NO. 84048-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellants,

v.

CLOVER PARK SCHOOL DISTRICT NO. 400,

Respondent.

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON AND WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. IDENTITY AND INTEREST OF AMICI CURIAE

The American Civil Liberties Union of Washington ("ACLU") is a nonprofit, nonpartisan organization with over 20,000 members statewide that is dedicated to constitutional principles of liberty and equality. The ACLU has long been committed to the defense and preservation of civil liberties, including the right to be free from unlawful discrimination, whether the discrimination harms disabled public school students or others. The ACLU has submitted amicus briefs and engaged in direct representation in numerous cases involving the rights of students. *See, e.g., York v. Wahkiakum School District*, 163 Wn.2d 297, 178 P.3d 995 (2008).

The Washington Employment Lawyers Association (WELA) has approximately 130 members who are admitted to practice law in the State of Washington. WELA is a chapter of the National Employment Lawyers Association. WELA's members primarily represent employees in employment discrimination law matters, particularly in cases alleging a violation of the Washington Law Against Discrimination (WLAD). WELA has a strong interest in preserving the complementary enforcement of both state and federal civil rights statutes without the necessity of exhaustion of administrative remedies under the WLAD. WELA has

appeared in numerous cases before this Court involving the interpretation of the WLAD.

II. ISSUES ADDRESSED BY AMICUS

Whether plaintiffs were required under any law, state or federal, to exhaust administrative remedies before proceeding in court with their state WLAD claims?

III. STATEMENT OF THE CASE

The parents and guardians of ten developmentally disabled students enrolled in special education programs in the Clover Park School District ("District") filed suit in 2006 against the District in Pierce County Superior Court. The suit alleged that the students had been subjected to discriminatory treatment by District staff members on a daily basis for an indefinite period of time. CP 1-19, 54-71, 74-91. Plaintiffs' suit included a claim that the District employees' conduct violated the Washington Law Against Discrimination (WLAD, RCW 49.60). *Id*. Plaintiffs sought retrospective monetary damages and not changes in their Individual Education Plans (IEPs). CP 87.

The plaintiffs' allegations supporting their state law discrimination claims included complaints of physical and verbal abuse, as well as other serious forms of harassment. CP 74-91; Op. Br. of Appellants at 7-11. On

several occasions, Mr. Barnes, a teacher employed by the District, forced plaintiffs to clean up after non-disabled students in the cafeteria while he referred to them as "slaves." CP 79. Mr. Barnes also required disabled students to pick up garbage on the school's campus, regardless of their physical capacity to endure the work. *Id*. Students were forced to handle dangerous and unsanitary items, including used condoms, broken glass, and food leftovers. *Id*.

The students also endured endless verbal abuse from District employees, including derogatory commentary and jokes, name-calling, and nonstop mocking. CP 79-85. Nam Su, the developmentally disabled son of plaintiffs Mitch and In Cha Dowler, was called "nasty ass," "little devil," "devil child," and "demon" by District teachers and staff members. *Id*. Other disabled students also received insulting nicknames from employees of the defendant, such as "Shamu," "stinky boy," "brat," "drama queen," "asshole," "son of a bitch," "bastard," and "bucktooth." *Id*. Staff members were overheard mocking students' abilities and physical characteristics both directly to the plaintiffs and amongst themselves. *Id*. One para-educator was overheard saying that plaintiff Stephanie Sullivan, who was repeatedly referred to as a "monster" by District employees, had "more hair on her chest than [she] has on her legs." *Id*.

One teacher was overheard saying that her position was "nothing more than a glorified babysitting position because the students [were] too stupid to learn and incapable of doing anything other than playing or sleeping." CP 84-85. Moreover, employees' inattention permitted non-disabled students to take advantage of the disabled students, and these allegations included instances of repeated sexual assault, physical abuse, and threats of violence. *Id*.

Finally, plaintiffs' suit alleged that they had been subjected to ongoing physical abuse by District employees. *Id*. Nam Su repeatedly returned home from school with unexplained bruises and injuries, and witnesses had observed teachers pushing him from behind to move faster. *Id*. Witnesses also observed District employees frightening students by unexpectedly placing bags over their heads or slamming their desks with yard sticks and clip boards. *Id*.

At one point in the proceedings, the trial court judge, Honorable Thomas Felnagle, granted dismissal without prejudice, ruling that the plaintiffs could not proceed with their WLAD and other claims because they had failed to exhaust their administrative remedies under IDEA and other federal claims. Op. Br. of Appellants at 11-18. Plaintiffs then voluntarily dismissed all of their education-related complaints. *Id*. They also attempted to exhaust administrative remedies through the Office of

the Superintendent of Public Instruction (OSPI), but OSPI ruled the plaintiffs' claims did not involve violations of IDEA and OSPI had no jurisdiction to address their discrimination and tort claims. *Id*. Based on this, Judge Felnagle reinstated plaintiffs' suit. *Id*. However in December 2009, the court granted the District's summary judgment motion and dismissed the suit for failure to exhaust administrative remedies. CP 3539-43.

Although the judge found no preemption problem, he believed the exhaustion of remedies problem was insurmountable, explaining:

> I believe it's truly an exhaustion of remedies analysis rather than a preemption argument. [T]he reason things are futile now is because the right process wasn't followed.

RP(12/11/09) 19-21. However, in making his ruling, Judge Felnagle acknowledged the harmful effect his ruling would have on the plaintiffs: "[i]s this really a fair process, a reasonable access to justice, when the procedures are so unclear, the forum that you are supposed to go to is so lacking in direction and clarity." RP(12/11/09) 8-9. Plaintiffs appealed the summary judgment ruling and this Court has granted direct review.

IV. ARGUMENT

A. NEITHER THE IDEA NOR ANY OTHER FEDERAL LAW REQUIRED PLAINTIFFS TO EXHAUST ADMINISTRATIVE REMEDIES BEFORE PURSUING THEIR WLAD CLAIMS.

Plaintiffs have never pursued a federal law claim in this case, and instead have consistently based their state court suit on the state WLAD and state tort law claims. The trial court nevertheless granted summary judgment to the defendant District on the grounds that the federal Individuals with Disabilities Education Act (IDEA) compelled the exhaustion of administrative remedies before plaintiffs' state law claims could be pursued in state court. There are several reasons why this ruling was incorrect and should be reversed.

First, the trial court's ruling conflicts with the plain language of the relevant section of the IDEA, 20 U.S.C. § 1415(l). That statute requires exhaustion prior to pursuing other **federal** law claims, but says nothing about any exhaustion requirement for **state** law claims. 20 U.S.C. § 1415(1) states:

> 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.A. § 12101et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 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) of this

> section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

It is a well established canon of statutory construction that a statute's expression of one thing implies exclusion of others, and this exclusion is presumed to be deliberate (*expressio unius est exclusio alterius*). *State v. Delgado,* 148 Wn.2d 723, 729, 63 P.3d 792 (2003). The exclusion of state law claims from IDEA's express language is therefore presumed to be an intentional choice by Congress.

Secondly, there is no federal preemption bar to plaintiffs proceeding with their WLAD claims in state court. Federal courts recognize two kinds of preemption: field and conflict preemption. "Field preemption arises when state law 'regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.' [citation omitted.]" *Pacific Merchant Shipping Ass'n v. Goldstene,* ___ F.3d ___, 2011 WL 1108201 (9th Cir. 2011). Preemption may be stated expressly in a federal statute, or implied, but to find implied preemption a strict test must be met:

> We will find implicit preemption where the intent of Congress is clearly manifested, or implicit from a pervasive scheme of federal regulation that **leaves no room for state and local supplementation**, or implicit from the fact that the federal law touches a field (e.g. foreign affairs) in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' [citation omitted; emphasis added.]

Id. at *8.

The strict test for when a federal law impliedly preempts a state law is not met here. There is no basis for concluding the federal law in issue (IDEA) was intended to "leave no room for state supplementation" by the WLAD, since 20 U.S.C. § 1415(1) only states that administrative exhaustion is required before other **federal** claims are pursued. When the predecessor to the IDEA was enacted by Congress in 1975, Congress was well aware that many states like Washington provided their own protections against discrimination. *See*, 20 U.S.C. § 1400; RCW 49.60.010. Congress's failure to mention state law claims in § 1415(1) must be construed as a choice to approve them as complementary alternative remedies with no prior exhaustion requirement. [1] "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Wyeth v. Levine*, 555 U.S. 555, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009).

[1] This Court's recent decision is *Veit ex rel. Nelson v. Burlington Northern Santa Fe Corp*., ___ Wn.2d ___, ___ P.3d ___, 2011 WL 666283 (2011) is easily distinguishable since the federal law there explicitly discussed when state law regulation was permitted.

The federal courts recognize that there is a "well-established presumption or assumption against preemption …." *Pacific Merchant Shipping, supra*; *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) ("Consideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not to be superseded by ... Federal Act, unless that is the clear and manifest purpose of Congress.") In this case, for the reasons stated above, the defendant District cannot overcome that presumption.

Both the presumption against preemption and the strict requirements for finding preemption have led the federal courts to conclude that other federal laws do not impliedly preempt WLAD. *Humble v. Boeing Co*., 305 F.3d 1004 (9th Cir. 2002) (plaintiff's WLAD claims not preempted by federal law on collective bargaining agreements).[2] In *Humble* as in the case at bar, the trial court erroneously ruled that any potential overlap between the plaintiff's claims and the subject matter of the federal law meant that the federal law procedures had to be followed before the plaintiff could pursue her WLAD claims in court. The *Humble* Court, 305 F.3d at 1007, recognized that the federal

[2] It has always been clear that WLAD is not preempted by federal civil rights laws like Title VII, since Title VII expressly provides for continued co-existence of state civil rights laws. 42 U.S.C. §§ 2000e-7 and 2000h-4; *Shaw v. Delta Air Lines, Inc*., 463 U.S. 85, 103 n. 24, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983).

law there was "not designed to trump substantive and mandatory state law regulation of the employee-employer relationship; [footnote omitted] § 301 has not become a 'mighty oak' that might supply cover to employers from all substantive aspects of state law." The District's argument, claiming the IDEA precludes pursuit of the WLAD claims until administrative exhaustion occurs, is essentially the same preemption argument rejected in *Humble*. It should likewise be rejected here.

Similarly, there is no conflict preemption in this case. The federal courts state that conflict preemption occurs "where it is impossible for a private party to comply with both state and federal requirements," or "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990).

Neither part of the conflict preemption test is met here. For a long time, the state and federal governments have both had a hand in matters involving special education students (*see, e.g.*, RCW 28A.155.010 et seq.), and in matters involving protection from discrimination. Compliance with state discrimination laws does not make it impossible for a school district to comply with the IDEA. The state WLAD does not stand as an obstacle to fulfilling Congress's purposes under the IDEA, because state

laws regarding discrimination in schools and the IDEA are a "cooperative" scheme, not a conflicting one. *Cf., Ameriquest Mortg. Co. v. Washington State Office of Atty. Gen.*, 170 Wn.2d 418, 439-40, 241 P.3d 1245 (2010) (state Public Records Act and federal law do not conflict, so preemption claim rejected). Those matters that can be addressed in a student's individual education plan may be handled under the IDEA's procedures. But that does not stop a state discrimination suit for damages from proceeding.

This Court also has consistently rejected federal preemption claims and instead has upheld plaintiffs' ability to seek a remedy based on state law in state court, particularly when the federal law in issue lacks such a remedy. *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 233 P.3d 861 (2010). In *McCurry*, the Court rejected a bank's claim that state contract and consumer protection laws were preempted by federal regulation of loan fees. The federal regulatory scheme did not provide a remedy for the claims raised by plaintiffs, and allowing the state law claim (challenging the legality of fax and other fees) to proceed would have only an "incidental effect" on federal loan operations, thus the state law claims were not preempted. [3]

[3] The holding in *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342-44, 103 P.3d 773 (2004) is entirely distinguishable. In that case an employee's contract stated that all employment disputes would be first submitted to arbitration, and federal precedent

The same reasoning applies in this case. The damages remedy plaintiffs sought was not available through the federal IDEA nor through any state administrative process. On the other hand, the WLAD and tort claims in state court do provide for damages, which are a traditional remedy for plaintiffs subjected to discriminatory conduct, including verbal abuse. *See, e.g., Robel v. Roundup Corp*., 148 Wn.2d 35, 52, 59 P.3d 611 (2002) (verbal abuse of disabled employee supports WLAD hostile environment and outrage claims; noting that "added impetus" is given to an outrage claim "[w]hen one in a position of authority, actual or apparent, over another has allegedly made racial slurs and jokes and comments.")

Absurd results would occur if the District's reasoning were accepted. A group of ten African-American students not in special education classes who suffered the same kind of verbal abuse as is alleged here would be free to file a WLAD claim in state court with no exhaustion requirement. But the District claims each similarly situated special education student would have to first pursue the IDEA's administrative exhaustion requirement. Yet that would serve no valid purpose, since the remedies being sought are not available in the IDEA process (especially, as is the case here, where the students have already graduated). Adjustments in a special education student's education program are

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had clearly held that the federal law requiring enforcement of the arbitration clause preempted the plaintiff's WLAD claims.

simply inadequate remedies for abuse that violates their civil rights. And requiring each student to use the IDEA process risks producing ten different results. Nor does the District's desire to rely on the federal IDEA in defending against the WLAD claims establish preemption; the plaintiff retains the choice to pursue the independent remedies of the WLAD. *Humble v. Boeing Co.*, *supra*; *accord, Bruce v. Northwest Metal Products Co.*, 79 Wn.App. 505, 903 P.2d 506 (1995). There is a very real danger that if plaintiffs here are deprived of this choice, they will be precluded from any remedy at all.

The trial court correctly ruled that there was no preemption problem here, but failed to see that the same problems were inherent in the District's administrative exhaustion arguments. For this reason, the summary judgment ruling should be reversed.

B. THE WLAD HAS NO ADMINISTRATIVE EXHAUSTION REQUIREMENT.

Since, as explained above, there is no federal law impediment to plaintiffs' WLAD claims, this Court should allow those claims to proceed in the trial court, and it should also reaffirm that there is no administrative exhaustion requirement under the WLAD.

The Washington Law Against Discrimination (WLAD, RCW 49.60) prohibits discrimination on the basis of various characteristics,

including disability. RCW 49.60.010. As noted above, the state used its historic police power in enacting the WLAD; it "is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights." *Id*. Consistent with the WLAD's broad remedial purposes, nowhere does it require that a plaintiff first pursue administrative remedies before proceeding to court.

This starkly contrasts with federal equal employment provisions under Title VII which specify the detailed administrative exhaustion steps that must be taken through the EEOC before a federal employment discrimination claim may be filed in court. 42 U.S.C. § 2000e-5(f)(1):

> (f) Civil action by … person aggrieved …
>
> (1)…. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and **within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge** (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. …

(emphasis added.)

Similarly, the WLAD's language lacking an explicit administrative exhaustion requirement contrasts with the very explicit exhaustion requirement of the federal IDEA, 20 U.S.C. § 1415(l), which states:

> that **before the filing of a civil action** under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section **shall be exhausted** to the same extent as would be required had the action been brought under this subchapter. (emphasis added.)[4]

Other portions of the WLAD confirm the lack of any administrative exhaustion requirement. RCW 49.60.230(a) states that "[a]ny person claiming to be aggrieved by an alleged unfair practice **may** … file with the commission a complaint …. " (emphasis added). The use of the term "may" clearly establishes that WLAD provides an **option** of administrative relief through the Human Rights Commission but there is no mandate that a plaintiff first exhaust this option of administrative relief before proceeding in court. *State ex rel. Blume v. Yelle*, 52 Wn.2d 158,

[4] The language of other states' discrimination statutes that have been interpreted as requiring exhaustion of administrative remedies prior to instituting a civil action are clearly different than the WLAD. For example, the Colorado Anti-discrimination Act expressly states that "[n]o person may file a civil action in a district court in this state based on an alleged discriminatory or unfair practice . . . without first exhausting the proceedings and remedies available to him." C.R.S. § 24-34-306(14). Likewise, Nevada's anti-discrimination statute states that "[i]f the Nevada Equal Rights Commission does not conclude that an unfair employment practice within the scope of N.R.S. 613.310 to 613.435, inclusive, has occurred, any person alleging such a practice may apply to the district court for an order granting or restoring to that person the rights to which the person is entitled under those sections." N.R.S. 613.420.

324 P.2d 247 (1958) (term "may" in a statute is normally permissive not mandatory).

Furthermore, the intent of the legislature regarding the lack of any administrative exhaustion requirement under WLAD is confirmed by its legislative history. In the 1973 session of the legislature, House Bill 404 was introduced, which amended both RCW 49.60.030 and RCW 49.60.020. These amendments provided explicitly for a plaintiff to bring a civil action in court under the WLAD and at the same time removed a forced election of remedies between a civil cause of action and administrative remedies. A subsection (2) was added to RCW 49.60.030, to provide that "[a]ny person deeming himself or herself injured by any act in violation of this chapter **shall have a civil action in a court** of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person . . . or any other appropriate remedy . . . " RCW 49.60.030(2) (emphasis added). In addition, the bill removed from RCW 49.60.020 a clause stating "the election of such a remedy shall preclude him from pursuing [those administrative remedies] created by this act."

These amendments demonstrate a legislative intent to give WLAD plaintiffs a choice of remedies, by providing for concurrent jurisdiction for civil court and the Commission. This conclusion necessarily follows from

reading the 1973 changes in RCW 49.60.030 and RCW 49.60.020 together. There is no indication whatsoever that an administrative exhaustion requirement was ever approved by the Legislature.

The rules of statutory interpretation require that "where statutory language is plain and unambiguous, a statute's meaning should be derived from the wording of the statute itself." *Human Rights Comm'n v. Cheney Sch. Dist*., 97 Wn.2d 118, 121, 641 P.2d 163 (1982). The court's primary role in interpreting statutes is to determine the intent of the legislature and give effect to it. *Id*. This Court has recognized that in light of the broad remedial purposes and protection for election of remedies in RCW 49.60.020, it must "view with caution any construction that would narrow the coverage of the law." *Marquis v. City of Spokane*, 130 Wn.2d 97, 108, 922 P.2d 43 (1996).

Consistent with these principles, and based on the lack of any language in the WLAD supporting an exhaustion requirement, Washington courts have repeatedly rejected an administrative exhaustion prerequisite to filing WLAD claims in court. *See, e.g., Cheney Sch. Dist*., *supra* (holding that a person seeking pain and suffering damages should seek relief through a WLAD civil court action rather than using the Commission's administrative process); *Mutual of Enumclaw v. Human Rights Commission*, 39 Wn.App. 213, 216, 692 P.2d 882 (1984) (holding

that "[t]he superior court and the Human Rights Commission have concurrent jurisdiction to enforce the law against discrimination."); *Morales v. Westinghouse Hanford Co.*, 73 Wn.App. 367, 371-72, 869 P.2d 120 (1994) (holding that WLAD does not require exhaustion of remedies in a collective bargaining agreement before filing suit in civil court because the WLAD claim is an "independent" remedy). Literature discussing WLAD confirms this interpretation: "[u]nlike Title VII claims, a plaintiff is not required to file any administrative charge before initiating suit under Washington's Law Against Discrimination." David C. Bratz & Amanda A. Owen, Discrimination and Harassment Claims Against Maritime Employers: Preparing for and Facing down the Inevitable, 15 U.S.F. Mar. L.J. 111, 134 (2002-2003).

Finally, an interpretation of the statute excluding the exhaustion requirement is consistent with WLAD's provisions limiting the role of the Human Rights Commission. The Commission's purpose, as codified in RCW 49.60.010, is not primarily related to the compensation of individuals. Rather, it was designed to eliminate and prevent discrimination. RCW 49.60.010. Requiring that a WLAD claimant exhaust administrative remedies through the Commission before seeking damages in court would overwhelm the Commission's very limited staff and budget. For this reason, the Commission's own regulations recognize

that it is not a required or preferred forum for WLAD claims. WAC 162-08-061(2) provides in part: "[t]he commission was not designed to compete with the courts as a forum for the vindication of private rights; its task is to work for the public good of eliminating and preventing discrimination. If the commission were obligated to dispose of every contention then its resources would be diverted from this central task." WAC 162-08-061(2). WAC 162-08-061 and -062 recognize that WLAD "preserves the right of a complainant or aggrieved person to simultaneously pursue other available civil or criminal remedies for an alleged violation of the law in addition to, or in lieu of, filing an administrative complaint of discrimination with the commission.")

If defendant's arguments insisting on IDEA exhaustion prior to plaintiffs' pursuit of WLAD claims were to succeed, it would directly contradict the broad remedial purposes of the WLAD. RCW 49.60.020; *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 521, 844 P.2d 389 (1993) (holding Legislature's purpose in enacting the WLAD, to eliminate discrimination, demands liberal interpretation). Because affirmance of the trial court's ruling here would have that effect, and because it lacks any legal support in the language of the WLAD, this Court should reverse.

IV. CONCLUSION

For the reasons set forth herein, Amici respectfully request that the trial court's granting of defendant's summary judgment motion be reversed.

Respectfully submitted this 18th day of April, 2011.

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