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SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Appellants,

vs.

CLOVER PARK SCHOOL DISTRICT NO. 400,

Respondent.

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SUPREME COURT  
STATE OF WASHINGTON  
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**AMICUS CURIAE BRIEF OF COUNCIL OF PARENT  
ATTORNEYS AND ADVOCATES, INC.**

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**STATEMENT OF INTEREST OF THE COUNCIL OF PARENT  
ATTORNEYS AND ADVOCATES, INC.**

The Council of Parent Attorneys and Advocates, Inc. ("COPAA") is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA does not undertake individual representation for children with disabilities, but provides resources, training, and information for parents, advocates and attorneys to assist in obtaining the free appropriate public education ("FAPE") such children are entitled to under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* and Section 504 of the Rehabilitation Act of 1973 ("Section 504"). COPAA brings to this Court a unique perspective of parents and advocates for children with disabilities and their first-hand experiences with the challenges faced by such children, whose success depends on the right to secure the FAPE promised by the IDEA and Section 504. One of the keys to this success is the provision of a safe education environment based upon sound research-based principles of instruction and behavioral intervention.

**INTRODUCTION**

The lower court improperly dismissed the tort claims of abuse, neglect and discrimination at the hands of the educators of former high

school students previously receiving special education services at Clover Park School District No. 400 for purportedly failing to exhaust their administrative remedies under the IDEA. Because the tortious actions forming the basis of the students' claims were not educationally related and served no educational purpose, jurisdiction was proper in the lower court. Purely abusive, neglectful and discriminatory acts do not become "educationally related" merely because they are visited upon students who have exercised their right to receive special education services under state and federal law. Children receiving special education services pursuant to the IDEA do not lose access to the courts to pursue civil tort claims, a right guaranteed to every citizen, simply because the tort occurred on school grounds or in the educational setting.

A child with a disability should have no greater hurdle than a child without a disability to pursue compensation for abusive, neglectful and discriminatory activities by educators. Although monetary damages are not available under the IDEA for a denial of FAPE, special education students do not forfeit their rights to be free from abuse, neglect, and discrimination. Both Washington state and federal law provide guidance and limitations on the use of physical force on children as well as remedies for abuse that results in physical, emotional, and/or mental harm, including injunctive relief and monetary damages. A school district cannot

avoid such laws because abusive, discriminatory and neglectful behavior of teachers, by definition, has no educational purpose.

Acknowledging that abuse, neglect and/or discrimination of a child is not related to the delivery of FAPE neither compromises the integrity, nor undermines the Congressional intent, of the IDEA. Furthermore, the IDEA and its goals are not compromised by a court of law, as opposed to an administrative law judge, assessing whether a student's tort claims of abuse, neglect and discrimination fall outside of the purview of the IDEA. Indeed, a court fulfills its very mandate as arbiter of critical legal issues by discerning exactly these types of jurisdictional questions to help determine, after careful analysis, what claims are properly before it.

#### **STATEMENT OF THE CASE**

COPAA adopts and incorporates herein the Statement of the Case set forth by Appellants in their brief at pages 3 through 19.

#### **ARGUMENT**

**I. Abuse, Neglect and Discrimination Do Not Invoke IDEA Process And Protections As They Are Never Related To The Delivery Of FAPE.**

- A. The Plain Language of the IDEA Demonstrates a Congressional Intent to Limit the IDEA Procedures to Review Complaints Related to the Denial of FAPE and the Identification, Evaluation and Placement for Special Education Services.

The IDEA was enacted, in relevant part, to ensure "that all children

with disabilities have available to them a free appropriate public education” and “to ensure that the rights of children with disabilities and parents of such children are protected.” 20 U.S.C. §§ 1400(d)(1)(A)-(B). The IDEA is designed to assist states, localities, educational service agencies, and Federal agencies “to provide for the education of all children with disabilities.” 20 U.S.C. § 1400(d)(1)(C). To that end, the IDEA provides procedural safeguards and substantive requirements for the development of an Individualized Education Program (“IEP”), which is a program designed to meet the unique educational needs of each IDEA eligible child. *Bd. of Ed. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 193-194 (1982).

The IDEA does not restrict or limit the right of children to seek additional remedies available under the Constitution, federal statutes or state law protecting the rights of children with disabilities. 20 U.S.C. § 1415(l) (“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. S 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. S 79[1] et seq.], or other Federal laws protecting the rights of children with disabilities...”).

In addition to the IDEA safeguards and requirements, many states enacted additional procedures and safeguards to ensure that the IDEA and

its due process hearing requirements are implemented consistently throughout their jurisdictions. *See, e.g.*, RCW 28A.155.010-.160 and WAC 392-172A.01000-07070. One key procedural safeguard provided under the IDEA is an administrative procedure for hearing complaints pertaining to the provision of FAPE for special education students. 20 U.S.C. §§ 1415(b)(6)(A) and (f)(1). The scope of the hearings in this administrative process *pertain to the identification, evaluation, or placement of special education students or to the provision of FAPE.* 20 U.S.C. § 1415(b)(6)(A) (emphasis added); WAC 392-172A-05080.

When specific relief is sought that is provided under the IDEA, exhaustion of the administrative process is required before a civil action may be filed. 20 U.S.C. § 1415(l). This exhaustion requirement, however, is not without limits. In explaining the IDEA's exhaustion requirement, the Ninth Circuit Court of Appeals held that "plaintiffs must exhaust administrative remedies before filing a civil lawsuit if they seek relief for injuries that could be redressed to any degree by the IDEA's administrative procedures." *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1163 (9th Cir. 2007). If the claims cannot be redressed in any way by the IDEA, exhaustion is not required.

No court in the State of Washington has yet addressed the IDEA's exhaustion requirement and its impact on claims based on abuse, neglect

and discrimination that are unrelated to the provision of FAPE. COPAA contends that the trial court below erred in concluding that the acts complained of by the former students should have been redressed in the administrative process designed for reviewing claims related to a denial of FAPE. At the time of the trial court's decision, these former students were only seeking an award of damages for the pain, suffering and emotional distress—all touchstones of a traditional tort-like remedy—caused by the abusive, neglectful and discriminatory activities directed at them by teachers. The IDEA was not implicated as these students were neither seeking to be identified, evaluated, or properly placed with special education services, nor were they seeking a remedy for a denial of FAPE.

The mere fact that the alleged abuse, neglect and discrimination arose in the educational setting, or that there were IDEA-related claims that have since been resolved, does not transform these tort claims into IDEA claims related to the denial of FAPE. COPAA is familiar with the strategy by school districts to try to lump such claims with claims directly related to the provision of FAPE, or, as in this case, force non-FAPE claims that seek monetary damages to go through the IDEA administrative process. COPAA urges this Court to reject this strategy.

- B. Abuse, Neglect and Discrimination Are Never Educationally Related Under the IDEA Because Such Egregious Actions Hinder a Child's Ability to Receive a

FAPE and Have No Pedagogical Purpose.

Under the IDEA, local school districts are to provide students with disabilities FAPE—*i.e.*, special education and related services at public expense in accordance with an IEP designed to help the student receive educational benefit. 20 U.S.C. §§ 1401(9), (14) and (29); 1414(d).

Behavioral management and discipline of students with disabilities in public schools must not impinge on students' rights to a meaningful public education. Schools are required to accommodate all manifestations of a student's disabilities, including behaviors that impact learning. *See* 20 U.S.C. § 1414(d)(3)(B)(i). When behavior "impedes the child's learning or that of others," the IEP team must "consider the use of positive behavioral interventions and supports, and other strategies to address that behavior." 34 C.F.R. § 300.324(a)(2)(ii). When the behavior is related to a student's disability, the student is not disciplined as non-disabled students. *Id.* Critical to these provisions is the recognition that both educational services and discipline must be part of the IEP, and may not negatively impact or hinder a child's ability to receive a FAPE. *Id.*

The IDEA has long used the requirement of FAPE to address a dark tradition of educators subjecting students with disabilities to non-productive or harmful activities. *See Honig v. Doe*, 484 U.S. 305, 323-324 (1988) (Congress intends to "strip schools of the unilateral authority they

had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.”) *See also Preschooler II v. Clark County Sch. Bd. of Trs.*, 479 F.3d 1175, 1182 (9th Cir. 2007) (noting clear constitutional prohibition of physical abuse of schoolchildren and heightened protections for disabled pupils). While there is no bright-line test for what is and what is not necessary for the provision of FAPE, courts have consistently found that when allegations of physical and mental abuse are made, they fall outside general disciplinary and pedagogical practices as well as outside of the scope of the IDEA and its administrative procedures. *See Sagan v. Sumner County Bd. of Ed.*, 726 F. Supp. 2d 868, 882-83 (M.D. Tenn. 2010) (“Plaintiffs’ claims concern the alleged unlawful and unreasonable use of force... The Court construes these claims as *arising from non-educational injuries, irrespective of the fact they occurred in an educational setting and were allegedly perpetrated by educators against a student*. If Jane Doe were not a disabled student, there would be no administrative barrier to her pursuit of these claims. . .”) (emphasis added); *Meers v. Medley*, 168 S.W.3d 406, 410 (Ky. App. 2004) (“We do not view Meers’ and Rogers’ allegations as encompassing “general disciplinary practices.” Rather, we think the allegations asserted by Meers and Rogers are best described as allegations of physical and mental assault and/or abuse, which are *not within the*

*scope of the IDEA.*”) (emphasis added); *Sabaski v. Wilson County Bd. of Ed.*, 2010 Tenn. App. LEXIS 784, \*13-14 (Tenn. Ct. App. Dec. 17, 2010) (“With respect to the plaintiffs’ claims for assault and battery and false imprisonment, which are intentional torts, *we do not consider the IDEA preclusive*... If Emily were not a disabled child entitled to services under the IDEA, her parents would not be precluded from bringing actions for these intentional torts.”) (emphasis added).

Educators on the national level agree that such types of activities fall short of having a pedagogical purpose and are thus not supported by the IDEA. The National Education Association, through its Code of Ethics (“the Code”), sets forth the fundamental principle that every educator “[s]hall make reasonable effort to protect the student from conditions harmful to learning or to health and safety.” National Education Association, Code of Ethics of the Education Profession, Principle 1, Item 4, <http://www.nea.org/home/30442.htm>. The Code then requires that an educator “[s]hall not intentionally expose the student to embarrassment or disparagement.” *Id.* at Item 5. These two statements constitute a quarter of the Code’s first principle—commitment to the student. As these statements make clear, a very important part of an educator’s commitment to the student is ensuring that the student has a safe environment in which to learn; otherwise, a child’s ability to learn is hindered or completely

halted.

For example, aversive procedures, including the “use [of] painful stimuli in response to behaviors that are deemed unacceptable by [a student’s] caretakers[,]” do not have a pedagogical purpose and can easily constitute abuse. *COPAA Declaration of Principles Opposing the Use of Restraints, Seclusion, and Other Aversive Interventions Upon Children and Disabilities June 2008* (updated March, 2011), <http://www.copaa.org/public-policy/copaas-major-legislative-priorities/ending-abuse-through-restraint-and-seclusion/>. Without a pedagogical purpose, those techniques, which could include things like restraints or seclusion, do not qualify as educationally related and could be dangerous to the child, and are, at best, simply punishment. See United States General Accounting Office, *Report to Congressional Requesters, Improper Restraint or Seclusion Use Places People at Risk*, GAO/HEHS-99-176 (September 1999). See also Wanda A. Mohr, et. al, *Faulty Assumptions Associated With the Use of Restraints With Children*, 14 No. 3, *Journal of Child and Psychiatric Nursing* 141, 146 (2001) (“By definition, punishment constitutes infliction of pain, an aversive stimulus or consequence, or painful confinement of a person as a penalty for an offense”).

The United States Supreme Court and the State of Washington are in agreement with national educators that physical and verbal abuse,

neglect and discrimination of individuals with disabilities at the hands of professionals, including educators, is a substantial departure from acceptable methods of practice, standards or judgment. *See Youngberg v. Romero*, 457 U.S. 307 (1982); RCW 9A.16.100. In addressing the substantive due process rights of involuntarily committed persons with intellectual disabilities, the United States Supreme Court held that the “right to personal security constitutes a ‘historic liberty interest’ protected substantively by the Due Process Clause.” *Id.* at 315. The Court held that a substantive due process claim exists “when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such a judgment.” *Id.* at 323. Since 1982, *Youngberg* has been applied to the educational setting and used to determine if the teaching methods employed violated a child’s due process rights. *See e.g., Heidemann v. Rother*, 84 F.3d 1021, 1029 (8th Cir. 1996); *M.H. v. Bristol Bd. of Ed.*, 169 F. Supp. 21, 31 (D. Conn. 2001). These decisions make clear that people with disabilities are entitled to be free from abusive, neglectful and discriminatory behavior at the hands of professionals, including educators, if such activities have no professional—here, pedagogical—purpose.

The Washington State Legislature has codified similar principles

applicable to the education setting, taking a clear stand against abuse of children in schools and warning educators about the use of force and assaultive behavior on children, RCW 9A.16.100 provides

It is the policy of this state to protect children from assault and abuse and to encourage parents, teachers, and their authorized agents to use methods of correction and restraint of children that are not dangerous to the children.

Washington State has further recognized that the risk and potential harm aversive procedures pose to special education students requires not only regulation, but strict limits on what is or is not permitted within the school. *See* WAC 392.172A.03120-03135. Special care must be taken when implementing and using any type of procedure that involves the systematic use of stimuli or other treatment which a student is known to find unpleasant for the purpose of discouraging undesirable behavior on the part of the student. WAC 392.172A.03120. Such aversive procedures are only to be used in the special education context after a number of conditions have been satisfied, including a determination by the IEP team, which includes the parents, that a specified aversive technique is appropriate. WAC 392.172A.03135. Accordingly, an aversive technique can *not* be used on a special education student unless the use of such technique is *approved* by the parents and the rest of the IEP team and

made a written part of the IEP. *Id.* Activities that could cause physical and mental harm to a student are outside the bounds of what is educationally related. *Id.*

As these cases, state statutes, and national education principles make clear, the IDEA is intended to ensure the provision of FAPE to students, and teaching practices or the activities of educators that are abusive, neglectful or discriminatory have no pedagogical purpose, and are therefore outside the scope of the IDEA.

**II. As Abuse, Neglect and Discrimination are a Complete Departure from the IDEA's Accepted Professional Practice and Standards, the Exhaustion Requirement Does Not Apply to Appellants' Claims.**

To determine if a claim is properly within the scope of the IDEA's administrative regime the court's primary concern is the "source and nature of the alleged injuries" for which the remedy is sought. *Padilla v. Sch. Dist. No. 1 in the City and County of Denver, Colo.*, 233 F.3d 1268, 1274 (10th Cir. 2000). *See also Robb v. Bethel Sch. Dist. No. 403*, 308 F.3d 1047, 1050 (9th Cir. 2002). "[T]he proper inquiry is whether the plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies . . . Where the IDEA's ability to remedy a particular injury is unclear, exhaustion should be required in order to give educational agencies an initial opportunity to

ascertain and alleviate the alleged problem.” *Padilla*, 233 F.3d at 1274.

*See also Kutasi*, 494 F.3d at 1163.

However, “[i]f the plaintiff seeks a remedy for an injury that could not be redressed by the IDEA’s administrative procedures, then the claim falls outside § 1415(l)’s rubric and exhaustion is unnecessary.” *Kutasi*, 494 F.3d at 1168. *See also Blanchard v. Morton Sch. Dist.*, 420 F.3d 918, 921 (9th Cir. 2005) (“We hold that Blanchard had no remedies under the IDEA to exhaust. Blanchard has resolved the educational issues implicated by her son’s disability and has obtained the educational relief available under the IDEA ...”); *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1276 (9th Cir. 1999) (exhaustion not required because only monetary damages were sought and IDEA provides no such remedy).

The activities toward and injuries sustained by these former students cannot be redressed to any degree by the IDEA’s administrative procedures. These former students presented evidence related to claims of “physical, verbal, and psychological abuse and discrimination based on their disabilities suffered by ten developmentally disabled students at the hands of teachers and school administrators in the Clover Park School District No. 400...” Brief of Appellants at 1. The activities directed at these former students, most of whom are nonverbal, include being thrown into lockers and couches, subjected to yelling and verbal attack, being

shoved and pushed, force fed food they were not permitted to eat, and being punished by having their food removed. *Id.* at 3, 8-10. One paraeducator allegedly punished a student for his inability to move his hand by slamming a washing machine lid on his hand. *Id.* at 9. Similarly, another student was allegedly punished for his inability to control involuntary noises *Id.* at 10. Such abusive activities were not in furtherance of their education. *Id.* at 12. Each of these former students is seeking monetary damages for such activities.

Respondents contend that the alleged abuse complained of either is part of the education of the student, necessary disciplinary measures, or other physical contact that was required to assist or move the student as part of the student's educational routine. Brief of Respondents at 26-45. There is no excuse for physical or mental abusive, neglectful or discriminatory activities by educators because they are not pedagogically supported by the IDEA, Washington state law, or nationally recognized educational principles. Not one of the complained abuses was a written part of an IEP, and certainly were not techniques approved by the parents or the entire IEP team. The type of activities and the injuries suffered by these former students are therefore not related to the delivery of FAPE, and are therefore not educationally related. *See* 20 U.S.C. § 1415(b)(6)(A).

The remedy sought by these former students for non-educationally

related abuses—monetary damages—does not involve an adjusted plan for the children’s education; indeed, these students are now former students of the school, aging out of high school. The remedy sought was not to amend, modify or otherwise alter an IEP to eliminate these abusive, neglectful or discriminatory practices, because no revised IEP could accomplish this. There is no additional remedy available under the IDEA, e.g., compensatory services or therapy, to adequately address or compensate for the abuse, neglect and discrimination inflicted upon by these students. The appropriate legal remedy for the harms committed against these children when they were students is monetary compensation, which Courts generally agree are typically not available under the IDEA. *See, e.g., Mountain View-Los Altos Union High Sch. Dist. v. Sharron*, 709 F.2d 28, 30 (9th Cir. 1983); *Witte*, 197 F.3d at 1275; *Sellers v. School Bd.*, 141 F.3d 524, 526-27 (4th Cir. 1998); *Hoekstra v. Indep. Sch. Dist. No. 283*, 103 F.3d 624, 625-26 (8th Cir. 1996); *Crocker v. Tennessee Secondary Sch. Athl. Ass’n*, 980 F.2d 382, 386-87 (6th Cir. 1992).

Schools have an obligation to provide a safe and productive environment for their students. In cases where abuse and discrimination are alleged, exhaustion of administrative remedies should not be required because “[t]he remedies available under the IDEA would not appear to be well suited to addressing past physical injuries adequately; such injuries

typically are remedied through an award of monetary damages.” *Witte*, 197 F.3d at 1276. *See also Blanchard*, 420 F.3d at 921-22 (where money damages for retrospective and non-educational injuries are not available under the IDEA administrative exhaustion is not required). It is not the mere seeking of monetary damages that eliminates the exhaustion requirement under the IDEA—it is the nature and source of the allegations, such as past abuse, that excludes these types of claims from the IDEA’s exhaustion requirement. *See Kutasi*, 494 F.3d at 1168-69. Many courts are in agreement that IDEA exhaustion is unnecessary because the nature and source of the activities and harm was completely separate from any educational purpose. *See Witte*, 197 F.3d at 1273; *McCormick v. Waukegan Sch. Dist.*, 374 F.3d 564, 569 (7th Cir. 2004) (since these injuries were physical, not educational, the court concluded that their remedy fell outside the scope of IDEA, and exhaustion was excused); *Sagan*, 726 F. Supp. 2d at 883 (“the [abuse] claims ... are not directly related to the school’s provision of a FAPE to [the student].”)

The failures in behavior management and self control exhibited by the school district staff in the case at hand are both dangerous and harmful. These horrifying and alarming actions do not comport with either the federal or state laws’ contemplation of appropriate behavior or accepted practices concerning students with disabilities. No justification can be

found for the use of physical force and humiliation such as those exhibited by the staff and suffered by the students in this case.

**III. Courts are Well Equipped to Make Considered Determinations as to Whether a Claim Sounds in Tort, and Requiring Not-Educationally Related Claims to be Adjudicated Through the IDEA Administrative Process is Unduly Burdensome and Inefficient.**

The lower court erred in making the blanket assertion that these former students were obligated to give the administrative education process the extensive amount of time needed to resolve the claims because “that is the way the whole system is designed.” Respondents’ Brief at 9. The IDEA has limits, and claims of abuse, neglect and discrimination that fall outside of those limits because they are not educationally related simply cannot be resolved through the administrative process as it cannot provide an appropriate or effective remedy. It is also improper to assume that the experience of an administrative law judge hearing special education cases makes him or her a better arbiter of whether a tort claim is inside or outside the scope of the IDEA.

As the saying goes, ‘when you are a hammer, everything looks like a nail.’ COPAA’s experience is that administrative hearing officers are less likely to question whether a claim is properly before them when the claim is between a student and school and took place in a school, which is where every other claim before the hearing officers took place. The

question of whether a tort claim involves activities that are educationally related can be adjudicated, in the first instance, by the court system. A district or state court is quite familiar with the myriad of claims commonly before them, and is certainly familiar with tort claims and tort remedies. An administrative hearing officer overseeing IDEA claims has a narrower range of issues it engages in each day and those issues fall within the confines of special education and the IDEA. This results in a level of expertise in special education matters, but much less knowledge about the jurisdiction and business of the larger court system.

Requiring children to go through the administrative review process when nothing sought by the children is compensable through that process, and when a court is perfectly capable of knowing when a claim is a tort or not, is also unnecessary and contrary to the plain language and purpose of the IDEA. Causing unnecessary delay for the resolution of tort claims by imposing a meaningless administrative review process would also be unduly burdensome and inefficient. This is not a result COPAA can support. COPAA has extensive experience in special education proceedings from the IEP and administrative due process stage up through actions brought in federal and state courts in jurisdictions across the nation. This experience has revealed that special education claims are delayed to the point of justice denied by too many delays in a clogged

system. To require administrative exhaustion would further clog that system with the unnecessary and potentially rights-denying step of sending the claims through an undue process in a system that is neither designed to address, nor equipped to correct, them.

### CONCLUSION

This Court should overturn the lower court's decision because administrative exhaustion under the IDEA is not required for tort claims of abuse, neglect and discrimination based on activities that are not educationally related.

Respectfully submitted this 15th day of April, 2011.

COUNCIL OF PARENT  
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