STATE OF NORTH CAROLINA COUNTY OF ORANGE	BEFORE A STATE HEARING REVIEW OFFICER 08 EDC 2969
O.M.M., by parent or guardian N.M. and A.M. Petitioners, v. Orange County Board of Education, Respondent.	**MOTION TO AMEND DECISION**

RESPONDENT, ORANGE COUNTY SCHOOLS, respectfully requests that the honorable State Hearing Review Officer reconsider his decision on the appeal in the above-captioned matter solely with regard to procedural violations resulting in an alleged denial of a free, appropriate public education ("FAPE"). In support of this motion, Respondent asserts the following:

1. A motion to alter or amend a judgment may be requested on the grounds of insufficiency of the evidence to justify the verdict or that the verdict is contrary to law, or that an error of law occurred and was objected to by the party making the motion. N.C. Gen. Stat. §1A-1.

2. The State Hearing Review Officer in the above-captioned case found that Respondent offered a FAPE in accordance with a properly developed IEP (State Hearing Review Officer Decision, Conclusion of Law ¶8). The State Hearing Review Officer found, however, that procedural violations committed by Respondent impeded O.M.M.'s right to FAPE and his parents' opportunity to participate in the decision-making process regarding O.M.M.'s education. (State Hearing Review Officer Decision, Conclusions of Law ¶¶9 and 10).

3. The State Hearing Review Officer, on page 38 of his decision, expanded upon his conclusions of law with regard to procedural errors stating that "[t]he failure to give the required notice on July 30, and to have someone outside the IEP Team make decision that must be made by the IEP Team are grievous procedural errors. These errors caused O.M.M. to loose (sic) opportunities for a FAPE and denied the parents their right to participate in the decisions affecting their child. Either of these is sufficient to provide relief to the Petitioners. The failure to obtained (sic) informed consent, while not as serious, was also a clear violation of IDEA."

4. Respondent respectfully submits that there is insufficient evidence to justify the Review Officer's decision with regard to the alleged procedural errors denying FAPE, that the decision on that point is contrary to law, and that an error in the application of the law occurred.

The Prior Written Notice from the July 30, 2008, IEP Meeting was Procedurally Compliant

5. Prior written notice is the responsibility of the LEA (not the IEP team) and does not have to be provided at the IEP team meeting.

6. An IEP team meeting for O.M.M. was held on July 30, 2008. The IEP team meeting was recorded by both the parents and the school system.

7. The July 30, 2008, IEP meeting ended with a completed IEP. The school system members and the parents' members of the IEP team disagreed as to an appropriate educational plan for O.M.M..

8. At the end of the July 30, 2008, IEP meeting, O.M.M.'s parent asked that certain parent requests, which she understood the school system IEP team members to be denying as necessary to an appropriate IEP, be addressed in the prior written notice (DEC 5).

9. Specifically, Lisa Dankner (parent advocate), stated that the prior written notice would verify that the O.M.M. was being denied a typical preschool placement and twenty-five (25) hours of special education services per week.

10. The LEA representative on the IEP team (Lisa Combs) indicated that she was going to involve the school system's Director of Exceptional Children, Milinda Grenard, in the provision of the prior written notice. Neither O.M.M's parent nor her advocates objected to Ms. Grenard's involvement.

11. Ms. Combs and the parents' advocates discussed when the prior written notice might be forthcoming. Neither the parent nor advocates objected to the provision of the prior written notice after the IEP meeting.

12. Ms. Combs indicated that she did not know Ms. Grenard's schedule, but that she would like ten days to complete the prior written notice. Neither the parent nor her advocates objected to this timeline.

13. The IEP meeting minutes from the July 30, 2008, IEP meeting were then read aloud with changes made as suggested by O.M.M.'s parent or advocates.

14. At the end of the IEP meeting, O.M.M.'s parent was provided with a copy of the completed IEP and the IEP meeting minutes.

15. Following the IEP meeting, Ms. Grenard reviewed the IEP meeting minutes and listened to the audio recordings of the IEP team meetings (including July 30, 2008) and, in anticipation of litigation, sought assistance of counsel in preparing the prior written notice for the July 30, 2008, IEP meeting. (T. 858, 869).

16. The prior written notice, in draft form, was provided to all school system members of the IEP team and the testimony at hearing was that the school system team

members reviewed the prior written notice, made changes to it, and signed the prior written notice. (T. p. 1158, 1190).

17. There was no testimony at hearing that the prior written notice varied in any way from the decisions made by the IEP team on July 30, 2008.

18. On the ninth business day after the meeting, Ms. Combs e-mailed Mrs. M. indicating that the prior written notice was complete but that signatures were being obtained. Ms. Combs informed Mrs. M. that the prior written notice would be provided on August 14, 2008. Mrs. M. thanked Ms. Combs for this information, and did not object to the provision of the prior written notice on August 14th.

19. The prior written notice was provided on August 14, 2008, in the form of a letter on the school system's letterhead signed by each of the school system IEP team members.

20. The prior written notice contained all the required components of a prior written notice and did not alter the decisions of the school system IEP team members in any way. The prior written notice, among other things, confirmed what Mrs. M.'s advocate forecasted it would say as to a denial of the requested services and placement.

21. The prior written notice changed nothing from the IEP meeting on July 30, 2008, and served only to formally provide notice that the decisions made on that date were final.

22. No one outside of the IEP team made any decisions as O.M.M.'s IEP was complete when the meeting ended; agents of the LEA simply assisted in drafting the notice of the decisions that were made by the IEP team.

23. Neither the State Hearing Review Officer nor the Petitioners raised any issues with regard to the contents of the prior written notice, but instead the State Hearing Review Officer found that procedural errors relating to the prior written notice denied O.M.M. a FAPE.

This finding is based upon the alleged involvement of non-IEP team members in drafting the prior written notice, and the provision of the notice outside of the IEP team meeting.

24. §34 C.F.R. 300.23 defines the "Individualized Education Program team" as a "group of individuals…**responsible for developing, reviewing, or revising an IEP for a child with a disability**." (Emphasis added.)

25. 20 U.S.C. §1401(19) and §34 C.F.R. 300.28(a) define "**Local Educational Agency**" or LEA to mean "a public **board of education.**" (Emphasis added.)

26. 20 U.S.C. §1415(b)(3) and (4), (c)(1), and §34 C.F.R. 300.503, entitled "Prior Notice by the public agency; content of notice" requires that the **LEA** (not the IEP team) provide prior written notice.

27. Neither the Federal statute nor regulation relating to prior written notices requires that the notice be provided by the IEP team (as opposed to the LEA), or that the notice be provided at the IEP team meeting where the decisions in the notice have been made. The obligation to provide prior written notice is the LEA's and it must provide a notice with the required content within a reasonable time before enacting the decisions of the IEP team. 20 U.S.C. §1415 (b)(3) and (4), (c)(1), and 34. C.F.R. §300.503.

28. The commentary to §34 C.F.R. 300.503 speaks to the "reasonable time" requirement. One commenter suggested that notice be given at least fifteen (15) days before the public agency proposes to initiate or effect a change. The Secretary responded that, "*We do not believe that it is necessary to substitute a specific timeline to clarify what is meant by the requirement that the notice be provided within a reasonable period of time.*" (71 F.R. 46691.) (Emphasis added.)

29. The Secretary went on to clarify that a "public agency meets the requirements in §34 C.F.R. 300.503 **so long as the prior written notice is provided a reasonable time before the public agency implements the proposal (or refusal) described in the notice.**" (71 F.R. 46691.)

30. The prior written notice was provided in a reasonable time before the start of the 2008-09 school year, when the IEP was to be implemented.

31. The commentary also sheds light on the form which the prior written notice might take. One commenter suggested permitting the IEP itself to serve as the prior written notice to which the Secretary responded that "there is nothing in the Act or these regulations that would prohibit a public agency from using the IEP as part of the prior written notice so long as the document(s) the parent receives meets all the requirements in §300.503."

32. OSEP stated, in *Letter to Lieberman*, 52 IDELR 18, ¶2, that, "If, during an IEP meeting, the team…agrees to a change in the child's services, the *public agency* must provide written notice" and can do so following the IEP Team meeting. (Emphasis added.) OSEP goes on to reiterate that nothing in the IDEA or its regulations prohibits a public agency from using the IEP as part of the prior written notice so long as the document(s) the parent receives meets all the requirements for notice.

33. The United States Department of Education has developed a Model Form for Prior Written Notice. The form states that "**the school district"** must give the written notice. The Model Form goes on to state that "**[t]he school district** will need to insert the required child- and situation-specific information, and must inform parents, as part of the notice, that they have protection under the procedural safeguards of Part B of the IDEA." (Emphasis added.)

34. The IEP and the meeting minutes provided to the parent at the end of the July 30, 2008, IEP meeting could conceivably satisfy the requirements of the prior written notice. In any event, the letter signed by the IEP team and provided by the LEA representative on the team provided proper prior written notice under the Federal statute and regulations.

35. N.C. Gen. Stat. §115C-109.5 provides the state statutory requirement as to prior written notices. This statute, in pertinent part, provides that "**the local educational agency**" shall provide the prior written notice to parents.

36. N.C. Gen. Stat. §115C-106.3(11) defines "local educational agency" to include local school administrative units.

37. N.C. Gen. Stat. §115C-106.3(7) defines IEP team as it is defined in IDEA.

38. The 2007 Policies Governing Services for Children with Disabilities ("Policies"), published by the North Carolina Department of Public Instruction, defines an IEP team as "a group of individuals consisting of an LEA representative, parent of a child with a disability, regular education teacher of the child, special education teacher of the child, and others as described in NC 1503-4.2 that is responsible for *developing, reviewing, or revising an IEP* for a child with a disability." (Policies, 1500-2.17.)(Emphasis added.)

39. In contrast, the Policies define a Local Educational Agency ("LEA") as "**a public board of education.**" (Policies, 1500-2.22.)(Emphasis added.)

40. The Policies provide the requirements of the "Prior notice by the LEA; content of notice" at Policies 1504-1.4. There is no requirement in this provision that the prior written notice be provided at an IEP meeting. In addition, it is clear – even from the title – that the responsibility to provide the notice rests with the LEA, not the IEP team.

41. The Procedural Safeguards: Handbook on Parents' Rights, at page 3, discusses prior written notice. It clearly indicates that the "**LEA** must give [parents] notice." (Emphasis added.) At page 27, the Handbook defines LEA as a school program conducted by a public school or agency and approved by the North Carolina Department of Public Instruction. The definition notes that, in North Carolina, "this includes county, city, and charter schools and State-operated programs." Most importantly, in the definition section of the Handbook, "prior written notice" is defined and it is specifically noted that "**LEAs are not required to use the state form (DEC 5) and may use their own.** ***An LEA may write a letter to you as the prior written notice.***" (Emphasis added.)

42. The Guiding Practices: Implementing Policies Governing Services for Children with Disabilities, published in the summer of 2008, contains no recommendation that prior written notice be provided at IEP meeting in which the decisions being noticed were made and, again, designates the responsibility for providing prior written notice to the LEA, not the IEP team.

43. The same information required to be in a prior written notice is required to be provided by "the LEA" in response to a due process petition if the prior written notice has not been provided. Given the litigious nature of special education administrative proceedings, this response (which is, in essence, a prior written notice) is frequently drafted by LEA counsel in consultation with the special education director and school system IEP team members.

44. No State statute or accompanying regulation or guidance requires or even suggests that the IEP team must write the prior written notice or that the notice must be provided at the IEP team meeting in which the decisions it notices were made. In fact, the Handbook (providing procedural safeguards notice to parents of exceptional children) clearly supports

Respondent's actions with regard to the prior written notice from the July 30, 2008, IEP meeting.

45. Respondent could find no case in which the involvement of someone outside of the IEP team in the drafting of the prior written notice was found to be a procedural violation.

46. Nor was Respondent able to find a single case in which failure to provide the prior written notice at the IEP meeting was determined to be a procedural violation.

47. Given that there was clearly no procedural violation with regard to the prior written notice, the State Hearing Review Officer's decision that procedural violations associated with the prior written notice denied O.M.M. a FAPE is contrary to the applicable law.

Any Determination that a Procedural Error in the Provision of Prior Written Notice Amounted to a Denial of FAPE is Unsupported by Law or Evidence

48. Respondent vehemently denies, based upon the information above, that there was any procedural error with regard to the prior written notice. Even if there were a procedural violation, however, it did not arise to the level of a denial of a FAPE.

49. Petitioners' own actions show the insignificance of any alleged procedural violations relating to the prior written notice.

50. Though the Petitioners had legal counsel and were anticipating litigation in May (prior to O.M.M.'s determination of eligibility), the Petition for a Contested Case Hearing makes no mention of procedural violations.

51. The Interrogatories and Request for Production of Documents provided to Respondent from Petitioner make no mention of the prior written notice.

52. There is no mention of any alleged impropriety with the prior written notice in Petitioners' opening arguments.

53. The only direct testimony provided by Petitioners witnesses at hearing regarding the prior written notice (DEC 5) is on four pages of N.M.'s testimony and four pages of Casey Palmer's testimony.

54. Mrs. M. testified that she believed the school district was required to explain their decisions in the case of disagreements with the parent. (T. p. 269). In response to the question, "so what was the question you were asking on the DEC 5," Mrs. M. noted that there was disagreement on the amount of services. (T. p. 270). She later noted there was also a request to include the placement decision on the DEC 5. (T. p. 284). Finally, Mrs. M.'s testimony simply confirms that she requested a DEC 5.

55. Mrs. M. provided no testimony that the prior written notice lacked any of the necessary components, that it inaccurately reflected the decisions of the IEP team, that its provision was untimely, or that it had any negative impact on O.M.M.'s educational opportunities.

56. In addition, the items that Mrs. M. testified about as being the subject of the prior written notice are those items her advocate clearly identified at the IEP meeting as requests that were being denied by the school system IEP team members – namely, more hours of service and a typical preschool classroom.

57. In fact, Mrs. M. and her advocate requested that the prior written notice include an implementation plan which clearly was not developed by the IEP team on July 30, 2008, (and is not a required element of an IEP) and was asked to be provided without any intervening IEP team meeting. Mrs. M. then agreed to provide samples of an implementation plan, and did so, several days after the IEP meeting.

58. It was never the Petitioners' claim, then, that the prior written notice had to be drafted by the IEP team at the IEP meeting, and their requests would have been inconsistent with such a claim.

59. Casey Palmer's testimony noted that a DEC 5 was requested (T. p. 728) and that a DEC 5 is to explain why requested services are not going to be provided (T. p. 729). Ms. Palmer then testified that a DEC 5 was produced and was signed by the IEP team members. (T. p. 730-731). Ms. Palmer did not testify that the notice lacked any of the necessary components, that it inaccurately reflected the decisions of the IEP team, that its provision was untimely, or that it had any negative impact on O.M.M.'s educational opportunities.

60. The only issue either Mrs. M. or Casey Palmer took with the DEC 5 is that it did not explain, to their liking, why three hours of service would be sufficient for O.M.M. Given that the three hours of service has been upheld by the State Hearing Review Officer, and that there is evidence that both of these witnesses had opinions that three hours of service were never enough for an autistic child, it is impossible to see that any amount of explanation would have sufficed. In any event, the legally required explanation was provided and was significantly more thorough than contemplated by the State or Federal model forms.

61. There is no evidence, and no reason to believe, that a prior written notice developed by the IEP team and provided at the July 30, 2008, IEP meeting offering the same placement and the same hours of service would have yielded any different results. Especially given the State Hearing Review Officer's clear finding that the parents had decided to enroll O.M.M. in a full-day preschool program as of July 30, 2008.

62. As any procedural error with regard to the prior written notice did not impact the availability of a free, appropriate public education through a properly developed IEP, such a procedural error cannot be said to have denied O.M.M. a FAPE.

Respondent Fully met its Obligation Regarding O.M.M.'s Parents' Right to Meaningful Participation

63. O.M.M.'s parents were afforded meaningful participation in O.M.M.'s IEP meetings and development, careful consideration of the information they provided to the IEP team, the IEP included provisions for regular reporting on O.M.M.'s progress, and the IEP was provided to Petitioners at the July 30, 2008, IEP meeting.

64. IEP meetings for O.M.M. were held on July 10, 22, and 30, 2008.

65. O.M.M.'s parent or parents were present at each of these meetings.

66. Respondent communicated with O.M.M.'s parents regarding the scheduling of IEP meetings and, upon the parents' request, rescheduled IEP meetings.

67. O.M.M.'s parents were consulting with counsel at all times during the July IEP meetings.

68. O.M.M.'s parents recorded the July 10 and 30, 2008, IEP meetings.

69. O.M.M.'s parents had advocates present at each of the IEP meetings.

70. O.M.M.'s parents and advocates provided significant input and commentary at each of the IEP meetings for O.M.M.

71. O.M.M.'s parents and advocates participated in preparing and reviewing draft goals and objectives for O.M.M., and agreed to the goals and objectives included in O.M.M.'s IEP for the 2008-09 school year.

72. At the July 30, 2008, IEP meeting, O.M.M.'s parent had two advocates present, both of whom participated freely and significantly in the discussions of the IEP team, as did Mrs. M..

73. All information provided by the parents was considered by the IEP team.

74. The State Hearing Review Officer's decision that procedural violations with regard to the prior written notice denied O.M.M. a FAPE is based upon an alleged denial of the parents' right to participate in the decision-making process regarding their son's education.

75. 34 C.F.R. §300.322 of the IDEA regulations governs "parent participation" and the public agency's responsibility in that regard. This provision requires that each public agency "take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate including providing the parents with proper notice of the meeting and scheduling the meeting at an agreed upon time and place." The requirement goes on to note that, if parents cannot attend an IEP meeting, the public agency must use other methods to ensure parent participate including telephone conferencing. The regulation provides the mandates applicable when a parent is <u>not</u> in attendance at the IEP meeting, and the use of interpreters for parents to meaningfully participate in the IEP meeting. Finally, the regulation mandates that parent participation requires that the public agency given the parent of a copy of the child's IEP at no cost to the parent.

76. All of the above-stated parent rights with regard to participation were clearly afforded to O.M.M.'s parents.

77. Nothing in IDEA's implementing regulation requires parent participation in any fashion other than that described above and certainly not in the development of the prior written

notice (as it often relates to the refusal to agree to parents demands). Other than provision of a copy of the child's IEP and reporting information on the student's progress, the regulations set out no parent participation rights outside of the IEP Team meeting context or after the IEP has been developed.

78. N.C. Gen. Stat. §115C-109.3 sets out the school system's obligation with regard to "parent participation." This provision specifies that parents must be provided an opportunity to participate in meetings.

79. Parent participation is addressed in the Policies at 1503-4.3 (IEPs section) and 1504-1.2 (procedural safeguards section). Both of these Policies ensure and protect the right of a parent to participate in meetings.

80. OSEP has specified that a parent's right to participate includes the right to participate in meetings with respect to the identification, evaluation, and placement of their child; have their concerns and information provided regarding their child considered in developing and reviewing their child's IEP; and, be regularly informed as to their child's progress. OSEP specifically notes that the IDEA expects parents of children with disabilities to have an expanded role in the evaluation and educational placement of their children and be participants, along with school personnel in "**developing, reviewing and revising the IEPs for their children**." (Letter to Mamas)(Emphasis added.)

81. O.M.M.'s parents' participation in the meetings, placement discussions and IEP development for O.M.M. was extensive and well documented by the IEP meeting minutes and recordings.

82. The right of parents to participate applies to the IEP team decision-making portion of the IEP development process. There were no IEP team decisions made between July

30, 2008, and August 14, 2008. Only the drafting of a legally required notice that comports with Federal and State statutes and regulations, and other guidance provided by both the United States Department of Education and the North Carolina Department of Public Instruction.

83. There is no legal authority setting out a right of participation for O.M.M.'s parents as it relates to the provision of this notice.

84. Failure of a school system employee to immediately respond to questions after the IEP has been completed cannot be said to interfere with the right to participate in the development of the plan.

85. The Fourth Circuit has provided clarification as to when a procedural violation of the IDEA that causes interference with the parents' ability to participate in the development of their child's IEP will be said to "actually interfere with the provision of FAPE to the child.

86. In DuBuo v. Board of Educ. of Worcester County, the Court noted:

> We have no doubt that a procedural violation of the IDEA (or one of its implementing regulations) that causes interference with the parents' ability to participate in the development of their child's IEP will often actually interfere with the provision of a FAPE to that child. For example, if (1) the school district members of an IEP team refuse to consider the private evaluations offered by the parents of a deaf child establishing that their child needs to be taught by a teacher with the ability to communicate in sign language in order for the child to receive FAPE, (2) contrary evidence is insufficient to rebut the conclusions of the private evaluations on the same point, and (3) the IEP ultimately does not provide for the child to be taught by such a teacher, the school district's refusal to place the child in a classroom with the special teacher no doubt actually interferes with the provision of a FAPE to that child. But *often* is not the same as *always*. For example, when a presumably correct finding is made that the same disabled child, under the applicable standards of the IDEA, did not need to be taught by a teacher with the ability to communicate in sign language in order to receive a FAPE, the refusal to consider the private evaluations cannot be said to have actually interfered with the provision of a FAPE to that child.
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> 309 F.3d 184, 191 (2002)(Emphasis added.)

87. In this case, where there was no procedural violation or denial of the parents' right to participate in the development of O.M.M.'s IEP, there can be no denial of FAPE on those bases. In any event, given the proper development of an appropriate IEP, there is clearly no actual interference with the provision of a FAPE.

O.M.M. was not Entitled to a FAPE from Respondent in his Parents' Unilateral Private Preschool Placement

88. Any procedural error committed by Respondent is unrelated to O.M.M. not receiving special education services from Respondent from the beginning of the school year through October. O.M.M. did not receive his IEP services in the private preschool placement before October because Respondent had no obligation to provide such services.

89. Children, who are unilaterally placed in private school by their parents, when FAPE is at issue, are not entitled to implementation of their IEP services at the private school.

90. The State Hearing Review Officer, in Conclusion of Law ¶9, inaccurately determined that Respondent was required to implement the IEP in the unilateral private school placement until October 29, 2008.

91. In his conclusion that the failure to attempt to implement the IEP was a failure to provide FAPE, the State Hearing Review Officer relies upon 20 U.S.C. §1412(a)(1)(A), N.C. Gen. Stat. §115C-106.2(a), 34 C.F.R. §300.323(a) and (c)(2), and N.C. Policies 1503-4.4(a) and (c)(2) to establish that Respondent had a duty to provide O.M.M. with FAPE in his unilateral private placement.

92. This conclusion was erroneous.

93. 20 USC §1412(a)(1)(A) and N.C. Gen Stat. §115C-106.2(a) require that school systems make available a free appropriate public education. The State Hearing Review Officer clearly found that the IEP made available a free appropriate public education.

94. The Policies at 1503-4.4 (a) and (c)(2) and 34 CFR §300.323(a) and (c)(2) require that each year, a public agency have an IEP in effect for each child with a disability within its jurisdiction. As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. Again, Respondent developed an appropriate IEP prior to the beginning of the 2008-09 school year and the services pursuant to that IEP were available to O.M.M. on the first day of the 2008-09 school year.

95. As indicated in a letter from Ms. Grenard dated August 22, 2008 (**prior to the beginning of the school year**), the school system remained ready, willing and able to serve O.M.M. in accordance with his IEP which included placement in the least restrictive environment appropriate for O.M.M.'s needs.

96. The State Hearing Review Officer's decision disregarded the specific provisions applicable to O.M.M.'s status at the beginning of the 2008-09 school year. The provisions in 1501-8.1 of the Policies, entitled "Placement of children by parents if FAPE is at issue," clearly apply. An LEA is not required to pay for the special education and related services of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. This comports with Federal law and regulations on this issue, 20 U.S.C. §1412(a)(10)(C) and 34 C.F.R. §300.148.

97. This provision makes sense, for how can a school system provide FAPE to the child in the parents' placement, when the school system's position is that FAPE requires some

other placement? What is FAPE during this time? Is the school system required to make some alternative FAPE available that necessarily adopts the parents' placement? Would any services have met the school system's obligation during September and October? Is it the State Hearing Review Officer's decision that the school system had an obligation to determine an "alternative FAPE" to that which had been determined by the IEP team, and to deliver services in the parents' desired private school? Without cooperation from the private school, the school system could not fulfill such a duty. Clearly, this was not intended.

98. Since the IEP provided FAPE, and the school system made it abundantly clear that they were willing to implement the IEP as written (including placement), it is the parents' rejection of the IEP as developed (and refusal to send O.M.M. to the school system's placement) that denied O.M.M. a FAPE from the beginning of the school year through October.

99. The decision to dispute the IEP and enroll O.M.M. in a private preschool, while clearly within the parents' authority, abrogated Respondents' duty to implement O.M.M.'s IEP. Parents who make such a decision do so at the risk that "their child's IEP will be found adequate, thus precluding their reimbursement." C.M. v. Board of Public Educ. of Henderson County, 184 F.Supp. 466, 485 (2002).

100. In addition, there would be no basis for reimbursement if the school system was required to provide FAPE in the parents' desired private school placement. Reimbursement is designed to have the school system provide payment for services the parent secured due to a failure to offer a FAPE.

101. Since the State Hearing Review Officer's decision indicates that the procedural errors that allegedly caused a denial of FAPE were those related to the prior written notice, and

not any procedural error related to the consent, Respondent will only briefly address the issue of consent.

102. As of August 25, 2008, a FAPE had been offered and it was clear that the parents would not send O.M.M. to the Pathways playgroup. In fact, on July 30, 2008, the school system was informed that O.M.M. would not be participating in the playgroup.

103. The provision or failure to provide consent under the circumstances was irrelevant.

104. The Policies, at 1503-1(b), govern the school system's responsibility with regard to seeking consent and mandates that, "An LEA that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child."

105. The commentary to the prior written notice regulations clarifies that consent may be sought after the provision of the prior written notice. 71 F.R. 46691.

106. The Policies at 1500-2.5 define consent as the parent agreeing to the "carrying out of the activity for which his or her consent is sought." O.M.M.'s parents clearly did not, even after signing the DEC 6 in October, consent to implementation of the IEP as developed. They consented to the provision of special education services other than as provided in the IEP and in a placement rejected by the IEP team, which the school system was not obligated to provide. Nonetheless, the school system began providing services to O.M.M. in his private placement.

107. Once O.M.M.'s parents enrolled him in a private school where Respondent had no obligation to provide FAPE, the only remaining issue was a decision on whether the IEP had offered FAPE (and if not, were Petitioners' entitled to reimbursement).

108. If the parents would have provided consent by signing the DEC 6 on July 30, 2008, and then enrolled O.M.M. in private school for the 2008-09 school year, the obligation of the school system on August 25, 2008 would have been no different. Once he was enrolled in private school, consent was not necessary because no IEP services were required to be provided in the private placement.

109. Obtaining the consent (DEC 6) in October did not create an obligation for the school system to implement O.M.M.'s IEP in the parents' unilateral placement. Even after receiving this consent, the school system had no obligation to provide O.M.M. services at Our Playhouse. If Respondent wished to provide O.M.M. with any special education services, however, it needed consent in advance. The school system made an administrative decision to begin providing O.M.M. services at the unilateral placement and so sought consent before beginning there services. Unfortunately, by agreeing to provide services, Respondent appears to have unwittingly subjected itself to the allegation that it should have provided services earlier (without any cite to a legal requirement to implement the disputed IEP of a student unilaterally enrolled in private school).

110. When a school system has an obligation to provide a student with a FAPE, consent must be sought before the provision of services begins. In this case, as O.M.M.'s parents clearly had elected to enroll him in private school as of July 30, 2008, (and subsequently did enroll him in private school before the start of the 2008-09 school year), so Respondent had no obligation to provide O.M.M.'s IEP services. Where no services are required to be provided, consent for services is unnecessary, or at the very least, failure to seek consent is of no significance.

Conclusion

111. The Conclusions of Law in ¶9 of the State Hearing Review Officers' Decision are, with all due respect, erroneous in that they are contrary to law and inconsistent with the evidence.

112. There were no procedural errors with regard to the prior written notice. The obligation for providing prior written notice is the LEA's, and not the IEP team's. There is also no requirement that the prior written notice be provided at the IEP meeting.

113. Errors should be clear and substantial if they are determined to deny a FAPE. Even if there were procedural errors associated with the prior written notice, which it appears clear there were not, that these errors arose to the level of denying O.M.M. educational benefit is unsupported by evidence. There was no testimony that this was the case, the development and provision of the prior written notice is not of the subject of pretrial documentation drafted by the Petitioner, and the scant testimony Petitioner offered on the issue did not allege that the prior written notice was legally insufficient or actually interfered with a FAPE in any way. The Petitioners were provided with the IEP and meeting minutes at the July 30, 2008, IEP meeting. In addition, the Petitioners clearly demonstrated that they knew in July 30, 2008, what the prior written notice would state.

114. Respondent had an obligation to make a FAPE available to O.M.M. and it did through a properly developed IEP which the school system was prepared to implement on the first day of the 2008-09 school year. O.M.M.'s parents disputed the appropriateness of the IEP and elected to send O.M.M. to a private school placement. Respondent was not required to provide a FAPE in this environment, and could not have provided FAPE as the environment was not appropriate for O.M.M.'s needs. A parent who disputes FAPE and enrolls their child in

a private school is not entitled to have the IEP implemented. This was clearly O.M.M.'s status when the 2008-09 school year began.

115. O.M.M.'s parents' had the right to enroll O.M.M. in private school, provide what they believed to be a FAPE, and seek reimbursement.

116. In fact, there was no obligation to provide services consistent with O.M.M.'s IEP beginning in October, but the school system made an administrative decision to do so.

117. The provision or failure to seek consent had no bearing once O.M.M.'s parents decided to enroll him in a private preschool (which they had decided to do on or before the date the IEP was completed).

118. Neither the alleged procedural violations with regard to the prior written notice nor the consent prevented O.M.M. from receiving a FAPE at any point during the 2008-09 school year. As Ms. Grenard indicated on August 22, 2008, the school system was ready, willing and able to serve O.M.M. consistent with his IEP on August 25, 2008. Had O.M.M.'s parents not clearly stated that O.M.M. would be attending a private placement, and had they not enrolled O.M.M. in a private preschool, they would have been provided with the paperwork necessary to begin O.M.M.'s services at Pathways Elementary School (including the consent for services) and O.M.M. would have begun receiving appropriate services in an appropriate placement provided, free of charge to Petitioners, on August 25, 2008.

119. Once enrolled in the private preschool, Petitioners' remedy is reimbursement (if they prove the IEP did not provide FAPE but the parent placement was appropriate).

120. Reimbursement is designed to have the school system provide payment for services it should have been providing all along. The State Hearing Review Officer's decision was that the services and placement offered to O.M.M. in his IEP were appropriate. There is no

authority for a requirement that Respondent alter an appropriate IEP by providing services in a placement deemed inappropriate by the IEP team. To do so would be to require that, when parents unilaterally place their child in private school and challenge FAPE, the child receives the parents' FAPE and some modified version of the school system's offered FAPE. This is clearly contrary to State and Federal Law.

WHEREFORE, Respondent respectfully moves the State Review Hearing Officer:

1. Amend his decision to indicate that there were no procedural violations committed by Respondent with regard to the provision of the prior written notice in this case; and,

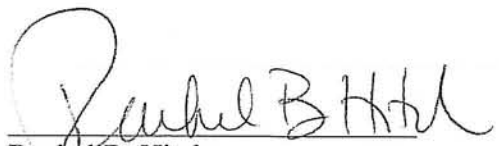
2. Amend his decision to clarify that, there was no procedural violation with regard to Respondent seeking consent; or,

3. In the alternative, amend his decision to indicate that, to the extent that there was any procedural violation with regard to prior written notice or consent, the procedural violations did not deny O.M.M. a FAPE or his parents their right to participate in O.M.M.'s special education; and,

4. Amend his decision to deny Petitioners any reimbursement.

This the 31st day of August, 2009.

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

BY: 

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STATE OF NORTH CAROLINA COUNTY OF ORANGE	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 08 EDC 2969
O.M.M., by parent or guardian N.M. and A.M. Petitioners, v. Orange County Board of Education, Respondent.	**CERTIFICATE OF SERVICE**

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

Joe D. Walters
State Hearing Review Officer
150 Blink Bonny Drive
Waynesville, NC 28786
jdwalters@bellsouth.net

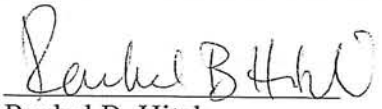
Robert C. Ekstrand
Ekstrand & Ekstrand, L.L.P.
811 Ninth Street, Suite 260
Durham, NC 27705
rce@ninthstreetlaw.com

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 facsimile to:

Lynn Smith
Consultant for Due Process and Parents' Rights
N.C. Dept. of Public Instruction
Facsimile Number: (919) 807-3243

This the 31st day of August, 2009.

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

By: 

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