

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

*MS. M., as parent and* )  
*next friend of K.M., a minor,* )  
 )  
*Plaintiff* )  
 )  
*v.* ) *Civil No. 02-169-P-H*  
 )  
*PORTLAND SCHOOL COMMITTEE,* )  
 )  
*Defendant* )

**RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Ms. M., mother of severely learning disabled student K.M., challenges portions of a decision of a Maine Department of Education (“MDOE”) hearing officer (“Hearing Officer”) issued pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.*, denying reimbursement for costs incurred in connection with her unilateral placement of her son at the Aucocisco School (“Aucocisco”), a private special-purpose school in South Portland, during the 2001-02 school year. Plaintiff’s Memorandum of Law (“Plaintiff’s Brief”) (Docket No. 12) at 1; Complaint, etc. (“Complaint”), attached to Notice of Removal (Docket No. 1). After careful review of the entire record filed in this case and the parties’ memoranda of law, I propose that the court adopt the following findings of fact and conclusions of law, on the basis of which I recommend that judgment be entered in favor of the defendant Portland School Committee (“School”) as to all claims.<sup>1</sup>

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<sup>1</sup> The scheduling order proposed by the parties and adopted by the court contemplates adjudication of this matter on the basis of (i) the administrative record, (ii) such supplemental evidence as might be approved by the court on motion of a party and (iii) the parties’ briefs. *See* Scheduling Order (Docket No. 6). Ms. M. moved to supplement the record; however, that motion was denied. *See (continued on next page)*

## I. Proposed Findings of Fact

1. K.M., born July 28, 1989, resides with his mother, Ms. M., in Portland, Maine. Special Education Due Process Hearing Decision (“Hearing Decision”), *Portland v. [M.]*, Case No. 02.088 (Me. Dep’t of Educ. Jun. 10, 2002), at 1<sup>2</sup>; *see also* Record, Vol. II at 171, Vol. III at 499-500.<sup>3</sup> From 1995, when K.M. moved to Portland with his mother, until the end of his fifth-grade year (2000-01), K.M. attended the Longfellow School (“Longfellow”), a public elementary school operated by the defendant. Record, Vol. II at 171, 203.

2. K.M., who has been diagnosed with a language-based learning disability and Attention Deficit Hyperactivity Disorder (“ADHD”), qualifies as a student with a disability under the IDEA and Maine special-education law. Complaint ¶¶ 2-3; Answer (Docket No. 3) ¶¶ 2-3.

3. The School is the local education agency responsible for providing a free appropriate public education (“FAPE”) to children with disabilities who reside in Portland. *Id.* ¶ 4. The School receives federal financial assistance for the purpose of administering and implementing programs and activities designed to provide special education services to children with disabilities as required by federal and state law. *Id.* ¶ 5.

4. During kindergarten screening in Gorham, Maine, K.M. was noted to exhibit speech, language and attentional deficits. Record, Vol. II at 173, 185, 192-93. He repeated his kindergarten year after his family moved from Gorham to Portland and he began to attend Longfellow. *Id.* at 171.

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Plaintiff’s Motion To Permit Presentation of Additional Evidence, etc. (Docket No. 8); Memorandum Decision on Motion To Supplement Record (Docket No. 10).

<sup>2</sup> For ease of reference I shall refer to the Hearing Officer’s decision, contained at pages 142-62 of Volume I of the Administrative Record (“Record”), as “Hearing Decision,” citing the consecutively numbered pages of the Hearing Decision itself rather than Record pages.

<sup>3</sup> I have drawn my proposed facts from the Hearing Officer’s findings to the extent relevant and supported by a preponderance of the evidence of Record, supplementing those findings as necessary with additional Record information.

5. After K.M. failed to make adequate progress in reading or writing during both his second kindergarten year (1995-96) and his first-grade year (1996-97), his first-grade teacher referred him to a pupil evaluation team (“PET”) in March 1997. *Id.* at 218. Evaluations conducted pursuant to that referral disclosed a significant discrepancy between K.M.’s intellectual ability and his academic achievement, particularly in the areas of reading and writing. *Id.* at 227, 230-31. Consequently, at the end of his first-grade year, he was identified as eligible for special education services as a student with a learning disability. *Id.*

6. PETs were convened, and individualized education programs (“IEPs”) developed, for K.M.’s second- through fifth-grade years. Hearing Decision at 3-6, ¶¶ 2-13; *see also* Record, Vol. II at 232-37 (second grade), Vol. IV at 603-07 (third grade), Vol. II at 266-70 (fourth grade), 282-86 (fifth grade).

7. School was difficult for K.M. Transcript of Special Education Due Process Hearing (“Transcript”), *Portland v. [M.]*, Case No. 02.088 (Me. Dep’t of Educ.), at 685, 688 (testimony of Ms. M.); *see also* Record, Vol. II at 264.<sup>4</sup> He was highly motivated and eager to participate but struggled academically and experienced anxiety and frustration. *Id.*

8. K.M.’s second-grade IEP provided for six-and-a-half hours per week of resource-room assistance with reading and writing and ninety minutes per week of speech-language therapy. Hearing Decision at 3, ¶ 2; *see also* Record, Vol. II at 232, 238. His third-grade IEP provided for ten hours per week of resource-room services plus an hour per week of speech-language therapy. Hearing Decision at 3-4, ¶ 3; *see also* Record, Vol. IV at 603.

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<sup>4</sup> For ease of reference I shall refer to the transcript of the due-process hearing, contained at pages 668-939 of Volumes IV-V of the Record, as “Transcript,” citing the consecutively numbered pages of the Transcript itself rather than Record pages.

9. Effective as of May 1999 (at the end of K.M.'s third-grade year), his PET revised his IEP to add an additional two hours per week of resource-room support, bringing the total of number of hours of such support to twelve per week. Record, Vol. IV at 593-94.

10. Evaluations performed by the School at the beginning of K.M.'s fourth-grade year once again revealed significant disparities between his level of intellectual ability and his performance in reading and writing. *See, e.g., id.*, Vol. III at 580-82, 584. His reading and writing skills remained only at first- and second-grade levels. *Id.* at 581. A speech-language assessment conducted just prior to the beginning of fourth grade indicated that K.M. had delayed language and phonological processing skills and recommended daily phonemic awareness activities. *Id.* at 591.

11. In October 1999, at the start of K.M.'s fourth-grade year, his PET revised his IEP to provide fourteen hours per week of resource services, with eight hours to be devoted to language arts and six to content support in the classroom. Hearing Decision at 5, ¶ 10; *see also* Record, Vol. II at 265. The PET also adopted annual goals of, *inter alia*, increasing K.M.'s reading skills from "end initial" to "mid transitional" stage; increasing his writing skills from "initial" to "early transitional" stage; and increasing on-task behaviors to age-appropriate levels. Hearing Decision at 5, ¶ 10; *see also* Record, Vol. II at 266, 269-70.<sup>5</sup>

12. Content-area subjects were to be taught in the regular classroom, and K.M. had access to support from an educational technician assigned to the classroom. Hearing Decision at 5, ¶ 10; *see also* Transcript at 213-16 (testimony of Cindy Louise Nilson). Such support was available roughly half of the time that K.M. was mainstreamed in the regular classroom during fourth grade. Transcript at 218 (Nilson testimony).

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<sup>5</sup> Students' reading and writing abilities are assessed, *inter alia*, along a four-stage continuum: emergent (typically achieved in Grades K-1), initial (typically achieved in Grades 1-2), transitional (typically achieved in Grades 2-4) and basic (typically achieved in Grades 4-6). *See* Record, Vol. II at 211-12. As of June 1996, the end of K.M.'s first-grade year, he was assessed as being in the  
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13. K.M. was placed on medication to control his ADHD at the beginning of his fourth-grade year, after which his classroom teacher, Cindy Nilson, observed improvements in his attention span, behavior and academic achievement. *Id.* at 191-93.

14. During K.M.'s fourth-grade year he also began receiving one-on-one instruction from resource-room teacher Margaret Jackson ("Peg") Lewis in the Wilson reading program, a multisensory phonologically based reading program. Hearing Decision at 5, ¶ 11; *see also* Transcript at 56-57 (testimony of Margaret Jackson Lewis), 644-45 (testimony of Ann Nordstrom). This individualized Wilson tutoring was provided two to three times a week during the school day for approximately forty minutes per session; however, it was not part of K.M.'s IEP. Transcript at 56-57 (Lewis testimony). Rather, Lewis happened to choose K.M. as her practicum subject in fulfillment of requirements to obtain Wilson certification. *Id.* at 56, 92-93. K.M. also received Wilson spelling instruction, delivered in a small-group setting, as part of resource-room services delivered pursuant to his IEP. *Id.* at 54, 70.

15. Pre- and post-testing using the Wilson assessment materials revealed that K.M. progressed significantly in his ability to sequence sounds and perceive phonological patterns. Hearing Decision at 5-6, ¶ 11; *see also* Record, Vol. IV at 629. Lewis recommended that K.M. continue with the Wilson program. *Id.*

16. Ms. M., who judged Lewis's Wilson tutoring to have been good for K.M., observed that her son seemed happy with, and energized by, his Wilson sessions. Transcript at 690 (Ms. M. testimony). Nonetheless, in Ms. M.'s estimation, K.M. continued to experience social discomfort and stress over his disabilities during his fourth-grade year. *Id.* at 688-90. During that year, he failed to

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"emergent" stage in both reading and writing. *See id.*

meet three of five standards in Maine Educational Assessment (“MEA”) testing and only partially met the remaining two. Record, Vol. II at 271.

17. Following K.M.’s fourth-grade year Lewis moved into a different School job as a reading consultant and no longer served as a resource-room teacher for K.M. Transcript at 64 (Lewis testimony). Longfellow did not incorporate individualized Wilson tutoring into K.M.’s IEP, although he continued to receive Wilson spelling instruction as part of his resource-room services. *Id.* at 69-70, 113.

18. In October 2000 K.M.’s family hired a private tutor, Ann Nordstrom, to provide three to four hours per week of one-on-one tutoring to K.M. in the Wilson reading program. Hearing Decision at 6, ¶ 14; *see also* Transcript at 66-68 (Lewis testimony), 654 (Nordstrom testimony). Nordstrom provided this service, at K.M.’s family’s expense, from October 2000 through August 2001. Hearing Decision at 6, ¶ 14; *see also* Transcript at 647, 654, 658 (Nordstrom testimony).

19. At a PET meeting held on November 30, 2000, after K.M. had started fifth grade, the team discussed his continuing struggles with learning and distractibility. Record, Vol. III at 551. K.M.’s resource-room teacher, special educator Kate Conley, shared her progress report. Hearing Decision at 6, ¶ 13; *see also* Record, Vol. III at 551, 559-60. She reported that K.M. was reading “instructionally at the mid-transitional stage,” met his math goal to increase skills to third-grade level and met his goal of participating in content-area studies by demonstrating understanding. *Id.* In addition, per Conley, K.M. had made progress toward his writing goal and his goal of increasing on-task behaviors. *Id.*

20. The PET revised K.M.’s IEP, effective through November 2001, to increase special education services to nineteen hours per week, with three hours to be devoted to math, ten and three-

quarters hours to language arts and five and a quarter hours to support in content areas. Hearing Decision at 6, ¶ 13; *see also* Record, Vol. III at 551-52.

21. In addition, at the November 2000 PET meeting, Ms. M. and her brother, Tom Landry, presented the PET with a written statement of her concerns. Hearing Decision at 6, ¶ 13; *see also* Record, Vol. III at 551, 561.<sup>6</sup> Because Ms. M. suffers from a serious learning disability similar to that of her son, her brother had to help her prepare the written statement of concerns for the meeting. Transcript at 683-84, 700 (Ms. M. testimony). The PET agreed to reconvene to discuss Ms. M.'s list of concerns. Hearing Decision at 6, ¶ 13; *see also* Record, Vol. III at 551.

22. At the November 2000 meeting the PET also began discussion of K.M.'s transition to sixth grade. *Id.* Dr. D. Durham, a learning strategist from Lincoln Middle School ("Lincoln"), discussed options available at Lincoln. Record, Vol. III at 551. The PET determined that K.M. would be in co-teach classes during sixth grade – math, language arts and social studies – and would receive resource support each day during "flex" and a multisensory approach to reading. *Id.*

23. Following the November 2000 PET meeting, Ms. M. obtained assistance from an educational advocate who helped her to compose a written request for a publicly funded independent evaluation of K.M. to address her growing concerns. Record, Vol. III at 541; Transcript at 829-30, 834-35 (Ms. M. testimony).

24. On January 17, 2001 the PET reconvened to continue discussion of K.M.'s fifth-grade program and Ms. M.'s list of concerns. Hearing Decision at 6, ¶ 15; *see also* Record, Vol. III at 542-

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<sup>6</sup> Ms. M.'s list of concerns included: (i) lack of provision in his IEP for Wilson tutoring, (ii) ineffectiveness of resource room time, with insufficient one-on-one instruction, (iii) the loss of Lewis's services given her new role as reading consultant, (iv) that time spent in art and music classes would be better spent receiving additional one-on-one reading help, (v) that despite several years of services the gap between K.M. and other students in reading, comprehension and writing remained the same, if not greater, (vi) that the family was bearing the cost of an outside tutor, (vii) increasing reading-based homework, taking K.M. several hours to complete, (viii) the stress of the length of K.M.'s day, (ix) distraction caused by switching classes and having different teachers and (x) worsening social issues in and out of school, including frustration, poor self-image and behavioral issues. Record, Vol. III at 561.

43. In attendance, in addition to Ms. M., her brother (Landry) and Donna Verhoeven, a Disability Rights Center (“DRC”) advocate, were Conley, Nilson, Lewis, Longfellow learning strategist O. Solodar, Longfellow principal Dawn Carrigan and Kristen Rollins, the School’s assistant director of special services. Record, Vol. III at 542; Transcript at 1093 (testimony of Donna Elizabeth Verhoeven).

25. At Ms. M.’s request, the team agreed to suspend K.M.’s art and music and increase his special-education services from nineteen to twenty-and-a-half hours per week, with the additional time to be used for resource-room preteaching in content areas. Hearing Decision at 6, ¶ 15; *see also* Record, Vol. III at 542-43. As a practical matter, K.M. as of this point received virtually full-time support in his mainstream classes. Transcript at 235-36 (Nilson testimony). The PET also agreed that K.M. would arrive at 8 a.m. to complete homework assignments in his regular classroom with assistance from his teacher as needed. Hearing Decision at 7, ¶ 15; *see also* Record, Vol. III at 542-43. The team also noted that K.M. had demonstrated regression after the summer of 2000 and that he generally demonstrated regression of skills following weekends and vacations. *Id.* It reaffirmed his need for summer services. *Id.* In addition to concerns previously listed by Ms. M., Verhoeven raised an issue regarding the use of assistive technology. Record, Vol. III at 542. On this point, the team determined that Ms. M. was to access paperwork for books on tape. *Id.* at 543.

26. On February 26, 2001 the PET again reconvened to continue discussions about K.M.’s program and progress. Hearing Decision at 7, ¶ 17; *see also* Record, Vol. III at 528. Present were Ms. M., accompanied by Landry and Verhoeven, as well as School personnel Nilson, Lewis, Solodar, Conley, Carrigan and Rollins. *Id.* The team was noted to have briefly discussed K.M.’s middle-

school placement, with a visit to be set up at King Middle School (“King”) for Ms. M. and Verhoeven. Record, Vol. III at 529.<sup>7</sup>

27. At Ms. M.’s request, Laura Slap-Shelton, Psy.D., performed a neuropsychological evaluation of K.M. in February and March 2001. Hearing Decision at 7, ¶ 18; *see also* Record, Vol. III at 498; Transcript at 710 (testimony of Laura Slap-Shelton).<sup>8</sup> Among other things, Dr. Slap-Shelton administered a Wechsler Independent Achievement Test (“WIAT”) on which K.M. achieved a “reading composite” of 69, with decoding skills in the 5th percentile and reading comprehension in the 4th percentile; a “mathematics composite” of 90, with math reasoning in the 66th percentile and numerical operations in the 5th percentile; a “language composite” of 115 (placing him in the 84th percentile) and a “writing composite” of 70 (placing him in the 2d percentile and at second-grade level). Hearing Decision at 7, ¶ 18; *see also* Record, Vol. III at 503. K.M.’s reading scores fell two standard deviations below his full-scale IQ, with his spelling significantly impaired and his writing impaired. Record, Vol. III at 508.

28. Overall, Dr. Slap-Shelton’s testing indicated that K.M. suffered from dyslexia, mild neurological soft dysfunction, or “soft signs,” and ADHD. Hearing Decision at 7-8, ¶ 18; *see also* Record, Vol. III at 509. She also noted that K.M. could be “considered as having Dysthymia, a form of chronic depression.” Record, Vol. III at 509. She added, “It is notable that despite early intervention from preschool on and appropriate reading tutoring provided both by his school and privately, [K.M.] has not been able to progress in reading. Given this, it is unlikely that he will make rapid progress in reading in the coming school years.” *Id.*<sup>9</sup>

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<sup>7</sup> Ms. M. had by then moved from the Lincoln to the King school district. Transcript at 80 (Lewis testimony).

<sup>8</sup> The School refused to pay for Dr. Slap-Shelton’s evaluation. *See, e.g.*, Transcript at 266-67 (testimony of Dawn Louise Carrigan). The Hearing Officer ordered the School to do so, *see* Hearing Decision at 20-21, and the School’s non-payment of this cost is not at issue in this appeal.

<sup>9</sup> At hearing, Dr. Slap-Shelton testified that “given the right supports [K.M.] would make progress commensurate with his peers.” (*continued on next page*)

29. K.M. did not exhibit significant social problems at school, nor did he appear to his teachers or principal to be depressed or to suffer from school phobia. Transcript at 198-200 (Nilson testimony), 257-58 (Carrigan testimony).

30. Dr. Slap-Shelton made twenty-eight recommendations, including that K.M. (i) should be placed in a school designed to teach students with average and above intellectual ability who have significant learning disabilities, (ii) would learn best in a small school with a supportive staff, (iii) would learn best in a classroom of up to ten students offering one-on-one and hands-on learning opportunities, (iv) should be placed in a well-structured educational setting, with distractions and transitions minimized, (v) should be provided preferential seating, (vi) should continue to receive tutoring making use of Wilson or a similar technique three to four days a week, (vii) should work with a computer-based program such as Earobics or Fast Forward to help with phonics, (viii) should listen to books on tape, (ix) would need a reader or audiotope for written tests and extra time for test taking, (x) should be helped to progress in spelling and punctuation but also be taught to use a keyboard and spell-checker, (xi) should be provided class notes taken by another student or his teacher and tape his classes, (xii) should be provided help in learning how to organize his assignments, and (xiii) should be given reduced quantity of homework and schoolwork when possible. Record, Vol. III at 509-11.

31. On May 1, 2001 Ms. M. completed an application to enroll K.M. at Aucocisco. Hearing Decision at 8, ¶ 20; *see also* Record, Vol. II at 280-81. She did not inform the School of this action. Hearing Decision at 8, ¶ 20; *see also* Transcript at 1056-57 (Ms. M. testimony).

32. Aucocisco is a private day school approved by the MDOE as a special-purpose day school. Transcript at 850-51, 899 (testimony of Barbara Lois Melnick). Like public schools, it aligns its curriculum with the Maine Learning Results. *Id.* at 850. It provides intensive remediation for

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Transcript at 718. She explained that she had changed her mind subsequent to writing the report of her neuropsychological evaluation. (continued on next page)

students with learning disabilities and attentional disorders across all areas of the normal middle-school curriculum. *Id.* at 846-51. It features classes with low student-teacher ratios, emphasizes intensive specially designed instruction for students with reading and written language disabilities and makes some use of assistive technology devices and services to foster success in its population of students with learning disabilities. *Id.* at 848-52, 868-69.

33. On May 9, 2001 K.M.'s PET reconvened to review the results of Dr. Slap-Shelton's evaluation. Hearing Decision at 8, ¶ 21; *see also* Record, Vol. III at 496. Present were Ms. M., Landry, Verhoeven and Dr. Slap-Shelton, as well as School personnel Nilson, Lewis, Conley, Rollins, Solodar, Carrigan, C. Kaufman (the School's lead psychologist) and J. McDonough (a King learning strategist). *Id.* Dr. Slap-Shelton discussed her report and at least some of her recommendations, copies of which were made available to the PET. Transcript at 138 (Lewis testimony), 1151-52 (testimony of Thomas Landry); Record, Vol. III at 491-521.<sup>10</sup>

34. A summary of the meeting indicates a lengthy discussion of K.M.'s needs, including his need for a "high degree of orally presented instruction and assignments, and a high degree of reading instruction," a "need for significantly modified production presentation (keyboard access, note taking)" and support to address his emotional needs. Hearing Decision at 8, ¶ 21; *see also* Record, Vol. III at 496. The team outlined six goals for K.M.: (i) increase independent reading level to a mid-fourth-grade level by annual 2002, (ii) increase writing skills to a beginning third-grade level, (iii) develop ability to identify resources and materials needed to complete projects, (iv) self-monitor his work, (v) access appropriate social-problem-solving skills for a sixth grader and (vi) develop social

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*Id.* at 778.

<sup>10</sup> Ms. M. asks the court to find that Dr. Slap-Shelton was treated very rudely by Longfellow's administrator. *See* Plaintiff's Brief at 7, ¶ 19. There is indeed substantial evidence that one PET member treated Dr. Slap-Shelton rudely. *See, e.g.*, Transcript at 992-93 (Ms. M. testimony), 1099-1101 (Verhoeven testimony), 1151-53 (Landry testimony); *but see id.* at 248-49 (Nilson testimony). However, there is no evidence that the PET as a whole adopted a dismissive attitude toward Dr. Slap-Shelton's work. *See, e.g.*, (continued on next page)

pragmatic skills appropriate for a sixth grader. Hearing Decision at 8, ¶ 21; *see also* Record, Vol. III at 497. The team agreed to reconvene in June. *Id.* Ms. M. did not inform the PET that she had made application to Aucocisco. Hearing Decision at 8, ¶ 21; *see also* Record, Vol. III at 496-97.

35. On June 13, 2001 the PET reconvened. Hearing Decision at 8, ¶ 22; *see also* Record, Vol. III at 491. Ms. M. attended, accompanied by Landry, Verhoeven and Dr. Slap-Shelton. *Id.* Also in attendance were School personnel Kaufman, Solodar, Nilson, Conley, Lewis, Carrigan and Rollins, as well as Mike Lynch, Strand leader at King. *Id.*<sup>11</sup>

36. After a review of the May discussion of K.M.'s needs and goals, the team proceeded to discuss K.M.'s proposed program for sixth grade. Hearing Decision at 8, ¶ 22; *see also* Record, Vol. III at 491-92. Lynch discussed King's program and various options available to K.M. Record, Vol. III at 491. Dr. Slap-Shelton expressed her opinion that K.M. required full-time, one-on-one support from an educational technician – something that Lynch indicated King did not then have the resources to provide. Transcript at 726 (Slap-Shelton testimony).

37. As Lewis recalled the meeting, “We were listing academic needs, and then we were trying to look at the programming King had, and that’s when we put it on a chart so we would understand who was meeting – what [K.M.’s] day would look like, and then what were the areas of concern and how could they be addressed; and looking at the neuropsych, what other areas do we need to look at to put in place for middle school.” *Id.* at 144 (Lewis testimony); *see also id.* at 246 (testimony of Nilson that the reason June PET meeting “was so lengthy was that we very carefully and thoroughly outlined what we felt to be [K.M.’s] issues and needs. And we really had to know that

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Transcript at 138-40 (Lewis testimony), 268-70 (Carrigan testimony).

<sup>11</sup> A “Strand leader” is a learning strategist. Transcript at 368 (testimony of Michael Francis Lynch).

King would be able to provide the arena that [he] could be successful in.”), *id.* at 373-74, 384-86 (testimony of Lynch that K.M.’s needs, past services and fit with King discussed).

38. The team determined that K.M. would receive eight hours of “co-teach” support from special-education staff in the regular classroom for math, language arts, science and social studies in every six-day cycle (the cycle used by King rather than a weekly cycle), two hours of support in the resource room per six-day cycle, Wilson reading instruction for two hours per six-day cycle and one hour per week of social-work services. Hearing Decision at 8-9, ¶ 22; *see also* Record, Vol. III at 492; Transcript at 378-80 (Lynch testimony).<sup>12</sup> The team also determined that K.M. would receive extended school-year services for eight hours per week to address his regression during summer vacation and that the School would provide a Type to Learn program for his computer. Record, Vol. III at 491-92.

39. Ms. M. expressed concern that this plan would not meet K.M.’s needs, but did not reject it. Hearing Decision at 9, ¶¶ 22, 25; *see also* Record, Vol. III at 491; Transcript at 364-65 (Carrigan testimony), 411-12 (Lynch testimony). Nor did she disclose that she intended to enroll K.M. in Aucocisco or any other private school. Transcript at 1056 (Ms. M. testimony). Ms. M. asked to reconvene the PET immediately, the next day or week if possible. *Id.* at 1005-06; *see also id.* at 1155 (Landry testimony). She was told this was not possible. *Id.* The team agreed to reconvene in early September to address her concerns as well as to develop resource goals and goals for executive functioning, study skills and organizational skills. Hearing Decision at 9, ¶ 22; *see also* Record, Vol. III at 491.<sup>13</sup>

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<sup>12</sup> The Wilson instruction was to be provided for forty minutes, every other day, in a small-group setting (two to three students). Transcript at 391 (Lynch testimony). This program was to entail reading instruction plus some small written assignments. *Id.* Resource support was to have been provided for forty minutes, every other day, to enable K.M. to complete homework during school and to hone skills such as writing. *Id.* at 395-96.

<sup>13</sup> Lynch testified at hearing that, although the PET had not set forth new IEP goals and objectives as of the June 2001 meeting, the  
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40. On July 2, 2001 the School sent Ms. M. minutes of the June PET meeting together with a three-page written version of the proposed sixth-grade IEP (“June 2001 IEP”). Record, Vol. III at 491-95. The IEP listed the following program modifications for K.M.’s mainstream classes: (i) math: assistance with word problems, monitor for comprehension, cues to attend and access to calculator; (ii) science/social studies: pre-teach vocabulary and key concepts, monitor for comprehension, cues to attend, note-taking assistance, testing modifications and assistance with project organization; and (iii) language arts: books on tape and instruction to access, shortened assignments, graphic organizers, modifications for ADHD and use of assistive technology. *Id.* at 494. No annual goals or short-term objectives were included in the proposed IEP. *Id.* at 493-95.

41. After receiving the minutes and proposed IEP, Ms. M. was discouraged, concluding that the School had not provided a sufficient program for K.M., and began the process of finding the money to pay for K.M.’s Aucocisco tuition. Transcript at 1082-83 (Ms. M. testimony).

42. The June 2001 IEP would have provided K.M. with “co-teach” support for approximately fifty percent of his mainstream-class time, to be used flexibly (*e.g.*, more for language arts, less for math). Transcript at 382-84 (Lynch testimony).<sup>14</sup> This was more support than most students with learning disabilities receive at King, although less than K.M. had received at Longfellow. *Id.* at 384-85 (Lynch testimony), 1107-08 (Verhoeven testimony). However, middle school is less textbook-driven than fifth grade, *see, e.g., id.* at 346 (Carrigan testimony), 385-87 (Lynch testimony), and K.M. was capable of participating without a technician’s support in classroom discussions and in projects or assignments that required little writing, *id.* at 355 (Carrigan testimony).

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goals and objectives in K.M.’s existing IEP, which were in effect until November 2001, were appropriate for K.M.’s sixth-grade year at King and would have been used in the interim before new goals and objectives were devised. Transcript at 404-06 (Lynch testimony); *see also* Record, Vol. III at 544-50 (listing goals and objectives in effect until November 30, 2001).

<sup>14</sup> K.M.’s case manager and an educational technician would have shared the duty of providing his mainstream support. Transcript at 458-59 (Lynch testimony). Each also would have been responsible for simultaneously supporting the work of three or four other (*continued on next page*)

There are also social reasons for maximizing a disabled middle-school student's inclusion in mainstream classes and minimizing "pullouts" to special education classrooms. *Id.* at 593-94 (testimony of Christopher Kaufman).

43. There is a difference of opinion as to whether the June 2001 IEP was reasonably calculated to meet K.M.'s needs. *Compare, e.g., id.* at 83 (testimony of Lewis that "I felt very good about that [June 2001] IEP. I felt it was very appropriate and I thought it was very thoughtfully orchestrated."); *id.* at 239 (testimony of Nilson that "I had some concerns about [K.M.] being placed at Lincoln. And once [Ms. M.] was moved into the King neighborhood and certainly once we had the PET with the King folks at the table, my concerns evaporated."), *id.* at 551-52 (testimony of Dr. Kaufman that "[w]e have other students . . . at the middle school level in Portland whose disabilities are commensurate with the severity of [K.M.'s] who do show reasonable degree of benefit in the context of this level of support [as provided in the June 2001 IEP]") *with id.* at 661 (Nordstrom testimony that K.M. required one-on-one Wilson tutoring and it "would have been very difficult for [him] to be successful" with June 2001 IEP plan), *id.* at 727-29 (testimony of Dr. Slap-Shelton that K.M. required full-time educational technician, at least three hours per week of one-on-one Wilson tutoring and written-language recommendations, which she did not see in June 2001 IEP), *id.* at 1008-09 (testimony of Ms. M. that June 2001 IEP provided insufficient help for her son).

44. Subsequent to the June PET meeting Barbara Dee, the School's director of special education, made several attempts to schedule a PET with Ms. M. that summer with a view to finalizing K.M.'s IEP prior to the start of his sixth-grade school year. Transcript at 1177, 1180-81 (testimony of Barbara H. Dee). She contacted Ms. M. in July in order to schedule a meeting prior to the start of school. *Id.* at 1051 (Ms. M. testimony), 1180 (Dee testimony). Ms. M. told Dee she was willing to

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students besides K.M. *Id.* at 459-60.

meet before school began but needed to check possible dates with her brother and her advocate and would get back to Ms. M. *Id.* at 1181-82 (Dee testimony). She never did. *Id.* at 1182. Dee attempted to contact Ms. M. again in late July or early August, leaving a message with several possible late-August PET dates on Ms. M.'s answering machine. *Id.* Again, Dee never heard back from Ms. M. *Id.* A PET meeting eventually was scheduled for September 12, 2001. *Id.*

45. The Record contains a number of meeting and change-of-program notices addressed to Ms. M. in which appears a notation at the bottom that a copy of the "Procedural Safeguards Statement 9/94" is attached. *See, e.g.,* Record, Vol. II at 275 (letter dated October 11, 2000), 277 (letter dated November 17, 2000), 278 (letter dated December 12, 2000), 279 (letter dated January 4, 2001), 280 (letter dated February 28, 2001), 294 (letter dated June 1, 2001), 295 (letter dated June 13, 2001). The attachments to which the notices refer are not made part of the Record. *See, e.g., id.*

46. Ms. M. acknowledged receipt of procedural safeguards sent in connection with PET meetings during K.M.'s fifth-grade year. Transcript at 1045 (Ms. M. testimony). As of January 2001, Verhoeven assisted Ms. M. in understanding PET minutes and forms. *Id.* at 1047-48.

47. Although the notices sent to Ms. M. indicate that copies of safeguards effective in September 1994 were sent, the School revised its safeguards in approximately November 2000 to incorporate revisions to the IDEA made in 1997. *Id.* at 1185 (Dee testimony). The School thereafter made sure it distributed the revised safeguards to parents. *Id.*<sup>15</sup>

48. Ms. M. has difficulty reading and writing, as at least some School personnel were aware. *See, e.g.,* Transcript at 300-01 (Carrigan testimony), 835-36 (Ms. M. testimony). Nonetheless, Ms. M., a high school graduate, *id.* at 682 (Ms. M. testimony), is capable of

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<sup>15</sup> The IDEA was amended in 1997 to impose new notice requirements on parents unilaterally placing a child in private school and to impose a corresponding duty on school districts to inform parents of those new requirements. *See* 20 U.S.C. §§ 1412(a)(10)(C)(ii)-(iv), 1415(d)(2)(H); *see also M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 69 n.9 (2d Cir. 2000).

communicating in English in writing, albeit with grammatical and spelling errors, Hearing Decision at 17-18; *see also* Record, Vol. II at 207 (letter dated September 29, 1995 written by Ms. M.), 280-81 (Aucocisco application completed May 1, 2001 by Ms. M.); Transcript at 1042 (Ms. M. testimony).

49. On August 15 and 17, 2001 the deposit and initial tuition payment to Aucocisco were made by checks signed by K.M.'s father for \$7,440 and by his uncle for \$1,855, respectively. Hearing Decision at 9, ¶ 24; *see also* Record, Vol. II at 317. In December 2001 the balance of the tuition was paid by checks from the student's uncle for \$1,851 and his paternal grandmother for \$7,404, respectively. *Id.* K.M.'s father signed the enrollment contract on August 15, 2001. Hearing Decision at 9, ¶ 24; *see also* Record, Vol. II at 301. The School was unaware that K.M. would not be returning at the beginning of the school year. Hearing Decision at 9, ¶ 24; *see also* Transcript at 371, 410-11 (Lynch testimony).

50. In a handwritten letter dated September 11, 2001, Ms. M. informed the School that K.M. had been placed privately at Aucocisco and that she would not be attending any more PET meetings. Hearing Decision at 9, ¶ 25; *see also* Record, Vol. III at 485. The meeting scheduled for the following day was cancelled. Hearing Decision at 9, ¶ 25; *see also* Record, Vol. III at 486; Transcript at 412 (Lynch testimony).

51. When Aucocisco staff evaluated K.M. on his arrival, they found that his language-arts skills were even lower than anticipated. Record, Vol. III at 481; Transcript at 855-56 (Melnick testimony). Consequently, they had to order special materials to teach him how to read. *Id.* They also discovered that he had developed an array of avoidance and other unproductive behaviors. Record, Vol. III at 481; Transcript at 872-73 (Melnick testimony).

52. On or about November 20, 2001 Ms. M. informed the School that she intended to seek reimbursement for K.M.'s Aucocisco tuition on the basis of denial of FAPE. Hearing Decision at 9, ¶ 25; *see also* Record, Vol. III at 484.

53. The School scheduled a PET meeting for December 19, 2001. Hearing Decision at 9, ¶ 26; *see also* Record, Vol. II at 329. Ms. M. attended with Verhoeven and another parent advocate, Maria Bowden. *Id.* Also in attendance were School personnel Dee, Lynch, AnnMarie Wolfe (special educator), Dr. Heather Dick (administrator), Dr. Nancy Smith (psychologist), and Pat Niles (social studies teacher). *Id.*

54. After a lengthy discussion of the proposed program at King and the existing program at Aucocisco, the team came to no resolution about K.M.'s placement in the school. Hearing Decision at 9, ¶ 26; *see also* Record, Vol. II at 329-33. The PET determined that additional academic testing and observations of K.M. at Aucocisco were necessary to assess his current levels of performance and his needs. Hearing Decision at 10, ¶ 26; *see also* Record, Vol. II at 332-33.

55. Chip Cain, a social worker commissioned by the PET to evaluate K.M. at Aucocisco, recommended a "school program of small groups/classes, minimal distractions, a great deal of reading/writing support (one-on-one as much as possible), organizational support and confidence building." Record, Vol. II at 333, Vol. III at 443.

56. In January 2002 Lynch administered the WIAT to K.M., and a classroom observation was made of K.M. in his reading tutorial at Aucocisco. Hearing Decision at 10, ¶ 27; *see also* Record, Vol. II at 336, 338. K.M. obtained a reading composite of 73, a mathematics composite of 97 and a writing composite of 67 on the WIAT, indicating that his skills exceeded those of approximately four percent of students his age in reading, approximately one percent of students his age in writing

and approximately forty-two percent of students his age in math. Hearing Decision at 10, ¶ 27; *see also* Record, Vol. II at 338-39.

57. During elementary school K.M. made slow, steady academic progress – typical of students with severe learning disabilities and attentional problems, even when they have had highly supported instruction. Transcript at 516 (Kaufman testimony). K.M. achieved consistent standard scores on academic achievement testing during this time, indicating that he was “holding his own” in comparison with his non-disabled peers. *Id.* at 524-26.

58. The PET reconvened on February 26, 2002. Hearing Decision at 10, ¶ 28; *see also* Record, Vol. III at 429. Ms. M. attended with Bowden. *Id.* Also in attendance were School personnel Cain, Lynch, Leah Fasulo (special-education educational technician), Dr. Dick, Dr. Smith and Joseph Farrell (teacher). *Id.*

59. Following lengthy discussion of the recent assessment information, K.M.’s program at Aucocisco, his needs and the proposed King program, the School proposed a revised IEP (“February 2002 IEP”) offering the following services per six-day King cycle: (i) eight hours of academic support in the regular classroom for math, language arts, science and social studies, (ii) two hours of resource-room support, (iii) four hours of one-on-one reading instruction, (iv) one hour per week of speech and language support for pragmatic language and (v) one hour per week of social work services, either individual or small group. Hearing Decision at 10, ¶ 28; *see also* Record, Vol. II at 359, Vol. III at 431-32.

60. Modifications proposed to assist K.M. in participating in the regular classroom included: (i) assistance for reading and understanding math problems, (ii) reduced homework, (iii) cues to attend, (iv) assistive technology in language arts and (v) testing modifications as needed. Hearing Decision at 10, ¶ 28; *see also* Record, Vol. II at 360. The six goals initially sketched out by

the PET on May 9, 2001 were combined into two, one addressing reading and written language and the other addressing emotional/social-pragmatic needs. Record, Vol. II at 362-63. Short-term objectives were added. *Id.*

61. At the conclusion of the meeting Bowden stated that she and Ms. M. were unable to say whether Ms. M. would accept the February 2002 IEP. Hearing Decision at 10, ¶ 28; *see also* Record, Vol. III at 432. They agreed to let the School know by March 8, 2002. Record, Vol. III at 432. There is no evidence that either Ms. M. or Bowden thereafter informed the School whether the IEP was acceptable.

62. On or about March 13, 2001 the School filed a request for a due-process hearing. Record, Vol. I at 1-6. In response Ms. M. also asserted claims, requesting reimbursement of the cost of tuition and transportation associated with K.M.'s unilateral placement at Aucocisco in September 2001. *Id.* at 24-26.

63. Following a five-day hearing held during April and May 2002, *see* Record, Vol. IV at 668, the Hearing Officer issued a decision adverse to the family on the issue of tuition reimbursement for Aucocisco while finding in favor of Ms. M. on other issues and ordering reimbursement of the costs of private Wilson tutoring and of K.M.'s evaluation by Dr. Slap-Shelton, *see generally* Hearing Decision.

64. In her June 10, 2002 decision, the Hearing Officer first found that K.M.'s sixth-grade IEP (as it stood as of February 2002) offered FAPE. Hearing Decision at 11-16. She summarized the IEP process as follows:

The 2001-2002 IEP, which drives this dispute, began at the PET in May 2001 with a review of the parent's independent educational evaluation, and continued until February 2002. The PET met a total of four times in its effort to complete the IEP. The parent and her representatives attended each of the meetings. Before the process was completed the parent placed the student in a private, special purpose day school that specializes in educating students with learning disabilities. The school convened

two more PET meetings after the parent's unilateral placement. She and her representatives continued to participate in the process. The meetings were lengthy, with significant discussion around the student's needs. The parent continued to voice concerns about the final IEP and the student's ability to succeed in the program, however she neither accepted nor rejected the IEP.

*Id.* at 11.

65. With respect to Ms. M.'s argument that the School had committed a procedural violation of the IDEA by "predetermining" K.M.'s placement at King, she wrote:

In light of the preference of IDEA for educating students in the least restrictive environment and this student's educational history, it is difficult to fault the school for making the logical assumption that the student would begin his sixth grade year much as he had ended his fifth grade year. . . . The student had been educated in his neighborhood school in the mainstream for the previous five years. While there was a growing dispute around the parent's concern of the student's limited progress in reading and writing, there was no discussion that the student's program should be removed from the mainstream.

A review of testimony and exhibits surrounding the PET discussions does not support a 'take it or leave it' attitude from the school as the parent seems to imply. There were two lengthy PET meetings prior to the end of the fifth grade school year. The parent alleges that there was not a full discussion of the neuropsychological evaluation, because her evaluator was not given ample time to discuss her recommendations. It is true that the evaluator's lengthy list of 28 recommendations was not reviewed in its entirety, but there is no disagreement that the PET considered the assessment data in the evaluation, gave the evaluator ample time to present the data, and that the full report including the recommendations, was available to the team. This information along with teacher reports resulted in a full discussion of the student's needs and strengths as evidenced by the PET minutes. The discussion did not generate data to suggest that the PET needed to radically rethink the placement for the student. No other placement option or setting was put forth by any team member, even though evidence shows that the parent had already begun the enrollment process at Aucocisco.

It was only at PET meetings after the private placement, and a notice of a claim for reimbursement, that the parent's preference for a private special purpose school for learning disabled students even became part of the discussions. Disagreement with the parent's preference by the school does not equate to pre-determination of placement. In fact, the record is quite clear that the PET, including the parent, participated in extended discussions around the student's needs and how to meet those needs within the context of a public middle school. It is the law's preference to educate students with disabilities in the least restrictive environment. The school did not then, nor does it now, believe that the student requires placement outside the public school. . . . The student's placement was not pre-determined. Ultimately, there was simply no

agreement between the parent and the school that the student's needs could be met in the public middle school.

*Id.* at 12-13 (footnote omitted).

66. The Hearing Officer next found that the February IEP offered FAPE as a substantive matter, noting:

It is the parent's position that this IEP does not offer the hours of services previously provided the student. It is true that the frequency and amount of services listed in this IEP are less than [in the IEP offered] the previous year. However, the amount of individual reading instruction offered, the Wilson reading, is similar to the 3-4 hours per week the student received during fifth grade from the private tutor. . . .

The biggest area of difference in hours of support offered the student between the fifth and sixth grade IEPs are [sic] the support provided by special education staff in the regular classroom. The parent asserts that, given his reading and writing deficits, the student would not succeed in the content areas in a public middle school without a full-time, individually assigned, aide. The school presents a convincing argument that the program does take into account the student's severe reading and writing deficits as they impact his ability to participate in the regular classroom content areas. They present the middle school experience as less text-driven, with much of the material presented orally, through visual methods and using hands-on learning. These methods of presentation build on the student's strengths and offer good opportunities for him to succeed with his age peers in his high interest subjects. This, coupled with the class modifications and assistive technology listed in the IEP, present[s] a picture of a program that takes into account the student[']s strengths and weaknesses. . . .

Much of the evidence of the hearing focused on the student's scores in standardized reading and writing achievement tests. . . . The parent argues that because these scores did not increase between the 1997 and 2001 evaluations, and that his reading ability has not shown significant gain, the student has not made measurable progress, and therefore the IEP failed to confer benefit. It is true that testing does not show that the student has made substantial gains in his reading and writing over the past few years. This in and of itself is not conclusive evidence that the student has failed to benefit from past IEPs or that he cannot succeed in a public school setting given the currently proposed IEP.

The discrepancy between the student's ability and achievement in reading and writing is greater than two standard deviations. This profile has not changed over the years. School's psychologist, Dr. Kaufman, makes a convincing argument that these achievement scores indicate a student, who even with his significant impairment, is continuing to make slow measured progress in his areas of weakness. As the expectations increase in the normative sample of the test population, the student's consistent standard scores in reading and writing represents [sic] a picture of a student

who is “holding his own”. He opines that, given the severity of his neurologically based learning disability, the student has maintained the measured progress one might look for in a student with his profile.

Parent’s expert, Dr. Slap-Shelton, does not disagree with this analysis, but uses it to draw different conclusions and make specific educational placement recommendations for the student. She testified that the student could, with the right instruction, show a rate of learning commensurate with his peers, and that this data supports the parents [sic] position that the student has failed to benefit from his education. She argues that the student must have intense individual and small group instruction, in small classes, in order for him to make greater gains in his deficit areas. This might indeed be the optimum atmosphere in which to remediate the student’s reading and writing disability, but it is not what the law requires.

*Id.* at 14-15 (footnote omitted).

67. The Hearing Officer also found, in relevant part, that Ms. M. had failed to qualify for reimbursement for Aucocisco tuition by virtue of her non-compliance with relevant IDEA notice requirements set forth at 34 C.F.R. § 300.403. *Id.* at 16-18. The Hearing Officer rejected Ms. M.’s arguments that her non-compliance should be excused on the basis of illiteracy or failure to receive notice of her procedural rights from the School, finding:

I do not dispute the parent’s claim that she suffers from a significant learning disability similar to her son’s, and struggles to read and write. But the evidence does not demonstrate that she is illiterate and cannot write in English. The parent is a high school graduate. There are at least three documents in the record written by the parent in her own handwriting: the September 11, 2001 letter, the application for enrollment at Aucocisco, and a letter to the school written in 1995. Both the application to Aucocisco and the letter to the school in 1995, while containing some grammatical errors, contain well-formed words and language that is clear. Her intent is easily understood. The principal and the student’s fourth grade teacher both testified that they were aware that the parent had difficulty reading, but each of them had no indication that she was unable to read. There is no way to conclude that she meets the exception in paragraph (e).

The parent also argues that the school failed to provide adequate notice of her obligation to provide prior notice before removing the student from public school. There is no evidence upon which to draw that conclusion. The parent did not deny that she has received the procedural safeguards notifying her of her rights. Reading and interpreting the notice requirement when placing a student privately may have been difficult for the parent. However, she has been supported by both her brother and/or an able advocate for well over a year and a half.

*Id.* at 17-18 (footnote omitted).<sup>16</sup>

68. The Hearing Officer rejected Ms. M.'s argument that K.M.'s fourth-grade program failed to offer FAPE; however, she found that he failed to receive a key component of his fifth-grade program, the Wilson reading program, at public expense. *Id.* at 18-20. She also deemed the School responsible for the cost of Dr. Slap-Shelton's independent evaluation of K.M. *Id.* at 20-21. She therefore ordered the School to reimburse (i) the full cost of payments K.M.'s family made to Nordstrom (his Wilson reading tutor) for his fifth-grade school year and (ii) the cost of the Slap-Shelton evaluation. *Id.* at 21.

69. Ms. M. filed the instant appeal in the Maine Superior Court (Cumberland County) on July 9, 2002. *See* Notice of Removal ¶ 1. On August 12, 2002 the School removed the action to this court. *See id.* at 1.

## II. Proposed Conclusions of Law

1. Congress enacted the IDEA to ensure that children with disabilities receive FAPE. *See, e.g.,* 20 U.S.C. § 1400(d)(1)(A). FAPE consists of special education and related services that are provided to children with disabilities at public expense and under public supervision during preschool, elementary school and secondary school. *See id.* § 1401(8). The states and "local educational agencies" located within them are responsible for ensuring that children with disabilities receive FAPE. *See, e.g., id.* § 1412-13. In return, those bodies receive funds from the federal government for use in implementing the provisions of the IDEA. *See, e.g., id.* §§ 1412(a), 1413(a).

2. A PET, consisting of a disabled child's parents, teachers, school administrators and others who know the child well oversees the child's special education. *See id.* § 1414(d)(1)(B);

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<sup>16</sup> In the omitted footnote, the Hearing Officer observed, "The parent claims that she only copied the words in this letter [the September 11, 2001 letter] from a template given her by her advocate. While she may not have composed the letter, she clearly wrote (*continued on next page*)

Maine Special Education Regulations, Code Me. R. 05-071 ch. 101 (“MSER”), § 8. The PET develops, reviews and revises as appropriate an IEP outlining the special education services the child should receive. *See* 20 U.S.C. §§ 1414(d)(3) & (4)(A).

3. Per 20-A M.R.S.A. § 7207-B(2)(A), a school administrative unit may request the MDOE commissioner “to appoint an impartial hearing officer who shall conduct a hearing regarding the identification, evaluation and educational program of the student and shall make findings of fact and issue a decision[.]”

4. A party dissatisfied with the decision of a DOE hearing officer may appeal that decision to the Maine Superior Court or the United States District Court. *Id.* § 7207-B(2)(B); *see also* 20 U.S.C. § 1415(i)(2)(A).

5. The IDEA provides that a court reviewing the decision of a hearing officer “(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(B).

6. “The role of the district court is to render bounded, independent decisions – bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court.” *Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48, 52 (1st Cir. 1992) (citation and internal quotation marks omitted). “While the court must recognize the expertise of an administrative agency, as well as that of school officials, and consider carefully administrative findings, the precise degree of deference due such findings is ultimately left to the discretion of the trial court.” *Id.* (citations and internal quotation marks omitted).

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it.” Hearing Decision at 18 n.11.

7. Two questions are presented: “First, has the State complied with the procedures set forth in the Act? Second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” *Id.* (citation and internal quotation marks omitted).

8. The burden of proof rests on the party challenging the hearing officer’s decision. *Id.* at 54; *see also, e.g., Maine Sch. Admin. Dist. No. 35 v. Mr. and Mrs. R.*, 176 F. Supp.2d 15, 23 (D. Me. 2001) (rec. dec., *aff’d* Feb. 27, 2002), *rev’d on other grounds*, 321 F.3d 9 (1st Cir. 2003) (“The party allegedly aggrieved must carry the burden of proving . . . that the hearing officer’s award was contrary to law or without factual support.”).

9. The central issue in this case is whether Ms. M. is entitled to reimbursement of Aucocisco costs following her unilateral decision to place K.M. in Aucocisco. *See, e.g.,* Plaintiff’s Brief at 1. “Where the court or hearing officer finds that the school district did not make a FAPE available to the child in a timely manner, IDEA allows parents to place their disabled child in a private school and receive reimbursement.” *Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21, 26 (1st Cir. 2002) (footnote omitted). However, “parents are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act.” *Id.* (citation and internal quotation marks omitted) (emphasis in original).

10. IDEA regulations provide, in relevant part:

(c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. . . .

(d) Limitation on reimbursement. The cost of reimbursement described in

paragraph (c) of this section may be reduced or denied –

(1) If –

(i) At the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days . . . prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

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(e) Exception. Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement may not be reduced or denied for failure to provide the notice if –

(1) The parent is illiterate and cannot write in English; . . . or

(4) The parents had not received notice, pursuant to section 615 of the Act, of the notice requirement in paragraph (d)(1) of this section.

34 C.F.R. § 300.403.

11. Ms. M. contends that the Hearing Officer committed two serious legal errors with respect to K.M.'s claim for reimbursement for his sixth-grade year: (i) improperly considering whether the February 2002 IEP, rather than the June 2001 IEP, offered FAPE and (ii) wrongly failing to excuse Ms. M.'s noncompliance with IDEA notice requirements. *See* Plaintiff's Brief at 15-16. In addition, with respect to K.M.'s sixth-grade year, Ms. M. asks the court to find (i) (as a *de novo* matter inasmuch as the Hearing Officer addressed only the February 2002 IEP) that the June 2001 IEP was both procedurally and substantively inadequate and (ii) that the Hearing Officer erred in deeming the Aucocisco placement inappropriate. *See id.* at 20, 37-42. Ms. M. finally challenges the Hearing Officer's denial of compensatory education (in the form of Aucocisco reimbursement) for the School's asserted failure to provide K.M. FAPE in his fourth- and fifth-grade years. *See id.* at 42-49.

12. I conclude that, in the circumstances of this case, the Hearing Officer correctly focused on the February 2002 IEP. However, even assuming *arguendo* that she erred, the error is harmless inasmuch as the June 2001 IEP provided FAPE and, in any event, the Hearing Officer correctly concluded that Ms. M. did not qualify for excuse from her noncompliance with IDEA notice requirements. I further find that Ms. M. fails to demonstrate entitlement to Aucocisco reimbursement as a form of compensatory education for K.M.'s fourth- and fifth-grade years. I do not reach the question of whether the Aucocisco placement was appropriate.

### **A. Sixth-Grade Year**

#### **1. June 2001 v. February 2002 IEP**

13. In asserting that the Hearing Officer scrutinized the wrong version of K.M.'s sixth-grade IEP, Ms. M. presents what appears to be an issue of first impression: whether, in circumstances in which (i) a parent unilaterally places a child in private school, (ii) the parent is at least partly responsible for the school district's delay in timely completion of an IEP and (iii) the child's PET (with the parent's full participation) subsequently refines or completes the IEP, a hearing officer properly can focus on the belated version of the IEP to assess whether the School has met its obligation to offer the child FAPE.

14. As Ms. M. points out, the IDEA directs that an IEP be in effect "[a]t the beginning of each school year[.]" *See* Plaintiff's Brief at 16 (quoting 20 U.S.C. § 1414(d)(2)(A)). It follows, as a logical corollary, that the IEP in effect as of that time generally should be the one upon which a hearing officer or court should focus in assessing whether a student was provided FAPE.

15. Moreover, as Ms. M. also underscores, for purposes of determining whether a parent is entitled to reimbursement – the central issue in this case – relevant IDEA regulations direct hearing officers (and courts) to assess whether FAPE has been offered in a timely manner as of the time a

parent unilaterally enrolls a child in private school. *See id.* at 18-19; *see also* 34 C.F.R. § 300.403(c); *see also, e.g., Sylvie M. v. Board of Educ. of Dripping Springs Indep. Sch. Dist.*, 48 F. Supp.2d 681, 696 (W.D. Tex. 1999), *aff'd*, 214 F.3d 1351 (4th Cir. 2000) (“Sylvie’s parents may only recover the costs they incurred in unilaterally placing Sylvie at Élan if they establish that (1) the IEPs in effect at the time that Sylvie was removed from Dripping Springs I.S.D. were not reasonably calculated to provide Sylvie with a meaningful educational benefit, and (2) the parents’ placement of Sylvie at Élan was appropriate under the IDEA.”).

16. Nonetheless, as the School points out, courts have refused (properly, in my view) to hold a school district liable for the procedural violation of failing to have an IEP in effect at the commencement of the school year in circumstances in which a parent’s own actions frustrated the process of IEP completion. *See* Defendant’s Memorandum of Law (Docket No. 13) at 30-32; *see also MM v. School Dist. of Greenville County*, 303 F.3d 523, 533-35 (4th Cir. 2002) (refusing to hold school district liable for procedural violation of failure to complete timely IEP when parents were afforded full opportunity to participate in formulation of IEP, school district was attempting to offer child FAPE and parents ceased cooperating with PET prior to IEP’s completion, preferring to place child in private school); *Doe v. Defendant I*, 898 F.2d 1186, 1189 n.1 (6th Cir. 1990) (parent could not be heard to complain that school district failed to complete a timely IEP when IEP’s non-completion was attributable to parent’s request that school allow student to perform on his own for a while).<sup>17</sup>

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<sup>17</sup> Two cases upon which Ms. M. relies for the proposition that reimbursement of private-school tuition is appropriate in cases in which a school district fails to develop an appropriate IEP by the beginning of the school year, *Gadsby ex rel. Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997), and *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755 (6th Cir. 2001), *see* Plaintiff’s Brief at 16-19, are distinguishable both from *MM* and from the instant case. The school district in *Gadsby* did not even develop its first proposed IEP until October of the school year in question, and there was no indication the parents hindered its development. *See Gadsby*, 109 F.3d at 945. The school district in *Knable* never convened an IEP conference throughout the school year in question. *See Knable*, 238 F.3d at 766.

17. Like the parents in *MM*, Ms. M. frustrated timely completion of the IEP process. I am mindful that, when she pressed School officials at the conclusion of the June 2001 PET meeting to reconvene the team promptly, they informed her this was not possible, indicating that the team would reconvene in September (presumably after the start of K.M.'s sixth-grade school year). Had things been left this way, I would not find Ms. M. responsible for the PET's failure to complete K.M.'s sixth-grade IEP in a timely fashion. However, in July, School special-education director Dee attempted to schedule a summer PET meeting with a view toward finalizing the IEP before the start of the school year. Ms. M. indicated her willingness to participate in such a meeting but then dropped the ball, failing either to get back to Dee as promised or to return phone calls Dee placed to Ms. M. when she had not heard back from her. Afterwards, in mid-August, K.M. was enrolled at Aucocisco.

18. *MM* and *Doe* do not address the precise issue in question here: whether, in circumstances in which a parent frustrates timely completion of the IEP process, a hearing officer properly may take the measure of FAPE on the basis of an IEP finalized belatedly with the parent's full participation. Nor do the parties provide, or am I able to find, any case considering whether such an approach can be squared with the language of section 300.403(c).

19. Nonetheless, I find *MM* and *Doe* instructive. Section 300.403(c) states that tuition may be reimbursed if "the agency had not made FAPE available to the child in a timely manner prior to that [unilateral] enrollment[.]" In this case, the School was attempting, at the time of the Aucocisco enrollment in mid-August, to make FAPE available "in a timely manner." Ms. M. abruptly ceased all cooperation with the PET process without any word to the School that she was rejecting its IEP or enrolling her son at Aucocisco. The School thus had not failed as of mid-August to make FAPE available "in a timely manner"; it was still in the process of attempting to do so. Ms. M. subsequently rejoined efforts to finalize K.M.'s sixth-grade IEP.

20. Under the peculiar circumstances of this case, it would seem to have been an empty exercise for the Hearing Officer to assess whether the June 2001 IEP, as a substantive or procedural matter, offered FAPE. To at least some extent, the document would have been found wanting because it was unfinished; yet, no timely finished version existed in large part because of Ms. M.'s own actions – a circumstance in which (as noted in *MM*) it is plainly inequitable to hold a school liable. Further, Ms. M. and her advocates participated fully in the PET's belated attempts to refine and complete the IEP – a circumstance that counsels in favor of taking cognizance of the later (February 2002) version. The Hearing Officer accordingly committed no error in assessing whether the February 2002 version of K.M.'s IEP offered him FAPE for his sixth-grade year.

21. Even assuming *arguendo* that the Hearing Officer erred in weighing the merits of the February 2002 IEP rather than its earlier counterpart, any such error is harmless for two reasons: (i) the June 2001 IEP offered FAPE and, (ii) alternatively, the Hearing Officer correctly concluded that Ms. M. failed to comply with the notice provisions of 34 C.F.R. § 300.403(d) or to qualify for excuse from those provisions pursuant to the following subsection, 300.403(e).

22. I consider as a *de novo* matter (inasmuch as not addressed by the Hearing Officer) whether the June 2001 IEP made FAPE available to K.M. prior to his enrollment at Aucocisco on August 15, 2001. See *Metropolitan Nashville & Davidson County Sch. Sys. v. Guest*, 900 F. Supp. 905, 911 (M.D. Tenn. 1995) (adjudicating, *de novo*, issue unaddressed by administrative law judge in IDEA case). However, I do not write on a blank slate. Many of the Hearing Officer's findings and conclusions with respect to the February 2002 IEP are instructive in considering whether the School, prior to August 2001, offered K.M. FAPE. I have given these careful consideration.

## **2. June 2001 IEP: Alleged Procedural Flaws**

23. Ms. M. makes both procedural and substantive arguments in positing that the June 2001

IEP failed to offer FAPE. *See* Plaintiff’s Brief at 21-34. On the procedural side, her key contention is that the School impermissibly predetermined K.M.’s placement. *See id.* at 22-29.

24. In planning for K.M.’s transition to middle school, the PET in this case assumed that he would continue to be educated in public school (specifically, at his neighborhood school, first Lincoln, then King). The PET also began its discussion of placement at King before K.M.’s IEP was finalized – indeed, as part of the process of finalizing it.

25. In arguing that this process constituted a procedural violation of the IDEA, Ms. M. relies in part on commentary by the Office of Special Education and Rehabilitative Services, U.S. Department of Education, to the effect that “the IEP must be developed before placement” and “each student’s IEP forms the basis for the placement decision.” *See id.* at 24 (quoting Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12406, 12471, 12475 (Mar. 12, 1999) (codified at 34 C.F.R. pts. 300, 304)). Placed in proper context, neither comment supports a finding of IDEA violation in this case.

26. The first comment was made in response to the question, “For a child with a disability receiving special education for the first time, when must an IEP be developed – before or after the child begins to receive special education and related services?” *Id.* at 12475. K.M. was not a first-time recipient of special education.

27. The second comment is part of a larger statement that, on the whole, actually supports the approach employed by the School in this case:

Even though IDEA does not mandate regular class placement for every disabled student, IDEA presumes that the first placement option considered for each disabled student by the student’s placement team, which must include the parent, is the school the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement. Thus, before a disabled child can be placed outside of the regular educational environment, the full range of supplementary aids

and services that if provided would facilitate the student's placement in the regular classroom setting must be considered. Following that consideration, if a determination is made that [a] particular disabled student cannot be educated satisfactorily in the regular educational environment, even with the provision of appropriate supplementary aids and services, that student then could be placed in a setting other than the regular classroom. Later, if it becomes apparent that the child's IEP can be carried out in a less restrictive setting, with the provision of appropriate supplementary aids and services, if needed, Part B would require that the child's placement be changed from the more restrictive setting to a less restrictive setting. In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs, and not solely on factors such as category of disability, significance of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. Rather, each student's IEP forms the basis for the placement decision.

*Id.* at 12471.<sup>18</sup>

28. In any event, even assuming *arguendo* that the PET's approach in this case was procedurally flawed, the violation was not so egregious in the circumstances as to invalidate the resultant IEP. As the First Circuit has noted:

Courts must strictly scrutinize IEPs to ensure their procedural integrity. Strictness, however, must be tempered by considerations of fairness and practicality: procedural flaws do not automatically render an IEP legally defective. Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.

*Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (citations omitted).

29. In this case, Ms. M. and her advocates were active participants in the PET process. At its May 2001 meeting the PET engaged in extensive discussion of K.M.'s status and needs and delineated six goals for his sixth-grade year. It then invited a King representative (Lynch) to its next meeting in June. Armed with the benefit of Lynch's presentation, it began the process of sketching out

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<sup>18</sup> As Ms. M. notes, *see* Plaintiff's Brief at 24 n.8, school districts must "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services," 34 C.F.R. § 300.551. However, this regulation cannot fairly be construed to impose a rigid requirement that a PET that has found a less restrictive placement appropriate for a particular student proceed to consider more restrictive placements.

an IEP melding King's schedules and services with K.M.'s needs. King's scheduling and available resources were indeed taken into account; but so were K.M.'s history, status and needs. No one, including Ms. M. and her advocates, voiced a need for consideration of a private-placement option.

30. This process stands in sharp contrast with those described in cases relied upon by Ms. M. in which courts found an IEP-development process sufficiently flawed to merit invalidation of the resultant IEP. *Compare, e.g., W.G. v. Board of Trs. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992) (school district (i) independently developed proposed IEP without input from parents, (ii) considered no alternatives despite parents' objections and (iii) assumed a "take it or leave it" attitude); *Spielberg ex rel. Spielberg v. Henrico County Pub. Sch.*, 853 F.2d 256, 258-59 (4th Cir. 1988) (school district unilaterally decided to change child's placement from private residential to public before developing new IEP to support change); *Sanford Sch. Comm. v. Mr. & Mrs. L.*, No. 00-CV113 PH, 2001 WL 103544, at \*8 (D. Me. Feb. 1, 2001) (rec. dec., *aff'd* Feb. 27, 2001) (PET placed student in particular program solely to serve administrative convenience, without slightest consideration of whether program was capable of conferring any meaningful benefit to him).

31. In short, the PET in this case did what this court previously has said PETs must do: "give meaningful consideration to whether a proposed IEP and placement suit the unique needs of the child." *Sanford*, 2001 WL 103544, at \*8.

32. Ms. M. secondarily argues that the June 2001 IEP was procedurally deficient because it lacked key components. *See* Plaintiff's Brief at 29-30 (June version contained no statement of K.M.'s present levels of performance or measurable annual goals, including benchmarks and short-term objectives).

33. As noted above, in so arguing, Ms. M. asks the court to find the June 2001 IEP wanting because it was unfinished. Yet, it was unfinished because Ms. M. ceased cooperating with the PET

process – a circumstance in which it is plainly inequitable to hold a school district liable for a document’s procedural flaws. *See, e.g., MM*, 303 F.3d at 533-35; *Doe*, 898 F.2d at 1189 n.1.

34. In any event, the goals and objectives of K.M.’s existing (fifth-grade) IEP were in effect until November 30, 2001. These goals and objectives were appropriate for sixth grade and would have been followed until new ones were devised.

35. Ms. M. accordingly identifies no procedural flaw sufficient to call into question the validity of the June 2001 IEP.<sup>19</sup>

### **3. June 2001 IEP: Alleged Substantive Flaws**

36. For purposes of substantive analysis, “a FAPE has been defined as one guaranteeing a reasonable probability of educational benefits with sufficient supportive services at public expense.”

*G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 948 (1st Cir. 1991). As the First Circuit has further elaborated:

The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child’s potential.

The IDEA also articulates a preference for mainstreaming. Translated into practical application, this preference signifies that a student who would make educational progress in a day program is not entitled to a residential placement even if the latter would more nearly enable the child to reach his or her full potential. And, moreover, when the bias in favor of mainstreaming is married to the concepts of appropriateness and adequacy, it becomes apparent that an IEP which places a pupil in a regular public school program will ordinarily pass academic muster as long as it is

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<sup>19</sup> Ms. M. also complains that the School committed the procedural violation of failing, upon sending her the June 2001 IEP, to provide her with written notice (including procedural-safeguards notice) pursuant to 34 C.F.R. § 300.503 and MSER § 12.3. *See* Plaintiff’s Brief at 29. Assuming *arguendo* that the School did violate one or both of those rules, I find the violation to have been harmless inasmuch as (i) Ms. M. acknowledged that she did receive notice of procedural safeguards within the months preceding issuance of the June 2001 IEP and, (ii) despite her difficulties with reading and writing, she had assistance from one or more able advocates during that time frame in dealing with PET and IEP issues.

reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

*Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993) (citations and internal quotation marks omitted).

37. The June 2001 IEP, which proposed placing K.M. in a regular public-school program, was reasonably calculated to enable him to achieve passing marks and advance to seventh grade. The IEP provided significantly less individualized support than K.M. had received in fifth grade; however, K.M. was capable of participating fully in mainstream classes to the extent they were not textbook-dependent, and middle school is less textbook-driven than elementary school.

38. The June 2001 IEP also offered continuation of K.M.'s Wilson studies in a small-group setting for forty-minute segments every other day. While this was not an optimal setup given the severity of K.M.'s learning disability and his ADHD, it was a continuation of the specialized instruction that to date had proven most effective in remediating his profound reading and writing difficulties. The June 2001 IEP did not expressly provide for a structured writing-remediation program; however, Lynch testified at hearing (and it stands to reason) that part of the task of those assigned to support K.M. both in the mainstream and during his "pullout" resource-room time would have been to assist with his writing.

39. The June 2001 IEP finally envisaged a number of modifications to enable K.M. to succeed in his mainstream classes, many of which echo suggestions made by Dr. Slap-Shelton, including cues to attend, note-taking assistance, testing modifications, shortened assignments and use of assistive technology. The level of modifications proposed exceeded those offered to K.M. during fourth and fifth grade, and should have helped offset the loss of virtual full-time shadowing by an educational technician.

40. The June 2001 IEP was not optimal, particularly in its provision of group (versus individualized) Wilson tutoring, a weakness remedied in the February 2002 IEP. However, I find by a preponderance of the evidence that the June 2001 IEP was reasonably calculated to enable K.M. to achieve meaningful educational benefit. That is all the law requires.<sup>20</sup>

#### **4. Failure To Give Notice (34 C.F.R. § 300.403)**

41. In cases of a parent's unilateral placement of a child in private school, reimbursement may be reduced or denied if a parent either (i) fails to inform the PET, at the most recent meeting the parent attends prior the unilateral placement, that the parent is rejecting the school district's proposed placement and intends to enroll the child in private school at public expense, or (ii) fails to so inform the school district at least ten business days prior to the removal of the child from public school. *See* 34 C.F.R. § 300.403(d). The Hearing Officer found, and the Record makes manifest, that Ms. M. did neither of these things.

42. Non-compliance with this requirement cannot be the basis for denial or reduction in reimbursement if, *inter alia*, the "parent is illiterate and cannot write in English" or "the parents had not received notice, pursuant to section 615 of the Act, of the notice requirement in paragraph (d)(1) of this section." *Id.* § 300.403(e)(1) & (4).<sup>21</sup>

43. Ms. M., who herself has a learning disability, has difficulty reading and writing. Her handwriting is crude, and she makes a number of grammatical and spelling errors. Nonetheless, her

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<sup>20</sup> Ms. M. focuses the bulk of her argument of denial of FAPE on the June 2001 IEP. *See* Plaintiff's Brief at 21-34. However, she does argue in the alternative that the February 2002 IEP, as well, denied FAPE as a substantive matter inasmuch as it (i) failed to address K.M.'s written-language needs, (ii) provided insufficient educational-technician support for mainstream classes and (iii) ignored the recommendations of King's own social worker, Chip Cain, regarding the environment in which K.M. ought to be placed. *See id.* at 34-35 n.14. For reasons discussed above in the context of the June 2001 IEP, I reject these arguments. The February 2002 IEP manifestly provided FAPE.

<sup>21</sup> The notice requirements of section 615 of the IDEA are codified at 20 U.S.C. § 1415(d), which provides that "[a] copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum – (A) upon initial referral for evaluation; (B) upon each notification of an individualized education program meeting and upon reevaluation of the child; and (C) upon registration of a [parental] complaint[.].” 20 U.S.C. § 1415(d)(1). The safeguards must, *inter alia*, address  
(continued on next page)

handwriting is legible and her meaning discernable. The Hearing Officer properly found that she can write in English and that her noncompliance accordingly could not be excused pursuant to subsection (e)(1).

44. During K.M.'s fifth-grade year Ms. M. received procedural-safeguards notices from the School explaining subsection (d)'s notice requirements. During much of that school year, she was assisted with respect to PET and IEP issues by her brother and/or an able advocate who could have helped her comprehend these requirements. The Hearing Officer correctly declined to excuse Ms. M.'s noncompliance on the basis of subsection (e)(4).

45. The Hearing Officer had discretion to reduce or deny reimbursement for K.M.'s Aucocisco tuition on the basis of Ms. M.'s noncompliance with notice requirements. Ms. M. presses no argument that, to the extent the Hearing Officer correctly concluded that she (Ms. M.) failed to give proper notice or to qualify for excuse, the Hearing Officer nonetheless abused her discretion in denying reimbursement. *See* Plaintiff's Brief at 35-37; *see also, e.g., Rafferty*, 315 F.3d at 26 ("Reimbursement is a matter of equitable relief, committed to the sound discretion of the district court . . . usually reserved for parties who prevail at the end of the placement dispute. As the Supreme Court has stated, parents who unilaterally change their child's placement . . . without the consent of state or local school officials, do so at their own financial risk.") (citations and internal quotation marks omitted). Nor do I perceive any abuse of discretion under the circumstances. Reimbursement for K.M.'s Aucocisco tuition accordingly properly was denied pursuant to 34 C.F.R. § 300.403.

### **B. Fourth- and Fifth-Grade Years**

46. Ms. M. finally seeks reimbursement of K.M.'s Aucocisco tuition as a form of compensatory education for the School's asserted denial of FAPE in K.M.'s fourth- and fifth-grade

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"requirements for unilateral placement by parents of children in private schools at public expense[.]" *Id.* § 1415(d)(2)(H).

years. See Plaintiff's Brief at 42-50. "[T]he relevant [IDEA] regulation clearly limits challenges to the implementation of past IEPs, not to the content of past IEPs." *Bell v. Education in the Unorganized Territories*, No. 00-CV-160-B, slip op. at 10 (D. Me. Mar. 27, 2001) (citing 34 C.F.R. § 300.350); *Rome Sch. Comm. v. Mrs. B.*, No. 99-CV-20-B, 2000 WL 762027, at \*13 (D. Me. Mar. 8, 2000) (rec. dec., *aff'd* May 8, 2000) (same). Although Ms. M. attempts in her reply brief to characterize her challenge as implicating the implementation, as well as the content, of K.M.'s fourth- and fifth-grade IEPs, see Plaintiff's Reply Memorandum of Law (Docket No. 14) at 9, her quarrel manifestly is with their content, see Plaintiff's Brief at 42-50.

47. Ms. M. accordingly fails to demonstrate entitlement to compensatory education for the School's asserted denial of FAPE in K.M.'s fourth- and fifth-grade years.

### III. Conclusion

For the foregoing reasons, I recommend that the instant appeal be **DENIED**.

#### NOTICE

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 20th day of May, 2003.

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David M. Cohen  
United States Magistrate Judge

**Plaintiff**  
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***M, as parent and next friend of  
K.M., a minor***

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V.

**Defendant**

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