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

C.H., a minor, by and through his Parent, **Kimberly Williams**, individually, and on behalf of all others similarly situated,	)	
E.W., a minor, by and through his Parent, **Nina Williams**, individually, and on behalf of all others similarly situated,	)	
J.F. a minor, by and through his Parents, **Natalie Wieters and Larry Freedman,** individually, and on behalf of all others similarly situated,	)	Civil Action No. 2:14-cv-06210-MSG
Plaintiffs,	)	
v.	)	
The School District of Philadelphia,	)	
Defendant.		

ORDER

AND NOW, this _____day of _____, 2015, upon consideration of Defendant's Motion to Dismiss, Plaintiffs' response thereto, and any replies, it is **HEREBY ORDERED** that Defendant's Motion to Dismiss is **DENIED**.

BY THE COURT:

_____
Mitchell S. Goldberg, J.

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Plaintiffs,	)	
v.	)	
The School District of Philadelphia,	)	
Defendant.		

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This is a case about an unlawful policy, custom, or practice of the School District of Philadelphia ("the District") which impairs the right of certain children with disabilities to receive special education and related services based upon their individual unique needs beyond the traditional 180-day school year calendar. Specifically, the District unilaterally limits the amount and duration of these services (called extended school year or ESY services) to 4 hours per day, 3 days per week, for 6 weeks during the summer. This one-size-fits-all determination harms children and infringes on parents' rights to meaningfully participate in discussions about their children's education.

The District has moved to dismiss, arguing that plaintiffs do not have standing because its decision to limit amount and duration of ESY services is merely ministerial and does not harm the plaintiffs. This is a motion to dismiss, however, and the Court must take the plaintiffs' allegations as true. The plaintiffs *have* alleged harm. Moreover, as a matter of law, the alleged harm is substantive and not a mere ministerial violation. A hearing officer found that a plaintiff's ESY program, as established by the District's unilateral policy, custom, or practice was inappropriate. And the right of parents to participate in the decision-making about their child's educational program has long been recognized as a substantive right, which can be remedied in federal court.

BACKGROUND

A. EXTENDED SCHOOL YEAR SERVICES

The right to an individualized ESY program was first articulated in *Battle v. Pennsylvania*, 629 F.2d 269, 280 (3d Cir. 1980), where the Third Circuit struck down Pennsylvania's rigid policy limiting all children with disabilities to the traditional 180

school day calendar. The Court relied on the necessity of establishing an individualized program for each child:

> We believe the inflexibility of the defendants' policy of refusing to provide more than 180 days of education to be incompatible with the [IDEA's] emphasis on the individual. Rather than ascertaining the reasonable educational needs of each child in light of reasonable educational goals, and establishing a reasonable program to attain those goals, the 180 day rule imposes with rigid certainty a program restriction which may be wholly inappropriate to the child's educational objectives. This, the [IDEA] will not permit.

Id. at 280-81.

Battle was followed by similar court decisions around the country, emphasizing that categorical limitations on the length of ESY services were contrary to the IDEA.[1] As the doctrine was being developed, the federal Office of Special Education Programs (OSEP) issued a policy letter stating that limiting the duration of summer programs for students with disabilities "would violate the basic requirement that programs be designed to meet the individual needs of each child." *Letter to Baugh*, 211 IDELR 481 (1987), attached here as Ex. 1. In 1997, the Department of Education issued regulations codifying these rulings: a public agency "may not unilaterally limit the … amount, or duration of [ESY] services." 34 C.F.R. § 300.106(a)(3)(ii).

In 2006, the Department of Education reiterated the importance of individualized ESY determinations including amount and duration: "We believe it is important to retain the provisions in [34 C.F.R.] § 300.106 [which, in part, prohibits the unilateral limit of

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[1] *See Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986); *Yaris v. Special Sch. Dist., St. Louis Cnty.*, 558 F. Supp. 545, 559 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 (8th Cir. 1984); *Johnson v. Indep. Sch. Dist. No. 4 of Bixby*, 921 F.2d 1022, 1030-31 (10th Cir. 1990).

amount or duration of ESY services] because it is necessary that public agencies understand their obligation to ensure that children with disabilities who require ESY services in order to receive FAPE have the necessary services available to them, and that individualized determinations about each disabled child's need for ESY services are made through the IEP process." 71 Fed. Reg. 46540, 46582 (Aug. 14, 2006).

Pennsylvania adopted the federal regulation with additional eligibility and procedural safeguards. 22 Pa. Code § 14.132. The Pennsylvania Department of Education gave specific notice to the District that "[a]ny predetermination or set policy on the amount of time ESY will be provided is contrary to the regulations. *Individual determinations of the number of weeks, days per week, and minutes per day must be based on each student's unique needs.*" First Amended Complaint[2] Ex. J, p. 22 (emphasis added).

B. STATEMENT OF FACTS

The District sent each of the plaintiff parents of C.H., E.W., and J.F., a form letter which offered ESY services for a predetermined amount of weeks (6), days per week (3), and hours per day (4). Complaint ¶¶ 4, 7 and Ex. A. In each instance, the District sent the form before convening an IEP team meeting to discuss the plaintiff children's individual needs for ESY. Although an IEP team had not yet been convened, the form letter reads:

> At the time of your child's IEP meeting, it was determined that your son/daughter was eligible for the Extended School Year (ESY) Program. ESY begins on Tuesday, July 1, 2014, and ends on Thursday, August 7, 2014.

[2] All references in this Memorandum to the Complaint are to the First Amended Complaint ("Complaint") filed on March 3, 2015.

> Your child will be enrolled in the 2014 ESY Program. ... The Program is on Tuesdays, Wednesdays, and Thursdays from 9:00 a.m. to 1:00 p.m.

Complaint Ex. A.

When the plaintiffs' IEP teams did meet, they were precluded from discussing or changing the amount or duration of ESY services. Complaint ¶ 4; *see also* Complaint Ex. K, p. 5, ¶ 15-16 ("There was no substantive discussion about Student's individual needs … [instead,] the Special Education Director 'explained to the Parents about ESY'….. Student's IEP team would not, or could not, engage in any meaningful discussion of alternatives for summer ESY programming…."); Complaint Ex. B, p. 13, ¶¶ 78-79 (in January 2014, "the Parent was issued the District's notification of ESY programming and registration form … [which] included the dates, days and times of the ESY program."); Complaint Ex. D, p. 5, ¶¶ 15-16 ("The IEP team … was unable to have a substantive discussion of ESY programming [with] consideration of the student's individual ESY program…. [T]he District's 'ESY program' laid out in the [ESY form letter] is not an IEP team decision and is not subject to change.")

Each plaintiff requested and received an individual administrative due process hearing, alleging that the District's policy deprived them of an individualized determination of an ESY program.

C. THE HEARING OFFICERS' FINDINGS

***E.W. v. SDP,* ODR Case # 15180-1314/AS,** Complaint Ex. D. Hearing Officer McElligott found that E.W.'s predetermined ESY program was not appropriate to meet his needs. *Id.* at p. 8. An appropriate program should have been five hours per day (not four hours), four days per week (not three days), for six weeks. *Id*. Hearing Officer

McElligott found that E.W.'s parent received the ESY form letter before any IEP meeting where amount and duration of services was discussed. *Id.* at p. 4, ¶ 9. The Hearing Officer concluded that the "IEP team's consideration of the student's ESY programming was predetermined to fit within the specific context of the District's ESY programming schedule rather than an individualized consideration of the student's needs with ESY programming designed to meet those needs." *Id.* at p. 7. Hearing Officer McElligott concluded "that the District's approach to ESY programming for this student was a standard-program-first, rather than IEP-first, approach." *Id.*

***J.F. v. SDP, ODR* Case # 15531-1415/AS**, Complaint Ex. K. Hearing Officer Valentini found that J.F.'s parents received an ESY form letter before any IEP meeting and that there was no substantive discussion of the amount and duration of ESY services. *Id.* at p. 8. She held that it was permissible for the District to adopt a unilateral, predetermined ESY program, but clarified that this should not be construed to mean "that a school district should not consider adding additional days or hours or weeks to a student's ESY program if the needs of the student warrant such additions in order for the student to receive FAPE." *Id*.

***C.H. v. SDP,* ODR Case # 14530-1314/KE**, Complaint Ex. B. In this case, decided before the *J.F*. case described above, Hearing Officer Valentini found that C.H.'s parent received the ESY form letter before an IEP meeting and that the form included the dates, days and times of the ESY program. *Id.* at p. 13, ¶¶ 78-79. Hearing Officer Valentini held it was permissible for the District to unilaterally limit ESY services to a predetermined schedule for administrative convenience. *Id.* at p. 22.

ARGUMENT

Although the IDEA has been amended several times since Congress first passed its predecessor in 1975, the essential purpose has never changed, which is to ensure students with disabilities have access to a free and appropriate public education, just like all other children. *See Sch. Comm. of Burlington v. Dep't of Educ*., 471 U.S. 359, 372 (1985). The IEP and creation of it through an IEP team process is the centerpiece of the delivery system of services for children with disabilities. *Id.* at 368; 20 U.S.C. § 1414(d). It is black-letter law that a child's program must be created and based on the child's individual needs. The program must be created through the IEP team process, and it must be then provided in conformity with the IEP. 20 U.S.C. § 1414(d); 20 U.S.C. § 1401(9)(d). Parents are an integral part of this team and development process. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-526, (2007); *Hendrick Hudson Cent. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 (1982). The question in evaluating the child's program is whether the child has received a free and appropriate public education (FAPE). A violation is actionable regardless of whether it is "substantive" or "procedural" so long as the violation substantively impairs the parent's or child's rights. *D.B. v. Gloucester Twp. Sch. Dist*., 489 F. App'x 564, 566 (3d Cir. 2012) ("A procedural violation constitutes a denial of a FAPE when that violation causes 'substantive harm' to the child or her parents. … Such harm is present when the procedural violation 'significantly impede[s] the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child.'") (citations omitted).

The District argues that the plaintiffs lack standing because, it claims, its admitted[3] policy, custom, or practice is merely ministerial and does not cause harm. *See* Defendant's Memorandum of Law in Support of Motion to Dismiss ("Def.'s Br.") at p. 12, 15 n.5, and 17. The District's argument must be rejected because plaintiffs *have* alleged substantive harm, namely, the negative impact on their children's individual programs as well as the infringement on meaningful parental participation in the IEP process. Complaint ¶¶ 5, 49, 53. Moreover, the type of specific, individualized harm the District would require is not a prerequisite for standing where, as here, individuals who are subject to unlawful practices and procedures seek to stop those practices.

The District also seeks to dismiss plaintiff E.W. individually, suggesting that he lacks standing as his claim is time-barred and that he is not aggrieved. However plaintiff E.W. seeks only declaratory relief; thus the arguments that he is barred by his success at the administrative level and by an appeal deadline are clearly irrelevant.

A. THE COMPLAINT ALLEGES HARM TO THE PLAINTIFF CHILDREN ARISING FROM THE FAILURE TO CONSIDER THE AMOUNT AND DURATION OF ESY SERVICES.

The Complaint alleges that the plaintiff children and other class members are harmed when the District refuses to allow the IEP team to consider the amount and

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[3] There is no serious dispute that the District in fact has a policy, custom, or practice of unilaterally limiting the amount and duration of ESY services, although in its brief it struggles to avoid that fact by asserting that it "does not unilaterally limit the ESY services at issue in this litigation in any way". *See* Def.'s Br. at p. 13. However, the administrative record cited in the Complaint is replete with admissions to the policy. *See, e.g.,* Complaint Ex. G, p. 6-9; Complaint Ex. H, p. 8; Complaint Ex. I, p. 9-11. The District admits as much in its brief: "[T]he ESY services at issue in this case that will be provided to each disabled child in the School District are discussed and determined at that child's IEP Team meetings. These individualized services are then *provided when the School District offers its ESY services.*" Def.'s Br. at 15 (emphasis added).

duration of services. Complaint ¶ 59. For example, a hearing officer found that E.W. needed services for more days and more hours than that prescribed by the District's predetermined policy. Therefore, according to the hearing officer, E.W. was denied a free and appropriate public education.

This was not an anomaly and should not be surprising. ESY hearing decisions in Pennsylvania confirm that when an individual determination is utilized, children with disabilities may need a variety of "amount and duration of services." *See F.H. v. Radnor Twp. Sch. Dist.*, 01002 09-10AS (Skidmore, May 26, 2010), 55 IDELR 57, attached as Ex. 2 (child required 32 six-hour days of ESY service plus home-based speech therapy and behavior consultation services); *K.R. v. Phila. Sch. Dist.*, Spec. Ed. Op. 1506 (Zirkel, July 26, 2004), 41 IDELR 223, attached as Ex. 3 (child required five days of ESY service during the summer). In *K.R.*, as for each of the named plaintiffs here, the District impeded the IEP process when it "plugged [the student] into a pre-existing 3 days/week program without any particularized justification…." *K.R.*, 41 IDELR 223 at p. 3. The Special Education Appeals Panel proceeded to conclude that the "proposed six-week program was largely sufficient but that the customary five days/week frequency was required to ensure FAPE, or meaningful benefit, from [the student's] IEP." *Id.*

A Maryland case involving ESY is directly on point. In *Reusch v. Fountain,* 872 F. Supp. 1421, 1433-34 (D. Md. 1994), the Court ordered that the Montgomery County Public Schools, through the IEP process, "must make *individualized determinations of the number of weeks, days per week, and hours per day* that each student receiving ESY should be provided." *Id*. at 1438 (emphasis added). The Court relied upon

evidence that children have different needs and, therefore, predetermined ESY programs cannot be sufficient:

> evidence presented at trial established that there was little, if any, consideration of the appropriate duration of individual ESY programs at [IEP] meetings. … Moreover, the evidence revealed that in certain cases students were receiving uniform, fixed-length ESY programs based solely on the length of existing summer school/enrichment programs. … While these programs may have been appropriate for the students placed in them, no individual evaluation was made to ensure that this was the case.

Id.[4]

B. THE COMPLAINT ALLEGES HARM TO THE SEPARATE SUBSTANTIVE RIGHTS OF PARENTS TO MEANINGFULLY PARTICIPATE IN THE FORMULATION OF THEIR CHILDREN'S PROGRAMS

The right of parents to participate in decision-making about their children's educational programming is well settled. *See Winkelman v. Parma City Sch. Dist.,* 550 U.S. 516 (2007) (holding that parents have enforceable rights under the IDEA that are

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[4] The Court considered the financial consideration that Hearing Officer Valentini expressly cited and which are obliquely referenced by the district in its motion:

> [o]f course, the Court does not interpret the IDEA to require these decisions to be made in a vacuum, without any consideration of programs already in existence and the rational administration of [school district] resources. Rather, putting the existence of fixed-length programs in their proper place in the IDEA hierarchy, [the school district] *first must determine the child's individualized summer needs and then determine whether an existing program can satisfy those needs.* In any event, Defendants must make allowances and adjustments in those instances when a child's individualized needs cannot be met by an existing summer program.

Id. (emphasis added). The Court concluded, however, that "in any contest between systemic efficiency and the provision of a FAPE to a disabled child, Congress and the Supreme Court have made clear that the child must prevail." *Id.* at 1433-34.

intertwined with their children's rights); *see also Honig v. Doe*, 484 U.S. 305, 311 (1988) ("Congress repeatedly emphasized throughout the [IDEA] the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness.").

When parents are deprived of their rights to participation, these claims are actionable under the IDEA. *See D.S. v. Bayonne Bd. of Educ.,* 602 F.3d 553, 565 (3d Cir. 2010) ("The Supreme Court has made clear that the IDEA's 'procedural safeguards cannot be gainsaid,' as 'Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, as it did upon the measurement of the resulting IEP against a substantive standard.'") (citations omitted). And where, as here, parents are deprived of their rights to participation because a child's program is predetermined, the claims are actionable. In *D.B. v. Gloucester Twp. Sch. Dist*., 489 F. App'x 564 (3d Cir. 2012), the parents, like the plaintiffs in this case, were physically present and had discussions with staff about some issues regarding their child. *Id.* at 567 n.1. That did not prevent the Third Circuit from finding that the parents were still denied meaningful participation on the issue in dispute that they wished to discuss. *Id.* The school district argued that because it had acceded to the parents' wishes on some other educational issues, the parents were afforded meaningful participation generally. *Id.* But the Third Circuit concluded that this evidence, even when coupled with the school district's other citations to the record, did not warrant disturbing the district court's decision that the parents were denied complete meaningful participation. *Id.*

The contours of predetermination have been recently clarified in an 11th Circuit decision:

> Predetermination occurs when the [school district] makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team. … The prohibition on predetermination arises out of an IDEA implementing regulation, which maintains that a child's placement must be "based on the child's IEP." 34 C.F.R. § 300.116(b); *see also Spielberg v. Henrico Cnty. Public Schs.*, 853 F.2d 256, 259 (4th Cir. 1988). As a result, the [school district] cannot come into an IEP meeting with closed minds, having already decided material aspects of the child's educational program without parental input.

R.L. v. Miami-Dade Cnty. School Bd., 757 F.3d 1173, 1188 (11th Cir. 2014) (citations omitted).

Many other courts have described the harm where, as here, the school district predetermines and denies parents meaningful participation in their child's educational planning. *See Doug C. v. Haw. Dep't of Educ.*, 720 F.3d 1038, 1044 (9th Cir. 2013) (holding that "parental participation safeguards are '[a]mong the most important procedural safeguards' in the IDEA and that '[p]rocedural violations that interfere with parental participation in the IEP formulation process *undermine the very essence* of the IDEA.') (citation omitted) (emphasis added); *Deal v. Hamilton Cnty. Bd. of Educ*., 392 F.3d 840, 857 (6th Cir. 2004) (holding that where the school district pre-decided not to offer services regardless of any evidence concerning individual needs, this "predetermination amounted to a procedural violation of the IDEA. Because it effectively deprived … parents of meaningful participation in the IEP process, the predetermination caused substantive harm and therefore deprived [the student] of a FAPE."); *R.L.*, 757

F.3d at 1189 (finding predetermination where bureaucratic policies precluded IEP teams from considering any alternatives to the school's offer).

The District cites *J.T. ex. rel. A.T. v. Dumont Public Schools*, 533 F. App'x 44 (3d Cir. 2013) (Def.'s Br. at p. 11), but that case is inapposite. There, the Court held that plaintiffs did not have standing because they alleged purely procedural violations and conceded that they suffered no substantive harm. *Id.* at 48-49. *Dumont* is inapplicable here because the plaintiffs do not suggest that purely procedural violations are actionable; rather, as stated in the Complaint, they allege substantive harm resulting from the District's ESY policy, custom, or practice that "violates the purpose and intent of the IDEA as it occurs with little or no parental notice or involvement, thus seriously infringing on the participation of parents, without required consideration of children's individualized circumstances, and in direct violation of the mandated individual planning process of the IDEA." Complaint ¶ 9.

The District also argues that the decisions about the amount and duration of ESY are not *meaningful* decisions, while the questions which *are* discussed with parents, such as eligibility and goals, are the meaningful ones. But the best measure of what is meaningful lies in the regulations and other formal governmental interpretations which specifically require individual determinations of the number of weeks, days per week, and minutes per day for ESY services. And, the fact that an IEP team discusses some issues does not somehow erase the violation that occurs when other issues are put off limits. *D.B. v. Gloucester Twp. Sch. Dist.*, 489 F. App'x 564, 567 (3d Cir. 2012) (rejecting the argument that just because the school district incorporated some of the

parents' modifications does not mean that the school district did not predetermine other issues and thereby deny the parents meaningful participation in the IEP process.).

C. THE COMPLAINT ALLEGES THAT PLAINTIFFS ARE SUBJECT TO AN ILLEGAL POLICY, CUSTOM OR PRACTICE TO WHICH THEY WILL CONTINUE TO BE SUBJECT IN THE FUTURE

While in this case, the plaintiffs have met the standard that the District would impose -- a requirement that a plaintiff allege current harm in order to establish standing -- that is not, in fact, the law. Where a special education student or parent alleges that he or she is subject to a blanket, unlawful policy, that plaintiff has standing. *Christopher S. ex rel. Rita S. v. Stanislaus Cnty. Office of Educ*., 384 F.3d 1205, 1213 (9th Cir. 2004) (finding that plaintiffs had standing, in part, "because they are challenging a blanket decision to shorten the school day for autistic students, one made outside of the IEP process"); *see also Beth V. by Yvonne V. v. Carroll*, 87 F.3d 80, 89 (3d Cir. 1995) (plaintiffs had standing "where they allege systemic legal deficiencies and, correspondingly, request system-wide relief that cannot be provided (or even addressed) through the administrative process."); *C.G. v. Pennsylvania*, No. 1:06-cv-1523, 2009 U.S. Dist. LEXIS 90028, at *9 (M.D. Pa. Sept. 29, 2009) (holding that to have Article III standing, "Plaintiffs need only allege that all Plaintiffs are subject to the systemic failure to provide FAPE…")

P.V. v. Sch. Dist. of Phila., No. 2:11-cv-04027, 2011 U.S. Dist. LEXIS 125370 at *31-31 (E.D. Pa Oct. 31, 2011) was a very recent example alleging a similar refusal by the District to allow parents to discuss aspects of their children's education—in that case, where children with autism would be sent to school. There, like here, the District argued that the plaintiffs could not show actual harm because none of the plaintiffs were

harmed because they were not actually transferred from his or her preferred school. *Id.* at *33. The district court there denied a similar motion to dismiss for lack of standing because each student remained subject to the contested policy, and therefore there was an imminent violation of statutory rights under the IDEA. *Id.*

D. E.W.'s CLAIM IS DECLARATORY IN NATURE

The District argues that E.W.s claim is time-barred and that he is not aggrieved because he prevailed at his administrative hearing. Both arguments stem from a mis-characterization of E.W.'s cause of action: it is *not* an appeal from an unfavorable decision by a hearing officer, which must be filed within 90 days of the decision. Rather, it is an independent claim under federal law requesting declaratory relief that the district's practice of pre-determining amount and duration of ESY is unlawful.

In *P.V.*, the District made the same arguments with respect to plaintiffs who had prevailed in their due process hearings. *Id.* at *33. The Honorable Legrome D. Davis rejected this argument and denied the District's similar motion to dismiss for lack of standing because the plaintiffs would be subject to the same issues in the future.

> Even though Plaintiffs currently attend their preferred school, Plaintiffs will continue to be subject to the District's allegedly IDEA-deficient educational placement process from year to year. As such, Plaintiffs' injuries are imminent, not merely conjectural or hypothetical, and a favorable court decision will likely redress the systemic failures, if any, in the District's practices regarding the educational placement and transfer of autistic students. Therefore … Plaintiffs have standing to pursue their claims.

Id.

The same result follows here. E.W. and the other plaintiffs complain they will suffer the same injuries this school year and in future years unless and until a court

declares the practice unlawful. *See id.* ("[A]n imminent injury, including an imminent violation of statutory rights under IDEA, confers standing.") (citations omitted); *see also Korman v. Walking Co.*, 503 F. Supp. 2d 755, 759 (E.D. Pa. 2007) (holding that plaintiff who alleged a violation of a statute providing her with a benefit, although she suffered no actual harm, had standing, and noting that injury does not mean harm and "[a] statute itself may create a legal right, the invasion of which causes an injury sufficient to create standing").

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the District's Motion to Dismiss be denied.

Respectfully submitted,

/s Sonja D. Kerr

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Date: April 22, 2015

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2015, I have electronically filed the foregoing with the Clerk of Court using the CM/ECF system and it is available for download by all counsel of record.

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