IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NANCY VERNON, Individually as Guardian ad Litem for D.V., Appellant, v. BETHEL SCHOOL DISTRICT, a Municipal Corporation, Respondent.	No. 41510-1-II UNPUBLISHED OPINION

Hunt, J. — On behalf of her minor child, DV,[1] Nancy Vernon appeals the superior court's summary judgment dismissal of her common law tort and Washington Law Against Discrimination (WLAD)[2] claims against the Bethel School District. She argues that the superior court erred in (1) concluding that her state law claims were subject to the federal Individual with Disabilities Education Act (IDEA)[3] and its exhaustion-of-remedies requirement; (2) dismissing

[1] To provide confidentiality, we use the juvenile's initials in the case caption and body of this opinion.

[2] Ch. 49.60 RCW.

[3] 20 U.S.C. §§ 1400-1490.

with prejudice her state-law claims that arose before August 7, 2006, on grounds that she had failed to bring them within the IDEA's two-year statute of limitations; and (3) dismissing her remaining state-law claims—disability discrimination under chapter 49.60 RCW, negligent infliction of emotional distress, outrage, injury to the parent-child relationship, assault, battery, and negligent hiring, retention, and supervision—for failure to submit sufficient admissible evidence to establish a prima facie case. We affirm.

FACTS

At the time of Nancy Vernon's 2009 lawsuit, DV[4] was severely disabled from in utero exposure to cytomegalovirus.[5] Although able to discern some color, motion, and shapes with one eye, he was legally blind and profoundly deaf in both ears. He had a diagnosed seizure disorder,[6] autistic-like behaviors,[7] limitations to sensory input, developmental delays, and possible undiagnosed cognitive disabilities. Although he could communicate with a limited number of modified American Sign Language signs, his sensory limitations hindered effective communication

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[4] DV was 16 years old when the Bethel School District moved for summary judgment.

[5] Stedman's Medical Dictionary defines "cytomegalovirus" as "[a] group of viruses in the family Herpesviridae . . . causing enlargement of cells of various organs and development of characteristic inclusions in the cytoplasm or nucleus. Infection of embryo in utero may result in malformation and fetal death." Stedman's Medical Dictionary 437 (26th Ed. 1995).

[6] Vernon described DV's seizure disorder as follows: "[W]hen he has a seizure he doesn't move. He goes into basically a coma, other than shaking uncontrollably and not able to breathe." Clerk's Papers (CP) at 212.

[7] For example, as Vernon explained, "[O]nce [DV] develops a sequence of events, he seems to have to do the sequence of events"; so she would "try to change the sequence to get rid of a behavior." CP at 73.

with the people in his life. Even as an adolescent, Vernon "had to care for [DV] day and night because he couldn't cope with anyone else." Clerk's Papers (CP) at 90.

I. Special Education

His pediatric neurologist believed that DV was "capable of learning at a very rudimentary level." CP at 46. At age three, DV began receiving special education services at Spanaway Elementary School in the Bethel School District. According to Vernon, at some point DV began exhibiting "characteristics of posttraumatic stress": When DV approached "any school building," he "wouldn't get out of [her] car," and he had panic attacks. CP at 75. Although Vernon consulted medical and psychological health care providers, it is unclear whether they were treating DV because, according to Vernon, he could not "actually go into a doctor's office and sit and communicate." CP at 82. It is also not clear from the record on appeal whether DV regularly took medications for his conditions, except for phenobarbital to control his seizure disorder and other medications during the 2007-2008 school year. Several days a week after school, Vernon took DV to Good Samaritan Hospital's children's therapy unit.

As the person who knew, understood, and loved DV best, Vernon was his staunch advocate during the years he received education in the District's schools. Sometimes, however, the District viewed her actions as inappropriate interference with his education.

A. 2005-06 School Year

During the 2005-06 school year, DV was 12 years old in the fifth grade. Vernon participated in creating an Individualized Education Program (IEP) for DV.[8] DV's IEP provided

[8] Thereafter, Vernon addressed her concerns about DV's 2005-2006 IEP through the "IEP process": contacting the school; setting up IEP meetings; and initiating a citizen's complaint,

that he would (1) spend the majority of his time away from other children in a "sensory friendly" room, where he would receive services, such as "work time" and "free choice" time; and (2) leave the sensory-friendly room periodically throughout the day for "active free time, life skills[,] and computer skills times." CP at 236. The IEP stated that DV "enjoy[ed]" his sensory-friendly room and that he appeared "calmer" in this less stimulating environment. CP at 236.

At the beginning of fifth grade, DV began breaking objects at home after he got off the school bus and poking his eyes, which, by December, developed into keratoconus,[9] damaging his corneas. Believing these behaviors to be signs of distress, Vernon suspected that something was wrong with DV's treatment at school; eventually, she visited DV's his school, met with District staff members, and demanded to see his classroom. According to Vernon, (1) the District kept DV isolated in an 8- by 12-foot room, which resembled a "prison" because it contained nothing "except a bean bag" and its door had a lock; and (2) the school's hallways were "cluttered" with dollies, garbage cans, mailboxes, and food drive boxes, which hindered DV's ability to feel the walls as he walked, despite her admonitions to the District.[10] CP at 222, 233.

Several hours after DV came home from school on October 13, 2005,[11] Vernon noticed

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which, according to Vernon, resolved these education-related concerns. CP at 220.

[9] Stedman's Medical Dictionary defines "keratoconus" as "[a] conical protrusion of the cornea caused by thinning of the stroma." Stedman's at 914.

[10] Vernon once observed DV bump his head on a metal mailbox in the school's hallway, after she had told the District to keep the hallways clear.

[11] Vernon could not recall whether she had taken DV to therapy after school or whether she had brought him home immediately at 2:30 pm.

bruising on his arm. The next day, she called the police, took pictures of the bruising,[12] and contacted the school.[13] The District contacted Child Protective Services, which contacted the Tacoma Police Department; the police were unable to determine what had happened to DV because no one had witnessed the incident that had caused the bruising.[14]

Vernon continued to visit DV's school. She noticed that the District required DV to eat lunch by himself before the other students.[15] On one occasion, Vernon observed an "assistant" tell a class of first and second grade children, "Watch out. Here comes [DV]"; according to Vernon, this comment caused a little boy to cower in the corner, "dehumanized" DV, and presented him as a "monster." CP at 225, 253.

As a result of her observations at school and DV's behaviors at home, Vernon believed

[12] In a later deposition opposing the District's motion for summary judgment, Vernon alleged that (1) the responding police officer had told her DV's bruises were similar to the type seen on people who resisted arrest; and (2) DV's unnamed pediatrics physician had told her that, for such bruises to have occurred in that manner, someone would have had to have held DV down forcefully and pushed against his arms as he resisted and tried to get away. Vernon did not, however, submit the police report, portions of DV's medical records, or this pediatric physician's affidavit in support of her allegations. Nor does this information appear elsewhere in the record.

[13] According to Vernon, (1) she approached Spanaway Elementary School principal, Kim Hanson, who told her that, on October 13, DV had had a first-time substitute teacher, whom Hanson had neither interviewed nor reference-checked before hiring; and (2) the substitute teacher had told her that the District had not done a background check on her. Again, Vernon did not support these allegations with Hanson's affidavit or other offer of proof.

[14] Vernon later acknowledged that "nobody was witness to what happened to him when he got the bruises so I don't know [what] was implemented." CP at 240.

[15] According to Vernon, Hanson told her that DV needed to eat before the other students because they were afraid of him. Again, however, Vernon provided no offer of proof to support this assertion.

that (1) District staff members had "attacked" and "punished" DV on a regular basis because he could not see, hear, or do things they wanted him to do; (2) he exhibited signs of "abuse," even though she had never personally seen DV restrained, or physically and emotionally abused, at school[16]; and (3) DV had been trying to communicate his frustration when he threw objects at home and poked his eyes. CP at 208, 226, 234. Vernon attempted, but was unable, to arrange for DV to be transferred to a different school.

B. 2006-07 School Year

During the 2006-07 school year, DV attended the District's Cougar Mountain Junior High School. In April 2006, Vernon had actively participated in creating a new IEP for DV, which included a statement of his educational performance levels, determined annual measurable goals and short-term benchmarks for his education for the 2006-2007 school year, and specified necessary related services, supplemental aids and services, and other additional supports that he needed. This twice-amended IEP recognized that, because of DV's blindness and deafness,

> [DV] learns through experience, and the olfactory is a means to communicate experiential language and understanding. *The vinegar remains to be effective [one] year after introducing it as a form of communication*.[17] [DV] does not find it to be offensive or aversive; he understands the vinegar to mean he is to comply with a given directive.

CP at 47 (emphasis added). This April 2006 IEP also provided that DV would have a full-time,

[16] In her deposition, Vernon claimed that she had read in the District's notes that District staff members had physically restrained DV; but she submitted no affidavits or other offers of proof to support this assertion. Nor did she designate these District notes as part of the record on appeal.

[17] DV's IEP specified using vinegar communication to indicate the beginning of a sequence of events.

one-on-one special education teacher and two full-time para-educators for the new school year.

After engaging in a "nation-wide search" for DV's special education teacher, the District hired recent college graduate Jennifer Hippensteal, whom Vernon had encouraged the District to consider. CP at 20. Hippensteal had previously worked as a District para-educator and had provided respite care for DV. Recognizing that this was Hippensteal's first teaching job, the District hired her under a conditional certification program; and before she began working with DV, the District required her to complete a week-long training program in Yakima, focusing on the needs of deaf-blind students. The District also provided a behavioral specialist to serve as her mentor. In addition, the District obtained the services of a vision specialist, an orientation and mobility specialist, a specialist in the field of educating deaf-blind students, and a university professor recognized as an expert in special education students' behavioral issues. These specialists consulted with the District and made specific recommendations for DV's instructional plan.

DV continued to exhibit disruptive behaviors at school. During the 2006-2007 school year, (1) the District had six reported incidents of DV's biting or pinching and bruising his teachers and para-educators; and (2) he began taking his clothes off at school. The District responded by installing "blue boards" over his classroom windows to give him privacy and to prevent him from injuring himself by banging on the windows.[18] CP at 28.

C. 2007-08 School Year

[18] According to Vernon, DV "didn't understand that he couldn't smack things on the window." CP at 70.

During the next school year, 2007-08, DV again attended the District's Cougar Mountain Junior High School. In March 2007, Vernon again actively participated in creating a new IEP for DV. This new school year, however, DV became more agitated and aggressive.

According to Hippensteal, DV arrived at school very angry and was unable to calm himself down. By December 2007, he was climbing on tables, removing ceiling tiles, and throwing chairs in the classroom. From September 10, 2007, to February 21, 2008, the District had 29 reports of DV's grabbing, pinching, biting, elbowing, or kicking staff members, causing them injuries, including fracturing Hippensteal's nose, which required surgery.[19] Eventually the District required its staff members assigned to work with DV to wear arm guards, chest protectors, and back braces at all times for their protection; staff members in contact with DV were also instructed to avoid wearing loose clothing.

DV had a history of striking or banging on the windows at school, and he sometimes removed his clothes at school; in response, the District conducted "lock down drills," during which it covered the windows in DV's classroom with "blue boards" to protect him from injury and to preserve his privacy from other students walking past his classroom. CP at 56. DV was large enough and strong enough that he could overpower his special education teacher and para-educators, leave his classroom at will, lie down in the school hallway, and attempt to leave the school building. For the safety of DV, other students, and District staff, the District installed an electronic door lock on his classroom door,[20] after consulting with Vernon and specialists the

[19] DV also bit Vernon's finger.

[20] DV's classroom door lock button, located high up on the wall, had to be pressed continuously to keep the lock engaged, resulting in staff fatigue. To alleviate this fatigue, Hippensteal used

District had engaged, including special education behavioral expert Dr. Flint Simonsen.

DV became increasingly difficult to redirect and to keep focused on his instructional activities and curriculum. As a result, the District's staff members spent less and less time on instructional activities when DV refused to cooperate. On the recommendation of Dr. Simonsen, District staff members began using an "ignoring strategy" whenever DV engaged in behaviors that interfered with his educational instruction; the objective of this strategy was to avoid calling attention to and, thereby reinforcing, these behaviors. CP at 27.

According to Vernon, during this period, DV became very sensitive to touch, he was afraid to enter buildings that resembled schools, and he either refused to go to school or wanted her to stay with him once he arrived at school.[21] At home, DV began waking up in the middle of the night with panic attacks; both at home and at school he started picking the skin off his hands and picking raw the tip of his penis.[22]

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duct tape to keep the door lock button depressed, while always keeping at least one staff member in the classroom with DV during these times. This practice lasted for two weeks, until the principal directed her to discontinue it.

[21] On one occasion, Vernon believed that DV had a "panic attack" when she dropped him off at school, which, she asserts District employees Jake Butler and Donna Greiwe witnessed. CP at 262. Vernon did not, however, submit supporting affidavits from Butler or Greiwe or other offers of proof about this incident.

[22] Vernon stated that she shared this information with two child psychologists, Drs. Steve Becker and Wyma, both of whom told her that DV's behaviors were consistent with symptoms of Post Traumatic Stress Disorder (PTSD). Dr. Wyma, however, had no direct contact with DV as a patient, and he did not formally diagnose him. Vernon also stated that Dr. Becker did an "observation" with DV, saw DV on a regular basis, and helped Vernon "desensitize" DV to school-like structures and other buildings that triggered his panic attacks. CP at 76, 300. Vernon, however, did not submit DV's medical records or affidavits from Drs. Wyma or Becker explaining their medical observations, DV's treatment, or their alleged beliefs that DV had experienced symptoms of PTSD. Nor is there other evidence containing this information in the record on appeal.

In early to mid March 2008, Vernon again attended school with DV. She observed that (1) District staff members had locked DV in his classroom and had placed duct tape over the lock's high wall-mounted button to keep the lock activated; (2) staff members had allowed DV to sit in a corner for four hours at a time while his teachers allegedly "socialize[d] about their evening[s] and what they [did]" and had "conversations about their sex [lives]"[23]; and (3) one staff member was using food on a fork to lead DV down the hallway to the cafeteria.[24] At Vernon's request, this staff member stopped this activity.

Vernon continued to feel that the District's treatment of DV was discriminatory, which, she claimed, caused her "extreme distress" and "sadness" and "somewhat" affected her relationship with her son. CP at 289, 292. To cope with her problems, she began running. Although she spoke to general practitioner Dr. Sarner about her feelings, he did not diagnose her with any medical conditions or prescribe medications.

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[23] CP at 270, 275. According to Vernon, (1) District staff members also "grabbed" and "pulled" DV on a daily basis, restrained him, and bound his ankles, CP at 278, 280; and (2) someone told her that the District allowed DV to sit in the hallway masturbating in a sock. Vernon, however, neither asserted that such "grabbing" and "pulling" had occurred in her presence nor provided affidavits or other evidential support for these assertions.

[24]According to Vernon, although she had encouraged the District to use DV's sense of smell for communication, leading DV down the hallway with food on a fork and putting vinegar under his nose when he smashed a computer were not related to the IEP-specified use of vinegar communication to indicate the beginning of a sequence of events. Again, Vernon did not present evidence that these practices were not legitimate and agreed components of the DV's IEP; she did, however, assert that it is against the law to use food to "get [a child] to do anything." CP at 281. *But see* CP at 293, where Vernon discussed her frustration with the District's not appreciating "the need of the vinegar," which she apparently used regularly with success. *See e.g.*, CP at 301.

On March 20, 2008, Vernon informed the District's Executive Director of Special Services, Robert Maxwell, that she no longer wanted Hippensteal to serve as DV's teacher. On March 27, the District arranged an IEP meeting with Vernon and DV's IEP Team, and Vernon removed DV from the District's schools. Two weeks later, Vernon and the District agreed to an interim placement of DV for him to be homeschooled with District support.[25]

II. Procedure

A. 2007 Lawsuit

In 2007, Vernon had filed a lawsuit against the District,[26] (apparently alleging the same type of claims that she later alleged in her 2009 lawsuit, the subject of the instant appeal). The superior court apparently determined that Vernon's claims related to DV's special education and dismissed them on summary judgment because Vernon had not exhausted her administrative remedies under the IDEA. Vernon did not appeal this summary judgment.[27]

B. 2008 Administrative Claims

On August 7, 2008, Vernon filed a due process hearing request with the District, apparently complaining about much of the conduct that she now challenges. CP at 17, 58. On January 16, 2009, an Administrative Law Judge (ALJ) issued an initial order dismissing (1) "all

[25] In November 2008, Vernon and the District entered into a mediation agreement resolving all special education disputes between them for the 2008-2009 school year forward through the 2011-2012 school year.

[26] Pierce County Superior Court Cause No. 07-2-05140-1.

[27] Nor have the parties designated these 2007 proceedings as part of the record in the instant appeal.

[of Vernon's IDEA] claims for any alleged denial of FAPE [(free appropriate public education)] *prior to* August 7, 2006,"[28] because such claims were outside the IDEA's two-year statute of limitations; and (2) Vernon's claims for monetary damages, because the ALJ lacked jurisdiction to grant such relief under the IDEA. Vernon did not appeal this administrative dismissal of her pre-August 7, 2006 claims.

At Vernon's request, the ALJ then conducted extensive evidentiary hearings on her post-August 7, 2006 IDEA claims to determine (1) whether the District had denied DV a FAPE, (2) whether he had obtained an educational benefit during the 2006-2007 and 2007-2008 school years, and (3) whether DV was entitled to "compensatory education."[29] CP at 37. The ALJ issued findings of fact and conclusions of law for Vernon's IDEA claims arising *after* August 7, 2006, concluding that the District had denied DV a FAPE during the 2006-2007 school year by failing to implement two of his IEP goals: increasing computer skills and increasing receptiveness to American Sign Language and to vinegar communication. But the ALJ denied Vernon's request for compensatory education as "too speculative." CP at 37. Vernon did not appeal the ALJ's final April 2009 order.

C. 2009 Lawsuit

[28]CP at 13 (emphasis added) (boldface omitted).

[29] Compensatory education is designed "'to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.'" CP at 37 (quoting *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005)). Compensatory education may include, among other things: extra tutoring, summer school, additional instruction or special education services, and reimbursement for the costs of private special education services. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 479, 258 P.3d 676 (2011).

A few weeks later, Vernon filed a second lawsuit in superior court,[30] again alleging that

[30] Pierce County Superior Court Cause No. 09-2-09110-8.

the District had unlawfully discriminated against DV[31] and had committed several negligent and intentional torts while providing special education services to him. Seeking monetary damages, Vernon's complaint alleged the following state-law causes of action: (1) disability discrimination under chapter 49.60 RCW; (2) negligent infliction of emotional distress; (3) outrage; (4) assault; (5) battery; (6) injury to the parent-child relationship; and (7) negligent hiring, retention, and supervision of District employees.

The District moved for summary judgment, arguing that (1) Vernon's state-law tort and discrimination claims related to DV's special education and, thus, were governed by the federal IDEA and its exhaustion-of-remedies requirement; (2) the IDEA's two-year statute of limitations barred Vernon's state-law tort and discrimination claims arising before August 7, 2006, because the ALJ had not considered these claims during Vernon's due process hearing and, thus, Vernon had not exhausted her administrative remedies for such claims; and (3) Vernon had also failed to present sufficient admissible evidence to establish a prima facie case for each of her state-law tort and discrimination claims.

On October 2, 2010, the superior court granted summary judgment to the District, dismissing (1) Vernon's pre-August 7, 2006 state-law tort and discrimination claims as time-barred by the IDEA's two-year statute of limitations; and (2) Vernon's remaining post-August 7, 2006 state-law tort and discrimination claims for failure to present sufficient evidence

[31] Although Vernon originally alleged that the District had also discriminated against her personally, she later conceded that she does not have a "disability" as defined in RCW 49.60.040(7)(a). Thus, she withdrew her personal disability discrimination claim, leaving only the disability discrimination claim that she asserted on DV's behalf.

to establish a prima facie case and/or for lack of a genuine issue of material fact for trial. Vernon appeals.

ANALYSIS

Vernon argues that the superior court granted summary judgment on two erroneous grounds: (1) ruling that her state-law tort and discrimination claims were governed by the IDEA and then dismissing any pre-August 7, 2006 claims as time-barred under the IDEA's two-year statute of limitations; and (2) dismissing her remaining state-law tort and discrimination claims for failure to present sufficient evidence to establish prima facie cases. We agree with Vernon's first argument but disagree with the second.

I. Standard of Review

We review summary judgment orders de novo, performing the same inquiry as the superior court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). When reviewing a summary judgment, we consider all facts and reasonable inferences from them in the light most favorable to the non-moving party, here, Vernon. *Vallandigham*, 154 Wn.2d at 26; *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). But we will not consider inadmissible evidence when reviewing a summary judgment. CR 56(e); *see also Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986).

A party opposing summary judgment "may *not rely on speculation*, argumentative assertions that unresolved factual issues remain, or in having [her] affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entm't Co*., 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (emphasis added). Instead, after the moving party meets its initial burden and submits adequate affidavits, the nonmoving party "must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Seven Gables Corp.*, 106 Wn.2d at 13. If the nonmoving party fails to meet this burden, summary judgment, if appropriate, will be entered against her. *Seven Gables Corp*., 106 Wn.2d at 12-13. We will affirm summary judgment only if, after reviewing all of the evidence, reasonable persons could reach but one conclusion. *Vallandigham*, 154 Wn.2d at 26. Such is the result we reach here.

II. IDEA

Vernon first argues that the superior court erred in (1) concluding that the IDEA and its exhaustion-of-remedies requirement govern her state-law tort and discrimination claims, and (2) dismissing her pre-August 7, 2006 claims under the IDEA's two-year statute of limitations because she had exhausted administrative remedies only for claims occurring after this date. Vernon is correct that our Supreme Court has recently held that the IDEA and its two-year statute of limitations do not apply to state-law tort and discrimination claims of the type that she

brings here.[32] *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 481-83, 258 P.3d 676 (2011). *Dowler* compels our holding that the superior court erred in applying the IDEA[33] and, on that basis, dismissing Vernon's pre-August 7, 2006 claims for failure to conform to IDEA requirements.[34]

That the superior court erred in dismissing Vernon's pre-August 7, 2006 claims under the IDEA, however, does not mean that the superior court erred in dismissing Vernon's claims

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[32] Nevertheless, we note that, although chapter 49.60 RCW does not contain its own statute of limitations, discrimination claims must be brought within the RCW 4.16.080(2) three-year statute of limitations for personal injury actions. *Antonius v. King County*, 153 Wn.2d 256, 261-262, 103 P.3d 729 (2004). Chapter 4.16 RCW provides the statutes of limitations for assault, battery, negligent infliction of emotional distress, outrage, injury to parent-child relationship, and negligent hiring, retention, and supervision claims. RCW 4.16.100 (two-year statute of limitations for assault and battery); RCW 4.16.080(2) (three-year statute of limitations for any other injury to person or rights not hereafter enumerated); *Cox v. Oasis Physical Therapy, PLLC*, 153 Wn. App. 176, 190, 222 P.3d 119 (2009).

RCW 4.16.190 tolls the statute of limitations for all causes of action "mentioned in this chapter" until a child, such as DV, reaches age 18. RCW 4.16.190(1). Thus, the claims that Vernon brings on DV's behalf for the 2005-2006 school year may still be actionable. Any claims for Vernon personally (as opposed to those on DV's behalf), however, would still be governed by the standard two-year or three-year statutes of limitations. But because we ultimately hold that Vernon does not present sufficient evidence to establish a prima facie case for any of the claims at issue in this appeal, we need not consider the applicability of these statutes of limitations.

[33] The Supreme Court did not issue *Dowler* until two years after the superior court granted its 2009 summary judgment for the District on this IDEA-based ground.

[34] The District contends that, because Vernon failed to appeal the superior court's 2007 summary judgment dismissal of her first lawsuit (2007), the law of the case and the collateral estoppel doctrines prohibit her re-litigating whether the IDEA and its two-year statute of limitations apply to her current claims (2009 lawsuit). A party asserting collateral estoppel, however, must provide the reviewing court with a sufficient record of the prior litigation to facilitate such analysis. *State v. Barnes*, 85 Wn. App. 638, 651, 932 P.2d 669, *review denied*, 133 Wn.2d 1021 (1997). Contrary to RAP 9.2(b), the District has not provided parts of the 2007 record necessary for our review of its collateral estoppel and law-of-the-case arguments; in particular, the District has not included in the record Vernon's February 8, 2007 complaint or a copy of the 2007 summary judgment order of dismissal. Accordingly, we do not further consider these arguments.

altogether or that she prevails on appeal. Reviewing this summary judgment order de novo, we affirm the superior court's dismissing all of Vernon's claims[35] because she failed to present admissible evidence to establish prima facie cases sufficient to defeat summary judgment and to proceed to trial.

III. Lack of Evidentiary Support

Vernon based DV's disability discrimination claim largely on her tort allegations that District staff members had physically "abuse[d], neglect[ed, and] humiliat[ed]" DV; she did not, however, personally observe or proffer admissible evidence to support most of these alleged instances of mistreatment. Reply Br. of Appellant at 6. Nor did she provide necessary factual support for her other tort claims, both those that were personal to her and those that she brought on DV's behalf. Reviewing de novo the District's motion for summary judgment, we independently determine and agree with the superior court that Vernon failed to produce sufficient admissible evidence to establish prima facie cases for (1) DV's disability discrimination claim; and (2) her other tort claims—negligent infliction of emotional distress, outrage, assault, battery, injury to the parent-child relationship, and negligent hiring, retention, and supervision of District employees.

Vernon relied nearly exclusively[36] on her two depositions to oppose the District's motion

[35] Although the superior court dismissed some of Vernon's claims on IDEA-related grounds, it dismissed her other claims on this evidentiary ground. In our view, Vernon did not support any of her claims, whether pre- or post-August 7, 2006, with sufficient evidence to go to trial. Therefore, we affirm dismissal of all of her claims on this evidentiary insufficiency ground. *LaMon v. Butler*, 112 Wn.2d 193, 200–01, 770 P.2d 1027 (1989) (we may affirm a superior court's ruling on any grounds the record adequately supports).

[36] Vernon introduced other declarations to support her argument that she was not required to exhaust administrative remedies under the IDEA, which issue we resolve in her favor.

for summary judgment and to attempt establishing factual support for her claims. Her deposition testimonies, however, were based largely on speculation, hearsay, and Vernon's own unsupported conclusions and beliefs about what happened to DV at school. This deposition testimony failed to meet the requirements of CR 56(e),[37] which provides, in pertinent part:

> Supporting and opposing affidavits shall be made on *personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein*. . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials of his pleading*, but his response, by affidavits or as otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial*. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(Emphasis added).

The allegations in Vernon's depositions were not offers of admissible evidence: These allegations were not based on her own personal knowledge or observations; she did not demonstrate that she would have been competent to testify about any of the alleged events that she did not witness; and she did not support her allegations with affidavits or offers of proof from

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[37] At oral argument, Vernon argued for the first time that the District could not challenge the sufficiency of her deposition evidence because the District did not move below to strike its inadmissible components. She did not raise this argument in her opening brief. That Vernon cited case law in support of this new argument in her statements of additional authority does not ameliorate her failure to comply with RAP 10.8, which admonishes that a "statement [of additional authority] should not contain argument." And, unless we order otherwise, RAP 12.1(a) confines the scope of our review to the "issues set forth by the parties in their briefs." Accordingly, because Vernon did not argue in her opening brief that the District waived its challenge to the sufficiency of her evidence when it failed to move to strike portions of her deposition below, and because we did not order supplemental briefs on this issue, we do not further consider Vernon's improperly raised argument.

others who had witnessed the alleged events or experts who could testify about whether the District's treatment of DV deviated from legitimate treatment methods consistent with his IEP and its objectives. In short, Vernon's failure to meet CR 56(e)'s mandate for establishing a material issue of genuine fact for trial justified the superior court's grant of summary judgment to the District on all of her claims—arising both before and after August 7, 2006. *See LaMon v. Butler*, 112 Wn.2d 193, 200–01, 770 P.2d 1027 (1989); *see also* RAP 2.5(a).

Taking the evidence in the light most favorable to Vernon, as we must, we hold that (1) there is no genuine issue as to any material fact on any of her claims; and (2) as a matter of law, the District is entitled to summary judgment on the discrimination claim that Vernon brought on DV's behalf and all of the tort claims that she raises in this appeal (whether personal to her or asserted on DV's behalf). We examine each claim in turn.

A. Disability Discrimination in "Places of Public Accommodation"

Vernon first argues that the superior court erred in dismissing DV's disability discrimination claim because she introduced sufficient evidence of discrimination in a place of "'public accommodation'" under WLAD.[38] Relying primarily on the prima facie case that our Supreme Court announced in *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 911 P.2d 1319 (1996), she contends that (1) the District's schools are "places of public accommodation," (2) former RCW 49.60.215 (2009) forbids disability discrimination in such places, and (3) the District discriminated against DV by allowing its staff members to "abuse, neglect, [and]

[38] Br. of Appellant at 38 (internal quotation marks omitted) (quoting *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 637, 911 P.2d 1319 (1996) (quoting former RCW 49.60.215 (2009))).

humiliate[e]" DV and to make him "feel unwelcome" when non-disabled students were not.[39] Br. of Appellant at 39, 40; Reply Br. of Appellant at 6. We disagree.

1. Context of DV's discrimination claim

At the outset, we note the paradox inherent in addressing Vernon's unlawful discrimination claim in the special education context: Her discrimination claim primarily stems from the District's specialized educational program for DV and his treatment at school, which special education program by definition requires different treatment of DV to accommodate his special needs. As the District noted below, the challenge in applying *Fell*'s[40] traditional "discrimination in places of public accommodation" analysis to DV's special educational program and treatment is that, by definition, DV's special education program

> is not only different from that provided to non-special education students, but . . . is required [by law] to be different. The District is charged with the responsibility of providing a free appropriate public education [FAPE] which meets the specific requirements and needs of each individual special education student.

CP at 130. In short, to the extent that special education requires differentiation among students, the District was required to "discriminate" even among its array of differently-abled students in

[39] The District responds that WLAD is not an "appropriate and independent vehicle" for assessing DV's special education because (1) the District's compliance with the IDEA should foreclose Vernon's discrimination claim under WLAD, a more generalized anti-discrimination statute, Br. of Resp't at 16; (2) the District was not required to provide special education services to DV under WLAD; and (3) Vernon's discrimination claim is akin to "educational malpractice," a cause of action not recognized in Washington. Br. of Resp't at 22. We do not address this WLAD issue and, instead, agree with the superior court that Vernon failed to present sufficient evidence to support her claims.

[40] *Fell*, 128 Wn.2d at 637 (quoting former RCW 49.60.215) (requiring the plaintiff to show as part of his prima facie case that he was discriminated against by receiving treatment "not comparable" to the level of services provided to individuals without disabilities).

order to provide each a FAPE, custom-tailored to meet each special education student's different needs. We further recognize that in similar cases involving curriculum challenges, we have held, "Courts and judges are normally not in a position to substitute their judgment for that of school authorities. [N]or are we equipped to oversee and monitor day-to-day operations of a school system." *Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 537, 762 P.2d 356 (1988) (citing *Millikan v. Bd. of Dirs.*, 93 Wn.2d 522, 611 P.2d 414 (1980)).

Here, before the beginning of each school year, Vernon and the District met to tailor an IEP to meet DV's needs and capabilities within the context of his multiple disabilities, including his communication, mental health, and behavioral challenges.[41] His IEPs involved vinegar communication,[42] restraint whenever DV went out on "community access,"[43] and his own "sensory-regulated" or "sensory-friendly" classroom where he could work without distractions.[44]

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[41] The parties have not designated any of DV's IEPs as part of the record on appeal. Thus, we attempt to glean the general nature of DV's IEPs from portions of the record that we do have. In so doing, we attempt only to provide a context for understanding the extraordinary challenges confronting all parties in this case.

[42] Vernon also used vinegar communication with DV at home, especially when trying to "tell him 'no'" and that "he couldn't do that," such as when he picked at his hands. CP at 265.

[43] For example, according to Vernon, if the vinegar communication was not working, the District would use ankle restraints to keep DV safe in his car seat when they went out into the community. Vernon also uses ankle restraints when necessary "to communicate to him that he needs to remain seated in the car. [I]f he tries to move then you can lock them together." CP at 249.

[44] According to Vernon, the Office of Superintendent of Public Instruction (OSPI) addressed the District's use of this sensory-regulated room from an educational point of view only and "believed [that] it was inappropriate." CP at 255. Vernon did not, however, submit an affidavit from any OSPI employee supporting her assertion.

CP at 235. For at least one year, DV had his own teacher and two para-educators, for which the District spent over $100,000.

Nevertheless, Vernon maintains that she does not challenge DV's IEPs or her "educational concerns." Br. of Appellant at 16 (emphasis omitted). Instead, she asserts that the District discriminated against DV in the uncaring manner in which the staff treated him, *allegedly outside the IEP context*, and that our "discrimination [in places] of public accommodation" case law provides a workable framework for analyzing such claims, which appear at least partially related to DV's special educational program. Br. of Appellant at 38. Despite reservations about using *Fell*'s traditional framework for analyzing Vernon's discrimination claim,[45] we hold that she fails to meet her prima facie case even under this standard.

2. "Discrimination in places of public accommodation" burden-shifting scheme

RCW 49.60.030(1) prohibits discrimination in places of "public . . . accommodation" on the basis of "any sensory, mental, or physical disability," and secures the right of people with disabilities "to the *full enjoyment of* any of the accommodations, advantages, facilities, or

[45] Washington's discrimination in places of public accommodation case law appears somewhat incongruous because "[t]he statute's primary thrust is the refusing or withholding of *admission* to places of public accommodation, and the use of [such] facilities on equal footing with all others." *Evergreen Sch. Dist. No. 114 v. Human Rights Comm'n*, 39 Wn. App. 763, 777, 695 P.2d 999 (1985) (emphasis added); *see also In re Matter of Johnson*, 71 Wn.2d 245, 246-47, 252, 427 P.2d 968 (1967) (barbershop violated RCW 49.60.215 by refusing to give African American haircut because of race). Here, however, DV was not denied admission to the District's schools. And as we have already noted, the District was required to provide individualized instruction and services to DV under the IDEA, which, to some extent, separated him from other students. Nevertheless, the District does not argue that former RCW 49.60.215 is entirely inapplicable here; rather, the District concedes that a school is a place of "public accommodation" under RCW 49.60.040(2). Br. of Resp't at 15. We, therefore, analyze Vernon's claim under this standard.

privileges of any place of public resort, accommodation, assemblage, or amusement,"[46] which includes educational institutions. RCW 49.60.040(14), in turn, defines "full enjoyment of" as including:

> [t]he *admission* of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, *without acts directly or indirectly causing persons . . . with* [*disabilities*], *to be treated as not welcome,* accepted, desired, or solicited.

(Emphasis added).

Washington has adopted the burden-shifting scheme that federal courts use to analyze cases alleging discrimination in places of public accommodation. *Demelash v. Ross Stores, Inc*., 105 Wn. App. 508, 524, 20 P.3d 447 (2001). Under this burden-shifting scheme, a plaintiff must first establish a prima facie case of discrimination. *Demelash*, 105 Wn. App. at 524. The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. *Demelash*, 105 Wn. App. at 524. Once the defendant meets its burden, the burden shifts back to the plaintiff to show that the defendant's articulated reason was mere "pretext" for unlawful discrimination. *Demelash*, 105 Wn. App. at 524-25.

3. No prima facie case

To prove a prima facie case of discrimination in a place of public accommodation, a plaintiff must prove that (1) the plaintiff has a disability under the statute, (2) the defendant's business or establishment is a place of public accommodation, (3) the plaintiff was "*discriminated against by receiving treatment that was not comparable* to the level of designated

[46] RCW 49.60.030(1)(b) (emphasis added).

services provided to individuals without disabilities,"[47] and (4) the plaintiff's disability was a substantial factor causing the discrimination. *Fell*, 128 Wn.2d at 637 (emphasis added) (citing former RCW 49.60.215). According to the Washington Supreme Court, the first three elements in a plaintiff's prima facie case are questions of mixed law and fact, and only the last element is strictly a question of fact. *Fell*, 128 Wn.2d at 637. Thus, where the facts are either undisputed or where reasonable minds would not differ about them, a court may decide the presence or absence of the first three elements as a matter of law. *Fell*, 128 Wn.2d at 637.

Here, the parties do not dispute the first two elements of Vernon's prima facie case: that DV has a disability and that the District's schools are places of public accommodation. Vernon argues she also satisfied the third element—that DV was "discriminated against by receiving treatment that was not comparable to the level . . . provided to individuals without disabilities"[48]—because the District's staff members treated him "differently" and as "not welcome, accepted, or desired" in the District's schools. Vernon bases her claim of different and unaccepting treatment of DV on her allegations that District staff members (1) physically grabbed and bruised him, (2) isolated and ignored him in his sensory-friendly room, (3) allowed him to sit

[47] "Comparable" does not mean identical. *Negron v. Snoqualmie Valley Hosp.*, 86 Wn. App. 579, 585, 936 P.2d 55 (1997). Although there is no case law directly on point, it appears appropriate to consider the District's obligations to provide specialized instruction to DV under the IDEA when evaluating whether the District provided him with treatment "comparable" to non-disabled students because, as a special education student, by definition, DV necessarily received some disparate treatment in his educational instruction. Accordingly, DV's receiving separate, individualized instruction under his IEP, which was different from other students, does not affect our analysis of whether he received comparable educational treatment.

[48] Br. of Appellant at 38 (quoting *Fell*, 128 Wn.2d at 637).

for hours in a corner while they socialized, and (4) led him around the school like an "animal" with food on a fork. Br. of Appellant at 39. According to Vernon, this conduct amounted to "abuse, neglect, [and] humiliation," made DV "feel unwelcome," and drove him to pick at his eyes and skin and to throw objects around their home.[49] Reply Br. of Appellant at 6. But, as we have previously noted, Vernon did not introduce sufficient, admissible evidence meeting CR 56(e) requirements to substantiate the bare factual allegations in her deposition. Nor has she shown that some of this conduct, if it occurred, was unrelated to DV's legitimate IEP instruction, to which Vernon had previously agreed. Therefore, we do not consider these factual allegations in evaluating DV's discrimination claim.

To the extent Vernon argues that the District's actions made DV "feel"[50] unwelcome, her claim fails under *Evergreen Sch. Dist. No. 114 v. Human Rights Comm'n*, 39 Wn. App. 763, 695 P.2d 999 (1985).[51] As we explained in *Evergreen*, a plaintiff does not establish a prima facie case

[49] Vernon also claims she satisfied the fourth element of her prima facie case because she alleged that DV's disability was a substantial factor motivating the staff members' discriminatory conduct. Br. of Appellant at 40.

[50] Reply Br. of Appellant at 6.

[51] In *Evergreen*, a teacher made a racially offensive comment that embarrassed and humiliated a minority student. *Evergreen*, 39 Wn. App. at 764. The Washington State Human Rights Commission found the Evergreen School District liable under former RCW 49.60.215 (1985) for denying the student "equal access" to and the "full enjoyment of" her school and classroom because the teacher's comment had made her "feel" unwelcome. *Evergreen*, 39 Wn. App. at 768-69, 771. We reversed, emphasizing that former RCW 49.60.215 makes objective unlawful *treatment*, not a plaintiff's subjective *feelings*, the basis for liability. *Evergreen*, 39 Wn. App. at 772-73. Because the teacher's isolated comment was not targeted at the student directly and it had not caused the student to be treated differently by teachers and students, the student's discrimination claim failed. *Evergreeen*, 39 Wn. App. at 771-72, 777.

merely by alleging that he felt unwelcome; rather, he must show that he felt unwelcome because he had actually been *treated as unwelcome*. *Evergreen*, 39 Wn. App. at 772. As in *Evergreen*, Vernon appears to base her claim on DV's subjective feelings, her own speculation, and her argumentative assertions. We reiterate that Vernon offered no admissible evidence showing that, in accommodating DV's special needs consistent with his IEP, the District had treated DV as unwelcome. Nor did she point to *specific* incidents of unjustified disparate treatment.[52] *See Seven Gables Corp.*, 106 Wn.2d at 13.

We hold that Vernon fails to establish a prima facie case of discrimination in a place of public accommodation because she failed to produce sufficient, admissible evidence that DV received treatment "not comparable"[53] to that of other students in the District's schools. Accordingly, DV's discrimination claim fails.

B. Assault and Battery

Vernon next argues that the superior court erred in dismissing her assault and battery claims because she presented sufficient evidence that DV was "repeatedly physically restrained" and "forcefully grabbed while at school and ended up with dark bruises as a result." Br. of Appellant at 48-49. We agree with the District that Vernon failed to establish prima facie cases for these claims because she failed to present any evidence that District staff members physically

[52] Former RCW 49.60.215 specifically provided that disparate treatment does "not constitute an unfair practice" when a person's behavior or actions constitute a risk to property or other persons. Here, in addition to protecting other students and staff, the District was attempting to provide DV with a FAPE to the extent possible.

[53] *Fell*, 128 Wn.2d at 637.

restrained or forcefully grabbed DV, or that they did so with "intent" to cause harmful or offensive contact with DV's person or apprehension of such contact. Br. of Resp't at 33.

1. Elements of assault and battery

A "battery" is "'[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent.'"[54] Similarly, an assault is any act of such a nature that causes apprehension of a battery.[55] To prove "intent," a plaintiff must show that the defendant's act was "done *for the purpose* of causing the contact or apprehension or *with knowledge . . . that such contact or apprehension is substantially certain to be produced*." *Garratt v. Dailey*, 46 Wn.2d 197, 201, 279 P.2d 1091 (1955) (emphasis added) (quoting Restatement (First) of Torts § 13, at 29 (1934)).

2. No prima facie showing of assault

Vernon does not specify the conduct on which she bases her assault and battery claims, when these alleged intentional torts occurred, who committed them, or how such persons had the requisite intent to justify imposing intentional tort liability. In her Brief of Appellant, Vernon makes merely conclusory statements that "DV was battered" and that the District's restraining him and forcefully grabbing him were "harmful and offensive contacts" amounting to a battery. Br. of Appellant at 48-49. She does not, however, separately argue that these alleged "harmful or offensive contacts" constituted a civil assault independent of a battery claim. Br. of Appellant

[54] *McKinney v. City of Tukwila*, 103 Wn. App. 391, 408, 13 P.3d 631 (2000) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 9, at 39 (5th ed.1984)).

[55] *McKinney*, 103 Wn. App. at 408 (citing Keeton § 10, at 43).

at 49. Therefore, we consider the merits of only her battery claim.[56]

3. No prima facie showing of battery

Turning to Vernon's battery claim, our review of the record does not reveal that she ever *personally* observed any of the District's staff members physically restraining DV. Although Vernon stated in her deposition that she had *read* about such restraint in the District's notes, she did not introduce these District notes at the summary judgment hearing or include affidavits from people with personal knowledge of the District's use of restraint. Thus, these alleged instances of restraint are not in the record before us and are beyond the scope of admissible evidence that we may consider in evaluating the propriety of summary judgment for the District. *Dunlap*, 105 Wn.2d at 535.

Vernon also appears to base her assertion that the District's staff members "forcefully grabbed" and battered DV *entirely* on her own observation of DV's bruises the evening of October 13, 2005. Br. of Appellant at 48. Assuming, without deciding, that this incident is not time-barred under two-year statute of limitations applicable to batteries,[57] Vernon's claim nevertheless fails because she has not established the prima facie elements for battery based on

[56] Unlike battery, which requires intent and harmful or offensive contact with the plaintiff's person, assault requires that the plaintiff also be *aware* of the defendant's act at the time of the assault, to satisfy the apprehension element. Restatement (Second) of Torts § 22, at 38 (1965). Vernon failed to produce evidence of DV's awareness of the District's alleged offensive acts; her own observations of DV's behaviors after returning home from school do not establish the requisite connection between his behaviors and any District action. Because Vernon fails to support her civil assault argument with citations to law, facts, and the record, we do not further address it. *See Bohn v. Cody*, 119 Wn.2d 357, 368, 832 P.2d 71 (1992) (appellate court may decline to address inadequately briefed arguments).

[57] RCW 4.16.100 (two-year statute of limitations for assault and battery).

this incident. As we note above, Vernon neither asserted nor supported with an offer of proof that a District staff member actually *caused* the bruises to DV or that the responsible individual intended harmful or offensive contact by forcefully grabbing him.[58] Moreover, the Tacoma Police Department investigated this incident and could not determine the cause of DV's bruises. Yet Vernon appears to have relied on the "res ipsa loquitur" doctrine[59] in the proceedings below to attempt establishing the elements of battery, apparently asserting that a fact finder could infer a battery occurred because DV had been in the school's exclusive care at some point during the day on October 13. Although Washington courts have applied this doctrine in *negligence* actions, Vernon cites no case law applying it to *intentional* torts such as assault and battery; and we know of none.

Again, a party opposing summary judgment must allege "specific facts" that sufficiently rebut the moving party's contentions and disclose a genuine issue of material fact for trial. *Seven Gables Corp.*, 106 Wn.2d at 13. Although we consider all facts in the light most favorable to Vernon, she "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having [her] affidavits considered at face value." *Seven Gables Corp.*, 106 Wn.2d at

[58] Nor does she address whether the responsible individual was "privileged" to grab DV forcefully in order prevent him from causing a battery to that individual or to a third party, *see Garratt*, 46 Wn.2d at 200-01 (to prove battery, a plaintiff must also show that "the contact is not otherwise privileged"), or argue that the employee's intentional tort, if it occurred, should be imputed to the District.

[59] "Res ipsa loquitur" is a form of proof that allows the fact-finder to infer negligence if (1) the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the absence of negligence, (2) the instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence. *Curtis v. Lein*, 169 Wn.2d 884, 891, 239 P.3d 1078 (2010).

13. Because Vernon fails to establish prima facie cases of assault and battery, we hold that the superior court did not err in dismissing these claims on summary judgment.

C. Negligent Hiring, Supervision, and Retention of Employees

Vernon also argues that the superior court erred dismissing her negligent hiring, retention, and supervision claim because (1) the District had a duty to prevent foreseeable harms to students from negligent staffing and mistreatment; (2) "*if the* [*District*] *was aware* that teachers and staff had been mistreating DV," it was foreseeable that such mistreatment would continue if the District did nothing about it; and (3) she sufficiently demonstrated that the District's teachers and staff members were negligent in their treatment of DV. Br. of Appellant at 49 (emphasis added). Again, we agree with the District that the superior court properly granted summary judgment because Vernon failed to show that the District "knew" or "should have known" that one of its teachers or staff members posed a risk of harm to DV and that it failed to take reasonable precautions to prevent such harm. Br. of Resp't at 32.

An employer may be liable to a third person for negligence in hiring or retaining an employee who is incompetent or unfit. *Peck v. Siau*, 65 Wn. App. 285, 288, 827 P.2d 1108 (1992). To prove negligent hiring or retention, a plaintiff must demonstrate that (1) the employer knew or, in the exercise of ordinary care, should have known of its employee's unfitness at the time of hiring or retaining such individual; and (2) the negligently hired or retained employee proximately caused the plaintiff's injuries. *Carlsen v. Wackenhut Corp.*, 73 Wn. App. 247, 252-53, 868 P.2d 882 (1994); *Peck*, 65 Wn. App. at 288. Conversely, an employer is not liable for negligent supervision of an employee unless the employer knew or, in the exercise of reasonable

care, should have known that the employee presented a risk of danger to others.[60] *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993).

Again, Vernon does not identify or allege that any particular District employee harmed DV, much less that the District knew or, in the exercise of ordinary care, should have known about some unspecified employee's incompetence or unfitness at the time of hiring, retaining, or supervising. The earliest date the District conceivably had notice that someone *might* have presented a risk of harm to DV at school was October 13, 2005, the day Vernon noticed DV's bruises several hours after he arrived home from school, which she reported to the school the next day. The record shows that (1) in response to Vernon's report, the District called Child Protective Services and assisted with a police investigation; (2) the police could not determine what had happened to DV to have caused these bruises; and (3) there is no evidence pointing to the District as the cause of DV's bruises.

In her deposition, Vernon made broad, unsupported allegations that DV had had a "substitute [teacher]" in his room on October 13, 2005, and that Principal Hanson had said that she had not personally interviewed the substitute teacher or conducted a reference check. Even if these assertions were admissible, Vernon did not produce supporting evidence that the substitute teacher *actually had a history that made her incompetent or unfit* to teach DV. CP at 246. Nor did Vernon offer evidence that the District knew about such deficiencies or that it could have

[60] These theories of recovery impose liability for an employer's *own* negligence, distinct from its vicarious liability under the doctrine of respondeat superior, which Vernon has not alleged. *See Peck*, 65 Wn. App. at 288 (distinguishing negligent hiring and retention from respondeat superior liability); *Thompson*, 71 Wn. App. at 551-55 (treating plaintiff's negligent supervision claim separate from respondeat superior claims).

discovered such deficiencies through the exercise of ordinary care in its hiring or employment practices. Absent showing such knowledge, Vernon fails to establish a prima facie case of District negligent hiring, retention, or supervision based on the substitute teacher's alleged conduct.

To the extent that Vernon relies on events from the 2006-2007 and 2007-2008 school years, her claim also fails. She has not shown that DV's special education teacher, Hippensteal, was incompetent or unfit, or that the District knew or should have known about such alleged incompetency or unfitness at the time of hiring, retaining, or supervising her. On the contrary, the record shows that the District had engaged in a "nation-wide search" before selecting Hippensteal as DV's special education teacher, that Hippensteal had worked with the District and with DV in the past, that Vernon had personally asked the District to hire Hippensteal as DV's teacher, and that the District had provided Hippensteal with special training for educating deaf-blind students. CP at 20. Nor has Vernon alleged specific facts indicating that the District failed to supervise Hippensteal or any other employee who worked with or came into contact with DV.

Because Vernon has not shown that a specific District employee caused DV's injuries and that the District knew or should have known that such employee was incompetent or unfit at the time or hiring, retaining, or supervising such person, Vernon's negligent hiring, retention, and supervision claim fails.

D. Negligent Infliction of Emotional Distress

Vernon contends that she and DV both "suffered emotional distress as a result of [the District's] discrimination." Br. of Appellant at 40. She argues that the superior court erred in dismissing her negligent infliction of emotional distress claims because she demonstrated that (1)

the District had a duty to protect students from reasonably foreseeable harms and to hire competent staff; (2) the District breached its duty because it was aware that District teachers and staff members had "neglected, assaulted, and humiliated" DV yet allowed this conduct to continue; and (3) DV suffered severe emotional distress as a result. Br. of Appellant at 43. Again, we agree with the District that Vernon offered no proof that she *or* DV suffered emotional distress with "objective [symptomatology]."[61] Br. of Resp't at 26.

1. Vernon's personal emotional distress claim

Vernon's Brief of Appellant does not include argument or citations to the record to substantiate her claim that she *personally* suffered emotional distress as a result of the District's alleged discrimination against DV at school. We, therefore, do not further consider this claim. RAP 10.3(a)(6); *Bohn v. Cody*, 119 Wn.2d 357, 368, 832 P.2d 71 (1992); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

2. DV's emotional distress claim

We do, however, address DV's emotional distress claim. A plaintiff may recover for negligent infliction of emotional distress even if he has not experienced "any physical impact or the threat of an immediate physical invasion [to his] personal security." *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976). To recover for negligent infliction of emotional distress, a plaintiff must demonstrate the traditional negligence concepts of duty,[62] breach, causation, and

[61] We also agree with the District that Vernon presented no evidence or argument that *she* personally suffered emotional distress.

[62] A "defendant has a duty to avoid the negligent infliction of [emotional] distress." *Hunsley*, 87 Wn.2d at 435.

damages. *Hunsley*, 87 Wn.2d at 434. A plaintiff must also prove that his emotional response was reasonable under the circumstances and corroborated by "objective symptomatology." *Hunsley*, 87 Wn.2d at 436; *see also Hegel v. McMahon*, 136 Wn.2d 122, 135, 960 P.2d 424 (1998). In order to satisfy this objective symptomatology requirement, a plaintiff's emotional distress "must be susceptible to medical diagnosis and *proved through medical evidence*,"[63] which requires objective evidence about the severity of the distress and the causal link between the event causing the plaintiff's distress and his subsequent emotional reaction. *Hegel*, 136 Wn.2d at 135 (emphasis added).

Vernon failed to meet this burden here. Although Vernon baldly asserted in her deposition that DV suffered from symptoms of post traumatic stress syndrome (PTSD),[64] she did not introduce any competent medical evidence from doctors who treated him or from another qualified expert that DV suffered from this disorder or another emotional disorder or that his symptoms were attributable to the District's alleged discrimination and abuse. Her personal conclusions—that DV showed signs of distress by throwing household objects, eye poking, skin picking, and panic attacks—also failed to meet the objective symptomatology standard. Vernon failed to present medical evidence linking DV's behaviors to a diagnosable emotional disorder and to demonstrable actions of the District; therefore, we hold that her negligent infliction of

[63] *Hegel*, 136 Wn.2d at 135 (emphasis added). In order for nightmares, sleep disorders, intrusive memories, fear, and anger to satisfy the objective symptomatology requirement, they must also "constitute a *diagnosable* emotional disorder." *Hegel*, 136 Wn.2d at 135 (emphasis added).

[64] PTSD is an emotional disorder that may meet the objective symptomatology requirement. *Hegel*, 136 Wn.2d at 135 n.5.

emotional distress claim asserted on DV's behalf also fails.

E. Outrage

Vernon also argues that the superior court erred in dismissing DV's outrage claim[65] because "it [was] absolutely outrageous for teachers, administrators, and other staff to physically, verbally, and psychologically abuse" DV.[66] Br. of Appellant 48. Again, Vernon failed to support this cause of action with sufficient offers of proof.

Outrage claims require a plaintiff to be able to prove three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) the actual result of severe emotional distress to the plaintiff. *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003). Unlike negligent infliction of emotional distress claims, outrage claims do *not* require proof of emotional distress by "objective symptomatology." *Kloepfel*, 149 Wn.2d at 198. The plaintiff, however, must show that the defendant's conduct was

> "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

Kloepfel, 149 Wn.2d at 196 (emphasis omitted) (internal quotation marks omitted) (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)). Whether a defendant's conduct is sufficiently "outrageous" is ordinarily a question for the jury; nevertheless, a court must initially

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[65] Although Vernon originally pleaded outrage claims on behalf of herself *and* DV below, her Brief of Appellant does not include any argument, citation to the record, or citation to legal authority to substantiate the outrage claim that she brings on her own behalf. Thus, we do not further address her personal claim. RAP 10.3(a)(6); *Cowiche Canyon Conservancy*, 118 Wn.2d at 809; *Bohn*, 119 Wn.2d at 368.

[66] The District responds that the superior court properly granted summary judgment because (1) Vernon failed to establish a prima facie case of outrage; and (2) her outrage claim is based on the same facts as her discrimination claim, making it duplicative.

determine if reasonable minds could differ about whether the conduct was sufficiently "extreme" to result in liability. *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989).

To support DV's outrage claim, Vernon relies on Division One's holding in *Brower v. Ackerley*, arguing: "'[A] case of outrage should ordinarily go to a jury so long as the court determines the plaintiff['s] alleged damages are more than 'mere annoyance, inconvenience, or normal embarrassment' that is an ordinary fact of life.'"[67] Even were we to assume that DV's panic attacks, throwing objects, eye poking, skin picking, and distress were more than mere annoyance, inconvenience, or normal embarrassment associated with his daily life, Vernon overlooks that the *Brower* defendants *conceded* the first two elements of their plaintiff's outrage claim, namely that their conduct was "extreme and outrageous" and "intentional or reckless." *Brower*, 88 Wn. App. at 98-99. Thus, the only issue remaining for the *Brower* court on summary judgment was whether the plaintiff's emotional distress was "[sufficiently] severe" to satisfy the *third* element of the plaintiff's prima facie outrage claim. *Brower*, 88 Wn. App. at 99 (internal quotation marks omitted).

Unlike the *Brower* defendants, the District has not conceded that its conduct was extreme and outrageous or intentional and reckless. Thus, we must determine whether (1) Vernon introduced sufficient evidence to satisfy the first two elements of an outrage claim (i.e., "extreme and outrageous" conduct and "intentional or reckless" conduct) and (2) whether "reasonable minds could differ on whether the [District's] conduct was sufficiently *extreme* to result in

[67] Br. of Appellant at 46-47 (internal quotation marks omitted) (quoting *Brower v. Ackerley*, 88 Wn. App. 87, 101-02, 943 P.2d 1141 (1997), *review denied*, 134 Wn.2d 1021 (1998)).

liability." *Dicomes*, 113 Wn.2d at 630 (emphasis added). Vernon contends that the District's teachers and staff members engaged in "outrageous" conduct because they (1) led DV down the hallway with food on a fork; (2) installed an electronic lock on his classroom door and placed duct tape over it to keep the lock activated; (3) left DV alone in a corner for hours at a time while staff members socialized; (4) grabbed and pulled DV on a daily basis; (5) permitted DV to masturbate in the hallway; and (6) did not allow DV to use a cane in the hallways. Reply Br. of Appellant at 8. But again, having personally observed only a fraction of this alleged conduct, Vernon relies exclusively on her unsupported deposition allegations; and she does not point to supporting admissible evidence that these alleged events were unrelated to DV's IEP program. Moreover, Vernon makes virtually *no* argument that this conduct was "extreme" or that the District "intentionally or recklessly" caused DV's emotional distress.[68]

As we have previously noted, whether a defendant's conduct is sufficiently "outrageous" is ordinarily a question for the jury; nevertheless, a court must initially determine whether the conduct was sufficiently "extreme" to result in liability. *Dicomes*, 113 Wn.2d at 630. "When the conduct offered to establish the tort's first element is not extreme, a court must withhold the case from a jury notwithstanding proof of intense emotional suffering." *Brower*, 88 Wn. App. at 101. Vernon cannot meet this threshold requirement: An independent review of the record does not support a conclusion that the District's treatment of DV was sufficiently extreme to result in

[68] Instead, Vernon makes two conclusory statements: "[The District's] behavior toward DV was extreme and outrageous" and the District "acted intentionally, or at the very least recklessly, when it inflicted emotional distress upon [DV]." Br. of Appellant at 48. And, as with her earlier claims, she cites no legal authority to support these conclusions.

liability.[69]

On the contrary, the record shows that DV had become physically abusive; had caused numerous repeated injuries to District teachers and staff; and had engaged in highly disruptive behaviors, such as taking off his clothes, which required that he be left alone to avoid reinforcing these behaviors. Under these circumstances, installing a lock on DV's classroom door and leaving him alone while he acted out were not "extreme" responses by the District. Thus, even construing the facts in the light most favorable to Vernon, she fails to show that the District's conduct was "'so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'"[70] Accordingly, DV's outrage claim fails.

F. Injury to the Parent-Child Relationship

Last, Vernon argues that the superior court erred in dismissing her injury-to-the-parent-child-relationship claim because (1) she originally alleged in her *complaint* that she had suffered "mental anguish" and "emotional distress"; and (2) RCW 4.24.010 allows her to recover for "emotional distress caused by injury to DV as well as [for discrimination] under [former] RCW 46.60 *et. seq*." Br. of Appellant at 37-38. Again, we disagree. Our civil rules are clear that a party who opposes summary judgment "may *not* rest upon the *mere allegations or denials*

[69] As we note above, although a jury will ordinarily decide whether a defendant's conduct is sufficiently "outrageous," a court must initially determine if reasonable minds could differ about whether the conduct was sufficiently "extreme" to result in liability. *Dicomes*, 113 Wn.2d at 630. Such is the case here.

[70] *Kloepfel*, 149 Wn.2d at 196 (emphasis omitted) (internal quotation marks omitted) (quoting *Grimsby*, 85 Wn.2d at 59).

of [*her*] *pleading*"; instead, she must respond with affidavit or other evidence showing that there is a genuine issue for trial. CR 56(e) (emphasis added). Because Vernon relies for support on only the bare allegations in her complaint, this claim also fails.

In rendering our decision based on the law, as we must, we are nevertheless mindful of the extraordinary challenges faced by DV, Vernon, and the District. We affirm the superior court's summary judgment dismissal of DV's discrimination claim and Vernon's tort claims, which she asserted both personally and on DV's behalf, because she did not present sufficient admissible evidence to establish prima facie cases for these claims.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Johanson, A.C.J.

Penoyar, J.