

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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B.A., individually and on behalf of R.A., :  
Plaintiff, : Case No. \_\_\_\_\_  
-against- :  
New York City Department of Health and Mental :  
Hygiene, and New York City Department of :  
Education, :  
Defendants. :  
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**COMPLAINT**

**PRELIMINARY STATEMENT**

Plaintiff B.A.,<sup>1</sup> individually and as a parent of R.A., a child with a disability, by and through her attorneys, Morrison & Foerster LLP and Advocates for Children of New York, Inc., for her complaint hereby alleges:

1. R.A. was born on [REDACTED], 2019. She is a three-year-old child with autism,<sup>2</sup> a significant disability under federal and state law. She has limited communication skills and struggles to perform tasks that neurotypical three-year-olds have mastered, such as feeding herself or following basic, single-step instructions. R.A. has been irreparably harmed by Defendant New York City Department of Health and Mental Hygiene’s (“DOHMH”) failure to provide R.A. with all of the necessary Early Intervention services she was entitled to under the

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<sup>1</sup> This Complaint “does not expressly name the child or the parents” in this action “because in an action commenced by a parent or guardian on behalf of a minor child pursuant to the Individuals with Disabilities Education Act (“IDEA”), the Plaintiff should be permitted to proceed, as a matter of course, using initials in place of full names in public filings with the Court.” *H.L. v. N.Y.C. Dep’t of Educ.*, No. 15-cv-2451, 2019 WL 181307, at \*1 n.1 (S.D.N.Y. Jan. 11, 2019) (internal quotation marks omitted) (citing Fed. R. Civ. P. 5.2(a); 20 U.S.C. § 1417(c)).

<sup>2</sup> The Centers for Disease Control and Prevention defines “Autism Spectrum Disorder” or “ASD” as “a developmental disability that can cause significant social, communication and behavioral challenges.” Autism Spectrum Disorder (ASD), <https://www.cdc.gov/ncbddd/autism/index.html>.

Individuals with Disabilities Education Act (“IDEA”), DOHMH’s failure to provide compensatory services for the denial of legally-mandated Early Intervention services, and Defendant New York City Department of Education’s (“DOE”) failure to provide compensatory services for the Early Intervention services that R.A. never received. The harm incurred will increase every day Defendants fail to provide the necessary compensatory services to R.A. Because of the nature of brain development, therapeutic services provided later in a child’s development cannot fully compensate for therapeutic services provided earlier in development – services over time are not substitutes for each other.

2. On February 28, 2022, at the age of two, R.A. was referred to DOHMH for Early Intervention evaluations and services by her pediatrician.

3. DOHMH scheduled R.A.’s initial evaluations shortly after her referral, and the evaluations concluded that R.A. had no functional speech, limited attention skills, and severely delayed cognitive abilities.

4. DOHMH held R.A.’s Individualized Family Service Plan (“IFSP”) meeting on April 26, 2022. Due to her significant needs, R.A.’s IFSP called for special instruction, occupational therapy, and speech-language therapy. *See* Exh. A, R.A.’s IFSP. However, after R.A.’s mother consented to services at the IFSP meeting, the DOHMH failed to implement the IFSP and did not provide the services the IFSP mandated.

5. Despite the family’s numerous attempts to get R.A.’s services started, DOHMH only provided R.A. a fraction of the special instruction services mandated in her IFSP, and ***none*** of the occupational therapy or speech-language therapy.

6. Without receiving the full services her IFSP mandated, R.A. failed to make progress and failed to reach the goals in her IFSP.

7. In February 2023, because R.A. continued to show signs of significant delays as a result of not receiving all of her mandated Early Intervention services, the parent filed an impartial hearing request seeking compensatory services for DOHMH's failure to provide R.A. with her mandated Early Intervention services.

8. On May 11, 2023, the Administrative Law Judge ("ALJ") presiding over Plaintiffs' hearing request determined that no remedy was available because R.A. had aged out of Early Intervention services and asserted that R.A. could not receive "retroactive relief" through an Early Intervention due process hearing for the services DOHMH failed to provide her. *See* Exh. B, ALJ's Decision.

9. 34 C.F.R. § 303.344(d) requires that each disabled child's IFSP include the Early Intervention services necessary to meet the unique needs of the child and family and achieve the results or outcomes identified in the IFSP.

10. Additionally, the State of New York is required to ensure that necessary Early Intervention services are available and are provided to each child with a disability, and must do so in a timely manner. In New York City, the DOHMH is responsible for administering the Early Intervention program and ensuring children receive timely services.

11. Notwithstanding the federal mandate to prepare a developmental plan for R.A. and implement the plan by providing her essential Early Intervention services, the DOHMH failed to provide all the services required by R.A.'s IFSP.

12. The entire concept of Early Intervention services established by the United States Congress is based around providing services during a child's early development, particularly for children with autism. Intensive early intervention for young children with autism lays a

foundation for learning, paying attention, speaking, filtering distractions, and becoming an active member of their community.

13. The developmental time lost to R.A. due to the City's failure to provide Early Intervention services that Defendant DOHMH recognized R.A. needed has resulted in irreparable harm, and that harm mounts daily. R.A. needs immediate services to compensate for the services she missed out on from April 2022 to November 2022. Her DOE preschool program cannot make up for the services denied to her under her IFSP, and the DOE has similarly failed to provide R.A. with the Early Intervention services denied to her.

14. Therefore, this Complaint seeks preliminary injunctive relief in the form of 10 hours of one-to-one special instruction (Applied Behavior Analysis therapy), 1 hour of occupational therapy, and 2 hours of speech-language therapy per week at the child's home.

15. Additionally, this Complaint seeks permanent injunctive relief in the form of at least 200 hours of one-to-one special instruction (Applied Behavior Analysis therapy), 25 hours of occupational therapy, and 50 hours of speech-language therapy at the child's home to make up for the Early Intervention services R.A. was supposed to receive, but did not.

#### **JURISDICTION AND VENUE**

16. This Court has jurisdiction under 28 U.S.C. § 1331, in that claims are asserted under the laws of the United States, and under 20 U.S.C. § 1439(a)(1), which provides procedural safeguards for addressing the concerns of parents related to Early Intervention services.

17. Venue is proper under 28 U.S.C. § 1391(b). Defendants are located in this district, R.A. and her family reside in this district, and the Defendants are injuring them in this district.

## THE PARTIES

18. B.A. is the mother of R.A., a child with a disability who resides in Brooklyn, NY.

19. R.A. is a three-year-old child who has been diagnosed with Autism Spectrum Disorder, a disability that results in impaired psychological development and delayed milestones in childhood.

20. Defendant the New York City Department of Health and Mental Hygiene (“DOHMH”) administers the Early Intervention Program through the Bureau of Early Intervention. DOHMH receives federal funding for purposes of providing Early Intervention services to children with disabilities. DOHMH’s address is 42-09 28<sup>th</sup> Street, 14th Floor, Queens, New York 11101-4132.

21. Defendant New York City Department of Education (“DOE”) is the official body charged with developing policies with respect to the administration and operation of public schools in New York City, including programs and services for students with disabilities. The DOE is a recipient of federal financial assistance. The DOE is a branch of the municipal government in New York City, with its principal place of business at 100 Church Street, New York NY 10007.

## FACTUAL BACKGROUND

### **A. DOHMH Violated IDEA by Failing to Provide R.A. Early Intervention Services from April to November 2022.**

22. R.A. was born on [REDACTED], 2019.

23. R.A. was referred to DOHMH for Early Intervention services by her pediatrician in February 2022 because of concerns with R.A.’s development.

24. DOHMH scheduled R.A.’s initial evaluations shortly after her referral, and the evaluations concluded that R.A. had no functional speech, limited attention skills, and severely

delayed cognitive abilities. DOHMH held R.A.'s IFSP meeting on April 26, 2022. Due to her significant needs, R.A.'s IFSP mandated that R.A. receive 20 hours a week of special instruction (Applied Behavior Analysis therapy), 1 hour a week of occupational therapy, and 2 hours a week of speech-language therapy. The services were to be provided in R.A.'s home. However, after the child's mother consented to services during the IFSP meeting, DOHMH did not provide all of the services the IFSP mandated, thus failing to implement the IFSP.

25. From April to November 2022, DOHMH only provided R.A. a fraction of the special instruction services mandated in her IFSP, and *none* of the at-home occupational therapy or speech-language therapy.

26. When DOHMH continued to not provide R.A.'s IFSP mandated services, B.A. transitioned R.A. to preschool special education services under the DOE in November 2022, with the hope that R.A. would receive more services. She is classified by the DOE as a preschooler with a disability.

**B. Plaintiff Timely Requested an Impartial Hearing Pursuant to N.Y. Pub. Health Law § 2549. The ALJ Ruled that Compensatory Relief for the Failure to Implement the IFSP was Not Available for R.A. Because She was No Longer Age-Eligible for Early Intervention.**

27. The IDEA recognizes the right and need for parents to challenge denial of services and to receive compensatory services to make up for the denial of services. The IDEA imposes extensive procedural requirements on participating state and local agencies to safeguard the rights of a child with a disability. The IFSP is the governing document mandating the individualized services for infants and toddlers with developmental delays or disabilities in the Early Intervention program. The IDEA requires that each state develop a system for resolution of complaints through mediation, State complaint procedures, and due process hearing procedures. 34 C.F.R § 303.430. In New York, parents have a right to an impartial hearing to

resolve any complaints about a child's eligibility determination and provision of services as mandated by an IFSP. N.Y. Pub. Health Law § 2549(3).

28. The Statute of Limitations for asserting a violation of the IDEA is two years, and the Statute of Limitations for asserting a violation of Section 504 of the Rehabilitation Act is three years.

29. As part of a parent's due process rights, the IDEA broadly authorizes hearing officers and federal courts to provide equitable relief, including compensatory services.

30. On February 21, 2023, B.A., the parent of R.A., filed an impartial hearing request under N.Y. Pub. Health Law § 2549 and the federal IDEA requesting compensatory services for the services DOHMH failed to provide R.A. from April 2022 to November 2022.

31. On March 7, 2023, Administrative Law Judge Jean T. Carney held a conference to discuss the impartial hearing request. During the conference, ALJ Carney questioned her jurisdiction over the case and ability to award compensatory services for a child who, like R.A., has aged out of the Early Intervention program at the time of the hearing.

32. In her final decision dated May 11, 2023, ALJ Carney concluded the requested relief for DOHMH's failure to provide Early Intervention services while R.A. should have been receiving them could not be granted because, at the time that Plaintiffs filed the hearing request, R.A. was no longer eligible for Early Intervention services. Specifically, ALJ Carney ruled that R.A. was not eligible to receive compensatory services from DOHMH for the Early Intervention services DOHMH did not provide because (1) she was receiving preschool special education services, and (2) R.A. had turned three years old on [REDACTED], 2022, and aged out of Early Intervention services on that day. ALJ Carney determined she did not have jurisdiction over the dispute. The decision concluded, "[t]he Petitioner's recourse is to work with the [DOE's

Committee on Preschool Special Education Services (“CPSE”)], currently providing [preschool special education] services to R.A.”

**C. Preschool Special Education Alone Cannot Compensate R.A. for the Early Intervention Services Denied to Her.**

33. The IDEA is divided into two major components. Part B of the Act governs children from the ages of three through twenty-one, while Part C governs infants and toddlers under three years of age. Early Intervention services under Part C are designed to meet a child’s developmental needs and authorize developmental services such as special instruction and speech-language therapy.

34. Under IDEA Part C,<sup>3</sup> Congress outlined the following findings and policy:

(a) Findings

Congress finds that there is an urgent and substantial need—

(1) to enhance the development of infants and toddlers with disabilities, *to minimize their potential for developmental delay, and to recognize the significant brain development that occurs during a child’s first 3 years of life;*

(2) to reduce the educational costs to our society, including our Nation’s schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age;

(3) to maximize the potential for individuals with disabilities to live independently in society;

(4) to enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities; and

(5) to enhance the capacity of State and local agencies and service providers to identify, evaluate, and meet the needs of all children, particularly minority, low-income, inner city, and rural children, and infants and toddlers in foster care.

(b) Policy

It is the policy of the United States to provide financial assistance to States—

(1) to develop *and implement* a statewide, comprehensive, coordinated, multidisciplinary, interagency system that provides *early intervention services for infants and toddlers with disabilities and their families;*

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<sup>3</sup> 20 U.S.C. § 1431, *et seq.*



- (2) to facilitate the coordination of payment for early intervention services from Federal, State, local, and private sources (including public and private insurance coverage);
- (3) to enhance State capacity to provide quality early intervention services and expand and improve existing early intervention services being provided to infants and toddlers with disabilities and their families; and
- (4) to encourage States to expand opportunities for children under 3 years of age who would be at risk of having substantial developmental delay if they did not receive early intervention services.<sup>4</sup>

35. The accompanying United States Department of Education regulations broadly define Early Intervention services as developmental services that are provided under public supervision, in collaboration with parents, at no-cost (subject to an exception immaterial to this complaint), and “designed to meet the developmental needs of an infant or toddler with a disability and the needs of the family to assist appropriately in the infant’s or toddler’s development[.]”<sup>5</sup>

36. Because R.A. was not receiving vital Early Intervention services under Part C, B.A. transitioned R.A. to a preschool special education program under Part B of the Act once she was found eligible in November 2022 in an attempt to receive services to address her developmental delays and autism diagnosis. The receipt of preschool special education going forward did not result in R.A. receiving compensatory services for the foundational Early Intervention services that R.A.’s IFSP mandated and that she did not receive.

37. The purpose of Part C of the Act is to provide Early Intervention services for infants and toddlers with disabilities and their families. 34 C.F.R. § 303.1(a). Early Intervention services are designed to meet the developmental needs of an infant or toddler with a disability and the needs of the family to assist in the infant’s or toddler’s development in any one or more

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<sup>4</sup> 20 U.S.C. § 1431 (emphasis added).

<sup>5</sup> 34 C.F.R. § 303.13(a).

of the following areas: (i) physical development; (ii) cognitive development; (iii) communication development; (iv) social or emotional development; or (v) adaptive development. 34 C.F.R. § 303.13(a)(4).

38. In contrast, the purpose of Part B of the Act is to provide children with disabilities a “free appropriate public education” that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. While Part B and C are similar, they are not the same. For example, special education services under Part B of the Act are generally provided in a classroom setting, while Early Intervention services under Part C of the Act are provided in the infant or toddler’s “natural environment,” usually their home. R.A.’s IFSP specified that her natural environment was her home. Similarly, preschool special education services under Part B of the Act are specifically for the benefit of children whose disabilities impact their ability to learn, while Early Intervention services under Part C of the Act serve both the infant or toddler and their family by meeting “the needs of the family to assist appropriately in the infant’s or toddler’s development[.]” 34 C.F.R. § 303.13(a)(4).

39. The IFSP that DOHMH developed for R.A. mandated that DOHMH provide R.A. with substantial Early Intervention services due to her substantial needs. Specifically, the IFSP required that DOHMH provide each week in R.A.’s home 1 hour of occupational therapy, 2 hours of speech-language therapy, and 20 hours of one-to-one special instruction (or Applied Behavior Analysis therapy). From April to November 2022, DOHMH only provided R.A. a fraction of the at-home special instruction services mandated in her IFSP, and *none* of the at-home occupational therapy or speech-language therapy.

40. The failure of DOHMH to provide R.A. her IFSP-mandated Early Intervention services resulted in R.A. not developing key foundational skills that she still has not acquired.

41. R.A. requires compensatory Early Intervention services to bring her to where she would have been in her development had DOHMH implemented her IFSP. R.A. has been irreparably harmed by DOHMH's failure to provide R.A. all of her Early Intervention services from April 2022 to November 2022, DOHMH's failure to provide compensatory services for the Early Intervention services that R.A. did not receive, and DOE's failure to provide compensatory services to bring R.A. to where she would be but for the denial of her Early Intervention services. The time period in which R.A. did not receive Early Intervention services was a critical stage in her development.<sup>6</sup> This harm increases every day Defendants fail to provide compensatory Early Intervention services to R.A. and her family.

### **CAUSES OF ACTION**

#### **Count I: Violations of Part C of the IDEA**

42. The Plaintiffs incorporate the preceding paragraphs into their First Cause of Action.

43. Defendant DOHMH violated Part C of the IDEA. DOHMH failed to implement R.A.'s IFSP, and in doing so failed to provide R.A. with all the special instruction, occupational therapy, and speech-language therapy she desperately needed and that DOHMH was required to provide under Part C of the IDEA.

44. As a result, B.A. has a right to compensatory services for DOHMH's failure to provide her daughter with the services mandated by her IFSP and DOHMH and the DOE's failure to provide compensatory services for the Early Intervention services that R.A. lost. This

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<sup>6</sup> Congress recognized "the significant brain development that occurs during a child's first 3 years of life" when it provided for early intervention services under the IDEA. *See* 20 U.S.C. § 1431.

right to compensatory services exists even after the child has aged out of the Part C program or is no longer in the Part C program. *See Wagner v. Short*, 63 F. Supp. 2d 672, 677 (D. Md. 1999) (“To give meaning to the state’s obligations under Part C of the IDEA, compensatory education must be an available remedy for children who establish Part C violations but have since reached the age of three. Otherwise, the [defendant] and similar agencies could abrogate their responsibilities under the IDEA and escape any accountability simply by relying on the time-consuming appeals process.”)

45. R.A.’s age does not raise a jurisdictional issue. The IDEA provides a two-year statute of limitations. *See* 20 U.S.C. § 1415. The statute of limitations starts once the parent knew or should have known that the DOHMH violated R.A.’s rights under the IDEA by failing to provide required services. Here, the parent’s claim is well within two years from the date of the alleged violations. Limiting jurisdiction to cases where a child remains age-eligible for Early Intervention services under Part C of IDEA at the time the hearing request was brought would shorten and contradict the IDEA’s two-year statute of limitations. As such, this Court has jurisdiction over this case and has the authority to render a decision and order implementation of the requested remedies.

46. Furthermore, undermining the statute of limitations and restricting the Court’s jurisdiction to only remedy complaints on behalf of children who remain age eligible for Part C services would unfairly prejudice families and curtail their due process rights. Instead of having up to two years in which to file a complaint, families of children with IFSP implementation dates close to a child’s third birthday would have only months to file a complaint alleging violations of the IDEA, and an even smaller window to receive services to make up for implementation failures. Such a reading would create adverse incentives for DOHMH to stop serving children

over the age of two as families would have almost no recourse to challenge the deprivation of services, no remedy from filing a due process complaint, and no right to compensatory services for children even though they went without services DOHMH had a clear obligation to provide. The reading also discourages parents from working with DOHMH and attempting to reach resolution without litigation, as R.A.'s family did here. Finally, the regulatory history makes it clear that such a bar was not intended:

Regarding the issue of a complaint filed after a child turns three and is no longer eligible for Part C services, if parents have a complaint about the services received or not received by their child while an infant or toddler, those parents would properly file the complaint with the lead agency that had responsibility for the child during that time period, *even if the child has 'aged out' of the Part C program at age three*. That lead agency has the responsibility to resolve and, as appropriate, investigate the complaint, and award appropriate corrective action, which may need to be designed by working with the SEA if the child is Part B eligible, or by working with other appropriate service providers if the child is not Part B-eligible. *These regulations do not prevent parents from filing a complaint with the lead agency after the child leaves the Part C program.*

64 Fed. Reg. 12406, 12654 (March 12, 1999).

## **Count II: Violations under the IDEA for Failure to Provide Compensatory Services**

47. The Plaintiffs incorporate the preceding paragraphs into their Second Cause of Action.

48. Defendants DOHMH and the DOE have failed to provide compensatory services for the Early Intervention services that R.A. lost. This right to compensatory services exists even after the child has aged out of the Part C program or is no longer in the Part C program. *See Wagner v. Short*, 63 F. Supp. 2d 672, 677 (D. Md. 1999) (“To give meaning to the state’s obligations under Part C of the IDEA, compensatory education must be an available remedy for children who establish Part C violations but have since reached the age of three. Otherwise, the

[defendant] and similar agencies could abrogate their responsibilities under the IDEA and escape any accountability simply by relying on the time-consuming appeals process.”)

### **Count III: Violations of Section 504 of the Rehabilitation Act**

49. The Plaintiffs incorporate the preceding paragraphs into their Third Cause of Action.

50. Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and its implementing regulations provide, “[n]o otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance[.]” 29 U.S.C. § 794(a); *see also* 34 C.F.R. § 104.4(a).

51. As entities subject to Section 504, DOHMH and DOE must provide equal opportunity to qualified children with disabilities to participate or benefit from any aid, benefit, or service they make available. 34 C.F.R. § 104.4(b)(1)(ii). Here, R.A. was qualified for Early Intervention services because of her disability, but was denied those services, despite repeated pleas from her family.

52. R.A. is an individual with a disability as defined by Section 504. 29 U.S.C. § 705(20)(B), referencing 42 U.S.C. § 12102(1).

53. In R.A.’s IFSP, DOHMH recognized that R.A.’s disabilities affect her ability to learn, concentrate, communicate, care for herself, and eat, all of which are major life activities. 42 U.S.C. § 12102(2)(A). The IFSP that DOHMH created for R.A. mandated the at-home services that R.A. needed in order to develop foundational skills and reach developmental milestones to prepare her to attend school and progress.

54. Despite the recognition of the services that R.A. needed on her IFSP, Defendant DOHMH failed to implement R.A.'s IFSP. Defendant's failure to provide R.A. necessary services based solely on her autism disability discriminates against R.A. and deprives R.A. of meaningful access to benefits from Part C Early Intervention services.

55. Defendant DOHMH's refusal to implement R.A.'s IFSP constitutes intentional disability-based discrimination, with reckless indifference, and has resulted in the continued denial of benefits to which R.A. and her family are entitled.

**Count IV: 42 U.S.C. § 1983**

56. The Plaintiffs incorporate the preceding paragraphs into their Fourth Cause of Action.

57. Plaintiffs' rights under the IDEA are enforceable under 42 U.S.C. § 1983.

58. Defendant DOHMH acted with deliberate indifference in failing to provide R.A. her mandated Early Intervention services under her IFSP in violation of the IDEA Part C.

59. Defendants DOHMH and DOE have denied Plaintiffs their rights under the IDEA for compensatory services for the denial of Early Intervention services.

60. Defendants DOHMH and DOE have denied Plaintiffs their rights under the IDEA to due process to challenge the denial of Early Intervention services.

61. R.A.'s exclusion from DOHMH's Early Intervention services deprived R.A. of her rights under the IDEA and Section 504, and thus deprived her of her rights secured to her under federal law in violation of 42 U.S.C. § 1983.

62. If R.A. is not granted compensatory services, there will be no other remedy left open to her, and she will have been denied the right to Early Intervention services.

63. As a result of these violations, Plaintiffs are entitled to injunctive and declaratory relief, and to costs and attorney's fees.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that the Court:

- a. Grant immediate injunctive relief ordering the Defendants to fund R.A.'s compensatory services in the amount of: 10 hours of one-to-one special instruction, 1 hour of occupational therapy, and 2 hours of speech-language therapy per week at the child's home;
- b. Grant permanent injunctive relief ordering the Defendants to fund R.A.'s compensatory services in the amount of: at least 200 hours of one-to-one special instruction, 25 hours of occupational therapy, and 50 hours of speech-language therapy at the child's home;
- c. Issue a judgment declaring that Defendants failed to provide R.A. with services and rights she was entitled to under the IDEA, Rehabilitation Act, and 42 U.S.C. § 1983;
- d. Award Plaintiffs costs and attorney's fees; and
- e. Grant such other and further relief as may be appropriate.

Dated: September 26, 2023  
New York, New York

By: /s/ Michael B. Miller

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