STATE OF NORTH CAROLINA

COUNTY OF ORANGE

BEFORE A STATE HEARING REVIEW OFFICER FOR THE STATE BOARD OF EDUCATION PURSUANT TO G.S. 115C-109.9

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O.M.M., by parent or guardian N.M. and A.M.

Petitioners,

v.

Orange County Board of Education,

Respondent.

WRITTEN ARGUMENTS

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BRIEF OF RESPONDENT

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I. PRELIMINARY STATEMENT

Respondent submitted a proposed decision in this matter which sets out the background, facts and Respondent's position in this case. In addition, Respondent submitted a Brief in Lieu of Closing Argument which sets out the applicable law in this case. Both the proposed decision and the brief have been provided as part of the record in this matter.

O.M.M. was a three-year old when he moved to Orange County in or about April 2008. O.M.M. had been evaluated in Florida in February 2008, while his family was living in Argentina, and O.M.M. was diagnosed with Pervasive Developmental Disorder – Not Otherwise Specified (PDD-NOS). Prior to leaving Argentina, Petitioners contacted multiple agencies to provide private services upon the family's arrival in Orange County, North Carolina. In May 2008, after Petitioners had secured an Orange County residence, the school system and Petitioners referred O.M.M. for special education services through the Orange County Schools. In July 2008, O.M.M. was determined to be eligible for special education as a child on the autism spectrum. Over a series of three meetings held in July 2008, an Individualized Education Program (IEP) was developed for O.M.M.. The IEP team meetings were led by the LEA representative and guided by a North Carolina Department of Instruction IEP form. Each

meeting included O.M.M.'s parents and their advocates and lasted in excess of an hour. The entire IEP team agreed to the goals set out in the IEP (they had been collaboratively drafted during and between meetings). Disagreement arose as to the amount of special education O.M.M. would receive and O.M.M.'s placement. A July 30, 2008, IEP meeting ended with Respondent's IEP team members at an impasse with Petitioners on these issues. The IEP was signed by Respondent's IEP team members on July 30, 2008, representing completion of the IEP, but was not signed by Petitioners. Petitioners subsequently filed a due process petition on the issues of evaluation, appropriateness of special education services, and O.M.M.'s placement.

II. STATE REVIEW OFFICER'S STANDARD OF REVIEW

The State Review Officer conducts an impartial review of the findings and decision appealed, and makes an independent decision upon completion of the review. N.C. Gen. Stat. §115C-109.9.

III. DECISION OF THE ALJ

This contested case was heard before Administrative Law Judge, Melissa Owens Lassiter, on January 21, March 23 - 24, March 26- 27, April 2 - 3, and April 6, 2009. The parties submitted proposed decisions to Judge Lassiter on May 20, 2009. The ALJ issued her decision on June 18, 2009, concluding that:

1. Petitioner proved by a preponderance of the evidence that:
    a. Respondent failed to provide O.M.M. with a free, appropriate public education through the development of an Individualized Education Plan (IEP);

b. Respondent failed to provide O.M.M. with a free, appropriate public education through an IEP that was reasonably calculated to provide O.M.M. with educational benefit;

c. Respondent failed to provide O.M.M. a free, appropriate public education in the least restrictive environment;

d. Respondent procedurally and substantively failed to provide O.M.M. a free, appropriate public education by failing to provide O.M.M. with educational services before October 28, 2008; and,

e. Petitioners' private educational placement was appropriate.

2. The ALJ awarded to the Petitioners reimbursement for tuition at the private preschool for 8:45 p.m. (sic) until 12:30 p.m. Monday through Friday from September 2008 through December 2008, compensation for costs of private special education services provided from July 31 through October 28, 2008, four hours of private special education services from October 28, 2008 through the end of the 2008-09 school year, and costs for speech/language instruction and occupational therapy for the entire school year beginning on August 25, 2008. The ALJ excluded from reimbursement private consultants' fees for preparing for or attending IEP meetings. ALJ Decision, Final Decision, ¶¶ 1-5.

Respondent appealed from this decision on July 16, 2009. In support of its appeal Respondent submits and argues the following:

IV. FACTS

A. *General Information*:

1. The IEP team that developed O.M.M.'s IEP was of exceptional quality. (T., p. 827). Combined, three of Respondent's team members had over 50 years of experience working with special needs children, and each had worked with hundreds of IEPs. (T. pp. 1084, 1150, 1267, 1355; R224, R231).

2. Respondent's IEP team members made decisions based on all of the information available to the team about O.M.M. This included educational, psychological, behavioral-emotional, communication, adaptive-behavior, occupational therapy, and speech assessments and observations. It also included information available about O.M.M.'s autism spectrum disorder and O.M.M.'s history. (Ex. P6, p. 4; Decision, Finding of Fact ¶ 28(b); P6, p.5). Among this information was observations of O.M.M. with peers, a school report from O.M.M.'s preschool in Argentina, a speech-language evaluation, a letter from TEACCH, audiological reports, anecdotal information from O.M.M.'s parents, and input from O.M.M.'s autism consultant. (T. pp. 1254, 1255, 1340, 1341, 1342, 1343).

3. At the hearing, Respondent's IEP was supported as appropriate by numerous expert witnesses for Respondent.

4. Petitioners' evidence did not support a conclusion that, despite the deference to be given to Respondent's professional educators, O.M.M.'s IEP was inappropriate in its development, services offered, or placement.

B. *Appropriateness of Services*:

5. Petitioners' goals for O.M.M.'s special education services were different than those legally required of the school system. Notably, Mr. M. stated at the July 10, 2008, IEP

team eligibility meeting that "As Mrs. M. says, the goal is to get him all of the services that he needs to get into a kindergarten, and be eligible to travel again with his family. Otherwise you will see me going off to Pakistan or Tibet without my family." (P9).

6. At the July 30, 2008, IEP meeting, Mrs. M. clearly advocated providing services for O.M.M. to be taken away if he did not need them. Mrs. M. objected to the notion of establishing need before providing services. (P10).

7. In any event, Petitioners agreed with the goals in O.M.M.'s IEP. (T. p. 205).

8. None of the information available to the IEP team in July 2008 recommended a any particular number of hours or a full-time program for O.M.M.. Specifically, Dr. Umbel did not recommend a number of hours of special education that were necessary to meet O.M.M.'s needs in her evaluation report or during her testimony, (T. pp. 96-127), nor did Ms. Vasquez (the Miami speech evaluator), nor TEACCH.

9. The information available to the IEP team about O.M.M. revealed that his impairment was mild.

- The significant majority of the evaluation data available to the IEP team in July 2008 revealed O.M.M.'s scores in most areas to be in the average range. (P9, P10, P11).
- TEACCH noted in May that O.M.M's. diagnosis was consistent with mild autism. (P41, p. 2).

10. This was supported by the testimony at hearing:

- According to Petitioners' private teacher (Dotty Hoyle), as of September 2008, O.M.M. participated in class at least as much, if not more, than 99% of the children in his private school class. He had more language, attended to the

teachers better, and followed directions most of the time. (T. pp. 495, 557; P69).

- O.M.M.'s high intelligence enables him to be a "one-trial learner." (T. pp. 482, 485).
- As compared to typically developing children, in February 2009, Dotty Hoyle rated O.M.M. as having no borderline or clinically significant behavior issues. (T. p. 507).
- Three hours of special education was first "recommended" by LEA representative Lisa Combs. (P10).
- The other IEP team members, Ms. Seawell and Ms. Tyberg, both testified that they would have voiced disagreement with Ms. Combs' suggestion of three hours of special education if, in their professional opinions, O.M.M. needed more services. They have done this in the past. (T. pp. 1285, 1320, 1356, 1357).

11. The IEP team determined that three hours per week of specialized instruction and one hour per week of occupational therapy was sufficient for O.M.M. to make progress on his IEP goals. (P6, p. 3).

12. At the July 30, 2008, IEP meeting, Respondent's IEP team members attempted to explain the basis for the three hour recommendation.

- In response to Mrs. M.'s concerns about how three hours of special education would provide enough time to address the goals on O.M.M.'s IEP, the LEA representative explained how goals are addressed in an inclusive setting. (P71, p. 3).

- When Mrs. M. asked the IEP team to explain why O.M.M. did not need a full-time program, the LEA representative referred to the assessment information. Mrs. M. interrupted the LEA representative's explanation and erroneously stated that the IEP team could not base its decision on the assessments. (P9).
- Mrs. M. later again asked the IEP team why it believed three hours of special education was appropriate. When the LEA representative began to discuss that O.M.M. was "bright," she was again interrupted by Mrs. M. who stated that it did not matter that "O.M.M. was bright." (P10).

13. There is ample evidence that the IEP team's decision that three hours of special education and one hour of occupational therapy as a related service per week was reasonable.

- The IEP team's decision was based upon O.M.M.'s age level, ability and learning characteristics (as set out in evaluations) consistent with DPI's Best Practices in Educating Children with Autism (P. 6, p. 3; P36).
- School system experts, including Respondent's IEP team members, provided substantial testimony that three hours was an appropriate amount of time in which to implement O.M.M.'s IEP goals because O.M.M. was mildly impaired, very bright and a quick learner, many of the IEP goals were overlapping, and the goals could be worked on simultaneously.
- Research discussed by Respondent's expert supports the effectiveness of three hours per week for students with autism. Similarly impaired autistic students in Respondent's schools have made educational gains with three hours or less of special education. (T. pp. 1121, 1266, 1267, 1315, 1353, 1354, 1357, 1456; Decision, Finding of Fact ¶ 102).

- At the hearing, a witness for Respondent provided an example of how several of O.M.M.'s goals could be addressed during a single facilitated play exchange. (T. pp. 1315-1318).
- The school system professionals on O.M.M.'s IEP team relied, in part, upon their knowledge and experience to determine that three hours of special education and one hour of occupational therapy per week were appropriate to implement O.M.M.'s IEP goals and provide O.M.M. with educational benefit (Decision, Finding of Fact ¶ 54).
- O.M.M.'s IEP was appropriate and calculated to provide him with educational benefit. (T. pp. 929, 930, 1134, 1286, 1287, 1375, 1460).
- Respondent presented Dr. Sally Flagler as an expert witness. Dr. Flagler is not an employee of Respondent. Dr. Flagler has an extensive background in assessing and working with preschoolers with autism (R245, T. pp. 893, 906). Dr. Flagler testified that, if O.M.M. had presented in the Wake County Schools with the documentation available to the IEP team in July, Dr. Flagler would have supported providing services to O.M.M. twice per week for an hour. (T.p. 918). Dr. Flagler opined that three hours was an appropriate amount of special education for implementing O.M.M.'s IEP as developed by the team in July. (T. pp. 921, 1454; Decision, Finding of Fact ¶ 107).

14. Petitioners did not provide evidence sufficient to refute the reasonableness or appropriateness of the IEP team's decision that O.M.M. would receive educational benefit from three hours of special education and one hour of occupational therapy per week.

- Dr. Umbel did not testify that the IEP was inappropriate for O.M.M.'s needs with regard to hours of service or was otherwise inconsistent with her recommendations. (T. pp. 96-127).
- A progress report from Dotty Hoyle, O.M.M.'s private special educator, dated November 17, 2008, indicated that O.M.M. made "remarkable" progress in four months while receiving six hours of special education per week. (P16, p. 6).
- Mrs. M. admitted at hearing that O.M.M. made very good progress with six hours of special education. (T. p. 352).
- If six hours of special education is sufficient to provide "remarkable" progress, then it was reasonable to determine that three hours would provide some benefit, the legal standard.

15. Petitioners' witnesses who did testify that three hours of special education and one hour of occupational therapy as a related service was inappropriate were not credible.

- Mrs. M. believes that all autistic children need more than three hours of service per week. (R256, p. 87).
- Mr. M. does not believe three hours of service is ever appropriate for an autistic preschooler. (R257, p. 56).
- Casey Palmer (Petitioners' private autism consultant) told Petitioners that ten hours of special education was appropriate. However, she never suggested to the IEP team that ten hours of instruction was appropriate (as she had told Petitioners). She instead mistakenly claimed (misrepresented) that 25 hours was recommended by DPI. (T. pp. 753, 756, 757; Decision, Findings of Fact

¶¶ 118 and 104). Also, Ms. Palmer had never observed O.M.M. in any group setting (small or large) when she made her recommendation. (P10).

- Petitioners' research showed that programs that require twenty hours of intervention per week are used with children who have full scale IQs ranging from 49 to 70 (mentally retarded), and that this range was "consistent with that of the general populations of preschool children with autism." (P54, pp. 5, 6). O.M.M.'s high IQ sets him apart from the general population of children with autism.
- Though at one point Dotty Hoyle had opined that O.M.M. needs ten hours of service (which is inconsistent with her acknowledging "remarkable" progress with six hours of special education), this opinion was based on her belief that O.M.M. needs Applied Behavior Analysis (ABA). (T. p. 500; Decision, Finding of Fact ¶ 117). Dotty Hoyle further believes that not using ABA for autistic students is "malpractice." (T. p. 515).
- Petitioners felt that ABA, and thus ten hours per week of special education, was "ideal" for O.M.M. (T. p. 303). Nothing in the information provided to the IEP team indicated that O.M.M. needed ABA as a specific methodology. (T. p. 928). There are several methodologies commonly used with autistic students, and no particular methodology is required. Most schools use an eclectic approach, choosing the methods that work best with each particular child. (T. pp. 927, 928). TEACCH is a widely recognized methodology which is renowned for its structured teaching approach and its success in addressing behavioral issues for children with autism. (T. p. 222). TEACCH

is not an ABA methodology. Notwithstanding Dotty Hoyle's devotion to ABA, the TEACCH program is not malpractice.

- The ALJ correctly concluded as a matter of law, that school districts have discretion to determine what educational methodology or methodologies to employ as long as the choice provides FAPE. (Decision, Conclusion of Law ¶10).
- Though they made recommendations as to the amount of time and placement O.M.M. needed during the development of the IEP, none of Petitioners' expert witnesses observed O.M.M. with peers in a classroom setting prior to the development of his IEP. In contrast, at least three of Respondent's IEP team participants had observed O.M.M. in a classroom setting. (T. pp. 126, 258, 551, 606).

16. In Conclusion of Law ¶ 28, the ALJ uses Respondent's expert's testimony (Whitney Griffin) that O.M.M. made "a lot of progress" in the private placement as evidence that three hours of special education was not enough. This was improper. Petitioners agreed at hearing that O.M.M.'s progress in his private placement was not evidence of the inappropriateness of Respondent's program, but could be used to support the appropriateness of Petitioners' placement if it was determined that Respondent's IEP has insufficient. (See the extensive discussion on this issue at T. pp. 251-255).

17. With regard to the allegation that Respondent's IEP did not provide appropriate speech services:

- Stefanie Vasquez, the speech-language pathologist who had most recently evaluated O.M.M. prior to his arrival in Respondent's schools, recommended evaluation of O.M.M.'s social pragmatic skills. (P3, p. 7).
- Accordingly, Respondent evaluated O.M.M.'s social pragmatic skills in May 2008, upon his arrival in Orange County, and found O.M.M. to be in the average range in all areas. (Decision, Finding of Fact ¶ 29(b); R38)
- Respondent's pragmatic evaluation included a Teacher's Rating Scale for Pragmatic Language Evaluation which revealed a mild difficulty using appropriate eye contact, maintaining topic and appropriate interruption. (P61, p. 3)
- Respondent's pragmatic evaluation also included a Pragmatic Language Checklist which noted O.M.M.'s ability to perform a significant majority of the tasks on the checklist. (P61, pp. 5-6).
- Respondent's evaluator, a speech/language pathologist who was also a member of O.M.M.'s IEP team, testified that these tools were taken from DPI's website. (T. p.p. 1250-1253).
- On July 14, 2008, Casey Palmer indicated to Mrs. M. that she "knew from the evaluations that speech was going to be a stretch, but <u>we will still put the language goals in the IEP for all staff to address</u>." (R67) (Emphasis supplied). This is exactly how the pragmatic issues were addressed by the IEP team (including Petitioners').

- No information from O.M.M.'s private speech/language pathologist was provided to the IEP team prior to the initiation of this hearing. (T.p. 1116, 1258).
- Nonetheless, O.M.M.'s IEP contains pragmatic goals which are strikingly similar to those of O.M.M.'s private speech therapist. (T. pp. 1263-1266). These goals were to be addressed by the professional providing O.M.M.'s special education services (though in the proposed placement a speech/language pathologist would have been of assistance as the co-teacher).
- In February 2008, Stefanie Vasquez also recommended reevaluation of O.M.M.'s expressive and receptive language skills in six months. (P3, p. 7). Accordingly, Respondent tested O.M.M.'s receptive and expressive language on August 27, 2008. (P63). O.M.M.'s expressive and receptive language skills presented within the average range. (P5, p. 3). However, O.M.M. was determined to have a mild articulation disorder (approximately five percent less intelligible than was age-appropriate). (P5, p. 3). As such, O.M.M.'s IEP was amended to include thirty minutes per week of speech therapy for the articulation disorder. (Decision, Finding of Fact ¶87; P57). O.M.M. received speech as a related service beginning in October 2008 and his progress was reported to Petitioners. (¶¶ P62, P64).

18. With regard to the provision of occupational therapy as a related service:

- In April 2008, O.M.M.'s private occupational therapist recommended weekly occupational therapy. (P4, p. 3).

- In May, Respondent's occupational therapist observed O.M.M. for occupational therapy needs in the classroom setting.
- Though the ALJ cites the report from Respondent's occupational therapist in Finding of Fact ¶30, this report was excluded from evidence over Respondent's objection at hearing.
- The IEP team, including Petitioners, agreed on O.M.M.'s occupational therapy goals at the July 22, 2008, IEP meeting.
- The IEP team decided in July 2008 that O.M.M. required one hour of occupational therapy per week as a related service.
- O.M.M. received weekly occupational therapy from Respondent beginning in October 2008. (P65).
- Respondent's occupational therapist inquired several times of O.M.M.'s classroom teachers and his parents, and no occupational therapy concerns were reported to her. (P65).
- Respondent provided evidence at the hearing that O.M.M.'s IEP was appropriate with regard to occupational therapy goals at the time it was written. (T. p.1021).
- At hearing, Mrs. M. testified that she had thought (until her testimony) that O.M.M. was receiving one session of occupational therapy for thirty minutes per week. This was incorrect and O.M.M. had been receiving, from Respondent, two sessions of occupational therapy for a total of one hour per week. (T. p. 265).

19. Dr. Umbel recommended comprehensive psychodevelopmental evaluation in one year. (P2, p. 13). Accordingly, Respondent sought consent for evaluation. However, from December 2008, until the first day of the due process hearing, Petitioners refused to provide consent for the Orange County Schools to evaluate O.M.M. (R254).

20. Any evaluations conducted after the development of the IEP, and certainly after the beginning of the hearing, are irrelevant to the review of the appropriateness of Respondent's IEP as of the time it was prepared. These include:

- The evaluation conducted in February 2009 by the Center for Development and Learning at the University of North Carolina at Chapel Hill (P74);
- The occupational therapy evaluation conducted in February and March 2009 by O.M.M.'s private occupational therapist. (P76);
- Respondent's occupational therapy evaluation conducted in March 2009 (P77); and,
- The January 2009 progress note from O.M.M.'s private occupational therapist (P78).

21. If, after Respondent had been given an opportunity to work with O.M.M., it was determined that his IEP needed revision, the IEP team would have been willing to amend O.M.M.'s IEP. IEP team members have revised IEPs for other students when necessary. (T. pp. 841, 842, 1135, 1261, 1267, 1287, 1288, 1376, 1433, 1438, 1439, 1499).

C. *Least Restrictive Environment:*

22. The LRE requirement applies at the preschool level, but its application has some nuances.

- There is no publicly funded "general education" preschool available to children in North Carolina. (T. pp. 918, 923, 1359, 1360).
- Where a state has no general education preschool, LEAs may meet their least restrictive environment obligation by housing preschool special education programs at regular elementary schools and providing access to typical peers in programs such as Title I, More at Four, and Head Start. (T. pp. 835, 836).
- Petitioners' documentary evidence specifically notes that public school systems may meet their least restrictive environment requirements by "providing opportunities for the participation (even part-time) of preschool children with disabilities in other preschool programs operated by public agencies (such as Head Start)," and by "locating classes for preschool children with disabilities in regular elementary schools." (P52, p. 1).
- North Carolina school systems utilize this means of providing access to typical peers in meeting their obligation to provide a least restrictive environment at the preschool level. (T. p. 837).

23. The IEP team discussed placements and locations for serving O.M.M. other than the offered placement:

- The IEP team discussed O.M.M.'s placement on July 22, 2008, but did not make a decision that day. (P6, p. 3).
- On July 22, 2008, Lisa Combs (LEA representative) noted that the full continuum of services is offered to preschoolers needing special education. (P 47, p. 334).

- The IEP team considered a regular early childhood program as a potential placement for O.M.M. (P1, III.C.).
- On July 30, 2008, the IEP team considered a typical preschool setting if O.M.M.'s parents chose to enroll him in a typical preschool and determined that, though O.M.M. (like all children) might benefit from attending a general education program at a preschool, a different environment was necessary for his special education needs. (P71, p. 3).
- The IEP team considered the fact that O.M.M. had significant difficulty in a prior typical preschool program in Argentina. (P6, p. 5). Mrs. M. also noted that she knows what happens to O.M.M. in a large group setting in a normal preschool and referred to the report from Argentina. (P10).
- The blended full-day placements at Frank Porter Graham and Children's Learning Center were discussed and Petitioners were informed that those placements were for students needing full-time special education. (P71, p. 2)
- Also at the July 30, 2008, IEP meeting, the LEA representative discussed the Title I preschool class. (P71, p. 2)
- The IEP team considered the placement recommendations in the information available to the team, and a typical preschool class and the blended preschool classes did not meet those recommendations.
- The IEP team informed Petitioners that some of the placements requested by Petitioners, such as the blended classes at Frank Porter Graham and the Children's Learning Center, had teacher/pupil ratios that were similar to the class in which O.M.M. had not been successful in Argentina. (P6, p. 3)

24. An IEP team does not have to choose an inappropriate environment just because that environment might be less restrictive. (T. p. 1365).

25. The IEP team had specific recommendations from multiple evaluators regarding O.M.M.'s placement needs, which were confirmed by Petitioners' witnesses at the hearing on this matter:

- TEACCH conducted an intake interview regarding O.M.M. and summarized that interview in a letter dated May 27, 2008. (P41, p. 1). TEACCH reported an opportunity to observe O.M.M.'s behavior regarding independent play and ability to sustain social interaction. (P41, p. 1). TEACCH noted that O.M.M. demonstrated many strengths and a "strong potential for learning," given a "well-structured, individualized educational program." (P41, p. 2). TEACCH recommended a placement in a "special education preschool setting." (P41, p. 2). The IEP team considered this recommendation for a special education preschool setting. (P6, p. 4)(T. pp. 1123, 1363).
- Stefanie Vasquez, who conducted a speech-language pathology evaluation in February 2008 recommended placement in a "language-based preschool setting (English speaking)." (P3., p. 7). The IEP team considered this recommendation for a language-based preschool setting. (P6, p. 4).
- Dr. Umbel, the evaluator who conducted the February 2008 psychodevelopmental evaluation, recommended a "special education school placement sensitive to O.M.M.'s communication problems in order to advance his verbal and nonverbal learning experiences and foster peer socialization skills. Placement should be in a small (low teacher-pupil ratio) structured

language-intensive classroom where behavior modification techniques are utilized." (P2, p. 13; T. pp. 116, 121, 122).

- Dr. Umbel testified that O.M.M.'s behaviors needed to be addressed before he would be able to access a regular program with typical peers. (T. pp.116, 117).
- Dr. Umbel also testified that O.M.M. needed teachers who were knowledgeable and experienced with regard to students on the autism spectrum. (T. pp. 126, 127).

26. At the July 30, 2008, IEP meeting, the LEA representative presented a "playgroup option" including Head Start children and children with speech impairments. (P71, p. 2).

27. There was concern by Petitioners over whether the playgroup was a "preschool classroom" and Ms. Combs explained that it was. (P9).

28. The offered placement was not restrictive. (T. p. 924).

- At the preschool level, the least restrictive environment is that environment which is appropriate and removes the child from their natural environment (where they would otherwise be) as little as possible. (T. pp. 834, 835, 1460, 1460).
- The offered placement only removed O.M.M. from his natural environment, (i.e., whatever he would otherwise be doing as determined by his parents) four hours per week.
- The IEP documents that O.M.M.'s offered placement was at one of the Respondent's elementary schools with typical peers from other programs. (P1., III.D.).

- O.M.M. would have been provided opportunities to interact regularly with typical peers as part of his offered placement. This was discussed at the July 30, 2008, IEP meeting. (T. pp. 1128, 1277; P6, p.3; P71, p.3).
- Petitioners' objected to the offered placement at the July 30, 2008, IEP in large part because of the low student to teacher ratio. (P10). Mrs. M. commented that the student/teacher ratio made the environment "really restrictive." (P10). Petitioners' expert, Casey Palmer, indicated, "I am not convinced that that small group intensive type of setting is going to prepare him the way he needs to be prepared." (P10). This position is contradictory to the recommendations of evaluators and reflected a misunderstanding that the ratio somehow determined the restrictiveness of a placement.

29. The placement offered by the school system was an appropriate fit to the recommendations available to the IEP team as to placement. (T. pp. 840, 1125, 1269, 1270, 1363, 1364, 1457, 1458).

- The offered placement was a special education preschool placement. (T. pp. 1125, 1275, 1363, 1364). A special education classroom is one in which specialized instruction is provided for children with special needs. (T. pp. 1123, 1124). The placement offered by the school system included a special education teacher. (T. p. 842).
- The offered placement had a low teacher-pupil ratio. (T. pp. 1125, 1275, 1363, 1364). The IEP team knew that O.M.M. had not done well in a prior preschool with a ratio of approximately 15 students to two adults. (T. pp. 1124, 1286). Though the exact students and preschool teacher assigned to the

offered placement were uncertain at the time the IEP was completed, such is always the case prior to the start of school. In any event, Petitioners understood, as of July 23, 2008, the offered placement to include "5 boys with speech delays but not social delays...and 2 teachers." (P40, p. 140).

- Respondent's IEP team members informed Petitioners that the staff in the offered placement had the specialized knowledge necessary to address O.M.M.'s individual needs. (P6, p. 3). The IEP team noted that one of the teachers in the offered placement had significant speech-language qualifications. (P6, p. 4). Petitioners were also told that the classroom would have a licensed preschool teacher. (P10). A licensed preschool teacher in North Carolina is a licensed special education teacher and would know the behavior modification techniques necessary to work with O.M.M. (T. p. 1125). Petitioners acknowledged that O.M.M. needed to be in a placement where the teachers had specialized knowledge or he would not be successful. (P6, p. 3). The placement offered by Respondent also had a consulting occupational therapist. (T. p. 842; P10).
- The offered placement provided a structured environment. (T. pp. 389, 1125, 1275, 1276). Casey Palmer testified that O.M.M. needs structure to address his behavioral issues. (T. p. 768).
- The offered placement was in a language intensive classroom (T. pp. 1125, 1276, 1363, 1364). The placement offered by the school system would have included as a co-teacher Kristin Seawell, a licensed speech pathologist whose

primary experience is with small children with language delays (including language issues as a result of autism). (T. p. 843).

- Techniques considered effective for working with students on the autism spectrum were used in the offered placement. (T. p. 388). Behavior modification techniques are utilized in the offered placement. (T. pp. 1125, 1276, 1363, 1364). Petitioners believed that the techniques used in Respondent's offered placement were designed for children with speech issues, provided structure to the environment, and were known to be effective with students on the autism spectrum. (T. pp. 191, 193, 194).

30. O.M.M. had been observed in the offered placement and had done well.

- The IEP team considered the fact that O.M.M. had done well in the offered placement when he was observed there on two occasions. (P6, p. 4-5).
- Mabel Tyberg, Respondent's lead psychologist and IEP team member, observed O.M.M. in the offered placement in June 2008. During this observation, there were four students in attendance. (P20).
- In that observation, Mabel Tyberg noted that O.M.M. adjusted well to the small group setting with two adults coordinating the activity. (P20).
- After two observations (May and June 2008) of O.M.M. participating in Respondent's offered placement, Petitioners reported that he had done very well. (T. pp. 195, 197).
- In fact, Petitioners expressed <u>strong support</u> for the offered placement. Mrs. M. informed the LEA representative in an e-mail dated May 28, 2008, following an observation of O.M.M. in the offered placement, that "the

success O.M.M. had within the setting in which he was observed – a low student-teacher ratio in a special education setting with techniques known to work well with children like O.M.M. – **speaks to the fact that this is the environment he needs in order to progress and succeed.**" (R43; T. pp. 1116, 1127)(Emphasis supplied).

31. The offered placement was appropriate. (T. pp. 922, 1361, 1362).

32. Dr. Flagler testified that the IEP placement was appropriate. (Decision, Finding of Fact ¶107).

33. Respondent's experts, and IEP team members considered the offered placement to be the least restrictive appropriate environment in light of the information available about O.M.M. at the time of his IEP development and evaluator recommendations for a special education preschool placement, with a low teacher-pupil ratio, structured environment, in a language intensive classroom where behavior modification techniques are utilized. (P6, p. 2; T. pp. 1122, 1123, 1134, 1135, 1269, 1287, 1349, 1363, 1376, 1457, 1458).

34. Dr. Umbel, testified on behalf of Petitioners, but conspicuously did not testify that the offered placement was inappropriate or too restrictive for O.M.M.'s needs. (T. pp. 96-127).

35. As with Petitioners' private placement and any classroom, some specific details about the particular people to be assigned to the offered placement were to be determined when the school year began and enrollment was fixed. The ALJ refers to this in Finding of Fact ¶56. At hearing, Mrs. M. testified that the details of the students and teachers in the offered placement did not matter to her because she knew she would be putting O.M.M. in a full-day program. (T. p. 387). At the July 30, 2008, IEP meeting, there was a question about the playgroup being "five kids," and Ms. Combs noted that there might be fewer children some days than others (as with

any classroom including O.M.M.'s private preschool class). (P10). Also at that meeting, Petitioner was told that the staff in the placement would include a Birth-Kindergarten teacher, Kristen Seawell (the speech/language pathologist) and an occupational therapist. (P10). In an attempt to explain more about the offered placement, Kristen Seawell was asked to provide details but Mrs. M. interrupted indicating that she had observed the playgroup. (P10).

36. Respondent's IEP team members described the details of the offered placement to the parents in a manner sufficient for them to understand the offered placement, especially in light of O.M.M.'s participation in the placement on two occasions (May and June 2008) before the development of his IEP.

37. O.M.M. had been successful in other programs similar to the offered placement.

- Some of O.M.M.'s private service providers had served O.M.M. in a playgroup format, including a social skills playgroup at TEACCH and a group for speech therapy at Emerge (O.M.M's private speech provider). (T. pp. 391-395).
- The TEACCH social skills group met once per week for two hours and had approximately six children in it. (R256, p. 71) The group focused on developing social, communication, and play skills through activities taught using structured teaching. (R211).
- Mr. M. believed O.M.M. benefited from the TEACCH social skills playgroup. (R257, pp. 57-58).
- Mrs. M. noted that O.M.M. "loved" the TEACCH social skills playgroup once per week. (P40, p. 162).

- The speech group O.M.M. attended had a ratio of approximately five students to two adults. (T. pp. 391, 394).
- While in Argentina waiting to return to the United States, O.M.M. was placed in a classroom with a low student-teacher ratio. This interim preschool placement was supervised by a special educator with training in speech/language. O.M.M. did well in that setting. This information was not provided to the IEP team but was introduced at the hearing on this matter. (T. pp. 171, 437, 1347, 1348).

38. Essentially, Petitioners expected Respondent to provide funding for general education preschool for O.M.M. because they wanted him in preschool full-time, five-days per week. (R256, p. 82). This was Petitioners' desired arrangement for O.M.M. regardless of his disability (T. p. 73) and was necessitated by Petitioners work schedules. (Decision, Finding of Fact ¶134). There was no evidence that O.M.M.'s disability required this level of service.

39. In June 2008, Casey Palmer suggested that Mrs. M. investigate a church preschool in Durham, which Mrs. M. did online. Mrs. M. determined that the preschool Casey Palmer had suggested showed a schedule whereby three-year olds attended twice per week and four-year olds attended three times per week. Mrs. M. indicated, "we were hoping to find something 5 days a week." (R187). This was the foundation for Petitioners' disagreement with Respondent's IEP. (Decision, Finding of Fact ¶ 51.)

40. At the July 30, 2008 IEP meeting, Ms. Tyberg and Ms. Combs explained that O.M.M.'s specialized instruction is the financial responsibility of the school while regular preschool (general education) is the responsibility of a child's parents. (P71, p. 3).

41. Our Playhouse offered a three day per week program (half day or full day). (Decision, Finding of Fact ¶132). O.M.M. could have attended Respondent's offered placement and still attended a general education program at Our Playhouse.

V. ARGUMENT

A. *Introduction:*

O.M.M. is a student with disabilities entitled to special education under the Individuals with Disabilities Act (IDEA), 20 U.S.C. §1400 et seq., the federal statute governing the education of students with disabilities. Federal regulations promulgated under the IDEA are codified at 34 C.F.R. Part 300. The controlling state law for the education of students with disabilities is G.S. §115C-106.1 et seq., and the corresponding state regulations are the Policies Governing Services for Children with Disabilities. The Office of Administrative Hearings (OAH) has jurisdiction of this contested case pursuant to Chapters 115C and 150B of the North Carolina General Statutes, and the Individuals with Disabilities Education Act.

Petitioners have the burden of proof by the preponderance of the evidence. Schaffer v. Weast, 546 U.S. 49 (2005); G.S. §150B-29(a).

The Fourth Circuit has made it abundantly clear that in IDEA cases the considered educational judgments of local school officials are entitled to deference. MM v. School District of Greenville County, 303 F.3d 523, 532-33 (4th Cir. 2002) ("We have always been, and we should continue to be, reluctant to second-guess professional educators. ... The courts should, to the extent possible, defer to the considered rulings of the administrative officers, who also must give appropriate deference to the decisions of professional educators"); A.B. v. Lawson, 354 F.3d 315, 328 (4th Cir. 2004) ("IDEA requires great deference to the views of the school system

rather than those of even the most well-meaning parent"); Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1997) ("Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment"); Tice v. Botetourt County School Board, 908 F.2d 1200, 1208 (4th Cir. 1990) ("once education authorities have made a professional judgment about the substantive content of a child's IEP, that judgment must be respected").

The standard for assessing the substantive adequacy of a free and appropriate public education (FAPE) under the IDEA is whether the individualized educational program (IEP) is "**reasonably calculated to enable the child to receive educational benefits.**" Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982). See, also, A.B. v. Lawson, 354 F.3d 315, 319 (4th Cir. 2004) ("the FAPE must only be 'calculated to confer *some* educational benefit on a disabled child.'") (Emphasis in original).

Congress did not require that school districts maximize each disabled child's potential commensurate with the opportunity provided other children. Rowley, 458 U.S. at 198. See also, Cone v. Randolph County Schools, 302 F.Supp.2d 500, 509 (M.D.N.C. 2004) (the Rowley standard is "relatively modest," and does "not require a school district to maximize a handicapped child's potential, but merely mandates that the IEP provide some educational benefits"). See also, A.B. v. Lawson, 354 F.3d 315, 330 (4th Cir. 2004) (although a child was thriving in private school, "IDEA's FAPE standards are far more modest than to require that a child excel or thrive"). North Carolina previously had a higher "full potential" standard, but the statute setting out this standard has been repealed, and the state standard is now aligned to the federal Rowley standards.

Procedural violations of IDEA that do not actually interfere with the provision of a free appropriate public education will not support a finding that the school system failed to provide FAPE or justify relief. DiBuo v. Board of Education 309 F.3d 184, 190 (4th Cir. 2002). See also, G.S. §115C-109.6(F), which provides that "the decision of the ALJ shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education."

School districts have discretion to determine what educational methodology or methodologies to employ as long as the choice provides FAPE. Lachman v. Illinois State Board of Education, 852 F.2d 290 (7th Cir. 1988) ("Rowley and its progeny leave no doubt that parents, no matter how well motivated, do not have a right under the EAHCA to compel a school district to provide a specific program or employ a specific methodology in providing for the education for their handicapped child.").

Applying these standards, the substantive adequacy of Respondent's IEP must be upheld unless there was no reasonable basis for school officials' determination. The ALJ should have found that the IEP provided by Respondent was reasonably calculated to enable O.M.M. to receive educational benefits, and therefore provided a free appropriate public education (FAPE) under the Rowley standard.

B. *Respondent provided O.M.M. with a free, appropriate public education through the development of an Individualized Education Plan (IEP).*

1. *A failure to respond to e-mails after the IEP was completed and while the Prior Written Notice was being drafted did not deny Petitioners their right to participate in the IEP development.*

The documentary evidence and audio recordings of hours of IEP meetings in this case leave no doubt that Petitioners were afforded the opportunity to, and did, participate extensively

in the development of O.M.M.'s IEP (as did their various experts and advocates). The ALJ's opinion to the contrary seems to be based on her distaste for the fact that Respondent did not respond to e-mails from Mrs. M. after the development of the IEP and while the school system was preparing the required Prior Written Notice. This cannot be considered a denial of FAPE. The IEP had been completed (and clearly was not acceptable to the parents) when Mrs. M. sent the emails referred to in Findings of Fact ¶¶ 65 through 74 of the ALJ's decision.

The questions from Mrs. M. in the emails related to the provision of special education services in the parents' private placement – services the school system had no obligation to provide (see below). The e-mails clearly represented a misunderstanding by Petitioners that the school system had an obligation to implement the portions of the IEP with which Petitioners agreed at Petitioners' desired placement. It is well established that the school system is not obliged to accommodate such "cherry picking." At the time of the e-mails and this misunderstanding, Petitioners had multiple advocates (including legal counsel) and had been anticipating litigation for months (Petitioners' attorney asserted "work product" privilege for documents generated in May – two months prior to O.M.M.'s eligibility determination). Mrs. M. had secured O.M.M. a private preschool placement before the IEP team made its placement decision. And, if and to the extent services in the private placement was an IEP team issue (as the ALJ apparently thought and Respondent vehemently denies), it would have been improper for Ms. Combs to unilaterally determine those services. At the end of the meeting on July 30, 2008, (before Mrs. M.'s e-mails) O.M.M. had a completed IEP with which Petitioners disagreed. It cannot be said that the failure to respond to the e-mails prior to providing the Prior Written Notice amounted to a denial of Petitioners' right to participate in the IEP development.

Despite the ALJ's apparent opinion that the prudent response from the school system would have been to answer Mrs. M.'s e-mails, there is no legal basis for a determination that the failure to do so denied Petitioners' their rights to participate in the development of the IEP, thus denying FAPE. Respondent's representatives interpreted the e-mails as an improper attempt to continue the placement discussion outside of the IEP team meeting. In any event, the e-mails were responded to in less than two weeks via delivery of the Prior Written Notice indicating that private preschool had not been deemed necessary for O.M.M.'s special education and the school system remained "ready, willing and able" to provide services to O.M.M. consistent with the IEP (including placement).

2. *No decisions relating to the IEP were made outside of IEP meetings.*

The ALJ's Conclusions of Law ¶¶ 29 through 34 are erroneous, in that the ALJ concludes that because Ms. Combs was instructed not to respond to Mrs. M.'s e-mails for two weeks while the Prior Written Notice was being drafted, decisions were made by a non-team member. The ALJ's implication that the IEP team was directed by a non-team member as to its decisions is made without reference to supporting evidence. There is no evidence of this and substantial evidence to the contrary. As of the date of the first e-mail in question, the IEP team's decisions had been made and were final. Petitioners request for information about how services might be provided in their own unilateral placement is outside the IEP process. Ms. Combs could have responded but had no obligation to do so.

Along the same lines, the ALJ took issue with the involvement of Respondent's Director of Exceptional Children (Melinda Grenard) and legal counsel in the preparation of the Prior Written Notice (DEC5) (Conclusion of Law ¶¶ 35-37). This also is not a violation of the IDEA. The IEP team is responsible for developing the IEP. Respondent is responsible for providing the

appropriate notice. There is nothing improper about having Ms. Grenard or counsel involved in the preparation of the required Prior Written Notice. Involving an upper-level administrator and legal counsel in drafting a legal notice is significantly different than delegating the IEP's team's decision-making authority to the administrator and counsel.

The testimony at hearing, which was not refuted, was that the DEC 5 (Prior Written Notice) was reviewed by each school system IEP team member, amended by those members, and signed by those members. The Prior Written Notice reflects the IEP team's decisions, whether or not they obtained assistance in drafting it. (T. pp. 1132, 1133, 1189, 1190, 1278, 1279). The IEP which is the cornerstone of this litigation was completed prior to the involvement of Ms. Grenard or counsel in this matter and not amended by either of them in any way. (T. pp. 863-864). The ALJ's Conclusion of Law ¶35 even notes that the "County's final offer of services was made to Petitioners on July 30." Ms Grenard and counsel were involved solely to ensure preservation of Respondent's legal rights and compliance with special education laws with regard to notifying Petitioners of the IEP team's final decisions. Neither Ms. Grenard, nor counsel, made any determinations with regard to the IEP or interfered with the IEP team's decision- making in any way.

3. *Respondent provided Petitioners with a sufficient explanation of the basis for its decisions.*

The ALJ dedicates several Findings of Fact (¶¶ 52 through 54) to her belief that the explanation of Respondent's IEP team members as to their decisions was insufficient. Specifically as to the basis for determining that three hours of special-education and one hour of occupational therapy per week were appropriate. It is worth noting, as stated above, that at several points when school system staff tried to discuss the bases for their decision. (e.g., how the IEP would be implemented, specifics of the offered placement) they were cut off by Mrs. M.

There are no IDEA requirements for explaining an IEP team's decision except as required in the Prior Written Notice. The Prior Written Notice in this case was significantly more thorough in its explanation of the IEP team's decisions than is required by law or regulation (or the DPI form for providing such notice). Nonetheless, in Findings of Fact ¶¶ 115, the ALJ concludes that the allegedly insufficient explanation amounted to a failure to provide O.M.M. with special education services that were reasonably calculated to provide him with educational benefit. This reasoning is unfounded and inconsistent with the law.

The ALJ appears to base her conclusion on this point, at least in part, on Respondent's failure to provide an implementation plan. (Decision, Finding of Fact ¶ 59). No such plan is required under any special education law or regulation. In any event, Respondent informed Petitioners at the July 30, 2008, IEP meeting that the classroom teacher would have to provide information about the minute details regarding the implementation of the IEP and that the specifics of O.M.M.'s IEP implementation would vary depending on O.M.M. and the classroom activities on any given day.

C. *The Orange County Schools provided O.M.M. FAPE through an IEP that was reasonably calculated to provide O.M.M. with educational benefit.*

The applicable legal standard recognizes that IEPs are a prediction on the part of IEP teams. This is especially the case when the student previously has not been served by the school system. The IEP has to be "reasonably calculated" to provide educational benefit. Educators are to be given great deference in such predictions, and their decisions are not to be assessed retrospectively with information unavailable to them during the decision-making process. The ALJ found as a fact that based on the evaluations and assessments, Respondent's IEP team members opined that three hours per week of specialized instruction was sufficient for O.M.M.

to make progress in his IEP goals and that the offered placement was the least restrictive environment to which O.M.M.'s needs could be addressed. (Decision, Finding of Fact ¶ 47). There is ample evidence in the record showing the reasonableness of the opinion that the services set out in O.M.M.'s IEP would provide educational benefit and no credible evidence to the contrary.

As noted above, the goals in the IEP were agreed upon by all members of the team. The professional educators on the IEP team then relied upon all of the information available to the IEP team to determine that O.M.M. could make progress on those goals and receive educational benefit from three hours per week of special education and one hour per week of occupational therapy as a related service. The school system IEP team members arrived at this conclusion given all of the information available to the team about O.M.M.'s individual characteristics (e.g., individual needs, cognitive abilities, mild level of impairment), the fact that many of the goals in the IEP could be addressed simultaneously in a single exchange, and their experience with children having similar needs who received educational benefit from such a program. Respondent's reasonable belief that three hours of special education could provide educational benefit is also supported by research, which was discussed in testimony at the hearing.

The most compelling witness on this issue was Dr. Flagler, whose credentials in the area of autism assessment and education are unmatched by any other witness in this case. Dr. Flager testified on behalf of Respondent, though she is not employed by Respondent. Dr. Flagler testified that the level of service in O.M.M.'s IEP was appropriate. Given Dr. Flagler's expertise, her testimony alone establishes that the IEP met the "reasonably calculated" standard.

Rather than facing this issue directly, the ALJ's opinion attempts to discredit Dr. Flagler in Findings of Fact ¶¶ 108-113 by citing a portion of cross-examination related to the difficulty

of assessing high-functioning autistic children. This cross-examination is irrelevant to Dr. Flagler's opinion on the appropriateness of Respondent's level of service. The cross-examination relates to the difficulty of assessing high-functioning autistic children, but neither Petitioners nor Respondent contested the assessments setting out O.M.M.'s needs (most significantly Dr. Umbel's evaluation). The disagreement was focused on the services necessary to address those needs identified in the assessments accepted as valid by both parties. The ALJ also found that Dr. Flagler was unable to assess the appropriateness of Respondent's IEP because she was not provided recent information or opinions of Petitioners' experts. (Decision, Finding of Fact ¶ 108). Dr. Flagler indicated that the basis for her opinion was the information available to the IEP team in July. (T. p. 840). In addition, Exhibit P83 is a copy of the file given to Dr. Flagler (excluding a few pages the ALJ deemed as work product.) That file includes daily progress notes for O.M.M. though December, including notes from Petitioners' expert.

Petitioners did not meet their burden of proof in showing that Respondent's offer of services was inappropriate (i.e., not reasonably calculated to provide O.M.M. with educational benefit). In fact, Petitioners' expert's testimony that O.M.M. made "remarkable" progress in four months while receiving six hours of special education supports the reasonableness of Respondent's offer. It is worth noting that the first time Petitioners presented a number <u>other</u> than twenty-five (25) hours as necessary for O.M.M.'s educational services was as a part of this litigation, though Petitioners' experts (who attended the IEP meetings) had privately endorsed seven and ten hours of service as being appropriate. In addition, those of Petitioners' experts who testified that O.M.M. needed more than three hours of service had been privately providing the ABA services; the basis for their recommendations as to the hours of service O.M.M. needed.

Petitioners' contention that additional speech services outside of the IEP were necessary was apparently based on a mistaken belief that instruction relating to pragmatics and was not part of O.M.M.'s IEP. Petitioners' claimed at hearing that Respondent refused to include pragmatic goals in O.M.M's IEP. In fact, O.M.M.'s IEP contained special education goals and objectives addressing pragmatics which were nearly identical to the goals of the private speech therapist. (T. pp. 1263-1266).

Finally, at the IEP meetings there was no discussion that one hour per week of occupational therapy was insufficient as a related service. The first time this contention was ever made was as part of the hearing of this matter. O.M.M.'s private therapist had recommended one hour per week of occupational therapy, which O.M.M's IEP included. The occupational therapy goals to be addressed were admittedly agreed upon by Petitioners and other IEP team members when the IEP was developed. Again Petitioners arrived at the hearing with mistaken information as to the contents of the IEP. Mrs. M. believed, until her testimony, that O.M.M.'s IEP required thirty minutes of occupational therapy per week. It actually provided for one hour of occupational therapy per week. (T. pp. 264-265).

In addition, as was explained to Petitioners, if after the school system had the opportunity to serve O.M.M. for a time, and it was believed that the IEP ought to be modified (either by school personnel or Petitioners), the IEP team would reconvene to consider the issue. This is a common practice in Respondent's schools, especially for new students.

D. *O.M.M.'s IEP satisfies Respondent's obligation to provide a FAPE in the least restrictive environment:*

1. *LEAs do not have operate or fund regular preschool programs to meet the LRE requirement at the preschool level.*

School systems are to provide FAPE in the least restrictive environment (LRE). 42 U.S.C. §1412(a)(5). The LRE provisions apply not only to grades K-12, but also to preschool children with a disability. 34 C.F.R. §300.116. A disabled child is to be mainstreamed to the maximum extent "appropriate." 42 U.S.C. §1412(a)(5)(A). An IEP team's determination that a less restrictive placement would not be appropriate is entitled to substantial deference. Hartmann v. Loudoun County Board of Education, 118 F.3d 996, 1005 (4th Cir. 1997); School District of Wisconsin Dells v. Z.S. by Littlegeorge, 295 F.3d 671, 677 (7th Cir. 2002); Briggs v. Board of Education of State of Conn., 882 F.2d 688, 693 (2nd Cir. 1989); Lachman v. Illinois State Board of Education, 852 F.2d 290, 297 (7th Cir. 1988). Since a free, appropriate public education was offered to O.M.M., the sound judgment of educators should not be displaced by the preference of others. 20 USC 1412(a)(10)(C).

As indicated above, there is no "general education" preschool in North Carolina. Petitioners seem to be confusing a "regular education" environment for LRE purposes with a "general education" program. In states with no "general education" preschool, it is clear that the LEAs are not required to create a "general" preschool program in order to provide a least restrictive environment ("regular education environment") to preschool special education students. Public schools without general preschool programs for nondisabled children may meet LRE requirements by various alternative methods, including providing access to Head Start programs with nondisabled children and locating special education preschool programs in regular elementary schools. Letter to Cleary, 211 IDELR 347A (OSEP 1984):

> In the absence of public preschool programs for nonhandicapped children, there are a number of ways an SEA or LEA could meet the LRE requirements, such as linking the preschool handicapped programs to preschool programs for nonhandicapped children operated by other public agencies (such as Head Start),

or by locating preschool handicapped programs in regular elementary school buildings.

See also, Roane County School System, 45 IDELR 173 (SEA TN 2006) (alternative methods by which public agencies that do not operate programs for nondisabled preschool children may meet the LRE requirements include "(1) providing opportunities for participation (even part-time) of pre-school children with disabilities in other pre-school programs operated by public agencies (such as Head Start)..."). (Emphasis supplied). O.M.M.'s offered placement, as reflected in his IEP was located in a regular elementary school (Pathways) and included interaction with nondisabled students from other programs. The ALJ found as a fact that O.M.M.'s placement, as set out on his IEP, included interactions with typical peers. (Decision, Finding of Fact ¶ 44).

2. *The offered placement provided the least restrictive environment appropriate for O.M.M.*

The environment proposed by Respondent met Respondent's LRE requirement. Restrictiveness of an environment is determined by the amount of time a disabled child is removed from their nondisabled peers. For preschool children, the non-special education portion of the day is determined by the child's parents (natural environment). In either Respondent's offered placement or Petitioners' private placement, O.M.M. would be removed for special education less than 20% of the day – the lowest level of removal. Respondent's offered placement is at the same level of restrictiveness on the continuum as Petitioners'. The Court has not been provided any legal precedent finding a violation of LRE for an IEP providing four or fewer hours of special education and related services a week. Within this range of removal there are no distinctions as to restrictiveness. To find differently would be to impose a requirement that within a regular education placement, IEP teams must compare compositions of particular classrooms and all of the students in them. It is not relevant that Petitioners' private school

placement may have resulted in what they or their advocates considered a better education for O.M.M. or a preferred educational location for O.M.M..

In addition, even if it was determined that Respondent's placement is more restrictive than Petitioners', the LRE requirement is subordinate to the requirement that a child be educated in an appropriate environment. The IEP team had a reasonable basis to conclude that placement in a regular preschool setting would not have been appropriate, even with supplementary aids and services, considering among other factors O.M.M.'s experience at a regular preschool in Argentina and the report and recommendations by Dr. Vivian Umbel. This was solidified by Dr. Umbel's testimony at hearing. The IEP team had a reasonable basis for determining that the educational advantages offered by the small, structured, low teacher-student ratio, language-intensive, special education placement proposed by the IEP could not be feasibly provided in a typical preschool setting, even with supplementary aids and services.

Respondent offered a structured special education placement, with a ratio of five students or fewer to two teachers, co-taught by a licensed preschool (B-K) teacher (special education and regular education) and a speech-language pathologist, where at least one teacher was experienced in working with autistic children and had been trained in multiple autism methodologies (including TEACCH and ABA). (T. pp. 1245, 1246). The other students in this group were to be children with mild speech/language delays. (who would model typical behaviors) As part of O.M.M.'s IEP, the class was to be located in an elementary school and include regular interactions with nondisabled peers in other programs at the school. At the time this decision was made, the IEP team considered that O.M.M. had not been successful in a typical preschool environment with a ratio of fifteen students to two teachers prior to arriving in the Orange County Schools. In contrast, O.M.M. was observed multiple times in the school

system's offered placement and several IEP team members (including Petitioners) noted that he did well in that environment. In fact, after O.M.M. was observed in the placement, Mrs. M. contacted the LEA representative a school staff member indicating that "the success O.M.M. had within the setting in which he was observed – a low student-teacher ratio in a special education setting with techniques known to work well with children like O.M.M. – speaks to the fact that this is the environment he needs in order to progress and succeed."

The IEP's team's placement of O.M.M. in Respondent's speech-language playgroup at Pathways Elementary School for three hours per week, coupled with the opportunity to interact regularly with nondisabled Head Start peers, satisfied Respondent's obligation to offer FAPE in the least restrictive environment. The facts in this case are analogous to Alhambra Unified School District, 107 LRP 21579 (SEA CAL 2007), which determined that a California school district satisfied LRE when it supplemented a preschool special education speech and language class with access to a Head Start preschool for exposure to nondisabled peers.

Respondent's IEP is in the "regular setting" category on the continuum of alternative placements, as it would remove O.M.M. from the regular educational environment for less than 20% of the time. A placement in a "regular setting" is minimally restrictive, and school districts should have significant discretion in balancing considerations of cost and educational impact against the benefits of additional mainstreaming. In addition, even if there were less restrictive settings available, it was reasonable for the IEP team to conclude that they were inappropriate for O.M.M. given the information available to the team.

3. *Petitioners' private placement was not a less restrictive appropriate placement.*

It is noteworthy that the ALJ avoids any discussion or conclusions with regard to Respondent's offered placement on the continuum of placement restrictiveness. Without

addressing this threshold legal issue, and without reference to any evidence, the ALJ substitutes her opinion for that of the professional educators on the IEP team. In Conclusion of Law ¶43, the ALJ concludes that the evidence showed that O.M.M. could be satisfactorily educated in a regular education setting with appropriate supports and services at the time the IEP was developed in July. Respondent's position is that its offered placement was a "regular" education placement. To the extent the ALJ disagreed or meant a typical (private, general education) preschool program, none of the information before the IEP team supported a conclusion that such a class was an appropriate environment for O.M.M.'s specialized instruction.

A comparison of Petitioners' placement to the recommendations before the IEP team illustrates this point. Petitioners' placement was an unstructured typical private preschool program with no speech-language pathologist or speech language curriculum, with a ratio of at least fifteen students to two teachers, where the classroom teachers did not have experience working with autistic students. The testimony at hearing (a significant portion of which was provided by Petitioners' witnesses) supports Respondent's point that Petitioners' placement was inappropriate given the recommendations available in July.

Our Playhouse is not a special education setting. (T. p. 626). The private placement does not provide a low student-teacher ratio. (T. pp. 476, 499, 649, 443, 1458). According to the 2008-09 Policy Manual for Our Playhouse, O.M.M.'s private preschool class has a ratio of sixteen students to two teachers. (T. pp. 443, 649). Dotty Hoyle described O.M.M.'s private preschool class as "chock full" of kids. (T. p 476). The large number of children in O.M.M.'s class diminished the time available to address O.M.M.'s needs. (T. p. 499). Dotty Hoyle opined that there were not a lot of models for O.M.M. in this private preschool class. (Decision, Finding of Fact ¶122). O.M.M.'s class at Our Playhouse is comprised of three, four and five-year olds.

There was no testimony as to how many of O.M.M.'s classmates are same-aged peers. (T. p. 443). "Typically developing peers" does not include children a year older or younger than O.M.M. An alleged lack of peer modeling was a primary reason for Petitioners' objection of Respondent's placement.

The private preschool setting is not structured. (T. pp. 498, 499, 768, 769, 1008, 1014, 1439, 1441, 1458). Mrs. M. referred to the structure at Our Playhouse as "loosey goosey." (T. pp. 444, 445) and Beth Reynolds from TEACCH agreed with this characterization. (Decision, Finding of Fact ¶122). Casey Palmer expressed concerns that Our Playhouse is not structured enough to meet O.M.M.'s needs. (T. p. 768) (Decision, Finding of Fact ¶122). Casey Palmer indicated in September 2008 that O.M.M.'s classroom at Our Playhouse was "inconsistent" and that made it "difficult for O.M.M. to follow routines." (T. p. 768; Decision, Finding of Fact ¶ 122). O.M.M.'s classroom in the morning is "unstructured," "chaotic" with "lots of kids" and "lots of activities all over the place." (T. p. 1008, 1014; Decision, Finding of Fact ¶14). The private preschool classroom in which O.M.M. was placed is not well-managed, and small-group modeling activities were not occurring in September. (T. pp. 498, 499).

The private placement is not a language-intensive environment. (T. p. 1458; Decision, Finding of Fact ¶121).

There is no evidence that the private placement is in a classroom where behavior modification techniques known to work with autistic students are utilized. It was only after a trial period of abbreviated days three days per week that Our Playhouse determined that O.M.M. could attend school there. (T pp.653, 654). The lead teacher in O.M.M.'s private placement has not had any training or experience working with autistic children. (T. p. 1459).

The private placement clearly does not meet the recommendations that were available to the IEP team in its decision-making process or as testified to by Dr. Umbel. (T. pp. 1364, 1365). In an attempt to make this inappropriate setting appropriate, the services of Dotty Hoyle (not a licensed special education teacher and not certified in ABA – though that is the methodology she espouses and was to be implementing), a private speech-language pathologist and a private occupational therapist, as well as an autism consultant were utilized. In addition, in October 2008, the school system added the services of its own autism specialist, speech/language pathologist and occupational therapist to the classroom.

Petitioners' private autism consultant admitted that, in an unstructured environment, O.M.M. might need more special education. (T. p. 769; Decision, Finding of Fact ¶ 49.) Likewise, Mrs. M. stated at the July 30, 2008, IEP meeting that in a typical preschool "that does not have teachers trained in special education techniques and behavioral techniques and these things...he is going to need a whole lot more than three hours a week." (P10). Respondent has no obligation to provide enough personnel to make a naturally inappropriate environment appropriate.

It is within the IEP team's authority to determine that a particular environment, even if possibly less restrictive, is inappropriate to meet a student's needs.

As an independent ground for holding that Respondent's IEP satisfied LRE, in light of the minimally restrictive nature of Respondent's IEP, the benefits of additional mainstreaming are de minimis and do not outweigh the educational benefits and lesser cost of the speech-language playgroup provided by the IEP. The additional cost of providing a less restrictive setting is a legitimate factor that may be considered in determining whether mainstreaming has been accomplished to the maximum extent appropriate. A.W. v. Northwest R-1 School District,

813 F.2d 158 (8th Cir. 1987); School District of Wisconsin Dells v. Z.S. by Littlegeorge, 295 F.3d 671, 672 (7th Cir. 2002); Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983).

In addition, Petitioners' private placement included a one-on-one shadow (Dotty Hoyle) for O.M.M. This in no way reflects a "typical" or "regular" preschool experience. Some students with a one-on-one educator assigned to the student have become very dependent on that person and the educator has difficulty "backing off." O.M.M.'s private autism consultant expressed her concern that she has trouble backing off. (T. pp. 1446, 1447).

In March 2009, Dr. Naftel determined O.M.M.'s current placement was appropriate without having seen O.M.M. in the classroom or interacting with peers (in any setting). (T. pp. 257, 258). Significantly, Dr. Naftel does not know whether the current placement would have been appropriate in July 2008. (T. p. 260)

In any event, though it would not have been reasonable for Respondent to place O.M.M. in the private placement based on the information available to the IEP team as it turned out, O.M.M. did make goal progress in the private setting and this was not disputed by Respondent's witnesses. But O.M.M.'s actual progress in the private placement should not be used to second guess the reasonable placement decision of professional educators planning for O.M.M. in July based on information available at that time.

E. *Respondent had no obligation to provide O.M.M. any services after he was enrolled in the private preschool by his parents.*

1. *Once Petitioners rejected Respondent's IEP and placed O.M.M. in a private school, Respondent had no obligation to implement O.M.M.'s IEP.*

The ALJ concludes as a matter of law that Respondent's witnesses acknowledged that Respondent was required to provide O.M.M. with services identified in O.M.M.'s IEP.

(Decision, Conclusion of Law ¶15). The cite associated with this conclusion does not support this conclusion at all. In fact, Respondent's witnesses testified to the contrary. (T. pp. 886-888, 1224-1225). In support of this erroneous conclusion, the ALJ also points to the NC Policies Governing Children with Disabilities ("Policies)" for the contention that Respondent had a duty to seek consent for initial special education services. Even if Respondent had consent for services (a signed DEC 6) on July 30, 2008, it was irrelevant as to Respondent's duty to provide services for O.M.M. at the private school placement. The relevant Policies to determine Respondent's obligation are:

- 1501-6.1: The definition of "parentally placed" private school students includes the situation at hand;
- 1501-6.8(a): "No parentally placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school;
- 1501-6.11: Due process is not available for "equitable share" claims;" and,
- 1051-8.1: Reimbursement is the remedy if a parent unilaterally places a child in a private school as a result of a dispute as to FAPE.

In addition, the Handbook for Parents' Rights ("Handbook") notes that for parentally placed private school students where FAPE is at issue, the LEA where the private school is located may provide some services. (Handbook, p.8).

2. *The duty to seek consent before providing initial services does not create a duty to provide services in Petitioners' unilaterally chosen private school placement.*

The duty to seek consent before providing a child with special education services in no way establishes a duty to provide services to a child. Respondent had no duty to implement O.M.M.'s IEP, consent or not, once Petitioners clearly rejected the IEP as developed and

enrolled O.M.M. in private school. A parentally placed private school student, even when FAPE is at issue and even if consent has been provided for initial services, has no right to require an LEA to implement the IEP at the private placement. Respondent could do so if it chose (possibly mitigating O.M.M.'s damages if it were determined that Respondent's IEP did not offer FAPE). Once informed of which preschool O.M.M. was attending, and upon verifying that the preschool was in the school system service area (rather than the Chapel Hill-Carrboro Schools), O.M.M. was promptly provided services as an administrative decision given the expectation of litigation and a desire to secure services for O.M.M..

Petitioners rejection of Respondent's IEP as developed was unequivocal. Petitioners had already secured O.M.M. a spot at the private preschool before the IEP team made a placement decision (R143). Petitioners did not sign O.M.M.'s IEP because they did not agree with it. (P40, p. 158). On July 30, 2008, Mrs. M. notified the Orange County Schools that she would not accept services in the placement identified on O.M.M.'s IEP. (P47, p. 338). On August 14, 2008, Petitioners were provided with a Written Prior Notice indicating that the IEP team had determined the offered placement as appropriate and explaining the basis for that decision. (P47, p. 348). On August 22, 2008, Milinda Grenard informed Petitioners that the school system was "ready, willing, and able" to serve O.M.M. pursuant to the IEP. (P7). Petitioners' letter in response, dated September 10, 2008, indicated that they never agreed to the services as set out in the IEP. (P8). Petitioners consented to services on October 16, 2008, but did not consent to services as set out in the IEP. (P12). Mrs. M. did not ever allow O.M.M. to participate in the offered placement as part of the IEP because "we made it clear that O.M.M. would not be participating in the play group, because he would be going to a preschool classroom five days a week." (R256, p. 104) (Decision, Findings of Fact ¶¶ 77 and 78). After this rejection of the

IEP and placement in private school, the Respondent had no obligation to provide special education services to O.M.M. and the DEC 6 (or consent for initial services) does not create any such obligation.

The services provided by Respondent after October in no way bound Respondent to compensation for the tuition at the private school placement. If Respondent's IEP offered FAPE, it was never bound to private school reimbursement. If Respondent's IEP did not offer FAPE, it could be obligated to reimburse Petitioners for their private school placement for whatever part of the 2008-09 school year O.M.M. was in the private placement.

Once Petitioners unilaterally enrolled O.M.M. in the private school, Respondent's only obligation was the "equitable share" obligation. This obligation was alluded to during the hearing, but no evidence was provided indicating that Respondent had failed to meet that obligation. In addition, O.M.M. has no individual right of action under that obligation and such alleged violations are not subject to a due process hearing.

The ALJ's Conclusions of Law ¶¶ 11 through 14 were based on an erroneous belief that, when parents reject a school system's IEP and enroll their child in a private school, the school system has an obligation to implement the IEP at the parents' chosen private school. She provides, however, no legal authority for such a duty. This is because no such duty exists and the DEC 6 (consent for services) is irrelevant to establishing any such duty.

F. *Petitioners have not met their burden of proof with regard to their reimbursement claim.*

1. *Petitioners' evidence on costs was untimely, incomplete and insufficient.*

The IEP team could not even have written an IEP to comport with the ALJ's decision. The IEP team is only authorized to determine special education, not general education. The ALJ has awarded compensation for the private preschool environment not only during the provision

of special education services, but also for general education. At the very most, if the ALJ found against the great weight of the evidence that seven hours of special education was necessary and that the school system had not provided an appropriate LRE, the Respondent should have been required to reimburse Petitioners for the time at Our Playhouse necessary to provide 7 hours of special education; either by prorating the tuition on an hourly basis or reimbursing Petitioners for Our Playhouse program that meets two days per week for half of the day.

Petitioners sought reimbursement for private preschool tuition, an autism consultant, a private unlicensed special education teacher, private speech-language therapy, and private occupational therapy. At hearing, the reimbursement evidence was not provided in advance of the hearing as part of the exhibit exchange, was limited, and was full of errors such that a bottom-line figure for reimbursement cannot be determined. Also at hearing, the Petitioners were unable to answer questions about the invoices they had submitted. Petitioners have not provided ample evidence to support their claim for reimbursement.

2. *The ALJ improperly excluded evidence as to the third-party payments for Petitioners' costs.*

During the hearing, Respondent attempted to obtain information regarding payment of Petitioners' expenses by third parties such as insurance. Petitioners objected, asserting that the collateral source rule applied.

The collateral source doctrine does not apply to claims for reimbursement under the IDEA. Such claims are equitable in nature rather than claims for damages. Sellers by Sellers v. School Board of City of Manassas, 141 F.3d 524, 527 (4th Cir. 1998). The right to reimbursement derives from the disabled child's right to a free appropriate public education. Cases hold that school districts are not obligated to reimburse parents for payments made on behalf of a disabled child by the parents' insurance carrier if there is no additional detriment to

the parents. The leading case is Seals v. Loftis, 614 F.Supp. 302 (E.D.Tenn. 1985). In Paradise School District and Butte County SELPA, 25 IDELR 676 (SEA CAL 1997), the hearing officer specifically rejected application of the collateral source rule, holding that parents are entitled to reimbursement for only the transportation costs they actually incurred, not reimbursement for transportation expenses paid by a third party. In contrast, if payments by insurance carriers reduce a lifetime cap under the policy, the benefits are not "free" to the parent, and the school district is responsible for reimbursement. Richardson Independent School District v. Michael Z, 561 F.Supp.2d 589, 608 (N.D.Tex. 2007) (parents are "entitled to reimbursement of allowed costs that caused a reduction in lifetime benefits under their insurance policy").

Petitioners may be reimbursed only for amounts they actually expended, personally or through depletion of an insurance benefit. Petitioners' tactical decision not to present evidence of actual payment by Petitioners, albeit in mistaken reliance on the collateral source doctrine, precludes recovery.

VI. PREJUDICIAL PROCEDURAL ERRORS BY THE ALJ

A. *The ALJ granted multiple continuances to Petitioners without good cause and prejudiced Respondent.*

The ALJ's decision to granted repeated continuances in this matter for long periods of time, even after the hearing had started, significantly prejudiced Respondent. The first day of hearing in this matter was January 21, 2009. On that date Petitioner's original counsel, Ms. Brown, informed the Court that Petitioners would finally consent to the school system conducting an evaluation but specifically stated:

> We will consent to an evaluation. We just would ask that an evaluation be done after this is concluded. We don't believe anything relative to what he is now relates to how these services should have been provided in July when the IEP was

developed, that they're two distinct issues. But we'll go ahead and consent to one after this. (T. p. 22)(Emphasis supplied).

When Respondent's counsel inquired as to whether Petitioners would make O.M.M. available for evaluation by the end of February or March, Ms. Brown replied, "I would just ask that it be done – that they work that part out after these proceedings are concluded because it's a separate issue." Ms. Brown apparently became ill some time after the testimony ended on January 21 and asked, via e-mail on January 22, that the hearing not resume until the following Monday (January 26). On January 23, Ms. Brown's boss, Robert Ekstrand, filed a Motion to Continue until February 2, 2009, based on Ms. Brown's illness. When Respondent's counsel expressed great concern about the delay, Mr. Ekstrand assured Respondent's counsel that he would "get up to speed" on the case so that the hearing would be certain to continue on February 2. The continuance was granted.

On January 29, 2009, Mr. Ekstrand filed his Notice of Appearance and a Motion to Continue pending the evaluation to which Petitioners had finally consented on the first day of hearing. On January 30, 2009, over strenuous objections by Respondents' counsel, Mr. Ekstrand's motion was granted. In addition to the citing the obvious prejudice such a delay would cause Respondent, Respondent's counsel respectfully submitted that it appeared Petitioners had changed counsel (and trial strategy with regard to the evaluation) after the start of the hearing and were delaying the hearing for that reason. The ALJ specifically asked Mr. Ekstrand about Ms. Brown's continued involvement in the hearing to which Mr. Ekstrand responded that Ms. Brown would continue to examine witnesses and prosecute Petitioners' case, but that Mr. Ekstrand would also be present at hearing. The hearing resumed on March 23, some two months after it began and Ms. Brown never examined another witness (in fact, she did not

even attend the hearing most days). This delay of over two months was improper given Petitioners' refusal to provide consent for an evaluation until the hearing had begun and their subsequent request for a delay until the evaluation was conducted (after Petitioners' counsel plainly asserted the evaluation was clearly irrelevant to the instant matter).

This delay is noncompliant with the IDEA timelines and prejudiced Respondent greatly. Respondent's witnesses were prepared to testify in January. When the case was postponed, Respondent was faced with the cost of preparing the witnesses again or presenting witnesses whose preparation was two months old. In addition, the results from the evaluation conducted in the interim were allowed and used to support the ALJ's decision against Respondent. Moreover, Petitioner was awarded reimbursement for the time period during which they were responsible for delay. Had a decision been issued in March, as expected, Respondent could have mitigated some of this cost.

B. The ALJ failed to resolve the insufficiency of the Petition prior to the hearing.

The Petition, though having a checked box next to "evaluation" contained no facts regarding an alleged dispute or the issue of evaluation. Likewise, there was no proposed resolution with regard to an alleged dispute over evaluation. Petitioners refused to consent to an evaluation prior to the first day of hearing. No evidence of a dispute as to evaluation was presented at hearing and, most importantly, the ALJ made no Findings of Fact or Conclusions of Law relating to an evaluation dispute. As of this date, Respondent still does not know the substance of the evaluation dispute to which the checked box on the Petition refers. Clearly this was prejudicial to Respondent in preparing for the hearing and contrary to the sufficiency requirements of the IDEA.

VII. OTHER ERRORS IN ALJ'S DECISION

A. The ALJ made findings of fact and conclusions of law that are wholly inconsistent with the law or evidence.

1. The ALJ's Finding of Fact ¶37.a. seems to take issue with the fact that the team moved from developing O.M.M.'s IEP goals straight to determining the time required to implement them. There is no required discussion between these two decisions nor any intermediate portion of the IEP. The ALJ failed to state what she believed was required to be addressed between these two decisions or any legal authority for such a required discussion.

2. Contrary to the ALJ's Finding of Fact ¶38, there was no evidence offered at hearing that the offered placement consisted of two to four children at the time of O.M.M.'s IEP development.

3. Contrary to the ALJ's Finding of Fact ¶39, there was no evidence offered at hearing that O.M.M. was participating in a daily preschool program with other typical kids and a special educator at the time of O.M.M.'s IEP development.

4. The ALJ's Findings of Fact ¶¶55-58 contain several statements not supported by the evidence. The LEA representative at the July 30, 2008 IEP meeting indicated to Petitioners that there might be two children in the playgroup on one day and six on another (because children are sometimes absent). (P10). It was never contemplated, and there is no evidence, that only two students might be assigned to the playgroup. There was testimony that there were two or three students in the playgroup at the time of the October 13, 2008 IEP meeting, but there was no evidence that this was the number of students assigned to the playgroup "at the beginning of the 2008-09 school year." In fact, on October 13, 2008 there were two or three students in the playgroup after two other students had been moved to different placements. (T. p. 331; P10). In addition, though the ALJ found that Respondent did not provide Petitioners with information

about the qualifications of the second staff member in the playgroup, this is contrary to the evidence. The IEP team informed Petitioners that the offered placement was staffed by people with the specialized knowledge necessary to address O.M.M.'s individual needs. (P6, p. 3). The IEP team noted that one of the teachers in the offered placement had significant speech-language qualifications. (P6, p. 4). Petitioners were also told that the classroom would have a licensed preschool teacher. (P10).

5. The ALJ's Finding of Fact ¶91.a. refers to Petitioners' private preschool setting as having 12-14 preschoolers. The cite provided to support this fact actually indicates that O.M.M.'s preschool class contained 16 preschoolers. In addition, this finding of fact indicates that O.M.M.'s classroom consisted of students ages 3 to 4 years old. This is inaccurate as Mrs. M. (who provided the only evidence on this fact) testified that O.M.M.'s class consisted of students 3 to 5 years old. (T. p. ¶443).

6. In Findings of Fact ¶¶ 124 and 127, the ALJ notes that Dr. Naftel was on Respondent's witness list as an expert and that "after receiving Dr. Naftel's report, Respondent abandoned Dr. Naftel as their designated expert on autism and the education of children with autism." This is inaccurate and there is no evidence of this. Instead, Petitioners added Dr. Naftel to their witness list as an expert, negating the need for Respondent to "call" Dr. Naftel as a witness. Respondent, who had subpoenaed Dr. Naftel, presented its questions to Dr. Naftel on cross-examination.

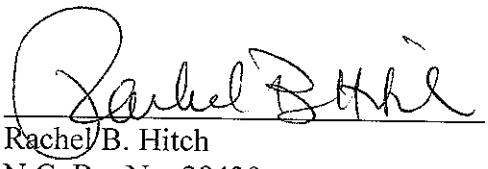
VIII. CONCLUSION

O.M.M.'s IEP was properly developed and Petitioners were afforded their right to participate in the development of the IEP. Respondent's IEP team members made decisions with regard to O.M.M.'s education based on the information before them and in the exercise of their professional judgment. These decisions were reasonable and are entitled to deference. The IEP

that was developed for O.M.M. was reasonably calculated to provide O.M.M. with educational benefit in the least restrictive environment appropriate for his needs. Once Petitioners rejected the IEP as developed and enrolled O.M.M. in a private preschool, O.M.M. had no right to the implementation of the services set out in his IEP at the private preschool placement. As the IEP offered by Respondent provided FAPE, Petitioners are not entitled to any reimbursement for any costs associated with O.M.M.'s education for the 2008-09 school year, especially in light of Petitioners unreasonable delay and protraction of litigation in this matter.

Respectfully submitted this 11th day of August, 2009.

SCHWARTZ & SHAW, P.L.L.C.

BY: 

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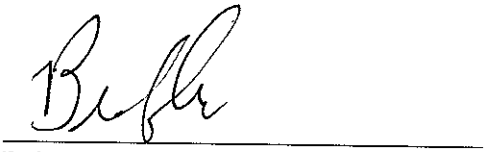

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STATE OF NORTH CAROLINA COUNTY OF ORANGE	BEFORE A STATE HEARING REVIEW OFFICER FOR THE STATE BOARD OF EDUCATION PURSUANT TO G.S. 115C-109.9
O.M.M., by parent or guardian N.M. and A.M. Petitioners, v. Orange County Board of Education, Respondent.	**CERTIFCATE OF SERVICE**

This is to certify that I have this day served a copy of the foregoing **WRITTEN ARGUMENT** on the following parties via electronic mail and U.S. Mail to the following addresses:

Joe D. Walters
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and, as required by N.C. Gen. Stat. §109.6(h), to the person designated by the State Board of Education under N.C. Gen. Stat. §115C-107.2(b) via electronic mail to:

Lynn Smith
Consultant for Due Process and Parents' Rights
N.C. Dept. of Public Instruction

This the 12 day of August , 2009.

SCHWARTZ & SHAW, P.L.L.C.

By: _____

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