CIVIL TRACK I
THE HONORABLE JUDGE DIXON

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

T.I., et al.,

Plaintiffs,

v.

HAROLD DELIA, et al.,

Defendants.

NO. 90-2-16125-1

DEFENDANT SEATTLE SCHOOL DISTRICT'S REPLY BRIEF

I. INTRODUCTION

Plaintiffs' Opposition Brief is a smokescreen intended to cloud the fundamental issues addressed in the School District's Motion to Dismiss. Although plaintiffs' attorneys provide an interesting critique of what they, as attorneys, perceive to be inadequacies with the special education program in the detention school, conspicuously absent is any class representative alleging that he or she has been injured by any School District practice or policy. While plaintiffs' attorneys casually toss aside the absence of a representative as a "spurious procedural hurdle," it remains elementary that without an actual person who has (or ever had) an actual

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personal complaint about the School District's special education program, this lawsuit simply cannot continue.

II. ARGUMENT

A. NEITHER B.I. NOR S.K. HAVE STANDING TO SUE THE SCHOOL DISTRICT

As the Plaintiffs' Opposition Brief makes painfully obvious, neither of the named class representatives have standing to represent the class in this lawsuit. Plaintiffs concede that S.K. has no standing. Plaintiffs' Memorandum In Opposition to School District's Motion to Dismiss ("Plaintiffs' Memo") at 15. This leaves B.I. as the only possible representative. As to B.I., plaintiffs argue that he has standing because:

> (1) he was eligible for special education services in detention, and
>
> (2) he was subject to the Interim IEP process (or some predecessor process) and lack of resources to which all special education eligible students in detention are subjected . . . .

Id. Yet, the plaintiffs failed to submit any declaration from B.I. alleging that he was eligible for special education services or, more significantly, that he was ever subjected to the interim IEP process. Plaintiffs' attorneys' speculative suggestion that B.I. may have been subject to "some predecessor process" (which unknown process apparently may have created some case or controversy) is simply not

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sufficient to satisfy standing requirements. In fact, as pointed out in the School District's initial memorandum, the only statement the School District has received from B.I. contains absolutely no complaints regarding the special education services he received at the detention school.

Perhaps the reason this crucial information is missing is because plaintiffs' attorneys never thought to ask B.I. about his special education experiences.[1] As is evident from their answers to interrogatories regarding B.I., plaintiffs' attorneys know very little about him. They know nothing regarding his education, employment, or whether he has made any statements regarding his claims in this lawsuit. See B.I.'s Answers to Third Party Defendant's Interrogatories.[2] In response to a question regarding B.I.'s specific claims in this lawsuit, plaintiffs' attorneys made this general statement:

> Youth eligible for special education services who are incarcerated at DYS are not afforded individualized appropriate and legally required education and related services. Adequate

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[1]This is not to suggest, of course, that plaintiffs' attorneys somehow erred. It is only to reiterate the basic point that this lawsuit was not the one plaintiffs' attorneys or B.I. were concerned about when B.I. became the class representative.

[2]These interrogatories are appended as Exhibit A to the State of Washington's Motion to Compel Answers to Interrogatories.

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> special education resources do not exist at DYS to pursue those goals and objectives in existing IEP's which can be furthered in a correctional setting. OSPI fails to adequately fund and monitor the educational program at DYS.

Id., No. 12. Although plaintiffs' attorneys provide no specific information regarding B.I.'s claims, they state that their expert can provide further details. Id. However, unless their expert has been somehow deprived of a special education program at the detention school, these details are meaningless.

Since neither B.I. nor S.K. have standing, plaintiffs argue that this procedural hurdle is irrelevant because the School District conceded standing long ago. However, as plaintiffs themselves admit, the School District conceded standing only as to those claims alleging that it does not commit adequate resources to serving school age youth. This concession is understandable given that the School District is not the party responsible for allocating these resources. However, the School District expressly refused to concede certification with respect to claims that "youth are not adequately assessed and educated for reasons other than limited resources." See Plaintiffs' Memo at 14 n.7.

Furthermore, even if the School District had made such a concession, it is immaterial. A party cannot waive subject

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matter jurisdiction.[3] Briggs v. Anderson, 796 F.2d 1009, 1017 n.2 (8th Cir. 1986) (stipulation as to class certification "did not affect the court's continuing duty to scrutinize class representation"); Janakes v. United States Postal Service, 768 F.2d 1091, 1095 (9th Cir. 1985) ("the parties cannot by stipulation or waiver grant or deny . . . subject matter jurisdiction").

Plaintiffs also attempt to avoid the standing requirement by arguing that standing is unnecessary when the complaint alleges systemic practices. The case relied upon by plaintiffs, WEA v. Shelton School Dist., 93 Wn.2d 783, 790-91, 613 P.2d 769 (1980), is inapposite, however. WEA involved both a plaintiff and a defendant class. The issue was whether the plaintiffs had to have a claim against each and every defendant in the defendant class for the case to proceed. The court held that plaintiffs who bring a defendant class action and allege systemic discrimination need not have a claim against each and every defendant in the class. The WEA Court did not hold, as the plaintiffs urge this Court to hold, that

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[3]The plaintiffs also contend that the Court cannot readdress the certification issue without a change in circumstance or new facts. But here there have never been any facts before the Court regarding B.I. or S.K.'s special education claims.

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the case could proceed even though the individual plaintiffs had no claim against any defendant.

Finally, the plaintiffs argue that the standing problem is capable of repetition, yet evading review. This argument is entirely without merit. Here, B.I. and S.K. do not lack standing because they may no longer be detained at the facility. Rather, B.I. and S.K. lack standing because they do not now (and did not while they were at the facility) claim any injury as a result of the special education program in the detention school. The only way this can be considered "repetitive" is if the plaintiffs keep choosing class representatives who have absolutely no claim against the School District.[4]

B. PLAINTIFFS HAVE PRESENTED NO FACTS JUSTIFYING WAIVER OF THE EXHAUSTION REQUIREMENT

Plaintiffs also urge this Court to excuse exhaustion because:

(1) plaintiffs' attorneys speculate that neither B.I.'s nor S.K.'s parents received notice regarding an interim IEP;

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[4]As stated in the School District's opening brief, where class representatives lack standing, dismissal is the proper remedy. See Motion and Memorandum In Support of Motion to Dismiss at 14 n.7. Plaintiffs plea to the contrary is unsupported by the case law.

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(2) plaintiffs' attorneys believe that because of possible time constraints it would have been difficult for B.I. or S.K. to exhaust; and

(3) plaintiffs' attorneys claim the problems with special education in the detention school are systemic.

But speculation by a party's attorney is an insufficient basis for excusing exhaustion. Rather, plaintiffs must produce specific evidence supporting each of their arguments before the Court can hold that exhaustion is not required. See Christopher v. Portsmouth School Committee, 877 F.2d 1089, 1095 (1st Cir. 1989).

1. Plaintiffs Have Presented No Evidence that the School District Failed to Give B.I.'s or S.K.'s Parents Notice of an Interim IEP

Plaintiffs' attorneys speculate that B.I. and S.K. could not exhaust because they were not given notice of an interim IEP. Yet neither B.I. nor S.K. have made such an allegation.[5] The only evidence plaintiffs have regarding the alleged failure to notify is the mischaracterized testimony of Cindy Nash, a special education teacher at the detention school. Plaintiffs' attorneys assume that B.I. and/or S.K. received an interim IEP because Ms. Nash said in her deposition that she

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[5]As plaintiffs apparently agree, where a party does not allege that he was unaware of his procedural rights or prejudiced by a lack of notice, a failure to notify does not excuse exhaustion. Hoeft v. Tucson Unified School Dist., 967 F.2d 1298, 1302 (9th Cir. 1992); Plaintiffs' Memo at 9.

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currently writes interim IEP's for students eligible for special education. However, plaintiffs' attorney did not ask Ms. Nash if she wrote interim IEPs when B.I. and/or S.K. were detained at the facility nor did he ask her specifically whether she wrote an interim IEP for either B.I. and/or S.K.

Plaintiffs also rely on Ms. Nash's testimony to prove that the School District failed to send a notice to B.I.'s and/or S.K.'s parents prior to developing the interim IEP. Again, plaintiffs misrepresent Ms. Nash's testimony. Ms. Nash never said that she has discontinued sending notices to parents. Rather, she said:

> What I'm doing at the moment is I have the change of placement form, but I have crossed out a bunch of stuff and made some changes so that parents are not distressed. So I am sending--we're in the process of changing this parent change of placement form. So for a little while I didn't send it. Now I've crossed some things out, written some things in, and so I am sending it again.

See Phillips Decl., Ex. D, Nash Dep. 46:17-24 (emphasis added).

Not only is plaintiffs' evidence regarding failure to notify insufficient, but there is no case law supporting plaintiffs' proposition that a possible failure to notify justifies a failure to exhaust. The Doe case cited by plaintiffs in support of their argument is distinguishable.

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In Doe By Gonzeles v. Maher, 793 F.2d 1470 (9th Cir. 1987), there was an actual plaintiff with evidence of the school district's failure to notify. There, the student's grandparents alleged that the school district did not notify them that it was reducing their grandson's program. Here, neither B.I.'s nor S.K.'s parents have come forward to make a similar allegation. Consequently, the plaintiffs' argument that the failure to notify gives rise to a justifiable failure to exhaust must fail.

Even if plaintiffs had presented evidence that the School District had failed to give B.I.'s or S.K.'s parents notice, however, this still does not excuse exhaustion. Both B.I. and S.K. had retained attorneys long before the special education claim became the focus of this lawsuit. In fact, the attorneys became intensely involved in this case before either B.I. or S.K. were named as parties. See Complaint for Injunctive and Declaratory Relief filed August 10, 1990. Plaintiffs' attorneys first filed this lawsuit on August 10, 1990. Id. Neither B.I. nor S.K. were named as plaintiffs until November 16, 1990. See Second Amended Complaint for Injunctive Relief and Damages. Consequently, any assertion by B.I. or S.K. that they had no knowledge regarding the appropriate administrative procedures is unpersuasive.

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Christopher W. v. Portsmouth School Committee, 877 F.2d 1089, 1097 (1st Cir. 1989) ("Since Christopher W. had retained an attorney early on in this controversy, . . . we find lacking in persuasiveness any assertion of ignorance as to appropriate procedures to be followed."); Hoeft, 967 F.2d at 1305.

2. Plaintiffs Have Presented No Evidence Establishing that Exhausting Their Administrative Remedies Would Have Been Futile or Inadequate

Plaintiffs argue that exhaustion is not required because administrative remedies would be either inadequate or futile. Plaintiffs, however, have presented no facts to support their argument. Plaintiffs' attorneys simply speculate that neither B.I. nor S.K. could have been in the facility long enough to invoke the administrative process. This statement is made without any factual support regarding how long B.I. or S.K. actually were detained in the facility. Additionally, plaintiffs' arguments are unsupported by any case law. In the absence of facts regarding how long the plaintiffs stayed at the facility and case law establishing that length of stay is a proper reason to excuse exhaustion, this Court should not waive the exhaustion requirement.

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3. The Final Exhaustion Exception Comes With A Heavy Burden That Plaintiffs Cannot Satisfy

Plaintiffs finally argue that the Court should excuse exhaustion because their claims concern systemic problems with the special education program provided to students in the detention facility. As described in the School District's opening brief, plaintiffs carry a heavy burden when they seek to justify a failure to exhaust because of alleged systemic inadequacies. First, the alleged systemic inadequacies must involve "pure questions of law." Hoeft, 967 F.2d at 1305. Id. Next, the plaintiffs must establish that the agency's interest in resolving the alleged inadequacies is insubstantial. Id. at 1307. Plaintiffs have not met their heavy burden.

Plaintiffs allege the following systemic inadequacies:

> [a]ll [students] are subject to IEP modifications based on limited resources in the facility; and all students are deprived of an appropriate education to which they are entitled under Washington law.

Plaintiffs' Memo at 12. As is readily apparent, these complaints do not involve pure questions of law. Rather, the determination regarding whether students are deprived of an appropriate education and whether the IEPs are modified because of the facility's limited resources are questions of fact that are "best resolved with the benefit of agency

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expertise and a fully developed administrative record." Hoeft, 967 F.2d at 1305. Indeed, the question of whether IEPs are modified "based on limited resources" does not make out any claim against the School District for an additional reason: the State is obligated to fund the program.

Even if plaintiffs' claims involved pure questions of law, however, this Court cannot excuse the plaintiffs' failure to exhaust. Where, as here, plaintiffs challenge local school policies, the State has a significant interest in investigating and correcting any inadequacies. See id. at 1303, 1307; see also Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (education is "primarily the responsibility of parents, teachers and local school officials"); Magruder v. Bellingham Sch. Bd., 19 Wn. App. 628, 630, 576 P.2d 1340 (1978) ("[S]chool administrators and not courts should first administer school pogroms."). Given the State's substantial interest in resolving this dispute, the Court should hold that exhaustion of administrative remedies is required.

C. TO THE EXTENT PLAINTIFFS ALLEGE RESOURCES ARE INADEQUATE, THEIR CLAIMS AGAINST THE SCHOOL DISTRICT MUST BE DISMISSED

Plaintiffs' contention that the School District mischaracterized plaintiffs' claims as exclusively concerning

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resources was itself a mischaracterization. The School District only moved to dismiss those claims regarding inadequate funding. In any event, if the School District miscomprehends the nature of the plaintiffs' claims, it is understandable because even the plaintiffs seem confused. On page thirteen of their Opposition Brief, plaintiffs state that their claim is that

> [t]he School District has failed to provide adequate special educational services with its existing funding, and to the extent that special education services are inadequate because of shortfalls in funding, OSPI should be held accountable.

However, on page fifteen, plaintiffs state that their special education claim "addresses solely the adequacy of resources to provide minimum special education services to handicapped students in detention." (Emphasis added.)

Whatever way plaintiffs' evolving and dynamic claim is characterized, Plaintiffs apparently agree that the School District is not responsible for any inadequacies resulting from insufficient funding. Therefore, to the extent plaintiffs' claims involve funding issues, the School District reiterates its request that the Court so rule.

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III. CONCLUSION

For the foregoing reasons, the Seattle School District respectfully requests the Court to grant its Motion to Dismiss plaintiffs' claims against them in their entirety.

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