UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

PAUL VERHOEVEN, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 98-400-P-DMC***
	)	
BRUNSWICK SCHOOL COMMITTEE,	***)***	
	)	
Defendant	***)***	

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

A jury-waived trial was held in this matter on July 1-2, 1999. The parties have submitted post-trial written arguments and proposed findings of fact and conclusions of law.

I. Findings of Fact

A. Background and Chronology

1. The plaintiffs, Paul and Donna Verhoeven, are the parents of Paul J. Verhoeven ("P.J."), and all three are residents of Brunswick, Maine. During the 1998-99 school year, P.J. was fifteen years old and a ninth-grade student.

2. The defendant is the local education agency that is responsible under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*., for providing a free appropriate

[1] Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order entry of judgment.

public education to children with disabilities residing in Brunswick.

3. P.J. has been identified as a student with a disability under the IDEA and Maine's special education statutes and regulations.

4. During the school year 1997-98 P.J. attended school at the Southern Maine Learning Center ("SMLC") pursuant to a written agreement between the plaintiffs and the defendant. This agreement provided, *inter alia*, as follows:

> It is fully the intent of the parties to this Agreement that P.J. will return to the Brunswick School System as a ninth grader for the 1998-1999 school year and that the placement at the Southern Maine Learning Center for next year is a temporary placement only.

Settlement Agreement, Administrative Record at 107.

5. On June 1, 1998 the pupil evaluation team ("PET") for P.J. convened to develop an individualized education plan ("IEP") for him for the 1998-99 school year. Present at this meeting were P.J. and his parents; Carolyn A. Crowell, Director of Special Education for the Brunswick schools; a regular education teacher from Brunswick; a regular education teacher from SMLC; Margaret Dalrymple, a special education teacher who would be in charge of the self-contained special education ninth-grade classroom in Brunswick High School in the fall of 1998; the director of instruction from SMLC; and the superintendent of SMLC. Minutes of Pupil Evaluation Team Meeting, 6/1/98, *id*. at 72.

6. At this PET meeting, staff from the Brunswick schools provided information concerning the self-contained ninth-grade classroom program then under development. P.J.'s recent testing and progress at SMLC were reviewed. The PET participants agreed that a draft IEP, elements of which were written at the PET meeting, would be completed, with the self-contained classroom as the

placement for P.J., and sent to the parents for their review. Mrs. Verhoeven expressed concern about placing P.J. at Brunswick High School and requested more time to consider the proposed placement.

7. A full, written IEP for P.J., prepared by Ms. Dalrymple, was mailed to the parents on June 10, 1998. On June 15, 1998 Mrs. Verhoeven met with Ms. Crowell to discuss the IEP. After this meeting, Ms. Crowell wrote to the Verhoevens on June 16 and July 7, 1998, requesting that they inform her of their decision concerning P.J.'s proposed placement and offering an additional meeting to "finalize and adjust the I.E.P." *Id*. at 70. Ms. Crowell received no response to these letters. By letter dated July 20, 1998 the parents requested a due process hearing concerning the 1998-99 IEP. On August 12, 1998 Mrs. Verhoeven met with Ms. Dalrymple and the assistant principal of Brunswick High School. A letter from Ms. Crowell to the parents dated August 13, 1998 informed them that "Brunswick would like to schedule a PET meeting with you as soon as possible to make any necessary revisions or adjustments to P.J.'s IEP, including the goals and objectives, prior to the beginning of the school year." *Id*. at 125-26.

8. The due process hearing was scheduled for August 20, 1998. The parties met at a pre-hearing conference on August 13, 1998 during which they disagreed about P.J.'s "stay put" placement under 20 U.S.C. § 1415(j) during the hearing process and any appeals that might follow. The parties filed arguments with the hearing officer concerning this issue on August 20, 1998 and the hearing officer issued a ruling on August 28, 1998 identifying the public school as the appropriate "stay put" placement. The parents sought review of this ruling from this court, *Paul and Donna Verhoeven v. Brunswick School Committee*, Docket No. 98-308-P-C, and the resulting denial of injunctive relief is currently on appeal before the First Circuit, *id*. Docket Nos. 12 & 14.

9. After the due process hearing convened on August 20, 1998 the parties met privately and

then told the hearing officer that they had reached a settlement. On August 21, 1998 Mrs. Verhoeven contacted the hearing officer and stated that she wished to set aside the agreement and proceed to hearing. Over Brunswick's objection, the hearing officer went forward with the hearing on September 8-9, 1998. On October 1, 1998 the hearing officer issued a decision in favor of Brunswick. On October 30, 1998 the Verhoevens filed the present action in state court seeking review of the hearing officer's decision. The action was removed to this court by Brunswick on November 23, 1998.

10. During the settlement discussions on August 20, 1998 the parties agreed to schedule a PET meeting for August 27, 1998 to make changes in P.J.'s IEP in accordance with the settlement. At that time, Mrs. Verhoeven orally waived her right under applicable state regulations to seven days' advance notice of the PET meeting. The PET meeting was held on August 27, 1999 but the Verhoevens did not attend. Mrs. Verhoeven had asked on August 21, 1998 that this PET meeting be canceled, and by letter dated August 26, 1998 informed Ms. Crowell that she would "not be waiving [her] seven-day notice right for 8/27/98 meeting." Administrative Record at 146.

11. At the August 27, 1998 PET meeting P.J.'s IEP was revised to include what Brunswick staff understood to be changes agreed to at the August 20, 1998 settlement meeting.

12. The Verhoevens enrolled P.J. at SMLC at their own expense at the beginning of the 1998-99 school year. Each weekday, P.J. attended SMLC for a half day and received schooling at home for another half day.

13. On October 19, 1998 P.J.'s PET met "[t]o comply with the order of the due process hearing written 10/2/98 and to make final program decisions for P.J.'s IEP to be implemented at Brunswick High School." Trial Exhibit 29. Present were P.J., his parents, the assistant principal,

Ms. Crowell, Ms. Dalrymple, a social studies teacher and the school psychologist. At this meeting, Brunswick staff agreed that the parents' special education consultant, JoAnn Dee, and SMLC's director of instruction would serve as consultants to help in P.J.'s transition. Mrs. Verhoeven stated that she had asked Ms. Dee to draft an IEP for P.J. The PET agreed that a speech/language evaluation would be undertaken and that math and reading mastery tests would be administered as soon as possible.

14. On November 17, 1998 P.J.'s PET met again to review the evaluations and to revise his IEP. Present at this meeting were P.J.; his parents; Ms. Crowell; Ms. Dalrymple; the assistant principal of Brunswick High School; P.J.'s uncle; Leslie Darrell, the high school speech pathologist; Phyllis Worthley, director of student services at the high school; the school psychologist; a math teacher from the high school; Ms. Dee; and the school attorney. A copy of the minutes of this meeting were sent to SMLC's director of instruction, who had declined an invitation to attend. A revised IEP was prepared at this meeting.

15. P.J. began attending Brunswick High School on November 19, 1998.

16. The academic day at Brunswick High School is divided into four blocks. The program set forth in P.J.'s IEP called for him to spend the two blocks before lunch in the self-contained classroom receiving instruction in the four ninth-grade core curriculum subjects. In the afternoon, he would spend one block in remedial instruction in reading and writing and one block in mainstream electives (art and physical education/health) and additional remediation or homework.

17. P.J. entered Brunswick High School with a generally positive attitude and initially made some academic progress. During December Mrs. Verhoeven observed that P.J. was becoming withdrawn and displaying a poor attitude about school. She attended a staffing meeting with Ms.

Dalrymple on December 17, 1999 at which the possibility of expanding P.J.'s mainstream class time beyond one period per day was discussed.

18. On January 4, 1999, the first day after the holiday break, Mrs. Verhoeven was called to Brunswick High School due to P.J.'s refusal to do classroom work and making derogatory remarks about school. Over the next two weeks other incidents involving P.J.'s inappropriate behavior at school were brought to his parents' attention. Another PET meeting was held on January 22, 1999 at which the participants agreed to refer P.J. for a psychological evaluation and to develop a behavior plan for P.J. Present at this meeting were the Verhoevens; their advocate; Ms. Crowell; the assistant principal; a regular education teacher; Ms. Dalrymple; the speech pathologist; the school psychologist; and Ms. Worthley.

19. P.J. was out of school due to illness from January 19 to January 29.

20. Another PET meeting was held on February 22, 1999. Present at this meeting were the Verhoevens; their advocate; Ms. Dee; Ms. Crowell; the assistant principal; Ms. Dalrymple; Ms. Worthley; the speech pathologist; the art teacher; the school psychologist; the school principal; and the school behavioral specialist.[2] A draft behavior plan was presented by the school staff. Mrs. Verhoeven stated that she believed a behavior plan was not needed, but agreed to meet with school staff concerning the plan later in the week.

21. On February 26, 1999 Mrs. Verhoeven met with the assistant principal and the speech

[2] The plaintiffs note that the principal and the school psychologist "both attended without prior invitation or notice to the Verhoevens," Plaintiffs' Proposed Findings of Fact and Conclusions of Law ("Plaintiffs' Proposed Findings") (Docket No. 44) at 26, but do not suggest how or why this fact might be suggestive of any denial of their procedural rights or any substantive insufficiency in the IEP developed for P.J. *See* 20 U.S.C. § 1414(d)(1)(B)(vi) (agency may include other individuals on IEP team in its discretion); Maine Department of Education, Special Education Regulations, Chapter 101 (effective October 31, 1995) ("Maine Regulations"), § 8.7 (same).

pathologist concerning the behavior plan, which had been revised by the school staff in the interim. They agreed on the elements of an interim behavior plan for immediate implementation.

22. On March 1, 1999 P.J. left Brunswick High School without permission and was suspended for three days as a result. The parties differ in their versions of the events leading up to P.J.'s leaving the campus.

23. On March 3, 1999 another PET meeting was held, at which Mrs. Verhoeven announced that she was withdrawing P.J. from Brunswick High School and would provide him with home schooling.

B. Test and Evaluation Results

24. Testing performed in August 1997 revealed that P.J.'s "broad cognitive ability is in the very low range, suppressed by significant weaknesses in auditory analysis, rapid accurate processing of visual symbols, cognitive language development and short term memory," while his "basic language skills development is within the average range" and his "logical thinking skills are well developed." Administrative Record at 99.

25. Testing performed in May 1998 with the same test instrument revealed gains in most measured areas, with losses in visual processing, math calculation, math problem solving, and writing samples. *Id*. at 86.

26. Testing performed in December 1998 at the request of the Verhoevens found P.J.'s composite reading score to be a grade equivalent of 4.3 and his composite writing score to be a grade equivalent of 3.0. Trial Exhibit 14 at 2.

27. Before P.J. entered Brunswick High School the school speech pathologist conducted a speech/language evaluation that resulted in the addition of speech/language services to his IEP and

a recommendation that P.J. be evaluated by an audiologist for possible central auditory processing deficit. Trial Exhibit 16 at [2]. This testing was conducted in early 1999 and revealed fluctuating hearing loss rather than central auditory processing deficit. Trial Exhibit 23 at [2].

28. Testing performed before P.J. entered Brunswick High School showed that his math skills were at the 5th and 6th grade level. Trial Exhibit 16 at [2].

C. The IEPs

29. The IEP dated June 1, 1998 included the following:

A. an annual goal to improve P.J.'s math performance by at least one year from a current functional level of late fourth to early fifth grade, with four short-term instructional objectives;

B. an annual goal to improve his written language skills to at least a fourth grade level (from a mid-third grade level), with five short-term instructional objectives;

C. an annual goal to improve his reading to a mid-seventh grade level from a fifth grade level, with five short-term instructional objectives;

D. an annual goal of passing grades in the general education curriculum, with one short-term instructional objective;

E. 170 minutes per day of services in the self-contained freshman transition room and 170-425 minutes per week of resource services in that room;

F. a place to calm down when he becomes upset;

G. electives and physical education with non-handicapped peers;

H. projected graduation date of 2002-03.

30. The IEP dated August 27, 1998 made no changes in the annual goals for math, reading or general curriculum. It included the following changed or additional terms:

A. an annual goal to improve written language skills to at least a fifth grade level, with six short-term instructional objectives;

B. individual counseling for eight 40-minute sessions and thereafter as needed, one 40-minute group counseling session per week, one consultation with a reading consultant "then determined as needed," and one consultation session with SMLC staff "then determine as needed;"

C. graduation in 2003.

31. The IEP dated November 15, 1998 added the following under the heading "Consideration of behavior which impedes student's learning," etc.: "Class expectations will need to be reviewed. Both P.J. and the special education teacher will need to address 'what-if' situations to avoid misunderstanding of possible conflicts." It also included the following changed or additional terms:

A. an annual goal to improve P.J.'s math performance, where his current functioning is "at a 5-8 grade level," by "at least 1-5 year growth," with unchanged short-term instructional objectives;

B. an additional short-term instructional objective for written expression, and additional measurement by OWLS post-testing;

C. an annual goal for reading, where his current level of functioning is redefined as late second grade, to a fourth grade level, with three additional short-term instructional objectives;

D. an annual goal to demonstrate consistent use of compensatory strategies relating to central auditory processing with 80% accuracy, with three short-term instructional objectives;

E. an annual goal to provide basic information about central auditory processing deficit, with three short-term instructional objectives;

F. an annual goal, based on the lack of organizational skills needed to complete educational

requirements, to become self-sufficient in the classroom, with three short-term instructional objectives;

G. speech-language services from the speech pathologist, 40 minute sessions two to three times per week;

H. one 40-minute individual counseling session weekly, with no group counseling.

D. Expert Reports and Testimony

32. At the due process hearing, Ms. Dee testified that the June 1 IEP "was not going to provide the kind of services and the kind of programming that PJ would need considering his present level of performance level." Due Process Hearing Transcript, Volume V (Docket No. 35) at 456. She would have recommended more specific math objectives, one-to-one instruction on the mechanics of language, speech and language services, accommodation in addition to remediation, and intense daily remediation. *Id*. at 457, 460, 466, 468, 476.

33. Susan B. Holinger, a licensed psychological examiner and certified school psychological service provider retained by the plaintiffs, tested P.J. on December 23, 1998. Her report, Trial Exhibit 14, concludes, *inter alia*, that

> [r]eading and writing are both labor-intensive activities for P.J. While he may be committed to accomplishing tasks at a level equal to what his peers accomplish, at some point the price may be too high. While interventions can include the continued development of reading skills, strategy development should also be considered with a particular emphasis on the appropriate use of accommodations, time management, study skills, etc.

34. Dominick A. Ward-Pistone, a certified school psychological service provider, evaluated P.J. at the plaintiffs' request on March 24 and 26, 1999. His report appears in the record as Trial Exhibit 1. He also testified at trial. During his testimony, he stated that the use of the self-contained

classroom at Brunswick High School was a "good idea" for P.J., that the transition between SMLC and the high school could have been better developed, that accommodation should be emphasized in P.J.'s program, and that P.J. would benefit from vocational work such as short-term apprenticeships in fields of work in which he is interested.

II. Conclusions of Law

A. Applicable Legal Standards

1. The IDEA, which provides the basis for the plaintiffs' claims,[3] provides, in relevant part, that a state, like Maine, that receives federal financial assistance for its public schools, must ensure that:

> [a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.
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> * * *
>
> An individualized education program . . . is developed, reviewed, and revised for each child with a disability in accordance with section 1414(d) of this title.
>
> * * *
>
> To the maximum extent appropriate, children with disabilities, including children in public or private institutions . . ., are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of the child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
>
> * * *
>
> Children with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title.

[3] The complaint also asserts, in Count II, a claim of discrimination in violation of 29 U.S.C. § 794. However, the plaintiffs' submissions during and after trial in this action fail to address that claim. Accordingly, judgment will enter for the defendants on Count II.

20 U.S.C. § 1412(a)(1), (4), (5), & (6). The IDEA defines an IEP in relevant part as follows:

> The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes —
>
> (i) a statement of the child's present levels of educational performance including —
>
> (I) how the child's disability affects the child's involvement and progress in the general curriculum . . .
>
> (ii) a statement of measurable annual goals, including benchmarks or short-term objectives, related to —
>
> (I) 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
>
> (II) 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 . . . and a statement of the program modifications or supports for school personnel that will be provided for the child . . .;
>
> (iv) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class . . .; [and]
>
> * * *
>
> (vi) the projected date for the beginning of the services and modifications . . ., and the anticipated frequency, location, and duration of those services and modifications.

20 U.S.C. § 1414(d)(1)(A).

Finally, the IDEA imposes certain procedural requirements. The state must establish procedures that include

> an opportunity for the parents of a child with a disability . . . to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation

> of the child . . ., [and]
>
> an opportunity to present complaints with respect to any matter relating to the 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)(1) & (6). When such a complaint is presented, the parents involved "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency." *Id.* § 1415(f)(1). Any party aggrieved by the findings and decision made in a due process hearing has the right to bring a civil action in state or federal district court. *Id.* § 1415(i)(2)(A). That court shall receive the records of the administrative proceeding, hear additional evidence at the request of a party, and base its decision on the preponderance of the evidence. *Id.* § 1415(i)(2)(B).

2. Regulations implementing the IDEA add further requirements, set forth in relevant part below:

> The IEP for each child must include —
>
> * * *
>
> (2) A statement of annual goals, including short-term instructional objectives; [and]
>
> * * *
>
> (5) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

34 C.F.R. § 300.346(a).

The state educational agency must ensure that each child with a disability "is educated in the school that he or she would attend if nondisabled," unless his IEP requires some other arrangement. 34 C.F.R. § 300.552(c). An "appropriate education" is defined as

> the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped

> persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

34 C.F.R. § 104.33(b)(1).

3. The Maine Department of Education has promulgated regulations governing the provision of special education services. For purposes of this action, the only state regulation significantly different from the federal statutory and regulatory requirements set forth above is found at section 8.5, which provides that "[t]he school unit shall provide at least 7 days prior notice of each P.E.T. meeting to the parents of each student with a disability" and that "[t]he requirement for 7 days prior notice may be waived by written consent of the parent."[4]

4. The Supreme Court first interpreted the Education of the Handicapped Act, popularly referred to now as the IDEA, in *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). In that case, the Court held that "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items [included in 20 U.S.C. § 1401(18)] are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act." 458 U.S. at 189. The "other items" included in section 1401(18) are requirements that the education is provided at public expense and under public supervision, meets the standards of the state education agency, and is provided in accordance with the requirements of section 1414(a)(5).[5] The instruction and services provided by the state must

[4] The defendant states, and the plaintiffs do not dispute, that "proposed special education regulations recently drafted by the Maine Department of Education" remove the requirement that a parent's waiver of notice of a PET meeting be in writing. Post-Trial Brief of Defendant Brunswick School Committee ("Defendant's Brief") (Docket No. 46) at 27, n.18.

[5] Section 1414(a)(5) was repealed effective July 1, 1998. It required educational units to (continued...)

"approximate the grade levels used in the State's regular education, and must comport with the child's IEP." *Id*. at 203.

The court also held that

> the importance Congress attached to [the elaborate and highly specific] procedural safeguards [embodied in 20 U.S.C. § 1415] cannot be gainsaid. It seems to us no exaggeration to say that Congress place every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, *e.g.*, §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP . . . demonstrates 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.
>
> Thus the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. . . . The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings.

Id. at 205-06. The Court directs a "twofold inquiry" for reviewing courts:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Id. at 206-07. It is not the goal of the Act to maximize the potential of each handicapped child but rather to provide him or her with access to a free public education that will provide an educational benefit. *Id*. at 200-01.

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[5](...continued)
establish and maintain IEPs for children with disabilities. This requirement is now found at 20 U.S.C. § 1412(a)(4).

5. In this case, "[t]he court's principal function is one of involved oversight." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 989 (1st Cir. 1990).

> The Act contemplates that the source of the evidence generally will be the administrative hearing record, with some supplementation at trial, and obligates the court of first resort to assess the merits and make an independent ruling based on the preponderance of the evidence. Nevertheless, the district court's task is something short of a complete de novo review.
>
> The required perscrutation must, at one and the same time, be thorough yet deferential, recognizing the expertise of the administrative agency, considering the agency's findings carefully and endeavoring to respond to the hearing officer's resolution of each material issue. Jurists are not trained, practicing educators. Thus, the statutory scheme binds trial courts to give due weight to the state agency's decision in order to prevent judges from imposing their view of preferable educational methods upon the States.

Id. (citations and internal punctuation omitted). When the court pursues an inquiry under 20 U.S.C. § 1415(e)(2),

> the issue is not whether the IEP was prescient enough to achieve perfect academic results, but whether it was "reasonably calculated" to provide an "appropriate" education as defined in federal and state law. This concept has decretory significance in two respects. For one thing, actions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated. . . . We think it well that courts have exhibited an understandable reluctance to overturn a state education agency's judgment calls in such delicate areas — at least where it can be shown that "the IEP proposed by the school district is based upon an accepted, proven methodology." . . . Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs.

Id. at 992 (citations omitted).

6. The party allegedly aggrieved, the plaintiffs here, must carry the burden of proving that the claimed procedural or substantive shortcomings of the IEP caused harm. *Id*. at 995.

7. Evidence that was not before the hearing officer at the due process hearing "should be used by the courts only in assessing the reasonableness of the [defendant's] initial decisions regarding a particular IEP." *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 762 (3d Cir. 1995). "Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *Fuhrmann v. East Hanover Bd. of Educ*., 993 F.2d 1031, 1040 (3d Cir. 1993).

B. Procedural Challenges

8. The plaintiffs contend that the June and August 1998 IEPs[6] "should be found inappropriate on the basis of fatal procedural flaws alone." Plaintiffs' Brief at 6. Specifically, they contend that the fatal procedural flaws with respect to the June IEP are that the defendant "pre-determined P.J.'s placement to be in the yet-to-be-created self-contained class at Brunswick High School prior to completing the development of P.J.'s IEP" and that "the content of the June IEP was prepared by P.J.'s proposed teacher after the PET meeting and without [the plaintiffs'] participation," denying them a meaningful opportunity to participate in the development of the IEP. *Id*. at 3. The

[6] Only these IEPs were before the hearing officer; the November 1998 IEP, the only version under which P.J. actually attended Brunswick High School, had not been created at the time of the hearing. The First Circuit mandates that "[t]he court's focus [be] upon the educational program which finally emerges from the administrative review process, not the IEP as originally proposed." *Roland M.*, 910 F.2d at 988. The inconsistency between this directive and the First Circuit's emphasis on providing due weight to the findings of the hearing officer is minimized in this case by the fact that the plaintiffs' substantive challenges to the June, August and November 1998 IEPs are essentially identical. The plaintiffs do not identify any procedural irregularities associated with the November 1998 IEP. Their argument must be, therefore, that the alleged procedural flaws associated with the earlier versions so infected the process that the November 1998 IEP is inappropriate as well.

procedural flaw they cite in the August IEP is that the PET meeting at which it was developed was held without the seven days' notice required by state regulation and "in the face of their explicit withdrawal of any consent to waive their right to notice" on the day before the scheduled meeting. *Id*.

9. The hearing officer who presided at the due process hearing made the following significant findings concerning the allegation of predetermination.

> The school came to the PET meeting in June with a program concept for ninth grade students with significant learning disabilities. This program was designed to provide the concentrated instructional support required of severely learning disabled students while providing access to the benefits of a public high school. The school proposed this program as appropriate setting in which to implement the student's IEP. It is the parent's claim that this constituted a predetermination of placement . . . .
>
> Evidence does not support this claim. The parents entered into an agreement which obtained placement for the student at SMLC for a year, and then directed the school to "use the 1997-98 school year to effectively transition [the student] . . . to the high school setting". The parent, through her attorney, now asserts that the school has focused only on "placement" and has violated the procedural integrity of the process by predetermining the program in which the student would be educated. This argument is advanced in the face of an agreement which calls for the school to spend a year developing a program for the student. To now assert that the school's compliance with its agreement with the parent somehow constitutes a violation of the process is artful, at best.
>
> The fact that the school began efforts to design a new program which would be appropriate to meet the needs of the student and presented the outline of that program at the PET is not a violation of the PET process. Schools have an affirmative responsibility to plan for the students within their district. This student was not new to the school. His educational profile was not new to the school. It was reasonable for the PET to assume that the student's IEP could be appropriately delivered within this new program.

Special Education Due Process Hearing Decision, *Verhoeven v. Brunswick*, Case No. 98-103, October 1, 1998 ("Due Process Decision"), Administrative Record at 234-35 (footnote omitted).

10. The hearing officer made the following findings concerning the claim that the IEP was written after the June PET meeting, thereby denying the parents a meaningful opportunity to participate in its development.

> Evidence shows that the PET discusses the student's educational strengths and weaknesses, his past education program goals, teaching strategies used by the day school, and the goals for the coming year. The IEP components were discussed at the meeting and major portions were developed at the meeting. The objectives were written later by the special education teacher who was to provide the major part of the student's program. The teacher testified that these objectives were drawn from the IEP from the 1997-98 school year. Regulations do not require that the actual words and phrases of an IEP be written at the meeting. To complete the final writing phase of the IEP document outside the PET is not a violation of regulations, nor does it compromise the procedural integrity of the process.
>
> Evidence does not support the parent's contention that she was excluded from the process. The parent attended the June 1 PET meeting. Testimony at the hearing revealed that the PET meeting was lengthy, . . . and that the parent had equal opportunity to participate in the discussions. As the program at the high school continued to coalesce over the summer, the school made repeated efforts to meet with the parent to allay any concerns. The school made efforts to understand what the parent felt was lacking in the program and to integrate components into the IEP to address specific concerns the parent raised.
>
> * * *
>
> This dispute has, from the beginning, centered around the parent's claim that the school has failed to involve her in the process of developing her son's IEP. . . . The school's agreement to the items identified at the August 20 meeting, and the school's efforts to memorialize these items into the student's IEP, does not support that claim. . . . [T]he action of the participants of that meeting make it clear that the school's [sic] continues to be open and willing to modify the student's program to address the continued concerns of the parent.

Id. at 235-36 (footnote omitted).

11. With respect to the August IEP, the hearing officer noted that "[t]he school should not have convened the PET on August 27, over the objections of the parent during the pendency of a

hearing." *Id*. at 236. However, she made no further finding concerning this alleged procedural violation, and she found specifically that "[t]here is no evidence to support the parent's contention that 'procedural inadequacies compromised the student's right to an appropriate education or seriously hampered the parent's opportunity to participate in the formulation process or caused a deprivation of educational benefits.'" *Id*. at 234.

12. The hearing officer applied the appropriate legal standards to the facts presented at the due process hearing concerning the procedural claims. *Roland M.*, 910 F.2d at 994.

13. The hearing officer's conclusion concerning the allegation of predetermination is further supported by the commentary to the revisions to 34 C.F.R. part 300 that took effect on May 11, 1999. While the revisions themselves would not apply to this dispute, which is based on events that took place before May 11, 1999, the commentary accompanying the revisions to 34 C.F.R. § 300.347(1)(4), notes that that section's requirement that an IEP include an explanation of the extent to which the child will not participate with nondisabled children in class and extracurricular activities "is consistent with the least restrictive environment (LRE) provisions at §§ 300.550-300.553," 64 Fed. Reg. 12406, 12471 (1999), which were in effect at the time of the events giving rise to this dispute. Referring to the LRE provisions, the commentary states: "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 airs and services to facilitate such placement." *Id*. The defendant's actions in this case were based on this presumption; there is no indication that the defendant refused to consider any placement other than the self-contained program at the high school before the June PET meeting, or even after that

meeting. *Cf. Briere v. Fair Haven Grade Sch. Dist.*, 948 F. Supp. 1242, 1255 (D. Vt. 1996) (team members from school refused to discuss parent's request for private school placement, delayed team meeting for 23 months, and otherwise significantly inhibited parental participation in drafting IEP). The defendant acted upon the required presumption that placement at Brunswick High School would be the first option considered for P.J., and nothing in the evidence before the hearing officer or this court has established, as discussed further *infra*, that a private school placement was the only placement that could have provided P.J. with an appropriate program that would provide him with educational benefit.[7]

14. Even the fact that a draft IEP for a student is available before the team meeting or meetings at which placement is discussed does not mean that placement has been determined before the IEP has been finally approved. *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 947-48 (1st Cir. 1991). Here, the plaintiffs refer to "overwhelming evidence that Brunswick pre-determined P.J.'s 1998-1999 educational placement prior to completion of the IEP." Plaintiffs'' Brief at 9. The evidence to which this statement refers is apparently "Brunswick's announcement on June 1, 1998 that P.J. would be attending the self-contained room at Brunswick High School." *Id*. The hearing officer found no evidence of such an "announcement," and the plaintiffs have provided no evidence on this point beyond that submitted to the hearing officer. Finding the hearing officer's evaluation of the evidence presented on this point at the due process hearing to be well reasoned, I see no basis upon which to disagree with her conclusions. Brunswick was entitled to propose the self-contained

[7] The plaintiffs' argument based on a question and answer found in Appendix C to 34 C.F.R. part 300, Plaintiffs' Brief at 8, is inapposite. That commentary concerns a child receiving special education services for the first time; P.J. had clearly been receiving such services from the defendant at least since his seventh grade school year, two years before the school year for which the IEP at issue was being developed.

class room as a placement for P.J. at the June PET meeting. It had not determined at that time that this placement was the only possible placement for P.J. *See* Testimony of Carolyn Ann Crowell, Transcript of Due Process Hearing Number 99.103 (Volume IV) (Docket No. 34) ("Crowell Due Process Testimony") at 391. There was no procedural violation in this regard.

15. Evaluation of the plaintiffs' procedural claims is to a certain extent tied to evaluation of their substantive claims because a violation of the IDEA's procedural provisions is not a violation of the Act for which a plaintiff may recover unless harm to the student as a result of the procedural violation has been shown. *Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48, 54 (1st Cir. 1992); *Weiss v. School Bd.*, 141 F.3d 990, 996 (11th Cir. 1998). Here, because I agree with the hearing officer that the defendants did not predetermine P.J.'s placement, there is no need to reach the question whether such an action caused P.J. harm. If it were necessary to do so, however, my conclusion that the IEPs at issue met the substantive standards of the IDEA means that P.J. could not have been harmed by the PET's choice, in June or August 1998, of placement at Brunswick High School.

16. The next alleged procedural violation concerns the drafting of the IEP by the special education teacher after the close of the June PET meeting.[8] The plaintiffs contend that "the critical portions of [P.J.'s] IEP — including the annual goals, the short-term instructional objectives, and the nature and amount of special education services to be offered to him — were not developed until *after* the meeting when Ms. Dalrymple . . . prepared the details of the program *without* the Verhoevens' participation." Plaintiffs' Brief at 11. The hearing officer found that P.J.'s PET at the

[8] Apparently, the staff at the SMLC prepared a draft IEP for P.J. before any PET meeting was held concerning his 1997-98 school year at that facility. Testimony of Ellen C. Brunelle, Transcript of Due Process Hearing Number 99.103 (Volume II) (Docket No. 32), at 134, 138.

June meeting "discussed the student's needs and drafted elements of the IEP." Due Process Decision, Administrative Record at 230. Ms. Dalrymple testified at the due process hearing that she completed some of the IEP at the June 1 PET meeting, including stating annual goals, P.J.'s present educational levels and P.J.'s strengths; and that she drafted most of the short-term objectives after the PET meeting because she did not receive much response from other members of the meeting, including the representatives of SMLC, when she asked for input. Testimony of Margaret Dalrymple, Transcript of Due Process Hearing Number 99.103 (Volume III) ("Dalrymple Due Process Testimony") (Docket No. 33), at 273-78. Ms. Crowell testified at the due process hearing that the PET members "went through the IEP" at the June meeting. Crowell Due Process Testimony at 390. It is clear that the defendant considered the IEP completed after the June 1 meeting by Ms. Dalrymple to be a draft rather than a final document and that it was presented to the plaintiffs for their review and input. Mrs. Verhoeven participated in at least one meeting with Brunswick staff, on August 12, to discuss the IEP and the defendant repeatedly asked the plaintiffs for their input and approval so that a final IEP could be established.

17. Contrary to the plaintiffs' position on this issue, I can only conclude that the defendant made reasonable efforts to include the parents in the development of P.J.'s IEP. "It is permissible for one person to draft the IEP as long as the parents are not denied the opportunity to participate, and the members of the IEP team have an opportunity to discuss and amend the IEP." *Dobrowolski*, 976 F.2d at 54. The plaintiffs cite to no authority requiring that all physical drafting of an IEP take place during a PET meeting. Based on this record, imposition by this court of such a requirement would serve only to prolong PET meetings without concomitant benefit to the student or service to the objectives of the IDEA. The drafting of portions of the IEP by Ms. Dalrymple after the June 1

PET meeting, on the facts of this case, did not constitute a procedural violation of the IDEA or applicable state regulations.

18. The final procedural challenge raised by the plaintiffs in this proceeding concerns the August 1998 PET meeting, which they contend was held in violation of a state regulation requiring the school to provide seven days prior notice of a PET meeting, apparently in writing, and providing that this notice requirement may be waived in writing by the parents. Special Education Regulations, Chapter 101 (effective October 31, 1995), Maine Department of Education, § 8.5. Violation of state procedural requirements may constitute violation of the IDEA. *Murphy v. Timberlane Reg'l Sch. Dist.*, 22 F.3d 1186, 1195-96 (1st Cir. 1994). Assuming without deciding that a violation of the Maine regulation occurred in this case,[9] the plaintiffs have not shown that the August PET meeting compromised P.J.'s right to an appropriate education or caused a deprivation of educational benefits. *Id*. at 1196. Indeed, the plaintiffs do not seriously contend that the changes to the June IEP made at the August PET were anything other than changes agreed to by them at the negotiation session on August 20, nor do they point to any changes or additions to the IEP in August that were subsequently deleted at their request at the November PET meeting. Under these circumstances, the plaintiffs have not shown that the holding of the August PET meeting without written notice to them seven days in advance and without their written waiver of notice compromised P.J.'s right to an appropriate education or deprived him of educational benefits.

19. The defendant is entitled to judgment in its favor on the plaintiffs' claims of procedural violations.

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[9] If the parents had actual notice and were not deprived of any substantive right, noncompliance with the notice provisions of the IDEA is not a violation of the Act. *Frith v. Galeton Area Sch. Dist*., 900 F. Supp. 706, 713 (M.D.Pa. 1995).

C. Substantive Claims

20. The plaintiffs argue that neither the June nor the August IEP provided P.J. with an appropriate education because: (i) they "do not adequately show how objectives will be met;" (ii) remediation in language arts and mathematics "is not given priority;" and (iii) they "completely fail to address serious issues concerning P.J.'s social/emotional needs and his ability to transition successfully to a self-contained public school placement." Plaintiffs' Brief at 16-17. Further specifics are presented in the plaintiffs' proposed finding of fact on this issue:

> Neither Brunswick's June IEP nor August IEP for P.J. contains any objective criteria, evaluation procedures, or schedules for determining whether short term instructional objectives are being achieved. The staff/student ratio is not spelled out in the IEPs. Remediation of P.J.'s written language and mathematics is minimal under both offerings. No speech/language service is included in P.J.'s IEPs, and no speech/language evaluations or phonological evaluations were ordered prior to developing the goals and objectives in the IEPs. P.J.'s IEPs contain no developed math objectives and no provisions for "direct instruction," especially in electives which will have substantial requirements for reading and writing. There is no transition program outlined in the IEPs and there is no program for behavior management or social skills training.

Plaintiffs' Proposed Findings of Fact and Conclusions of Law (Docket No. 44) ¶ 35 at 16.

21. Neither the third specific claim set forth in the plaintiffs' brief nor the similar claim set forth in the final sentence of paragraph 35 of their proposed findings of fact was presented to the hearing officer. [Post Hearing] Memorandum dated September 16, 1998 from Advocate for Parents, Administrative Record at 199-216. The IDEA requires exhaustion of administrative remedies before claims may be raised in court. *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 424 (1st Cir. 1985) (decided under statutory predecessor of IDEA); *Logue v. Shawnee Mission Pub. Sch. Dist. No. 512*, 959 F. Supp. 1338, 1349 (D. Kan. 1997) (same under IDEA). Accordingly, this court lacks

jurisdiction to consider those claims.[10]

22. With respect to the substantive issues raised by the plaintiffs at the due process hearing, the hearing officer found that

> [t]he IEP contains measurable annual goals and short-term objectives which are directly related to the present levels of performance and stated needs of the student. Staff who will implement the IEP have devised instructional methodology and instructional strategies which will be employed to meet the goals and objectives contained in the IEP. The methodologies and strategies chosen by the school have been found to be appropriate to the learning needs of students such as the one in this case. The IEP contains a description of the special education and related services to be provided to the student.

Due Process Decision, Administrative Record at 232. She also found that "[e]vidence did not support that the student could only make reasonable gains when taught in a specific student/teacher ratio" and that "[t]here was ample evidence that the public school program has the capacity to apportion student/teacher ratio based upon the need of the student." *Id*. at 233.

23. The plaintiffs cite to authority describing in general terms the requirements for the contents of an IEP that provides an appropriate education under the IDEA, but not to any authority other than 34 C.F.R. § 300.346(a)(5) and the virtually identical § 9.3(H) of the Maine Special

[10] The plaintiffs offered at trial the testimony of Dominick Ward-Pistone to the effect that one meeting between SMLC personnel who had provided services to P.J. during the 1997-98 school year and Brunswick personnel who would be providing services to him during the 1998-99 school year would not be sufficient to provide a smooth transition between the two schools for P.J. Their post-trial submissions emphasize the claim that the IEP "authorized only one transition meeting with SMLC staff." Plaintiffs' Proposed Findings of Fact, etc., ¶43 at 19; Plaintiffs' Brief at 19. In fact, the August IEP provides, under the heading "Related Services," that consultation services with SMLC will consist of "1 session then determine as needed," Administrative Record at 144, which is *not* an authorization of only one such session, and SMLC's director of instruction testified at the due process hearing that SMLC's usual transition practice was to attend one or two meetings with the staff of the public school to which a student who had attended SMLC was transferred, Brunelle Due Process Testimony at 145.

Education Regulations in support of any of their specific contentions. That regulation provides that an IEP must include "[a]ppropriate objective criteria, evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved." The plaintiffs have not shown that the June and August IEPs do not meet the requirement of this regulation. *See generally O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 223*, 963 F. Supp. 1000, 1013 (D. Kan. 1997).

24. I will address briefly each of the specific allegations made by the plaintiffs in their proposed factual finding with respect to the alleged absence of specific measurements, objectives or types of instruction in the IEPS. In so doing, however, I am mindful of the First Circuit's admonition that

> [t]he Act does not mandate, nor has any court held it to require, that the district judge must consider each unique need in isolation and make a separate finding regarding the preponderance of the evidence in each and every identified area. Such a requirement would serve merely to balkanize the concept of educational benefit and to burden the district courts without producing any offsetting advantages. We hold that no such requirement exists. In the last analysis, what matters is not whether the district judge makes a series of segregable findings, but whether the judge is cognizant of all the child's special needs and considers the IEP's offerings as a unitary whole, taking those special needs into proper account.

Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1090 (1st Cir. 1993).

25. As noted above, the June and August IEPs do contain sufficient objective criteria, evaluation procedures and schedules to meet the requirements of the IDEA. There is no need to spell out the student/teacher ratio in an IEP and, to the extent that the plaintiffs claim that all of P.J.'s education at Brunswick would be provided at a student/teacher ratio between 9/1 and 12/1, depending on the total number of students in the self-contained ninth grade classroom, the record

reflects that remedial instruction was to be provided at a ratio no greater than 4/1. Dalrymple Due Process Testimony at 254. I also agree with the hearing examiner's conclusions on the question of student/teacher ratios. Both IEPs contain sufficiently developed objectives for math, Administrative Record at 76, 140, and the plaintiffs have failed to provide evidence that P.J.'s electives, physical education and art, had "substantial requirements for reading and writing" that could only be met by one-on-one ("direct") instruction, Plaintiffs' Proposed Findings at 16. The plaintiffs do not explain how the lack of speech/language evaluation or phonological evaluation ordered by Brunswick before developing the IEP renders the IEP legally insufficient.[11] Both the June and the August IEPs indicate an awareness that P.J. has difficulty with phonological processing that will be addressed with teaching techniques. *Id*. at 75, 78, 139, 142. Ms. Dalrymple uses phonological awareness techniques "across the curriculum" in the ninth grade self-contained classroom. Dalrymple Due Process Testimony at 232, 235.

26. The final substantive issue raised by the plaintiffs is the alleged lack of priority given to remediation in written language and mathematics. The August IEP provides 170-425 minutes per week of remediation. Administrative Record at 144. Ms. Dalrymple's testimony at the due process

[11] In fact, such evaluations were carried out before P.J. enrolled in Brunswick High School in November 1998, and speech and language services were provided to him at that time. November IEP, Trial Exh. 15, at 11; PET Meeting Minutes dated November 17, 1998, Trial Exh. 16, at [2]-[3]. The plaintiffs' strongly argued position that evidence of P.J.'s experience at Brunswick High School from November 1998 through March 1999 should be considered by the court to demonstrate the legal insufficiency of the June and August IEPs is inconsistent with their apparent intention that the court ignore the fact that these particular assertedly fatal omissions in the June and August IEPs were in fact remedied before P.J. ever attended the Brunswick program. It would most certainly exalt form over substance to find the defendant liable for a failure to meet the requirements of the IDEA in an IEP that was never implemented, when the IEP that *was* implemented addressed the very issues the omission of which is alleged to constitute the failure in the unimplemented IEP. *See generally Doe v. Defendant I*, 898 F.2d 1186, 1190 (6th Cir. 1990) (omission from IEP of information known to parents and school officials does not render IEP invalid).

hearing makes clear that the 170-425 minutes per week of "resource (study)" in the June IEP included remediation. Dalrymple Due Process Testimony at 253-56, 258-62. While the plaintiffs clearly would prefer more remediation, the evidence presented by their experts is conflicting at best on the question whether the remediation provided by the IEP is sufficient to provide P.J. with educational benefit.

The plaintiffs refer only to the testimony of JoAnn Dee at the due process hearing. Plaintiffs' Proposed Findings of Fact, etc. ¶ 25. Ms. Dee, a special education consultant, based her evaluation of the June IEP on the assumption that P.J. in four years should be able to "meet the requirements of being a high school graduate going on to some other kind of education." Testimony of JoAnn Dee, Transcript of Due Process Hearing No. 99.103 (Volume V) (Docket No. 35) at 460-61. Ms. Dee recommended "intense daily remediation" in written language, math and reading, "[a] lot of remediation," *id*. at 476, with primarily one-on-one instruction, *id*. at 458 (math), 460 & 462 (language). She testified that it would be a "miracle" if the remediation she believed necessary for P.J. could be provided at Brunswick High School. *Id*. at 483.

The plaintiffs also obtained psychological evaluations of P.J. from Susan B. Holinger and Dominick A. Ward-Pistone. Mr. Pistone testified at trial. As I have already noted, Ms. Holinger recommended that an emphasis on accommodation for P.J. should be considered, because "the price may be too high" for a goal of "accomplishing tasks at a level equal to what his peers accomplish." Trial Exh. 14 at 5. Mr. Pistone testified that P.J. would benefit from a "hands-on," functional education that includes field trips and short-term apprenticeships in fields of work in which P.J. is interested; he saw a need to focus P.J.'s education on his life's work. His recommendations for P.J. appeared to focus more on accommodation than on remediation. Two of the six recommendations

in Mr. Pistone's report concern remediation. Psychological Evaluation, Trial Exhibit 1, at 13-15.

27. On balance, the evidence does not support a conclusion that P.J. could only receive educational benefit from the intense remediation proposed by Ms. Dee. While such services might provide the best possible education for P.J., that is not the test under the IDEA. *Rowley*, 458 U.S. at 200; *Roland M.*, 910 F.2d at 992.

28. Giving due weight to the opinion of the hearing officer, and based upon my own review of the evidence, I conclude that the IEPs proposed for P.J. by the defendant are not invalid for any of the substantive reasons advanced by the plaintiffs.

D. "Stay-Put" Issue

29. The plaintiffs ask this court to revisit the issue of the hearing officer's ruling under 20 U.S.C. § 1415(j) that P.J.'s "current educational placement" to be maintained during the pendency of this action is the Brunswick public school system. That issue is currently before the First Circuit on the plaintiffs' appeal of this court's order in a separate action, which has not been consolidated with this case and to which the parties' consent to proceed before me, Docket No. 30, does not apply. *Paul and Donna Verhoeven v. Brunswick School Committee*, Docket No. 98-308-P-C. The plaintiffs suggest that the court's order in that case indicates that they "were not foreclosed from raising this issue in the context of an appeal from the hearing officer's decision." Plaintiffs' Brief at 23. However that order may be interpreted, the pendency of this issue before the First Circuit makes it inappropriate for consideration here at this time. "As a general rule . . ., entry of a notice of appeal divests the district court of jurisdiction to adjudicate any matters related to the appeal." *United States v. Distasio*, 820 F.2d 20, 23 (1st Cir. 1987). Litigants should not be able to circumvent this general rule by raising the same issue in two separate proceedings before the district court.

In light of the foregoing, judgment shall enter in favor of the defendant.

So ordered.

Dated this 9th day of September, 1999.

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David M. Cohen
United States Magistrate Judge