

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE

|                                        |   |                          |
|----------------------------------------|---|--------------------------|
| KIMBERLY LOPEZ, as guardian, next      | ) |                          |
| friend and parent of GILBERTO LOPEZ, a | ) | NO. 3:07-cv-799          |
| minor, individually, <u>et al.</u> ,   | ) |                          |
|                                        | ) | JURY DEMAND              |
|                                        | ) |                          |
| Plaintiffs,                            | ) | Judge Echols             |
|                                        | ) |                          |
| v.                                     | ) | Magistrate Judge Griffin |
|                                        | ) |                          |
| METROPOLITAN GOVERNMENT                | ) | Complaint-Class Action   |
| OF NASHVILLE AND DAVIDSON              | ) |                          |
| COUNTY                                 | ) |                          |
|                                        | ) |                          |
| and                                    | ) |                          |
|                                        | ) |                          |
| GENESIS LEARNING CENTERS               | ) |                          |
|                                        | ) |                          |
| Defendants.                            | ) |                          |

**FOURTH AMENDED COMPLAINT**

Kimberly Lopez, as guardian, next friend and parent of Gilberto Lopez (hereinafter, collectively, “Plaintiffs”), for their cause of action against Defendants The Board of Education for the Metropolitan Nashville Public Schools, (hereinafter “Metro”), and Genesis Learning Centers, (hereinafter “Genesis”), state as follows:

**PARTIES AND VENUE**

1. Plaintiff Kimberley Lopez is the natural mother of Gilberto Lopez, a special needs child suffering from autism and mild mental retardation who attended school at Genesis Academy in Nashville, Tennessee.

2. Gilberto was nine (9) years old at the time of the incidents described herein.

3. Defendant Metro, is a political entity responsible for oversight, rule making, compliance with state and Federal law, and control of the Metro Nashville Public School System, (hereinafter “MNPS”), which Metro oversees.

4. Defendant Genesis operates Genesis Academy, (hereinafter collectively “Genesis”), which is a private school facility with which Defendant Metro contracts to provide a free and appropriate educational setting for special needs students whom Defendant Metro deems cannot be properly cared for in a normal public school environment.

5. The acts, errors and omissions complained of herein were committed within Davidson County, Tennessee, and as such, this Court has proper venue and jurisdiction over the matter under the laws of Tennessee.

6. The Plaintiffs’ complaint alleges a cause of action based in violation of federal law.

7. This lawsuit was originally filed in state court and was removed to Federal Court by Defendant Metro on August 2, 2007, prior to Defendant Genesis being added as a named party.

8. At all times pertinent hereto, both Defendants were acting under color of state law and benefited from the receipt of federal financial assistance.

#### **ALLEGATIONS OF FACT**

9. For the academic year 2006-2007, Gilberto Lopez was a student at Genesis Academy, a school providing services to the MNPS.

10. Gilberto was transported to and from the school facility in a public school bus provided by MNPS.

11. Genesis is a school to which MNPS assigns children with behavioral problems and disabilities.

12. Genesis is a private facility that contracts with Metro to provide a free and appropriate education to special needs students who are deemed unable to attend other public schools within the MNPS because of the students' need for additional oversight.

13. Defendant Genesis, by and through its agents and employees, exercised discretion as to which students Defendant Metro placed at Genesis Academy and who was accepted.

14. A "cumulative file," containing all pertinent records on a student including, disciplinary record, academic record, and, as applicable, Individualized Education Program (IEP), behavioral plans, bus safety plans, and psychological testing is maintained by the school to which any student is assigned. A "special education file" is maintained by Metro on all special education students which includes, as applicable, Individualized Education Program (IEP), behavioral plans, bus safety plans, and psychological testing.

15. Kolby Harris was a nineteen (19) year old male student in the MNPS who was assigned to Genesis by MNPS in early 2006.

16. Genesis officials accepted Harris as a student, and he began as a student at Genesis Academy in April of 2006.

17. Genesis officials were informed prior to Harris starting at Genesis Academy that he was a special needs student and had a history of inappropriate sexual conduct with other students at other schools he had attended.

18. Genesis did not obtain Harris' cumulative file from his prior school or obtain Harris' "special education file" from Defendant Metro until January of 2007, almost a year after Harris started at the school.

19. Upon receipt of Harris' cumulative file by Genesis in January 2007, no one with Genesis reviewed the substantive content of Harris' file until after the incident that is the subject matter of this lawsuit.

20. Harris had a history of sexually inappropriate conduct, including, but not limited to, an attempt to engage in a sexual assault against another young boy in 2005 on a school bus which involved an attempt to compel the young boy to perform oral sex on Harris. Genesis officials were not aware of the full breadth or scope of Harris' record of prior instances because they had not obtained or reviewed Harris' cumulative file.<sup>1</sup>

21. In compiling Harris' most recent IEP only months before the incident that is the subject matter of this lawsuit, decision making officials with Defendant Metro reviewed Harris' cumulative and special education file and were aware of Harris' history of sexually inappropriate conduct, both at the time he was assigned to Genesis and assigned to a school bus on which the incident that is the subject matter of this lawsuit occurred.<sup>1</sup>

22. Defendant Metro knew Harris was a danger and that he required intensive supervision at all times, including adequate supervision of Harris on the school bus, over and above having a school bus driver to monitor him or at a minimum implementation of a school bus safety program.

23. As a student at Genesis, Gilberto Lopez, due to his mental condition, was bullied and preyed upon by other students on the school bus, who encouraged Gilberto to "throw" gang hand signs and obscene gestures and who placed stolen property in his pockets.

24. In April 2007, Kimberly Lopez contacted MNPS and requested a monitor on the school bus to ensure that her son and the other students were appropriately supervised.

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<sup>1</sup> The specific content of Kolby Harris' cumulative file is the subject of an agreed protective order entered in this case that prohibits the Plaintiffs from outlining, in detail, Harris' history in this Amended Complaint.

25. Kimberly Lopez was informed by the Special Education Department of MNPS that arranging for monitoring on school buses was the responsibility of the MNPS transportation department.

26. When Kimberly Lopez contacted the transportation department of MNPS, she was told that arranging for monitoring on school buses was the responsibility of the Special Education Department of MNPS.

27. Kimberly Lopez contacted officials for Defendant Genesis to ask about the placement of a monitor on the school bus.

28. Defendant Metro had a policy and practice in place whereby school officials were instructed and directed not to include school bus monitors in any student's IEP under any circumstance. This began, upon information and belief, shortly after a Department of Education Office of Civil Rights Determination critical of the special education school bus practices was issued in 2000.

29. Officials with Defendant Genesis were aware of this policy and went along with the directive and did not require placing monitors in any IEP.

30. By not including a monitor for a student in an IEP, Defendant Metro was able to claim insufficient funding as a basis for not providing a school bus monitor to a student even when having a monitor would be necessary to ensuring an appropriate education for a special needs student.

31. Gilberto's IEP from the Chicago school system in place at the time he transferred to MNPS included a requirement for school bus monitoring.

32. No monitor was ever assigned by Defendants to Gilberto Lopez's bus despite repeated efforts by Kimberly Lopez.

33. As a result of the continued abuse, Ms. Lopez then asked that her son be transferred from the regular school bus to a smaller school bus designated for special needs students, at the suggestion of Defendants' officials.

34. Officials with Defendant Genesis were aware of these requests for assistance by Ms. Lopez.

35. On the special needs school bus, instances of bullying and harm against Gilberto Lopez continued.

36. Gilberto was to be placed in a special harness and seated on the first seat of the school bus while being transported at the time of the incident that is the subject matter of this lawsuit.

37. No restrictive harness was used on the date of the incident that is the subject matter of this lawsuit.

38. Less than one week after being transferred, on May 7, 2007, Gilberto Lopez was sexually assaulted, and compelled to perform oral sex on Kolby Harris, while being transported on the special needs school bus, (hereinafter referred to as the "incident").

39. The incident was recorded on a MNPS school bus video camera.

40. Kimberly Lopez was not notified of the attack upon her child by anyone until officials from Defendant Genesis contacted her a week after the incident.

41. From the time of the incident until Ms. Lopez was notified, Harris and Gilberto rode on the same bus despite Harris' previously sexual assault on Gilberto.

42. Defendant Metro knew of the sexual assault immediately after it happened and still permitted Harris and Gilberto to ride on the same bus in reckless disregard for Gilberto's safety.

43. When Ms. Lopez spoke with Genesis officials about the incident, she was told by Melissa Adams, a director with Defendant Genesis, that Mrs. Adams knew of the incident but would not discuss the matter with Ms. Lopez.

44. The incident involving Gilberto and Harris occurred within feet of the school bus driver driving on the day of the incident, Gloria Smith, as Ms. Smith, an employee of Metro, operated the bus within the scope of her employment.

45. Ms. Smith was capable of observing all children on the school bus during the incident as she drove and had a duty to do so. Because of Gilberto Lopez's mental condition, he is defenseless and at special risk for harm. The Defendants had a duty to anticipate harm to Gilberto.

46. The Defendants, by and through employees of Defendants, knew or should have known of the risk of harm to Gilberto Lopez given the prior instances of abuse perpetrated by Kolby Harris involving similar instances of severe sexual improper behavior by Mr. Harris.

47. Harris had a history of wrongful behavior including other prior instances of sexual misconduct and abuse.

48. Defendant Metro was aware of these instances of sexual misconduct by Mr. Harris and took no steps to minimize the known risk of harm that he posed.

49. Defendant Genesis had access to and knowledge of Mr. Harris' entire cumulative file that contained documents showing Mr. Harris' history of sexual misconduct, known propensities, and history of severe sexual acting out behavior.

50. Defendant Genesis took no steps to minimize the known risk of harm Mr. Harris posed to other students above and beyond oversight provided to all students at Genesis.

51. Despite actual knowledge of Gilberto's disabilities, and the known risk of harm from permitting him to be in close proximity to Kolby Harris, Defendants failed to protect Gilberto from the harm to which they had exposed him.

52. Defendant Metro failed to properly train Ms. Smith and other bus drivers for a position transporting special needs students.

53. Ms. Smith and other MNPS special education bus drivers were not trained by Defendant Metro with regards to the proper care and protection of children with autism and mental retardation.

54. Prior to the incident that is the subject matter of this lawsuit, officials with Genesis offered to provide training to Defendant Metro's special education bus drivers on the needs of special needs students. This offer was rejected.

55. Defendants assumed and created a special relationship with Gilberto Lopez and created the risk of harm he suffered by placing him at Genesis Learning Centers and on a special needs school bus with Mr. Harris due to both students' conditions and owed Gilberto an obligation to protect him against foreseeable risks of harm such as the harm he suffered.

56. As a direct and proximate result of Defendants' policy of assignment of special needs students and insufficient training along with their conduct and the conduct of Ms. Smith on the day of the incident, Gilberto Lopez has suffered physical and emotional injury for which he is entitled to damages for past and future expenses, past and future physical pain and suffering, mental anguish, and past and future lost capacity for the enjoyment of life.

57. Since the time of the incident, Gilberto Lopez has begun engaging in disturbing behavior including, but not limited to, squeezing his genitals to the point of

bruising, asking his mother to cut off his genitals, becoming anxious, physically ill and throwing up following his interview with the Department of Child Services regarding the incident, urinating in his home in inappropriate places, and defecating in his bedroom.

58. Prior to the incident involving Gilbert, and for a period of several years, Defendant Metro had maintained a pattern and practice of recklessly and intentionally creating risks of harm by their policy of assigning special needs students to school buses and by disregarding reports of sexual abuse occurring on school buses and knowingly, willfully, and recklessly failed to adopt or implement policies or training of subordinates to prevent such deprivations.

59. In response to the incident outlined above, as well as prior incidents of sexual assault on school buses, Defendant Metro has acted with deliberate indifference to this incident and other incidents involving potential class members, including, but not limited to, the following:

- (a) school officials speaking out in the media asserting that a video of an earlier incident involving Jenna Staehling “do not provide concrete evidence” of any attack;
- (b) admissions by school officials in the media that Defendant Metro should have acted differently in response to the incident involving Jenna Staehling;
- (c) by failing to offer any substantive counseling of any kind to Gilberto after the incident;
- (d) systematically failing to report incidents of sexual assault to police as required by Tennessee law;
- (e) failing to keep Gilberto’s mother, and systematically failing to keep parents of victims, informed of any developments including whether the

alleged perpetrator would be on Gilberto's school bus during this academic school year; and

(f) failing to notify Gilberto's teachers and counselors of the incident and to look out for changes in Gilberto's demeanor and provide assistance.

60. Following the filing of the initial Complaint, Defendants, by and through Defendants' agents, placed a school bus monitor on the school bus Gilberto rides.

61. No notice was provide to Ms. Lopez prior to the placement of the bus monitor on Gilberto's bus.

62. In addition, after the filing of this lawsuit, Gilberto was assigned to a school bus route which took him on an approximately two (2) hour ride, each way, to and from school every day.

63. Shortly after the new school year began, in October 2007, Gilberto was committed to the Cottage Program at Youth Villages in Memphis Tennessee and has been institutionalized at that facility from October 2007 through the present as a result of the incident that is the subject matter of this lawsuit.

64. For seven (7) years, including the academic year 2006-2007, Linda B. DePriest, Ed.D. was a Coordinator in the Department of Special Education for MNPS responsible for Moderate Intervention and Severe Behavioral Intervention Programs.

65. In her role as Coordinator, Dr. DePriest was personally and directly involved in determining the proper placement for special needs students with moderate and severe behavioral problems.

66. Prior to the incident that is the subject matter of this lawsuit, Dr. DePriest believed there was a substantial likelihood that an incident like the one that is the subject matter of this lawsuit would occur based on information she learned from other employees

of Defendants, complaints of parents, her review of confidential student records, and information of which she had personal knowledge.

67. Prior to the incident that is the subject matter of this lawsuit, Dr. DePriest expressed to Sharron Wright, Executive Director of Special Education for MNPS and Dr. Kaye Rackard, Director of Special Education for MNPS, her concerns for the safety of special needs children on special needs buses and the probability of occurrences similar to the one that is the subject matter of this lawsuit.

68. Prior to the incident that is the subject matter of this lawsuit, Dr. DePriest was aware of and concerned that school bus monitors were not being appropriately assigned to protect special needs students from probable harm.

69. When Dr. Depriest raised these concerns, Ms. Wright and Dr. Rackard responded that responsibility for assignment of monitors was the responsibility of the MNPS Department of Transportation and failed and refused to account for the safety of special needs children.

70. Prior to the incident that is the subject matter of this lawsuit, Dr. DePriest was told by the MNPS Department of Transportation and special education route coordinator, Sandy Burton, that the responsibility for assignment of monitors was that of the Department of Special Education.

71. Burton likewise failed to adopt means recommended by Dr. DePriest to prevent probable harm.

72. As a result of this confusion of responsibility and the failure of Defendant Metro to properly coordinate and organize performance of its duties, monitors were not appropriately assigned in the face of known danger.

73. Prior to the incident that is the subject matter of this lawsuit, Ms. Burton made decisions regarding assignment of special needs students to various special needs buses and specific routes based upon mere practical concerns regarding routes and locations with no regard for the specific needs of individual students or the possibility that students would be assigned to buses with age or sex inappropriate arrangements such as placing one female student on a bus with 4 boys or placing a nine year old on the same bus as a nineteen year old.

74. Because Burton neither requested nor was provided with special needs student's Individualized Education Programs (IEP) or other information concerning behavioral issues of pupils, she failed to take into consideration the individual needs and vulnerabilities of special needs students when determining school bus route assignments and whether certain pupils were, by virtue of age, disability, gender, and other characteristics vulnerable to others placed on the same bus.

75. Defendant Genesis was aware of and had access to records of Kolby Harris' severe sexual acting out behavioral history and did nothing to minimize the risk of harm he posed.

76. At all times pertinent hereto, Dr. Pedro Garcia, Ms. Wright, Dr. Rackard and Ms. Burton had authority to address the policies and to institute corrective measures on Defendant Metro's behalf. Similarly, officials of Defendant Genesis had authority to address these safety issues.

77. Defendants' policy and practice of assigning special needs students to special needs buses, while knowing of, but disregarding, safety concerns, created and increased the risk that Gilberto would be exposed to acts of violence and sexual misconduct.

78. Plaintiff Gilberto Lopez faced a special risk and danger that was distinguishable from a risk that affects the public at large.

79. The Defendants created and contributed to the creation of the danger that rendered Gilberto more vulnerable to harm.

80. The Defendants knew or clearly should have known that their actions specifically endangered Gilberto Lopez.

81. The Defendants' policies and practices regarding special needs student school bus assignments creates a constitutionally cognizable claim giving rise to liability under 42 U.S.C. § 1983.

82. No effort was made to take into account obvious dangers in making bus assignments on special needs school buses.

83. As a consequence, Gilberto Lopez, at nine (9) years of age, was placed on a bus with a driver who was untrained in the management of special needs children with a nineteen (19) year-old man who was known by the Defendants to have a history of sexual impropriety.

84. Since the incident that is the subject matter of this lawsuit occurred, other similar and similarly preventable incidents of sexual assault have occurred on school buses utilized by the Defendants.

95. Defendant Metro has provided individual school bus monitors and aides to comparable disabled students in the past.

#### **CAUSES OF ACTION**

#### ***DEFENDANT METRO UNDER GOVERNMENTAL TORT LIABILITY ACT***

96. Defendant Metro is vicariously liable under principles of common law and the Tennessee Governmental Tort Liability Act, T.C.A. § 29-20-101 et seq. for injuries suffered by Gilberto Lopez.

97. Ms. Smith's negligent acts and omissions as outlined above were operational in nature and not discretionary as contemplated by T.C.A. § 29-20-205.

98. Ms. Smith failed to exercise reasonable care and proper oversight under the circumstances which was a proximate cause of Plaintiff Gilberto Lopez's injuries.

99. Ms. Smith negligently supervised Plaintiff Gilberto Lopez and Kolby Harris causing and exacerbating Plaintiff Gilberto Lopez's injuries.

100. Defendant Metro and Ms. Smith failed to properly report the incidents to law enforcement and proper authorities as required by T.C.A. § 49-6-4301, § 37-1-403; and § 37-1-605.

101. Defendant Metro assumed a duty to protect Gilberto from harm and negligently failed and refused to do so.

102. Defendant Metro placed a helpless, autistic nine (9) year old child in dangerous proximity to a nineteen (19) year old man.

#### ***GENESIS NEGLIGENCE AND RECKLESS CONDUCT***

103. Defendant Genesis is liable for the injuries suffered by Gilbert.

104. If Genesis officials had obtained and reviewed the content of Harris' cumulative file, the incident that is the subject matter of this lawsuit would not have occurred and additional steps would have been taken by Genesis to ensure that a bus monitor was placed on the school bus.

105. Defendant Genesis had a duty to protect Gilberto from known risks of harm that extended to the school bus to which Gilberto was assigned.

106. Defendant Genesis knew or should have known of Kolby Harris' history of severe sexual acting out behavior and failed to take appropriate steps to minimize the risk of harm Harris posed.

107. More specifically, Defendant Genesis acted recklessly by permitting Harris to be a student at Genesis without reviewing the content of his cumulative file. Genesis was aware that Harris had a history of sexual inappropriate behavior but was not aware of the additional content in his cumulative file and took no steps to obtain or ensure that the content was reviewed prior to the incident that is the subject matter of this lawsuit.

108. As a direct and proximate result of Defendant Genesis' reckless conduct, Gilberto has suffered and will continue to suffer mental injury and damages.

***42 U.S.C.S. § 1983- GENERALLY***

109. Gilberto Lopez's Constitutional rights were violated as a result of the incident by Defendants' creation of a risk of harm that caused Gilberto injuries.

110. The Defendants were deliberately indifferent making a deliberate and conscious choice, to an obvious danger that resulted in deprivation of Gilberto Lopez's Constitutional rights by:

- (a) failing to train school employees;
- (b) failing to adopt or implement policies to prevent the sexual assaults against Gilberto Lopez and similarly situated students from occurring;
- (c) failing to properly supervise or discipline school employees;
- (d) permitting Ms. Smith, an incompetent and untrained school bus driver, to transport Gilberto Lopez;
- (e) failing to train Ms. Smith to report procedures for incidents such as those at issue in this case;

- (f) failing to assign Gilberto to a bus with a bus monitor;
- (g) creating a risk of harm by assigning Gilberto to a bus with a special needs students known to be a risk of harm; and
- (h) assigning Gilberto to a bus with other special needs students known to be a risk to him and knowing he had no way of defending herself.

111. Defendants created and had actual or constructive notice that their actions or failure to act were substantially certain to result in a Constitutional deprivation, and Defendants consciously or deliberately chose to disregard the risk of harm.

112. Defendants' failure to train Ms. Smith amounts to deliberate indifference to the rights of Gilberto Lopez and other special needs students.

113. Defendants' policies were the moving force behind the Constitutional violation Gilberto Lopez suffered. The Defendants' failure to train their employees in respect to Gilberto's autism and the special needs he had evidences a deliberate indifference to the Constitutional rights of Gilberto as does Defendants' policy of assignment of students with special needs to such buses.

114. Defendants knew that special needs students required specialty transportation and specialized oversight. Defendant Metro purchased specially designed and manufactured buses to allow Defendants to accomplish this task.

115. The need to train special needs school bus drivers is so obvious that Defendants' failure to do so amounts to deliberate indifference to special needs students' Constitutional rights.

116. As a direct cause of the Defendants' creation of the risk of harm and failure to adequately train, adopt, or implement certain policies and properly supervise school employees, Gilberto Lopez suffered loss and harm including violation of Gilberto's

Constitutional rights, including, but not limited to, rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution as protected by 42 U.S.C.S. § 1983 et. seq.

***42 U.S.C.S. § 1983- FAILURE TO TRAIN***

117. The conduct of the Defendants created a pervasive and offensive hostile atmosphere in violation of Gilberto Lopez's exercise of his rights under the Constitution.

118. As a result of these wrongful actions, Gilberto Lopez has suffered trauma, pain and distress.

119. The Defendants are liable for the wrongful conduct of their employees, as the Defendants' officials conceived and/or failed to create and implement a policy and practice of properly training bus personnel and employees to protect Gilberto Lopez.

120. Defendants are liable for the wrongful conduct of the Defendant's employees, as the Defendants' officials failed to train and supervise its supervisors, agents and employees to avoid such pervasive and offensive hostile conduct against known, vulnerable minor, special education students such as Gilberto.

121. Defendants are liable for the wrongful conduct of the School District's employees, as the Defendant's officials permitted and condoned a policy and practice of not properly training employees who were charged with the care and custody of students with disabilities and special needs.

122. As a result of the Defendants' wrongful conduct, Gilberto Lopez suffered the harm and damages averred to above.

***42 U.S.C.S. § 1983-DUE PROCESS***

123. Gilberto Lopez was a special needs student as defined by Section 504 of the Rehabilitation Act.

124. Gilberto's change in transportation was not done pursuant to a new IEP.

125. The change in transportation was not provided to Ms. Lopez in writing.

126. Ms. Lopez was not provided an oral or written notice of any due process rights related to this change in transportation or the assignment of school bus monitors.

127. The Defendants represented to Ms. Lopez that the new transportation arrangement would be appropriate and safe for Gilberto.

128. Relying on that representation, Ms. Lopez acceded to the new transportation arrangement made by the Defendants.

129. The change materially altered the transportation provisions of Gilberto's IEP to the detriment of Gilberto as stated heretofore.

130. Defendants, while acting under color of state law, violated and knew or should have known that they violated Gilberto Lopez's rights as guaranteed by State and Federal Law and the State and Federal Constitution by changing transportation and thereby creating a danger which caused harm to Gilberto, to wit, transporting him with non-age appropriate, sexually abusive and emotionally disturbed students without adequate safety precautions and supervision.

131. The conduct of the named Defendants was based on action or inaction of the Defendants which was deliberately indifferent to and in violation of rights guaranteed to Gilberto Lopez by law.

132. The actions of the Defendants were proximately related to the deprivation and loss of Gilberto's Constitutional rights as guaranteed by law.

133. Gilberto Lopez's denial of his rights under the Constitution of the United States, as guaranteed by law, were proximately related to the actions and inactions of the Defendants, by ignoring the negligent, reckless, arbitrary, and capricious conduct of the Defendants' employees, to wit, the transportation of a vulnerable, disabled student with a non-age appropriate known sexual predator without instruction, training, or proper supervision.

134. Defendants are liable for the wrongful conduct of the Defendants' employees, as the responsible decision makers conceived and implemented a policy and practice of failing to train bus personnel and employees to protect Gilberto Lopez.

135. The Defendants are liable for the wrongful conduct of their employees, as the decision makers failed to train and supervise their supervisors, agents, and employees to avoid such pervasive and offensive hostile conduct against known vulnerable students.

136. As a result of the Defendants' wrongful conduct, Plaintiff Gilberto Lopez suffered the harm and damages averred to above.

***42 U.S.C.S. § 1983-BREACH OF SPECIAL CUSTODIAL ARRANGEMENT***

137. The conduct of the named Defendants was based on action or inaction of the Defendants that was deliberately indifferent to and in violation of the rights guaranteed to Gilberto Lopez by law.

138. The actions of the Defendants were proximately related to the deprivation and loss of Gilberto's Constitutional rights as guaranteed by law.

139. As a result of these wrongful actions, Gilberto has suffered trauma and distress.

140. The Defendants are liable for the wrongful conduct of their employees, as the decision makers conceived and implemented a policy and practice of failing to train bus personnel and employees to protect Gilberto Lopez.

141. The Defendants are liable for the wrongful conduct of their employees, as the decision makers for the Defendants failed to train and supervise their supervisors, agents and employees to avoid such pervasive and offensive hostile conduct against known vulnerable students.

142. The Defendants are liable for the wrongful conduct of their employees, as the decision makers permitted and condoned a policy and practice of not properly training said persons and of directing and instructing officials not to include school bus monitors in and students IEP.

143. As a result of Defendants' wrongful conduct, Gilberto Lopez suffered the harm and damages averred to above.

***42 U.S.C.S. § 1983-VIOLATION OF THE FOURTEENTH AMENDMENT  
STATE CREATED DANGER***

144. The Defendants knew or should have known of the past inappropriate sexual conduct of Harris.

145. The Defendants, based on this knowledge should have anticipated that Harris would prey upon a vulnerable minor male student if provided the opportunity.

146. The harm ultimately caused to Gilberto was foreseeable and direct.

147. The Defendants acted in willful disregard for the safety of Gilberto.

148. There was a relationship between Gilberto and the Defendants in that he was a special needs student in their care and protection as required by law.

149. The Defendants used their authority and capacity to create the opportunity for harm that otherwise would not have existed by changing the transportation for Gilberto and failing to assure for proper supervision of the students during transit.

150. The Defendants' actions were predicated in a failure to act in light of a known risk of harm.

151. The Defendants' actions manifested a disregard of a high and excessive degree of danger, known to them or apparent from a reasonable person in their position.

152. The actions of the Defendants were outrageous and willful or in such a negligent manner as to rise to the level of outrageousness and willfulness.

***42 U.S.C.S. § 1983-RETALIATION FOR EXERCISE OF CONSTITUTIONAL  
AND STATUTORY RIGHTS***

153. The Plaintiffs' complaints and reports regarding Gilberto's assault concerned important issues of public interest and were protected by the First Amendment to the Constitution of the United States and implied by the relevant federal statutes.

154. After the complaints that Gilberto was not properly provided safe transportation as required by law and proximately related thereto, the agents and employees of the Defendants engaged in a pattern of retaliatory conduct.

155. This retaliation by Defendant Metro took the form of reassigning Gilberto to a school bus for the following school year which traveled a route in excess of two hours, each way, to and from school in violation of Tennessee law and to the detriment of Gilberto's mental condition.

156. This retaliation by Defendant Genesis took the form of excessive, improper and trumped-up allegations against Gilberto in an effort to portray him as a neglected student with numerous school conduct violations.

157. The conduct of the Defendants was taken in retaliation of the Plaintiffs' exercise of their rights and duties under the First Amendment to the Constitution of the United States and deprived the Plaintiffs of Constitutional rights as guaranteed by law.

158. As a result of this wrongful retaliation, the Plaintiffs have suffered losses as well as humiliation and emotional distress.

159. Defendants are liable for the wrongful conduct of their employees as the decision makers conceived and implemented a policy and practice of retaliating against Plaintiffs in the exercise of their First Amendment rights.

160. As a result of the Defendants' wrongful conduct, the Plaintiffs suffered the harm and damages averred to above.

***TITLE II OF THE AMERICANS WITH DISABILITIES ACT, AND SECTION  
504 OF THE REHABILITATION ACT***

161. The Defendants had a duty under law to provide Gilberto Lopez a free and appropriate education, including appropriate ancillary services such as safe transportation.

162. Gilberto suffered from a disability and mental impairment that substantially limited one or more of his major life activities which prevented his performance of a major life activity that the average person in the general population can perform.

163. Gilbert was to be provided appropriate transportation to and from Genesis.

164. Defendants changed Gilberto's transportation assignment without reconvening an IEP meeting.

165. Ms. Lopez was not provided notice of or afforded any due process rights related to this change.

166. The Defendants represented to Ms. Lopez that the new transportation would be appropriate and safe for Gilberto without any basis for this representation and contrary to the known risk of harm from Harris.

167. Relying on Defendants' representation, Ms. Lopez accepted the change by the Defendants.

168. The change materially altered the transportation services section of Gilberto's IEP to the detriment of Gilberto as stated heretofore by placing him with non-age appropriate students, an insufficiently trained driver and Harris.

169. At the same time, Defendant Metro provided bus monitors to other similarly situated and comparably disabled students.

170. The Defendants actions proximately caused a violation of the rights guaranteed to Gilberto under the ADA and Section 504.

171. Gilberto was injured as a result of these violations in a manner set out above..

***20 U.S.C.S. § 1681 ("Title IX")***

172. Gilberto was assaulted by Harris on the basis of Gilberto's sex. And the incident of contact of a sexual nature was so severe, pervasive, and objectively offensive that it deprived Gilberto Lopez of access to the educational opportunities or benefits provided by the MNPS.

173. The Defendants had actual knowledge of the incidents and prior inappropriate conduct of a sexual nature by Kolby Harris.

174. Defendant responded with deliberately indifference to the prior incidents of inappropriate conduct of a sexual nature, as outlined above.

175. As a result of the Defendants' deliberate indifference to prior instances and Gilberto Lopez's assault, Defendants created and allowed to continue an intimidating, hostile, offensive, and abusive school environment that violated Title IX of the Education

Amendments of 1972 outlined in 20 U.S.C.S. § 1681 et. seq. and deprived Gilberto Lopez of access to educational opportunities or benefits provided by MNPS.

**CLASS ACTION ALLEGATIONS SEEKING INJUNCTIVE AND EQUITABLE  
RELIEF**

176. In addition to the Plaintiffs' individual claims, this action is brought as a Class Action seeking certain equitable relief from Defendant Metro and may properly be maintained as such pursuant to the provisions of Rule 23 of the FEDERAL RULES OF CIVIL PROCEDURE.

177. A Class Action is superior to other available methods for the fair and effective adjudication of this claim and is sought to rectify the consistent pattern of deliberate indifference to the needs of special needs students, Defendant has demonstrated that, if not immediately addressed this indifference, will result in irreparable harm to members of the class.

***CLASS DEFINITION***

178. Plaintiffs bring this action on their own behalf and as a Class Action under the provisions of Rules 23(a), 23(b)(2) and 23(b)(3) of the FEDERAL RULES OF CIVIL PROCEDURE on behalf of all members of a Class of Plaintiffs defined as follows: All special needs students, suffering from any serious physical limitation or mental health condition, and the custodial and biological parents of any special needs student, presently attending a Metropolitan Nashville Public Schools system or otherwise a student at any school with whom The Board of Education for the Metropolitan Nashville Public Schools contracts to provide an education and who are transported on any school bus. (hereinafter the "Class").

179. Plaintiffs reserve the right to modify the Class definition based on the results of discovery.

### ***NUMEROSITY***

180. Plaintiffs do not know the exact number of Class members, because this information is within the control of Defendants, but Plaintiffs believe, on good faith information and belief, the number of Class members exceeds an aggregate of one hundred (100).

181. The Class members are sufficiently numerous, so that joinder of all Class members is impracticable.

182. The precise number of members in the Class and their identities and address may be determined from Defendant Metro's records.

183. The Class is readily ascertainable.

184. The likelihood of individual Class members prosecuting separate claims is remote, because the damages suffered by each individual Class member may be relatively small.

### ***EXISTENCE OF COMMON FACTS AND LAW***

185. There are well-defined questions of law and fact common to the members of the Class which predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages, which include, but are not limited to:

(a) Defendant Metro's legal responsibility for reporting instances of violence involving Class members to the appropriate authorities;

(b) Defendant Metro's failure to properly train officials and employees regarding the needs and requirements of the Class members as required by law;

(c) Defendant Metro's and MNPS' failure to inform the parents and custodial parents of instances of physical violence and sexual assault or battery involving special needs students and Defendant Metro's obligations to do so under state and federal law;

(d) Defendant Metro's failure to properly monitor special needs students on school buses;

(e) Such other legal and factual issues as may develop and arise during the course of discovery in this case moving forward.;

(f) Defendant Metro's systematic refusal to properly report instances of sexual abuse of class member as required by Tennessee law; and

(g) Defendant Metro's policy of refusing to include monitors as part of any student's IEP.

186. Since the incident that is the subject matter of this lawsuit, at least two other similar incidents are known to have occurred which, like this incident, could have been avoided had school bus monitors been assigned to the special education school buses.

187. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications establishing incompatible standards of conduct for the Defendant.

### ***TYPICALITY***

188. The Plaintiffs' claims are typical of the claims of the Class members they seek to represent. Plaintiffs share those claims in common with the Class members.

### ***ADEQUACY OF REPRESENTATION***

189. Plaintiffs will fairly and adequately protect the interests of the other members of the Class.

190. Plaintiffs are committed to and intend to prosecute this action vigorously.

191. The Plaintiffs have no interests that are adverse or antagonistic to those of other members of the Class.

192. Plaintiffs have retained counsel who are experienced in litigation such as this type.

193. Plaintiffs envision no unusual difficulty in the management and maintenance of this Class Action as a Class Action.

***PREDOMINANCE AND SUPERIORITY:***

194. A Class Action is superior to other methods for the fair and effective adjudication of this controversy. Treatment as a Class Action will permit a large number of similarly situated persons to adjudicate their common claims in a single forum simultaneously, effectively, and without duplication of effort and expense that numerous individual actions would engender.

195. This suit may also be maintained as a Class Action because questions of law and fact common to the Class predominate over the questions affecting only individual members of the Class and a Class Action is superior to other available means for the fair and effective adjudication of this dispute. Damages suffered by each individual Class member may be relatively small, especially given the burden and expense of individual prosecution of the complex and extensive litigation necessitated by the Defendants' conduct. Furthermore, it would be virtually impossible for the Class members, on an individual basis, to obtain effective redress to the wrongs done to them. Moreover, even if Class members themselves could afford such individual litigation, the Court system could not; individual litigation presents a potential for inconsistent and contradictory judgments. Individualized litigation increases the delay and expense to all parties in court systems presented by the legal issue of

the case. By contrast, the Class Action device presents far fewer management difficulties, and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court.

196. This suit may also be maintained as a Class Action because Plaintiffs and the Class seek declaratory and/or injunctive relief, and all of the above factors of numerosity, questions of fact and law, typicality and adequacy, are present. Moreover, Defendants have acted on grounds generally applicable to Plaintiffs and the Class as a whole, thereby making declaratory and/or injunctive relief proper.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs demand:

- a. That process be issued requiring the Defendants to answer this Fourth Amended Complaint within the time required by law;
- b. That the Court enter an order determining that the actions involving claims common to all Class members, may be maintained as a Class action as contemplated by Rule 23 of the FEDERAL RULES OF CIVIL PROCEDURE;
- c. The Plaintiffs be awarded such damages as will fully compensate Plaintiffs for all injury caused by the Defendants' actions in violation of Tennessee common law, Tennessee statute, and Federal law;
- d. That the Court enter an Order directing Defendants, under the supervision of the Court, to:
  - (1) train all employees of any school within the MNPS or with whom Defendant Metro contracts to provide educational services, regarding the

specific needs of, requirements for and Defendants' legal obligations towards, all Class members;

(2) provide safe and secure monitoring of special needs students both while at school and on any school bus to prevent instances of sexual or other physical abuse from occurring;

(3) require Defendants to immediately notify the parents of any special needs students via telephone, e-mail, and in writing following any instance of sexual or other physical abuse involving any special needs student;

(4) require Defendants to comply with T.C.A. § 49-6-4301, § 37-1-403; and § 37-1-605 regarding reporting requirements for instances of violence or abuse involving any special needs students;

(5) adopt and implement specific policies to prevent instances of violence or abuse involving any special needs students; and

(6) prohibit Defendant Metro from systematically refusing to include school bus monitors in student IEPs.

e. That Plaintiffs be awarded attorneys' fees authorized under 42 U.S.C.S. § 1988 for Defendants' violation of 42 U.S.C.S. § 1983 et. seq.;

f. That Plaintiffs and the Class be awarded such other, additional or general relief as is considered necessary and proper as the interests of justice may require;

g. That Plaintiffs be awarded punitive damages from Defendant Genesis for the reckless conduct of Defendant Genesis in bringing about the harm suffered by Gilberto in an amount no to exceed ten (10) times the amount of compensatory damages as determined by a fair and impartial jury; and

- h. For a jury to hear and render judgment on those causes of action so triable.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing **FOURTH AMENDED COMPLAINT** has been served via the Court's electronic filing system to the following:

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On this, the 30th day of April, 2008.

/s/ Robert T. Homlar  
Robert T. Homlar