IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:09-CV-692

O.M., by and through his parents, NICOLE MCWHIRTER and ARRAN MCWHIRTER, and NICOLE MCWHIRTER and ARRAN MCWHIRTER, Plaintiffs,	)	**ANSWER TO FIRST AMENDED COMPLAINT AND COUNTERCLAIM**
v.	)	
ORANGE COUNTY BOARD OF EDUCATION, Defendant.	)	

The Orange County Board of Education ("the Board"), by and through counsel, hereby responds to the First Amended Complaint as follows:

FIRST DEFENSE

Rule 12(b)(1) of the Federal Rules of Civil Procedure

This court lacks subject matter jurisdiction over plaintiffs' claims that the Board was required to provide O.M. with the services offered in the July 30, 2008, IEP in his private preschool placement during the 2008-09 school year.

SECOND DEFENSE

Answer

1. The Board admits that O.M. is a four-year old boy with autism. The Board admits that it stipulated in the proceedings below that O.M. is a "child with a disability" as that phrase is used in the (IDEA) and that O.M. was correctly diagnosed with autism. The Board also admits that O.M. is now enrolled in a public school classroom and that he has been successful in that placement. Except as specifically admitted, the allegations in paragraph 1 are denied.

2. The Board admits the allegations in paragraph 2.

3. The Board admits that it is a local educational agency (LEA) as that phrase is defined by the IDEA. The Board admits that state law does not require that LEAs conduct due process hearings and further admits that it was not responsible for conducting the due process hearing that initiated this action. Except as specifically admitted, the allegations in paragraph 3 are denied.

4. The allegations in paragraph 4 are legal conclusions to which no response is required. To the extent that a response is required, the allegations in paragraph 4 are denied.

5. The allegations in paragraph 5 are admitted.

6. The Board admits that Plaintiffs' petition alleged that O.M. had been denied a free appropriate public education (FAPE) and that they sought as relief reimbursement for the cost of tuition for a private educational placement, private specialized instruction services, and private related services. Except as specifically admitted, the allegations in paragraph 6 are denied.

7. The Board admits that in the Final Pre-Trial Order, Plaintiffs asserted that the Board deprived O.M. of a FAPE for the 2008-09 school year. The Board also admits that in the Final Pre-Trial Order, Plaintiffs asserted that the private educational placement and services were appropriate. Except as specifically admitted, the allegations in paragraph 7 are denied.

8. The allegations in paragraph 8 are admitted.

9. The allegations in paragraph 9 are admitted.

10. The allegations in paragraph 10 are admitted.

11. The allegations in paragraph 11 are denied.

12. The Board admits that the Administrative Law Judge (ALJ) concluded that Plaintiffs met their burden of proving that the Board denied O.M. a FAPE and that Plaintiffs' private placement was appropriate. Except as specifically admitted, the allegations in paragraph 12 are denied.

13. The allegations in paragraph 13 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 13 are denied.

14. The Board admits that the text in quotes in paragraph 14 and its subparagraphs accurately reflects the language in the Final Decision of the ALJ. The Board admits that its proposed placement was in a playgroup that would also include children with speech-language impairments and that typically developing children from other classrooms would periodically participate as well. The Board admits that during testimony its employees explained that in the preschool setting the least restrictive environment is the one that removes the child from his "natural environment" the least. Except as specifically admitted, the allegations in paragraph 14 and its subparts are denied.

15. The allegations in paragraph 15 are denied.

16. The Board admits that the ALJ concluded that Plaintiffs proved by a preponderance of the evidence that the Board failed to provide O.M. with a FAPE through the development of an Individualized Education Plan designed to all O.M. to make meaningful progress towards the specific goals and objectives that were agreed upon by O.M.'s IEP team. The Board admits that O.M.'s IEP goals included making transitions, engaging in appropriate exchanges with typical peers, and becoming

accustomed to a classroom routine. The Board admits that its members of O.M.'s IEP team believed and testified that its proposed placement of two 90-minute sessions per week in a playgroup were appropriate to meet O.M.'s needs. Except as specifically admitted, the allegations in paragraph 16 are denied.

17. The Board admits that the ALJ concluded that Plaintiffs established by a preponderance of the evidence that decisions of the IEP team were impermissibly delegated to an individual outside of the IEP team. Except as specifically admitted, the allegations in paragraph 17 are denied.

18. The Board admits that the ALJ concluded that Plaintiffs demonstrated by a preponderance of the evidence that the Board deprived O.M. of a FAPE by failing to offer an IEP reasonably calculated to meet the specific educational needs O.M.'s IEP team identified in the goals and objectives established in O.M.'s IEP.

19. The Board admits that the text in quotes in paragraph 19 accurately reflects the language in the Final Decision of the ALJ. Except as specifically admitted, the allegations in paragraph 19 are denied.

20. The Board admits that the ALJ concluded that Plaintiffs were entitled to reimbursement for costs and expenses. Except as specifically admitted, the allegations in paragraph 20 are denied.

21. The Board admits that the plaintiffs offered testimony and documentation regarding expenses they incurred in providing O.M.'s private placement, including expenses the Board was ordered to reimburse. The Board admits that the ALJ properly excluded reimbursement for the costs of consultants' services in preparation for or attendance

at the 2008 IEP meetings. Except as specifically admitted, the allegations in paragraph 21 are denied.

22. The Board admits that the language quoted in paragraph 22 accurately reflects the language of the ALJ's opinion. Except as specifically admitted, the allegations in paragraph 22 are denied.

23. The Board admits that the ALJ awarded plaintiffs relief including the items listed in paragraph 23. Except as specifically admitted, the allegations in paragraph 23 are denied.

24. The allegations in paragraph 24 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 24 are denied.

25. The allegations in paragraph 25 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 25 are denied.

26. The Board admits that it filed a "Notice of Appeal" to the State Educational Agency (SEA), in accordance with N.C. General Statutes § 115C-109.9. Except as specifically admitted, the allegations in paragraph 26 are denied.

27. The allegations in paragraph 27 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 27 are denied.

28. The Board's appeal to the SEA was in accordance with the state's due process procedures as set forth in the General Statutes and developed in accordance with the IDEA, 20 U.S.C. § 1412(a)(6)(A). To the extent Plaintiffs have a cause of action

arising from their claim that the state's due process procedures are flawed or violate the IDEA, the Board asserts that the state is a necessary party to this action. Except as specifically admitted, the allegations in paragraph 28 are denied.

29. The Board admits that if filed a Notice of Appeal to the SEA's Review Officer, in accordance with the state's due process procedures as set forth in the General Statutes and developed in accordance with the IDEA, 20 U.S.C. § 1412(a)(6)(A). To the extent Plaintiffs have a cause of action arising from their claim that the state's due process procedures are flawed or violate the IDEA, the Board asserts that the state is a necessary party to this action. Except as specifically admitted, the allegations in paragraph 29 are denied.

30. The Board admits that its Notice of Appeal did not list any specific exceptions to the ALJ's decision. Except as specifically admitted, the allegations in paragraph 30 are denied.

31. The Board's appeal to the SEA was in accordance with the state's due process procedures as set forth in the General Statutes and developed in accordance with the IDEA, 20 U.S.C. § 1412(a)(6)(A). To the extent Plaintiffs have a cause of action arising from their claim that the state's due process procedures are flawed or violate the IDEA, the Board asserts that the state is a necessary party to this action. The remaining allegations in paragraph 31 are legal conclusions to which no response is required. To the extent a response is required or except as specifically admitted, the allegations in paragraph 31 are denied.

32. The Board admits that the SEA Review Officer directed the parties to submit written arguments to him simultaneously and sought the record of the due process hearing for

his review and decision. The remaining allegations in paragraph 32 are legal conclusions to which no response is required. To the extent a response is required or except as specifically admitted, the allegations in paragraph 32 are denied.

33. To the extent Plaintiffs have a cause of action arising from their claim that the state's due process procedures are flawed or violate the IDEA, the Board asserts that the state is a necessary party to this action. Except as specifically admitted, the allegations in paragraph 33 are denied.

34. The Board specifically denies that the SEA's Review Officer affirmed the ALJ's findings and conclusions on the merits. The Board admits that the State Hearing Review Officer concluded that the Board engaged in procedural violations that caused a deprivation of educational opportunities and Plaintiffs' opportunity to meaningfully participate in the development of O.M.'s IEP, resulting in the denial of a FAPE to O.M. The Board further admits that the SRO concluded that Plaintiffs established that the Board denied O.M. a FAPE on several issues before the Review Officer. Except as specifically admitted, the allegations in paragraph 34 are denied.

35. The Board admits that the Review Officer concluded that plaintiffs' private placement was appropriate and that the language quoted in paragraph 35 accurately reflects the language in the Review Officer's decision.

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

37. The allegations in paragraph 37 are legal conclusions to which no response is required. To the extent that a response is required, the allegations in paragraph 37 are denied.

38. The Board admits that it filed a Motion to Amend with supporting brief with the SEA Review Officer after he issued his Final Decision. Except as specifically admitted, the allegations in paragraph 29 are denied.

39. The Board admits that the SEA Review Officer rejected the Board's Motion to Amend and stated that the appropriate forum to appeal the decision was set forth in the General Statutes. Except as specifically admitted, the allegations in paragraph 39 are denied.

40. The allegations in paragraph 40 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 40 are denied.

41. The allegations in paragraph 41 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 41 are denied.

42. The Board admits that the Review Officer reduced plaintiffs' reimbursement award because they did not give the required notice pursuant to 20 U.S.C. §1412(a)(10)(C). The Board admits that the ALJ found as a fact that Plaintiffs had given the required notice. Except as specifically admitted, the allegations in paragraph 42 are denied.

43. The allegations in paragraph 43 are denied.

44. The allegations in paragraph 44 are denied.

45. The allegations in paragraph 45 are denied.

46. The Board denies that the playgroup was disbanded during the 2008-09 academic year. Except as specifically admitted, the allegations in paragraph 46 are denied.

47. The allegations in paragraph 47 are denied.

48. The Board admits that the Review Officer concluded that the IDEA required Plaintiffs to give the notice required by 20 U.S.C. §1412(a)(10)(C). The Board further admits that the Review Officer concluded that Plaintiffs did not give the required notice. Except as specifically admitted, the allegations in paragraph 48 are denied.

49. The Board admits that at the July 30 IEP meeting Plaintiffs' consultant asked the board to explain why the Board would not itself place O.M. in a preschool full-time. Except as specifically admitted, the allegations in paragraph 49 are denied.

50. The Board admits that the Review Officer reduced plaintiffs' reimbursement award because they did not give the required notice pursuant to 20 U.S.C. §1412(a)(10)(C). The Board admits that the ALJ found as a fact that Plaintiffs had given the required notice. Except as specifically admitted, the allegations in paragraph 50 are denied.

51. The Board admits that in a September 10 letter, Plaintiffs notified the Exceptional Children's Program director that O.M. would be placed at a private preschool and that the parents would seek reimbursement from the Board. Except as specifically admitted, the allegations in paragraph 51 are denied.

52. The Board admits that the Review Officer concluded that Plaintiffs' written notice in the September 10 letter violated the 10-day rule under the IDEA. Except as specifically admitted, the allegations in paragraph 52 are denied.

53. The Board admits that the Review Officer concluded that O.M. was enrolled in his private placement prior to Plaintiffs' written notice to the Board. Except as specifically admitted, the allegations in paragraph 53 are denied.

54. The allegations in paragraph 54 are denied.

55. The Board's first appeal to the SEA was in accordance with the state's due process procedures as set forth in the General Statutes and developed in accordance with the IDEA, 20 U.S.C. § 1412(a)(6)(A). To the extent Plaintiffs have a cause of action arising from their claim that the state's due process procedures are flawed or violate the IDEA, the Board asserts that the state is a necessary party to this action. The remaining allegations in paragraph 55 are legal conclusions to which no response is required. To the extent a response is required or except as specifically admitted, the allegations in paragraph 55 are denied.

56. The Board admits that the IDEA authorizes an appeal to a State Educational Agency's (SEA) Review Office if the due process hearing is conducted by the Local Educational Agency. The Board further admits that Plaintiffs have correctly reproduced 20 U.S.C. § 1415 (g), with emphasis added. Except as specifically admitted, the allegations in paragraph 56 are denied.

57. The allegations in paragraph 57 are legal conclusions to which no response is required. To the extent that a response is required, the allegations in paragraph 57 are denied.

58. The allegations in paragraph 58 are legal conclusions to which no response is required. To the extent that a response is required, the allegations in paragraph 58 are denied.

59. The allegations in paragraph 59 are legal conclusions to which no response is required. To the extent that a response is required, the allegations in paragraph 59 are denied.

60. The Board admits that the North Carolina General Assembly does not provide LEAs with the authority to conduct the State's due process hearings, a decision codified in statutes and regulations. The Board admits that Plaintiffs have correctly reproduced N.C. General Statute § 115C-109.6. Except as specifically admitted, the allegations in paragraph 60 are denied.

61. To the extent Plaintiffs have a cause of action arising from their claim that the state's due process procedures are flawed or violate the IDEA, the Board asserts that the state is a necessary party to this action. The allegations in paragraph 61 are legal conclusions to which no response is required. To the extent a response is required or except as specifically admitted, the allegations in paragraph 61 are denied.

62. The allegations in paragraph 62 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 62 are denied.

63. To the extent Plaintiffs have a cause of action arising from their claim that the state's due process procedures are flawed or violate the IDEA, the Board asserts that the state is a necessary party to this action. The allegations in paragraph 63 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 63 are denied.

64. The allegations in paragraph 64 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 64 are denied.

65. To the extent Plaintiffs have a cause of action arising from their claim that the state's due process procedures are flawed or violate the IDEA, the Board asserts that the

state is a necessary party to this action. The allegations in paragraph 65 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 65 are denied.

FIRST CAUSE OF ACTION

66. Paragraphs 1 through 65 are incorporated herein by reference.

67. The Board admits that the Administrative Law Judge concluded that Defendant denied O.M. a FAPE, that the parents' private placement was appropriate and that the parents were entitled to reimbursement. The Board admits that the Review Officer concluded that the Board offered O.M. an appropriate IEP but engaged in procedural violations that impeded O.M.'s parents from participating in the decision making process regarding O.M.'s education and deprived O.M. of educational benefit. The Board further admits that the Review Officer concluded that the parents' private placement was appropriate and that reimbursement could be awarded. Except as specifically admitted, the allegations in paragraph 67 are denied.

68. The allegations in paragraph 68 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 68 are denied.

69. The Board admits that it made no written settlement offer more than 10 days prior to the start of the hearing. The Board contends that the remaining allegations contained in paragraph 69 are inadmissible under Rule 408 of the Federal Rules of Evidence and not appropriately included in a Complaint. Except as specifically admitted, the allegations in paragraph 69 are denied.

70. The Board contends that the allegations contained in paragraph 70 are inadmissible under Rule 408 of the Federal Rules of Evidence and not appropriately included in a Complaint. Except as specifically admitted, the allegations in paragraph 26 are denied.

71. The allegations in paragraph 71 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 71 are denied.

72. The Board admits that Plaintiffs have incurred attorney's fees in litigating these matters. Except as specifically admitted, the allegations in paragraph 72 are denied.

73. The allegations in paragraph 73 are denied.

74. The Board admits that it filed a Motion to Amend with supporting brief with the Review Officer after he issued his Final Decision. The Board admits that it did not request or obtain leave to file its motion, nor did it confer with plaintiffs' counsel regarding the motion or cite authority in the IDEA for its motion. Except as specifically admitted, the allegations in paragraph 74 are denied.

75. The Board admits that Plaintiffs will incur additional attorney's fees in litigating this action. Except as specifically admitted, the allegations in paragraph 75 are denied.

SECOND CAUSE OF ACTION

76. Paragraphs 1 through 75 are incorporated herein by reference.

77. The Board admits that the Review Officer reduced plaintiffs' reimbursement award because they did not give the required notice pursuant to 20 U.S.C. §1412(a)(10)(C). Except as specifically admitted, the allegations in paragraph 77 are denied.

78. The Board admits that the Review Officer found as a fact that "At the end of the July 30 IEP meeting, NM requested the Board's LEA representative to present Plaintiffs with a DEC 5 Notice … to explain why the following … were being refused: (a) A full-time preschool placement at Respondent's expense." Except as specifically admitted, the allegations in paragraph 78 are denied.

79. The Board admits Plaintiffs emailed the Board to determine how the services on O.M.'s proposed IEP, which Plaintiffs rejected, could be delivered in a private school setting. The Board further admits that the LEA representative was directed not to respond to plaintiffs' emails, as the Exceptional Children's program director intended to and did respond on behalf of the LEA. Except as specifically admitted, the allegations in paragraph 79 are denied.

80. The Board admits that the Review Officer 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)." The Board further admits that the plaintiffs have correctly quoted the language in *Forest Grove*. The remaining allegations in paragraph 80 are legal conclusions to which no response is required. To the extent that a response is required or except as specifically admitted, the remaining allegations in paragraph 80 are denied.

81. The Board admits that Plaintiffs have correctly quoted language in the *Forest Grove* decision. The Board denies that the Review Officer's reduction in Plaintiffs' reimbursement award relied entirely upon his conclusion that Plaintiffs did not quote from the statute. The Board admits that the Review Officer concluded that "NM never

stated in these emails the ‘intent to enroll their child in a private school at public expense.’” The remaining allegations in paragraph 81 are legal conclusions to which no response is required. To the extent that a response is required or except as specifically admitted, the remaining allegations in paragraph 81 are denied.

82. The Board admits that the ALJ found that Plaintiff Nicole McWhirter sent multiple emails to the LEA representative asking about the delivery of services to O.M. at a private preschool. The Board further admits that the LEA representative was directed not to respond to plaintiffs’ emails, as the Exceptional Children’s program director intended to and did respond on behalf of the LEA. Except as specifically admitted, the allegations in paragraph 82 are denied.

83. The allegations in paragraph 83 are denied.

THIRD CAUSE OF ACTION

84. Paragraphs 1 through 83 are incorporated herein by reference.

85. To the extent Plaintiffs have a cause of action arising from their claim that the state’s due process procedures are flawed or violate the IDEA, the Board asserts that the state is a necessary party to this action. The allegations in paragraph 85 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 85 are denied.

86. The allegations in paragraph 86 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 86 are denied.

87. The Board admits that it did not conduct the due process hearing in this case.

88. The Board's first appeal to the SEA was in accordance with the state's due process procedures as set forth in the General Statutes and developed in accordance with the IDEA, 20 U.S.C. § 1412(a)(6)(A). To the extent Plaintiffs have a cause of action arising from their claim that the state's due process procedures are flawed or violate the IDEA, the Board asserts that the state is a necessary party to this action. The allegations in paragraph 88 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 88 are denied.

89. The Board admits that Plaintiffs incurred in continuing to litigate this matter. To the extent Plaintiffs have a cause of action arising from their claim that the state's due process procedures are flawed or violate the IDEA, the Board asserts that the state is a necessary party to this action. The remaining allegations in paragraph 89 are legal conclusions to which no response is required. To the extent a response is required or except as specifically admitted, the allegations in paragraph 89 are denied.

90. The Board admits that Plaintiffs will incur additional legal expenses in continuing to litigate this matter. The Board's appeal to the SEA was in accordance with the state's due process procedures as set forth in the General Statutes and developed in accordance with the IDEA, 20 U.S.C. § 1412(a)(6)(A).. To the extent Plaintiffs have a cause of action arising from their claim that the state's due process procedures are flawed or violate the IDEA, the Board asserts that the state is a necessary party to this action. The remaining allegations in paragraph 90 are legal conclusions to which no response is required. To the extent a response is required or except as specifically admitted, the allegations in paragraph 90 are denied.

<u>FOURTH CAUSE OF ACTION</u>

91. Paragraphs 1 through 90 are incorporated herein by reference.

92. The allegations in paragraph 92 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 92 are denied.

93. The Board admits that the Review Officer's findings and conclusions that the Board engaged in any violations of the IDEA or deprived O.M. of a FAPE are contradicted by the record. Except as specifically admitted, the allegations in paragraph 93 are denied.

94. The allegations in paragraph 94 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 94 are denied.

95. The allegations in paragraph 95 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 95 are denied.

96. The allegations in paragraph 96 are legal conclusions to which no response is required. To the extent a response is required, the allegations in paragraph 96 are denied.

Further, the Board denies the allegations set forth in Plaintiffs' Prayer for Relief.

COUNTERCLAIM OF DEFENDANT ORANGE COUNTY BOARD OF EDUCATION

The Board hereby files the following counterclaim, based on evidence contained in the Administrative Record and found by the State Hearing Review Officer.

1. The Board's responses to paragraphs 1 through 96 of Plaintiffs' First Amended Complaint are incorporated herein by reference.

2. O.M.'s IEP team met twice during July 2008 to develop an appropriate program for O.M.

3. After developing O.M.'s goals at the July 22, 2008, IEP team meeting, the team turned to a discussion of the services that O.M. would require in order to meet those goals.

4. In May and June 2008, school system staff observed O.M. while he participated in a playgroup at Pathways Elementary School, a public school within the Orange County School System. The playgroup consisted of three to five children with speech-language delays but without behavioral difficulties. O.M. displayed average communication skills during his participation in the playgroup, with mild difficulties in using eye contact, maintaining the topic of conversation and interrupting. However, those difficulties did not interfere with O.M.'s successful participation in the playgroup.

5. O.M. also did not display difficulties with transitioning, following directions, or responding appropriately to peers or adults while participating in the playgroup.

6. Given his success in the playgroup and the other information about O.M. that was available to the team in July 2008, at the July 22, 2008, IEP meeting, school system staff proposed that O.M. receive three hours of special education services per week in the Pathways playgroup, as well as occupational therapy.

7. School system staff explained at the meeting that the playgroup was scheduled to be held only once per week but that it would be expanded to twice per week in order to allow O.M. to receive the special education services that the school staff believed he needed to achieve his goals.

8. School system staff also explained that the other children in the playgroup would be children with speech-language disabilities.

9. The playgroup, which would be taught by a licensed special education teacher and a licensed speech language pathologist, offered the small, language-intensive special education setting recommended by plaintiffs' expert witness, Dr. Vivian Umbel.

10. Plaintiff Arran McWhirter, O.M.'s father, and Casey Palmer, plaintiffs' private autism consultant, objected to the proposed placement, stating that the playgroup was not the appropriate setting and that three hours per week was not enough.

11. After a discussion of other possible options, including the McWhirters securing a placement in a preschool program, the team agreed to reconvene the following week to finalize O.M.'s IEP.

12. At a July 30, 2008, IEP team meeting, the school system again offered O.M. placement in the Pathways playgroup for three hours per week. The team also discussed having typically developing children from the school district's Head Start and Title I classrooms participate in the playgroup in order to provide O.M. with access to nondisabled peers.

13. School staff did not believe, based on the information available about O.M., that he needed a full-time special education placement in order to achieve the goals on his IEP.

14. The full-day options that the plaintiffs raised at the July 30 IEP team were similar in size to O.M.'s preschool program in Argentina, in which he had numerous behavioral difficulties. Those difficulties included tantruming, failing to interact appropriately with other children, hitting himself, and refusing to follow teacher directions.

15. The school system team members agreed that O.M. needed a small structured setting in order to make progress on his goals.

16. Plaintiff Nicole McWhirter, O.M.'s mother, and Ms. Palmer again objected to O.M. attending the Pathways playgroup and insisted that he needed a full-day program. Ms. Palmer had recommended that O.M. be provided with 25 hours a week of special education services, although she had previously told plaintiffs that O.M. needed about 10 hours per week of special education.

17. Ms. McWhirter made it clear that O.M. would not be attending the district's program at Pathways Elementary School.

18. At the conclusion of the meeting, Lisa Combs, the local educational agency (LEA) representative, discussed with Ms. McWhirter, Ms. Palmer, and Lisa Dankner, a family friend, the provision of the DEC 5 form, or "Prior Written Notice."

19. An LEA is required to provide parents with Prior Written Notice when it proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

20. Ms. McWhirter requested that the DEC 5 include an explanation of why the school system refused to (1) place O.M. in a full-time preschool program, (2) provide O.M. with 25 hours per week of special education services, and (3) provide O.M. with behavioral supports provided by qualified personnel. Ms. McWhirter also asked for an implementation plan specifying how the IEP goals would be addressed.

21. Ms. Combs stated the DEC 5 would reflect the proposed placement that the team had discussed during the July 22 and 30 IEP team meetings: three hours per week of

special education in the Pathways playgroup and one hour per week of occupational therapy.

22. Ms. Combs also stated that the school system's special education staff would be in training for the next several days and that it would take some time to provide the DEC 5 to Ms. McWhirter. After discussion with Ms. Palmer and Ms. Dankner, everyone agreed that the DEC 5 would be provided to Ms. McWhirter within 10 days.

23. Plaintiffs were not provided with a DEC 6, the form on which parents provide written consent for special education services, at the meetings in July 2008.

24. Ms. Combs asked the school system's Exceptional Children's program director, Milinda Grenard, for assistance in drafting the DEC 5. Prior to being consulted about the DEC 5, Ms. Grenard had not had any contact regarding O.M. with the school system staff that had been participating in O.M.'s IEP meetings.

25. Ms. Grenard asked the school system's counsel to draft the DEC 5, based on the information provided by the IEP team members, the meeting minutes and the audiotape of the July 30 meeting.

26. The school system employees on the IEP team reviewed the draft of the DEC 5 and made changes as necessary and also testified that the DEC 5 that was provided to the McWhirters accurately reflected the decisions made at the IEP team meetings. The staff members also testified that no one outside of the IEP team process directed them to offer O.M. the proposed placement at Pathways.

27. The DEC 5 was provided to the plaintiffs on August 14, 2009.

28. Ms. McWhirter emailed Ms. Combs multiple times after the July 30, 2008, IEP meeting and before receiving the DEC 5, asking the school system to describe how

the services on O.M.'s IEP would be delivered in a private setting. Because the school system was in the process of providing the DEC 5, Ms. Grenard told Ms. Combs not to respond to those emails.

29. Ms. McWhirter's emails made it clear that O.M. would not be participating in the program the district offered at Pathways Elementary School.

30. The plaintiffs enrolled O.M. in a regular preschool on September 2, 2008**,** but did not inform the district of this until September 10, 2008 in a letter to Ms. Grenard in which they stated for the first time that they intended to seek reimbursement from the school system for their private placement.

31. O.M.'s IEP team reconvened on October 13, 2008, to determine whether O.M. was eligible for speech language services. At that meeting, plaintiffs for the first time disclosed the location of O.M.'s private preschool. Plaintiffs also stated that they had never been asked to consent to services. The DEC 6 form was provided to plaintiffs, who signed the form and returned it to the school system on October 16, 2009.

32. After determining that the private preschool was located within the boundaries of the Orange County School System, the school district began providing O.M. with three hours per week of special education services, as well as speech and occupational therapy, on October 29, 2008, at Our Playhouse preschool, plaintiffs' private program.

33. The State Hearing Review Officer correctly concluded that the Board's proposed placement in July 2008 for O.M. at Pathways Elementary School for three hours per week of special education services and one hour per week of occupational therapy services was appropriate.

34. The Review Officer also correctly concluded that at the time of the July 30, 2008, IEP meeting, based on the information available to the IEP team, the Plaintiffs' private placement would not have been an appropriate placement for the IEP team to make. The Review Officer concluded that the Plaintiffs' private placement "did not have any of the characteristics of a placement recommended by all who had evaluated/assessed O.M. prior to the July 30, 2008, IEP meeting.

35. The State Hearing Review Officer erroneously concluded that the Board engaged in procedural violations that impeded O.M.'s right to FAPE and the parents' opportunity to participate in the decision making process regarding O.M.'s education when:

    a. The IEP team did not give the required Prior Notice at the conclusion of the July 30, 2008, IEP meeting;

    b. The Board allowed someone not involved in the IEP decision making process to draft the Prior Written Notice;

    c. The Board failed to obtain informed consent to provide services prior to October 16, 2008;

    d. The Board failed to implement the services in O.M.'s IEP until October 29, 2008.

FIRST CLAIM FOR RELIEF

36. Paragraphs 1 through 34 of the Board's counterclaim are herein incorporated by reference.

37. The Board is aggrieved by the State Hearing Review Officer's decision concluding that O.M. was denied a free appropriate public education when the school system failed to provide the DEC 5 at the conclusion of the IEP meeting and allowed an individual who was not a member of the IEP team to draft the DEC 5.

38. The law does not require that Prior Written Notice be provided at the conclusion of an IEP team meeting. Rather, the law requires that the Prior Written Notice be provided within a reasonable time prior to the agency action or refusal to act. Prior Written Notice was provided to plaintiffs ten days before the start of the 2008-09 school year, when O.M.'s IEP was scheduled to take effect.

39. The law does not require that the IEP team write the Prior Written Notice. The DEC 5 is a notice from the public agency to the parents. Parents do not have a right to participate in the drafting of a DEC 5, and there is no requirement that the individual who writes the DEC 5 be a member of the IEP team.

40. As long as the DEC 5 provides parents with the notice required under the statute, the public agency has met its obligation to provide Prior Written Notice.

41. Plaintiffs provided no evidence at the administrative hearing that the DEC 5 provided to the plaintiffs was inaccurate or reflected decisions made outside the IEP team meeting.

42. Plaintiffs' opportunity to participate in the decision making process cannot be significantly impeded by the school district's drafting of a notice for which it is solely responsible, particularly when that notice accurately reflects what occurred during the IEP team meeting.

SECOND CLAIM FOR RELIEF

43. Paragraphs 1 through 42 of the Board's counterclaim are herein incorporated by reference.

44. In the alternative, in the event that this Court determines that the Review Officer's decision is void, the Board is aggrieved by the ALJ's finding that the final decisions

regarding O.M. were improperly delegated to someone outside the IEP team meeting process.

45. Milinda Grenard, the Board's Exceptional Children's program director, testified at the hearing that she had no contact with anyone regarding O.M. until after the July 30, 2008, IEP meeting, at which the school system made a final placement proposal.

46. The DEC 5 provided to Plaintiffs on August 14, 2008, reflected the decisions made at the July 30, 2008, IEP meeting.

47. The school system staff who participated in O.M.'s IEP meetings testified that no one outside the IEP team meeting process directed their decisions regarding O.M.'s proposed placement and that the IEP was developed based on O.M.'s needs.

48. The record is insufficient to support the ALJ's finding that the Board improperly delegated the final decision regarding O.M.'s IEP to someone outside of the IEP team meeting process.

THIRD CLAIM FOR RELIEF

49. Paragraphs 1 through 47 of the Board's counterclaim are herein incorporated by reference.

50. The Board is aggrieved by the Review Officer's decision (and, in the alternative, the ALJ's decision) concluding that the Board committed a procedural violation that resulted in a denial of FAPE when it failed to provide the plaintiffs with a DEC 6 prior to October 13, 2008.

51. The Board is also aggrieved by the Review Officer's decision (and, in the alternative, the ALJ's decision) concluding that O.M. was denied a free appropriate public

education when the school system failed to provide services to O.M. between August 25, 2008, and October 29, 2008.

52. Plaintiffs made it clear at the July 30 IEP meetings that they were rejecting the Board's proposed placement at Pathways Elementary School. Ms. McWhirter confirmed that rejection in subsequent emails to school system staff, when she asked about the provision of services in a private preschool setting.

53. When plaintiffs chose to enroll O.M. in a private preschool, he became a parentally placed private school student, as defined by the IDEA. 34 C.F.R. §300.130.

54. Local educational agencies are required to develop services plans (not IEPs) for parentally placed private school students. 34 C.F.R. §300.132.

55. Local educational agencies are required to spend federal funds on services for parentally placed private school students in an amount proportionate to such students' share of the total number of children with disabilities located within the agency's district. 34 C.F.R. §300.133.

56. Under the IDEA, "no parentally placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. §300.137.

57. The Review Officer's conclusion (and, in the alternative, the ALJ,'s conclusion) that the school district was required to provide the services in O.M.'s IEP at his parents' chosen placement was erroneous. Once O.M.'s parents rejected the Board's proposed placement, which they emphatically did, the Board was not required to provide the services in O.M.'s IEP at the private placement.

58. Parents of parentally placed private school students who allege that the local educational agency violated the IDEA have two separate remedies available. Which remedy the parent is entitled to pursue depends on the nature of the alleged violation.

59. If the parents allege that the local educational agency offered an inappropriate educational program and therefore did not make FAPE available, they are entitled to file a due process petition and seek reimbursement as an equitable remedy. School Comm. of Town of Burlington, Mass. v. Dept. of Educ. of Mass., 471 U.S. 359, 371 (1985).

60. If the parents allege that the local educational agency failed to provide services to a parentally placed private school student, the remedy provided to that student's parent is the state complaint process. 34 C.F.R. §300.140(c). Due process procedures do not apply to such complaints. 34 C.F.R. §300.140 (a).

61. There is no private right of action in state or federal court arising from a complaint that a local educational agency did not provide a parentally placed private school student with services.

62. The court lacks subject matter jurisdiction over any claims that the Board failed to provide O.M. with the services on his IEP in his private placement.

<u>FOURTH CLAIM FOR RELIEF</u>

63. Paragraphs 1 through 61 of the Board's counterclaim are herein incorporated by reference.

64. In the event that this Court determines that the Review Officer's decision is void, the Board is aggrieved by the ALJ's finding that the program proposed by the Board at

the July 30, 2008, IEP team meeting denied O.M. a FAPE because it was not reasonably calculated to meet O.M.'s needs in the least restrictive environment.

65. At the time of the July 30, 2008, IEP team meeting, O.M.'s "natural environment" was his home. The least restrictive environment in which to provide him special education services was the one in which his removal from his natural environment was most limited.

66. In addition, in order to provide O.M. with access to non-disabled peers, the IEP team provided for the inclusion of typical students from other preschool classrooms in the playgroup.

67. The proposed placement in the Pathways playgroup offered the small, language-rich, intensive special education setting that had been recommended for O.M. by Plaintiffs' evaluator.

68. O.M. had been observed participating successfully in the playgroup, and the information provided to the IEP team at the July 2008 IEP meetings, including information regarding O.M.'s struggles in a regular education preschool classroom, supported the determination that O.M. needed a smaller, more structured setting.

69. The record is insufficient to support the ALJ's finding that the program offered to O.M. at the July 30, 2008, IEP meeting was inappropriate.

WHEREFORE, the Board respectfully requests that this court:

1. Conduct a *de novo* review of the legal issues raised in defendant's counterclaim;

2. Conclude that the Board did not engage in any material procedural violations that resulted in a denial of FAPE;

3. Conclude that the Board offered O.M. an educational program reasonably calculated to provide him with educational benefit;
4. Dismiss for lack of subject matter jurisdiction plaintiffs' claim that the Board was obligated and failed to provide O.M. with the services on his IEP in his private placement;
5. Deny plaintiffs' claim for attorneys' fees; and
6. Grant the Board such other relief as the court finds just and proper.

Respectfully submitted, this the 4th day of January, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **ANSWER AND COUNTERCLAIM** with the Clerk of Court using the CM/ECF system which will send notification of the filing to the following:

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This the 4th day of January, 2010.

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