UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA

O.M., by and through his parents, NICOLE McWHIRTER and ARRAN McWHIRTER, NICOLE McWHIRTER, and ARRAN McWHIRTER, *Plaintiffs*, v. ORANGE COUNTY (N.C.) BOARD OF EDUCATION, *Defendant*.	No. 1:09-CV-692

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

PLAINTIFFS respectfully file this First Amended Complaint as a matter of course within 21 days after Defendant served Plaintiffs with Defendant's pleading in response to Plaintiffs' Complaint, pursuant to Fed. R. Civ. P. Rule 15(a)(1)(B) (as amended, effective December 1, 2009).[1]

[1] Plaintiffs file this 'responsive amendment' pursuant to Fed. R. Civ. P. Rule 15(a)(1)(B), as amended, for the same purposes identified by the Advisory Committee. See, id., Notes of the Advisory Committee ("A responsive amendment may … reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim.") Should the Court deem the amended Rule inapplicable to the pleadings in this action, Plaintiffs respectfully request that the Court treat this pleading as a Motion for Leave to Amend the Pleadings pursuant to Rule 15(a)(2). Undersigned counsel has conferred with opposing counsel regarding such Defendant's position on such a motion, and opposing counsel has advised that Defendant would not consent.

THE PARTIES

1. PLAINTIFF, O.M., is a four year old boy with autism who made extraordinary progress in a private educational program established by his parents Nicole McWhirter and Arran McWhirter, after Defendant failed to offer O.M. "a free appropriate public education." 34 CFR §300.8. O.M. is now enrolled in a mainstream classroom in the public schools, and has been successful in that placement with the aid of supplemental services and supports. In the proceedings below, Defendant stipulated that O.M. is 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, O.M. resided with his parents in the Defendant's territorial jurisdiction, Orange County Board of Education.

2. PLAINTIFFS, NICOLE McWHIRTER AND ARRAN McWHIRTER ("N.M." and "A.M."), are O.M.'s mother and father, respectively. At all times relevant to this action, N.M. and A.M. 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 ("LEA") 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. Under North Carolina state law, Local Educational Agencies are not responsible for conducting the due process hearings

required by 20 U.S.C. § 1415, and Defendant was not responsible for conducting the due process hearing that initiated this action.

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). Subject matter 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 ARE THE PREVAILING PARTIES IN EACH OF THE THREE ADMINISTRATIVE PROCEEDINGS BELOW.

A. PLAINTIFFS PREVAILED AT THE DUE PROCESS HEARING ("O.M. I").

5. On December 1, 2008, O.M.'s parents, N.M. and A.M., 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 O.M. "has been denied a free appropriate public education," that, as a result, Plaintiffs enrolled O.M. in an appropriate private placement and paid for private specialized instruction and related services to be delivered to O.M. in his private placement. Plaintiffs sought all appropriate relief available to them 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 O.M.'s parents incurred in order to provide O.M. an appropriate education for the 2008-09 school year.

7. In the Final Pre-Trial Order, Plaintiffs contended that the Board deprived O.M. of a free appropriate public education for the 2008-09 school year, and asserted four independent and adequate factual bases to prove their contention. Further, Plaintiffs alleged that O.M.'s private educational placement and services were appropriate.

8. The Hearing Officer, the Honorable Melissa Owens Lassiter (the "ALJ"), presided over eight days of live 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 and carefully examined by the ALJ.

9. After both parties rested their case, the ALJ afforded counsel for both parties an opportunity to submit written arguments without any page limitations and proposed orders.

10. On June 18, 2009, the ALJ 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. The ALJ's findings of fact were "regularly made" and were based upon overwhelming evidence in the record to which the ALJ cited at length in the Final Decision.

12. Based on those findings, the ALJ concluded that Plaintiffs carried their burden of proving that Defendant deprived Plaintiffs of a free appropriate public education (in four ways), and that the private educational placement and the specialized instruction and related services provided there were appropriate.

13. As a matter of law, each one of the ALJ's four bases for finding that the Defendant deprived Plaintiffs of a FAPE was sufficient to meet Plaintiffs' burden of proof on the issue.

14. In the Final Decision, the ALJ concluded that Plaintiffs "proved by a preponderance of the evidence that [the Board] failed to provide O.M. a free, appropriate public education ("FAPE") in the least restrictive environment ("LRE") as required by 20 USCA § 1412(a)(5)(A)." Defendant violated the IDEA's Least Restrictive Environment mandate because, for example:

a. O.M.'s IEP Team's proposed placement was a highly restrictive (if not the most restrictive) placement in a self-contained playgroup that would enroll only two to three disabled children, all of whom had speech-language impairments.

b. Based on the information available to the IEP Team at the time it proposed O.M.'s IEP, the Board's proposed placement was not the Least Restrictive Environment. There were less restrictive placements on the continuum than a self-contained playgroup of two to three disabled children in which O.M. could be satisfactorily educated, particularly with the use of supplementary aids and services.

c. The Board's IEP Team members refused to consider enrolling O.M. in any of the County's pre-school programs, including some within the same elementary school that housed the playgroup. In the IEP Meetings, the Board's Team members repeatedly asserted that the County was not permitted by law to enroll O.M. in any of them. However, at the hearing, the Board's witnesses were sequestered and the LEA Representative

conceded that nothing barred the County from integrating O.M. into those those classrooms or programs, including the County's "More at Four," "Head Start," "Title I" classrooms, and Developmental Day Centers.

d. The Board's IEP Team members failed or refused to apply the Least Restrictive Environment continuum prescribed by the IDEA.

e. In testimony, the Board's IEP Team members explained that their proposed placement at or near the most restrictive node on the LRE continuum was really the least restrictive environment, because, for pre-school children, homebound instruction is the least restrictive environment. In doing so, the Board's IEP Team members described a wholly novel LRE continuum, one that is completely at odds with the LRE continuum identified by the IDEA. In the Board's LRE continuum, homebound instruction was the "Least Restrictive Environment" on the LRE continuum for pre-school children because there is no compulsory school attendance for pre-school students in North Carolina. But, as this Court has forcefully explained, neither the IEP Team nor the SRO has the authority to reject the LRE continuum established by the IDEA and its regulations. See, Whittenberg v. Winston-Salem Forsyth Co. Bd. of Educ., No. 1:05CV818, Slip-op. at 54-55 (M.D.N.C., Nov. 18, 2008). And when pressed, neither the Board's witnesses nor its counsel could identify a rule authorizing the County to turn the LRE mandate inside out and then stand the LRE continuum on its head. Nor could they; no such authority exists. See id.

f. The LRE continuum identified by the Board's witnesses when explaining O.M.'s placement is a plain violation of the IDEA's LRE mandate, just as this Court held the same theory to violate the LRE requirement in Whittenberg v. Winston-Salem Forsyth County Board of Education, 1:05CV818 (M.D.N.C., Nov. 18, 2008) (Slip Op. at 54-55). Plaintiffs established that, as this Court held in Whittenberg, "[t]he LRE does not distinguish between preschool-aged children and school-aged children." Id. at 55, *see also, id.* at 55 n. 26 (noting that neither the Board nor the parents disputed the proposition that neither the ALJ, SRO, nor the Court "ha[s] the authority to establish an LRE continuum that [is] contrary to the continuum created by federal statute and regulation."

15. Next, Plaintiffs proved by a preponderance of the evidence that [Defendant] procedurally and substantively failed to provide O.M. a free, appropriate public education by failing to provide N.M. and A.M. with an opportunity to give consent for the delivery of services to O.M.. As a result, Defendant deprived O.M. of all of the educational services that O.M.'s IEP prescribed, until October 28, 2008, more than two months after the school year began;

16. Next, the ALJ concluded that Plaintiffs proved that by a preponderance of the evidence that the Board failed to provide O.M. 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 O.M.'s IEP Team." This conclusion was grounded in the specific goals and objectives that O.M.'s IEP Team agreed upon, which required O.M. to become proficient in making transitions with a class, to engage in appropriate exchanges with typical peers, and to integrate in the classroom routine. These were O.M.'s specific, individualized needs as agreed

upon by O.M.'s IEP Team. However, the Board's Team Members—all of them—uniformly asserted that O.M. needed only two, 90-minute sessions per week in a self-contained "playgroup" that would enroll only two other children, both of whom were identified as having speech-language disabilities. During the IEP Meeting devoted to the issue of the placement and services that would meet O.M.'s identified needs, the Board's IEP Team members could not explain the rationale for their uniform decision on the amount of services and the placement the Board would offer in O.M.'s IEP. In the due process hearing, the IEP Team members (again, uniformly) asserted that O.M. was bright and did not require a great deal of support. That rationale was contradicted by the difficulties that O.M. experienced in his prior regular education classroom in Argentina (which had no supports, specialized instruction, or special educators at all). The Board's Team members' rationale also plainly contradicted their uniform conclusion that O.M. could not be satisfactorily educated in a less restrictive environment than a self-contained classroom with two other disabled children at or near the most restrictive node on the LRE continuum, even with specialized instruction and support.

17. The ALJ concluded that Plaintiffs established by a preponderance of the evidence that the IEP Team did not make the decision to offer O.M. the placement and services it proposed to meet O.M.'s goals and objectives. Instead, the ALJ concluded that an outsider to the IEP Team made the placement and services decision with respect to O.M.'s IEP. Further, the ALJ found that this procedural violation was "neither trivial nor inconsequential" and, as a direct result of that improper delegation of authority outside of the IEP Team, the Board deprived NM and AM of their right to participate meaningfully in the decision-making process with respect to O.M.'s IEP placement and services, which constitutes another substantive violation of the IDEA.

18. In addition, the ALJ concluded that, based upon the collection of the foregoing findings, among other things, Plaintiffs also demonstrated by a preponderance of the evidence that the Board deprived O.M. of a FAPE by failing to offer an IEP that was reasonably calculated to meet the specific educational needs O.M's IEP Team itself identified in the goals and objectives established in O.M.'s IEP.

19. With respect to the second issue (i.e., whether O.M.'s private placement was appropriate), the ALJ concluded that "[Plaintiffs] proved by a preponderance of the evidence that [Plaintiffs'] private educational placement was appropriate." Moreover, the ALJ found that the Board "did not offer substantial evidence to rebut Plaintiffs evidence that [Plaintiffs'] private placement was not appropriate under the standards established the Fourth Circuit."

20. Because Plaintiffs carried their burden proving of that the Board deprived O.M. of a FAPE and that Plaintiffs' private placement was appropriate, the ALJ determined that Plaintiffs "are entitled to reimbursement for costs and expenses."

21. Plaintiffs offered testimony and documentation establishing their reasonable and necessary expenses incurred in providing O.M. with the private placement. The actual costs the Board was ordered to reimburse were established through documentary and testimonial evidence presented by Plaintiffs. The ALJ properly excluded reimbursement of the costs of consultants' services in preparation for or attendance at the 2008 IEP meetings.

22. The Board offered no evidence tending to show that the Plaintiffs' expenses were unreasonable or unnecessary, and the ALJ concluded that a preponderance of the evidence showed that "[Plaintiffs'] expenses were reasonable and necessary to provide O.M. with an appropriate private educational placement.

23. After concluding Plaintiffs met their burden of proof, based upon the Findings of Fact and Conclusions of Law, the ALJ awarded Plaintiffs appropriate relief available under the IDEA, including compensation for the private tuition costs of their private placement; reimbursement of the costs for private special education services provided by and through New Hope ASD Consulting from July 31, 2008 until October 28, 2008; compensation for private special education services by and through New Hope ASD Consulting for four hours per week from October 28, 2008 until the end of Respondent's 2008-2009 school year; reimbursement for the costs of private speech and language and occupational therapy services for the entire 2008-2009 school year beginning on August 25, 2008; and any additional, equitable remedies tailored to address the specific deprivations that were established by the evidence in this case."

24. Plaintiffs obtained substantially all of the relief sought in their petition, and, moreover, met their burden of proving the Board deprived O.M. of a FAPE on multiple independently adequate grounds.

25. Therefore, Plaintiffs were the "prevailing parties" at the due process hearing, as that phrase is defined by the IDEA, 20 USC § 1415(i)(3)(B)(i)(I).

B. PLAINTIFFS WERE THE PREVAILING PARTIES IN DEFENDANT'S FIRST APPEAL TO THE SEA'S REVIEW OFFICER ("O.M. II")

26. The Board filed a "Notice of Appeal" to the State Educational Agency (SEA). Specifically the Board sought the SEA's review of the ALJ's Final Decision in the due process hearing conducted by the SEA. (Plaintiffs will refer to this proceeding as "O.M. II").

27. As explained, infra, the IDEA does not authorize an appeal to the State Educational Agency where the State Educational Agency is made responsible under state law for administering the due process hearing.

28. Under the IDEA the Board, as a party "aggrieved" by the ALJ's decision, was required to file a complaint directly with this Court (or in state court).

29. In violation of the IDEA's procedural requirements, the Board filed an unauthorized Notice of Appeal to the SEA's Review Officer from the decision of the SEA's due process hearing.

30. In its unauthorized "Notice of Appeal" to the SEA, the Board did not note any specific exceptions to the ALJ's decision in its Notice of Appeal to the SEA.

31. In response to the Board's unauthorized Notice of Appeal to the SEA's Review Officer, the SEA's Review Officer improperly assumed jurisdiction over the case in violation of the IDEA.

32. In violation of the IDEA, the SEA's Review Officer directed the parties to submit written arguments to him simultaneously with one another and demanded that the record of the due process hearing be submitted for his review and decision.

33. All of the SEA's Review Officer's acts in assuming and exercising jurisdiction over this matter were done in violation of the IDEA.

34. Nevertheless, in his "Decision" issued on August 19, 2008, the SEA's Review Officer affirmed the ALJ's findings and conclusions on the merits. Among other things, the SEA's Review Officer concluded that the Board deprived O.M. of a Free Appropriate Public Education, and that that Plaintiffs proved "that the [Board] did not offer O.M. a FAPE." Like the ALJ, the SRO also concluded that Plaintiffs established that the Board deprived O.M. of a FAPE on "on several issues before the Review Officer." The SRO identified additional procedural failures that caused a deprivation of educational opportunities and/or Nicole and Aaron's rights to participate meaningfully in the development of O.M.'s IEP.

35. The SEA's Review Officer also concluded that O.M.'s private placement was appropriate: "there is no question about the appropriateness of the parents' placement at Our Playhouse Preschool."

36. The SEA's Review Officer concluded that Plaintiffs were entitled to appropriate relief under the IDEA.

37. Therefore, Plaintiffs were the "prevailing parties," as that phrase is defined by the IDEA, 20 USC § 1415(i)(3)(B)(i)(I), in O.M. II, the first unauthorized proceedings brought by the Board before the SEA's Review Officer

C. PLAINTIFFS WERE THE PREVAILING PARTIES IN THE BOARD'S SECOND UNAUTHORIZED APPEAL TO THE SEA'S REVIEW OFFICER ("O.M. III")

38. After failing to overturn the ALJ's decision in its first unauthorized appeal to the SEA's Review Officer, the Board filed a second unauthorized appeal to the SEA, and submitted a full briefing (also unauthorized) in support of its second appeal to the SEA.

39. The SEA's Review Officer rejected the Boards second appeal, directing the Board (correctly) to file a complaint with this Court or a state court of competent jurisdiction.

40. Therefore, Plaintiffs were the "prevailing parties," as that phrase is defined by the IDEA, 20 USC § 1415(i)(3)(B)(i)(I), in O.M. III, the second unauthorized appeal brought by the Board before the SEA's Review Officer.

D. PLAINTIFFS ARE "AGGRIEVED" BY THE REVIEW OFFICER'S UNAUTHORIZED REDUCTION OF THE ALJ'S REIMBURSEMENT AWARD.

41. While Plaintiffs were the "prevailing parties" in all three of the administrative proceedings below, Plaintiffs are nevertheless "aggrieved" by having to incur the burden and

expense of defending their award in two unauthorized appeals to the SEA's Review Officer, and by the SEA's Review Officer's reduction of Plaintiffs' reimbursement award.

42. The SRO reduced Plaintiffs' reimbursement award based upon demonstrably incorrect application of the governing law and a factual finding the SRO's own prior findings directly contradict. Specifically, the SRO concluded that Plaintiffs failed to notify the Defendant of their intent to enroll O.M. in a private school. However, that conclusion is belied by another of the SRO's factual findings (and a nearly identical finding made by the ALJ), in which both found that Plaintiffs notified the Board of their intent to enroll O.M. privately at public expense.

43. In fact, while Plaintiffs were not required to comply with the notice requirements relied upon by the SRO, the Plaintiffs nevertheless complied. Most, if not all of the required content of the notice is preserved on an audio recording of the IEP Meeting in which it was given, which the ALJ duly admitted into evidence.

44. Moreover, the record is abundantly clear that, when Plaintiffs declared their intent to enroll O.M. privately during the July 30th IEP Meeting, Plaintiffs also explained—at length—the reasons why they intended to do so.

45. Plaintiffs also repeatedly offered to reconsider the Board's proposed placement and services if anyone among the Board's IEP Team members could explain to Plaintiffs they had arrived at the conclusion that O.M. would be able to make progress towards his IEP Goals and Objectives within two 90-minute playgroup sessions per week while placed in a self-contained class whose enrollment would include only two other children with speech-language disabilities and no typically developing peers.

46. Plaintiffs later learned that the "playgroup" was disbanded early on in the academic year.

47. As required by the notice rules applicable to students who have (unlike O.M.) received services from the LEA in the past, Plaintiffs expressly advised Defendant of their intent to enroll O.M. in a private school at public expense.

48. The SEA's Review Officer, however, incorrectly concluded that the IDEA imposed upon Plaintiffs an inflexible requirement that Plaintiffs' notify the LEA of their intent to enroll O.M. in a private school "at public expense" (which Plaintiffs did) either (a) 10-days prior to enrolling O.M. in private school or (b) during the last IEP meeting prior to the private enrollment (which Plaintiffs did). Then the SRO concluded, contrary to what is plainly audible in the recording of the July 30 IEP Meeting, that Plaintiffs failed to notify the IEP Team of their intent to enroll O.M. at private expense.

49. On the audiotape, Plaintiffs' consultant can be heard clarifying that Plaintiffs have asked for a private placement at public expense and were seeking an explanation for why that request was denied.

50. Despite that remarkably clear evidence, duly preserved in an audio recording, the SRO dramatically reduced Plaintiffs' reimbursement award on the basis of the SRO's incorrect finding that Plaintiffs failed to meet the IDEA's notice requirement—contrary to the ALJ's well documented findings, contrary to the SRO's own earlier findings, and contrary to direct evidence in the record.

51. Furthermore, Plaintiffs (while still not required to give the notice because they had not received services from the LEA) made certain that the LEA was notified in writing

as soon as Plaintiffs were confident that O.M could be enrolled in the only preschool that had any availability at the late date and under the circumstances.

52. The SRO also applied the incorrect standard to these Plaintiffs when he concluded that Plaintiffs' written notice violated the "10-day rule." The 10-day rule is not an inflexible rule, and, as the Supreme Court had just announced prior to the SRO's decision, it did not apply to students who had not received services from the public schools.

53. The SRO incorrectly concluded that O.M. was enrolled in a private school prior to the Plaintiffs' written notice, but the SRO failed to account for the fact—plainly in the record—that O.M. was not enrolled in his private placement until after he demonstrated success during "trial period" with that school. Plaintiffs and the school could be certain that the placement would be appropriate for O.M. with only the educational supports and services the Plaintiffs could privately fund.

54. And because the rule requiring notice does not apply to students who, like O.M., were not receiving special education services from the school district prior to a private enrollment, the SRO's unauthorized decision dramatically reduced the ALJ's reimbursement award based upon a theory that the Supreme Court squarely rejected little more than a month prior to the SRO's decision. See, Forest Grove Sch.Dist. v. T.A., 129 S.Ct. 2484 (June 22, 2009).

E. PLAINTIFFS ARE AGGRIEVED BY THE BOARD'S TWO UNAUTHORIZED APPEALS TO THE SEA'S REVIEW OFFICER

55. The Board's two appeals to the SEA's Review Officer were filed in violation of the IDEA's mandatory procedural requirements, and the State Review Officer's Decisions upon those appeals were unauthorized by the IDEA and are therefore void as a matter of law.

56. The IDEA authorizes an appeal to a State Educational Agency's (SEA) Review Officer, but only "if the due process hearing is conducted by a Local Educational Agency." Specifically, 20 U.S.C. § 1415(g), provides:

> (g) Appeal.
>
> (1) In general. **If the [due process] hearing required by subsection (f) is conducted by a local educational agency,** any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

20 U.S.C. §1415(g) (emphasis supplied).

57. The IDEA does not authorize an appeal to the State educational agency under any other circumstance.

58. The IDEA requires states to elect whether the State Educational Agency or their Local Educational Agencies will conduct the due process hearing required by the Act.

59. The IDEA provides that states may make their election through promulgation of a state statutes or policies.

60. In North Carolina, the General Assembly has made the legislative decision not to vest LEAs with the authority to conduct the State's due process hearings. That legislative decision is codified in the North Carolina General Statutes and in its educational policies. For example, N.C. Gen. Stat. § 115C-109.6 ("Impartial due process hearings") provides:

> (j) The State Board, through the Exceptional Children Division, and the State Office of Administrative Hearings shall develop and enter into a binding memorandum of understanding to ensure compliance with the statutory and regulatory procedures and timelines applicable under IDEA to due process hearings and to hearing officers' decisions,

> and to ensure the parties' due process rights to a fair and impartial hearing. ….

61. Because North Carolina has elected not to vest its Local Educational Agencies with the responsibility for conducting the due process hearings required by the IDEA, an "aggrieved party" to a due process hearing has no right of appeal to the State Educational Agency. In other words, only states that conduct due process hearings through their LEAs are authorized to establish a "two-tiered" administrative review (the second tier being a review conducted by the State Educational Agency's Review Officer).

62. North Carolina was free to determine whether its State educational agency or its local educational agencies would be responsible for conducting the "impartial due process hearings required by the IDEA. North Carolina chose to bestow that authority in its State Educational Agency (the State Board). The State Board, in turn, is responsible for conducting the due process hearings through a memorandum of agreement with the North Carolina Office of Administrative Hearings.

63. As a result, pursuant to basic principles of statutory construction, including, for example, the canon *expressio unius est exclusio alterius*, North Carolina's election to conduct due process hearings through its State Educational Agency forecloses the availability of a second state-level review conducted by a Review Officer designated by the State Educational Agency.

64. In North Carolina, like every other state that elects to conduct due process hearings through its SEAs, the aggrieved parties to due process hearings brought under the IDEA must simply take their grievances to the federal or state courts. The IDEA simply does not grant State Educational Agencies the right to conduct process hearings and a redundant right to review and adjust their results.

65. Therefore, the Board's two appeals to the SEA were precluded by the IDEA's procedural safeguards. Further, the Review Officer's "Decisions" were ultra vires and unlawful. They are void, as a matter of law, and should be given no weight by this Court.

FIRST CAUSE OF ACTION

ATTORNEY'S FEES AND COSTS PURSUANT TO 20 U.S.C. §1415(I)(3)

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

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

68. 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).

69. 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).

70. 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.

71. 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 Defendant's 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 O.M.'s private placement was appropriate.

72. The costs of litigating the proceedings designated, supra, as O.M. I, O.M. II, O.M. III, and in this proceeding (O.M. IV) include attorney's fees and professional services provided to the Plaintiffs by Plaintiffs' legal counsel and professionals who contributed to the work product required to meet their burdens of proof and defend their award on appeal and in these proceedings.

73. Plaintiffs' attorneys' fees in this matter were unnecessarily compounded by Defendant's protraction of the litigation. After Plaintiffs' prevailed at the due process hearing, the Board filed two, separate unauthorized appeals to the State Educational Agency, both in the absence of any authority under the IDEA.

74. Specifically, after the Board lost its first unauthorized appeal to the SEA, the Board then filed an unauthorized "Motion to Amend" the Agency's review decision. The Board's "Motion to Amend" was simply another fully briefed appeal dressed up as a "Motion." 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."

75. This cause of action will also include a petition for additional costs–including attorneys' fees–incurred in litigating this action in this Court (O.M. IV).

SECOND CAUSE OF ACTION

FULL REIMBURSEMENT OF EDUCATIONAL COSTS

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

77. 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.

78. As a factual matter, Plaintiffs did notify Defendant of their intent to enroll O.M. in private school at public expense. Plaintiffs notified the Defendant at the last IEP Team meeting prior to their enrollment of O.M. 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 O.M.'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 [the Board's] expense... .

(SRO Decision ¶ 55, at 16).

79. Plaintiffs also notified Defendant of their intent to enroll O.M. in a private school through a series of emails, all well before O.M.'s enrollment in a private school, in which N.M. sought information on how services could be delivered in a private school setting. As the ALJ clearly found, the Board's Director of E.C. Services directed the IEP Team's LEA Representative to deliberately ignore all of Plaintiffs' emails and inquiries, which consisted of Plaintiffs requests for information about provision of the services prescribed in O.M.'s to O.M.

80. As a matter of law, the SEA's 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, the Court in Forest

Grove held that §1412(a)(10)(c) does 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.

81. 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 O.M.'s parents did not quote from the statute when they plainly rejected the IEP and conveyed their intent to enroll O.M. 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.

82. 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 O.M. in a private school, and beseeched Defendant's LEA Representative for help in coordinating delivery of O.M.'s IEP services to O.M. 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 O.M.'s services at a private placement. Remarkably, those same ignored emails also contain more than sufficient "notice" of Plaintiffs' intent to enroll O.M. in a private school.

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

THIRD CAUSE OF ACTION

THE SRO'S DECISIONS ARE VOID AS A MATTER OF LAW

84. Plaintiffs incorporate by reference all of the foregoing allegations as though fully set forth here.

85. Plaintiffs are aggrieved by the SEA Review Officer's Decision because the Board's first and second appeal to the SEA Review Officer were unauthorized by the IDEA., and, as such, the SEA Review Officer lacked statutory authority to review the ALJ's Final Decision.

86. The IDEA authorizes an aggrieved party to appeal a hearing officer's decision to a state-level Review Officer, but only if the due process hearing is conducted by a local educational agency (LEA). The IDEA does not authorize an appeal to a state-level review officer in any other circumstance.

87. The due process hearing in this case was not conducted by a Local Educational Agency.

88. Therefore, the Board had no right to appeal the ALJ's Final Decision to the State's Review Officer (either time). As a result, the purported "decisions" of the State's Review Officer's were unauthorized under the IDEA, and they are void as a matter of law and should be given no weight by the Court in this action.

89. Plaintiffs are aggrieved by both of the Board's unauthorized appeals of the ALJ's Final Decision to the SEA's Review Officer. Among other things, the Board's unauthorized appeals caused Plaintiffs to incur additional undue expense to defend against them and to preserve Plaintiffs' status as the prevailing parties in the prior proceedings. In this action, the Board's unauthorized appeals continue to unnecessarily increase the burdens of this litigation, as Plaintiffs are now required to establish that the SRO's decisions below were not only unsupported by the record but also invalid at their inception.

90. Therefore, to the extent that the Board expressly or implicitly relies upon the SRO's authority or either of his decisions in these proceedings before this Court, the Plaintiffs will continue to suffer additional costs in establishing the invalidity of the Board's appeals to the SEA's Review Officer, as well as the legal and factual errors made by the SRO in reducing Plaintiffs' reimbursement award.

FOURTH CAUSE OF ACTION

THE SRO'S FINDINGS AND CONCLUSIONS ARE NOT REGULARLY MADE

91. Plaintiffs incorporate by reference all of the foregoing allegations as though fully set forth here.

92. In addition to Plaintiffs claim that the State Review Officer's Decisions were unauthorized by the IDEA's limited right of administrative appeal, Plaintiffs assert, as an independent basis for removing the SRO's decisions from the Court's consideration, that the SRO's findings and conclusions were not "regularly made."

93. The SRO's findings and conclusions are contradicted by the record, by the ALJ's well-documented and well-reasoned findings and conclusion, and, in material respects, by the SRO's own findings and conclusions themselves.

94. As amplified in the foregoing allegations, the SRO's findings and conclusions adversely affecting certain of Plaintiffs' established bases establishing Board's deprivation of a Free Appropriate Public Education in this case should be given no weight in this Court's review on the grounds that those findings either (a) apply the incorrect legal standard or rule governing the ALJ's findings and conclusions, (b) fail to correctly identify the correct factual basis animating the ALJ's findings and conclusions, or (c) both.

95. These adverse findings do not alter the Plaintiffs' status as a prevailing party or Plaintiffs' general right to appropriate relief under the IDEA.

96. However, should the Board seek to defeat Plaintiffs' right to recover the costs of this action, including attorneys' fees, Plaintiffs' right of reimbursement, or any other right established by the record and/or Judge Lassiter's Final Decision, (or to further diminish those rights) by relying in any way on the State Review Officer's unauthorized decision, Plaintiffs are aggrieved by the Review Officer's unauthorized decision, unsupported findings, and/ or failure to apply the correct rule of law.

PRAYER FOR RELIEF

97. WHEREFORE, Plaintiffs respectfully request that the Court order the following relief:

(A) Declare that the Board's two unauthorized appeals to the State Review Officer's Decision were barred by the IDEA at the time the appeals were brought, and, further, declare that the State Review Officers' Decisions pursuant to those appeals are void as a matter of law, and, further, declare that the State Review Officer's Decision is entitled to no weight in these or any other proceedings.

(B) Order the preparation and filing of the administrative record for this Court's review in these proceedings, as may be necessary;

(C) Award Plaintiffs complete reimbursement of all of the expenses and costs Plaintiffs incurred in connection with providing O.M. an appropriate education in a private setting during the 2008-09 school year, including but not limited to O.M.'s ESY placement and services at that private placement in the summer of 2009, prior to the County's offer of an appropriate IEP to O.M. in the public schools;

(D) Award to the Plaintiffs costs, including attorneys' fees, to which Plaintiffs are entitled by law in connection with litigating the administrative proceedings below, including O.M. I, O.M. II, and O.M. III, pursuant to 20 U.S.C. § 1415;

(E) Award to Plaintiffs the costs of this action, O.M. IV, including attorneys' fees, to which Plaintiffs are entitled by law in connection with litigating this action in this Court, pursuant to 20 U.S.C. § 1415;

(F) Award to Plaintiffs all pre-judgment and post-judgment interest on those amounts to which Plaintiffs may be entitled by law; and

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

Dated: December 7, 2009

Respectfully submitted:

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UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA

O.M., by and through his parents, NICOLE McWHIRTER and ARRAN McWHIRTER, NICOLE McWHIRTER, and ARRAN McWHIRTER, *Plaintiffs*, v. ORANGE COUNTY (N.C.) BOARD OF EDUCATION, *Defendant*.	No. 1:09-CV-692

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

The undersigned hereby certifies that, pursuant to Rule 5 of the Federal Rules of Civil Procedure and LR5.3 and LR5.4, MDNC, the foregoing First Amended Complaint & Petition for Attorneys' Fees Pursuant to the Individuals with Disabilities Education Act have been electronically filed with the Clerk of Court using the CM/ECF system. The CM/ECF system will automatically generate and send a Notice of Electronic Filing (NEF) to the undersigned filing user and registered users of record, and that the Court's electronic records show that each party to this action is represented by at least one registered user of record, to each of whom the NEF will be transmitted.

Dated: December 7, 2009

EKSTRAND & EKSTRAND LLP

By: /s/ Robert C. Ekstrand
North Carolina State Bar #26673