NORTH CAROLINA
ORANGE COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

OM (by his parents, NM and AM),
NM, and AM,
Petitioners,

v.

Orange County Board of
Education,
Respondent.

No. 08—EDC—2969

PETITIONERS' MOTION TO QUASH RESPONDENT'S UNAUTHORIZED "MOTION TO AMEND DECISION"

PETITIONERS OBJECT TO AND MOVE TO QUASH the Board's "Motion to Amend Decision" on the grounds that no such motion exists: the Motion is not authorized by the governing rules, it is precluded by the IDEA's procedural safeguards, and, as a practical matter, it is transparently another appeal dressed up as a "Motion." Furthermore, Petitioners have had no opportunity to be heard on the merits of the "Motion," and, should the SRO decide to entertain the "Motion," the SRO must establish a briefing schedule to afford Petitioners a right to respond and to brief the many errors of fact and law that Petitioners expect to litigate in the proper forum for those arguments: the federal court.

(A) NO AUTHORITY AUTHORIZES THE BOARD'S MOTION

The authority the Board relies on to assert its motion is "N.C.G.S. §1A-1." That is a reference to the entirety of the North Carolina Rules of Civil Procedure. The uncited quotation appears to come from Rule 59, a rule governing modification of "judgments" after "entry of judgment" by a trial court after "verdicts." Petitioners have attached the text of Rule 59—in its entirety—as an appendix. The rule plainly authorizes a "trial court" to amend a "judgment" after "entry of judgment." The "entry of judgment" is a term of art that is carefully defined by the

rules. This is explained in the Rules' commentary. The rule has no applicability here. The decision of an SRO in what the IDEA calls an "Appeal" is not the judgment of a trial court or its functional equivalent. Indeed, to the extent that such a motion was ever available to the Board, it could only be properly directed to the *trial* judge or the functional equivalent of a trial judge (i.e., Judge Lassiter. Notably, the Board never filed any such motion seeking Judge Lassiter's "reconsideration."

(B) THE BOARD'S "MOTION" IS MERELY AN APPEAL DRESSED UP AS A "MOTION TO AMEND" AND, AS SUCH, THE PROPER VEHICLE FOR THE "MOTION" IS A COMPLAINT IN THE FEDERAL COURT.

The proper venue for Respondent's 24-page "Motion" is the federal court, and the proper vehicle is a "complaint." It is clear from the Board's "Motion that the Board is "aggrieved" by the SRO's agreement with Judge Lassiter's correct conclusions that (1) the Board deprived Petitioners of a FAPE, (2) Petitioners' private placement was appropriate, and (3) Petitioners were therefore entitled to reimbursement under the IDEA. As explained below, the fact that the Board is "aggrieved" does not give the Board a right to file a second administrative appeal dressed up "Motion to Amend." Instead, the Board has a right to file a complaint in the federal courts.

The recourse available under the IDEA for "aggrieved parties" is a complaint in federal court. 20 USCS § 1415(i). Specifically, the IDEA provides that "any party aggrieved by the findings and decision made [in the State Agency Review] shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, ..." 20 USCS § 1415(i)(2)(A). Moreover, the time for filing a complaint will expire soon. The right to bring suit in federal court expires "90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows." 20 USCS § 1415(i)(2)(B).

The IDEA provides a very narrow window of time within which the SRO review must be concluded. That window has closed, and the IDEA does not provide a means of enlarging it. Given the narrow window, the Board's "Motion" must be quashed simply for insufficient time to afford Petitioners' a fair opportunity to respond and to be heard on their own requests "to amend." Furthermore, allowing the unauthorized "Motion" would lead to an absurd result: it would provide Respondent with an opportunity to rehash the same argument for the third time in the administrative phase of the litigation, after failing to succeed with it twice

before. Then, the Respondent would have a fourth opportunity to rehash the same argument in the district court, a fifth opportunity in the Fourth Circuit, and, perhaps, even a sixth opportunity before the Supreme Court, which (as explained further, *infra*), just rejected much the same theory.

Thus, one *reason* why no authority exists for Respondent's "Motion"is that Respondent has had ample opportunities to make its argument for the "amendements" it seeks, and the Board will have many more opportunities in the future. The Board knows it will have this opportunity because Petitioners have advised the Board's counsel (several days before the Board filed its "Motion") that Petitioners would be required to initiate proceedings in the federal court to seek attorneys' fees and to correct the SRO's legal and factual errors in reducing Judge Lassiter's reimbursement award by roughly 90%.

Petitioners, too, are "aggrieved" by the SRO's decision (albeit to a lesser degree than the Board). For example, among other errors, the SRO reduced Petitioners' reimbursement award in reliance upon the same theory that the United States Supreme Court flatly rejected two months prior to the SRO's decision. For example, in *Forest Grove v. T.A.,* the Court held, among other things, that the parent's failure to give any notice at all prior to the private enrollment did not preclude reimbursement. There are other errors in the reimbursement calculation, but the venue for litigating those errors and others Petitioners will assert is the federal district court, after filing a complaint. After making the same arguments twice, and having failed both times, the Board has no right to re-argue them in this venue.

(C) IF THE SRO DECIDES TO ENTERTAIN THE "MOTION", THE SRO MUST ALSO AFFORD PETITIONERS AN EQUAL OPPORTUNITY TO BE HEARD

In the alternative, should the SRO decide to consider the Board's "Motion," the IDEA requires the SRO to afford Petitioners an equal and fair opportunity to respond to the Board's arguments and also to present the many errors of fact and law Petitioners have identified in the SRO's order. The IDEA's procedural safeguards guarantees Petitioners an equal and fair opportunity to be heard in any proceeding that would alter the final decision of both the ALJ and the SRO. In this instance, the Board did not consult with Petitioners about its interest in filing a "Motion to Amend the Decision" (or anything of the sort). Indeed, just days prior to this filing, Petitioners' counsel contacted the Board's counsel to discuss a resolution of the matter, and the Board's counsel did not mention any intention to file its motion. In light of that, any fair opportunity to address the motion would

require additional time to carefully review the motion, identify the errors of law, identify the misstatements of fact, and argue the merits.

(D) ONE EXAMPLE OF THE FACTUAL AND LEGAL ERRORS IN THE SRO'S DECISION THAT ARE PROPERLY ADDRESSED BY PETITIONERS IN THE FEDERAL COURT

The Petitioners will assert the many errors of law and fact in the SRO's decision in the venue the IDEA provides: a complaint filed in federal court. To illustrate the point, take just one example: the SRO's rationale for gutting Petitioners' reimbursement by roughly 90% is wrong on the facts and wrong on the law.

On the facts, the SRO asserts two, mutually exclusive findings. First, the SRO correctly asserts:

> *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 requested services and/or information were being refused: (a)* ***A full-time preschool placement at Respondent's expense****... .*

SRO Decision, ¶55. This finding properly adopts the ALJ's finding which relies upon, quotes from, and cites to the audio recording of the IEP meeting in which the statement was plainly made. Because the finding was taken straight from the audio recording and the testimony at the hearing, the finding could not be disturbed by the SRO.

However, ten paragraphs later, the SRO contradicts himself to justify a 90% reduction in Judge Lassiter's reimbursement award:

> *There is, however, no evidence that the Petitioners gave the required notice during this meeting. NM did make statements regarding rejecting the Respondent's proposed placement and some references with regard to her placing OMM in a private preschool. NM, at no point, made a statement that that was even close to expressing "their intent to enroll their child in a private school at public expense." Quoting 34 CFR § 300.148(d)(1)(i)*

SRO Decision, ¶66. The SRO's finding is contradicted by the audio recording of the meeting and his own finding. Moreover, this is one of many "new findings" that the SRO made without any citation or reference to evidence in the record. The absence of references to the record is not trivial: it is explicitly required by the North

Carolina statutes any time an agency review officer makes a "new finding" made. As a result, the SRO's unsupported new findings (*i.e.*, all of them) are a nullity. N.C. Gen. Stat. § 150B-36; *Mission Hosps., Inc. v. N.C. HHS,* 189 N.C. App. 263, 275 (2008).

Continuing with the same example, Petitioners will show that the SRO is also wrong on the law governing the parents' notice of their intent to enroll OM in a private school. *Forest Grove* explicitly held reimbursement in cases where the child has not received services prior to private enrollment does not depend upon compliance with the provisions notice requirement at all. In *Forest Grove*, ***the parents did not provide any notice to the school prior to enrollment, but instead notified the school four days after they enrolled T.A. in private school*** :

> *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. A few weeks later, in April 2003, respondent's parents requested an administrative due process hearing ...*

Forest Grove, Slip Op. at 3 (attached as Exhibit A to Petitioner's Written Argument) (http://www.supremecourtus.gov/opinions/08pdf/08-305.pdf). The Court held that T.A.'s failure to receive services or give notice (at all) prior to the private enrollment did not bar his right to reimbursement under the equitable principles long ago established by the Supreme Court. In so holding, the Court expressly rejected the same analysis employed by the Board and adopted by the SRO. By contrast, Judge Lassiter correctly applied the rule as explained by the Court (remarkably, unlike the SRO, Judge Lassiter applied the correct rule without the benefit of the Court's explanation in *Forest Grove,* which was handed down three days after her final decision was due).

This particular error in the SRO's decision is also notable because (while the Board pressed the argument before Forest Grove was decided), the Board abandoned the argument once the Court rejected it in *Forest Grove*. (The Board turned instead to unsupported, *ad hominem* attacks to argue for a reduction in reimbursement by suggesting prejudicial delays (without identifying any particular prejudice)).

The point Petitioners are making is straightforward: Petitioners will file a Complaint in federal court (imminently) to cure the errors of fact and law that support the SRO's reduction in reimbursement by roughly 90%. The Board is free

to make the same arguments contained in its "Motion" to the district court. That is the forum and vehicle that the IDEA identifies for the Board's obvious purpose in filing its "Motion."

Again, Petitioners emphasize that this is but one example of the errors of fact and law in the SRO decision that Petitioners expect to litigate upon a complaint filed in federal court. Further, nothing in this Objection and Motion to Quash should be construed to suggest that Petitioners will refrain from filing the Complaint in federal court, particularly since the time for doing so will soon expire. At that time, the IDEA will operate to deprive the SRO decision of its status as a "final" decision, and the district court will review Judge Lassiter's findings of fact, and make its conclusions of law *de novo*.

WHEREFORE, in light of the foregoing, Petitioners respectfully request that the SRO:

1. Quash the Board's Motion and instruct the Board to direct its appeal to the proper tribunal: the federal court;

2. Order that the costs of responding to the Board's motion, including attorneys' fees, be taxed against the Board, as it was unauthorized by the rules, and made without notice and without an order granting leave to do so;

3. In the alternative, in the event that the SRO intends to amend the decision, establish a briefing schedule that would allow Petitioners to present their counterarguments to the Board's assertions, to present Petitioners' "requests to amend" the SRO decision, and ensure that the Petitioners' right to file a complaint (which expires on or about September 18,2009, does not lapse in the process (assuming without knowing that the SRO has the power to make any such assurances).

Dated: August 11, 2009 Respectfully submitted by:

/s/ Robert C. Ekstrand

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