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No. 84048-2

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,

vs.

CLOVER PARK SCHOOL DISTRICT, NO. 400,

Respondent.

COMBINED ANSWER TO THE AMICI CURIAE BRIEFS

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A. INTRODUCTION

The amici briefs provided to the Court offer very distinct perspectives on the issues to be decided in this appeal. The amicus curiae brief of the Washington Schools Risk Management Pool (“WSRMP”) offers little to assist the Court because it merely parrots the arguments of the Clover Park School District No. 400 (“District”) and pigeonholes the Students’ claims as routine educational matters when that is patently untrue.¹ The Students’ claims are unrelated to their education and do not require administrative exhaustion under the Individuals with Disabilities Education Act (“IDEA”) because the Students are not seeking to correct deficiencies in their educations. Instead, they are seeking redress for the tortious conduct they suffered at the District’s hands and cognizable under common law tort theories and Washington’s Law Against Discrimination, RCW 49.60 (“WLAD”). Their tort claims do not require administrative exhaustion.

By contrast, the amici briefs of the Washington State Association for Justice Foundation (“WSAJF”), Disability Rights Washington with the Arc of Washington State (“DRW/Arc”), the American Civil Liberties Union with Washington Employment Law Association (“ACLU/WELA”),

¹ By its nature, of course, WSRMP is a self-interested organization more concerned with liability in torts claims and its financial bottom line than with protecting disabled students from abusive teachers and staff.

and Council of Parent Attorneys and Advocates, Inc. (“COPAA”) reinforce the Students’ arguments that this case has nothing to do with the IDEA. The Students’ claims are not educationally-related and the Court should reject the trial court’s overly broad interpretation of IDEA’s administrative exhaustion requirement.

B. ARGUMENT

(1) WSRMP’s Amicus Brief Misstates the Law on IDEA Exhaustion

WSRMP urges the Court to rule that virtually any state law claim is subject to administrative exhaustion where the alleged injury merely touches upon special education services. WSRMP br. at 2. Like the District, WSRMP treats overt abuse and discrimination as somehow arising out of the legitimate educational process and thus requiring exhaustion.² It cannot seriously contend, however, that sexual assaults or physical abuse have an “educational” purpose, for example.

WSRMP’s argument is misplaced because the Students are not seeking to correct deficiencies in their educations. IDEA exhaustion is limited. The Students are not alleging that they were denied an appropriate education or that the harm they suffered at the hands of the District impacted their educations. They dismissed any facet of their

² WSRMP overlooks the traditional summary judgment rule that this Court must treat the facts in a light most favorable to the Students as the non-moving party. *See, e.g., Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 1770 P.2d 182 (1989).

complaint pertaining to education. Instead, the Students contend they were verbally and physically assaulted, harassed, and discriminated against. They suffered personal torts serving *no legitimate educational purpose*. The IDEA has no bearing on such claims and exhaustion is not required.

Like the District, WSRMP labors to frame the Students' tort claims as "educational" in a desperate attempt to retain the IDEA exhaustion requirement here.³ It cites a number of cases with little analysis to argue the Students were required to exhaust their administrative remedies prior to filing their lawsuit. WSRMP br. at 3 n.1. The cases are distinguishable because they are tied to strictly educational issues.

For example, the main focus of *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634 (9th Cir. 2005) was a thoroughly educational assertion; namely that the district's failure to include a regular education teacher on the team that prepared the student's individualized education program ("IEP") rendered the IEP invalid under 20 U.S.C. § 1414(d)(1)(B)(ii). 394 F.3d at 636. The Ninth Circuit concluded the procedural violation resulted in a lost educational opportunity, and denied the student a FAPE because a properly constituted IEP team would likely have given greater

³ WSRMP acknowledges that exhaustion would not be required if a student's allegations had no basis in the student's educational program. WSRMP br. at 15. But it fails to provide the Court with any examples of such a claim.

consideration to mainstreaming and provided the student an IEP with more opportunities in a traditional educational setting. *Id.* at 657.

Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. # 221, 375 F.3d 603 (7th Cir. 2004) likewise dealt exclusively with educational claims. The sole question before the Seventh Circuit was whether the school district unreasonably developed and implemented the student's IEP, thus denying him a free, appropriate public education ("FAPE"). There were no allegations of abuse or discrimination.

Payne v. Peninsula Sch. Dist., 598 F.3d 1123, *rehearing en banc granted*, 621 F.3d 1001 (9th Cir. 2010) concerned the use of a time-out in a "safe room" to manage a special education student's behavioral issues. *Id.* at 1125. The use of that safe room, however, *was incorporated into the child's IEP*. *Id.* The parents' suit concerned the long-term consequences of the time-out procedure. *Id.*⁴

In *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, *cert. denied*, 546 U.S. 933 (5th Cir. 2005), a physically and developmentally disabled student brought claims under the IDEA for failure to make his high school campus accessible to wheelchairs and for deficiencies in his IEPs. After having his claims denied in a due process hearing and separate complaint

⁴ In his dissent, Judge Noonan, viewing the factor in the light most favorable to the plaintiffs, said that locking an autistic child in a dark closet served no legitimate educational purpose. *Payne*, 598 F.3d at 1128-29.

with the Office for Civil Rights of the Department of Education, he filed suit in federal court seeking damages and injunctive relief not only for the violations of the IDEA, but also the Americans with Disabilities Act, § 504 of the Rehabilitation Act (“ADA”), and § 1983. The district court bifurcated the IDEA and non-IDEA claims and affirmed the administrative denial of the IDEA claims. The district court then granted summary judgment, concluding that the factual grounds for the non-IDEA claims were indistinct from the IDEA claims, thereby rendering the non-IDEA claims collaterally estopped. The Fifth Circuit affirmed, finding the accessibility standards the school was required to comply with under the IDEA and the ADA were the same. *Pace*, 403 F.3d at 292-93.

The cases WSRMP cites do not contain claims even remotely resembling the Students’ tort claims in this case. Those cases only address educational matters to which the IDEA attaches. They do not address physical and psychological abuse and outright discrimination like the Students experienced here. The Students were subjected to mistreatment that was not part of an IEP and that served no legitimate educational purpose. The fundamental concept WSRMP fails to grasp is that abuse and discrimination have no place in an appropriate education. CP 2176.

As the Students noted in their briefs, *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271 (9th Cir. 1999), *Blanchard v. Morton Sch. Dist.*, 420

F.3d 918 (9th Cir. 2005), *cert. denied*, 552 U.S. 1231 (2008), and *Meers v. Medley*, 168 S.W.3d 406 (Ky. App. 2004), are dispositive of the issue. Br. of Appellants at 26-33; Reply brief at 13-15. Despite the District's efforts to ignore *Witte* and *Blanchard* and WSRMP's decision to ignore them entirely, both cases are good law in the Ninth Circuit. They are core cases addressing the IDEA exhaustion and their holdings remain the law. *See Payne*, 598 F.3d at 1126; *Kutasi v. Las Virgenes Unified School Dist.*, 494 F.3d 1162, 1168 (9th Cir. 2007). Under *Witte* and *Blanchard*, the Students need not exhaust administrative remedies.

WSRMP next appears to independently argue that the Students' state claims are also subject to exhaustion under state law. WSRMP br. at 6. As WSAJF and DRW/Arc note, no Washington law confers exclusive original jurisdiction on an administrative agency for a WLAD claim, or for common law tort claims. WSAJF br. at 11; DRW/Arc br. at 13-17. The Students and ACLU/WELA agree. Thus, there is no exhaustion requirement for a WLAD claim. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342-44, 103 P.3d 773 (2004). Similarly, no statute or regulation governing special education generally imposes an exhaustion of remedies requirement for state law claims. ACLU/WELA br. at 14, 17. Nor do the IDEA implementing regulations. WSAJF br. at 12. As ACLU/WELA correctly note, WSRMP's argument that the IDEA precludes pursuit of the

Students' WLAD claims until administrative exhaustion occurs has essentially already been rejected by the Ninth Circuit in *Humble v. The Boeing Co.*, 305 F.3d 1004 (9th Cir. 2002). This Court should likewise do so here.

WSRMP also contends the Students have an adequate administrative remedy for their claims.⁵ WSRMP br. at 7, 11. This argument is refuted by Dr. Douglas Gill, Director of Special Education for the Office of Superintendent of Public Instruction ("OSPI") for more than seventeen years. Dr. Gill's testimony also contradicts WSRMP's claim that the IDEA administrative process would provide the Students with an adequate remedy.

While this case was on appeal, the Students filed a citizen's complaint with the OSPI to determine whether the identified acts of physical and verbal abuse were educationally-related and whether such acts were covered by the IDEA. CP 1920, 1922-39, 2026. Dr. Gill concluded that their claims did not address specific violations of the IDEA. CP 2027, 2277-83.

⁵ WSRMP argues that the OSPI's specialized knowledge of the IDEA makes it more suitable to addressing the Students' claims. WSRMP br. at 8. But the OSPI does not have any particular expertise with respect to WLAD and state tort law claims for money damages. These types of claims for relief are simply beyond the OSPI's purview. As DRW/Arc recognize, if the OSPI were not limited to educationally-related claims, then it would become the final arbiter of claims over which it has little or no expertise. DRW/Arc br. at 10.

Following the Students' submission of additional material to the OSPI, Dr. Gill again stated that their complaint did not specify violations of the IDEA. CP 2027, 2285. He provided examples of the types of violations that the OSPI would investigate, including staff qualifications, improper use of behavioral supports or aversive interventions, or failure to provide services as outlined in a student's IEP. CP 2285. Not one example related to the physical and verbal abuse or discrimination alleged in this case. CP 2285.

Dr. Gill was later deposed in a parallel case, *Vernon v. Bethel Sch. Dist.*, Pierce County Cause No. 07-2-05140-1, and specifically asked whether the facts alleged by each individual student in the *Dowler* litigation could be remedied under the IDEA and whether the OSPI had the jurisdiction and authority to address them under the IDEA. CP 2027-28, 2150-2212, 2853-54. He confirmed that the Students' claims of verbal and physical abuse, discrimination, and other WLAD/common law tort claims for damages were not within the OSPI's jurisdiction. CP 2028, 2159-60, 2162, 2173-77, 2185, 2854. When asked to explain why those issues would not come under his authority, Dr. Gill testified: "[those] issues are related to professional practices. Issues of treatment of a student in a school building are not IEP-related issues as I read them." CP 2159. Dr. Gill concluded that the Students' allegations did not

constitute violations of the IDEA and therefore could not be remedied through the OSPI. CP 2176-77, 2854. Indeed, Dr. Gill stated that some of the Students' abuse accusations warranted a call to the police. CP 2053, 2063, 2164, 2166.

WSRMP suggests that "artful" pleading cannot vitiate IDEA exhaustion requirements. WSRMP br. at 13. This argument begs a rhetorical question - if there are no educational claims to be decided in a case, what claims are left to be exhausted? Any educational issues in this case were resolved - they were voluntarily dismissed with prejudice. CP 1358. The District did not appeal that dismissal.⁶ Where a plaintiff voluntarily dismisses certain claims, this Court has limited its analysis to the remaining claims. *See Simonetta v. Viad Corp.*, 165 Wn.2d 341, 346-47 n.2, 197 P.3d 127 (2008). The Students dismissed *all* of their educationally-related claims *years* before the trial court ruled on the District's third and final summary judgment motion. CP 1358. Additionally, the Students have either graduated, or will have graduated in June, 2010 and would thus have no educational claims to bring.

Finally, WSRMP argues, with a fair amount of hyperbole, that allowing any state claim to proceed without requiring IDEA exhaustion

⁶ The effect of a voluntary dismissal of a complaint is to render the proceedings a nullity and leave the parties as if the action had never been brought. *Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 861, 158 P.3d 1271 (2007), *aff'd*, 165 Wn.2d 481, 200 P.3d 683 (2009).

would create perverse incentives with deleterious consequences. WSRMP br. at 15. WSRMP ignores the plain fact that common law tort claims and WLAD claims do not require administrative exhaustion. *See Adler*, 153 Wn.2d at 342-44.

(2) The Amici Curiae Briefs of WSAJF, ACLU/WELA, DRW/Arc and COPAA Support the Students' Position that IDEA Exhaustion Is Not Required⁷

Unlike WSRMP, WSAJF and ACLU/WELA understand that the IDEA applies *only* to federal claims brought pursuant to federal law. WSAJF br. at 7-8; ACLU/WELA br. at 6. The Students agree. The IDEA requires that administrative appeal procedures be exhausted before seeking judicial review under it or other “[f]ederal laws protecting the rights of children with disabilities . . . seeking relief that is also available under this subchapter[.]” 20 U.S.C. § 1415(l). *See also, Christopher S. v. Stanislaus County Office of Educ.*, 384 F.3d 1205 (9th Cir. 2004) (exhaustion of IDEA administrative remedies is a prerequisite to filing any federal claim for relief that is also available under the IDEA). The plain language of this provision only requires exhaustion of remedies before commencing a civil action based upon federal law. While the IDEA requires exhaustion

⁷ These amici curiae briefs provide the Court with an excellent summary of the Students’ specific claims of verbal and physical abuse and discrimination and highlight the non-educational and tortious nature of those claims. The briefs also provide the Court with additional analyses of the scope and purpose of the IDEA.

prior to pursuing *federal* law claims, it says *nothing* about exhaustion of state law claims.

As ACLU/WELA observe, the exclusion of state law claims from the IDEA's express language is presumed to be an intentional choice by Congress based on well-established canons of statutory construction. ACLU/WELA br. at 7. And as WSAJF further explains, the IDEA is predicated on the Spending Clause of the United States Constitution art. I § 8, cl. 1. WSAJF br. at 5, 8. The spending power of Congress is subject to a number of restrictions. *South Dakota v. Dole*, 483 U.S. 203, 207, 107 S. Ct. 2793, 97 L.Ed.2d 171 (1987) (explaining Spending Clause principles). Thus, conditions imposed by Congress on a state's receipt of federal funds must be *unambiguous*. Given this requirement, Congress could not have intended to require exhaustion for state law claims in a provision that references only federal laws. The Students agree with ACLU/WELA and WSAJF that 20 U.S.C. § 1415(*I*) cannot be construed as either expressly or impliedly subjecting state law claims to its exhaustion requirement.

WSAJF and ACLU/WELA expand upon the Students' argument in their opening brief that the IDEA's exhaustion requirement does not apply because they have brought only *state* statutory or common law tort claims pursuant to *state* law. The Students seek redress for the tortious

conduct they experienced at the hands of the District that was cognizable under state common law tort theories and WLAD. CP 4, 14-15, 55, 65-67, 75, 85-87. They did not allege any federal claims. *Id.*; CP 42.

WSAJF notes one issue that both the District and WSRMP fail to address in their briefs. To the extent a federal claim referenced in 1415(*l*) would be cognizable in state court, that court would be required to consider the statute's exhaustion requirement under the Supremacy Clause, U.S. Const. art. VI § 2. *Id.* at 8 n.6. The trial court made no such inquiry here. Whether the IDEA's exhaustion requirement would apply to such federal claims in state court raises the same issues as those raised in this case.

DRW/Arc likewise expand on the Students' argument that if the torts alleged to have occurred here occurred at work or in public, there is little question that they would be actionable. DRW/Arc br. at 5. *See also*, ACLU/WELA br. at 12. Children receiving special education services under the IDEA do not lose access to the courts to pursue civil tort claims simply because the tort occurred on school grounds or in an educational setting. The Students have not forfeited their rights to be free from abuse, neglect and discrimination simply by being disable.

Like the Students here, DRW/Arc recognize that a disabled student may be exposed to situations that could generate a variety of legal claims

against the school district. *Id.* Some of those claims might be cognizable under the IDEA, requiring administrative exhaustion, and some might not. *Id.* DRW/Arc thus understand a critical distinction the District and WSRMP do not; namely, that relief is available under the IDEA only when both the genesis and the manifestations of the student's problem are educational. *See Robb v. Bethel Sch. Dist. # 403*, 308 F.3d 1047, 1052 (9th Cir. 2002). In other words, not every claim or injury is educationally-related and subject to IDEA administrative exhaustion. *See Blanchard v. Morton Sch. Dist.*, 420 F.3d 918, 921 (9th Cir. 2005) (noting the courts have recognized that the IDEA's administrative remedies cannot compensate completely non-educational injuries).

The Students agree with DRW/Arc and COPAA that the determination of whether a student's claims are educational in nature must begin with a claim-by-claim analysis to determine if the injury is educationally-related or non-educationally-related. WSRMP also agrees. WSRMP br. at 14. Although not complicated, this analysis examines more than simply *where* the injury occurred. It also examines *the source and nature* of the injury for which the remedy is sought. *Sagan v. Sumner County Board of Educ.*, 726 F. Supp.2d 868 (M.D. Tenn. 2010); *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1274 (10th Cir. 2000). As DRW/Arc explain, tort claims such as assault, rape, and sexual assault are not

connected to education, irrespective of whether they occur in a school setting. DRW/Arc at 14.

Here, the Students' injuries are not educationally-related simply because they occurred at school. As the Students extensively recount in their briefs, neither their tort claims nor their injuries are the result of alleged deficiencies in their educations. Br. of Appellants at 30-33; Reply br. at 17-19. The Students have alleged among other things that they were raped, thrown into lockers and onto couches, shoved and pushed, force fed foods they were not permitted to eat, prevented from eating, and intentionally injured when they were unable to control involuntary movements or noises. Br. of Appellants at 3, 8-10, 12. This abuse served no legitimate educational purpose and is a substantial departure from acceptable methods of practice, standards, or judgment. COPAA br. at 11.

As COPAA recognizes, not one single IEP authorized the abuses the Students suffered here. *Id.* at 15. The genesis and the manifestations of their problems are non-educational and similar to the problems facing the students in the cases analyzed by DRW/Arc. DRW/Arc br. at 11, 14-15. Administrative exhaustion was not required in those cases and should not be required here.

Moreover, the Students are seeking only an award of damages for pain and suffering and emotional distress. CP 15-19, 67-70, 87-90. As

COPAA correctly notes, these are all touchstones of a traditional tort-like remedy. COPAA br. at 6. The IDEA is not implicated where the Students are not seeking to be identified, evaluated, or properly placed in special education services. *Christopher S.*, 384 F.3d at 1210-11 (disabled students not required to exhaust administrative remedies under the IDEA prior to bringing discrimination lawsuit where their claims had nothing to do with the content of their IEPs). Nor are the students seeking a remedy for the denial of a FAPE. The appropriate remedy for the harms the District committed is monetary damages, which the IDEA cannot provide.⁸ Requiring the Students to go through an administrative review process when nothing they seek is compensable through that process is unnecessary and contrary to the plain language of the IDEA. Moreover, it would also cause unnecessary delay in the resolution of their tort claims and be unduly burdensome and inefficient.

C. CONCLUSION

The amici curiae briefs of WSAJF, DRW/Arc, ACLU/WELA, and COPAA reinforce the Students' arguments that this case has nothing to do with the IDEA. IDEA exhaustion is inapplicable to the Students' state law claims. The Students' claims are not educationally-related, having no

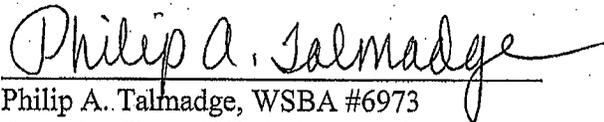
⁸ COPAA makes an important distinction worth noting – it is not the mere seeking of monetary damages that eliminates the IDEA exhaustion requirement. Rather, it is the nature and course of the allegations, such as past abuse, that excludes the Students' claims from the IDEA exhaustion requirement. COPAA br. at 17.

relationship to the Students' IEPs or FAPE. Allegations of abuse and discrimination fall outside general disciplinary and pedagogical practices and are not within the scope of the IDEA.

This Court should reverse and remand the case for trial on the Students' abuse and discrimination claims under the common law and WLAD. Costs, including reasonable attorney fees, should be awarded to the Students.

DATED this 6th day of May, 2011.

Respectfully submitted,



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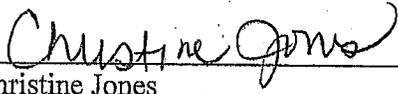
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

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Attached for filing in Supreme Court case number 84048-2, Dowler v. Clover Park School District, is Dowler's Combined Answer to Amici Curiae Briefs.

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