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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**TEREANCE D., through his Guardian and
next friend, WANDA D., and WANDA D.
In Her Own Right** :

Plaintiffs : **CIVIL ACTION**

v. : **NO.**

**SCHOOL DISTRICT OF
PHILADELPHIA** :

Defendant :

COMPLAINT

07 4166

FILED

OCT 15 2007

**MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk**

I. PRELIMINARY STATEMENT

1. Tereance D., ("Tereance"), through his Mother, Wanda D., as Tereance's parent and natural guardian, and Wanda D. in her own right, bring this action against the School District of Philadelphia ("District") for its failure to provide Tereance with a free appropriate public education ("FAPE"), and for discrimination against him on the basis of his disabilities.

2. Tereance is a student with autistic spectrum disorders and related disabilities who transitioned from Early Intervention to the School District during the 2000-1 school year. From the time he began Kindergarten, it was apparent that his needs were too extensive to be met in a regular education environment. Over the next several years, the District placed Tereance in increasingly restrictive placements which failed to address his academic and behavioral needs, many of which derived specifically from his autism. Rather than provide Tereance with services to address his autistic behaviors, the District shunted Tereance into a series of inappropriate full-time emotional support (ES) placements with a punitive and disciplinary focus based on inadequate evaluations and IEP's which were academically inappropriate. It was not until May,

2005, that the District finally addressed Tereance's internally driven sensory integration deficits, pragmatic language delays, and the other concomitant behavioral manifestations of his autistic spectrum disorder, and agreed to provide him with autistic support services. Meanwhile, Tereance was denied FAPE.

3. The District's actions have exacerbated the overall debilitation that Tereance has experienced as a result of his disability. Tereance has suffered and continues to suffer from the District's failure to afford him FAPE, which has, among other things, delayed his academic, behavioral, and emotional functioning, increased and maintained his social isolation, and constructively excluded him from age-appropriate activities at school, at home, and in the community.

4. Plaintiffs allege that the District has deprived Tereance of his rights under the Individuals with Disabilities Education Act, ("IDEA"), 20 U.S.C. §1401 *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 *et seq.*, ("Section 504"), Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§12101 *et seq.* ("ADA"), the Equal Protection Clause of the United States Constitution, and 42 U.S.C. § 1983.

5. Plaintiffs seek injunctive relief, compensatory education, as well as compensatory damages to compensate Tereance for the District's violations of his rights and the injuries he sustained as a result of those violations. Plaintiffs also seek to recover the attorney's fees and costs which they have incurred and will incur in their effort to secure appropriate educational services for Tereance, as well as compensatory education, compensatory damages, and attorneys fees. 20 U.S.C. § 1415 (i)(3)(B); 29 U.S.C. § 794a (b); 42 U.S.C. § 1988.

6. Additionally, Plaintiffs seek to enforce the July 17, 2007 Special Education Appeals Panel's (hereafter "the Panel") award of compensatory education encompassing the period between December 13, 2004 through May 9, 2005, and for the District's deprivation of ESY services to Tereance for the summers of 2002 through 2004 and the summer of 2006.

7. Plaintiffs also invoke the judicial review provisions of the IDEA, 20 U.S.C. §1415 (j), in connection with the Panel's decision to deny Tereance's claims for compensatory education for 2001-2, 2002-3, 2003-4, and the first four months of the 2004-5 school years based on the statute of limitations provisions contained in the Individuals with Disabilities Education Improvement Act. 20 U.S.C. §1415 (f)(3)(D)(I).

8. The District's actions set forth below were done intentionally or with deliberate indifference to Plaintiffs' federal statutory rights. The District knew or should have known that its actions as set forth herein violated the standards of conduct which were legally required at the time those actions took place.

II. JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343. Plaintiffs' causes of action arise under 20 U.S.C. § 1402, 29 U.S.C. § 794, 42 U.S.C. § 2000d, §§ 12161-12165 and § 1983. Venue in this District is proper under 28 U.S.C. § 1391 because Plaintiffs reside within Philadelphia County, Pennsylvania, where the Defendant School District is located, and where the Plaintiffs' causes of action arose.

III. PARTIES

10. Plaintiff Tereance D., ("Tereance") was born on May 1, 1995, and is a student with an autistic spectrum disorder with related impairments in speech and language, sensory

integration, and social and emotional development. Since September, 2005, Tereance has attended an Autistic Support (AS) class in the Nebinger Elementary School within the School District of Philadelphia (hereafter “the District”). The appropriateness of Tereance’s placement at Nebinger is not at issue here.

11. Wanda D. is Tereance’s mother. At all times relevant to this action, she has resided in Philadelphia, Pennsylvania, and within the geographical boundaries of the District.

12. The District is a local educational agency (LEA) within the meaning of the IDEA and Section 504. As such, it receives federal funds for the purpose of educating children with disabilities within its boundaries. The District is also a “public entity” as defined by Title II of the ADA. 42 U.S.C. § 12131 (1).

13. The District has the responsibility under federal and state law to assure that students with disabilities are properly evaluated, identified, and provided with appropriate special education, related services, supplemental supports, and/or accommodations to enable them to achieve meaningful educational benefit and enjoy equal educational opportunities in relation to their typically developing age mates, in the least restrictive appropriate environment given their individual needs.

IV. STATUTORY AND REGULATORY BACKGROUND

“Child Find” and the Duty to Provide a Free and Appropriate Public Education

14. Any student with a disability who needs individualized instruction in order to benefit from his or her educational programming, and meets the state mandated age criteria, is eligible to receive a free and appropriate special education (FAPE), comprised of special education and related services. 20 U.S.C. § 1401(a); 34 C.F.R. § 300.26(b)(3).

15. Section 504 also requires that students with disabilities be provided FAPE. In addition, Section 504 prohibits the exclusion of, or discrimination against, any otherwise qualified individual with a disability by federal fund recipients, as does Title II of the ADA, 42 U.S.C. § 12132, *st seq.* Failure to provide accommodations and supplemental services constitutes discrimination for purposes of both Section 504 and the ADA.

16. Both the IDEA and Section 504 require each state and Local educational Agency (LEA) to locate, identify, and comprehensively evaluate every child with a disability who resides within its boundaries, whether or not those children are enrolled in the public school system. 34 C.F.R. § 300.125; 34 C.F.R. § 104.35.

17. Evaluations must be tailored to assess all areas of educational need and must comprehensively examine all areas of suspected disability. 34 C.F.R. § 300.532 (b).

18. Evaluations are deficient where they fail to uncover areas of a child's learning disabilities. *Warren G. V. Cumberland County School District*, 190 F.3d 80 (3rd Cir. 1999). *See also D.H. v. Manheim Township School District*, 2005 U.S. Dist. LEXIS 39756 (November 29, 2005).

The Right to Extended School Year Services

19. Extended School Year services (ESY) are comprised of special education and related services that are provided to a child with a disability beyond the normal school year in accordance with the child's IEP at no cost to the parents, if the child needs such services to receive FAPE. 34 C.F.R. 300.309 (a)(2).

20. Whether a child needs and qualifies for ESY services must be raised and discussed at every IEP team meeting. 22 Pa. Code 711.44 (6).

21. A public agency may not limit extended school year services to particular categories of disability or unilaterally limit the type, amount, or duration of those services. 34 C.F.R. 300.309 (a)(3).

22. Factors to be considered in the determination of eligibility for ESY include: the extent to which the student has mastered and consolidated an important skill or behavior at the point when educational programming would be interrupted; whether the child is at the point of an emerging skill and/or breakthrough opportunity when the break in services is scheduled to occur; the extent to which a skill or behavior is particularly crucial to reaching the goals of self-sufficiency and independence from caretakers; the extent to which successive interruptions in educational programming reduce a student's motivation and trust and may lead to an irreversible withdrawal from the learning process; whether the student's disability is severe, such as autism/pervasive developmental disorder, serious emotional disturbance, severe mental retardation, degenerative impairments with mental involvement and severe multiple disabilities.

23. If these factors, either singly or in combination, make it unlikely that the student will maintain skills and behaviors relevant to IEP goals and objectives, or if the student otherwise needs ESY services to receive FAPE, the student is ESY eligible. No single factor is determinative. 22 Pa. Code 711.44 (3)

Statute of Limitations for Claims for Compensatory Education

24. Both the IDEA and Section 504 provide procedural safeguards to enable meaningful parental participation in matters concerning their child's educational program, and allow parents to obtain administrative and judicial review of school districts' decisions concerning their child's education.

25. On July 1, 2005, the Individuals with Disabilities Education Improvement Act (IDEIA) went into effect. The IDEIA amends the IDEA in certain respects. Among other things, it contains an express statute of limitations for claims of compensatory education. However, the IDEIA is not retroactive; moreover, it did not amend Section 504.

26. Even where the IDEIA applies, a parent's claims for compensatory education are tolled when "the parent was prevented from requesting a hearing due to (i) specific misrepresentation by the local educational agency that it had resolved the problem forming the basis of the complaint; or (ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent. 20 U.S.C. § 1415 (f)(3)(D).

VI. ADMINISTRATIVE EXHAUSTION

27. On December 13, 2006, Tereance's mother, Wanda D., brought a due process complaint pursuant to the IDEA and Section 504 seeking compensatory education for Tereance for the 2001-2, 2002-3, 2003-4, and 2004-5 school years, as well as for the deprivation of ESY services from the summer of 2002 through and including the summer of 2006.

28. A due process hearing was held over the course of six sessions between February 16, 2007 and May 8, 2007 before Hearing Officer Dr. Linda Valentini.

29. In a Decision dated June 8, 2007, Dr. Valentini ordered the District to provide compensatory education to Tereance for the period between December 13, 2004 and May 9, 2005. She also ordered compensatory ESY services for the summers of 2002, 2003, 2004, and 2006, but denied the ESY claim for the summer of 2005.

30. Based on the statute of limitations provision contained in the Individuals with Disabilities Improvement Act (IDEIA), the Hearing Officer denied compensatory education to

Tereance for the school years 2001-2, 2002-3, 2003-4. As to the 2004-5 school year, the Hearing Officer relied on the IDEIA to deny compensatory education for the period between September 8, 2004 and December 12, 2004.

31. Because Tereance's claims for compensatory education arose before the effective date of the IDEIA, they are not controlled by limitations provisions contained in the IDEIA.

32. On July 1, 2007 Wanda D., through counsel, filed Exceptions to the Hearing Officer's decision. She challenged the Panel's denial of Tereance's compensatory education claims based on the limitations provisions in the IDEIA because the statute is not retroactive and also because those claims should have been tolled pursuant to the IDEIA's specific exceptions. Wanda D. did not challenge the Hearing Officer's decision to deny ESY services for the summer of 2005, nor did she contest the denial of the compensatory education claim for May 9, 2005 through the conclusion of the 2004-5 school year.

33. The School District did not file Exceptions to the Hearing Officer's decision, but it responded to the Parent's Exceptions on July 9, 2007, arguing that it had not deprived Tereance of FAPE and that the Hearing Officer was wrong to order any remedy whatsoever to Tereance.

34. On July 17, 2005 the Panel issued a decision in which it affirmed the Hearing Officer's award of compensatory education and ESY services to Tereance.

35. The Panel concluded that the evidence was "overwhelming" that the District had denied FAPE to Tereance from the time he entered Kindergarten through the conclusion of the compensatory education period. A true and correct copy of the Panel's decision is attached hereto and incorporated herein by reference.

36. The Panel denied compensatory education to Tereance for the 2001-2, 2002-3, and 2003-4 school years and for the first half of the 2004-5 school year on the ground that those claims were time-barred if not by the IDEIA, then by state law as set forth in *Montour School District v. S.T.*, 805 A.2d 29 (Pa. Commw. 2002).

37. The Panel's assumption that the IDEIA extinguished pending claims when it became effective on July 1, 2005 was erroneous, as the Act is not retroactive. *Lawrence Township Board of Educ. v. New Jersey*, 417 F.3d 368, 370 (3rd Cir. 2005). The Panel also misapplied the exceptions to the IDEIA, and failed to even consider the majority of the Plaintiffs' arguments as to why their compensatory claims were tolled and were thereby timely filed even if the IDEIA was applicable to their claims.

38. The Panel's application of a one-year state-created statute of limitations to deprive Tereance of compensatory education for violations of federal law was erroneous, as the federal courts have unanimously concluded over the course of many years. *See e.g., Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *M.C. v. Regional School District*, 81 F.3d 389, 397 (3rd Cir. 1996); *Susavage v. Bucks County Intermediate Unit*, 2002 U.S. Dist. Lexis 1274 (E.D. Pa. 2002); *Amanda A. V. Coatesville Area School District*, 2005 U.S. Dist. Lexis 2637 (E.D. Pa. 2005); *Kristi H. v. Tri-Valley School District*, 107 F. Supp. 2d 628 (M.D. Pa. 2004); *Johnathan T. v. Elizabeth Forward School District*, F. Supp.2d. (W.D. Pa. 2004).

39. Because the District did not appeal from the Panel's award, it is final and binding on the District. The District has done nothing to implement the Panel's compensatory education award to Tereance.

V. FACTUAL BACKGROUND

Kindergarten, the 2000-2001 School Year

40. Tereance came to the District as a Kindergarten student during the 2000-2001 school year after having attended an Early Intervention program for children with disabilities.

41. When he entered Kindergarten, Tereance's readiness skills were at the level of a 2-year-six-month old child, although he showed signs of having higher potential. He was demonstrating delays of at least 25% or greater in speech/language, cognitive, social/emotional, fine/gross motor, and self-help skills.

42. Dr. Susan Huntington, the District psychologist who performed several evaluations of Terence over the course of the next several years, first evaluated Terence while he was still in Early Intervention.

43. Although Dr. Huntington understood that there was a possibility that Tereance had an autistic spectrum disorder due to his significant impairments in speech and language development, she failed to comprehensively assess whether Tereance was autistic.

44. Autistic spectrum disorders are neurological impairments that primarily impact a child's ability to acquire language and relate to others. Even if they learn to produce articulate speech, many children with Autistic spectrum disorders are unable to engage in meaningful communication (pragmatic language).

45. Dr. Huntington was not familiar with the instruments used to evaluate autistic spectrum disorders in young children.

46. Based on a cursory observation and evaluation, Dr. Huntington erroneously concluded that Terence had mental retardation. She also recommended that Terence receive an

immediate speech and language evaluation.

47. Based on Dr. Huntington's evaluation and recommendation, the District placed Tereance in a regular Kindergarten program at the Alcorn Elementary School with no supplemental supports. Although the IEP states that Tereance would receive speech services, no such services were provided.

48. The District knew or should have known that its proffered placement was inappropriate for Tereance, as was his IEP.

49. Almost immediately after he began Kindergarten, it was apparent that Tereance's needs were too extensive to be met in a regular education environment. Although Dr. Huntington had misclassified Tereance, she specifically stated in her report that Tereance required special education services ("learning support") in his regular education classroom in order to receive FAPE, but none was provided.

50. Less than one month into the school year, the District convened an IEP meeting.

51. The District provided Wanda D. with no notice that ESY would be discussed at the meeting, nor did it provide her with any information as to how eligibility for ESY is determined under the state and federal law. The District determined that Tereance was not eligible for ESY without considering any of the required eligibility factors.

52. During the IEP meeting, the team concluded that Tereance needed to be transferred immediately to a self-contained learning support classroom.

53. Even after Tereance was moved to a self-contained classroom and provided with full-time learning support, he could not attend school independently. Beginning in November, 2000, his medical assistance provider approved Therapeutic Support Services (TSS) services for

Tereance both at school and at home. The TSS attended school with Tereance to provide him with daily 1-1 behavioral support throughout the school day.

54. Because Tereance was doing so poorly even with 1-1 TSS support, the District held another IEP meeting on December 20, 2000. At the conclusion of the meeting, the District recommended that Terence be transferred to a self-contained learning support classroom at the Arthur Elementary, an “alternate regular school.”

55. The District provided no notice to Ms. Douglas that ESY would be considered at December IEP meeting, and it determined that Tereance was not eligible for ESY without properly raising or considering the issue.

56. The District did not complete a speech and language evaluation until February, 2001, more than six months after Tereance started Kindergarten and almost a year after the District’s psychologist said that Tereance’s speech should be evaluated immediately. No IEP meeting was held to discuss the speech evaluation until May, 2001.

First Grade, the 2001-2002 School Year

57. Tereance received no ESY services between Kindergarten and first grade.

58. At the beginning of first grade, Tereance’s language and toileting skills had deteriorated from the year before; he was exhibiting autistic-like behaviors in school, including dramatic language delays; he was making slow progress academically. He entered first grade about a year behind his peers in both reading and math.

59. Tereance was 90% non-verbal. He had far below average social skills, experienced extreme sensitivity to noise, and had difficulties with transitions and following school rules. He demonstrated little or no interest in the activities of his classmates.

60. An IEP meeting was held on September 20, 2000. The District provided no notice to Ms. Douglas that ESY would be considered, and the District determined that Tereance was not eligible for ESY without properly raising or considering the issue.

61. During the IEP meeting, the District agreed to re-evaluate Tereance.

62. Although the District knew that autism was a suspected area of disability for Tereance, and it was obligated to conduct a comprehensive evaluation of all suspected disabilities, the District assigned Dr. Huntington to do the evaluation. No one informed Wanda D. that Dr. Huntington was not competent to evaluate an autistic child.

63. Dr. Huntington completed the evaluation report (ER) in November, 2001. She acknowledged in her report that Tereance was not succeeding behaviorally in his current placement, even with the daily intervention of a TSS.

64. The District held an IEP meeting in January to discuss the ER.

65. The District provided no notice to Ms. Douglas that ESY would be considered in the January IEP meeting, and the District determined that Tereance was not eligible for ESY without properly raising or considering the issue at the meeting.

66. The District did not inform Wanda D. that its ER was not comprehensive enough to satisfy the requirements of either the IDEA or Section 504.

67. The District misinformed Wanda D. that it was not possible to formally test Tereance because he “refused contact with the evaluator.”

68. The District withheld critical information from Wanda D. which a comprehensive evaluation would have revealed. The District concluded, based on the diagnosis of Tereance’s behavioral health provider, that he had an autistic spectrum disorder. However, the ER

erroneously states that Tereance had receptive language skills that enabled him to understand what was going on in his first grade classroom and could use “well-formed speech” when he was “motivated.” The District did not assess Tereance’s pragmatic speech development, nor did it assess the extent to which Tereance’s behavioral issues were organically-based, and not motivational in nature.

69. The ER states that Tereance should have an occupational therapy evaluation to explore his “extreme sensory sensitivities,” but no one from the District followed up on this recommendation.

70. Although the District knew or should have known that further investigation of Tereance’s neurological functioning was necessary, it did not refer him for a neuro-psychological evaluation nor did it otherwise explore how Tereance’s autism might be impacting his overall performance in school.

71. Without performing any assessment of Tereance’s emotional functioning, much less a comprehensive assessment, the District told Wanda D. that she should have Tereance evaluated privately by a psychiatrist and should place him in a partial hospitalization setting in order to “provide direction” as to how to meet his educational needs when he “re-ent[ers] the educational system.”

72. The District did not inform Wanda D. that it was solely responsible for evaluating and identifying Tereance’s educational needs.

73. When Ms. Douglas refused to remove Tereance from school or to have him hospitalized, the District left him in the full-time learning support placement which its own psychologist had concluded was not providing him with FAPE.

74. The District did not consider whether Tereance needed Autistic Support services to address his needs, nor did it inform Wanda D. that such services existed or that Tereance might require them in order to receive FAPE.

75. Tereance continued to receive little or no benefit from his educational placement in any of his areas of greatest need -- pragmatic language, social, and behavioral development.

76. As direct result of the District's failure to appropriately address his needs in school, Tereance's behaviors escalated, and he had to be hospitalized for one week in April, 2002.

77. On April 19, 2002, after Tereance's hospitalization, Ms. Douglas requested a due process hearing to address Tereance's classroom placement, behavior, functional behavior analysis, behavior plan, ES class, CER/academic performance, and school transfer.

78. At a Pre-Hearing Conference on May 22, 2002, the District told Ms. Douglas that it would resolve the issues which precipitated her request. The District inaccurately reported to Wanda D. that Tereance was working on grade level, and it assured her that it would incorporate the recommendations of Tereance's medical assistance providers into his IEP. It informed her that Tereance's ever-increasing social and behavioral needs could be and would be appropriately met in a full-time emotional support (ES) classroom.

79. The District failed to consider Autistic Support as a possible placement for Tereance, nor did it inform Wanda D. that such services existed or that Tereance might require them in order to receive FAPE.

80. By failing to provide Wanda D. with critical information regarding Tereance's educational needs and the full panoply of special education options available to meet those needs,

the District secured her uninformed consent to place Tereance in an ES classroom for second grade which it knew or should have known would be inappropriate.

Second Grade, the 2002-3 School Year

81. Terence received no ESY services between First and Second Grades.

82. Tereance entered second grade years behind grade level in language, social, and behavioral skills. He had no friends and continued to display behaviors in the classroom which were classically symptomatic of a child with autism and sensory integration deficits.

83. Within two weeks after school began, Tereance was not taking part in any learning activity; he was aggressive towards adults and his peers; additionally, he was easily frustrated and communicated with grunts and animal noises.

84. Although the school psychologist had identified Tereance's "extreme sensory sensitivities" as a possible trigger for some of his outbursts, he was receiving no services or accommodations to minimize the behaviors which were triggered by external noise.

85. Tereance's unaddressed sensory deficits minimized his ability to make progress toward age-appropriate academic and social skills, and ensured his continued exclusion from any meaningful participation with the mainstream school population.

86. In addition to sensory overload, Tereance was frustrated by his pragmatic language delays, which had never been appropriately identified or addressed by the District.

87. Without having provided Tereance with an sensory integration occupational therapy evaluation or an evaluation to assess his pragmatic language, the District told Wanda D. that Tereance's outbursts and other inappropriate social behaviors were the result of emotional factors.

88. The District held an IEP meeting on September 27, 2002.

89. The District provided no notice to Ms. Douglas that ESY would be considered at the meeting, and the District determined that Tereance was not eligible for ESY without properly raising or considering the issue.

90. At the September IEP meeting, the District finally acted on the recommendation that Tereance have an OT evaluation to address his sensory needs which Dr. Huntington had made ten months earlier in her November, 2001 ER.

91. The District's Occupational Therapist, however, performed only a cursory "OT screen" and failed entirely to assess Tereance's needs in the sensory area. Based on her inadequate evaluation, she concluded, inaccurately, that Terence was functioning adequately in the educational curriculum without the need for OT services of any kind; therefore, the District provided no OT services to Tereance in spite of his critical need for them.

92. In June, 2002, based on its failure to provide comprehensive assessments to evaluate Tereance's needs, the District told Wanda D. that Tereance's behavioral deficits were emotionally based and that his needs could be and would be appropriately addressed in a full-time ES classroom at McDaniel Elementary School.

93. The District never assessed to what extent Tereance's behaviors and educational needs derived from his autistic spectrum disorder, much less an emotional disturbance, and it failed to inform Wanda D. that its assessments were incomplete, that Terence may benefit from autistic support services, or that he might need such services to receive FAPE.

Third Grade, the 2003-4 School Year

94. The District returned Tereance to a full-time emotional support classroom at McDaniel Elementary School for Third Grade pursuant to an IEP which did not meet his needs.

95. Tereance continued to struggle both academically and behaviorally in the ES classroom at McDaniel and made very little progress, academic or otherwise.

96. Although his speech was only at about fifty-per cent age-appropriate, Tereance received speech and language services just one time a week which was heavily focused on articulation, not pragmatic speech.

97. Tereance received no services to address his needs in the sensory area, nor did he receive any other behavioral services or individualized supports to address his disruptive behaviors and deficits in social skills and communication.

98. Instead, the District attempted to manage his behaviors through a one-size-fits-all behavior plan and through heavy reliance on the TSS.

99. Tereance continued to have behavioral outbursts in class due to his sensory integration issues and age-inappropriate language, social, and behavioral skills. The classroom environment exacerbated his sensory deficits, as it was chaotic and noisy; additionally, the staff was loud and aggressive and did not understand how to address Tereance's autistic behaviors.

100. The District held an IEP meeting on September 29, 2003 to address Tereance's difficulties in the ES classroom.

101. The District provided no notice to Ms. Douglas that ESY would be considered at the meeting.

102. Even though this was the third year in a row that Tereance returned to school with more severe behavioral problems than he had before the summer break, the District determined that Tereance was not eligible for ESY without properly raising or considering the issue.

103. Prior to the IEP meeting, Tereance's teacher told Wanda D. that her ES classroom was not "the best place" for Terence.

104. During the IEP meeting, however, the District told Wanda D. that there was no other placement that would meet Tereance's needs.

105. The District continued to assume, and to report to Wanda D., that Tereance's behaviors were being triggered by emotional factors rather than neurological or environmental ones.

106. Accordingly, Tereance remained in the ES classroom, where his negative behaviors increased as the year progressed, as did his isolation from the general school population.

107. The District failed or refused to implement the suggestions provided by Tereance's wraparound team. Instead, it responded to Tereance's behaviors by removing him from the instructional area. Tereance was excluded from the classroom 50 to 75 per cent of the time.

108. Tereance made no progress toward his behavioral IEP goals. He began and ended the year needing full-time 1-1 support. Likewise, he began and ended the year with the same reading and math levels.

109. The District notified Wanda D. that it could and would meet Tereance's needs in an ES program at McDaniel in a classroom run by Community Council, a provider of mental

health services.

110. The District contracted with Community Council to provide FAPE to children in its this and other ES classrooms throughout the City.

111. Tereance received no ESY services between third and fourth grades, although he was eligible for them.

Fourth Grade, the 2004-5 School Year

112. When Tereance returned to school for fourth grade, he had difficulties readjusting to school and his new classroom.

113. Terence made no academic progress in fourth grade. He made little or no behavioral progress either. He remained TSS-dependent throughout the school year, and even regressed in some areas.

114. Until May, 2005, the District continued to employ an IEP which used the same goals and objectives which had failed to produce any progress during the previous two years, and which assumed that Tereance's problematic behaviors were emotionally-driven rather than manifestations of his autistic spectrum disorder.

115. Although Tereance had great difficulty with assignments involving handwriting, and this had been identified as a trigger for some of Tereance's tantruming behaviors, the District failed to properly evaluate Tereance for OT services or to deliver those services to Tereance.

116. Had the District performed an adequate OT evaluation, it would have known that Tereance was in need of OT services to address his deficits in handwriting and sensory integration in order to receive FAPE.

117. In addition to the inadequate IEP, the ES classroom was an inappropriate placement for Tereance. It was loud and chaotic, and because of Tereance's sensory integration and pragmatic language difficulties, he was not able to function independently in this environment. He was frequently excluded from the classroom and its activities.

118. Additionally, the classroom instruction was below Tereance's academic level, and the other students in the classroom were inappropriate social models for him.

119. The District did nothing to supervise Community Council or to ensure that Community Council was providing FAPE in Tereance's special education classroom.

120. The District was required to provide Tereance with a fully certified special education teacher. IDEA 2004, § 612 (a)(14)(A).

121. Tereance's teacher, a Community Council employee, had no teaching credentials whatsoever, and had been denied an Emergency Teacher's Certification by the Pennsylvania Department of Education.

122. In addition to her lack of teaching credentials, Tereance's teacher was not competent to implement the academic content in Tereance's IEP or to work with a child with an autistic spectrum disorder.

123. Wanda D. and Tereance's behavioral health wraparound team expressed concern during several IEP meetings held throughout the school year as to whether Terence's placement in the ES classroom was appropriate.

124. The ES "teacher" reported to the team, falsely, that Tereance was progressing at a normal pace in the general curriculum and that he was making behavioral progress as well.

125. The ES “teacher” was not competent to determine whether Tereance was making educational progress.

126. In fact, Tereance had made no academic progress for almost two years.

127. Although she repeatedly reported to the IEP team that Tereance was making behavioral progress in the ES classroom, the ES “teacher” had documented no such progress.

128. The District evaluated Tereance in November, 2004, but this evaluation did not comprehensively assess every area of suspected disability and it withheld important information to which Wanda D. was entitled.

129. The ER concluded that Tereance’s IQ was in the range of mental retardation. Tereance, however, is not mentally retarded. The District conducted no assessment of whether Tereance had a learning disability, but it acknowledged that Tereance has PDD – an autistic spectrum disorder, based on the evaluation performed by Tereance’s behavioral health team.

130. The ER correctly concluded that Tereance’s behavioral problems were “internally driven by his PDD condition” and triggered for the most part by more noise than he was able to tolerate.

131. Although the District had acknowledged since November, 2002 that Tereance had a disability on the autistic spectrum, it never assessed the extent of his need for Autistic Support or provide information to Wanda D. as to what those services might involve or how she could access them for Tereance.

132. In December, 2004, after securing an evaluation for Tereance from the Center for Autistic Children, Wanda D. and Tereance’s wraparound team demanded that the District provide Tereance with Autistic Support.

133. For the next five months the District misinformed Wanda D. that Tereance was not eligible for Autistic Support because he was too “high functioning.”

134. Moreover, the District falsely informed Wanda D. that it did not have an Autistic Support classroom which was appropriate for Tereance; that it did not have to create a program for him; and that Tereance’s needs could only be addressed in his emotional support classroom.

135. Additionally, the District failed to inform Ms. Douglas that it was legally required to provide Tereance with appropriate Autistic Support services if he needed them to receive FAPE, whether or not the District itself could provide them.

136. The District misinformed Ms. Douglas that it would be illegal to place Tereance in Autistic Support since such a placement would be more restrictive than the ES placement in which he had made no progress for three years. The District never told Wanda D. that Tereance could receive itinerant Autistic Support services regardless of the type of classroom he attended.

137. In April, 2005, Wanda D., having secured legal representation for the first time, requested a Pre-Hearing Conference to redress the District’s refusal to provide Tereance with Autistic Support services and/or an appropriate educational program and placement.

138. At the Pre-Hearing Conference on May 9, 2005, the District agreed to transfer Tereance to an Autistic Support classroom at the Nebinger Elementary School beginning in September, 2005.

139. Wanda D. learned for the first time during the Pre-Hearing Conference that the Autistic Support classroom at Nebinger had been there for seventeen years, in direct contradiction to the District’s previous claims that it did not have an Autistic Support classroom for students such as Tereance.

140. Also during the Pre-Hearing Conference, the District for the first time agreed to provide Tereance with OT services to address Tereance's deficits in handwriting and sensory integration. The District also agreed to provide Tereance for the first time with direct instruction in pragmatic language.

Fifth Grade, the 2005-6 School Year

141. During Tereance's first few months in the Autistic Support classroom at Nebinger, Tereance's academic levels rose dramatically. His social skills and pragmatic speech also improved, as did his behaviors. Tereance was able to function both in school and in the community to a far greater extent than he had been previously.

142. Just a few weeks after he entered the AS classroom, for the first time since first grade, Tereance was able to attend school without a TSS.

143. The teacher in the Autistic Support classroom is highly skilled and has years of experience teaching children on the autistic spectrum. She provides a calm, quiet, and structured environment for both Tereance and her other students.

144. The peer group in the Autistic Support classroom is appropriate for Tereance, and for the first time since Kindergarten, he was able to make a few friends in school.

145. Because Tereance was more comfortable at school, and making good progress both socially and academically, he was happier and more independent at home as well.

146. Most of the students in Tereance's Autistic Support classroom at Nebinger were in that class during the time the District was telling Wanda D. that Tereance was too "high functioning" for Autistic Support. His other classmates had been attending Autistic Support classrooms in other parts of the City, none of which the District had identified in response to

Wanda D.'s repeated pleas for Autistic Support services for Tereance.

147. The District conducted an IEP meeting on December 1, 2005. During that meeting, the District found that Tereance was eligible for ESY because he "suffers recoupment losses from end of week to beginning after weekend break."

148. During a meeting in the spring of 2006, however, Tereance's AS teacher misinformed Wanda D. that the only ESY services that would be available to Tereance through the District would be inappropriate for him. Because of this misinformation, Wanda D. agreed to sign a waiver of Tereance's right to ESY.

149. The misinformation Wanda D. received from the District deprived Tereance of the 72 hours of ESY guaranteed by his IEP for the summer of 2006, thus depriving him of FAPE.

150. The AS teacher had never been properly trained as to how ESY eligibility was determined, nor did she know that the District could provide individualized ESY services to special education students such as Tereance. Accordingly, she did not inform Wanda D. that Tereance was entitled to an individualized ESY program designed to meet his unique needs. Moreover, the District's policies and procedures regarding the provision of ESY services did not comport with state or federal law, and were designed to systematically mislead parents as to their right to ESY.

151. Had the AS teacher provided Wanda D. with accurate information regarding Tereance's right to ESY, she never would have waived his right to receive it.

VII. CAUSES OF ACTION

**COUNT I: ENFORCEMENT OF THE HEARING OFFICER'S AWARD OF
COMPENSATORY EDUCATION AND ESY**

152. The factual averments set forth in Paragraphs 1-151 are re-alleged and incorporated by reference herein.

153. The Panel awarded compensatory education to Tereance for every hour school was in session between December 13, 2004 through May 9 2005, a total of approximately 658 hours.

154. Additionally, the Panel affirmed the Hearing Officer's award of compensatory education to remedy the District's deprivation of 288 hours of ESY services to Tereance due to the District's failure to comply with the standards for ESY eligibility set forth in the IDEA and state law.

155. Although the Panel's unappealed award of compensatory education to Tereance is final and binding on the District, the District has failed to provide assurance that it will carry out the Panel's Decision, nor has it taken any action to implement the Panel's Order.

156. The educational services which were denied to Tereance have a value of approximately \$100.00 per hour.

157. Tereance is entitled to an order enforcing the Panel's award.

158. Because the District was responsible for the deprivation of FAPE to Tereance over the course of many years, the compensatory award should be converted to its monetary equivalent and paid to Wanda D. and a neutral third party who will manage the funds in Tereance's best interest.

COUNT II: APPEAL FROM ADMINISTRATIVE DECISION

159. The factual averments set forth in Paragraphs 1- 158 are re-alleged and incorporated by reference herein.

160. The Panel found overwhelming evidence in the administrative record that the District deprived Tereance of FAPE from the time he entered Kindergarten until May 9, 2005. The Panel's conclusion is fully supported by the record, and was never appealed by the District.

161. The District's failure to provide FAPE to Tereance violated his rights under the Individuals with Disabilities Education Act, as amended, 20 U.S.C. § 1401 *et seq.*, and its regulations at 34 C.F.R. Part 300, as well as Section 504 of the Rehabilitation Act, 29 U.S.C. §794, *et seq*; 34 C.F.R. § 104.33.

162. In spite of the District's violation of Tereance's right to FAPE, the Panel denied compensatory education to Tereance for the period between November 1, 2001 and December 12, 2004 by improperly and retroactively applying the statute of limitations contained in the IDEIA and/or by utilizing a one-year state-court statute of limitations which violates Tereance's federal rights under the IDEA and Section 504.

163. Even if the IDEIA applies to Plaintiffs' compensatory education claims for the 2001-2, 2002-3, and the 2003-4 school years, as well as the first four months of the 2004-5 school year, those claims were tolled because the District failed and/or refused to provide Wanda D. with information to which she was legally entitled and/or misinformed her that it would rectify the violations which she brought to the District's attention.

164. The District's actions and omissions prevented Wanda D. from understanding her rights and from asserting Tereance's claims in an earlier proceeding. This resulted in the

deprivation of FAPE to Tereance.

165. The Panel's decision to deny compensatory education to Tereance pursuant to the IDEIA for the 2001-2002, 2002-3, 2003-4, and from September, 2004 through December 12, 2004 should be reversed.

**COUNT III: THE DISTRICT, THROUGH BAD FAITH AND GROSS
MISMANAGEMENT, INTENTIONALLY DISCRIMINATED
AGAINST TEREANCE ON THE BASIS OF HIS DISABILITIES
IN VIOLATION OF HIS RIGHTS UNDER SECTION 504
OF THE REHABILITATION ACT AND THE ADA**

166. The factual averments set forth in Paragraphs 1- 165 are re-alleged and incorporated by reference herein.

167. In spite of his disabilities, Tereance is a student who is otherwise qualified to participate in the District's educational programs with appropriate instruction, accommodations, and supplemental supports.

168. From the time Tereance entered the District's programs, the District failed to provide him with appropriate educational and related services, accommodations, and supplemental services which he required in order to have access to the District's programs and services and to make appropriate developmental and educational progress equal to that provided children without disabilities.

169. The District's failure to provide FAPE to Tereance and to properly accommodate his disabilities was the result of bad faith and gross mismanagement, and discriminated against Tereance on the basis of his disabilities.

170. The District's failure to timely provide appropriate educational services, accommodations, and related services to Tereance and has, among other things, exacerbated the

impact of Tereance's disabilities; interfered with his ability to communicate with others, form and maintain relationships, and meaningfully participate with typically developing peers; and deferred indefinitely Tereance's ability to engage and be included in age-appropriate social, educational, and vocational opportunities, programs, and services to which he would have had access if he had received appropriate related services and accommodations in a timely and integrated manner, thus excluding him from the mainstream of his school, family, and community. Moreover, the District's discriminatory actions have caused Tereance to require hospitalization and far more restrictive educational placements than would have been necessary otherwise, and has caused him to suffer emotional distress.

**COUNT IV: INTENTIONAL DISCRIMINATION AGAINST TEREANCE IN
VIOLATION OF HIS RIGHTS PURSUANT TO THE
THE EQUAL PROTECTION CLAUSE AND SECTION 1983**

171. The factual averments set forth in Paragraphs 1-170 are re-alleged and incorporated by reference herein.

172. The Equal Protection Clause of the United States Constitution provides Tereance with substantive protection from unequal treatment based on his disability which is not rationally related to an important state interest.

173. The District, intentionally and under color of law, has discriminated against Tereance on the basis of his disability, without rational justification or excuse, and without any legitimate or important governmental need to do so, and has thereby deprived him of the equal protection of the law.

174. The District's actions were in furtherance of an official policy or ratification of systematic practices which it knew or should have known violate Tereance's well-established

federal constitutional rights as well of the rights of other children with disabilities, and was in deliberate indifference of those rights. The District also systematically failed to train its staff or to supervise its staff and contractors to prevent the deprivation of FAPE to Tereance and others like him and for whom the District is required to provide equal education opportunities in spite of their disabilities.

175. The District violated Tereance's right to equal protection of the law pursuant to the Fourteenth Amendment to the United States Constitution and in violation of 42 U.S.C. § 1983.

**COUNT V: DEFENDANT'S FAILURE TO REIMBURSE PLAINTIFFS
FOR THEIR ATTORNEYS FEES AND COSTS VIOLATES THEIR
RIGHTS PURSUANT TO THE IDEA AND SECTION 504 AND 42 U.S.C § 1988.**

176. The factual averments set forth in Paragraphs 1-175 are re-alleged and incorporated by reference herein.

177. Parents who succeed on any significant issue in any action or proceeding brought under the IDEA and/or Section 504 are prevailing parties and thereby entitled to recover their reasonable attorney's fees and costs. 20 U.S.C. § 1415(i)(3)(A) & (B); 29 U.S.C. § 794a (b); 42 U.S.C § 1988.

178. As a result of the Hearing Officer's decision, which found that the District deprived Tereance of FAPE from December 13, 2004 through May 9, 2005, Wanda D. is a prevailing party.

179. At all times during the administrative proceedings below, and continuing to the present, Plaintiffs were represented by counsel from the firm, McKinley & Ryan, LLC.

180. Through the date of the Panel's decision, McKinley & Ryan, LLC expended over 287 hours on Plaintiffs' behalf, and incurred attorneys fees in the amount of \$100,553.16. Counsel also incurred litigation expenses, including expert fees, in the amount of \$2680.16.

181. The expenditure of attorney time and the litigation costs expended, including the expert costs, were necessary in order to secure an award in Tereance's favor in the administrative proceedings below.

182. Although Plaintiffs' counsel has asked the District to reimburse Tereance and Wanda D. for their attorneys' fees and litigation costs, the District has refused to do so.

183. The District's refusal to reimburse Plaintiffs for their attorneys' fees and costs is unreasonable and violates their rights under the IDEA, Section 504, and Section 1988.

VIII. PRAYER FOR RELIEF

Wherefore, the Plaintiffs request the following relief:

1. That this Court accept jurisdiction over the compensatory education claims set forth herein, take additional evidence, and award Tereance compensatory education for the period between November 1, 2001 through the conclusion of the 2001-2 school year, the 2002-3 and 2003-4 school years, as well for the period between September 1st and December 12, 2004.

2. Award Tereance D. compensatory damages to redress the injuries he has sustained as a result of the Defendant's illegal conduct and deliberately indifferent violations of his rights;

3. Award Plaintiffs all the reasonable attorney fees and costs which he has incurred or will incur in prosecuting this action, and which he has incurred in the administrative proceedings below.

4. Grant such other relief as this Court deems just and appropriate.

Respectfully submitted:

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DATE: October 3, 2007