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THE SUPREME COURT OF THE
STATE OF WASHINGTON

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

Appellants,

v.

CLOVER PARK SCHOOL DISTRICT NO. 400,

Respondent.

BRIEF OF AMICUS CURIAE THE
WASHINGTON SCHOOLS RISK MANAGEMENT POOL

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STATE OF WASHINGTON
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Schools Risk Management Pool (“WSRMP”) is a self-funded group with approximately 80 members, comprising Washington public school districts, educational service districts, and inter-local cooperatives that pool their resources to prevent, control, and pay for liability and property risks. WSRMP has an interest in the rights of school districts facing claims arising from their educational services, including the rights of public agencies to predictability and procedural fairness in the conduct of administrative and judicial proceedings.

II. INTRODUCTION AND STATEMENT OF THE CASE

In this case, the Court has been asked to review, as a matter of first impression, the scope and application of the exhaustion requirements of the federal Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400, to Washington tort and statutory claims. An existing, fully developed body of federal case law explicates the application of the exhaustion doctrine to analogous federal causes of action, and WSRMP urges the Court to adopt similar rules to guide the parties here.

The underlying facts on review are set forth in the briefing of the parties, and WSRMP adopts Respondent’s Statement of the Case.

III. ISSUES OF CONCERN TO AMICUS

For the reasons below, WSRMP asks the Court to rule that state law claims are subject to administrative exhaustion under the procedures in RCW ch. 28A.155 and WAC ch. 392-172A where the alleged injury resulted from alleged misconduct in the identification, development, or delivery of special education services to a student by a Washington public school district and where the injury could be remedied to any degree by such procedures.

IV. DISCUSSION

A. Federal Law Requires that a Student Exhaust IDEA's Administrative Remedies Prior to Bringing a Civil Lawsuit Concerning Any Aspect of the Student's Educational Program.

The IDEA provides funding to state and local education agencies to ensure that children with qualifying disabilities have available to them a free, appropriate public education (known as a "FAPE") through the provision of special education and related services. 20 U.S.C. § 1400(d)(1)(A). Generally, the IDEA requires school districts to provide each eligible student with educational services tailored to address his or her unique needs. *Id.* The IDEA is a "comprehensive educational scheme that confers on students with disabilities a substantive right to public education." Kutsai v. Las Virgenes Unified Sch. Dist., 494 F.3d 1162, 1166 (9th Cir. 2007).

Under the IDEA, an eligible disabled student or his parents may request an administrative hearing conducted by the appropriate state educational agency whenever they believe that the student has not received a FAPE for any reason. 20 U.S.C. §§ 1415(b)(6) and (l); RCW 28A.155.090(6); WAC 392-101-010(2); RCW 34.05.410-476. Through the administrative hearing process, students and parents can raise any allegation that a school district has failed to meet the IDEA's procedural or substantive requirements. 20 U.S.C. § 1415(f).¹

Federal law requires that the family first exhaust this administrative hearing remedy prior to bringing education-related claims before the courts. See Robb v. Bethel Sch. Dist., 308 F.3d 1047, 1050 (9th Cir. 2002). In most cases, exhaustion requires the presentation of claims in an IDEA administrative hearing prior to initiating a court action

¹ For example, contentions that a special education student has been harassed at school, that a student's disability-related behaviors have been inappropriately addressed, that a district's facilities do not provide equal access to students with disabilities, and/or that a district's program demeans students with disabilities are each matters that may be appropriately raised in an IDEA administrative hearing where a party alleges that they impacted the student's receipt of a FAPE. See, e.g., M.L. v. Federal Way Sch. Dist., 394 F.3d 634, 650 (9th Cir. 2005) (examining bullying claims under the IDEA); Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist., 375 F.3d 603, 616 (7th Cir. 2004) (upholding under IDEA district's efforts to address disabled student's intensifying behaviors); Payne v. Peninsula Sch. Dist., 598 F.3d 1123, 1127-28 (9th Cir. 2010) (dismissing civil damage claims arising out of use of time-out room with disabled student for failure to first exhaust IDEA remedies); Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 289-90 (5th Cir. 2005) (student's claims that inaccessible school facilities prevented him from receiving a FAPE were properly litigated in IDEA process).

where the central facts involve conduct related to a student's educational program. Id. ("The dispositive question generally is whether the plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies.").

The IDEA's exhaustion requirement has been broadly construed by the federal courts,² which resolve any doubts about the ability of the administrative process to remedy a particular injury in favor of exhaustion. Id. ("Where the IDEA's ability to remedy a particular injury is unclear, exhaustion should be required to give educational agencies an initial opportunity to ascertain and alleviate the alleged problem.") (emphasis added); see also Kutasi, 494 F.3d at 1170 (exhaustion is required even if the IDEA's ability to remedy an injury is unclear). Where both the "genesis and manifestations of the problem are educational; the IDEA offers comprehensive educational solutions" Charlie F. v. Bd. of Educ. of Skokie Sch. Dist., 98 F.3d 989, 993 (7th Cir. 1996).

As in other contexts requiring exhaustion, the IDEA's administrative process is not intended to prevent a disabled student from obtaining judicial review. Indeed, any party aggrieved by the ALJ's final

² The exceptions to exhaustion require a showing of either futility or inadequacy. Hoefl v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992); see also Robb, 308 F.3d at 1050 n. 2 (party alleging futility or inadequacy of IDEA administrative procedures bears the burden of proof).

order may seek judicial review in either state or federal court. 20 U.S.C. § 1415(i)(2). Having exhausted the IDEA's administrative remedies, a party is also free to assert *additional legal claims and request new or different remedies* at that time. See, e.g., S.J. v. Issaquah Sch. Dist., 2007 WL 2703056, *14 (W.D. Wash. 2007) (student brought state and federal constitutional and statutory claims along with appeal of adverse IDEA administrative ruling); Independent Sch. Dist. No. 283 v. S.D., 88 F.3d 556, 562-63 (8th Cir. 1996) (multiple non-IDEA federal and state statutory and tort claims raised in IDEA appeal).

B. A Student Must Also Pursue IDEA Administrative Remedies Before Bringing State Claims Before the Court.

While this Court has not previously ruled on the scope of the IDEA exhaustion requirement as applied to state law claims, the same rules should apply in our state courts as those that govern federal proceedings. It is well established in Washington that a litigant must access an available administrative process before recourse to court. It is beyond dispute that Washington's administrative process for IDEA-related claims is robust and affords eligible disabled students and their families an accessible forum for raising claims concerning a student's education. Washington's strong policy in favor of administrative exhaustion mandates that any doubt be resolved in favor of pursuing this administrative remedy. Each

of these considerations supports requiring administrative exhaustion before judicial review of state law claims concerning a student's special education program, as detailed below.

1. A Washington litigant must exhaust available administrative remedies prior to bringing state claims before the Court.

As a general rule in Washington, exhaustion of administrative remedies is required where "an administrative proceeding can alleviate the harmful consequences of a governmental activity at issue" and "where a claim is originally cognizable by an agency which has clearly defined mechanisms for resolving complaints by aggrieved parties and the administrative remedies can provide the relief sought." Smoke v. City of Seattle, 132 Wn.2d 214, 223-24, 937 P.2d 186 (1997) (citations omitted); see also Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997) ("[t]he court will not intervene and administrative remedies need to be exhausted when the "relief sought ... can be obtained by resort to an exclusive or adequate administrative remedy.") (citations omitted). The available remedies need not provide the exact relief sought or provide a complete remedy in order to require exhaustion. See, e.g., Dioxin/Organochlorine Center v. Dep't of Ecology, 119 Wn.2d 761, 778, 837 P.2d 1007 (1992) (requiring exhaustion of

administrative remedies despite unavailability of injunctive relief sought by plaintiffs).

2. Washington has a comprehensive administrative process for claims related to the provision of special education services that must be accessed prior to resort to the Courts.

There can be no question that students in Washington have an adequate administrative remedy for claims related to the provision of special education services by local school districts. Indeed, the Washington Legislature vested *exclusive* responsibility with the Office of the Superintendent of Public Instruction (“OSPI”) for overseeing the appropriateness of special educational programs for students with disabilities. RCW 28A.155.020 and .090. OSPI has adopted an entire chapter of administrative regulations regarding the rights and entitlements of those students with disabilities who qualify for special education services. See WAC ch. 392-172A.

Pursuant to those regulations, which parallel and implement their rights under the IDEA, parents and students are entitled to file with OSPI an administrative “due process hearing request on any of the matters relating to the identification, evaluation or educational placement, or the provision of a FAPE to a student.” WAC 392-172A-05080. Such administrative complaints can address any issue occurring in a school

setting that is believed to be adversely impacting the education of a student with a disability, including alleged inappropriate accommodations, discriminatory discipline decisions, inappropriate behavioral interventions, peer harassment, and inadequate staff training. See OSPI, *Special Education Due Process Hearing Summaries, 2000-2010*.³

OSPI has delegated its authority to conduct special education due process hearings to the state's Office of Administrative Hearings ("OAH"). See WAC 392-172A-05095. The administrative law judges ("ALJs") assigned to preside over these hearings are charged with conducting hearings and rendering written decisions. Id. The ALJs have legal training, including specialized knowledge of the IDEA and surrounding caselaw. Id. Each party to the hearing has a panoply of procedural rights, including the right to be accompanied and advised by counsel, the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, and the right to receive a written record of the hearing and written findings of fact and a final decision. WAC 392-172A-05100. The ALJ issues a final decision generally within seventy-five days of the hearing request. WAC 392-172A-05110.

³ Available at http://www.k12.wa.us/SpecialEd/DisputeResolution/due_process.aspx

3. Washington's strong policy in favor of exhaustion requires a student to first bring education-related claims through OSPI's administrative review process.

Washington's administrative regulations reflect the IDEA's requirement that a student exhaust this administrative hearing remedy prior to initiating a civil action. See WAC 392-172A-05115 (incorporating IDEA exhaustion language). OSPI has also adopted the Washington Administrative Procedure Act's model rules for the conduct of due process hearings: WAC 392-172A-05100(6). The model rules themselves were promulgated under the APA, which expressly requires exhaustion of "all administrative remedies available within the agency whose action is being challenged," unless the petitioner shows that the administrative remedies are patently inadequate, exhaustion would be futile, or that grave irreparable harm outweighs the public policy requiring administrative exhaustion. WAC 10-08-001; RCW 34.05.534.

To the extent that the exhaustion requirements in the IDEA and the state regulations leave any room to argue about whether administrative exhaustion applies to state law claims in addition to federal causes of action, Washington's clear public policy tips the balance in favor of administrative exhaustion. Washington courts recognize a "strong bias" in favor of requiring parties to exhaust their administrative remedies. Friedman v. Pierce Cty., 112 Wn.2d 68, 78, 768 P.2d 462 (1989). This

bias is particularly strong where, as here, the “issue presented involves technical matters peculiarly within the competence and special skills of an administrative authority.” Sunny Brook Farms v. Omdahl, 42 Wn.2d 788, 793, 259 P.2d 383 (1953); Wash. State Sch. Dir. Assoc. v. Dep’t of Labor and Indus., 82 Wn.2d 367, 381, 510 P.2d 818 (1973) (holding same in context of worker’s compensation rate challenges).

Recognizing the compelling policy favoring exhaustion, Washington courts have required exhaustion even in the absence of an express statutory mandate. *See, e.g., R/L Assoc., Inc. v. City of Seattle*, 61 Wn. App. 670, 674-75, 811 P.2d 971 (1991) (requiring exhaustion of administrative remedies prior to filing of mandamus action despite lack of statutory requirement); Credit General Ins. Co. v. Zewdu, 82 Wn. App. 620, 628 n.2, 919 P.2d 93 (1996) (relying on judicial doctrine to require administrative exhaustion).

As this Court has explained, the exhaustion doctrine is grounded in strong policy rationales, including the need “to (1) insure against premature interruption of the administrative process, (2) allow the agency to develop the necessary factual background on which to base a decision, (3) allow the exercise of agency expertise, (4) provide a more efficient process and allow the agency to correct its own mistake, and (5) insure that individuals are not encouraged to ignore administrative procedures by

resort to the courts.” Friedman, 112 Wn.2d at 78 (internal quotations and citations omitted); see also R/L Assoc., 61 Wn. App. at 675 (recognizing same policy considerations in support of judicial exhaustion doctrine).

“Each of these policy underpinnings to the exhaustion doctrine is significant in and of itself, and, together, they *mandate* observance of the exhaustion requirement absent compelling ground for excuse.” Friedman, 112 Wn.2d at 78 (emphasis added).

Each of these policy grounds counsels in favor of requiring the exhaustion of administrative remedies for state law claims that involve IDEA-related allegations. Here, there is no question that OSPI has the authority to resolve questions related to the adequacy and appropriateness of educational services provided to disabled students; the IDEA and its state counterparts specifically task it with such determinations. OSPI has special competence over these matters that render it better able to resolve such education-related disputes in the first instance. Likewise, OAH has particular expertise in adjudicating special education disputes and has decades of experience developing the appropriate factual record for rendering an appropriate decision on education-related claims. The administrative process is also generally more efficient, streamlined, and faster than the court system and is more accessible to participants, especially those proceeding *pro se*. Moreover, this pervasive regulatory

scheme requires a consistent application best accomplished through administrative proceedings.

Indeed, the Ninth Circuit has recognized nearly identical policy rationales supporting IDEA exhaustion:

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).

Any doubt here should be resolved in favor of exhaustion.

Although not addressed by the parties, the related doctrine of primary jurisdiction would also weigh in favor of referring special education-related claims to the administrative process in the first instance: “When both a court and an agency have jurisdiction over a matter, the doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision.” Vogt v. Seattle-First Nat. Bank, 117 Wn.2d 541, 554, 817 P.2d 1364 (1991). As this Court has explained, “[t]he precise function of the doctrine of primary jurisdiction is to guide a [trial] court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding

before the court.” Dioxin/Organochlorine, 119 Wn.2d at 775 (quoting State v. Tacoma-Pierce Cty. Mult. Listing Serv., 95 Wn.2d 280, 288, 622 P.2d 1190 (1980) (Brachtenbach, J., dissenting)).⁴ Thus, while the exhaustion rule is likely to provide better, more predictable outcomes than the application of the primary jurisdiction doctrine, WSRMP notes that if state trial courts have concurrent jurisdiction over certain of the asserted claims, the courts may refer those matters to the administrative process in the first instance.

C. Artful Pleading Cannot Vitiating Exhaustion Requirements.

In the case before the Court, the Students and their families suggest that a plaintiff can avoid these exhaustion requirements by sanitizing the complaint – either by failing to plead IDEA claims in the first instance or by dismissing such claims from a lawsuit. This tactical pleading cannot govern whether administrative exhaustion is required. To the contrary, the federal cases make clear that such selective pleading will not allow a

⁴ Each factor implicated by the primary jurisdiction doctrine supports the doctrine’s application to matters involving a disabled student’s educational program. These factors include (1) whether the administrative agency has the authority to resolve the issues that would be referred by the court; (2) whether the agency has some special competence over all or part of the controversy which renders it better able to resolve the issue; and (3) whether the claim involves issues that fall within the scope of a “pervasive regulatory scheme” and a danger exists that the judicial action would conflict with that scheme. Id.

plaintiff to evade exhaustion. Robb, 308 F.3d at 1050 (plaintiff cannot avoid exhaustion requirement by artful pleading of education claims).

WSRMP urges the Court to adopt a test similar to the analysis applied by federal courts reviewing the education-related claims brought before them. See, e.g., North Kitsap School District v. K.W., 130 Wn. App. 347, 359 n.3, 123 P.3d 469 (2005) (because of the dearth of relevant Washington case law, court of appeals relies on the federal authority “that consistently and routinely interprets IDEA.”). When considering whether a student is required to exhaust the claims asserted in a complaint, the federal courts look to the “source and nature of the alleged injuries for which [plaintiff] seeks a remedy, not the specific remedy requested.” Robb, 308 F.3d at 1050. It is the *type of injury* alleged, not the legal cause of action or requested relief, that governs this analysis: “The dispositive question generally is whether the plaintiff has alleged injuries that could be redressed to any degree by the IDEA’s administrative procedures and remedies.” Id. (emphasis added); see also Kutasi, 494 F.3d at 1170 (affirming dismissal of Section 1983 and Section 504 claims for failure to exhaust where plaintiffs’ alleged injuries could be redressed to “some degree” by the IDEA’s administrative procedures and remedies); Charlie E., 98 F.3d 989 at 992 (“The statute speaks of available relief, and what relief is “available” does not necessarily depend on what the aggrieved

party wants the theory behind the grievance may activate the IDEA's process, even if the plaintiff wants a form of relief that the IDEA does not supply.").

This flexible standard, which focuses on the actual injury alleged rather than how the legal claim is drafted, prevents a claimant from simply pleading around the exhaustion requirement. This balanced approach reduces the risk of artful pleading while accepting the student's factual allegations. For allegations that truly have no basis in a disabled student's educational program, exhaustion will be irrelevant. But where a student's allegations of misconduct, if true, necessarily impact the disabled student's receipt of a free and appropriate public education,⁵ exhaustion is required regardless of whether the student seeks IDEA remedies or directly alleges IDEA claims in the complaint. This ensures that a specialized ALJ will hear allegations that are inextricably bound and dependent upon a disabled student's educational services.

D. A Rule Allowing Any State Claim To Proceed Without Requiring IDEA Exhaustion Would Set Perverse Incentives with Deleterious Consequences.

The Students before the Court seek a ruling that the IDEA's exhaustion requirements simply do not apply to Washington statutory

⁵ For example, the Students here cannot credibly claim that their allegations, if true, had no impact on their receipt of FAPE.

discrimination claims and common law tort claims. Such a broad holding should not be adopted, as it is contrary to the policy of this state and wholly unnecessary to vindicate disabled students' rights. As discussed above, the doctrine of exhaustion of administrative remedies promotes sound public policy. The doctrine already contains adequate safeguards (in its adequacy, futility, and irreparable harm exceptions), which ensure that individuals are not prejudiced by its application. See e.g., Hoelt, 967 F.2d at 1303 (doctrine inapplicable upon showing of futility or inadequacy); South Hollywood Hills Citizens Ass'n for Preservation of Neighborhood Safety and Environment v. King County, 101 Wn.2d 68, 74, 677 P.2d 114 (1984) (recognizing various bases for excusing exhaustion on grounds of "fairness and practicality", including futility and lack of notice); RCW 34.05.534(3) (APA exceptions).

WSRMP anticipates that other Amicus Curiae before the Court may suggest that the application of the exhaustion doctrine to state tort and statutory claims will effectively bar claims by disabled students. There is no basis for such an assertion. The IDEA's exhaustion requirement has been in place and enforced by the federal courts for over 25 years. Smith v. Robinson, 468 U.S. 992, 1011-12 (1984) (reviewing comprehensive nature of IDEA's predecessor, the Education for All Handicapped Children), overruled by Handicapped Children's Protection Act of 1986,

Pub.L. No. 99-372, § 3, 100 Stat. 796, 797. There is no indication that this requirement has been a bar to federal claimants or prevented the vindication of the rights of disabled students in federal court. Again, exhaustion does not bar disabled students from bringing meritorious claims to trial; it simply requires that they first pursue their administrative remedies.

Similarly, application of the IDEA's exhaustion requirement to state law claims will not increase exhaustion-related litigation over RCW 49.60 claims generally. As noted above and detailed in the other filings before this Court, special education is a highly regulated area and distinguishable from other state or federal civil rights laws. Conforming our state standards to explicitly mirror the federal jurisprudence in the IDEA arena will not promote increased litigation over exhaustion for other Washington civil rights claims or litigants.

WSRMP represents over eighty school districts in Washington state. In 2010 alone, WSRMP districts defended themselves in more than twenty special education due process hearings, as compared to five civil lawsuits involving student claims. In 2010, OAH received at least 58 due process hearing requests.⁶ If claimants are allowed to skip the IDEA's administrative process, it is inevitable that district will expend more public

⁶ See OSPI, *Special Education Due Process Hearing Summaries, 2000-2010*, available at http://www.k12.wa.us/SpecialEd/DisputeResolution/due_process.aspx.

resources in defending litigation, with no evidence that such expenditures will lead to better results for districts or the students they serve.

Moreover, such forum shopping will delay the resolution of underlying educational disputes while the litigation works its way through the judicial system. The faster resolution available through OSPI's hearing process will be frustrated, as will the opportunity that process gives for the parties to mediate their dispute. This is particularly problematic in IDEA cases, since a special education student's education and maturation do not stop to wait for the outcome of litigation. See, e.g., Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396, 1402 (9th Cir. 1994) ("Though the doors to federal courts are always open, the slow and tedious workings of the judicial system make the courthouse a less than ideal forum in which to resolve disputes over a child's education. Ryan's experience offers a poignant reminder that everyone's interests are better served when parents and school officials resolve their differences through cooperation and compromise rather than litigation."). A blanket rejection of the IDEA's exhaustion requirements is likely to promote simultaneous prosecution of state lawsuits and administrative proceedings, leading to duplicative fact-finding and potentially inconsistent determinations.

Conforming Washington's exhaustion rules with the long-standing federal interpretations of the IDEA will not undermine individual student

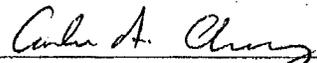
or family rights. The reality is that special education law in Washington is inextricably bound up with the federal IDEA statutory regime, as our state law implements the federal system in exchange for federal funding. And, contrary to the Students' suggestion, exhaustion does not preclude either party from appealing, adding new claims, and/or initiating new action following administrative proceedings. See, e.g., Blanchard v. Morton Sch. Dist., 509 F.3d 934, 921-22 (9th Cir. 2005) (exhaustion satisfied where parent first resolved educational issues related to son's disability); Independent Sch. Dist., 88 F.3d at 562-63. Exhaustion does not bar students from their day in court; it merely requires that they engage in the administrative process before resorting to a lawsuit.

V. CONCLUSION

For all of these reasons, WSRMP urges the Court to adopt the legal analysis advanced in this brief, and resolve the issues accordingly.

Respectfully submitted, this 18th day of April 2011.

K&L GATES LLP

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