UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA

OM by and through his parents,
NM and AM, NM and AM,

*Plaintiffs*,

v.
ORANGE COUNTY (N.C.)
BOARD OF EDUCATION,

*Defendant*

Civil Action No. 1:09-CV-692

# COMPLAINT
&
# PETITION FOR ATTORNEYS FEES PURSUANT TO THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Dated: September 9, 2009

EKSTRAND & EKSTRAND LLP

Robert C. Ekstrand (NC Bar #26673)
811 Ninth Street
Durham, North Carolina
E-mail: RCE@ninthstreetlaw.com
Telephone: (919) 416-4590

*Counsel for Plaintiffs OM, NM, and AM*

## THE PARTIES

1. PLAINTIFF, OM, is four year old boy with autism who has made extraordinary progress in a private educational program established by his parents NM and AM, after Defendant failed to offer OM "a free appropriate public education." OM is 34 CFR §300.8. In the proceedings below, Defendant stipulated that OM is a a "child with a disability" as that phrase is used in the Individuals with Disabilities Education Act ("IDEA"), 20 US.C. §1401(3)(A), and was correctly diagnosed with autism. At all times relevant to this action, OM resided with his parents in the Defendant's territorial jurisdiction, Orange County Board of Education.

2. PLAINTIFFS, NM and AM, are OM's mother and father, respectively. At all times relevant to this action, NM and AM were (and remain) citizens and residents of Orange County, North Carolina, and resided within the territorial jurisdiction of Defendant Orange County Board of Education.

3. DEFENDANT, ORANGE COUNTY BOARD OF EDUCATION, is a local educational agency as that phrase is defined by the IDEA, 20 U.S.C. § 1401(15). As such, Defendant is obligated to provide educational and related programs and services to all children with disabilities who reside in their territorial jurisdiction, consistent with federal and state constitutions, statutes, common law, and regulations, including the requirements of 20 U.S.C. § 1400 et seq., the parallel provisions of North Carolina's enabling statutes, and the state and federal regulations promulgated to enforce those laws.

## JURISDICTION & VENUE

4. This Court has jurisdiction over the subject matter and the parties pursuant to 20 U.S.C. §1415(i)(3)(A), which grants jurisdiction over this matter "without regard to the amount in controversy." 20 USC § 1415(i)(3)(A). Jurisdiction is further predicated upon 28 U.S.C. § 1331, which provides the district courts with original jurisdiction over all civil actions that arise under the laws of the United States. Venue is proper in the Middle District of North Carolina pursuant to 28 U.S.C.§ 1391(b)(1) and 28 U.S.C.§ 1391(b)(2).

## I. THE PLANTIFFS PREVAILED IN THE ADMINISTRATIVE PROCEEDINGS BELOW—TWICE.

### (A) The Due Process Hearing

5. On December 1, 2008, OM's parents, NM and AM, filed timely a Petition for a Contested Case Hearing ("Petition"), with the Clerk of the North Carolina Office of Administrative Hearings.

6. Plaintiffs' Petition alleged, *inter alia,* that OM "has been denied a free appropriate public education," that, as a result, Plaintiffs enrolled OM in an appropriate private placement. Plaintiffs sought all appropriate relief under the IDEA, including, but not limited to reimbursement for the cost of tuition for the private educational placement, private specialized instruction services, and private related services, which OM's parents incurred in order to provide OM an appropriate education for the 2008-09 school year.

7. In the Final Pre-Trial Order, Plaintiffs asserted that Defendant deprived OM of a free appropriate public education for the 2008-09 school year, and asserted four independent and adequate factual bases to establish that claim. Further, Petitioners alleged that OM's private educational placement and services were appropriate.

8. The Hearing Officer, the Honorable Melissa Lassiter, presided over eight days of testimony (on January 21, 2009; March 23, 2009; March 24, 2009; March 26, 2009; March 27, 2009; April 2, 2009; April 3, 2009; and April 6, 2009), in which 16 witnesses testified and hundreds of pages of exhibits and audio recordings of the IEP Team Meetings were admitted into evidence pursuant to the North Carolina Rules of Civil Procedure.

9. After both parties rested their case, Judge Lassiter afforded counsel for both parties an opportunity to submit written arguments and proposed orders.

10. On June 18, 2009, Judge Lassiter issued a 45-page Final Decision, concluding, *inter alia*, that Plaintiffs proved by a preponderance of the evidence all four of Plaintiffs' alternative theories supporting their claim that Defendant deprived Plaintiffs of a free appropriate public education.

11. Judge Lassiter's findings of fact were "regularly made" and were based upon ov*erwhelming* evidence in the record to which Judge Lassiter cited at length in her Final Decision.

12. Based on those findings, Judge Lassiter concluded that Plaintiffs carried their burden of proving that Defendant deprived Plaintiffs of a free appropriate public education (in four ways), and that Plaintiffs' private placement and services

were appropriate. Each one of those four findings is sufficient to carry Plaintiffs' burden of proof on the issue. Judge Lassiter specifically concluded that:

a. Plaintiffs "proved by a preponderance of the evidence that [Defendant] failed to provide OMM a free, appropriate public education in the least restrictive environment as required by 20 USCA § 1412(a)(5)(A)" and in fact, considered only the *highly* restrictive placement in a self-contained classroom that the IEP Team proposed;

b. Plaintiffs "proved by a preponderance of the evidence that [Defendant] procedurally and substantively failed to provide OM a free, appropriate public education by failing to provide OM with educational services before October 28, 2008, the date Respondent first provided services to OMM at his private preschool placement"—more than two months after the school year began;

c. Plaintiffs "proved that by a preponderance of the evidence that [Defendant] … failed to provide OMM with a free, appropriate public education through the development of an Individualized Education Plan (IEP) [designed to] make meaningful progress towards the specific goals and objectives that were agreed upon by OM's IEP Team";

d. Plaintiffs "proved that by a preponderance of the evidence that [Defendant] … failed to provide OMM with a free, appropriate

public education through an IEP that was reasonably calculated to provide OMM with educational benefit"; and

e. Plaintiffs "established by a preponderance of the evidence that Respondent improperly delegated the authority to make the final decision with respect to its proposed IEP to an outsider to the IEP Team." This procedural violation was "neither trivial nor inconsequential. Because of Respondent's improper delegation of decision making authority over OMM's services and placement, NM and AM were deprived of their right to participate meaningfully in the decision-making process with respect to OM's IEP placement and services," a substantive violation.

13. Finally, Judge Lassiter concluded that "[Plaintiffs] proved by a preponderance of the evidence that [Plaintiffs'] private educational placement was appropriate, and they are entitled to reimbursement for costs and expenses," as provided in the Final Order. Moreover, Judge Lassiter found that Defendants "did not offer substantial evidence to rebut Petitioners evidence that OMM's private placement was not appropriate under the standards established the Fourth Circuit."

14. After concluding Plaintiffs met their burden of proof, based upon the Findings of Fact and Conclusions of Law, Judge Lassiter awarded Plaintiffs:

a. "compensation for the private tuition costs at Our Play House from September 2008 through December 2008 from 8:45 pm until 12:30 pm Monday through Friday";

b. "compensation for all costs for private special education services provide by New Hope ASD Consulting from July 31,2008 until October 28,2008";

c. "compensation for private special education services by New Hope ASD Consulting for four hours per week from October 28, 2008 until the end of Respondent's 2008-2009 school year";

d. "costs for speech and language instruction, and occupational therapy incurred for the entire 2008-2009 school year beginning on August 25, 2008"; and

e. "any additional, equitable remedies tailored to address the specific deprivations that were established by the evidence in this case."

15. Further, Judge Lassiter expressly concluded that: "[Plaintiffs'] expenses were reasonable and necessary to provide OM with an appropriate private educational placement. The actual costs to be reimbursed were established through documentary and testimonial evidence. Reimbursement shall not include consultants' costs in preparation of IEP meetings or for consultants to attend IEP meetings."

16. Plainly Plaintiffs were the "prevailing parties" at the due process hearing.

**(B) Defendant's Appeal to the State Agency's Review Officer**

17. The Defendant sought a review of Judge Lassiter's Final Decision by a State Agency Review Officer. In his "Decision" issued on August 19, 2008, the Review Officer affirmed Judge Lassiter's findings on the merits. First, the Review Officer concluded that Defendants did not offer OM a FAPE, asserting that "the Petitioners have the burden to show that the Respondent did not offer OM a FAPE

[and they] have met this burden on several issues before the Review Officer." Second, the Review Officer concluded that OM's private placement was appropriate, stating plainly, "there is no question about the appropriateness of the parents' placement at Our Playhouse Preschool. Finally, the Review Officer concluded that Plaintiffs were entitled to reimbursement under the IDEA.

18. Plainly, Plaintiffs were the "prevailing parties" in the Defendant's appeal to the State Agency, and are the "prevailing parties" as that phrase is defined by the I.D.E.A., 20 USC § 1415(i)(3)(B)(i)(I).

19. At the same time, because the Agency's Review Officer reduced Judge Lassiter's reimbursement award Plaintiffs are nevertheless "aggrieved" by the Agency's reduction of Judge Lassiter's reimbursement award.

20. The Agency relied upon a demonstrably incorrect and self-contradicting factual finding that Plaintiffs did not give the Defendant appropriate notice of their intent to enroll OM in a private school. However, the Agency (and the hearing officer) both made the factual finding that did put Defendant on notice of their intent to enroll OM privately at public expense. As required by the notice rules applicable to students who have (unlike OM) received services from the LEA in the past, Plaintiffs expressly advised Defendant of their intent to enroll OM in a private school at public expense. The Agency later makes a contradictory finding (to its own earlier finding) to support the substantial reduction in reimbursement that Judge Lassiter awarded Plaintiffs.

21. Because the rule requiring notice does not apply to students who, like OM, were not receiving special education services from the school district prior to a

private enrollment, the Agency's reduction relies upon a theory that the Supreme Court flatly rejected in *Forest Grove Sch.Dist. v. T.A.*, 129 S.Ct. 2484 (June 22, 2009).

**FIRST CAUSE OF ACTION**
**ATTORNEY'S FEES AND COSTS**
**(20 U.S.C. §1415(i)(3))**

22. The foregoing allegations are incorporated by reference as though fully set forth here.

23. Both the hearing officer and the Agency concluded that (1) Defendant deprived OM of a "free appropriate public education," (2) OM's private placement was appropriate, and, as a result, (3) Petitioners are entitled to reimbursement.

24. Plaintiffs are therefore the "prevailing parties" in the administrative proceedings below, and, as such, Plaintiffs are entitled to an award of attorneys' fees, which the IDEA provides are included "as part of the costs." 20 USC §1415(i)(3)(B) and (C).

25. Defendant made no offer qualifying as an Offer of Judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The only settlement offer Defendant made in this litigation was transmitted on January 16, 2009 (five days prior to the first day of the due process hearing). Defendant offered a lump sum payment of $10,000.00 and expressly required Plaintiffs to execute a "[w]aiver of any other claims sought in connection with the Petition for a Contested Case Hearing in this matter (**including but not limited to attorney's fees**)." (emphasis added).

26. When Defendant offered a lump sum of $10,000.00 on January 16, that amount was a less than one-third of Plaintiffs' costs—standing alone—up to that point. Including reimbursable educational expenses, the offer was leaving aside the accumulated educational expenses Plaintiffs had incurred up to that point (tuition, educational providers, transportation, and the like). Moreover, Plaintiffs made a counteroffer that same day, which eliminated the fees waiver, and Defendant rejected it. Plaintiffs later made other settlement offers (again based upon a $10,000 lump sum payment), which Defendant similarly rejected without making any counterproposal.

27. Furthermore, even if the Defendant had made an offer that complied with Rule 68 and was more favorable than the relief Plaintiffs finally obtained, Plaintiffs nevertheless would have been "substantially justified" in rejecting the Defendants lump sum offer. *See* 20 U.S.C. §1415 (i)(3)(E). The Supreme Court interprets the phrase "substantially justified" to mean "justified in the main," which the Fourth Circuit interprets to mean "justified to a degree that could satisfy a reasonable person." *United States v. Cox,* No. 07-4906, No. 08-4680, slip op. at 4 (4th Cir. Aug. 5, 2009) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). The plaintiffs succeeded in this in satisfying the legal scrutiny of several judicial officials. The Plaintiffs have prevailed in both administrative proceedings below. The hearing officer and the Review Officer concluded that Plaintiffs carried their burden of proving that the Defendant failed to offer a free appropriate public education and that the OM's private placement was appropriate.

28. Legal services in connection with litigating this matter in the administrative proceedings and in this action were provided by Robert Ekstrand, Courtney Brown, and Jesse Haskins of Ekstrand & Ekstrand. In addition, consultation services were provided by Richard Ekstrand.

29. Plaintiffs' attorneys' fees in this matter were unnecessarily compounded by Defendant's protraction of the litigation. Most recently, after Plaintiffs' prevailed on Defendant's appeal, Defendant filed an unauthorized "Motion to Amend" the Agency's review decision. Ostensibly the Motion was brought pursuant to Rule 59, but Defendant did not direct its "Motion" to the trial judge (Judge Lassiter). Instead, Defendant directed it to the Agency. Defendant neither requested nor obtained leave to file its "Motion" from the Review Officer to do so, did not advise or confer with Plaintiffs' counsel prior to filing its "Motion," and did not point to any governing authority in the governing law (20 U.D.C. 1415(g)) authorizing a "Motion to Amend." Moreover, Defendant's "Motion to Amend" simply rehashed arguments Defendant had already made at points throughout the proceedings. As a result, Plaintiffs had to employ counsel to respond for the limited purpose of litigating the impropriety of Defendant's belated and misdirected "Motion to Amend."

30. Plaintiffs reserve the right to amend this cause of action to include additional costs–including attorneys' fees–incurred in litigating this action in this Court.

## SECOND CAUSE OF ACTION
## FULL REIMBURSEMENT OF EDUCATIONAL COSTS

31. The foregoing allegations are incorporated by reference as though fully set forth here.

32. The Review Officer drastically reduced Plaintiffs' reimbursement award because, he contended, "the parents did not give the required notice" pursuant to 20 U.S.C. §1412(a)(10)(C). The contention is wrong on the facts and wrong on the law.

33. As a factual matter, Plaintiffs did notify Defendant of their intent to enroll OM in private school at public expense. Plaintiffs notified the Defendant at the last IEP Team meeting prior to their enrollment of OM in a private school (precisely when the statute requires such notice). In fact, the Review Officer made the following finding of fact, based upon witness testimony and the audio recording of the last IEP meeting prior to OM's enrollment in private school:

> At the end of the July 30 IEP meeting, NM requested Ms. Combs present them with a DEC 5 Notice… to explain why the following … were being refused: (a) *A full-time preschool placement at Respondent's expense*… .

(SRO Decision ¶ 55, at 16).

34. Plaintiffs also notified Defendant of their intent to enroll OM in a private school through a series of emails, all well before OM's enrollment in a private school, in which NM sought information on how services could be delivered in a private school setting. As Judge Lassiter found, Defendants deliberately ignored all of Plaintiffs' emails, and the LEA Representative to whom they were directed was instructed not to respond to Plaintiffs requests for information about delivery of services to a private placement.

35. As a matter of law, the Review Officer incorrectly asserted that in *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (June 22, 2009), "the U.S. Supreme Court said … the parents must still provide notice. The notice to which they were referring is that in 20 U.S.C. 1412(a)(10)(C)." SRO Decision ¶27, at 33. To the contrary, *Forest Grove* held that §1412(a)(10)(c) do not create a categorical bar to reimbursement because the addition of that section to the IDEA "did not modify the text of §1415(i)(2)(C)(iii) [which authorizes "appropriate relief" including reimbursement] and

we do not read §1412(a)(10)(C) to alter that provision's meaning. Consistent with our decisions in *Burlington* and *Carter,* we conclude that IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school." *Id.* at 2496.

36. *Forest Grove* simply does not hold that reimbursement is conditioned upon parents' notice to the school prior to a private enrollment. In fact, the parents in *Forest Grove* did not notify the school district of T.A.'s private enrollment until *four days after* they enrolled T.A. in a private school. *Id.* at 2489 ("Four days after enrolling him in private school, respondent's parents hired a lawyer to ascertain their rights and to give the School District written notice of respondent's private placement."). Instead, the decades-old equitable principles the Court established in *Burlington* and *Carter* govern the equitable balancing of factors. The Review Officer's reduction relies entirely upon his finding that OM's parents did not quote from the statute when they plainly rejected the IEP and conveyed their intent to enroll OM in a private school at public expense. *See, e.g.,* SRO Decision ¶30, at 33 ("[NM] never stated in these emails the "intent to enroll their child in a private school at public expense."). That is precisely the literalism that the Court "roundly reject[ed]" in *Forest Grove*.

37. Because reimbursement does not turn upon a parents' quotation from a statute, but instead upon the equitable principles established in *Burlington* and *Carter*, the multiple forms of notice Plaintiffs did, in fact, provide Defendant were more than sufficient. As Judge Lassiter found, beginning the day of the last IEP meeting and through the weeks prior to the start of school, NM repeatedly expressed her intent to enroll OM in a private school, and beseeched Defendant's LEA Representative for

help in coordinating delivery of OM's IEP services to OM at a private placement. Plaintiffs were thwarted by the Defendant's officers; as Judge Lassiter explicitly found as fact, Defendant's LEA Representative had been directed by her supervisor (Defendant's EC Coordinator) not to respond to NM's repeated inquiries about coordinating delivery of OM's services at a private placement. Remarkably, those same ignored emails also contain more than sufficient "notice" of Plaintiffs' intent to enroll OM in a private school.

38. Plaintiffs are therefore entitled to full reimbursement of all costs incurred in educating OM privately, including tuition, transportation, and private special education and related service providers.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court:

(A) Order the preparation and filing of the administrative record, as necessary;

(B) Award complete reimbursement of all of Plaintiffs' educational expenses incurred in providing OM with a private educational placement during the 2008-09 school year;

(C) Award to the Plaintiffs costs, expenses, and attorneys' fees incurred in litigating the administrative proceedings, pursuant to 20 U.S.C. § 1415;

(D) Award Plaintiffs costs expenses, and attorneys' fees, including pre-judgment and post-judgment interest, incurred in connection with litigating this action, pursuant to 20 U.S.C. § 1415; and

(E) Award Plaintiffs all such other and further relief as the Court deems just and proper.

Dated: September 9, 2009

Respectfully submitted:

EKSTRAND & EKSTRAND LLP

Robert C. Ekstrand (NC Bar #26673)
811 Ninth Street
Durham, North Carolina
E-mail: RCE@ninthstreetlaw.com
Telephone: (919) 416-4590

*Counsel for Plaintiffs OM, NM, and AM*