

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SANFORD SCHOOL COMMITTEE,            )  
  )  
  Plaintiff                    )  
  )  
v.    ) Civil No. 00-CV-113-P-H  
  )  
MR. and MRS. L,                        )  
  )  
  Defendant                    )

**RECOMMENDED DECISION**

Sanford School Committee (“Sanford”) has filed this action pursuant to Section 1415(i)(2) of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1487, challenging the decision of a Maine Department of Education hearing officer that Sanford violated the rights of K.L. and his parents by imposing a revised Individualized Educational Program (“IEP”) and educational placement on K.L. without complying with the procedural and substantive requirements of the Act. Additionally, Sanford challenges the hearing officer’s “stay put” order and his award of compensatory educational services to K.L. I conclude that the preponderance of the evidence supports the hearing officer’s findings and conclusions and recommend that the Court **AFFIRM** his administrative order.

**Overview of the IDEA**

The Individuals with Disabilities Education Act (“IDEA”) is designed to ensure “a free appropriate public education” to children with disabilities. 20 U.S.C. § 1400(d). To reach this goal, Congress provides federal funding to the states, provided that they implement specific policies and procedures set forth in the IDEA. *See id.* § 1412(a). The basic, general prerequisite to the receipt of federal funds is the provision of a “free appropriate public education” in the

“least restrictive educational environment” to all disabled children residing within the state. *Id.* §§ 1412(a)(1) & (5). By “free appropriate public education,” Congress envisioned an education “that emphasizes special education and related services designed to meet the[] unique needs” of each child.<sup>1</sup> *Id.* § 1400(d)(1). By “least restrictive educational environment,” Congress sought to ensure that children with disabilities would be educated alongside non-disabled students “[t]o the maximum extent appropriate.”<sup>2</sup> *Id.* § 1412(a)(5)(A).

Pursuant to the IDEA, the unique needs of each child are to be set forth in an individualized educational program, or IEP, developed by a team of individuals including the child’s parents, the child’s regular and special education teachers, a qualified representative of the local educational agency, and, where appropriate, the child. *See* 20 U.S.C. § 1414(d). The IEP is a written statement that is developed and periodically<sup>3</sup> reviewed and revised in accordance with specific procedures set forth in the IDEA. *See id.* § 1414(d)(3) & (4). The IDEA sets forth eight elements of a proper IEP. They include:

- (i) [A] statement of the child’s present levels of educational performance, including [] how the child’s disability affects the child’s involvement and progress in the general curriculum . . . ;
- (ii) [A] statement of measurable annual goals . . . related to [] meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum; and []meeting each of the child’s other educational needs that result from the child’s disability;
- (iii) [A] statement of the special education and related services and supplementary aids and services to be provided to the child . . . .

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<sup>1</sup> The Supreme Court has interpreted this goal as requiring the states to tailor an instructional plan for each child that is “reasonably calculated to enable the child to receive education benefits.” *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982) (White, J., dissenting).

<sup>2</sup> This is sometimes referred to as the IDEA’s “mainstreaming” requirement.

<sup>3</sup> The IDEA requires that review and revision take place no less frequently than annually. *See* 20 U.S.C. § 1414(d)(4).

*Id.* § 1414(d)(1)(A)(i)-(viii). The IDEA also imposes various procedural safeguards on the states and their educational agencies. These safeguards are designed to ensure that the child and his or her parents or guardians are able to fully participate in any proceedings related to the “identification, evaluation, and educational placement of the child,” including the right to examine the records pertaining thereto, and to obtain an independent educational evaluation of the child, if desired. *Id.* § 1415(b)(1). Additionally, parents or guardians are entitled to receive “written prior notice” whenever the state or agency proposes to change the child’s identification, evaluation, or educational placement, including, *inter alia*,

an explanation of why the agency proposes . . . to take the action[,] a description of any other options that the agency considered and the reasons why those options were rejected[, and] a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed . . . action.

*Id.* § 1415(c). More significantly, the IDEA imposes certain burdens, or procedures, on the local educational agency to ensure that the child’s IEP is appropriate. Most relevant to this case are the following burdens:

1. When reevaluating a child, the local educational agency “shall ensure that . . . assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.” *Id.* § 1414(b)(3)(D).
2. “[A]s part of any reevaluation under this section, the IEP Team . . . shall review existing evaluation data . . . and . . . on the basis of that review, and input from the child’s parents, identify what additional data, if any, are needed to determine . . . the present . . . educational needs of the child . . . and . . . whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the [IEP] of the child and to participate, as appropriate, in the general curriculum.” *Id.* § 1414(c)(ii), (iv).
3. In order to produce the data desired by the IEP Team for purposes of reevaluation, “[t]he local educational agency shall administer such tests and other evaluation materials as may be needed.” *Id.* § 1414(c)(2).

In the event that parents are dissatisfied with an agency’s “identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child”, 20 U.S.C. § 1415(b)(6), the IDEA entitles them to present complaints in an “impartial

due process hearing.” In addition to providing parents the right to an administrative hearing, the IDEA also grants to any party “aggrieved by the findings and decision” of the hearing officer, the right to bring an IDEA “civil action” in either a state court or the appropriate United States District Court. *Id.* § 1415(i)(2).

### **Standard of Review**

The task Congress has assigned to the courts in IDEA actions is to “receive” the record of the administrative proceedings, consider additional evidence offered by a party, and grant “appropriate” relief based on a preponderance of the evidence. *See id.* § 1415(i)(2)(B). This process has been interpreted as requiring the courts to review the administrative proceedings using a unique, intermediate standard of review. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-207 (1982); *Lenn v. Portland School Committee*, 998 F.2d 1083, 1086 (1st Cir. 1993). Pursuant to this standard, this Court must independently consider the evidence and then evaluate the hearing officer’s decision more vigorously than deferentially, but less vigorously than *de novo*. *See Lenn*, 998 F.2d at 1086. In the process, the Court must remain mindful of the fact that it lacks specialization in educational policy. *See Rowley*, 458 U.S. at 208 (“[O]nce a court determines [whether] the requirements of the Act have been met, questions of methodology are for resolution by the States.”) Of course, the Court’s review of the case is not unaided; “the burden rests with the complaining party to prove that the agency’s decision was wrong.” *Roland M.*, 910 F.2d at 991 (citing *Kerkam v. McKenzie*, 862 F.2d 884, 887 (D.C. Cir. 1988) (“[W]e think it clear that a party challenging the administrative determination must at least take on the burden of persuading the court that the hearing officer was wrong.”)). “In the end, the judicial function at the trial-court level is ‘one of involved oversight,’ and in the course of that oversight, the persuasiveness of a particular administrative finding, or the lack thereof, is likely to tell the

tale.” *Id.* at 1087 (quoting *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 989 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991)).

### **Background**

K.L. is an eight year old “child with a disability,” 20 U.S.C. § 1401(3), who lives with his parents, Mr. and Mrs. L., in Sanford, Maine. K.L. has been identified as being autistic, a condition that requires the provision of special education services. (Agency Record, “AR”, at 146.<sup>4</sup>) K.L.’s autism imposes significant restraints on his mental and physical faculties. In May 1998, professionals at the Edmund N. Ervin Pediatric Center at Maine General Medical Center in Waterville, Maine, diagnosed<sup>5</sup> K.L. as autistic and observed that K.L. was cognitively delayed and also delayed in his adaptive functioning. They described K.L.’s self-care and socialization skills as being below the first percentile, with “severely disordered” communication skills. The Center advised Mr. and Mrs. L. to enroll K.L. in an applied behavioral analysis<sup>6</sup> (“ABA”) program, to be administered both at school and at home, and to enter K.L. in a “center-based school program with a one-on-one aide trained in [ABA].” (AR at 146-47.)

K.L. first became eligible for public school services in the 1998-1999 school year. (Transcript, “Tr.”, at 367.) As K.L.’s local education agency, Sanford School Committee is responsible for ensuring that free and adequate educational services are provided to K.L. On

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<sup>4</sup> Volume I of the Agency Record is hand-paginated at both the top and bottom of each page. My citations reflect the page numbers found at the top right.

<sup>5</sup> K.L. was first diagnosed as autistic in March 1997 by the Child Development Center in New Hampshire. (Transcript, “Tr.”, at 50.)

<sup>6</sup> Applied behavioral analysis is a theory or method of educating students with special needs. It uses a basic stimulus-response-consequence model to reinforce appropriate behavior and discourage inappropriate behavior. One manner in which ABA is put into practice is through discrete trial therapy. With discrete trial therapy, an educator or therapist applies the principles of ABA by focusing on discrete skills, or parts of skills, such as greeting others or organizing items into categories. For example, to teach a student to wave, a therapist might establish a trial format in which he or she waves to a student and then prompts the student by waving the student’s hand. The return wave is reinforced with a reward. Gradually, through repeated trials, the student should require less “intrusive” prompts and, ultimately, be capable of waving back without a prompt. (Tr. at 76, 290-91; AR at 478-79.) Naturally, such techniques require considerable one-to-one student-teacher contact.

August 27, 1998, a Pupil Evaluation Team<sup>7</sup> (“PET”) convened to address K.L.’s special education placement for the 1998-1999 school year. The team agreed that, during that school year, K.L. would obtain special education services from the Child Development Center (“CDC”) rather than from one of Sanford’s public elementary schools. (AR at 137.) CDC contracted with a consultant behavioral specialist at the May Center, Jennifer Quiet, who designed and implemented an ABA discrete trial therapy<sup>8</sup> program for K.L. (Tr. at 247.) Quiet also trained an educational technician, Betty Hendrickson, who served as K.L.’s primary ABA therapist at CDC. (Tr. at 249.) Over the course of the school year, Hendrickson administered approximately ten hours of weekly ABA therapy to K.L. in the afternoons. (Tr. at 58, 302-303.) In the morning session of each school day, Hendrickson would attend to K.L. in a mainstream classroom setting. (Tr. at 303-304.) According to Hendrickson and Mrs. L., K.L. made significant strides over the year, thanks primarily to the ABA program. (Tr. at 60-63, 306-10.) Most notably, he began communicating through a symbol board, interacting with his peers, and tending to his own toilet needs. He also significantly decreased his past tendency to self-stimulate and engage in activities disruptive to the mainstream class environment. (*Id.*) According to Quiet, ABA discrete trial therapy is the only therapeutic methodology that will help K.L. continue to progress. (Tr. at 257-58, 281-83.)

K.L.’s PET met in March and June 1999 to discuss his program and placement for the upcoming 1999-2000 school year. The PET determined that K.L. was to transition to Sanford’s Carl Lamb Elementary School and that he should be included in a mainstream kindergarten classroom for the morning and continue to receive ABA discrete trial therapy in the afternoon.

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<sup>7</sup> In Maine, the team that develops a child’s IEP is referred to as the pupil evaluation team, or PET.

<sup>8</sup> For a description of discrete trial therapy, see note 6, *supra*.

(Tr. at 258-59, 384-85.) The appropriate amount of ABA discrete trial therapy that K.L. should receive was determined to be two and one-half hours daily. (Tr. at 467; AR at 59.) Sanford hired Michele Legere to serve as the educational technician who would administer K.L.'s ABA discrete trial therapy. When she was hired, Legere had no prior experience in special education, but she received training from Quiet and from Hendrickson, whom she was replacing. (Tr. at 262-63, 545-46.)

K.L.'s progress faltered with his transition to the public school system. Although his IEP called for 12 ½ weekly hours of ABA, it was routine for him to receive only one-half to one and one-half hours of ABA daily, averaging about four hours per week. (Tr. at 464.) K.L. began exhibiting increased disruptive behavior during the mainstream portion of his school day and was beginning to kick, pinch and grab Legere. (Tr. at 402-03, 409-10, 553, 557, 616.) According to Legere and Deborah Smith, K.L.'s mainstream kindergarten teacher, K.L. at this time exhibited no appreciable verbal communication skills and only limited non-verbal communication skills and was not deriving any benefit from the mainstream class lessons. (Tr. at 557-59, 614, 617-20, 625.) Legere and Smith also testified that K.L. did not interact with his fellow students, even when they attempted to engage him. (Tr. at 557-59, 616-18.) Their testimony reveals that K.L. received very little, if any, benefit from the mainstream portion of his day. However, the record supports the inference that K.L.'s regression during the mainstream session was due in large measure to Sanford's failure to provide adequate and consistent levels of ABA discrete trial therapy, and also in part to K.L. being transferred to a new placement in a public institution, which is much larger than the CDC school, with a new educational technician. (Tr. at 185, 472, 638.)

On December 17, 1999, the PET was convened to discuss K.L.'s situation. The primary topic of conversation was what steps should be taken to remove K.L. from the morning session. Elizabeth St. Cyr, Sanford's Special Education Director, and Legere believed that K.L. should spend his morning session in a special education classroom. (Tr. at 414-416, 574-75, 594-95.) Mrs. L. and Kathryn Tyrrell, K.L.'s new ABA consultant, disapproved of that recommendation, with Tyrrell recommending that K.L. be placed temporarily in a smaller mainstream class with volunteer non-disabled students. (Tr. at 95, 105, 576, 596.) The meeting concluded with a determination that K.L. would be temporarily removed from virtually all of the mainstream portion of his day because he was deriving little, if any, benefit from it and was serving as a disruption for the other students. (*Id.* & Tr. at 476.) During these times he was to work with Legere in a one-to-one setting. (Tr. at 576.) However, on December 20, 1999, Legere resigned from her position, largely due to her frustration with K.L.'s program, or lack thereof, and the breakdown in her working relationship with Mrs. L. (Tr. at 574, 577-78.) St. Cyr and Mrs. L. received Legere's resignation on December 21. In response, St. Cyr called an emergency session of the PET, which convened on December 22. (Tr. at 480-81.) Due to the short notice, neither Tyrrell nor Mrs. L.'s counsel were able to attend the meeting. Mr. and Mrs. L. attended the meeting and expressed that they were uncomfortable attending without the support of counsel or Tyrrell. (Tr. at 533.) They also indicated that they considered the emergency to have arisen only due to St. Cyr's failure to ensure that a backup education technician was trained to relieve Legere, who they considered to have resigned due to "burn-out." (AR at 41-42.) St. Cyr noted on the minutes of the meeting that she was concerned that K.L.'s extensive one-to-one placement was not the least restrictive environment. (AR at 42.) She also noted that K.L. would be placed

in “the Spurwink Carl Lamb classroom<sup>9</sup> for students with autism for a diagnostic period not to exceed 30 days. During that time we will be looking at the appropriateness and effectiveness of the current IEP.” (AR at 41.) Mr. and Mrs. L. objected to this placement. (Tr. at 427.) Finally, St. Cyr noted, “During the month we will advertise for an educational technician trained in ABA or interview applicants who may be interested and qualified.” (AR at 42.) Mr. and Mrs. L. kept K.L. at home for the remainder of the week and through the holiday vacation period. During this time, Sanford ran two newspaper advertisements for a new educational technician: a mid-week, one-day ad in the *Biddeford Journal Tribune* and another mid-week, one-day ad in the *Sanford News*. Sanford also posted an internal memorandum inquiring if any existing special education staff would be interested in the position. No applicants were forthcoming. (Tr. at 482-83.)

Mr. and Mrs. L. did not return K.L. to school when classes resumed on January 3, 2000. On January 10, 2000, the PET reconvened. Mrs. L. and Tyrell were both present, though there is no indication that Mr. and Mrs. L. sought to have counsel present. (AR at 17.) St. Cyr arrived at the meeting with a revised IEP that she had drafted on her own. (Tr. at 488-89.) St. Cyr’s IEP provided that K.L. would be placed in the Spurwink program. (AR at 19-22.) There was no new evaluation of K.L. to support his placement in the Spurwink program, either by Spurwink personnel or by Sanford. (Tr. at 487, 667-68.) Input was not sought from Mr. and Mrs. L. or from Tyrell. Rather, St. Cyr indicated that she had designed the objectives set forth in the IEP based on samples prepared by Quiet in connection with K.L.’s September 24, 1999 IEP. (AR at 17.) There was no indication that the placement was temporary or for diagnostic purposes. (*Id.*) Mrs. L. stated that she rejected the IEP and would seek a due process hearing. (AR at 18.)

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<sup>9</sup> The Spurwink program is described, *infra*, at page 10.

Sanford's Spurwink classroom is a self-contained, limited enrollment, special education program that is managed by employees of the Spurwink School, a non-profit mental health agency located in southern Maine, which contracted with Sanford to provide the program sometime in 1998. (Tr. at 630-632). The program is generally described in the testimony of Dr. Linda Butler, an Associate Director of Clinical Services at Spurwink. (Tr. at 628-29.) Dr. Butler has a Ph.D. in early childhood special education and is a Licensed Clinical Social Worker. (Tr. at 628.) She is also Spurwink's appointed autism expert. (Tr. at 631.) The Spurwink program does not offer ABA discrete therapy and does not typically provide students with a one-to-one educational technician. (Tr. at 111, 645-46.) According to Dr. Butler, the one-to-one format can present problems for students with autism because it caters to one of their stereotypical disorders, the tendency to become "stuck" on one care provider and fail to generalize their skills when presented with unfamiliar people or environments. (Tr. at 645-46.) The classroom is run on any given day by three individuals and enrollment is capped at eight. (Tr. at 644, 664.) The classroom's therapeutic model is a so-called "eclectic" or "relationship milieu therapy approach." (Tr. at 632, 690.) Dr. Butler described this model as having to do with "the environment." (Tr. at 633.) Although she provided an adequate description of Spurwink's institutional organization and staff, she did not provide any insight into how the milieu approach plays out in the classroom or what the classroom environment would do for K.L. (Tr. at 633-645.) In addition to utilizing what appear to be a variety of therapeutic methodologies, the Spurwink classroom caters to children with varying disorders. (Tr. at 670.) It appears that the approaches taken vary significantly from child to child. (Tr. at 645.) It is clear that Dr. Butler thinks K.L. could derive benefit from the program, but neither she nor any member of her staff has taken any measures to prepare for K.L.'s arrival or considered what kinds of therapies would

be most appropriate for him based on his educational record. Further qualifying her optimistic outlook are admissions that the Spurwink model is not appropriate for every child with autism and that, unlike K.L., every other child in the program is verbal. (Tr. at 668-669.) Finally, she testified that she was unaware of any student in the program that required a one-on-one educational technician at all times. (Tr. at 672.) The Spurwink classroom had been at capacity until sometime in December 1999, when a student from outside of the school district was withdrawn. (*Id.*) The program then became available for K.L. to join and St. Cyr drafted an IEP that would enable K.L. to participate in the program. (Tr. at 109.)

On January 14, 2000, Mr. and Mrs. L. requested a due process hearing from the Maine Department of Education to resolve their dispute over K.L.'s placement in the Spurwink classroom. (AR at 1-2.) Pending resolution of the dispute, they enrolled K.L. in a home based ABA program. The Department appointed Stephen Ulman to serve as the impartial hearing officer. On February 10, 2000, Ulman entered a prehearing "stay put" order, pursuant to 20 U.S.C. § 1415(j), which provided that K.L. was to receive the services provided for in the September 24, 1999 IEP pending a resolution of the dispute. On February 16, 17, and 19, 2000, Ulman conducted the due process hearing. On March 16, 2000, Sanford came into compliance with Ulman's stay put order. Ulman issued his decision on March 23, 2000. In it he addresses four issues he and the parties had framed previously:

1. Whether Sanford's (St. Cyr's) January 2000 IEP and placement are invalid because Sanford violated IDEA procedures?
2. Whether the IEP and placement fail to provide K.L. with an adequate education, tailored to his unique needs, in the least restrictive environment?
3. Whether Sanford violated Ulman's stay-put order of February 9, 2000?
4. Whether K.L. is entitled to relief consisting of reinstatement of his September 1999 IEP and placement and/or compensatory educational services?

(AR at 352, 606.) Ulman determined that the December “diagnostic” placement and the January IEP and placement violated K.L.’s right to a free appropriate education in the least restrictive environment and ordered Sanford to reinstitute the September 1999 IEP “until such time as the PET determines that the student’s needs, based on diagnostic information, dictate a need for change.” (AR at 615.) He also ordered Sanford to train a second educational technician to administer ABA therapy “to insure a continuance of service in the event one educational technician becomes unavailable.” (*Id.*) Finally, Ulman ordered Sanford to compensate K.L. for services lost between January 3, 2000 and March 16, 2000. (AR at 616.)

Sanford’s challenge requires the Court to evaluate the hearing officer’s ruling with respect to two central issues: (1) whether Sanford violated the procedural or substantive requirements of the IDEA and (2) whether the hearing officer’s stay put order and award of compensatory services are erroneous.

### **Discussion**

*1. Whether the January 2000 IEP and the Spurwink placement violated the procedural and substantive requirements of the IDEA?*

The Supreme Court has prescribed a two-part test for analyzing challenges to an IEP and educational placement. “First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive education benefits?”<sup>10</sup> *Rowley*, 458 U.S. at 206-207. More recent opinions in this Circuit indicate that the first part of this test is more instructive than dispositive and that compliance with the second part is likely to nullify a

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<sup>10</sup> In its own footnote commentary to this standard, the Supreme Court observed, “This inquiry will require a court not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has created an IEP for the child in question which conforms with the requirements of [§ 1414(d)].” *Rowley*, 458 U.S. at 206 n.27.

violation of the first. *See Town of Burlington v. Dept. of Educ.*, 736 F.2d 773, 788 (1st Cir. 1984) (“The ultimate question for a court under the Act is whether a proposed IEP is adequate and appropriate for a particular child at a given point in time.”) Of course, the distinction between process and substance, here as in other areas of the law, is often less than clear. This reflects the fact that the procedural safeguards afforded by the IDEA were designed to produce an adequate IEP when followed and, in that regard, bear heavily on any consideration of the substantive adequacy of a program. *See Rowley*, 458 U.S. at 206 (describing “the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP”). Indeed, in *Rowley*, the Supreme Court made much of the central role that procedural safeguards play in ensuring that an adequate IEP is produced, observing that “[w]hen the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, . . . the importance Congress attached to these procedural safeguards cannot be gainsaid.” *Id.* at 205. The legal standard for evaluating whether a procedural violation will invalidate an IEP and placement has subsequently been prescribed by the First Circuit Court of Appeals. Pursuant to that standard, procedural violations will undermine an IEP only if there is “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.*, 910 F.2d at 994.

The hearing officer determined that the December 22, 2000 IEP violated the procedural requirements of the IDEA because the revised IEP bore no relation to any diagnostic information that would have supported a change in K.L.’s placement. According to the hearing officer,

Sanford's decision to revise K.L.'s IEP based solely on administrative convenience denied K.L. the right to an appropriate education in the least restrictive environment.<sup>11</sup> (AR at 612-13.) He also concluded that ABA is the only therapeutic methodology proven to benefit K.L. and that, until Sanford can provide some diagnostic evidence that K.L. needs what the Spurwink classroom offers, K.L.'s September 24, 1999 IEP should remain in effect. (AR at 614.) With respect to his stay put order, the hearing officer determined that Sanford made a good faith effort to comply and came into compliance on March 16, 2000. Finally, with respect to the appropriate remedy, the hearing officer determined that the September 1999 IEP must be reinstated and that K.L. is entitled to compensatory services for the interruption of his ABA program between the dates of January 3, 2000 and March 16, 2000. (AR at 615.)

Sanford primarily contends that the hearing officer's decision should be vacated due to the "fundamental error" of failing to address "whether the January 10, 2000 IEP was itself reasonably calculated to provide K.L. with educational benefit in the least restrictive environment." (Plaintiff's Memorandum, Docket No. 10, at 10-11.) According to Sanford, "This failure was particularly important here, since the family has not provided any evidence at all in opposition to the appropriateness of [the Spurwink] program." (*Id.* at 11.) Sanford then argues, accurately, that children with disabilities are not entitled to the best possible education or to programs that are time tested and clearly proven, but does so in order to present this case, inaccurately, as one of competing methodologies. (*Id.* at 16-18.) Sanford believes that it is being forced "to disprove all the potential alternative placements that could be considered, rather than showing simply that the IEP it is actually offering meets the IDEA standards." (Plaintiff's Reply Memorandum, Docket No. 12, at 2.)

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<sup>11</sup> The hearing officer did not base his determination on Sanford's failure to provide Mr. and Mrs. L. with the notice required by statute.

I do not agree with Sanford's contention that the procedural violations that occurred in this case are inconsequential so long as the Spurwink program could be capable of providing meaningful benefit to K.L. in the least restrictive environment. The problem with this argument is that there is no basis in the record for this Court to meaningfully evaluate whether K.L. could derive educational benefit from the Spurwink program. Dr. Butler and her staff never evaluated K.L.'s record and Dr. Butler acknowledged that none of the other students in the program are as severely autistic as K.L.. But more significant than the shortcomings of the evidence contained in the record is what is missing from the record. K.L.'s PET has never addressed the key factual issue of whether the Spurwink program will benefit K.L. In other words, Sanford is asking this Court to rule that the Spurwink program provides a free appropriate education to K.L. even though the PET, the entity primarily responsible for ensuring that K.L. receives an appropriate placement that caters to his unique needs, has never given consideration to the matter. This basic flaw reveals quite clearly that Sanford is not being made "to disprove all the potential alternative placements that could be considered," but to simply prove that it actually gave even a passing consideration to whether the Spurwink program was individually suited to K.L.

In my view, the hearing officer was correct to find fault with both the procedure and substance of the January IEP because Sanford failed to establish that the PET conducted an evaluation of the Spurwink program *in relation to K.L.* to determine whether it was capable of conferring any meaningful benefit to him, or, at a bare minimum, to a child having a disability of the same nature and degree as K.L.<sup>12</sup> The preponderance of the evidence simply does not move me to conclude that the Spurwink classroom provides a free appropriate public education for K.L. Rather, the preponderance of the evidence impels me to the conclusion that K.L. was

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<sup>12</sup> In this light, I note that I do not agree with the hearing officer's conclusion that K.L. must remain in his ABA program until his needs change. He could be moved to another program if there was a determination that the program would fulfill his needs.

placed in the Spurwink program solely to serve administrative convenience and without regard to his educational needs. In my view, this compromised his right to an appropriate education.

That the IDEA requires more is obvious. A child's PET is not established merely to serve school administration, but to serve the child. The PET simply must give meaningful consideration to whether a proposed IEP and placement suit the unique needs of the child.<sup>13</sup> *See, e.g.,* Regulations of the Offices of the Department of Education, 34 C.F.R. § 104.35(c) & 303.346(a)(1)(ii) (requiring team evaluations for all placement decisions and requiring consideration of “[t]he results of the initial or most recent evaluation of the child” before an IEP is formulated); 64 Fed. Reg. 12406, 12475 (March 12, 1999) (stating that “it would not be permissible first to place the child and then develop the IEP”). Because I find that this basic, first principle of the IDEA was not met, I do not consider the separate issue adverted to in the briefs concerning whether the Spurwink classroom provides the least restrictive environment. Not only is resolution of this issue unnecessary at this time, but contrary to Mr. and Mrs. L.'s memorandum (Docket No. 11 at 41), it is not clear that the hearing officer ruled on it. (AR at 613.)

2. *Whether the hearing officer's stay put order and compensatory award were erroneous?*

Pursuant to 20 U.S.C. § 1415(j), “during the pendency of any [due process] proceedings [or action for judicial review], unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child.”

This provision is known as the IDEA's “stay put” provision.

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<sup>13</sup> This recommendation is not meant to disparage the Spurwink program. That program may be capable of providing more than adequate services to K.L. Nor do I mean to suggest that administrative convenience is an inappropriate concern when it is not the sole placement criterion.

Sanford argues that the hearing officer exceeded his authority by ordering Sanford to reinstate the September 1999 IEP as K.L.’s stay put placement. (Docket No. 10 at 46.) Sanford contends that the September IEP could not serve as the stay put placement because “Sanford was simply unable to reinstitute such a program after Ms. Legere resigned.” (*Id.*)

The policy behind section 1415(j) supports an interpretation of “current educational placement” that excludes temporary placements . . . . Section 1415(j) “is designed to preserve the status quo pending resolution of administrative and judicial proceedings under the Act.” [*Doe v. Anrig*, 692 F.2d [800,] 810 [(1st Cir. 1982)]. The preservation of the status quo ensures that the student remains in the last placement that the parents and the educational authority agreed to be appropriate.

*Verhoeven v. Brunswick Sch. Comm.*, 207 F.3d 1, 10 (1st Cir. 1999). There is no question but that the September 1999 IEP placement was the last placement mutually satisfactory to the parties. I do not consider the administrative obstacles faced by Sanford to be substantial enough to warrant a departure from the stay put requirement of Section 1415(j), even if it were clear that this Court had the discretion to ignore it in cases of hardship. Sanford had available viable alternatives either for complying with the requirements of the September 1999 IEP and placement or for arranging a placement that would have been “otherwise agreeable” to K.L.’s parents. For instance, Sanford could have reassigned and trained existing staff, which would have complied with the letter of the September 1999 IEP and placement, or it could have placed K.L. with a private service provider such as the May Center, which, based on the record, would have been “otherwise agreeable” to K.L.’s parents.

The award of compensatory educational services is approved of in this Circuit in order to remedy deprivations of a disabled child’s right to a free appropriate education. *See Pihl v. Mass. Dep’t of Educ.*, 9 F.3d 184, 188-89 (1st Cir. 1993). If a child or a child’s parents “can prove that the school district denied [the child’s] right to an

appropriate education under the IDEA during the challenged period,” the child is entitled to a compensatory award. *Id.* at 190.

Because I have concluded that the preponderance of the evidence establishes that Sanford deprived K.L. of his right to a free appropriate education when it preemptively revised K.L.’s IEP and placement solely for administrative purposes, I find no fault with the hearing officer’s decision to award compensatory services to K.L. With respect to the extent of the compensation awarded, I disagree with Sanford’s argument that it is too great because the educational harm to K.L., “if any[,] likely resulted from the family’s unfortunate decision to keep K.L. at home.” (Docket No. 10 at 47.) I do not consider the extent of the award to be out of proportion to the harm, considering the amount of ABA therapy withheld from K.L.

### **Conclusion**

Because the hearing officer’s determination that Sanford denied K.L. the right to a free appropriate education is supported by a preponderance of the evidence, I recommend that the Court **AFFIRM** the hearing officer’s stay put order, placement order, and compensation order, **DENY** Sanford’s appeal, and **ENTER JUDGMENT FOR DEFENDANTS**.

**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, within ten (10) days of being served with a copy thereof. A responsive memorandum 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: February 1, 2001

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Margaret J. Kravchuk  
U.S. Magistrate Judge

U.S. District Court

District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-113

SANFORD SCHOOL COMMI v. MR & MRS L

Filed: 04/17/00

Assigned to: JUDGE D. BROCK HORNBY

Demand: \$0,000

Nature of Suit: 440

Lead Docket: None

Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 20:1400 Civil Rights of Handicapped Child

SANFORD SCHOOL COMMITTE

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plaintiff

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v.

ON THEIR OWN BEHALF AND ON

RICHARD L. O'MEARA

BEHALF OF THEIR MINOR SON KL

773-5651

defendant

[COR LD NTC]

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