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(67pp.)

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

**DANIEL DRINKER**, by his parents  
and next friends Ned Drinker  
and Diane Drinker, and the  
Parents, **Ned Drinker** and  
**Diane Drinker** on their own  
behalf,

CIVIL ACTION  
NO. 94-7101

Plaintiffs,

vs.

COLONIAL SCHOOL DISTRICT:

**STANLEY J. DURTAN**, individually and  
in his capacity as Superintendent  
of Schools: **FRED G. SHIPMAN**,  
individually and in his capacity  
as Director of Pupil Services:  
**RITA M. GREELEY**, individually and  
in her capacity as Coordinator of  
Special Education; **STUART KESSLER**,  
individually and in his capacity  
as President of the School Board:  
**JACK PINHEIRO**, individually and in  
his capacity as Vice-President of  
the School Board: **LENORA CICALONE**,  
**RICHARD CONNOLLY**, **ALLEN MANDELBAUM**,  
**ROBERT OINEILL**, **MARC ORLOW** and  
**DIANE RAMBO**, individually and in  
their capacities as Members of the  
School Board,

Defendants.

FIRST AMENDED COMPLAINT

I. INTRODUCTION

A. This is a civil rights action brought on behalf of **Daniel Drinker**, a nine year old student with a disability and his parents under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 9

1401, & sea., against the Colonial School Board and school officials of the Colonial School District, for money damages and injunctive relief to enforce the federal laws that protect the Constitutional and statutory rights of individuals with disabilities to free appropriate public education and right.

## II. JURISDICTION AND VENUE

This court has subject matter jurisdiction over this action pursuant to 20 U.S.C. 5 1415, 28 U.S.C. §§ 1331, 1337, 1343 and 42 U.S.C. 5 1983. Plaintiffs' cause of action arises under 20 U.S.C. 5 1401 & sea.i appropriate declaratory relief is authorized pursuant to 38 U.S.C. 85 2201 and 2202. Venue in this district is appropriate under 28 U.S.C. 9 1391(b). Plaintiff has fully exhausted the administrative remedies available through the Pennsylvania Department of Education and in accordance with 22 Pa. Code § 14.64(m) appeals this matter to this Court.

## III. PARTIES

### Plaintiffs

1. Daniel Drinker, a nine-year old child born with Down's syndrome and cerebral palsy who has received special education and related services since he was an infant, resides and has resided since the summer of 1992 with his family in the Colonial School District (Colonial). Daniel received his first evaluation that summer and an individual education program from the district in October 1992. Beginning with the 1992-93 school year, Daniel has had an individual education program (IEP) prepared for each of the three consecutive school years that he has been in the

district by teams at meetings convened by Colonial. Each year, the consensus among team members has been that Gladwyne Elementary, in the adjacent Lower Merion School District, is the appropriate setting for Daniel. Daniel has attended and continues to attend Gladwyne Elementary since he entered Colonial.

2. **Ned and Diane Drinker**, the parents of Daniel, another son who attends his neighborhood school, Plymouth Elementary, and a pre-school age daughter, are residents and taxpayers in the Colonial School District. For the last five years, the family has received counseling therapy on a regularly scheduled basis from Dr. Wayne Jones, a clinical psychologist. As members of Daniel's team, the parents have participated in every IEP team meeting that the Colonial School District has convened for Daniel. Because Colonial has refused to pay for Daniel's education at Gladwyne Elementary (see Attachment A), the Lower Merion school district has billed the parents \$19,753.00 per year in tuition costs and \$3,384.00 per year for the cost of Daniel's educationally necessary and required related services: 18 sessions of speech and language therapy (\$504.00); 36 sessions of adaptive physical education (\$1,224.00); 18 sessions of occupational therapy (\$828.00); and 18 sessions of physical therapy (\$828.00). The family has paid Lower Merion \$6,000.00 for the first quarter's tuition to provide for Daniel's education in accord with the recommendation made by the team on Daniel's last agreed upon IEP. There is an outstanding balance of \$6,324.50 for the first semester which ended in January 1995. The \$12,324.50 for the second

semester is now due (see Attachment B). The parents have depleted their savings and do not have the financial resources to make any additional payments to Lower Merion School District for Daniel's education. Lower Merion School District has informed the parents that they reserve the right to take legal action against them for payment of all outstanding tuition.

**Defendants**

3. **Defendant Colonial School District** is the local education agency responsible for implementing the state plan by providing all children with disabilities who reside in the district a free appropriate education as defined under the rules and regulations of the Pennsylvania Department of Education, 22 Pa. Code Chapters 14 and 342, and the IDEA 20 U.S.C. 51400 & sea. Pursuant to the IDEA, Colonial School District receives federal funds, as well as funds under other federal assistance programs, to enable the district to carry out this mandate.

4. **Defendant Stanley J. Durtan**, the Superintendent of Schools for the Colonial School District, told the parents that the decision to transfer Daniel to the Whitemarsh Elementary School was a matter of money. He is charged-with violating 22 PA Code 5 14.342(b)(6) which asserts that placement cannot be based on the administrative convenience of the school entity. At all times relevant to this complaint, Dr. Durtan was responsible for the administration of the Colonial Public Schools and its special education programs. By virtue of his position and his direct participation, Dr. Durtan knew or reasonably should have known that

the Colonial Public Schools were denying and are continuing to deny Daniel Drinker a free appropriate public education and denying him rights secured under federal and state laws.

5. **Defendant Fred G. Shipman**, the Director of Pupil Services for the Colonial School District, supervises and has supervised said Rita Greeley at all times relevant to this action and knew or should have known that Ms. Greeley changed Daniel's Notice of Recommended Assignment (NORA) for the 1993-94 school year after it was approved and signed and changed the IEP for the 1994-95 school year after the members of the team signed it. At all times relevant to this complaint, Mr. Shipman was responsible for the administration of the educational programs to children with disabilities in the Colonial Public Schools. By virtue of his position and his direct participation, Mr. Shipman knew or reasonably should have known that the Colonial Public Schools were denying Daniel Drinker a free appropriate public education and denying him rights secured under federal and state laws.

6. **Defendant Rita Greeley** is Colonial's local Coordinator of Special Education and has chaired every IEP team meeting that the district has convened for Daniel. Ms. Greeley, whose responsibilities include participating in the IEP writing process for students who are placed out of district, never discussed with Daniel's IEP team participants a location of services for Daniel other than Gladwyne Elementary school. On the Placement Options Sheets attached to Daniel's 1992-93 and 1993-94 **IEP's**, dated October 21, 1992 and October 13, 1993, respectively,

Ms. Greeley's signature indicated that she had no difference of opinion with the Gladwyne Elementary placement which was approved by the team as the appropriate placement and location of his educational services. Ms. Greeley has violated federal and state laws by:

a. Altering Daniel's NORA for the 1993-94 school year, eight months after it was approved and signed, to change the placement of services from Gladwyne Elementary to Whitemarsh Elementary. Ms. Greeley notified the parents of the revised Notice of Recommended Assignment indicating the new location by letter dated July 30, 1993. Neither the parents, as part of the IEP team, nor any other team members participated in any conference concerning the revised NORA;

b. Refusing to conduct a fair and impartial meeting of Daniel's IEP team which prepared his 1994-95 individual education programs;

c. Refusing to permit the team to have any participatory decision making in the process of determining placement and location of services for Daniel: and,

d. Doctoring Daniel's 1994-95 IEP with omissions and changes after the team affixed their signatures to the document and added these without their knowledge.

7. **Defendant Stuart Kessler** is the President of the School Board of the Colonial School District. At all times relevant to this action, this individual was responsible for the administration of educational programs for children with

disabilities in the Colonial Public Schools and with the district's compliance with its obligations under federal and state laws.

8. **Defendant Jack Pinheiro** is the Vice-President of the School Board of the Colonial School District. At all times relevant to this action, this individual was responsible for the administration of educational programs for children with disabilities in the Colonial Public Schools and with the district's compliance with its obligations under federal and state laws.

9. **Defendants LenoraCiccalone, RichardConnolly, Allen Mandelbaum, Robert OtNeill, Marc Orlow and Diane Rambo** are members of the School Board. At all times relevant to this action, these individuals were responsible for the administration of educational programs for children with disabilities in the Colonial Public Schools and with the district's compliance with its obligations under federal and state laws.

#### IV. FACTS

10. The Drinkers moved into the Colonial School District during the summer of 1992, and the district's school psychologist, Dr. Kenneth Sheinen, prepared Daniel's initial psychological report to guide the team in developing Daniel's IEP.

11. Dr. Sheinen's report indicates that Daniel's clinical picture is clearly one of a youngster functioning in the mildly retarded range who needs to be in a program with youngsters who are functioning closer to the average range of intelligence as opposed to youngsters thought to be moderately or trainable mentally retarded.

12. Daniel's IEP team met in October 1992 and prepared an educational program that indicated the appropriate placement for Daniel was the Gladwyne Elementary School's self-contained classroom for the 1992-93 school year.

13. Daniel's IEP team consisted of his parents, Rita Greeley, Colonial's coordinator of special education who serves as the local education agency representative; Allison Schumacher, Daniel's teacher at Gladwyne Elementary; Christine Gaspar, occupational therapist; and Rebecca Shadle, speech therapist. The composition of Daniel's IEP team has been consistent for the 1992-93, 1993-94 and 1994-95 school years, with the following exceptions: Ms. Kraus, the physical therapist, attended the 1993-94 meeting; Judy Horowitz, the school psychologist, attended the 1994-95 meeting, and, with Ms. Schumacher, Ms. Greeley and the parents, comprised the IEP team at the June 1993 meeting when Daniel's 1994-95 educational program was developed.

14. Daniel's transition from a small private school in Philadelphia to the larger school setting of Gladwyne was so difficult that he was unable to progress with his class to the next grade and, with compliance from Colonial's representative, he repeated the second grade with Ms. Schumacher.

15. At the October due process hearing, Ms. Schumacher, Daniel's teacher for the 1992-93 and the 1993-94 school years, and Ms. Settani, his current teacher, testified that his ability to acclimate to a new environment is so impaired that it was necessary to spread his transition from one class to another in the same

building over a six month period.

16. The IEP prepared by Daniel's team for the 1993-94 school year is silent on any transitioning services that Daniel would have required had there been a decision to change his placement.

17. Colonial School District, through its administrative staff, was advised that for five years, Daniel had been and was continuing to be seen by a psychologist, Dr. Wayne Jones, for among other reasons, the problems he experiences with changes in the environment Attachment C). No member of Colonial's administration or staff ever extended an offer either, directly or through the parents, for Dr. Jones to participate as a team member or for him to prepare a report for the team's consideration.

18. There was no testimony presented by Colonial at any of the due process hearings or in any of the appeals that Daniel was not receiving the appropriate education which was planned for in his IEP.

19. Colonial's psychologist, Judy Horowitz, was a member of the IEP team that prepared Daniel's educational program in June 1993 for the 1994-95 school year: however, she indicated that she was unaware that Daniel was to be transferred from Gladwyne Elementary to Whitemarsh Elementary and did not participate in the development of a transition plan.

20. Allison Schumacher, Daniel's teacher for the 1992-93 and 1993-94 school years and a member of his IEP team, participated at the June 1994 IEP meeting and testified that the

team was not given the opportunity to discuss placement or location of intervention which is a responsibility of the IEP team and that she was unaware that Daniel's placement would be changed for the following school year.

21. Because the Colonial School District houses its grades K through 3 in one building, its grades 4 through 5 in another building and grades 6 through 8 in yet another building, under Colonial's proposed change, Daniel, as a student in the school district's program, would be required to change from the Whitemarsh school building for the 1994-95 school year to the Colonial Elementary school building for two years beginning with the 1995-96 school year and to the Colonial Middle school building beginning with the 1997-98 school year for two years.

22. If Daniel were allowed to remain in the Gladwyne Elementary school program, he would remain in the same school building through the fifth grade.

23. Fred Shipman, the Director of Pupil Services, refused to give the parents any assurances that Daniel would or would not move with his age-appropriate class from one building to the next or provide any insight into how Colonial proposed to manage the progression of the class. These concerns were never memorialized in the document which Colonial distributed following the August 1, 1994 pre-hearing conference in which the parents and the district, both with legal representation, participated.

24. From the time of the Appeal's Panel decision to the present, Colonial has continued its deliberate and reckless

disregard for Daniel's educational rights. This includes: failure to use the recommendation of the IEP team members: failure to take Daniel's needs in account when determining the appropriate location of services: failure to consider the potentially harmful effects of the suggested change in placement on Daniel; failure to involve the treating psychologist in the planning process.

25. Due to Colonial's failure to provide Daniel an appropriate public education as determined by his IEP team, the Drinker family was forced to assume a financial burden that **caused** them undue hardships.

26. Colonial minimized the parental input **and** participation in Daniel's educational program when they deliberately changed the location of services and refused to involve the IEP team in all the decisions about his education program.

27. The actions of Colonial were willful, deliberate and taken as a matter of Colonial School District's custom and policy.

28. The actions of Colonial were performed under the color of state law.

#### IV. CLAIMS

##### COUNT I

##### Deprivation of Civil Riughts In Violation of 42 U.S.C. 9 1983

29. Plaintiffs reallege and incorporate paragraphs 1 through 27 as though fully set forth herein.

30. Defendants, acting under color of state law as public school officials, administrators and the Board of Education

of the Colonial School District, deprived Daniel Drinker of his civil right to receive a free appropriate public education in violation of protections guaranteed by IDEA, as well as the Fourteenth Amendment to the United States Constitution and the Pennsylvania Constitution.

31. Defendants\* actions and non-actions constitute a violation of 42 U.S.C. 9 1983.

32. As a result of these constitutional and statutory violations, the Drinker family has been subjected to continuing and irreparable harm and has been damaged as alleged herein.

## COUNT II

### Individuals with Disabilities Education Act

33. Plaintiffs reallege and incorporate paragraphs 1 through 27 as though fully set forth herein.

34. Daniel Drinker is a school-aged child with disabilities within the meaning of IDEA, 20 U.S.C. 51401, & sea.

35. Defendants have violated the rights of plaintiffs secured by IDEA and regulations promulgated pursuant thereto, 34 C.F.R. part 300 by:

a. failure to properly assess, evaluate and take into account Daniel Drinker's disabilities in the development of his education plans and programs:

b. failure to provide plaintiff with a free appropriate public education;

36. Defendants have violated the IDEA, 20 U.S.C. 5 1415(e)(3) which requires that a child whose educational program

and/or placement is at issue remain in the "then current educational placement" during the pendency of any action under the statute, unless the parents and school officials specifically agree otherwise.

37. Ned and Diane Drinker have never agreed to change Daniel's placement or the location of his services during the pendency of the proceedings.

38. The "then current educational placement" for Daniel Drinker is the Gladwyne Elementary School which is the last agreed upon placement as determined to be appropriate by his IEP team.

**REQUEST FOR RELIEF**

WHEREFORE, plaintiffs respectfully request that this Court grant the following relief:

1. Permanently enjoin the Colonial Defendants Defendants to comply with the requirements of the IDEA by providing for Daniel Drinker to receive a free appropriate public education in the setting deemed appropriate by his IEP team

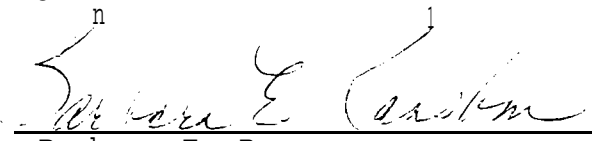
2. Require the Colonial Defendants to reimburse the Drinker family any and all funds that they have expended to maintain Daniel in Gladwyne Elementary, the placement deemed appropriate by his IEP team.

3. Require the Colonial Defendants to pay the Lower Merion School District the required cost for Daniel's education for any school year or portion thereof that his IEP has determined or will determine that a placement in that school district is appropriate.

4. Award plaintiffs compensatory and punitive damages.
5. Award plaintiffs costs, attorneys\* fees and such other relief as this Court may determine to be appropriate.

PUBLIC INTEREST LAW CENTER  
OF PHILADELPHIA

BY:



Barbara E. Ransom  
Attorney I.D., No. 64166

125 South 9th Street, Suite 700  
Philadelphia, PA 19107  
(215) 627-7100

Attorney for Plaintiffs

Dated: January 9, 1995

**ATTACHMENT-A**

# COLONIAL SCHOOL DISTRICT

*"The Vital Educational Force in the Conshohocken, Plymouth and Whitemarsh Community"*

August 1, 1994

Mr. Lawrence Sweigert  
Director of Pupil Services  
Lower Merion School District  
301 Montgomery Avenue  
Ardmore, PA 19003

RE: Daniel Drinker  
Gladwyne Elementary School

Dear Larry:

Please be advised Daniel Drinker's parents were informed on this date in the presence of their attorney that the Colonial School District will not support Daniel's continued enrollment in the Lower Merion School District. Should the Lower Merion School District choose to enroll Daniel in the fall, you do so at the risk of the parents assuming financial liability.

You may not be aware that we are under a Due Process Appeals Panel Order signed March 17, 1994, directing the district to enroll Daniel by April 25, 1994. In view of the fact that Daniel continued to be enrolled in the Lower Merion School District through the completion of the 93-94 school year, we have billed the parent for tuition accordingly. Under the circumstances, the Colonial School District has no plans to assure any further financial responsibility.

In the interest of your need to plan for September, I will keep you apprised of new developments as they unfold in this case. I apologize for any inconvenience this notice may cause your department. Please feel free to call me should you have additional questions or require clarification.

Sincerely,



Fred G. Shipman  
Director of Pupil Services

cc: Dr. S. J. Durtan, Superintendent  
Dr. David W. Magill, Superintendent  
Andrew Faust, Esq., Curtin and Heefner  
Paul Stevens, Esq., Curtin and Heefner  
Barbara E. Ransom, Esq., PILCOP  
Mr. and Mrs. Edward Drinker

FGS/bp

**ATTACHMENT B**

1994.96 FEES FOR SERVICES INVOICE.LOWER MERION SCHOOL DISTRICT1			
<b>STUDENT</b>	Daniel Drinker, DOB 5/9/85		
<b>ENROLLMENT DATE</b>	9/8/94		
LOWER MERION SCHOOL	Gladwyne		
<b>HOME SCHOOL DISTRICT</b>	N/A (formerly Colonial)		
<b>DATE OF INVOICE</b>	9/1 9194		
			1 1st Semester / 2nd Semester
<b>TUITION</b>	Balk Rate: 1	\$19.753.00	9376.501
<b>ITINERANT</b>			
<b>SERVICES:*</b>	<b># Sessions</b>	<b>RATE</b>	
Smsch.Grou~	18	s14.00	252.00i
Speecn-Indlv.	18	342. 00	756. 001
APEvGrouo	36	<b>s17.00</b>	512. 001
APE=Indlv.		ss1.00	
<b>OT-Group</b>	18	<b>\$23.00</b>	<b>414. 001</b>
OT=Indlv.		946. 00	
<b>PT-Grow</b>	18	<b>\$23.00</b>	414. 001
PT.tndtv.		546. 00	
		<b>I SEMESTER TOTAL</b>	<b>' 2.324.50/</b>
		<b>! 1st SEMESTER TOTAL</b>	<b>: 2.324.50 I</b>
		<b>( 2nd SEMESTER TdTAL</b>	<b>0.001</b>
		<b>) LESS PAYMENT RECEIVED</b>	<b>6.000.001</b>
		<b>t TOTAL REMAINING</b>	<b>\$6.324.50 I</b>
INDICATES PL 89-313			
\ Amount Due When Invova			
<b>( Please maKe cneK oavaole an0 send to:</b>			
<b>1 LOWER MERION SCHOOL DISTRICT</b>			
<b>! 301 E. Montgomery Avenue !</b>			
i Ardmore. PA 19003-3399			

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing First Amended Complaint was forwarded by Federal Express, Overnight Delivery on this 9th day of January, 1995 to the following:

Andrew E. Faust, Esquire  
Curtin and Heefner  
116 E. Court Street  
Box 150  
Doylestown, PA 18901



Barbara E. Ransom  
Barbara E. Ransom  
Attorney for Plaintiff

Public Interest Law Center  
; of Philadelphia  
125 S. 9th Street, Suite 700  
Philadelphia, PA 19107  
(215) 627-7100