

No. 41510-1-II

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,

Respondent.

11 JUN 11 11:07
STATE OF WASHINGTON
BY [Signature]
IDENTITY

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case arises from the education of a special education student, Drew Vernon. This is the second lawsuit filed by Plaintiff Nancy Vernon on behalf of Drew Vernon against Bethel School District. The first lawsuit was filed on February 8, 2007 under Pierce County Cause No. 07-2-05140-1. In that case, Defendant moved for summary dismissal based on Plaintiffs' failure to exhaust administrative remedies provided to special education students and parents under the Individuals With Disabilities Education Act (IDEA). The court granted that motion on July 1, 2008. Plaintiffs did not appeal that dismissal.

Instead, Plaintiffs pursued their administrative remedies by requesting a due process hearing under IDEA on August 7, 2008. CP 17. The Administrative Law Judge conducted an extensive hearing and then issued findings of fact, conclusions of law and an order on April 29, 2009. CP 17. The Administrative Law Judge ruled that Defendant provided Drew Vernon with a free appropriate public education as required by IDEA, except for two narrow areas of increasing the student's computer skills and his receptive ability. The Administrative Law Judge also concluded that it was not appropriate to make an award of compensatory education. CP 38. Plaintiffs did not appeal that administrative decision.

Plaintiffs brought the instant action on May 19, 2009. Plaintiffs' complaint alleges that Drew Vernon suffered physical injuries and emotional distress, that Plaintiff Nancy Vernon suffered emotional distress and that Plaintiffs were discriminated against. All of Plaintiffs' claims relate to the manner in which Defendant provided special education services to Drew Vernon.

Defendant moved for summary judgment dismissal of each of Plaintiffs' claims in this case, based on Plaintiffs' failure to support their allegations of physical injury, emotional distress and discrimination with admissible evidence sufficient to establish a prima facie case for those claims. The only issue on summary judgment related to the requirement that Plaintiffs exhaust their administrative remedies under IDEA was the application of the IDEA's two-year statute of limitations. Defendant moved to dismiss any of Plaintiffs' claims related to events occurring more than two years before Plaintiffs requested a due process hearing because Plaintiffs failed to exhaust administrative remedies for those claims.

The trial court reviewed the declarations, depositions and exhibits submitted by the parties and dismissed the Plaintiffs' tort claims related to allegations of physical injury and emotional distress and Plaintiffs' claims of discrimination because Plaintiffs did not submit admissible evidence

sufficient to establish the elements of a prima facie case for each of those claims. That dismissal was proper regardless of whether IDEA's statute of limitations applies.

Plaintiffs devote the majority of their opening brief to arguing the issue decided in their previous lawsuit – that they were required to exhaust administrative remedies. That issue was not addressed in this case and is not before this Court. The trial court's rulings that are before this Court – dismissal of Plaintiffs' claims for which they did not exhaust administrative remedies because the events occurred outside the limitations period of IDEA and dismissal of Plaintiffs' tort and discrimination claims based on Plaintiffs' failure to establish a prima facie case – should be affirmed.

II. RESTATEMENT OF ISSUES

1. Did the trial court correctly apply the doctrines of collateral estoppel and law of the case to dismiss any claim raised by Plaintiffs related to events occurring prior to August 7, 2006 as barred by the two-year statute of limitations of IDEA because it was previously determined in Plaintiffs' first lawsuit that Plaintiffs' claims involve educational issues subject to exhaustion of administrative remedies under IDEA?
2. Did the trial court correctly dismiss Plaintiffs' claims for discrimination because Plaintiffs failed to establish that the Washington Law Against Discrimination applies to educational services to a special education student and because the Plaintiffs did not submit admissible evidence sufficient to establish a prima facie case of discrimination under RCW 49.60?

3. Did the trial court properly dismiss Plaintiffs' claims of negligent infliction of emotional distress where Plaintiffs did not submit admissible evidence of a diagnosed medical condition resulting from the alleged emotional distress?
4. Did the trial court properly dismiss Plaintiffs' claims of outrage where Plaintiffs did not submit admissible evidence that Defendant engaged in extreme or outrageous conduct, intentionally or recklessly inflicted emotional distress or that Plaintiffs suffered severe emotional distress?
5. Did the trial court properly dismiss Plaintiff Nancy Vernon's claim for injury to the parent-child relationship where she has not established that Defendant caused injury to Drew Vernon, Plaintiff has not established that Nancy Vernon suffered emotional distress or other damages and such claim is time-barred?
6. Did the trial court properly dismiss Plaintiffs' claims of negligent hiring and supervision where Plaintiffs did not submit admissible evidence that Defendant's employees caused injury to Plaintiffs and that Defendant knew or should have known that an employee was likely to cause injury?
7. Did the trial court properly dismiss Plaintiffs' claims of assault and battery where Plaintiffs did not submit admissible evidence sufficient to establish a prima facie case of those intentional torts?

III. COUNTERSTATEMENT OF THE CASE

Plaintiff Drew Vernon is a severely disabled 16 year-old, deaf and blind student with epilepsy and autistic-like behaviors. He has been in Bethel School District's special education program since he was three years old. CP 19, 70.

For many years, Drew frequently exhibited unsafe behaviors. For example, over the course of the 2006-2007 school year, there were six

reported incidents where Drew either bit his teachers or paraeducator or pinched a paraeducator sufficient to cause bruising on her ribcage. CP 21. When Drew returned to school in September, 2007, he appeared more agitated and aggressive and there was a substantial increase in the frequency of incidents involving injuries to staff. CP 25.

There were 29 separate reports of Drew causing injury to a staff member from September 10, 2007 through February 21, 2008. CP 25. The causes of the injuries included Drew grabbing, pinching, biting, elbowing and kicking staff. The injuries included bruises, bite marks with and without penetration of the skin and a fracture of his teacher's nose, which required surgery. CP 25. During that period, incident reports document an almost weekly frequency of staff injuries. Defendant required its staff to wear arm guards, chest protectors and back braces at all times for their protection. *Id.* Nancy Vernon attributed Drew's increased aggressiveness to changes in his medication. CP 29-30.

Plaintiffs initially brought a lawsuit against Defendant in February, 2007 under Pierce County Cause No. 077-2-05140-1. On July 1, 2008, the Pierce County Superior Court granted Defendant's Motion for Summary Judgment, finding that Plaintiffs' allegations related to the special education he received at Bethel School District and, therefore, Plaintiffs were required to exhaust administrative remedies under IDEA. Plaintiffs did not appeal that dismissal.

On August 7, 2008, Plaintiffs initiated their administrative remedies by commencing a due process hearing under IDEA. CP 17. In

that hearing, Plaintiffs alleged that the District failed to provide a free, appropriate public education for Drew Vernon because of the manner in which special education services were provided to him. CP 18. In addition to injunctive relief in the form of compensatory education, Plaintiffs also sought an award of monetary damages. The Administrative Law Judge applied the two-year statute of limitations contained in IDEA and dismissed all claims related to events occurring more than two years before Plaintiffs filed their request for a due process hearing. CP 12. The Administrative Law Judge also dismissed Plaintiffs' claims for monetary relief as being outside of the scope of relief which can be provided under IDEA. CP 13. The Administrative Law Judge did not dismiss Plaintiffs' allegations of discrimination, physical injuries and emotional distress to the extent those issues affected Drew Vernon's special education. CP 11-15.

Following several days of extensive hearings, the Administrative Law Judge issued Findings of Fact, Conclusions of Law and an Order. Many of those Findings of Fact addressed Drew's educational setting and his program. CP 17-39. Plaintiffs did not appeal any of the Administrative Law Judge's decision in the due process hearing. On May 19, 2009, they filed this lawsuit.

Plaintiffs' Complaint does not identify specific injuries or acts of discrimination. In discovery, Defendant asked Plaintiffs to identify the date of injury, parts of Drew's body which were injured, the physical location where the injury occurred and the identity of each person

Plaintiffs alleged caused or were otherwise responsible for the injury. CP 109. Plaintiffs did not provide the information requested. Their response to Interrogatory No. 7 was, “The allegations in the complaint were committed at Spanaway Elementary School and Cougar Mountain Junior High in 2003 – March, 2008.” Plaintiffs then provided a list of “the individuals involved with the allegations.” CP 109-110.

Defendant also asked Plaintiffs to identify each incident of discrimination and/or disparate treatment in violation of RCW 49.60, as alleged in Plaintiffs’ complaint. Plaintiffs did not identify any acts of discrimination, but instead responded only, “See Interrogatory No. 7.” CP 112-113.

In response to an interrogatory asking Nancy Vernon to provide information regarding her allegation of emotional distress, Plaintiffs again simply referred to their response to Interrogatory No. 7. CP 115. Plaintiffs identified no expert witnesses for trial. CP 94.

In deposition, Plaintiff Nancy Vernon did not identify any physical injuries to Drew which were caused by Bethel employees. The only physical injuries to Drew during the two-year period for which he exhausted administrative remedies were that he picked at his hands and at his penis. CP 72. He did not require or receive medical care for either of those conditions. CP 73. Neither Nancy Vernon, nor Drew Vernon have received any medical diagnosis or care for the emotional distress allegedly caused by the District. CP 75-80.

In response to Defendant's motion for summary dismissal, Plaintiff allege that on or about October 13, 2005, Nancy Vernon picked up Drew at school at 2:30 in the afternoon and at 6:30 that evening after his bath, she saw that he had bruises on his arms. CP 241. Nancy Vernon is not certain whether Drew had therapy after school that day. CP 242. She took pictures of the bruises and contacted the police. CP 243-44. According to Nancy Vernon, the police could not determine what happened because there were no witnesses. CP 247. Also according to Nancy Vernon, a doctor told her that the bruises on Drew's arms could have been caused by someone holding Drew's arms while he resisted and tried to get away. CP 245. Plaintiff does not recall who that doctor was. CP 246. Nancy Vernon also testified that a police officer told her that the bruises were not caused by restraint. CP 244.

Nancy Vernon also testified that in 2005 Drew engaged in excessive eye-poking. CP 247. She said he poked at his eyes all of the time, including when he was at home. CP 248. She said it developed over time and there was nothing they could do to resolve it. CP 248. Plaintiffs did not submit any expert opinion regarding what, if anything, caused Drew to poke his eyes. Nancy Vernon said it "could be tied to emotional distress." CP 247.

Plaintiffs did not identify any expert witnesses who would testify at trial. Also, Plaintiffs did not submit any declarations of physicians or other expert witnesses to establish that either Nancy Vernon or Drew Vernon suffered emotional distress. Nancy Vernon described Drew's

behaviors to a doctor who never had any direct contact with Drew, could not confirm a diagnosis and did not examine Drew. CP 75-76. According to Plaintiff, the doctor believed the behaviors could be characteristic of post-traumatic stress disorder. CP 75.

In Plaintiffs' statement of the case, they assert that Drew's teachers regularly forced him to the ground. Appellants' Opening Brief, p.8. In deposition, Nancy Vernon testified that when she was at school, she never saw Drew restrained and that she has no personal knowledge of Drew being attacked or restrained. CP 51. She said she read descriptions in "their notes," although she did not identify whose notes she read and Plaintiffs did not submit notes containing such descriptions as evidence in opposition to Defendant's motion for summary judgment. CP 51.

IV. ARGUMENT

A. Standard of Review.

An appellate court reviews a trial court's grant of summary judgment *de novo* and may affirm on any basis the record supports. *Graff v. Allstate Ins. Co.*, 115 Wn. App. 799, 802, 54 P.3d 1266 (2002). In accordance with CR 56(c), summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact or absence

of evidence supporting the essential elements of the non-moving party's case and that the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Company*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997), citing, *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

To defeat summary judgment, the nonmoving party must come forward with specific, admissible evidence to sufficiently rebut the moving party's contentions and support all necessary elements of the party's claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Argumentative assertions, unsupported speculation, suspicions, beliefs and conclusions, as well as inadmissible evidence that unresolved factual issues remain, are insufficient to meet this burden. *White*, 131 Wn.2d at 9; *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Where reasonable minds could reach only one conclusion based on the facts, summary judgment should be granted. *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989).

B. The Trial Court Properly Dismissed Plaintiffs' Claims That Were Outside the Limitations Period of IDEA.¹

The bulk of Plaintiffs' opening brief is argues that Plaintiffs' claims are not governed by IDEA and, therefore, should not be subject to IDEA's two-year statute of limitations. The issue of whether Plaintiffs'

¹ Defendant is presenting its argument in the same order as the Plaintiffs' assignments of error rather than the sequence of Plaintiffs' argument that does not follow the assignments of error.

claims are subject to the IDEA was decided in the previous lawsuit Plaintiffs filed, alleging the same claims. Defendant moved to dismiss that lawsuit for failure to exhaust administrative remedies. That motion was granted on July 1, 2008 and Plaintiffs did not appeal that dismissal.

In its motion to dismiss Plaintiffs' previous lawsuit for failure to exhaust administrative remedies, Defendant explained to the court that judicial review under the IDEA is available only after Plaintiffs exhaust their administrative remedies. *See Honig v. Doe*, 484 U.S. 305, 326-27, 108 S. Ct. 595, 98 L. Ed. 686 (1988) (failure to exhaust administrative remedies under IDEA precludes judicial review); *Doe v. Arizona Dep't of Educ.*, 111 F.3d at 680-81 (9th Cir. 1997) ("Judicial review under IDEA is ordinarily available only after the plaintiff exhausts administrative remedies.").

In explaining the rationale behind exhaustion, the Ninth Circuit has stated:

The IDEA's exhaustion requirement . . . recognizes the traditionally strong state and local interest in education, as reflected in the statute's emphasis on state and local responsibility. . . . Exhaustion of the administrative process allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.

Hoefl v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992).

The exhaustion requirement is so strong that “[w]ithin the Ninth Circuit, . . . the exhaustion requirement appears to be jurisdictional in nature.” *Emma C. v. Eastin*, 985 F. Supp. 940, 942 (N.D. Cal. 1997).

Indeed, the IDEA itself states that exhaustion of administrative remedies is required whenever a party seeks relief that is available under the IDEA:

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies under the Constitution, the Americans with Disabilities Act of 1990 . . . , title V of the Rehabilitation Act of 1973 . . . , 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 U.S.C. § 1415(l) (emphasis added).²

The court granted Defendant’s motion to dismiss Plaintiff’s first lawsuit and Plaintiffs then filed their due process hearing request in August, 2008. IDEA has a two-year statute of limitations period. IDEA, 20 U.S.C. § 1415(f)(3). In the due process hearing brought by Plaintiffs, the District moved to dismiss all claims related to matters occurring more than two years before the August 7, 2008 filing date. The Administrative Law Judge granted that motion and dismissed all claims for any alleged denial of FAPE prior to August 7, 2006. CP 11-12. The due process hearing was limited to issues arising after August, 2006. Consequently,

² Prior to the 1997 amendments to IDEA, this section was codified at § 1415(f).

Plaintiff has exhausted administrative remedies only with regard to issues arising from the 2006-2007 and 2007-2008 school years.

A final order from which no appeal was taken becomes the law of the case. *Tornetta v. Allstate Insurance Co.*, 94 Wn. App. 803, 809, 973 P.2d 8 (1999). In the previous action, the trial court determined that Plaintiffs' claims were subject to IDEA or so intertwined with IDEA issues and remedies that the court granted summary dismissal because Plaintiffs had not exhausted their administrative remedies. Because Plaintiffs did not appeal that order, it constitutes the law of the case that Plaintiffs' claims are subject to the IDEA.

In addition to the law of the case doctrine, Plaintiffs are also barred from attempting to relitigate the issue of the application of IDEA to their claims under the doctrine of collateral estoppel. Like the doctrine of *res judicata* which bars relitigation of a claim once it has been decided, the doctrine of collateral estoppel, or issue preclusion, prevents relitigation of an issue after the party against whom the doctrine is applied has had a full or fair opportunity to litigate his or her case. *Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). Despite Plaintiffs' contention that IDEA should not apply to Plaintiffs' claims, the court has already decided that IDEA does apply. Plaintiffs may not relitigate that issue.

Plaintiffs also contend that the two-year statute of limitations of the IDEA does not apply because Plaintiffs' claims for injury and discrimination were dismissed by the Administrative Law Judge. That

assertion is incorrect. In the Plaintiffs' request for a due process hearing, they requested \$3,000,000 in general damages. On January 16, 2009, the Administrative Law Judge issued an order dismissing claims outside of the two-year statute of limitations of IDEA and also dismissing Plaintiffs' claims for money damages because, "money damages are not available under the IDEA for the pain and suffering of a disabled child, or for the lost earnings of suffering of a parent pursuing relief under the IDEA. *Blanchard v. Morton School District*, 504 F.3d 771, 48 IDELR 207, 107 LRP 54995 (9th Cir. 2007)" (Order on Motion to Dismiss Claims, pp.2-3, Plaintiff's Complaint, Exh. A). The ALJ did not dismiss claims of injury and discrimination that were intertwined with the educational issues.

The Administrative Law Judge in a due process hearing may consider issues of discrimination and harassment as well as physical injuries in determining whether those resulted in a denial of a free appropriate public education for a special education student. *See, M.L. v. Federal Way School District*, 394 F.3d 634, 651 (9th Cir. 2005).

Because the Plaintiffs' claims are subject to the provisions of IDEA and Plaintiffs were required to exhaust administrative remedies, the court should affirm the dismissal of all claims related to events occurring prior to August 7, 2006 as all such claims are outside the two-year limitations period of IDEA.

C. The Trial Court Properly Dismissed Plaintiffs' Discrimination Claims.

RCW 49.60.030(1) contains the following declaration of Civil

Rights:

The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental or physical disability and the use of trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

...

(b) 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;

An educational institution is within the statutory definition of place of public accommodation. RCW 49.60.040(10). The trial court properly dismissed Nancy Vernon's claim of discrimination because she does not have a disability. Appellants have not assigned error to the dismissal of that claim.

The initial difficulty in applying the WLAD analysis to the education of a special education student is that by definition, that education is not only different from that provided to non-special education students, but under the provisions of IDEA, is required to be different. The District is charged with the responsibility of providing a free

appropriate public education which meets the specific requirements and needs of each individual special education student. Plaintiffs' argument that "Drew was treated differently from students who did not share his disability" (App. Brief, p. 39) does not show that Drew was discriminated against.

A key issue underlying this case is whether Washington's Law Against Discrimination (WLAD) is an appropriate and independent vehicle for assessing the education provided to special education students. Defendant contends that WLAD is not an appropriate vehicle for two reasons.

First, a school district's compliance with the requirements of IDEA should satisfy the requirements of a more general anti-discrimination statute like the WLAD. Federal courts, for example, routinely hold that a school district's compliance with IDEA also means that the school district has complied with the requirements of the Americans with Disabilities Act or § 504 of the Rehabilitation Act.³ See e.g., *Pace v. Bogalusa City School*

³ Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), states:

No otherwise qualified individual with handicaps . . . shall solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

Bd., 403 F.3d 272, 297 (5th Cir. 2005) (a finding that school had not violated student's IDEA rights collaterally estopps student's ADA and § 504 claims); *Independent Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir. 1998) (dismissal of IDEA claim bars student's ADA, § 504, and state civil rights claims); *Moubry v. Independent School Dist.*, 9 F. Supp.2d 1086, 1111-12 (D. Minn. 1998) (dismissal of IDEA claim precludes ADA and state civil rights claim).

In addition, compliance with the rights provided by a specific statute, such as Washington's special education law, should prevail over a more general statute, such as the WLAD. For example, in *Jenkins v. Carney-Nadeau Pub. Sch.*, 505 N.W.2d 893 (Mich. Ct. App. 1993), the court held that compliance with the administrative procedures provided by the state's special education law prevailed over the state's more general disability discrimination statute. *Jenkins*, 505 N.W.2d at 894. As the court reasoned, Michigan's special education law "more specifically addresses the education of disabled children than does HCRA [Michigan's law against disability discrimination]." *Id.*

Thus, the District's compliance with the requirements of IDEA precludes redundant claims predicated on violations of other anti-discrimination laws. Here, the Administrative Law Judge has ruled that the District did not violate the IDEA (except for two narrow areas of

increasing the student's computer skills and receptive ability) and as a result the ALJ concluded that no compensatory education award was appropriate for Drew. CP 38. Plaintiffs did not appeal that administrative ruling. Thus, the ALJ's ruling that the District did not violate IDEA should bar Drew Vernon's redundant WLAD claim because this claim is predicated upon the education provided to Drew.

Second, WLAD does not require that school districts provide special services to disabled students. *See Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 639, 911 P.2d 1319 (1996). Thus, the provision of special education services should not be governed by the WLAD.

In *Fell*, the plaintiffs argued that the Spokane Transit Authority ("STA") must provide transportation services to disabled people who live within the STA's boundaries, regardless of whether the STA provided similar services to non-disabled people. *Id.* at 639. The *Fell* court rejected that argument and instead held that that the key issue under the WLAD is whether the defendant offered "plaintiffs services comparable to those of nondisabled people." *Id.* Unlike federal laws such as the ADA, which may mandate an entitlement to services not available to the non-disabled population, the *Fell* court held that there is no similar requirement under the WLAD:

While entitlement to services may be in the ADA, the Legislature has not enacted a counterpart to the ADA in Washington creating such entitlements. . . .

. . .

[T]he plaintiffs' approach might thereby effectively require STA to offer greater service to disabled people than is available to nondisabled people. We cannot find a basis for that requirement in Washington's Law Against Discrimination. Rather, the test is comparability of treatment, . . .

Id. at 640.

Similar to the ADA, the IDEA requires school districts to provide special services to disabled students, services that are not available to non-disabled students. For example, the IDEA requires schools to develop individual education programs for special education students. The IDEA also requires school districts to provide a wide range of services—including speech-language pathology and audiology services, psychological services, physical and occupational therapy, counseling and medical services—when these services are required to assist a disabled student in benefiting from special education. IDEA, 20 U.S.C. § 1401(22).

Like the transit authority in *Fell*, a school is a place of public accommodation under the WLAD. RCW 49.60.040(2). As in *Fell*, however, the WLAD does not require school districts to provide the special education services mandated by the IDEA. Thus, the WLAD is not an appropriate vehicle for assessing the treatment of special education students and claims for damages stemming from the alleged failure to properly educate Drew Vernon cannot be based upon the WLAD.

Nevertheless, the basis for Drew Vernon's discrimination claim primarily concerns the techniques and methodologies used by the District in educating Drew. For example, Plaintiffs refer to the classroom provided to Drew which was intended to limit his sensory input and the fact there was a lock on the door. The room was specifically part of Drew's educational program, as was the lock on the door. Drew's educational setting is part of the Findings of Fact and Conclusions of Law issued by the Administrative Law Judge in the due process hearing:

63. The Student has a history of engaging in attention-seeking behaviors to get the attention of adults in his life. *See e.g.* Exhibit D1, p. 29, Dr. Flint Simonsen report. Over the course of the two school years at issue, the Student began to exhibit more resistance to instruction from District staff. The Student began to exhibit behaviors including banging on classroom windows, lying on the floor, and refusing to be redirected on a more frequent basis. Dr. Simonsen's recommendations to the District included what became known as the "ignoring strategy." This strategy was predicated on the theory that to attempt to engage or redirect the Student while he was exhibiting behaviors that interfered with his educational instruction only served to reinforce those behaviors. Dr. Simonsen recommended that when the Student refused to respond to attempts by District staff to redirect or re-engage him, the staff should disengage from or ignore the Student for a period of time.
64. Over the course of the two school years at issue, and in particular during the 2007-2008 school year, the Student's special education teacher and para-educators utilized an ignoring-type strategy per Dr. Simonsen's recommendation. The strategy was more successful during the 2006-2007 school year than during the 2007-2008 school year.

65. The Student was assigned to the same classroom at CMJH during both the 2006-2007 and 2007-2008 school years. The District provided the Student with his own classroom, with an attached office for Ms. Hippensteal's use.
66. The Student has a history of striking or banging on windows at school, which dates back at least as far as his last year in elementary school. Although the exact date is not clear from the record, at some point after starting at CMJH, the Student began striking the windows in his classroom.
67. The Student began ripping or tearing off his shirt during the 2006-2007 school year. Although the exact date is not clear from the record, at some point the Student also began removing other pieces of his clothing while at school.
68. In order to protect the Student from accidental injury should he strike and break a window, to preserve his privacy when he removed his clothing, and to comply with CMJH procedures calling for all windows to be covered during 'lock down' drills, the District had made what became known as the 'blue boards.' *See e.g., Exhibit P27, p. 9, top photo.* The blue boards were placed in the windows of the Student's classroom to block him from striking the windows, to prevent other students and staff from seeing the Student without all his clothing on, and during lock-down drills. *See e.g., Exhibit 27, p. 2, bottom photo.*
69. As the 2007-2008 school year progressed, it became increasingly difficult for the Student's staff to keep him in the classroom. By this time the Student was large enough and strong enough to overpower or wear down his special education teacher and para-educators and leave the classroom as he chose. Once outside the classroom, the Student would lie down in the hallway, run down the hallway, and even attempt to exit the school building.
70. The District was concerned for the safety of the Student and other students if he left the classroom and ran down the hallway during passing time. The District was also

concerned about the safety of his staff trying to block the Student from leaving his classroom. The District decided to install an electronic door lock on the Student's classroom door. The decision was reached at a meeting on January 16, 2008, with Dr. Simonsen, Ms. Hippensteal, Mr. Maxwell, Lori Haugen, director of special services for the District, and Christine Struna, a District SLP. Exhibit 181, p. 2.

71. Prior to installation of the door lock, Mr. Maxwell called and spoke with the Parent. The Parent and Mr. Maxwell discussed the idea of having a lock put on the classroom door that would prevent the Student from opening the door and running out into the hallway. The Parent did not disagree with this idea. Transcript, pp. 949-950.

CP 27-28.

Because the nature of the classroom established for Drew and actions such as a lock on the door to aid in Drew's safety are integral parts of his education, and are aspects of his education to which Plaintiff agreed, they are not actionable and do not establish that the District discriminated against Drew. Because the WLAD is not an appropriate vehicle for assessing the education provided to Drew and because an ALJ has already ruled that the District offered a free appropriate education to Drew, Plaintiffs' WLAD claims were properly dismissed. Because the WLAD should not govern special education, Plaintiffs' WLAD claim fails as a matter of law.

Dismissal was also appropriate because, in essence, Plaintiff's complaint is for educational malpractice in the way that Drew Vernon's education was provided to him. However, no decision in Washington has

recognized a claim for educational malpractice. In fact, the vast majority of states have refused to recognize such claims, holding that they violate public policy. See 5 James A. Rapp, *Education Law*, at §12.05[3][b] (2010). In *Camer v. Seattle School District*, 52 Wn. App. 531, 762 P.2d 356 (1998), the court denied claims that the School District failed to provide an adequate education as required by state statutes. The court declined to find a private right of action because:

These matters are, by practical necessity, largely discretionary with those charged with the responsibilities of school administration. Courts and judges are normally not in a position to substitute their judgment for that of school authority... nor are we equipped to oversee and monitor day-to-day operations of a school system.

Camer, at 537.

Plaintiffs also argue that Drew was discriminated against because he was singled out by teachers and staff and physically grabbed and harmed, causing bruising. As discussed above, there is no evidence that the bruises on Drew's arms were caused by an employee of the District grabbing him. Also, according to Nancy Vernon's deposition testimony, she observed bruises on Drew's arms in October, 2005. CP 241. Not only is that event outside of the applicable limitations period under IDEA, the evidence submitted also does not establish that Drew was discriminated against.

Plaintiffs did not submit any testimony from a doctor establishing the cause of the bruises on Drew's arm. Nancy Vernon states in her

deposition that if the bruises were caused by a person holding Drew's arms, her doctor said that the bruise would have been because Drew "would have had to resist and they would have had to continue to hold him as he resisted, in order for the bruises to occur." CP 245. That inadmissible hearsay statement does not establish that an employee of the District caused the bruises.

Even if Ms. Vernon's conjecture is correct that Drew was bruised when an employee of Bethel School District held onto his arms while he resisted, Plaintiffs have not established that such action was inappropriate. As noted in the ALJ's findings, Drew often flailed his arms and legs about in such a way that it caused repeated injuries to teachers and staff. Also, Plaintiffs have submitted no evidence that if the bruises were caused by an employee of Bethel School District, that it was a form of discrimination based upon Drew's disability.

Plaintiffs also offer as their proof of discrimination that Nancy Vernon concluded that the aggressive behaviors Drew had been exhibiting at home starting in September 2005, including throwing objects and eye-poking behavior, confirmed that he was suffering distress as a result of his treatment at school. Plaintiffs' conclusion is nothing more than unsupported speculation, and conclusory allegations that are insufficient to defeat summary judgment. See *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). In addition, Plaintiffs' speculation as to Drew's actions being related to emotional distress is contrary to the Findings of the Administrative Law Judge regarding the effect of changes in Drew's

medication. Those findings establish that changes in Drew's behavior coincided with changes in his medication. CP 57-58. Plaintiffs have not appealed those Findings.

D. Plaintiffs Have Not Established The Elements of a Prima Facie Claim of Negligent Infliction of Emotional Distress.

Plaintiffs' third assignment of error is that the court erred in 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 caused by acts and omissions of defendant." In section five of their opening brief, Plaintiffs say, "Drew and Nancy have suffered emotional distress as a result of defendant's discrimination," but they offer no evidence or argument in support of their contention that Plaintiff Nancy Vernon suffered emotional distress.

To establish a claim for infliction of emotional distress, Plaintiff must prove she has suffered emotional distress by "objective symptomatology" and the emotional distress must be susceptible to medical diagnosis and proved through medical evidence. The symptoms of emotional distress must also "constitute a diagnosable emotional disorder." *Kloepfel v. Bokor*, 149 Wn.2d, 192, 197, 66 P.3d, 630 (2003), citing *Hegel v. McMahon*, 136 Wn.2d 122, 135, 960 P.2d, 425 (1998). Nancy Vernon did not receive any medical diagnosis of emotional distress, or any treatment. CP 79.) Also, she has submitted no evidence

that she suffered objective symptomatology of emotional distress. Her claim of negligent infliction of emotional distress was properly dismissed.

Similarly, Drew Vernon has not received any medical diagnosis of or treatment for emotional distress. Nancy Vernon testified that she told a doctor about Drew's actions and the doctor told her that Drew exhibits characteristics of post-traumatic stress disorder. CP 75-76. Such opinion by the doctor, who never examined Drew and cannot confirm a diagnosis without testing is hearsay and does not rise to the level of proof required.

Plaintiffs also argue that Drew communicated stress and frustration by throwing objects behind his back and poking at his own eyes. That is simply an assertion by Plaintiffs based on speculation and conjecture.

E. Plaintiffs Have Not Established a Prima Facie Claim of Outrage.

Plaintiffs' fourth assignment of error is that the court dismissed their claim of outrage. To establish an outrage claim, "A plaintiff must show (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff." *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998). Plaintiffs have failed to submit admissible evidence that would establish any of those three elements.

Plaintiffs make the conclusory statement that, "Drew has actually suffered severe emotional distress." (Plaintiffs' Brief, p. 44) However, Plaintiffs have not submitted any admissible evidence to support that claim. They simply say that where Drew has shown symptoms of a

diagnosable disorder, the emotional distress element is satisfied. That assertion, based solely on hearsay, is not enough.

Plaintiffs also make the conclusory statement that, “It is absolutely outrageous for teachers, administrators and other staff to physically and psychologically abuse a young, disabled, vulnerable child.” (Plaintiffs’ Brief, p. 48) Plaintiffs have not submitted testimony or other evidence that any Bethel School District teacher, administrator or other staff physically, verbally or psychologically abused Drew Vernon.

In her deposition, Ms. Vernon was not able to identify who she believed had assaulted Drew. CP 241-47. The only physical injury caused to Drew is the 2005 incident where he had bruises on his arms. Plaintiffs offer speculation as to whether the bruises could have possibly been caused by someone holding Drew’s arms while he resisted. Plaintiffs have not identified who that person was. In her deposition, Ms. Vernon acknowledged that the police investigated the incident, but the police “could not determine what happened to Drew because nobody saw anything.” CP 247.

In the case relied upon by Plaintiffs, *Brower v. Ackerly*, 88 Wn. App. 87, 943 P.2d 1141 (1997) Defendants did not dispute that a rational jury could conclude that the entire episode was extreme and outrageous. *Brower*, at 102. The *Brower* court stated the rule:

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 and emotional suffering. The situation is different when the alleged

conduct sufficiently satisfies the first two elements, outrageous and extreme conduct, and intentional and reckless infliction of emotional harm. In such cases, we hold a case of outrage should ordinarily go to a jury as long as the court determines the plaintiff's alleged damages are more than 'mere annoyance, inconvenience or normal embarrassment as an ordinary fact of life.'

Brower at 101-02.

Under the *Brower* court's analysis, Plaintiffs' claim for intentional infliction of emotional distress was properly dismissed. Plaintiffs have not established either extreme and outrageous conduct or that the Defendant engaged in intentional or reckless infliction of emotional distress.

Additionally, Plaintiffs have not identified any allegedly outrageous conduct on the part of Defendant other than the same conduct upon which it bases its claim of discrimination. Dismissal of a claim for outrage is appropriate when the outrage claim is based on the same facts as those alleged to form the basis of a claim of discrimination. *Haubry v. Snow*, 106 Wn. App. 666, 680, 31 P.3d 1106 (2001). The trial court dismissed plaintiffs' claims for emotional distress because those claims are based on the same allegations as their discrimination claims. CP 431. Plaintiffs did not assign error to that ruling.

F. The Trial Court Properly Dismissed Nancy Vernon's Claims For Injury to the Parent-Child Relationship.

The trial court dismissed Plaintiff Nancy Vernon's claims for negligent infliction of emotional distress because she did not submit any evidence of a diagnosable medical condition caused by the emotional distress. In section 3 of Plaintiffs' opening brief, they state that Nancy

Vernon's claims are "not for negligent infliction of emotional distress," but they maintain that she is entitled to emotional distress damages under RCW 4.24.010 for injury to Drew. That statute provides, in pertinent part:

A mother or father, or both, who has regularly contributed to the support of his or her minor child, and the mother or father, or both, of a child on whom either, or both, are dependent for support 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 distraction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

Plaintiffs' argument that Nancy Vernon is entitled to damages under this statute fails for two reasons:

First, it has been recognized that a fundamental condition to maintaining such an action is, 'there must be evidence of an injury to the [the child] with resulting damages.'

Plaintiffs also argue, without citations to any authority, that Nancy Vernon is able to recover for emotional distress caused to Drew for discrimination under RCW 49.60 et. seq. That contention is directly contrary to the language of RCW 4.24.410 that expressly provides for a cause of action based on injury or death of a child. The section does not create cause of action for emotional distress damages, but rather is limited

to loss of love and companionship of the child and for injury to or destruction of the parent-child relationship. Plaintiff has submitted no evidence of either loss of love and companionship or injury to the parent-child relationship.

Although Plaintiff could not identify any injury upon which they base a claim for damage to the parent-child relationship, if we assume that Plaintiffs referred to the bruises on Drew's arm or to his eye-poking, then a claim under RCW 4.24.010 is barred by the applicable statute of limitations. Those incidents occurred in 2005. Even if that claim is not subject to the two-year statute of limitations under IDEA, it would still be barred under the three-year statute of limitations for tort claims based on negligence. RCW 4.16.080. Summary judgment dismissal of Nancy Vernon's claims for injury to the parent-child relationship should be affirmed.

G. Plaintiffs Have Not Established Prima Facie Claims Of Negligent Hiring And Supervision And Assault And Battery.

Plaintiffs' sixth assignment of error is that the trial court erred by dismissing plaintiffs' claims of negligent hiring and supervision and assault and battery.

1. Plaintiffs Have Not Shown That Defendant Knew Or Should Have Known That An Employee Was Unfit.

Plaintiffs contend that Defendant breached a duty to use reasonable care to determine if an employee was incompetent or unfit before hiring

the teacher and also a duty to use reasonable care in supervising its teachers. (Opening Brief 42). Plaintiffs rely upon the holding of *Peck v. Siau*, 65 Wn. App. 285, 288-92, 827 P.2d 1108 (1992), as authority for their contention that Defendant breached its duty to Plaintiffs. That reliance is misplaced. In *Peck*, a student's parents sued Evergreen School District for negligence in hiring, retaining and supervising the school librarian who had sexual contact with a student. The court explained the cause of action for negligent hiring or retention as follows:

An employer may be liable to a third person for the employer's negligence in hiring or retaining a servant who is incompetent or unfit. Such negligence usually consists of hiring or retaining the employee with knowledge of his unfitness, or failing to use reasonable care to discover it before hiring or retaining him. The theory of these decisions is that such negligence on the part of the employer is a wrong to such a third person, entirely independent of the liability of the employer under the doctrine of respondeat superior. **It is of course, necessary to establish such negligence as the proximate cause of the damage to the third person, and this requires that the third person must have been injured by some negligent or other wrongful act of the employee so hired.** (Emphasis added). *Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 43, 747 P.2d 1124 (1987), quoting 53 Am. Jur. 2d *Master and Servant* §422 (1970) review denied, 110 Wn.2d 1016 (1988).

Peck, at 288.

Plaintiffs make broad, unsupported allegations that Defendant failed to take 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.

(Appellants' Brief 43). Plaintiffs have not identified who these employees were, when such actions occurred or, in fact, what those actions were. Further, Plaintiffs failed to meet the requirement stated in *Peck* that they must first establish that Drew suffered an injury as a result of negligence or other actions by a District employee. Without that proof, the trial court properly granted summary judgment.

In *Peck*, the court also discussed a cause of action against the school district for supervision of its employee. After analyzing cases that addressed that issue, the court said:

These rules draw us back to the same question already addressed: did the district know or in the exercise of reasonable care, should have known that [the employee] was a risk to its students.

Peck at 293.

Where Plaintiffs have only vague allegations that the District was aware that Drew was being harmed by “teachers and/or staff” but did nothing to stop the abuse, Plaintiffs have not shown that the District knew or should have known that a particular employee posed a risk of harm to Drew. As was the case in *Peck*, summary judgment dismissal should be affirmed.

2. There Is No Evidence That Drew Was Assaulted And Battered.

Appellants correctly define battery as 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 and an assault is any act of such a nature that causes such apprehension of a battery. *See, McKinney v. City of Tukwila*, 103 Wn. App. 391, 408, 13 P.3d 631 (2000). Appellants again argue that the bruises on Drew's arms provide evidence of a tort. At this instance, appellants contend, "Drew is forcibly grabbed while at school and ended up with dark bruises as a result. Appellants have offered no proof that anyone at school forcibly grabbed Drew causing bruises. Appellants also contend that Drew was repeatedly physically restrained and that these were harmful and offensive contacts (battery). Opening Brief at 48-49. Appellants have offered no evidence of any repeated physical restraining of Drew and, more importantly they have offered no evidence that anyone did restrain Drew with the intent to cause harmful or offensive contact with him or an apprehension of a battery. In the circumstances described by the Administrative Law Judge where Drew repeatedly flailed his arms and legs in such a way that it caused significant injuries to the teachers and paraeducators assigned to Drew, there is no basis for Plaintiffs' assumption that there was an intent to cause harm to Drew. Moreover, there is no showing that Drew did suffer any harm as a result of any actions of Defendant.

V. CONCLUSION

The trial Court correctly found that the two-year statute of limitations of IDEA applied to Plaintiffs' claims because of the determination in the previous lawsuit that Plaintiffs' claims were subject

to the requirement of exhaustion of administrative remedies under IDEA. Plaintiffs have not carried their burden here of showing that the trial Court erred in that ruling. Accordingly, the trial Court order should be affirmed.

Even without application of the two-year statute of limitations period under IDEA, Plaintiffs have not supported their claims with sufficient admissible evidence to establish the elements of prima facie cases of discrimination, negligent infliction of emotional distress, outrage, injury to the parent-child relationship, negligent hiring and supervision or assault and battery. Because Plaintiffs failed to show evidence of a genuine issue of material fact, Defendant is entitled to summary dismissal as a matter of law. The order granting summary judgment dismissal should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 1st day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct:

That on June 1, 2011, I caused to be delivered a true and correct copy of each of the following:

- 1) Brief of Respondent
- to: Mr. Thaddeus P. Martin
Law Offices of Thaddeus P. Martin
4928 109th Street SW
Lakewood, WA 98499

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by the following method:

Delivering a copy to Legal Messenger Service, Inc., with appropriate instructions to deliver the same to the person(s) identified above.

DATED this 1st day of June, 2011, at Tacoma, Washington.



Rachel A. Schweinler