UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA

O.M., *et al.*, *Plaintiffs* *v.* ORANGE COUNTY (N.C.) BOARD OF EDUCATION, *Defendant*	No. 09-CVS-692

PLAINTIFFS' ANSWER TO DEFENDANT'S COUNTERCLAIMS

Plaintiffs, pursuant to Fed. R. Civ. P. Rule 12(a)(1)(B) and M.D.N.C. LR7.1, respond to Defendant's Answer and Counterclaims as follows:

FIRST DEFENSE

THE STATE REVIEW OFFICER'S "FINAL DECSION" IS VOID AS A MATTER OF LAW

In the proceedings below, Plaintiffs prevailed at the due process hearing that initiated this action. The Board filed two appeals to the State Review Officer. While the Plaintiffs prevailed in both appeals, Plaintiff contends that both appeals and both SRO decisions were not authorized by the IDEA's limited right of state-level review. The SRO's decisions are therefore void as a matter of law. As a result, the SRO's decisions (while favorable to the Plaintiffs) can be given no weight in these proceedings.

The IDEA authorizes an appeal to a State Educational Agency's (SEA) Review Officer only "if the due process hearing is conducted by a Local Educational Agency." 20 U.S.C. § 1415(g). By operation of the canon of construction, *expressio unius est exclusio alterius*, the IDEA does not authorize state-level review in the only other alternative circumstance (i.e., where the State Educational Agency is responsible for the conduct of due process hearings). Therefore, where, as here, the State's Educational Agency is responsible for conducting the due process hearings required by the IDEA, any aggrieved party to a due process hearing (like the Board in this case) has no right to appeal to a "second-tier" state-level Review Officer. The only recourse available in that case is by way of a complaint filed in state or federal court. However, the Board filed not one but two appeals to the State's Review Officer from a due process hearing conducted by the State's Educational Agency. Because North Carolina elected, as a matter of state statute, not to conduct its due process hearings through its LEAs, the IDEA bars review by a state-level Review Officer. As a result, the Board's two appeals to the State Review Officer and the State Review Officer's subsequent decisions were all unauthorized—barred by the IDEA's procedural safeguards—and therefore void as a matter of law. As such, the SRO's decisions should be given no weight in the determination of this action.

SECOND DEFENSE

DEFENDANT'S RULE 12(B)(1) MOTION MUST BE DENIED

The Board has asserted a motion within its Answer and Counterclaims pursuant to 12(b)(1), in violation of M.D.N.C LR 7.2 and 7.3(a)-(b). By asserting its motion in its responsive pleading and without an accompanying brief, Defendant has waived any argument that might support the proposition that this Court's somehow lacks subject matter jurisdiction. Plainly, this Court may take jurisdiction over any action involving federal rights, as this action does. Because it is beyond plausible

dispute that this Court has subject matter jurisdiction over this action, and because Defendant's motion to the contrary was improperly filed in violation of this Court's rules, Defendant's Motion to Dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) should be summarily denied, particularly since the a motion pursuant to Rule 12(b)(1) may be raised whenever it appears that events have deprived the Court of its subject matter jurisdiction in this or any other case.

PLAINTIFFS' RESPONSE TO DEFENDANT'S COUNTERCLAIMS

Plaintiffs respond to the allegations set forth in Defendant's counterclaims as follows:

1. Plaintiffs incorporate by reference the allegations set forth in Plaintiffs First Amended Complaint as though fully set forth here.

2. Plaintiffs admit that O.M.'s IEP Team met twice during July 2008. Plaintiffs deny the remaining allegations set forth in paragraph 2.

3. Plaintiffs admit that, during the July 22, 2008, IEP Team meeting, O.M.'s IEP Team developed and agreed upon appropriate goals, objectives, and benchmarks for O.M.'s IEP. Plaintiffs deny that IEP Team discussed the kind and levels of services that would enable O.M. to meet or make meaningful progress towards the agreed upon goals, objectives, and benchmarks. Plaintiffs deny the remaining allegations in paragraph 3.

4. Plaintiffs admit that O.M. was observed during his participation in a playgroup at Pathways Elementary School, and that Pathways is a public school within the Orange County School System. Plaintiffs admit that the playgroup was a segregated, self-contained classroom whose enrollment was limited to children with

speech-language disabilities and that no typically developing peers were or would be enrolled in that playgroup. Plaintiffs admit that, during those brief observations, Defendant's observers did not personally observe any of O.M.'s difficulties in the classroom. Plaintiffs deny the remaining allegations set forth in paragraph 4.

5. Plaintiffs deny the allegations set forth in paragraph 5.

6. Plaintiffs admit that school system staff decided that the appropriate placement and level of services for O.M. two 90-minute sessions per week in the self-contained, segregated playgroup at Pathways, and that, as the ALJ found, the determination was made by an outsider to O.M.'s I.E.P. Team, who directed O.M.'s I.E.P. Team to offer nothing more or different than that placement or services. The same outsider directed the LEA Representative on O.M.'s IEP Team to not respond to Ms. McWhirter's email inquiries regarding the provision of O.M.'s IEP services in an alternative setting, as the IEP Team had discussed. Plaintiffs deny the remaining allegations set forth in paragraph 6.

7. Plaintiffs admit that the Defendant offered only one placement and only one level of services: two 90-minute sessions per week in the Defendant's self-contained, segregated playgroup at Pathways Elementary whose enrollment would include two or three disabled children and no typically developing peers. Plaintiffs admit that the Defendant's IEP Team members asserted that they believed the playgroup would meet twice per week, but Plaintiffs deny that the playgroup had any schedule established at that time at all or any particular staff identified to serve the playgroup. Plaintiffs deny the remaining allegations set forth in paragraph 7.

8. Plaintiffs admit that Defendant's IEP Team members told Plaintiffs that only two or three other children with speech-language disabilities would

be enrolled in the Defendant's self-contained, segregated playgroup at Pathways. Plaintiffs deny the remaining allegations set forth in paragraph 8.

9. Plaintiffs emphatically deny that Plaintiff's expert witness recommended that O.M. be educated in a self-contained, segregated playgroup whose enrollment included no typically developing peers and only two or three other children, all of whom had speech-language disabilities. Moreover, Dr. Umbel's evaluation specifically called for a speech-language evaluation to be conducted, as that dimension of the evaluation Dr. Umbel oversaw was not reliable in her view.

10. Plaintiffs admit that Arran and Nicole McWhirter and their autism consultant, Casey Palmer, all expressed their belief to the IEP Team that the Defendant's educational plan of two 90-minute sessions per week in a self-contained, segregated classroom limited to children with speech-language disabilities was not appropriate for O.M. Arran and Nicole repeatedly explained that that they did not understand how the Defendant's IEP Team members concluded that O.M. could make progress on his specific goals and objectives in that placement, in that infrequent and limited amount of time, and with that level of service. Plaintiffs repeatedly asked the Defendants IEP Team members to explain to them how they arrived at two 90-minute sessions in the self-contained, segregated playgroup in light of O.M.'s goals and objectives. The audio recordings reveal that no substantive explanation would be given by the Defendant's IEP Team members, all of whom uniformly expressed support for that level of service and placement and no other. Arran, Nicole, and Ms. Palmer were particularly concerned about how the Defendant's IEP Team members concluded that O.M. would make progress towards his goals in the proposed educational plan; particularly those goals that explicitly required O.M. to develop proficiency in interactions with typically developing peers, making transitions within the classrooms, responding appropriately to appropriate

peer interactions in the classroom, and other, similar goals and objectives in O.M.'s IEP. Plaintiffs deny the remaining allegations set forth in paragraph 10.

11. Plaintiffs admit that Defendant's IEP Team members and Plaintiffs all agreed that it would be advisable for the team to inquire into available enrollment in a regular or blended preschool classroom for O.M. No IEP Team member objected to O.M. being educated in a regular or blended classroom or expressed any concern that O.M. could be satisfactorily educated in such a setting with supplementary aids and supports. The Defendant's LEA Representative inquired with the Frank Porter Graham School, and other team members inquired with other mainstream and blended preschools. Plaintiffs admit that Plaintiffs and O.M.'s IEP Team agreed to investigate whether any of those less restrictive environments had availability O.M.'s enrollment. Plaintiffs deny the remaining allegations set forth in paragraph 11.

12. Plaintiffs admit that, at the July 30th IEP meeting, Defendants IEP Team members returned and proposed the exact same placement: two 90-minute sessions in the Defendant's self-contained, segregated playgroup at Pathways Elementary, whose enrollment still was expected to be limited to children with speech-language disabilities. At that time, the Defendant still had not conducted the speech-language evaluation and no speech-language services were included in O.M.'s IEP. While Plaintiffs admit that one of Defendant's IEP Team members remarked that O.M. might be exposed to typical peers from Head Start or Title I classes held in Pathways after the playgroup on the playground on occasion. But Plaintiffs deny that any such provision was incorporated into O.M.'s IEP or was otherwise made a part of O.M.'s educational plan. Further, Defendant's LEA Representative reported that she believed a spot was available for O.M. at Frank Porter Graham school, but that it was designated for a typically developing child and Plaintiffs would be required to pay the

tuition and costs of that enrollment. Plaintiffs deny the remaining allegations set forth in paragraph 12.

13. Plaintiffs lack sufficient information to admit or deny the beliefs of unnamed school staff referred to in paragraph 13, and, as such, Plaintiffs deny the allegations set forth in paragraph 13.

14. Plaintiffs admit that some of the preschool options discussed at the July 30th IEP meeting were roughly similar in size to the preschool program O.M. attended in Argentina and that he had significant difficulties there. But Plaintiffs deny, unlike the O.M.'s school in Argentina, the options discussed at the July 30th IEP meeting all included supplemental aids and specialized instruction designed to teach O.M. to respond adaptively in circumstances that would cause him difficulty. Plaintiffs deny the remaining allegations set forth in paragraph 14.

15. Plaintiffs were not present when the Defendant's IEP Team members agreed to propose only one placement option for O.M. (i.e., two 90-minute sessions in Defendant's self-contained, segregated playgroup). As such, Plaintiffs lack sufficient information to admit or deny the allegations set forth in paragraph 15, and therefore Plaintiffs deny them.

16. As before, Plaintiffs admit that Nicole and Arran McWhirter and their autism consultant, Ms. Palmer, stated that they believed the Defendant's placement and level of services were inappropriate. Plaintiffs deny, however, that they insisted upon a full day placement, that they insisted upon any specific number of hours. Instead, Plaintiffs admit that, after the Defendant's Team members refused to explain how they arrived at three hours, Plaintiffs sought to elicit some insight into the Team's rationale behind three hours (two 90-minute sessions) by asking the team, why not ten, twenty, twenty five hours? The audio recording of the July 30th meeting is in

evidence and is the best evidence of what was discussed. To the extent that Defendant's allegations deviate from the recording, Plaintiffs deny them.

17. Plaintiffs deny the allegations set forth in paragraph 17.

18. The audio recording of the July 30th meeting is in evidence and is the best evidence of what was discussed. To the extent that Defendant's allegations in paragraph 18 deviate from the recording, Plaintiffs deny them.

19. Paragraph 19 calls for legal conclusion and, as such, no response is required.

20. The audio recording of the July 30th meeting is in evidence and is the best evidence of what was stated there and by whom. To the extent that Defendant's allegations in paragraph 20 deviate from the recording, Plaintiffs deny them.

21. The audio recording of the July 30th meeting is in evidence and is the best evidence of what Ms. Combs stated in the meeting. To the extent that Defendant's allegations in paragraph 21 deviate from the recording, Plaintiffs deny them.

22. The audio recording of the July 30th meeting is in evidence and is the best evidence of what Ms. Combs stated in the meeting. To the extent that Defendant's allegations in paragraph 22 deviate from the recording, Plaintiffs deny them.

23. Plaintiffs admit the allegations in paragraph 23.

24. It is admitted that Melinda Grenard (an outsider to the IEP Team) asked Defendant's counsel (an outsider to the IEP Team) drafted the Defendant's

explanation for O.M.'s IEP Team's decision to offer no placement other than two 90-minute sessions per week in the Defendant's self-contained, segregated playgroup at the most restrictive noted of the LRE continuum. Discovery in the proceedings below revealed no evidence any kind evincing the communications or exchange of materials alleged in paragraph 24; therefore Plaintiff denies them.

25. Discovery produced by the Defendant and its IEP Team members in the due process proceedings revealed absolutely no material of any kind evincing or tending to show that any of the Defendant's IEP Team members commented upon, revised or suggested any modification to the DEC 5. Therefore, Plaintiffs deny the allegations of communications, revisions or markups produced by the Defendant's IEP Team to either Ms. Grenard or Defendant's trial counsel. Plaintiffs deny the remaining allegations set forth in paragraph 25.

26. Plaintiffs admit the allegations set forth in paragraph 26

27. Plaintiffs admit that Ms. McWhirter e-mailed Ms. Combs multiple times after the July 30, 2008 IEP meeting and before receiving the DEC 5. Plaintiffs also admit that defendant's the director, Ms. Grenard, directed the Defendant's LEA Representative not to respond to Ms. McWhirter's e-mails, and, further, not to advise Ms. McWhirter that no response would be forthcoming except insofar as it was incorporated in the DEC 5. Plaintiffs further admit that the e-mails Ms. McWhirter was sending were requesting information from the defendant relating to the delivery of services to O.M. The e-mails are in evidence, they speak for themselves, and are the best evidence of what they contain. To the extent that defendant's allegations regarding the contents of the e-mail deviate from the actual contents of the e-mails, plaintiffs deny those allegations and the remaining allegations set forth in paragraph 27.

28. Plaintiffs deny the allegations set forth in paragraph 28.

29. Plaintiffs deny the allegations set forth in paragraph 29 to the extent that the word "enrolled" means anything other than attendance at a educational institution for purposes of a limited "trial period." Plaintiffs deny the remaining allegations set forth in paragraph 29.

30. Plaintiffs admit that the IEP team did not determine whether 0M was eligible for speech language services until October 13, 2008; that prior to October 13, 2008, Defendant failed to request Plaintiffs' consent for the delivery of services to O.M.; that, at that meeting, plaintiffs were given the first opportunity to formally consent to Defendant's delivery of services to O.M.; and, that Plaintiffs sign the form consenting to defendant's provision of services to O.M. and returned it to the Defendant on October 16, 2008 [for purposes of this response, plaintiffs assume that the defendant's allegation inadvertently dated this event in the year 2009 instead of 2008, when it occurred]. Plaintiffs deny the remaining allegations set forth in paragraph 30.

31. Plaintiffs admit that are about October 29, 2008, after Plaintiffs were given an opportunity to consent or refuse Defendant's provision of specialized instruction and related services for O.M. and consented, the Defendant first began to provide services to O.M. at his private preschool. Plaintiffs lack sufficient information to admit or deny when Defendant determined "that O.M.'s private preschool was located within the boundaries of the Orange County school system," and as such Plaintiffs deny those and the remaining allegations set forth in paragraph 31.

32. Plaintiffs deny the allegations set forth in paragraph 32

33. Plaintiffs deny the allegations set forth in paragraph 33, including its subparagraphs (a) through (d).

34. Plaintiffs incorporate the their responses to the allegations set forth in paragraphs 1 through 33 of Defendant's counterclaim as though fully set forth here.

35. Plaintiffs deny the allegations set forth in paragraphs 35 through paragraph 40.

36. Plaintiffs incorporate by reference their responses to the allegations set forth in paragraphs 1 through 40 of the Defendant's counterclaims as though fully set forth here.

37. Plaintiffs deny the allegations set forth in paragraph 42.

38. Plaintiffs deny the allegations set forth in paragraph 43.

39. Plaintiffs admit that OM's parents asserted that the Defendant's proposed IEP for OM deprived him of a FAPE in the least restrictive environment, that multiple emails sent by Ms. McWhirter to the LEA Representative went unanswered because the E.C. Director directed the LEA Representative not to respond to her inquiries in any way, and that the emails referred to in paragraph 40 speak for themselves and are the best evidence of what they contain. Plaintiff denies all of the remaining allegations set forth in paragraph 44.

40. Plaintiffs deny the allegations set forth in paragraphs 45 through 54.

Dated: December 8, 2009

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FIILING 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 Answer to Defendant's Counterclaims has been filed electronically 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 8, 2009

Respectfully Submitted,
EKSTRAND & EKSTRAND LLP

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