drew's damages in the form of severe emotional distress. As Nancy testified, Drew's inability to communicate with a psychologist did not prevent two doctors from recognizing that Drew was exhibiting the symptoms of one who has suffered post traumatic stress, including panic attacks. Drew also communicated his stress and frustration in the few ways he was able, including throwing objects behind his back and poking at his own eyes. 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. The objective symptomatology demonstrated by plaintiffs satisfies the requirement for a showing of negligent infliction of emotional distress. Defendant's motion for summary judgment should have been denied.

6. Defendant's treatment of Drew was extreme and outrageous.

Washington has adopted the Restatement (Second) of Torts, §46(1), (2), and (2)(a) definition of outrage. *Grimsby v. Samson*, 85 Wn.2d 52, 60, 530 P.2d 291 (1975). The basic elements of the tort of Outrage are: “(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress.” *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987); Restatement (Second) of Torts §46 (1965).

“The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability.” *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (citing *Phillips v. Hardwick*, 29 Wn.App.382, 387, 628 P.2d 506 (1981)). It is important to look at the totality of the circumstances in this case when determining whether the conduct is sufficiently outrageous.

Drew has actually suffered severe emotional distress. A very illustrative case on emotional distress is *Brower v. Ackerley*, 88 Wn.App. 87, 943 P.2d 1141, *rev. denied*, 134 Wn.2d 1021 (1998). In *Brower*, the plaintiff received anonymous telephone calls stating: “get a life” and

“give it up” and “You think you’re pretty smart, don’t you?” *Id.* at 89-91. The calls became more threatening. Brower filed suit against the caller, claiming the tort of outrage. The trial court dismissed all of Mr. Brower’s claims on defendant’s summary judgment motion, but the appellate court reversed with respect to the tort of outrage claim, holding, “...a case of outrage should ordinarily go to jury so long as the court determines the plaintiff’s alleged damages are more than ‘mere annoyance, inconvenience or normal embarrassment’ that is the ordinary fact of life.” *Brower* at 101-102 (citing *Spurrell v. Bloch*, 40 Wn.App. 854, 701 P.2d 529 (1985)).

The *Brower* court distinguished the proof of emotional distress necessary under the tort of negligent infliction of emotional distress from the proof of emotional distress necessary under the tort of outrage (also called intentional infliction of emotional distress):

“[The objective symptomatology] requirement, however, belongs to the tort of negligent infliction of emotional distress. No Washington case has incorporated it into the tort of outrage. The restatement has recognized that bodily harm is not necessary.” *Brower* at 99-100 (internal cites omitted). Consequently, to prevail on a claim of outrage, the plaintiff need not show objective symptomatology, a diagnosable disease or illness, or any bodily injury.

Next, the court analyzed the two prior Washington cases which

had dealt with the severity of emotional distress necessary: *Spurrell v. Bloch*, 40 Wn.App. 854, 701 P.2d 529 (1985) and *Lawson v. Boeing*, 58 Wn.App. 261, 792 P.2d 545 (1990). Both cases held that emotional distress symptoms of “depression, sleeplessness, increased headaches, loss of libido and energy and loss of appetite” (*Lawson* at 270) and “one sleepless night, tears, loss of appetite, and anxiety” (*Spurrell* at 863) were insufficient to establish severe emotional distress.

The *Brower* court was critical of the *Spurrell* and *Lawson* Courts’ “conclusory analysis of the severity of the plaintiff’s distress.” *Brower* at 101. The *Brower* Court pointed out that in *Lawson* and *Spurrell*, the alleged conduct was not that outrageous, and in fact both cases found that the plaintiff had failed to satisfy the element of “outrageous conduct.” *Brower* at 100-101. The *Brower* court recognized that there needed to be a showing of severe emotional distress, but the degree of severe emotional distress necessary to bring the claim depends in part upon the degree of outrageousness of the conduct:

When the conduct offered to establish the tort’s first element is not extreme, a court must withhold the case from a jury notwithstanding proof of intense emotional suffering. The situation is different when the alleged conduct sufficiently satisfies the first two elements, outrageous and extreme conduct, and intentional or reckless infliction of emotional harm. In such cases, we hold a case of outrage should ordinarily go to a jury so long as the court determines the plaintiffs alleged damages are more than

“mere annoyance, inconvenience, or normal embarrassment” that is an ordinary fact of life.

Brower, at 101-102.

Brower also cited the Restatement (Second) of Torts §46, comment j, which states that “in many cases the extreme and outrageous character of the defendant’s conduct is in itself important evidence that the distress has existed.”

Therefore, the degree of emotional distress necessary to bring an outrage case to the jury depends upon the degree of the outrageousness of the defendant’s conduct. Both the Restatement and *Brower* recognized that the difficulty with the “severe emotional distress” element of outrage is in proving that in fact the plaintiff suffered severe emotional distress. In *Lawson*, the outrageous conduct alleged was that Boeing had demoted plaintiff after complaints about her behavior. In *Spurrell*, the outrageous conduct alleged was that authorities had failed to notify the parents/plaintiffs before removing children from their house. Clearly the acts alleged are not sufficiently outrageous to meet the standard under the tort of outrage, and the courts properly dismissed them. In *Brower*, on the other hand, the court evaluated the severity of the conduct – threatening phone calls – in determining the severity of the emotional distress necessary to bring the case to a jury.

In a case such as this where a disabled child has shown symptoms of a diagnosable disorder (PTSD) the emotional distress element is satisfied. Additionally, in the instant case, the degree of outrageous conduct is extremely high. Defendant's behavior toward Drew was extreme and outrageous. It is absolutely outrageous for teachers, administrators, and other staff to physically, verbally, and psychologically abuse a young, disabled, vulnerable child. This is utterly intolerable in a civilized society. These acts are unquestionably outrageous. Defendant acted intentionally, or at the very least recklessly, when it inflicted emotional distress upon Drew. The acts of violence and intimidation were clearly intentional.

7. Drew was assaulted and battered

“A battery is [a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent . . . An assault is any act of such a nature that causes apprehension of a battery.” *McKinney v. City of Tukwila*, 103 Wn. App. 391, 408, 13 P.3d 631 (2000).

As the evidence in section D.1..., *supra*, shows, Drew was battered by District employees. Drew was forcefully grabbed while at school and ended up with dark bruises as a result. Drew was repeatedly physically

restrained. These were harmful and offensive contacts (battery), especially for a child with limited visual and auditory senses. One can only imagine how horrendous it must be to be assaulted and battered, out of the silence and the darkness, with little or no warning that it is about to occur.

8. Defendant is liable for negligence.

A duty of care will exist if there is a “special relationship” between the Plaintiff and Defendant. Washington courts have found special relationships in a variety of situations, giving rise to a duty to act reasonably. *See, e.g., C.J.C. v. Corporation of Catholic Bishop*, 138 Wn.2d 699, 720, 985 P.2d 262 (1999) (finding that a church is liable to the children of its congregation). Washington courts have also **specifically and repeatedly** held that a special relationship exists between an educational institution and its students. *See Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997); *Griffin v. West R.S., Inc.*, 97 Wn. App. 557, 563-65, 984 P.2d 1070 (1999); *McLeod v. Grant Cty. School Dist. No. 128*, 42 Wn.2d 316, 319-22, 255 P.2d 360 (1953).

Here, there is no doubt that Defendant had a duty of care not to cause harm to the Plaintiffs through its negligent staffing and subsequent mistreatment of Drew. It was foreseeable that, if Defendant was aware that teachers and staff had been mistreating Drew that mistreatment would

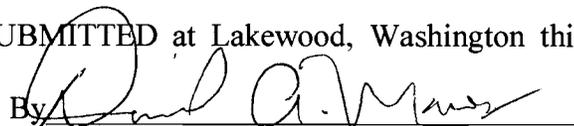
continue if nothing was done about it, and additional harm would come to Drew. Even though the rule of “ordinary” care imposed a duty on Defendant not to cause the harm to Plaintiffs, since Defendant and Drew stood in a special relationship with one another, the existence of a duty to Drew is beyond question.

In this case duty already exists as the claims of negligence are based on negligent retention, supervision, and negligent hiring. There is no question but that duties exist under Washington law in each of these claims. These are not new or unique claims. Plaintiffs have shown, through the fact section of their opposition to defendant’s motion for summary judgment (CP 141-166), that defendant’s teachers and staff were, at the very least, negligent in their treatment of Drew. Plaintiffs’ negligence claims should go to trial.

G. Conclusion

For all of the reasons stated above, 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
2nd day of May, 2011.

By 
Thaddeus P. Martin, WSBA No. 28175
Daniel A. Mares, WSBA No. 34059
Attorneys for Appellant

No. 41510-1-II

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

**IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON**

NANCY VERNON, individually as limited guardian ad litem for DREW
VERNON,

Appellants,

v.

BETHEL SCHOOL DISTRICT, a municipal corporation;

Respondents.

CERTIFICATE OF SERVICE

LAW OFFICES OF THADDEUS P. MARTIN & ASSOCIATES

Thaddeus P. Martin, WSBA # 28175

Daniel A. Mares, WSBA #34059

Of Attorneys for Appellant

ORIGINAL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION AND THAT I PLACED FOR SERVICE OF APPELLANT'S REPLY BRIEF ON THE FOLLOWING PARTIES IN THE FOLLOWING MANNER(S):

William Coats Andy Saller Vandenberg Johnson Gandara 1201 Pacific Avenue, #1900 Tacoma, WA 98402
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[XXX] by causing a full, true, and correct copy thereof to be hand delivered to the party at their last known address on the date set forth below.

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

Executed at Tacoma, Washington on the 2 day of May, 2011.



Dee Jerome, Legal Assistant