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 FIRST AMENDED COUNTERCLAIMS

Plaintiffs, pursuant to Fed. R. Civ. P. Rule 12(a)(1)(B) and M.D.N.C. L.R.7.1, respond to Defendant's First Amended Counterclaims as follows:

FIRST DEFENSE
THE 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. The Plaintiffs prevailed in both of the Board's appeals. The Board's counterclaims are premised on its contention that dispositive findings and conclusions of the ALJ—the factfinder in the proceedings below—are superseded by the SRO's decision. However, the Board's contentions come to nothing because the SRO's decision simply

finds additional grounds upon which the Plaintiffs have proven that the Board deprived them of a free appropriate public education ("FAPE").

To the extent that the Board contends that the entirety of the SRO decision supersedes the entirety of the ALJ's decision, its contention fails at the threshold because the SRO's decision was ultra vires.

The IDEA authorizes an aggrieved party to appeal to a "second-tier" state administrative review only where the due process hearing was conducted by a Local Educational Agency ("LEA"). Specifically, the IDEA authorizes an appeal to a State Educational Agency's (SEA) Review Officer "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 bars states from imposing a state-level administrative review of any due process hearing not conducted by an LEA. Because North Carolina state law does not delegate to its LEAs the authority to conduct due process hearings, the IDEA precludes the "second-tier" administrative review conducted by the State Review Officer in this case. As such, the Board's two appeals to the SRO were both barred by the IDEA's appeal provisions. Therefore, both of the SRO decisions the Board relies upon in its counterclaims are void as a matter of law. While favorable to the Plaintiffs, they are being employed now to confuse the issues and protract the litigation. Both SRO decision should be given no weight in these proceedings.

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 L.R. 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 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, most of which required O.M. to develop skills needed to succeed in interactions with typical peers in a regular classroom environment. The testimony of the Board's IEP Team members contradicts the Board's allegation that IEP Team ever 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, and Plaintiffs deny those allegations upon their own personal knowledge. To the contrary, the testimony of the Board's IEP Team members revealed that the IEP Team skipped over not only a discussion about what specialized instruction and

related services O.M. would need to meet his IEP goals, but also any discussion about whether O.M. could be satisfactorily educated in any of the less restrictive placements on the LRE continuum than a self-contained, segregated classroom with two other disabled children and two teachers. Instead, the Board's IEP Team members asserted what the Board would offer: (1) O.M. would not participate at all in a regular education classroom, (2) O.M.'s entire education would consist of two 90-minute sessions each week; and (3) all in the most restrictive placement on the LRE continuum—a self-contained classroom, with two teachers and two other disabled students. Any remaining allegations in paragraph 3 are denied.

4. Plaintiffs admit that school system staff observed O.M. while he participated in a playgroup at Pathways Elementary ("Playgroup"), once in May and once in June 2008, for less than an hour each time. Plaintiffs admit that, during those brief observations, Defendant's observers did not personally observe any of O.M.'s difficulties in the classroom because, as the Board's own expert conceded at the hearing based upon her own published research based writings, the Board's observations were ill conceived because they masked O.M.'s disabilities. The Board's own expert witness published a book that addresses this very mistake, that it is frequently made in assessing high-functioning autistic children, and the same mistake rendered the Board's brief 'observations' of O.M. in one, controlled environment unreliable as assessment tools. 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 deny that "the playgroup consisted of three to five children" because, despite Plaintiffs' requests, the Board never produced evidence that would establish the number of children enrolled or whether the "Pathways Playgroup" actually existed at the time of the hearing at all. Plaintiffs lack information

with respect to whether the disabled children enrolled in the Pathways Playgroup were "without behavioral difficulties," and therefore deny that allegation. Plaintiffs admit that the two children in the self-contained classroom offered by the Board had speech-language delays. The record plainly shows that only two children were enrolled in the Playgroup at the time O.M.'s IEP was being developed. Plaintiffs deny any other allegations in Paragraph 4.

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

6. Plaintiffs admit that school system staff offered only one placement and one level of services to Petitioners: two 90-minute sessions per week in the self-contained, segregated playgroup at Pathways. Plaintiffs admit that, as the ALJ found, that determination was made by an outsider to O.M.'s I.E.P. Team, who directed the Board's I.E.P. Team members to offer nothing more, less, or different than "two 90-minute sessions at the Pathways Playgroup," and the Board's members on O.M.'s IEP Team proceeded accordingly and did not consider any alternatives. The same outsider directed the LEA Representative on O.M.'s IEP Team to not respond to Ms. McWhirter's email inquiries requesting guidance on how O.M.'s IEP services would be delivered if she found a private regular preschool setting, and, again, the LEA Representative proceeded accordingly, refusing to respond (at all) to those requests. 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 self-contained, segregated playgroup the Board offered as O.M's placement. Plaintiffs deny the remaining allegations set forth in paragraph 8.

9. Plaintiffs emphatically deny that Dr. Umbel recommended that O.M. be educated in a self-contained, segregated playgroup with no typically developing peers, two other children with speech-language disabilities, and two teachers. With respect to Dr. Umbel's actual recommendations, the Board's IEP Team members ignored them. Moreover, as Plaintiffs explained to the IEP Team at length, O.M. began developing may of the skills Dr. Umbel identified when she diagnosed O.M., because Plaintiffs established a team of private educational providers and undertook an aggressive intervention in the six months between Dr. Umbel's evaluation and the Board's proposal to place O.M. in a self-contained classroom with two other disabled children.

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 Defendant's IEP Team members could give no explanation at all for how they came to the conclusion that no time in a regular education classroom at all and two 90-minute sessions in a segregated, self-contained "playgroup" with two disabled students and two teachers. Arran, Nicole, and Ms. Palmer expressed serious concern about how O.M. would make progress towards his goals. In particular, they pointed to goals requiring O.M. to develop skills that related to the regular classroom environment; that is, skills in adaptive responses to peer requests, skills in interactive play with typical peers, skills in making transitions within the regular classroom, and other, similar 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. During the IEP Team meetings, no one contended that OM could not be satisfactorily educated in a mainstream or blended setting with supplemental aids and services. Instead, the Board's LEA Representative incorrectly asserted that, because O.M. was preschool age, the Board was only responsible for providing specialized instruction and related services in his home, but not a classroom environment. The same LEA Representative also incorrectly led OM's Team to believe that, by disagreeing with the Board's proposed IEP, Petitioners were refusing to consent to delivery of services. The Board admitted the LEA's assertions were incorrect in the proceedings below. No IEP Team member expressed a belief that O.M. could not be satisfactorily educated in a regular or blended classroom; instead, their placement decisions were based on the false premise that they were not responsible for providing such a placement to preschool students. Consistent with that, the record also shows that the

Board's IEP Team members investigated whether any local private preschools (blended and mainstream) had enrollment spots available for O.M. and where the Board would deliver its services. 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, 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 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, or 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, or 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. Plaintiffs deny that the LEA Representative asked the EC Director, Melinda Grenard, for assistance in drafting the DEC 5. Plaintiffs deny that "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." Plaintiffs deny the remaining allegations in paragraph 24.

25. It is admitted that Melinda Grenard (an outsider to the IEP Team) asked Defendant's counsel (also an outsider to the IEP Team) to explain why O.M.'s IEP Team refused to offer any placement less restrictive that a self-contained classroom for three disabled students, and how O.M. would make progress towards

his specific goals with only two 90-minute sessions per week in a setting at the most restrictive placement node of the LRE continuum. Plaintiffs admit that the Board's counsel did draft the DEC 5, but emphatically denies the allegation that counsel did so "based on information provided by the IEP Team members" -- the record is clear that the Board produced no documents or electronically stored information evincing any such communications or exchange of materials alleged in paragraph 25, and the Board's counsel asserted that none existed when Plaintiffs moved to compel any such materials. Plaintiffs deny the remaining allegations in paragraph 25.

26. Discovery produced by the Defendant and its IEP Team members in the due process proceedings revealed absolutely no material of any kind evincing that any of the Defendant's IEP Team members ever commented upon, revised, marked up, or suggested any modification to the DEC 5 drafted by counsel. In fact the Board produced no documents, ESI, or any other material evincing that a counsel's draft was ever circulated to any one of O.M.'s IEP Team members. Moreover, when the ALJ ordered the Board to produce such materials (after Ms. Grenard's testimony suggested that this very exchange occurred), the Board produced no materials evincing the alleged circulation of drafts and revisions. Further, the Board's counsel represented to the court that none existed. 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 26.

27. Plaintiffs admit the allegations set forth in paragraph 27.

28. 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 the EC Director, Ms. Grenard, directed the Defendant's LEA

Representative not to respond in any way to Ms. McWhirter's e-mails seeking information about delivery of the IEP services in a private placement—not even to notify Ms. McWhirter that she was not going to provide that information. Plaintiffs further admit, Ms. McWhirter's e-mails requested information relating to the delivery of services in O.M.'s IEP in a less restrictive setting than she was then hoping to find on her own. Ms. McWhirter's e-mails are in evidence in the record (as are the facts relating to the Board's affirmative directive not to respond to them); they speak for themselves, and are the best evidence of what they contain. Plaintiffs deny any allegations that contradict that evidence and the remaining allegations set forth in paragraph 28.

29. Plaintiffs deny the allegations set forth in paragraph 29.

30. Plaintiffs deny the allegations set forth in paragraph 30 to the extent that the word "enrolled" means anything other than O.M.'s participation in classes at his private preschool during the initial, limited "trial period." The record is clear that O.M. was not offered permanent enrollment at that school until the conclusion of an initial "trial period." During that "trial period," O.M. was successful, was making progress towards his IEP goals, and learning the skills targeted for him to learn with the help of special education and related services Plaintiffs privately provided for O.M. at the preschool. Plaintiffs deny the remaining allegations set forth in paragraph 30.

31. Plaintiffs admit that the IEP team did not determine whether O.M. 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 31.

32. Plaintiffs admit that it was not until more than six weeks into the school year had passed before the Board gave Plaintiffs the option to consent or refuse the special education and related services in O.M.'s IEP. Plaintiffs admit that they disagreed with their sufficiency and consented to the delivery of what services were offered, but deny that they ever refused services (a point conceded long ago, but which the Board resurrects here). Plaintiffs also admit that the Board did not provide any special education or related services to O.M. until October 29, 2009. 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." The scant testimony of Board's EC director in this regard is subject to the ALJ's adverse credibility determinations. The record also shows that Plaintiffs' notified the Board of the identity and location of O.M.'s preschool, and, with that information, it was plainly obvious to the Board that O.M.'s preschool was located within its territorial jurisdiction. Plaintiffs deny remaining allegations set forth in paragraph 32.

33. Plaintiffs deny the allegations set forth in paragraph 33.

34. Plaintiffs move to strike the allegations set forth in paragraph 34 as irrelevant. While the SRO did find that the Plaintiffs private placement would not have been an appropriate placement for the IEP Team to make, that finding is irrelevant to any issue in this (or any reimbursement case). To the extent that it is

relevant to the determination of any issue, it is impugned by the universal testimony that O.M. made "remarkable" progress in that placement. Further, while Plaintiffs admit that the SRO stated that O.M.'s ultimate 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," Plaintiffs emphatically deny that the record in this case plausibly supports that sweeping claim.

35. Plaintiffs deny the allegations set forth in paragraph 35, including its subparagraphs (a) through (d).

36. Plaintiffs incorporate their responses to the allegations set forth in paragraphs 1 through 35 of Defendant's counterclaim as though fully set forth here.

37. Plaintiffs deny the allegations in paragraph 37.

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

39. Plaintiffs deny the allegations set forth in paragraph 39.

40. Plaintiffs deny the allegations set forth in paragraph 40.

41. Plaintiffs deny the allegations set forth in paragraph 41.

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

43. Plaintiffs incorporate by reference their responses to the allegations in paragraphs 1-42.

44. Insofar as the Board will be deemed to have deprived Plaintifffs of a FAPE, Plaintiffs admit the Board is an "aggrieved party" with respect to the ALJ's factual finding that the final decisions relating to the Board's offered placement and services to O.M. were improperly delegated to an outsider to O.M.'s IEP Team

and were made outside of any of O.M.'s IEP Team meetings. However, Plaintiffs deny any allegation that the finding was incorrect, not regularly made, and/or not amply supported by the record and Judge Lassiter's credibility determinations.

45. Plaintiffs deny that "Melinda Grenard testified at the hearing that she had no contact with anyone regarding O.M. until after the July 30, 2008, IEP meeting." To the contrary, Ms. Grenard testified that she was responsible for OM's IEP Team, and that she understood that the meetings leading up to the July 30, 2008, meeting had been contentious. At the hearing, the ALJ directly asked Ms. Grenard how she knew the meetings had been contentious on July 30th when she had not discussed the prior meetings with any IEP Team member. Ms. Grenard's explanation (that she knew from the tapes, which she had to listen to in order to write the DEC-5, but was impeached when Petitioners elicited her admission that she did not write the DEC-5 (in fact, the Board's counsel did). Plaintiffs admit that it was at the July 30, 2008, meeting where the Board's LEA Representative presented the only placement and services the Board's Team members ever offered: 180-minutes of education—total—per week, none of it in a regular education classroom, none of it with typical peers, all of it in a segregated, self-contained classroom, with two other disabled children, at the most restrictive node on the LRE continuum. Any remaining allegations in paragraph 45 are denied.

46. Plaintiffs deny that the DEC-5 provided to Plaintiffs on August 14, 2008, "reflected the decisions made at the July 30, 2008, IEP meeting." The record is clear that the DEC-5 was not written by any member of the IEP Team, or even an employee of the Board's EC Department. The Board's own EC Director admitted that the DEC-5 was written by the Board's outside counsel. To the extent that there is nominal testimony of Board witnesses that their lawyer's DEC-5 was circulated to the team members, the Board produced no ESI, no documents, no notes, no markups, no

redlined drafts, no comments, no call notes, or any other evidence that would corroborate the claim, despite Plaintiffs discovery requests or motions to compel their production. Plaintiffs deny the remaining allegations in paragraph 46.

47. Plaintiffs deny the Board's allegation that "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." Plaintiffs deny the remaining allegations in paragraph 47.

48. Plaintiffs deny the Board's allegation that "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." That finding was regularly made and the record fully supports it. For example, the finding was based, in part, upon the ALJ's determination of the credibility of the Board's IEP Team Members. Those damning credibility findings were, in turn, based upon the ALJ's personal evaluation of their testimony, and the evidence that impeached it. By way of example, the ALJ interposed to ask the Board's EC Director, Melinda Grenard, why she was listening to the tapes of the IEP meetings. Ms. Grenard told the Court, "for me to write the DEC 5, I had to listen to the tapes." But later, it was revealed that, in fact, Grenard did not write the DEC-5—the Board's outside counsel wrote the DEC-5. The ALJ did not find that that the other Board-employee witnesses were credible either. These adverse credibility determinations were also regularly made and the record fully supports them. For example, the record is replete with testimony from the Board's IEP Team members' constant obfuscation of straightforward facts, their uniform inability to explain how they personally concluded that 3 hours of education per week in a segregated, self-contained classroom was appropriate for O.M., and their (uniform) inability to understand

questions designed to elicit from them what they understood the Least Restrictive Environment mandate to requires, no matter how many times the question were rephrased by Plaintiffs' counsel. The ALJ was also impressed by the incongruity of the Board's Team members' uniform testimony that, on the one hand, O.M. did not need intensive services because he was so capable and they observed no evidence of his difficulties, and, on the other hand, that, because of the nature and severity of O.M.'s disabilities, O.M. could not be satisfactorily in a regular education setting, or any other setting less restrictive than a segregated, self-contained classroom with two disabled students and two teachers. In addition to the foregoing examples, the record is rife with additional evidence that amply supports to support the ALJ's adverse credibility determinations of the Board's IEP Team members.. And, if that is not enough, the uncontested fact is that the Board's outside counsel—not anyone on O.M.'s IEP team—wrote the final determination of the services and placement the Board would offer in O.M.'s IEP. Plaintiffs deny the remaining allegations in paragraph 48.

49. Plaintiffs incorporate by reference their responses to the allegations in paragraphs 1 through 48 of the boards counterclaim as though fully set forth here.

50. Plaintiffs admit that the board is "aggrieved" by the SRO's decision and the ALJ's decision concluding that the board committed a procedural violation that resulted in a denial of state when the Board failed to provide the Plaintiffs with a DEC-6 prior to October 13, 2008. However Plaintiffs emphatically denied any suggestion that the same conclusion reached by the ALJ and the SRO were based on findings that were not regularly made, errors of law, or that any other basis exists to reverse both the ALJ and the SRO on this dispositive conclusion. Plaintiffs deny any other allegations set forth in paragraph 50.

51. Plaintiffs admit that the board is "aggrieved" by the dispositive finding and conclusion reached by both the ALJ and the SRO that the Board "denied O.M. a free appropriate public education when the school system failed to provide services to O.M. between August 25, 2008 and October 29, 2008." Plaintiffs deny that both the ALJ and the SRO (twice) erred in reaching the same conclusion independently. The ALJ and SRO arrived at same conclusion based on findings of fact that were regularly made, and without legal error. There is no basis to reverse both the ALJ's or the SRO's identical, dispositive conclusion. Plaintiffs deny any other allegations set forth in paragraph 51.

52. Plaintiffs admit that O.M.'s parents asserted that the Defendant's proposed IEP for O.M. 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 52 speak for themselves and are the best evidence of what they contain. Plaintiff denies all of the remaining allegations set forth in paragraph 52.

53. The allegations set forth in paragraph 53 call for legal conclusions to which no response is required. Insofar as any allegations remain those allegations are denied.

54. The allegations in paragraph 54 call for legal conclusions to which no response is required.

55. To the extent that the board alleges that it was required to develop a "service plan" for O.M. when his parents enrolled him in a private school, but failed to do that, causing all the time to be deprived of educational benefit of those services prescribed in his IEP until late October, Plaintiffs admit that the Board has identified

another basis upon which it deprived O.M. a FAPE. Plaintiffs deny the remaining allegations set forth in paragraph 55.

56. The allegations set forth in paragraphs 56 through 62 all call for legal conclusions to which no response is required, and to the extent that any response is required, Plaintiffs deny them. Moreover, none of the contentions or allegations asserted in the Board's "Third Claim for Relief" were ever raised by the Board in the **three** administrative proceedings below, and are therefore subject to Plaintiff's affirmative defense predicated upon the Board's failure to raise any of these issues in any of the proceedings below.

57. Plaintiffs deny that the "final decision" or final offer with respect O.M.'s services and placement were made at the July 30, 2008, IEP Team meeting, or that anyone on O.M.'s IEP Team made them. But Plaintiffs admit the Board is "aggrieved" by the ALJ's conclusion that the Board's proposal to educate O.M. was "not reasonably calculated to meet O.M.'s needs in the least restrictive environment" because, in part, while the Board agreed that O.M. needed to develop skills in responding adaptively to the varied and spontaneous challenges of a regular eduation setting with typically developing peers, it was implausible to believe that O.M. would make progress towards all of those goals if his entire education was limited to three hours per week, all of it in a segregated, self-contained classroom, with two disabled students and two teachers, none of it in a regular education classroom with typically developing peers. Plaintiffs deny the remaining allegations in paragraph 57.

58. Plaintiffs deny the allegations in paragraph 58.

59. Plaintiffs deny the Board's allegation that "at the time of the July 30, 2008, IEP meeting, Owens "natural environment" was his home. At the time of that meeting, O.M. was involved the intensive interventions initiated by his parents

after obtaining his diagnosis months earlier. These intensive interventions (special education and related services) were being directed and implemented by an array of well-trained professionals in various settings and at service provider facilities. O.M. was not in a classroom during the summer because his parents were transferred by the State Department to North Carolina, and, here, classes are not in session in July. The Board failed to timely identify him as a child with a disability upon his mother's first referral, and no placement was offered by the Board until that date. Moreover, prior to his parents move into the Board's school district, O.M. was a full time student at a preschool the entire school year prior to the July 30, 2008 IEP team meeting. Plaintiffs also deny the Board's suggestion that the least restrictive environment continuum should be stood on its head under these or any other circumstances. Neither the IDEA, its regulations, or even the Board's own IEP Forms recognize such a departure from the LRE mandate and its continuum of placements. Moreover, this Court has flatly rejected the same attempt to subvert the LRE requirement by invoking a continuum based on a "natural environment." In fact, when the argument was made by the parents to the SRO in this case, the SRO had no difficulty identifying the same fallacy when parents utilized it in their argument that their preschool aged child should be provided ABA services in the home. Then, SRO eviscerated the parents contention and this court agreed. Yet, in this case, when the Board relied upon the same, unsupportable inversion of the LRE mandate based upon a "natural environment" theory, the SRO invoked the same reasoning he impugned (and this Court rejected) in *Whittenburg* to "reverse" the ALJ's LRE finding. The remaining allegations in paragraph 59 are denied.

60. Plaintiffs deny the allegations in paragraph 60: nothing in the IEP offered by the board "provides for the inclusion of typical students from other preschool classrooms and the playgroup."

61. Plaintiffs deny the allegations in paragraph 61.

62. Plaintiffs deny the allegations in paragraph 62.

63. Plaintiffs deny the allegations in paragraph 63.

Dated: January 28, 2010

Respectfully submitted,

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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. 1:09-CV-692

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: January 28, 2010

Respectfully Submitted,

EKSTRAND & EKSTRAND LLP

By: /s/ Robert C. Ekstrand
Robert C. Ekstrand (N.C. Bar #26673)