

ORIGINAL

No. 84048-2
(on appeal from Pierce County Superior Court Cause No. 06 2 08565 1)

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.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
10 APR 26 PM 3:43
BY RONALD R. CARPENTER
CLERK

BRIEF OF RESPONDENT

Vandeberg Johnson & Gandara, LLP

William A. Coats, WSBA #4608
H. Andrew Saller, Jr., WSBA #12945
Daniel C. Montopoli, WSBA #26217
Attorneys for Respondent
1201 Pacific Avenue, Suite 1900
P. O. Box 1315
Tacoma, WA 98401-1315
(253) 383-3791

**FILED AS
ATTACHMENT TO EMAIL**

TABLE OF CONTENTS

I. INTRODUCTION1

II. RESTATEMENT OF ISSUES3

III. COUNTERSTATEMENT OF THE CASE.....3

IV. ARGUMENT.....9

A. Standard of Review.....9

B. Special Education Law Requires School Districts To Offer a Free Appropriate Public Education to Special Education Students.....9

1. The Administrative Remedies Available to Special Education Students and Their Parents.....11

2. Exhaustion of Administrative Remedies Is Required When Some of a Plaintiff’s Alleged Injuries Could Be Redressed to any Degree by IDEA, even when Plaintiffs Seek Money Damages for Abuse or Discrimination Claims in State Court.....13

a) Plaintiffs Cannot “Opt Out” of IDEA’s Exhaustion Requirement by Asserting a Claim for Money Damages or by “Waiving” Their Educationally-Related Claims.15

b) If There Are Unresolved Educational Issues, Exhaustion Will Be Required Even When Plaintiffs Allege Discrimination or Abuse, or State Law Claims.18

3. Plaintiffs’ Reliance on *Witte* and *Blanchard* Is Misplaced Because All Educational Issues Had Been Resolved in Those Cases.....20

4. The Administrative Process Can Address Abuse and Discrimination Claims When Those Claims Affect FAPE.21

C.	The Trial Court Correctly Required Exhaustion Because Unresolved Educational Issues Exist That Could Have Been Addressed in Administrative Proceedings.....	25
1.	Plaintiff Nam Su Chong.....	26
	a) Educationally-Related Allegations for Nam Su.....	27
	b) The “Law” Was a Disciplinary Measure Intended To Curtail Nam Su’s Aggression.	27
	c) The Physical Guidance of Nam Su Stems From Attempts at Facilitating his Movement in School.	28
	d) Physical Redirection Is an Established Technique With Special Education Students.....	29
	e) Preventing the Student from Injuring Himself or Others.....	29
	f) Name Calling, If True, Could Be Remedied By the IDEA.	29
	g) The Deposition Testimony Establishes That Nam Su Chong’s Educational Issues Have Not Been Resolved.....	30
2.	Plaintiff Alexias Davis.....	31
3.	Plaintiff Zachary Davis.....	33
4.	Plaintiff Christina (“Tina”) Eschevarria.....	35
5.	Plaintiff Joshua Lumley.....	36
6.	Plaintiff Ralshodd Moye.....	38
7.	Plaintiff Conner Schueneman.....	39
8.	Plaintiff Vance Stevens.....	41
9.	Plaintiff Stephanie Sullivan.....	43
10.	Plaintiff Joshua Vollmer.....	44

D. Plaintiffs' Briefing in the Trial Court Illustrated that Educational Issues Remained Unresolved After Plaintiffs Filed Their Motion to Withdraw Educationally-Related Claims.45

E. Plaintiff's Argument That Exhaustion Would Be Futile Is Without Merit.47

F. The Exhaustion of Administrative Remedies Under State Law Is Well Established in Washington.49

V. CONCLUSION.....50

TABLE OF AUTHORITIES

CASES

<i>Alexopoulos v. San Francisco Unified Sch. Dist.</i> , 817 F.2d 551 (9 th Cir. 1987)	13
<i>Ass'n for Cmty. Living v. Romer</i> , 992 F.2d 1040 (10 th Cir. 1993)	49
<i>Blanchard v. Morton Sch. Dist.</i> , 420 F.3d 918 (9 th Cir. 2005)	21
<i>Cudjoe v. Independent Sch. Dist. No. 12</i> , 297 F.3d 1058 (10 th Cir. 2002).....	19
<i>Diaz-Fonseca v. Puerto Rico</i> , 451 F.3d 13 (1 st Cir. 2006)	19
<i>Doe v. Arizona Dep't of Educ.</i> , 111 F.3d 678 (9 th Cir. 1997)	13
<i>Graff v. Allstate Ins. Co.</i> , 113 Wn. App. 799, 54 P.3d 1266 (2002).....	9
<i>Harrington v. Spokane County</i> , 128 Wn. App. 202, 114 P.3d 1233 (2005).....	49, 50
<i>Hayes v. Unified Sch. Dist. No. 377</i> , 877 F.2d 809 (10 th Cir. 1989).....	20
<i>Hoelt v. Tucson Unified Sch. Dist.</i> , 967 F.2d 1298 (9 th Cir. 1992).....	14
<i>Honig v. Doe</i> , 484 U.S. 305, 108 S. Ct. 595, 98 L. Ed. 686 (1988)	13
<i>Koopman v. Fremont Cty. Sch. Dist. No. 1</i> , 911 P.2d 1049 (Wyo. 1996).....	20
<i>Kutasi v. Las Virgenes Unified Sch. Dist.</i> , 494 F.3d 1162 (9 th Cir. 2007).....	passim
<i>M.C. v. Central Regional Sch. Dist.</i> , 81 F.3d 389 (3 ^d Cir. 1996).....	12
<i>M.L. v. Federal Way Sch. Dist.</i> , 394 F.3d 634 (9 th Cir. 2005)	22
<i>M.T.V. v. DeKalb County Sch. Dist.</i> , 446 F.3d 1153 (11 th Cir. 2006).....	19
<i>Miener v. Missouri</i> , 800 F.2d 749 (8 th Cir. 1986).....	5
<i>Payne v. Peninsula Sch. Dist.</i> , 598 F.3d 1123 (9 th Cir. 2010)	19, 32

<i>Polera v. Board of Educ. of Newburgh Enlarged City Sch. Dist.</i> , 288 F.3d 478 (2nd Cir. 2002)	20
<i>Robb v. Bethel Sch. Dist.</i> , 308 F.3d 1047 (9 th Cir. 2002)	passim
<i>Shields v. Helena Sch. Dist. No. 1</i> , 943 P.2d 999 (Mont. 1997)	20
<i>Smith v. Bates Technical College</i> , 139 Wn.2d 793, 991 P.2d 1135 (2000)	49
<i>Tunstall v. Bergeson</i> , 141 Wn.2d 201, 5 P.3d 691 (2000)	10
<i>Waterman v. Marquette-Alger Intermediate Sch. Dist.</i> , 739 F. Supp. 361 (W.D. Mich. 1990)	20
<i>Weber v. Cranston Sch. Comm.</i> , 212 F.3d 41 (1 st Cir. 2000)	49
<i>Winkelman v. Parma City Sch. Dist.</i> , 550 U.S. 516, 127 S. Ct. 1994, 2001, 167 L. Ed 904 (2007)	11
<i>Witte v. Clark County Sch. Dist.</i> , 197 F.3d 1271 (9 th Cir. 1999)	21

STATUTES

20 U.S.C. § 1401(26)	12, 18
20 U.S.C. § 1401(9)(D)	10
20 U.S.C. § 1412	9
20 U.S.C. § 1412(a)	10
20 U.S.C. § 1412(a)(1)	10
20 U.S.C. § 1414(d)(1)(A)	10
20 U.S.C. § 1414(d)(1)(B)	10
20 U.S.C. § 1415(b)(3)	11
20 U.S.C. § 1415(b)(6)	11
20 U.S.C. § 1415(f)(1)	11
20 U.S.C. § 1415(f)(3)(A)	13
20 U.S.C. § 1415(i)(2)(A)	13
20 U.S.C. § 1415(i)(2)(B)	13
20 U.S.C. § 1415(l)	14
20 U.S.C. §§ 1400-1491	1
RCW 28A.155.010	9, 12
RCW 28A.155.020	12
RCW 28A.155.030	12

REGULATIONS

34 C.F.R. § 104.36..... 11
34 C.F.R. § 300.106..... 12
34 C.F.R. § 300.107(b)..... 12
34 C.F.R. § 300.151..... 12
34 C.F.R. § 300.153..... 12
34 C.F.R. § 300.320(a)(3)(ii)..... 11
34 C.F.R. § 300.34..... 12, 18
34 C.F.R. § 300.530..... 45
WAC 392-172A-01000..... 12
WAC 392-172A-01080..... 10
WAC 392-172A-02000..... 10
WAC 392-172A-03090..... 10, 11
WAC 392-172A-03095..... 10
WAC 392-172A-05010(1)(a)..... 11
WAC 392-172A-05015..... 11
WAC 392-172A-05080..... 11
WAC 392-172A-05090..... 13
WAC 392-172A-05095..... 13
WAC 392-172A-05105..... 13
WAC 392-172A-05115(2)..... 13

RULES

CR 56(c)..... 9

ADMINISTRATIVE DECISIONS

B.D. & D.D., Parents of C.D. v. Puyallup Sch. Dist., OAH Special Education Cause No. 2008-SE-010 (reprinted at CP 2526-84)..... 24
D.V. v. Bethel Sch. Dist., OAH Special Education Cause No. 2008-SE-0086, (reprinted at CP 2661-83)..... 24

I. INTRODUCTION

This case concerns the education of special education students, where the parents of the students alleged deficiencies in the education of their children without exhausting the administrative remedies available to them under state and federal law governing special education. The concept of “special education” is predicated upon the granting of special rights to disabled students to receive a “free appropriate public education.”¹ With these rights, comes the responsibility of exhausting administrative procedures that are designed to ascertain, evaluate, and alleviate the educationally-related complaints of special education students in a timely manner. Parents dissatisfied with any matter relating to the education of their child have the right to request a hearing before an administrative law judge.

The vast majority of courts throughout the United States have required plaintiffs to exhaust their administrative remedies under the Individuals with Disabilities Education Act (IDEA)² prior to filing suit whenever plaintiffs have alleged injuries that could be redressed to any degree by administrative procedures before administrative law judges with expertise in special education. This principal holds true even when plaintiffs have alleged discrimination or abuse.

¹ WAC 392-172A-02000; 20 U.S.C. § 1412(a)(1)(A).

² 20 U.S.C. §§ 1400-1491.

In accordance with these cases, the Honorable Thomas J. Felnagle, Pierce County Superior Court, dismissed Plaintiffs' suit for failure to exhaust their administrative remedies because the suit included numerous educationally-related issues which should be addressed in administrative hearings. There are several reasons why this Court should affirm the trial court's decision.

First, Washington's special education law is identical to and encompasses federal law. Thus, the principles governing exhaustion in federal courts should apply to actions brought in state court. Second, Washington has adopted legislation and regulations specifically intended to comply with IDEA's due process hearing requirements. In so doing, Washington has authorized a state agency, the Office of Superintendent of Public Instruction (OSPI), to develop expertise in the area of special education. Requiring exhaustion allows OSPI to exercise its expertise in an area that may be outside the court's experience. Requiring exhaustion would develop the factual and technical record available to the court, potentially allow OSPI to correct deficiencies in a student's education in a timely fashion, and discourage litigants from ignoring administrative procedures by prematurely resorting to the courts. Most importantly, requiring exhaustion would benefit special education students by encouraging parents to pursue administrative remedies to correct deficiencies in their child's education in a timely fashion.

In addition, Plaintiffs primarily argue that they should be allowed to escape the exhaustion requirement because they withdrew their

educationally-related claims. This Court should reject this argument for two reasons. First, Plaintiff's withdrawal is a tacit acknowledgment that their Complaint presented numerous educationally-related claims. Second, allowing Plaintiffs to avoid exhaustion by simply withdrawing claims would thwart the purpose behind exhaustion and render the requirement meaningless. As the trial court noted, Plaintiffs should not be allowed to wave a "magic wand" to make their educationally-related claims disappear. For these reasons, this Court should affirm the trial court's summary judgment order.

II. RESTATEMENT OF ISSUES

1. Did the trial court correctly dismiss the Complaint for failure to exhaust administrative remedies because the Plaintiffs sought remedies that could be available under the Individuals with Disabilities Education Act without complying with the administrative procedures found in the Act?

2. Did the trial court correctly hold that the Plaintiffs could not avoid the exhaustion requirement by asserting a claim for money damages or by withdrawing their educationally-related claims after the Defendant moved for summary judgment for failure to exhaust administrative remedies?

III. COUNTERSTATEMENT OF THE CASE

On June 13, 2006, Plaintiffs filed their first Complaint. CP 3-19. On July 12, 2006, Plaintiffs amended their complaint to add plaintiffs. CP

23-40. Both complaints alleged that the Clover Park School District (“District”) discriminated against the Plaintiff students because of “their sensory, mental and physical disabilities.” CP 55, 75. The ten Plaintiff students are, in general, severely disabled and in many cases, non-verbal. CP 125-26, 141-42, 167, 170.

The District filed its Answer on August 16, 2006. CP 41-47. Because both complaints contained several allegations that concerned the education received by the Plaintiff students, the Answer asserted the affirmative defense that the Plaintiffs had failed to exhaust their administrative remedies. CP 46.

On May 7, 2007, Plaintiffs filed their Third Amended Complaint to name additional plaintiffs. CP 74-91. Like the prior complaints, the Third Amended Complaint (“Complaint”) made several allegations that concerned the education received by the Plaintiff students, including:

- The “District has implemented a curriculum that objectively demeans developmentally disabled students.” CP 78;
- The District discriminated against the Plaintiffs in “extracurricular activities.” CP 78;
- Developmentally disabled students have been inappropriately disciplined and that the District engaged in “Discriminatory Application of Student Discipline.” CP 78;³
- A teacher stated he was not responsible for teaching anything new to the students. CP 80;
- Teachers failed to work with Plaintiff Vance Stevens and instead gave him “busy work to do.” CP 81;

³ Remarkably, Plaintiffs now argue that “They have made no claim that the abuse they suffered was disciplinary in nature” App. Br. at 31.

- Plaintiff Dobrinski alleged that the District failed to follow her son's Individualized Education Program. CP 82;
- The District ignored the special needs of Plaintiff Vollmer by placing him in a team sport with non-disabled students. CP 83;
- The District failed to pay attention to "the actual instruction given" to Plaintiff students and the students were left without supervision in the classroom. CP 84;
- Para-educators worked only with "easy students" while ignoring "difficult students." CP 84;
- That teachers in the special education department referred to their positions as "glorified babysitting positions" and "Little if any attention was given to the actual instruction of these developmentally disabled children." CP 84, 85;
- Para-educators "were often witnessed during class time searching the internet, reading newspapers." CP 84;
- "Instead of being taught, these children have often been subject to repeatedly watching the same movies over and over again." CP 85.

In addition to seeking money damages, the Complaint sought relief for "loss of educational opportunities," and for "loss of academic, vocational and athletic opportunities," and requested an award of "compensatory education" to offset the losses allegedly caused by the District's conduct. CP 87, 90. (Compensatory education is a remedy available in special education law. *Miener v. Missouri*, 800 F.2d 749 (8th Cir. 1986).)

On October 12, 2007, the District moved for the summary judgment dismissal of all claims for Plaintiffs' failure to exhaust their administrative remedies. CP 92-118. In response, the Plaintiffs moved to

voluntarily withdraw “all claims related to education pursuant to CR 41(1)(a)(B).” CP 270.

In November 2007, the trial court granted the Plaintiffs’ CR 41 motion. CP 1358. The trial court also granted the District’s summary judgment motion to dismiss Plaintiffs’ discrimination claims and all claims by Plaintiffs that related to educational services because Plaintiffs failed to exhaust their administrative remedies. CP 1357-58. At the same time, the court requested additional briefing to determine “if any plaintiff has any claims that are strictly tort claims for physical and/or verbal abuse” that do not involve any aspect of discipline or education. CP 1358.

On December 14, 2007, in response to Plaintiff’s Motion for Reconsideration of the Court’s dismissal of Plaintiffs’ discrimination claim, the court requested that the discrimination claim be addressed similarly to the allegations of abuse. RP, Dec. 14, 2007, at 2:12–3:11. On that date, the court did not rule on Plaintiffs’ motion for reconsideration but instead requested an additional summary judgment motion to determine if any Plaintiff had an abuse or discrimination claim that did not involve any aspect of special education or that could not be remedied through the administrative procedures available for special education students. At the November 16 and December 14, 2007 hearings, the Court stressed that if there were any educational issues, or if there were a mixture of educational issues and abuse or discrimination, then summary judgment dismissal would be granted. RP, Nov. 14, 2007, at 28:24–29:9; RP, Dec. 14, 2007, at 2:20–3:8.

In response to the trial court's request, the District filed another summary judgment motion to address Plaintiffs' specific allegations of abuse and discrimination. CP 1626-72. At the summary judgment hearing, Judge Felnagle noted that the Plaintiffs' withdrawal of their educationally related claims did not excuse them from complying with the exhaustion requirement:

Clearly the law does say that if there are any educational issues to be had, and the second question is if there are educational issues to begin with and clearly there were raised in each of these cases initially educational issues, can you make them go away by saying, "We dismiss them. We get rid of them," and the law seems to say that, no, you cannot use that slight of hand to avoid the administrative process," and it only makes sense that that's the case because that would make the requirement of administrative exhaustion worthless because you could do away with it with the wave of your magic wand, if you will.

RP, Jan. 25, 2008, at p. 34.

Judge Felnagle then granted summary judgment because every Plaintiff had educationally-related issues that required exhaustion:

[E]ach of these cases has not only an initial claim for remedying the inadequate education, but they have about them questions of discipline, of appropriate educational setting, of appropriate educational process, of all aspects of the setting in which these kids are educated, and that is exactly what is anticipated in the IDEA and that is why administrative exhaustion is required first. It's not to say that you can't ultimately get to court. It's just saying you've got to go through the administrative process first, and I think the defense's position is well taken. I'm prepared to grant summary judgment on each of the cases.

RP, January 25, 2008, at p. 35.

On February 8, 2008, the trial court entered an order granting the District's motion to dismiss Plaintiffs' abuse and discrimination claims and denied Plaintiffs' motion to reconsider its prior order. As a result, all claims were dismissed without prejudice for Plaintiffs' failure to exhaust. CP 1895-98.

On June 18, 2008, Plaintiffs filed a CR 60 Motion to Vacate the trial court's judgment entered on February 8, 2008. CP 2008-18. Plaintiffs' motion was based upon the deposition testimony of Douglas Gill, an employee of OSPI, that was taken in another case which did not involve the Clover Park School District. CP 2325-27. Nevertheless, the trial court granted the Plaintiffs' motion to vacate. CP 2431-32.

The trial court granted the motion to vacate because the deposition testimony raised a question as to whether any of Plaintiffs' claims could be addressed through the administrative process. The trial court's order noted that the District could renew its summary judgment motion at a later date. CP 2432.

On October 14, 2009, the District submitted another summary judgment motion to illustrate that the jurisdiction of the administrative law judges and federal court judges presiding over due process hearings includes disability discrimination, harassment, and abuse issues where it is alleged that those matters interfere with a special education student's right to receive a proper education. CP 2816-30. At the December 11, 2009 hearing, the trial court granted the District's motion, stating:

[The Plaintiffs] needed to go and give the education process the first shot at this to resolve what it could. That's the way the whole system is designed. And while I found that there was a concern from Dr. Gill's statements in the companion case, I think those have been resolved to my satisfaction.

RP, Dec. 11, 2009, at 20:15-20.

The Plaintiffs filed their Notice of Appeal on December 29, 2009. CP 3544-50.

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.*, 113 Wn. App. 799, 802, 54 P.3d 1266 (2002). Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

B. Special Education Law Requires School Districts To Offer a Free Appropriate Public Education to Special Education Students.

To understand why the trial court correctly dismissed the Plaintiffs' suit requires a discussion of special education law and the administrative remedies available to parents of special education students.

State and federal law require that school districts offer special education students the opportunity for an appropriate education at public expense. RCW 28A.155.010; 20 U.S.C. § 1412. As this Court has stated:

The IDEA was enacted to address the special educational needs of disabled children. The act's purpose is "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs...." 20 U.S.C. § 1400(c). . . .

Tunstall v. Bergeson, 141 Wn.2d 201, 228, 5 P.3d 691 (2000); *see also Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162 (9th Cir. 2007) (IDEA is a "comprehensive educational scheme that confers on students with disabilities a substantive right to public education.")

To help states meet their educational requirements, the IDEA provides financial assistance. 20 U.S.C. § 1412(a). This financial assistance, however, requires that states establish policies and procedures to assure disabled children the right to a free appropriate public education ("FAPE"). 20 U.S.C. § 1412(a)(1); WAC 392-172A-02000.

To achieve the goal of offering a FAPE to disabled children, the IDEA requires that school districts develop an individualized education program ("IEP") for each child with a disability covered by IDEA. 20 U.S.C. § 1401(9)(D); WAC 392-172A-01080. Along with teachers and school staff, parents serve as members of the team that creates the IEP. 20 U.S.C. § 1414(d)(1)(B); WAC 392-172A-03095. The IEP includes a written statement of the child's present education level, annual goals and short-term instructional objectives for the child, and the specific educational services to be provided. 20 U.S.C. § 1414(d)(1)(A); WAC 392-172A-03090. Regulations also require that parents receive periodic

reports of the child's progress in attaining the goals of the IEP. 34 C.F.R. § 300.320(a)(3)(ii); WAC 392-172A-03090.

1. The Administrative Remedies Available to Special Education Students and Their Parents.

To ensure the appropriateness of the education offered to a special education student, the IDEA establishes a series of procedural protections. For example, a school district must provide written notice to parents before developing or changing an IEP. 20 U.S.C. § 1415(b)(3); WAC 392-172A-05010(1)(a). The IDEA also requires that school districts provide parents of special education students with an annual notice of the procedural safeguards that are available to them. WAC 392-172A-05015; 34 C.F.R. § 104.36.

In addition, a parent has the right "to object to the adequacy of the education provided, the construction of the IEP, or some related matter." *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 127 S. Ct. 1994, 2001, 167 L. Ed 904 (2007). The IDEA states specifically that parents have the right to complain about "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6); WAC 392-172A-05080.

Either individually or on behalf of a disabled child, a parent challenging "any matter" relating to the education of a disabled child has the right to an impartial due process hearing. 20 U.S.C. § 1415(f)(1). At the hearing, the administrative law judge has the authority to order that the

student's IEP be modified. To address the alleged deficiencies in a student's past education, the ALJ could order a wide range of relief, including tutoring, reimbursement for private instruction, extended school year instruction, extracurricular activities, psychological counseling for the student or the parents, and social work services. 34 C.F.R. § 300.106, 20 U.S.C. § 1401(26), 34 C.F.R. §§ 300.34(a) & 34(c), 34 C.F.R. § 300.107(b). While the right to a FAPE terminates when the child reaches age 21, an award of compensatory education may extend beyond that age to make up for any earlier deprivation. *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 395 n.4 & n.5 (3d Cir. 1996).⁴

In addition, Washington has adopted legislation and regulations to implement IDEA and its due process hearing requirement. See RCW 28A.155.010-.160 and WAC 392-172A-01000—07070. The Legislature designated OSPI as the agency with expertise in the area of special education and provided OSPI with the authority to resolve complaints involving the provision of special education and related services. RCW 28A.155.020-.030.

In 2007, three administrative law judges were assigned to hearing special education and OSPI matters exclusively, with another six ALJs assigned special education matters as part of their caseload. CP 1199.

⁴ In addition to due process hearings, federal regulations provide a citizen complaint process for ensuring state and local compliance with the IDEA. 34 C.F.R. §§ 300.151-300.153. However, several courts have held that the citizen complaint process does not satisfy IDEA's exhaustion requirement. See page 49 below.

Federal and state law require that these ALJs be qualified to hear special education matters. 20 U.S.C. § 1415(f)(3)(A); WAC 392-172A-05095. As a result, every ALJ attended a minimum of three and one-half days of training in special education in 2006. CP 1200.

State regulations require that disputes involving special education students be resolved in a timely fashion: The ALJ must render a decision within 45 days after OSPI receives the due process hearing request. WAC 392-172A-05090 & 392-172A-05105. Any party aggrieved by the ALJ's decision has the right to bring a civil action. 20 U.S.C. § 1415(i)(2)(A); WAC 392-172A-05115. The IDEA requires that this action be brought within ninety days. 20 U.S.C. § 1415(i)(2)(B); WAC 392-172A-05115(2).

Thus, the IDEA is designed to assure appropriate education for special education students at the earliest time possible. *Alexopoulos v. San Francisco Unified Sch. Dist.*, 817 F.2d 551, 555-56 (9th Cir. 1987).

2. Exhaustion of Administrative Remedies Is Required When Some of a Plaintiff's Alleged Injuries Could Be Redressed to any Degree by IDEA, even when Plaintiffs Seek Money Damages for Abuse or Discrimination Claims in State Court.

In general, judicial review is available only after plaintiffs exhaust their administrative remedies under the IDEA. *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 678, 680-81 (9th Cir. 1997) ("Judicial review under IDEA is ordinarily available only after the plaintiff exhausts administrative remedies.")

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 available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(D).

The Ninth Circuit explained the rationale behind requiring exhaustion:

The IDEA's exhaustion requirement 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.

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

There are, however, exceptions to the exhaustion requirement. Exhaustion will not be required if doing so would be (1) futile or inadequate; or (2) the agency has adopted a policy or pursued a practice of general applicability that is contrary to law. *Hoelt*, 967 F.2d at 1303-04.

Here, the Plaintiffs have not alleged that an administrative agency has adopted a policy or pursued a practice of general applicability that is

contrary to law. Thus, for exhaustion to be excused, the Plaintiffs must show that requiring exhaustion would be futile or inadequate. *See Kutasi*, 494 F.3d at 1168 (A party “that alleges futility or inadequacy of IDEA administrative procedures bears the burden of proof.”).

Exhaustion, however, will not be futile or inadequate if a plaintiff’s alleged injuries could be redressed to any degree by IDEA, even when it is not clear whether IDEA could provide a remedy:

[I]f the injury could be redressed “to any degree” by the IDEA’s administrative procedures—or if the IDEA’s ability to remedy an injury is unclear—then exhaustion is required.

Kutasi, 494 F.3d at 1168.

a) Plaintiffs Cannot “Opt Out” of IDEA’s Exhaustion Requirement by Asserting a Claim for Money Damages or by “Waiving” Their Educationally-Related Claims.

Like the Plaintiffs here, several plaintiffs in other cases have attempted to avoid the exhaustion requirement by asserting a claim for money damages without relying on special education law. For example, the plaintiff in *Charlie F. v. Board of Educ. of Skokie Sch. Dist. No. 68*, 98 F.3d 989 (7th Cir. 1996) attempted to file a suit seeking money damages alleging state tort claims, disability discrimination, and Constitutional violations, while ignoring special education claims and remedies. *Id.* at 991. The *Charlie F.* court rejected the attempt at circumventing special education law and required exhaustion even though the plaintiff had not mentioned special education law in his complaint. *Id.* at 991, 993.

As the *Charlie F.* court noted, the IDEA “speaks of available relief, and what relief is ‘available’ does not necessarily depend on what the aggrieved party wants.” *Id.* at 991. Rather, it is “the nature of the claim and the governing law [that] determine the relief no matter what the plaintiff demands.” *Charlie F.*, 98 F.3d. at 992.

The *Charlie F.* court stated that it was “unwilling to allow parents to opt out of the IDEA by proclaiming that it does not offer them anything they value.” *Charlie F.*, 98 F.3d. at 993. Because the IDEA could provide relief, the *Charlie F.* court required exhaustion. *Id.*

Similarly, the Ninth Circuit in *Kutasi* stressed that exhaustion will still be required even when the plaintiffs would prefer other relief:

For purposes of exhaustion, “relief that is also available under” the IDEA does not necessarily mean relief that fully satisfies the aggrieved party. Rather, it means “relief suitable to remedy the wrong done the plaintiff, which may not always be relief in the precise form the plaintiff prefers.”

Kutasi, 494 F.3d at 1169 (quoting *Robb v. Bethel Sch. Dist.*, 308 F.3d 1047, 1049 (9th Cir. 2002)).

In *Robb*, the Ninth Circuit held that a plaintiff cannot evade the exhaustion requirement merely by limiting a claim to money damages. In that case, a student's parents filed a 42 U.S.C. § 1983 action on behalf of themselves and their daughter after the student was removed from her classroom and tutored by junior high and high school students. 308 F.3d at 1048. The plaintiffs requested money damages as compensation for “lost educational opportunities” and “emotional distress, humiliation,

embarrassment, and psychological injury." *Id.* Even though an administrative proceeding could not provide relief in the form requested by the plaintiffs, the *Robb* court required exhaustion:

This case is a good example of why parents should not be permitted to opt out of the IDEA simply by making a demand for money or services the IDEA does not provide. The Robbs seek money to compensate them for "lost educational opportunities" and "emotional distress, humiliation, embarrassment, and psychological injury." Why do they want this money? Presumably at least in part to pay for services (such as counseling and tutoring) that will assist their daughter's recovery of self-esteem and promote her progress in school. Damages could be measured by the cost of these services. Yet the school district may be able (indeed, may be obliged) to provide these services *in kind* under the IDEA. The IDEA requires a school district to provide not only education but also "related services," including

such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services ...) as may be required to assist a child with a disability to benefit from special education.

20 U.S.C. § 1401(22). The regulations implementing the statute provide that "psychological services" include "psychological counseling for children and parents." 34 C.F.R. § 300.24(b)(9)(v). This battery of educational, psychological, and counseling services could go a long way to correct past wrongdoing by helping Ms. Robb to heal psychologically and to catch up with her peers academically, if she has not done so already. It would be

inappropriate for a federal court to short-circuit the local school district's administrative process based on the possibility that some residue of the harm Ms. Robb allegedly suffered may not be fully remedied by the services Congress specified in the IDEA. We are not ready to say that money is the only balm.

Id. at 1050 (footnotes omitted).⁵

Because the plaintiffs had alleged injuries that “could be redressed to some degree” by IDEA, the court required exhaustion. *Id.* at 1052-54. As a result, the Ninth Circuit joined with the First, Sixth, Seventh, Tenth and Eleventh Circuits in holding that a plaintiff cannot choose to “opt out” of IDEA’s remedies whenever that plaintiff has alleged injuries that could be redressed by IDEA’s procedures and remedies. *Id.* at 1049.

Thus, the absence of monetary damages does not mean that IDEA cannot provide remedies where torts and discrimination affect a special education student’s ability to obtain the benefits of a public education.

b) If There Are Unresolved Educational Issues, Exhaustion Will Be Required Even When Plaintiffs Allege Discrimination or Abuse, or State Law Claims.

Numerous cases have held a plaintiff’s failure to exhaust administrative remedies under the IDEA requires dismissal of a plaintiff’s discrimination or abuse claim whenever some of a plaintiff’s alleged injuries could be addressed to any degree by administrative procedures. In *Kutasi*, for example, the complaint alleged 18 acts of retaliation and

⁵ The definition of related services now appears at 20 U.S.C. § 1401(26) (previously codified at § 1401(22)). The federal regulations defining related services now appear at 34 C.F.R. § 300.34 (previously § 300.24.)

discrimination. 494 F.3d at 1164-65. In requiring exhaustion, the *Kutasi* court focused on three of the 18 allegations—the failure of the school district to allow the plaintiff student to attend a particular school, inconvenient times for IEP meetings, and the school district’s failure to reimburse the plaintiffs for home therapy. *Id.* at 1169-70. Because these three issues had not been resolved and because all three could be redressed to some degree by IDEA, the Ninth Circuit required exhaustion. *Id.*

Recently, the Ninth Circuit followed *Kutasi* and *Robb* and required exhaustion even though the plaintiffs alleged that the special education student had been inappropriately locked in a safe room as a timeout. *Payne v. Peninsula Sch. Dist.*, 598 F.3d 1123, 1125-26 (9th Cir. 2010). Because the plaintiff asserted educationally-related claims that had not been resolved, the Ninth Circuit affirmed the trial court’s dismissal for failure to exhaust. *Id.* at 1128.

Several other courts have also required exhaustion whenever plaintiffs have alleged educationally-related discrimination or abuse claims. *See, e.g., Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (1st Cir. 2006) (plaintiff may not use the ADA or § 504 of the Rehabilitation Act in an attempt to evade the “remedial structure of the IDEA.”); *Cudjoe v. Independent Sch. Dist. No. 12*, 297 F.3d 1058, 1068 (10th Cir. 2002) (discrimination claim barred by failure to exhaust because the “genesis and manifestation” of the claims were educational); *M.T.V. v. DeKalb County School Dist.*, 446 F.3d 1153 (11th Cir. 2006) (ADA and § 504 claims barred for failure to exhaust); *Polera v. Board of Educ. of*

Newburgh Enlarged City Sch. Dist., 288 F.3d 478 (2nd Cir. 2002) (failure to exhaust bars ADA and § 504 claims); *Charlie F.*, 98 F.3d at 993 (discrimination and state law tort claims based upon abuse by school employees dismissed for failure to exhaust because allegations “have both an educational source and an adverse educational consequence.”); *Hayes v. Unified Sch. Dist. No. 377*, 877 F.2d 809, 812-13 (10th Cir. 1989) (requiring exhaustion because discipline—including use of time-out room—was educationally-related).

Similarly, the exhaustion requirement applies in state court and to state law-based claims. *Shields v. Helena Sch. Dist. No. 1*, 943 P.2d 999 (Mont. 1997) (requiring exhaustion even though plaintiffs advanced state claims without invoking IDEA); *Koopman v. Fremont Cty. Sch. Dist. No. 1*, 911 P.2d 1049 (Wyo. 1996) (same); *Waterman v. Marquette-Alger Intermediate Sch. Dist.*, 739 F. Supp. 361, 363-65 (W.D. Mich. 1990) (requiring exhaustion even though complaint involved “disturbing allegations of excessive and abusive discipline” in violation of federal law and state tort law because discipline covered by IDEA).

Thus, Plaintiffs’ assertion that exhaustion only applies to federal claims is incorrect.

3. Plaintiffs’ Reliance on *Witte* and *Blanchard* Is Misplaced Because All Educational Issues Had Been Resolved in Those Cases.

In requiring exhaustion, the *Kutasi* court distinguished the same two cases relied upon by the Appellants here: *Witte v. Clark County Sch.*

Dist., 197 F.3d 1271 (9th Cir. 1999) and *Blanchard v. Morton Sch. Dist.*, 420 F.3d 918 (9th Cir. 2005). The *Kutasi* court distinguished *Witte* and *Blanchard* primarily because all educational issues in those cases had been resolved prior to the plaintiffs commencing litigation. *Kutasi*, 494 F.3d at 1169.

For example, the parties in *Witte* had resolved all educational issues through the IEP process prior to the plaintiff filing suit. *Witte*, 197 F.3d at 1275. As the *Witte* court stated: “all educational issues already have been resolved to the parties' mutual satisfaction through the [administrative] process.” 197 F.3d at 1275.

Similarly, the plaintiff in *Blanchard* previously had represented her autistic son in several administrative actions that resulted in an order requiring the school district to implement an IEP and provide compensatory education to the student. *Blanchard*, 420 F.3d at 920. Thus, the plaintiff had “resolved the educational issues implicated by her son's disability” while obtaining the relief available under the IDEA. *Id.* at 922.

Here, all educational issues have not been resolved. *See* Section IV.C, below.

4. The Administrative Process Can Address Abuse and Discrimination Claims When Those Claims Affect FAPE.

Plaintiffs argue that OSPI lacks the jurisdiction to address claims of discrimination or abuse. App. Br. at 46. That assertion is incorrect.

If discrimination or abuse interferes with a special education students' receipt of FAPE, a due process hearing can address those issues. See *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634 (9th Cir. 2005). In that case, a special education student's parents alleged that their child, M.L., "was denied a FAPE because [the Federal Way School District] failed to take action to prevent other students from teasing M.L." *Id.*, at 650. The Ninth Circuit Court agreed that teasing could constitute a denial of FAPE:

If a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE.

Id. at 651.

The United States Department of Education (DOE) has also recognized that harassment can result in a denial of FAPE. On July 25, 2000, the United States Office for Civil Rights (OCR), the Office of Special Education and Rehabilitative Services (OSERS) and the DOE jointly issued a memo on what it termed "a vital issue that affects students in school – harassment based on disability." CP 2438. The memo concludes: "Parents may initiate administrative due process procedures under IDEA . . . to address a denial of FAPE, including a denial that results from disability harassment." CP 2439.

Dr. Douglas Gill, Director of Special Education for OSPI, has issued two citizen complaint decisions which expressly applied the DOE memo in recognizing that where disability harassment adversely affects a student's education, it may result in the denial of FAPE. CP 2445-65. In Special

Education Citizen Complaint No. 04-37, one of the issues addressed by Dr. Gill was “whether the District denied the Student a Free Appropriate Public Education (FAPE) due to harassment by another student occurring in June 2004.” CP 2445. The parents alleged that the student experienced verbal and physical harassment by a male student and was singled out for the harassment because she was receiving special education. CP 2449.

In Special Education Citizen Complaint No. 05-63, a special education student’s parents alleged that during her junior year, the District allowed the student to be subjected to harassment due to her disability which prevented her from obtaining a FAPE. CP 2453. Contrary to Plaintiffs’ assertion that the administrative process cannot address allegations of harassment, Dr. Gill did consider that allegation:

As explained in the legal standards, in order for the Parent’s harassment claim to prevail the evidence must show the disability-based harassment occurred that undermined the Student’s ability to receive a FAPE, and that the District did not take proper action to prevent or stop the harassment.

CP 2462. Dr. Gill then discussed the actions taken by the District and concluded, “The record does not contain evidence to support the Parent’s claim that the District failed to respond to disability based harassment against the Student or that the other students’ conduct undermined the Student’s ability to obtain a FAPE.” CP 2462.

Two recent due process hearing decisions show that administrative law judges in Washington can address allegations of discrimination and abuse that are nearly identical to the Plaintiffs’ allegations in this case. *See*

B.D. & D.D., Parents of C.D. v. Puyallup Sch. Dist., OAH Special Education Cause No. 2008-SE-010 (reprinted at CP 2526-84); *D.V. v. Bethel Sch. Dist.*, OAH Special Education Cause No. 2008-SE-0086, (reprinted at CP 2661-83).

The *B.D. & D.D.* decision was preceded by a due process hearing request containing allegations that are remarkably similar to the allegations made in plaintiffs' complaint in this case. CP 2467-2505. Those allegations include specific references to harassment, discrimination and physical and verbal abuse. CP 2470-78.

In the due process hearing, the Puyallup School District moved to dismiss the parents' claims for monetary damages under RCW 49.60 and common law torts. The Administrative Law Judge dismissed the claim for money damages because they are not authorized under IDEA. CP 2519. The Administrative Law Judge also dismissed claims for discrimination under RCW 49.60, but the Administrative Law Judge ruled:

17. However, to the extent any discriminatory behavior at the student's school or in his IEP placement denying him a free, appropriate public education (FAPE), that loss of a free, appropriate education is compensable under the IDEA. The evidence of such FAPE denial, within the two year statutory period, may be presented by the Parents' at hearing. (Emphasis in original)

18. The IDEA does not confer jurisdiction to the Administrative Law Judge to order an injunction against a District to stop discriminatory actions. Therefore, I cannot grant an injunction as requested by the parents. However, as noted above, to the extent that proven discriminatory behavior in *this* student's educational placement has denied

him a FAPE, there is jurisdiction under the IDEA for the administrative law judge to order compensation, of such types as allowed under the IDEA, for the loss of a FAPE.

CP 2520. Plaintiffs extensive discussion of *B.D. & D.D.* at pages 40-42 of their Appellate Brief conveniently ignores the above quote.

After thorough evidentiary hearings, the Administrative Law Judge concluded that she had jurisdiction to consider the issues raised by the parents, including the allegations of harassment. CP 2567. The ALJ also concluded that the parents failed to carry their burden of establishing that the student had been denied FAPE as a result of the District's indifference to harassment or discrimination. CP 2575.

Similarly, in *D.V. v. Bethel School District*, a parent of a special education student filed a due process hearing request that alleged discrimination and abuse by the Bethel School District. CP 2616-43. At the hearing, the ALJ did not find a denial of FAPE based on the alleged harassment, discrimination or abuse. CP 2676-82. The ALJ did find that the District denied the student FAPE by failing to implement certain services necessary for the student to obtain educational benefits from his IEP goals. CP 2682.

C. The Trial Court Correctly Required Exhaustion Because Unresolved Educational Issues Exist That Could Have Been Addressed in Administrative Proceedings.

After the District first moved for summary judgment, the trial court requested additional briefing regarding whether Plaintiffs' abuse and discrimination claims could exist apart from any unresolved educational issues. RP, Dec. 14, 2007, at 2:12-3:11. Later, the trial court invited

additional briefing on whether the administrative process had the authority to address discrimination and abuse claims that affect the education of special education students. CP 2817. Only when the trial court was convinced that the Plaintiffs had advanced educationally-related claims that could have been addressed in the administrative process, did the trial court grant the summary judgment dismissal of Plaintiffs' claims.

The trial court's decision is supported by the educationally-related allegations made by the Plaintiffs, the deposition testimony of the Plaintiffs,⁶ and the briefing submitted by the Plaintiffs in response to the District's summary judgment motion. The following sections discuss the educationally-related claims for each Plaintiff.

1. Plaintiff Nam Su Chong

Plaintiff Nam Su Chong has multiple disabilities, including moderate mental retardation, atypical bipolar disorder, oppositional defiant disorder, pan-hypopituitarism and small body stature, photophobia and nystagmus. He has a significant history of aggressive, very violent

⁶ Plaintiffs attempt to discredit their deposition testimony by claiming that it was in response to "irrelevant questions" posed after the trial court had granted Plaintiffs' CR 41 motion to dismiss their educationally-related claims. App. Br. at 43. This assertion is wrong for two reasons. First, the questions asked by Defense counsel—such as "What is it that you're seeking through this lawsuit?" (CP 153) and "What is it you're seeking for Josh in this lawsuit?" (CP 206)—are very relevant. In addition, these depositions occurred in March and April 2007, months *before* the trial court's order granting the voluntary withdrawal in November 2007. CP 144, 203, 1358. Thus, Plaintiffs' statement that these depositions are irrelevant is without merit.

outbursts, including clawing, punching, kicking, hitting, pulling hair, head banging, slamming doors, and profanity. CP 1576. He directs his violent outbursts towards strangers and people he knows. He also has a history of injuring himself. CP 1577.

a) Educationally-Related Allegations for Nam Su.

Plaintiffs alleged that Nam Su Chong was made to stand against a wall known as “the law” as punishment for grabbing or pinching; that he was pushed, pulled, or had his face grabbed by a teacher and that he was called names by a teacher. CP 79-80.

As discussed in the following section, all of Nam Su’s allegations are subject to exhaustion because they arise in the disciplinary context, are combined with other unresolved issues that could be remedied by IDEA, or could be redressed by remedies offered by IDEA.

b) The “Law” Was a Disciplinary Measure Intended To Curtail Nam Su’s Aggression.

The District experienced numerous problems dealing with Nam Su’s aggression and violence. CP 1577. The District consulted a behavioral specialist who recommended the “class law” concept. CP 1577. The class law was that the students were to keep their hands and feet to themselves and not to hit or otherwise make aggressive contact with anyone else. If students violated this law, then their disciplinary consequence was to stand next to a wall. The wall itself was also referred to as “the law.” Thus, the class law was part of Nam Su’s education program. CP 1577.

Whether the District improperly used discipline is a matter subject to the exhaustion requirement. *See Hayes*, 877 F.2d at 812-13 (requiring exhaustion because discipline was educationally-related); 739 F. Supp. At 363-65 (requiring exhaustion because discipline covered by IDEA).

c) The Physical Guidance of Nam Su Stems From Attempts at Facilitating his Movement in School.

The incidents that Plaintiffs describe as “pushing” concern the teachers’ efforts to have Nam Su move about the classroom or from one classroom to another. It is common to guide special education students by having the teacher or paraeducator place their hands on the students’ shoulders. CP 1577. Nam Su frequently stiffens when that happens and requires some assistance to move him forward. CP 1577. Like many of the plaintiffs, Nam Su also has difficulty standing and a teacher or aide may have to assist him in the process. Whether these efforts at facilitating Nam Su’s movement are appropriate is an issue that could be addressed in his IEP or at an IDEA hearing. CP 1578.

District employees are not the only ones who have experienced difficulty moving Nam Su. Mitch Dowler, Nam Su’s stepfather, testified that he had inadvertently injured Nam Su trying to move him. CP 1680-82. In that incident, Mr. Dowler dragged Nam Su from a room at home in an attempt to stop Nam Su from banging his head. Dragging Nam Su resulted in an abrasion on his back from a rug burn. CP 1681-82.

d) Physical Redirection Is an Established Technique With Special Education Students.

To the untrained eye, a teacher's grabbing of a student's face might appear to be abuse. In special education, however, grabbing a student's face and re-directing their attention is a recognized technique for working with students. CP 1578. Indeed, teachers are taught this technique. CP 1578. Whether this technique is appropriate for Nam Su is an issue best explored in an administrative hearing.

e) Preventing the Student from Injuring Himself or Others.

The Plaintiffs alleged that a teacher often would "slam" Nam Su's hand when he raised his hand. CP 1109. What Plaintiffs fail to mention, however, is that Nam Su has a history of injuring others and himself, including gouging his own eyes. CP 1579. Given this history, a teacher may have to respond quickly to prevent injury and it is customary for the teacher to push the hand away. *Id.* Whether the teacher's reaction is appropriate for Nam Su is an issue that could be addressed in an administrative hearing. *Id.*

f) Name Calling, If True, Could Be Remedied By the IDEA.

The allegations of name calling directed at Nam Su, if true, could conceivably cause Nam Su to suffer emotional distress, humiliation, embarrassment, or psychological injury. Indeed, the Plaintiffs sought relief for "emotional distress" and "humiliation." CP 87.

If Nam Su experienced a form of psychological injury or emotional distress whether as a result of excessive use of force, name-calling or discrimination based on his disability or race, then those injuries could have been addressed in his IEP. CP 1579. They also could have been addressed through the administrative remedies provided through the IDEA. See *Robb*, 308 F.3d at 1050. Because the injuries could be redressed by IDEA, exhaustion is required.

g) The Deposition Testimony Establishes That Nam Su Chong's Educational Issues Have Not Been Resolved.

Mitch Dowler is Nam Su's stepfather. In his deposition, Mr. Dowler objected to parts of Nam Su's IEP. CP 145. Although the Dowlers were not satisfied with their son's education, they did not request any changes in his IEP. CP 145-47. The Dowlers did file a complaint with OSPI in October 2005. They elected, however, not to pursue the issue when OSPI's initial response did not satisfy them. CP 147-48.

In his deposition, Mr. Dowler testified that he wanted additional education to compensate Nam Su for the time he spent in the District:

In fact, Nam Su is owed education all the way from when he started at Clover Park School District around April 2002 clear up until February of 2006. Because everything I see -- evidence points to that inadequate education was being provided there.

CP 149-50.

Mr. Dowler added that he pursued this lawsuit so that Nam Su could get an education:

Q You talked about education for Nam Su. What is it that you're seeking through this lawsuit?

A Number one, Nam Su's gonna get the education he deserves. Yes, he deserves his -- yes, he deserves his education from 2002 all the way up until January 2006. He deserves all of that time to be repeated anew. He deserves that with a one-on-one teacher.

CP 153.

2. Plaintiff Alexias Davis

Alexias Davis has had significant behavioral problems and has been diagnosed as having ADHD, post-traumatic stress disorder and oppositional-defiant disorder. CP 1579. She has been hospitalized for psychiatric conditions several times and has had many violent outbursts. She has been incarcerated at least five times at Remann Hall for assaulting her mother. CP 1579.

The Complaint stated that Alexias Davis was sexually assaulted by students on two occasions, with the first occasion occurring in 1998. CP 83. The Plaintiffs alleged that the District failed to properly supervise Alexias, that employees called her names, and that she was inappropriately disciplined by being "locked in a time out room." CP 83, 1153-55.

The District acknowledges that the sexual abuse of a student, standing by itself and with no nexus to IDEA, would not require exhaustion. The Plaintiffs, however, have not alleged that the District knew or should have known that the perpetrators were likely to abuse anyone. Instead, they alleged that Alexias needed more supervision. CP 83.

Whether Alexias's disability required more supervision is an area governed by IDEA and was addressed by the team establishing her IEP. CP 1579-80. If the District's level of supervision was inappropriate for Alexias, an administrative law judge could order the District to provide increased supervision. CP 1580. If Ms. Davis believed her daughter's supervision to be inadequate, she was obligated to raise this concern in a timely fashion so that Alexias may receive an appropriate education at the earliest time possible.

In addition, the claim that Alexias was inappropriately kept in a time-out room is a disciplinary matter covered by IDEA. Indeed, the allegation is similar to the claim in *Payne*, where the court required exhaustion despite the allegation that the plaintiff student was inappropriately locked in a room. Similarly, the allegation that staff verbally teased Alexias could be redressed, if warranted, by the counseling and other services available in IDEA.

In fact, Alexias received counseling through the District for her underlying psychological condition and for events occurring both inside and outside of the school. CP 1576, 1580. If Alexias and/or her mother believed that the counseling was not adequate or appropriate, there were remedies available to them under IDEA. CP 1580.

The deposition testimony of Kathleen Davis, the mother of Alexias, underscores the educationally-related claims that remained after Plaintiffs filed suit. In her deposition, Ms. Davis complained about her daughter's placement in a Behaviorally Disabled "BD" class:

My poor daughter's missed half of her education. I mean, my God. They wouldn't have placed her in the BD class, she wouldn't have turned out the way she did.

CP 137.

When asked what she wanted for her daughter, Ms. Davis responded: "I would like to see her get the education she deserves."

CP 138.

3. Plaintiff Zachary Davis

Zachary Davis is the older brother of Alexias. He is 19 years old and has cerebral palsy, fetal dilantin syndrome, seizure disorder, asthma and significant cognitive, language and motor delays. CP 1580. Zachary is non-verbal, can follow simple directions and perform simple tasks, but is pre-Kindergarten level in the area of functional academics. He is not able to convey when he needs to use the bathroom, so he wears a diaper and must be changed during the day. CP 1580.

The Plaintiffs alleged that Zachary Davis was prevented from using a computer because he drools, that he came home with unexplained injuries, that he was fed foods that caused diarrhea, that he was pushed and pulled by staff, that he sometimes came home with feces on him, and that he was called names by staff. CP 82-83, 1128-30.

Whether the District improperly kept Zachary from using a computer is an educational issue that is governed by IDEA. Like Nam Su, Zachary has difficulty walking and standing; to facilitate his movement, staff members may have to occasionally push or pull him. CP 1581.

Whether these efforts are appropriate or harmful to Zachary can be addressed in an administrative hearing. *Id.*

Similarly, a student's dietary restrictions can become part of his educational health plan and IEP. CP 1580-81. Any violation of these dietary restrictions that resulted in humiliation or a loss of educational opportunities could be redressed by IDEA. CP 1581. Also, the need to change a student's diaper is frequently addressed in an IEP. CP 1581. Whether Zachary required more frequent diaper changes, or whether he suffered emotional damages from the District's failure to timely change his diaper, are issues that could be addressed in an administrative hearing. CP 1581. In addition, verbal abuse could, if warranted, be remedied by the counseling services available in IDEA.

Furthermore, Zachary's "unexplained injuries" do not create a basis for a tort claim against the District. Even if they did, they are part of a mixture of other claims by Zachary that do involve the IDEA, so exhaustion is required.

In her deposition, Zachary's mother objected to the lack of computer instruction, or keyboarding, in Zachary's IEP. CP 134. Ms. Davis also objected to the education provided in Zachary's IEP:

Q Other than the use of the keyboard, what changes did you want, if any, in Zach's IEP?

A I wanted to see more learning skills. . . . I wanted to see him get an education.

CP 135-36.

Ms. Davis complained that Zachary lost skills because of a lack of curriculum in class. CP 132-33. She also objected to the District changing the school that Zachary attended. CP 129-31. Both of these issues could have been addressed in either the IEP or through the administrative process under the IDEA. CP 1581. Although Ms. Davis objected to Zachary's IEP, she never requested a due process hearing. CP 135.

4. Plaintiff Christina ("Tina") Eschevarria

Tina Eschevarria has a form of cerebral palsy which affects fine and gross motor skills, cognition and causes seizures. She uses a walker and for long distances, a wheelchair. CP 1581. The Plaintiffs alleged that Tina had to wait "hours" to use the bathroom, and that she was "trampled" and "sexually assaulted by other students." CP 85.

Allegations of being trampled or having to wait hours to use the bathroom, if true, might have been prevented by the presence of an aide. CP 1582. An administrative law judge could determine if Tina needs such an aide and whether the District's failure to provide the aide deprived Tina of an appropriate education. Also, teaching special education students to comply with schedules, including bathroom breaks, is part of their education. CP 1578, 1581-82.

Like Alexias Davis, Tina Eschevarria did not allege that the District knew or should have known that the student or students that allegedly sexually assaulted her were dangerous. Instead, Plaintiffs alleged a failure of supervision based on Tina's disabilities. However, Tina's level

of supervision is part of her education and any insufficiency in her supervision can be addressed through IDEA. CP 1582. In fact, Tina's level of supervision was addressed in her IEP. CP 1582. If Plaintiffs believed that her supervision was inadequate, they were obligated to raise their concerns or objections in a timely fashion so that Tina may receive an appropriate education at the earliest time possible.

In her deposition, Tina's mother stated that she wanted her daughter to continue her education after she reaches the age of 21. CP 200-01. An administrative law judge has the authority to award compensatory education that extends beyond the age of 21. As with the other Plaintiffs, Ms. Titchell sought damages for "mental and emotional distress, humiliation, emotional anguish" and "loss of enjoyment of life." CP 87. As discussed above, such damages may be remedied by IDEA.

5. Plaintiff Joshua Lumley

Joshua Lumley is an 18 year old student eligible for special education services for specific learning disabilities in basic reading, reading comprehension, math calculation, applied math, written language, oral expression and listening comprehension. CP 1582. When Josh was 13, he tested at the second and third grade equivalent in most academic areas. In addition, he has had behavioral issues, including several confrontations with other students. CP 1582.

Joshua's confrontations, however, often appear to be initiated or provoked by Joshua. CP 1582. As a result, he has been disciplined,

including suspensions and emergency expulsions. In addition, Joshua pled guilty when criminal charges were brought against him by another student. CP 1582.

In their Second Amended Complaint,⁷ Plaintiffs alleged that Joshua Lumley had been subject to verbal, physical, and mental abuse by staff and that the District failed to protect him from being abused by students. CP 65.

If Joshua's disability made him more likely to provoke confrontations with other students, then Joshua's IEP could have been designed to prevent or limit these hostile interactions either through counseling or the presence of a full-time aide. CP 1583. Similarly, any negative effects from verbal abuse could be remedied by counseling services available under IDEA.

In addition to the above allegations, Plaintiffs alleged that teachers regularly pushed Joshua into lockers and that a paraeducator constantly kicked Joshua during class. CP 1146, 1149-50. Even if these allegations are true, which is extremely unlikely, an ALJ could order counseling and other services to remedy negative effects.

In her deposition, Joshua's mother testified that she was dissatisfied with the District's failure to meet the goals in Joshua's IEP.

⁷ Joshua Lumley's name, the name of his mother and the name of his guardian do not appear in the caption or body of the Third Amended Complaint. CP 74-91. The Lumleys do appear in the Second Amended Complaint. CP 54, 65.

CP 156-57. Ms. Lumley also criticized the IEPs because they lacked sufficient speech therapy and one-on-one assistance:

Q Who was it that wasn't doing anything to help him?

A The special ed teachers.

Q What is it that you wanted them to do?

A I wanted them to more or less improve the -- my son's special ed, so more or less like, you know, do more of the speech therapy, help him one-on-one with the stuff that he needed to be done, which wasn't done right. All the stuff that needed to be done, like his reading, math, they always put him in a higher level that he didn't know. They -- they'd go, Okay, we're gonna move him up a little bit higher. They never improved that. It was never improved.

CP 157-58. Despite these criticisms, Ms. Lumley never sought outside assistance. CP 158.

The level of speech therapy provided to Joshua and claims that he was not put in a proper level for his reading and math classes go to the heart of Joshua's educational program. Indeed, the assigned levels of reading, math and other classes, and the extent of speech therapy services which he received, were addressed in his IEP. CP 1583.

6. Plaintiff Ralshodd Moye

Ralshodd Moye has autism, mental retardation, and a seizure disorder. He is non-verbal and has a history of causing injuries to teachers, staff and others. CP 1583. The Plaintiffs allege that Ralshodd was required to pick up trash and that he was made to "jump around like a monkey" to get candy. CP 84.

For a student as severely disabled as Ralshodd, picking up trash is an important part of his life skills training. CP 1584. Whether this activity

is appropriate for Ralshodd's training and education is an issue governed by IDEA.

In addition, there were times when it was difficult for Ralshodd to follow directions, such as getting on the school bus. CP 1583. His teacher would offer Ralshodd candy as a reward for getting on the bus and for following other directions. *Id.* Using candy or other rewards for following directions is a common part of a special education plan. CP 1583.

Jeanette Moye, Ralshodd's mother, stated in her deposition that she did not attend an IEP meeting while her son was at Lakes High School because the meeting was "useless" and her goals for her son were not being addressed. CP 161. Ms. Moye also testified about her dissatisfaction with Ralshodd's education. CP 162-63.

Despite their dissatisfaction with Ralshodd's education at Lakes High School, and despite having filed a due process request when Ralshodd was in middle school, the Moyes never requested a due process hearing to address the issues in this action from the time Ralshodd attended high school. CP 164.

7. Plaintiff Conner Schueneman

Conner has mild to moderate mental retardation, a seizure disorder, a central nervous system dysfunction that is autistic-like and a surgically-repaired back. He is largely non-verbal and he has been assigned a one-on-one paraeducator who accompanies him throughout the day. When the District moved for summary judgment in 2007, Conner attended Lakes

High School in the Clover Park School District, even though he did not reside in that attendance area. CP 1584.

The Plaintiffs alleged that the District inappropriately used negative treatment and reinforcement to educate Conner; failed to follow his IEP because the pool director refused to let him into the swimming pool; that a teacher yelled at Conner and threatened him with a timeout room; that he was required to pick up items from a floor even though he had spinal fusion surgery in 2005; and that he was pushed and pulled from his chair. CP 83; 1134-35.

Whether negative reinforcement is appropriate for Conner is an educational issue subject to IDEA. Special education students, like general education students, are often subjected to educational techniques that have both positive and negative consequences. CP 1584. The determination of how effective those consequences will be needs to be made by the teacher involved and will vary from student to student. CP 1584. If Conner was damaged by this treatment or by a teacher's yelling, an administrative law judge could order counseling or compensatory education. Whether the District failed to comply with Conner's IEP and whether this alleged failure damaged Conner could also be addressed in an administrative hearing. CP 1585.

Finally, any restrictions on Conner's physical activity can be addressed in Conner's IEP and the failure to abide by these restrictions would be subject to an IDEA administrative hearing. CP 1585. If necessary, the administrative law judge could order counseling or physical

therapy to redress any damage caused by inappropriate activity. *See Robb*, 308 F.3d at 1050.

In her deposition, Conner's mother complained of "a lack of programming" or planning in Conner's IEP. CP 176. She also complained repeatedly about her son's lack of access to a swimming pool. CP 174-75, 177-78. Although dissatisfied with her son's IEP, Ms. Schueneman-Dobrinski did not file a complaint with OSPI before filing suit. CP 179.

8. Plaintiff Vance Stevens

Vance Stevens is non-verbal, autistic, has mental retardation, and seizures. Vance is also obese and has a physical education program as part of his IEP. CP 1585.

The Plaintiffs allege that a teacher disciplined Vance by making him go on walks to the point where Vance had "difficulty breathing due to his obesity"; that the same teacher would frighten Vance by slamming "yard sticks and clip boards" on Vance's desk; that a paraeducator would tease Vance by hiding his markers; and that teachers seldom "worked with" Vance and instead gave him "busy work to do, such as drawing with markers on paper" and that a teacher would throw objects at Vance during class. CP 82, 1140-41.

Because Vance is obese and ambulatory, walking is part of his IEP. CP 1585. Walking not only benefited Vance physically, it also calmed him if he was agitated. CP 1585. Whether walking is an appropriate activity for Vance could be addressed in an administrative

hearing. If Vance's mother objected to this activity, she had an obligation under IDEA to object in a timely fashion so that Vance could have an appropriate education at the earliest time possible.

In addition, getting the attention of a special education student like Vance may pose a challenge for a special education teacher. CP 1585. Sometimes, a teacher might make a noise with a clipboard or yardstick to get the student's attention. CP 1585-86. If that was done to excess or if it was inappropriate because of the particular sensitivities of Vance, then that issue could be addressed in the IEP and also through the administrative process. CP 1586.

Vance also liked to use felt-tip markers and, at times, using those markers was part of the tasks Vance was supposed to be doing. CP 1585. However, taking markers away from him when he was supposed to be doing something else is also part of his education. CP 1585. Similarly, complaints about teachers seldom working with Vance are clearly related to his education and covered by IDEA.

Unlike the other plaintiffs, Melanie Stevens, mother of Vance, did pursue a citizen's complaint with OSPI in 2005. OSPI ordered the District to provide six months of compensatory education, which the District did. CP 183-84. Nevertheless, Ms. Stevens remained extremely dissatisfied with the education Vance received. When asked what she wanted from the District in this lawsuit, Ms. Stevens responded:

I'm seeking that they need to go back and reeducate my son, give him the education that he is due. They didn't teach him anything. They didn't provide the services that they promised to provide. He

was -- he was supposed to have speech language and he never got it. And his teacher was -- that was his specialty. He never got it. He never got any of the things that he was promised in his IEP.

CP 186. Because his educational issues have not been resolved, the Plaintiffs are required to exhaust their administrative remedies.

9. Plaintiff Stephanie Sullivan

Stephanie Sullivan has been diagnosed with a pervasive developmental disorder with autism. She is easily over-stimulated and can become angry and aggressive when she is over-stimulated. She sometimes self-abuses (such as pulling her hair out.) CP 1586.

The Plaintiffs alleged that teachers rarely spoke to Stephanie, that the teachers stated that they did not want to teach her anything new, and that teachers would throw rubber balls at her when she had self-abuse episodes. CP 80-81.

Throwing rubber balls at a self-abusing special education student is an established strategy for stopping the abuse by distracting the self-abuser. CP 1586. Whether this is an appropriate strategy for stopping Stephanie's abuse is most effectively handled in an administrative hearing. And, whether a teacher failed to speak to Stephanie or to teach her anything new are educationally-related issues.

Yolanda Sullivan, Stephanie's mother, testified the District did not meet the goals in Stephanie's IEP:

Q What leads you to say that obviously most of the time Stephanie's goals were not being met?

A Because, like I said, she's had basically the same goals during her entire -- during the entire time she's been in

Clover Park School District, and she still hasn't met most of the things on her IEPs.

CP 195. Ms. Sullivan stated that she is seeking compensatory education from this lawsuit. CP 196-97.

10. Plaintiff Joshua Vollmer

Joshua Vollmer is autistic, bi-polar, has a seizure disorder, and is emotionally/behaviorally disabled. He began receiving special education services as a preschool student in Ohio in the 1992-93 school year. CP 1586-87. He has been hospitalized in psychiatric facilities several times after physically threatening others, primarily his mother and siblings. CP 1587.

The Plaintiffs alleged that the District ignored Joshua's special needs by placing him in a team-sport setting and by allowing a teacher to stand too close to Joshua. As a result, the Plaintiffs alleged that Joshua became violent, resulting in Joshua being suspended from school. CP 83.

Whether the District ignored Josh's special needs and whether the District inappropriately allowed him to participate in team sports are educational issues subject to IDEA. Similarly, whether Joshua's attacking a teacher for invading Josh's personal space is a manifestation of his disability is an IDEA-related issue. CP 1587. A "manifestation determination" is an important discipline procedure under the IDEA that examines the relationship between a student's disability and his or her misconduct. CP 1587. Such an evaluation must be undertaken when a district proposes to take specified serious disciplinary actions. *See* 34

C.F.R. § 300.530. If the District inappropriately punished Joshua, an ALJ could order that the discipline cease and that Joshua's IEP be changed to prevent similar incidents from occurring in the future. CP 1587.

Plaintiff Judith Vollmer, Josh's mother, testified about the District's alleged failure to provide a one-on-one aide for her son. CP 204-5. And she also complained about her son's loss of education:

Q What is it that you're seeking for Josh in this lawsuit?

A Can they give back nine years of my son's education that he was basically not given? That's what I'd like. I would like him to have the education he deserved all those years he was in that school district.

CP 206.

If Joshua's mother was dissatisfied with the District's inability to address Joshua's behavior and the District's failure to provide a one-on-one aide for Joshua, then she had an obligation to raise these concerns in a timely fashion, including pursuing a due process hearing, to ensure that her son has an appropriate education as soon as possible. Because Josh Vollmer's allegations are educationally-related and because not all educational issues have been resolved, exhaustion is required.

D. Plaintiffs' Briefing in the Trial Court Illustrated that Educational Issues Remained Unresolved After Plaintiffs Filed Their Motion to Withdraw Educationally-Related Claims.

After the District filed its summary judgment motion to dismiss for failure to exhaust administrative remedies, the Plaintiffs responded with a

brief that contained numerous educationally-related issues.⁸ For example, Plaintiffs' response—which was filed after Plaintiffs' CR 41 motion to withdraw educationally-related claims (CP 270, 1085)—contained the following educationally-related allegations:

- A teacher was “seldom in class,” would not “challenge students” and had no patience with the students. CP 1103.
- Another teacher would “yell at Vance” and would discipline Vance by making him take a walk. CP 1106.
- A teacher was out of the classroom “most of the time.” CP 1107.
- Plaintiff students were required to perform tasks that were not part of their IEPs. CP 1107-8.
- Plaintiff Nam Su Chong was disciplined inappropriately by being required to stand facing a wall and that the District failed to follow his behavioral assessment. CP 1110, 1112.
- The District failed to devise a plan to prevent Plaintiff Stephanie Sullivan from hurting herself. CP 1142.
- Plaintiff Josh Vollmer claimed that he was forced “to watch the same movie every day.” CP 1144.
- Plaintiff Alexias Davis alleged that she was disciplined by being locked up in a time out room. CP 1153-54.

As these examples demonstrate, educationally-related issues remained even after Plaintiffs filed their CR 41 motion to withdraw them.

⁸ The trial court's December 2009 order granting summary judgment specifically referenced the prior summary judgment motions and all documents associated with those motions. CP 3541.

E. Plaintiff's Argument That Exhaustion Would Be Futile Is Without Merit.

In their brief, Plaintiffs argue that exhaustion would be futile because they withdrew their educationally-related claims, they are seeking only money damages, and OSPI has already "rebuffed" their attempt to obtain relief. App. Br. at 44-5. Appellant's argument is contrary to the law and to the facts of this case.

Regarding money damages, the Ninth Circuit, and the vast majority of courts that have considered this issue, have held that plaintiffs cannot opt out of IDEA's exhaustion requirement by simply claiming money damages or by ignoring their IDEA remedies. *See* Section IV.B.2(a) on page 15 above. As Judge Felnagle correctly concluded, the Plaintiffs cannot wave a "magic wand" and make their educationally-related claims disappear.

Second, OSPI never rebuffed the Plaintiffs. On the contrary, Plaintiffs not only failed to initiate a due process hearing, they also failed to timely file a citizen complaint.

On March 19, 2008, after the court dismissed plaintiffs' complaint, OSPI received a request for citizen complaint by the parents of Nam Su Chong. CP 1922-39. The citizen complaint request made no reference to the alleged failure of the District to provide proper education, referring primarily to Nam Su's teacher pushing him, sticking her foot out as if to trip him and calling him names. In fact, the citizen complaint even denies that Plaintiffs were making educational claims. CP 1924.

Dr. Gill responded on March 24, 2008 by first advising Plaintiffs of the availability of mediation and a due process hearing. CP 1940. Dr. Gill then declined to open a complaint because OSPI lacked enough information to determine if the Plaintiffs had alleged a violation of IDEA. CP 1940. Dr. Gill added:

Our refusal to open your citizen complaint at this time should not be construed as a final decision. **Nor should this letter be construed as precluding or otherwise prejudicing your right to file a citizen complaint, filing a request for due process hearing, or requesting mediation.**

CP 1940 (emphasis added).

Plaintiffs then submitted a second letter, dated April 2, 2008, in which they said there were IDEA violations and they were “asking for the appropriate remedies under IDEA.” CP 1943. The second letter again failed to identify the educational claims and referred primarily to the alleged physical and verbal abuse by Nam Su’s teachers.

Dr. Gill responded to the second letter on April 11, 2008. CP 1959. He again did not say that Plaintiffs have no administrative remedies under IDEA, nor did he say that the allegations do not constitute violations of IDEA. Instead, Dr. Gill stated that the allegations are from 2006 and that “our complaint process is limited to allegations of violations that occurred in the past year.” CP 1959. Dr. Gill then requested Plaintiffs to provide copies of the IEPs in effect from March 19, 2007 to the present. CP 1959.

Plaintiffs, however, did not provide the IEPs or pursue a due process hearing. Dr. Gill’s letters do not, as Plaintiffs contend, show that

administrative remedies were unavailable. They show only that Plaintiffs failed to timely submit their citizen complaint requests. Thus, Plaintiffs incorrectly claim that OSPI rebuffed their attempts at obtaining relief.

Moreover, numerous courts have held that only a due process hearing and not the citizen complaint process half-heartedly pursued by the Plaintiffs will satisfy the exhaustion requirement. (The citizen complaint process is sometimes called the state Complaint Review Procedure or "CRP.") See *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 53 (1st Cir. 2000) ("The case law confirms that state and federal complaint procedures other than the IDEA due process hearing do not suffice for exhaustion purposes. Even the CRP procedures . . . are 'not an adequate alternative to exhausting administrative remedies under IDEA.'"); *Ass'n for Cmty. Living v. Romer*, 992 F.2d 1040, 1045 (10th Cir. 1993) (citizen complaint process is "not an adequate alternative to exhausting administrative remedies under the IDEA.")

F. The Exhaustion of Administrative Remedies Under State Law Is Well Established in Washington.

In addition to the requirements of special education law, the doctrine of exhaustion of administrative remedies is well established in Washington. *Smith v. Bates Technical College*, 139 Wn.2d 793, 808, 991 P.2d 1135 (2000). In general, "A party must exhaust all available administrative remedies before the superior court can grant relief." *Harrington v. Spokane County*, 128 Wn. App. 202, 209, 114 P.3d 1233 (2005) (affirming summary judgment dismissal for failure to exhaust).

As the *Harrington* court explained, the doctrine allows for the exercise of agency expertise, develops the factual and technical record, allows the agency to correct errors, and discourages litigants from ignoring administrative procedures by prematurely resorting to the courts. *Harrington*, 128 Wn. App. at 210.

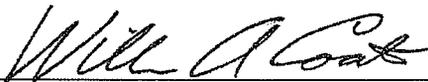
These reasons apply here. An administrative agency, OSPI, and the administrative law judges have the authority and special competence to address issues of special education. Plaintiffs have challenged the special education programs and services provided to Plaintiffs and these challenges are best resolved by initially allowing OSPI and the ALJs to exercise their expertise. Thus, exhaustion of administrative remedies is required.

V. CONCLUSION

For the above reasons, the District requests that this Court affirm the summary judgment dismissal of Plaintiffs' claims.

Respectfully submitted this 26~~th~~ day of April, 2010.

VANDEBERG JOHNSON &
GANDARA, LLP

By 

William A. Coats, WSBA #4608
H. Andrew Saller, Jr., WSBA #12945
Daniel C. Montopoli, WSBA #26217
Attorneys for Respondent