The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 14-044

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Gail M. Eckstein, Esq., of counsel

Law Offices of Lauren A. Baum, PC, attorneys for respondents, Lauren A. Baum, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from that portion of an interim decision of an impartial hearing officer (IHO) that ordered the district to pay for the costs of the student's pendency placement at the Mary McDowell Friends School (Mary McDowell)[1] as of the first day of the 2013-14 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee

[1] The student's school is variously referred to in the hearing record as the Mary McDowell Center for Learning and the Mary McDowell Friends School (see, e.g., IHO Decision at p. 2; Tr. pp. 5, 27). According to its mission statement, which is contained in the hearing record, the student's school is known as the Mary McDowell Friends School (Parent Ex. H).

on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the student is a 13 year-old girl who has been found eligible for special education and related services as a student with a speech or language impairment (Dist. Ex. 3). On January 10, 2007, the CSE met to develop an IEP for the 2007-08 school year (Parent Ex. B at p. 3). The parents rejected the recommendations of the CSE and unilaterally placed the student in Mary McDowell and requested an impartial hearing seeking tuition reimbursement for the 2007-08 school year (id.). By decision dated March 18, 2008, an IHO awarded tuition reimbursement to the parents (id. at pp. 8-10). The March 18, 2008 IHO decision was not appealed and the student has apparently remained at Mary McDowell since the 2007-08 school year (Tr. pp. 26-27; see Pet. ¶ 4).

On March 14, 2013, the CSE convened for the student's annual review and to develop an IEP for the 2013-14 school year (Dist. Ex. 3). At the time of the CSE meeting, the student was in the 7th grade at Mary McDowell (Dist. Ex. 5). The CSE recommended continuation of the student's classification as speech or language impaired and further recommended a 12:1 special class in a community school with the related services of group counseling once per week for 40 minutes, individual occupational therapy (OT) twice per week for 40 minutes, individual speech-language therapy once per week for 40 minutes, and group speech-language therapy twice per week for 40 minutes (Dist. Ex. 3 at pp. 1, 8). The resulting IEP also included a recommendation for an FM unit for individual use during all of the student's classes (id. at p. 9). The CSE also indicated that both an integrated co-teaching program and a 12:1+1 special class in a community school had been considered but ultimately rejected by the CSE (id. at 13). A Final Notice of Recommendation (FNR) dated July 17, 2013 notified the parents of the specific public school site to which the district assigned the student to attend (Dist. Ex. 7).

By facsimile sent August 7, 2013, the student's mother informed the CSE that she had received the FNR and detailed her efforts to contact or visit the assigned public school site (Parent Ex. D at pp. 1-2). She also listed a number of questions she wished to have answered prior to the first day of school, in the event that she was not able to visit the school herself (id. at p. 1). In closing, the student's mother stated that she would enroll the student at Mary McDowell and "seek reimbursement for that program until such time as I have an opportunity to visit the recommended program and determine its appropriateness" (id.).

In a facsimile sent September 17, 2013, the student's mother indicated to the CSE that she had visited the assigned public school site on September 11, 2013 (Parent Ex. C). After visiting the school and observing the 12:1 class that she believed to be the class in which the district proposed to implement the student's IEP, she raised a number of concerns about the recommended IEP, assigned public school site, and proposed classroom (id.). In particular, the student's mother indicated concern regarding the other students with whom the student would be placed, the amount of special education services the student would receive, the lack of recommended transition services, the provision of related services at the public school site, and the curriculum used at the assigned school (id. at pp. 1-2).

A. Due Process Complaint Notice

By due process complaint notice dated October 28, 2013, the parents requested an impartial hearing and objected to the program recommended by the March 2013 IEP and the public school site to which the student was assigned (Parent Ex. A). The parents claim that the March 2013 CSE was invalidly constituted and failed to consider sufficient evaluative material to justify its recommendations, that they were not provided with a meaningful opportunity to participate in the decision making process, and that the resultant IEP did not accurately reflect the student's needs or provide appropriate goals, special education, and related services to meet her needs (id. at pp. 1-3). With regard to the assigned public school site, the parents allege that it was not appropriate, was not capable of implementing the IEP, and was not "in conformity with" the IEP (id. at pp. 1, 3-4).

B. Impartial Hearing Officer Decision

On February 6, 2014, a hearing was held to discuss evidentiary matters and to hear arguments on the student's pendency placement (Tr. pp. 10-47).[2] In an interim decision dated February 20, 2014, the IHO noted that the parties were in agreement that, based upon an unappealed IHO decision from 2008, the student's pendency placement was Mary McDowell (IHO Decision at p. 2). However, the IHO noted that the parties disputed whether the district was obligated to pay the student's tuition beginning on the first day of school or upon the parents' filing of a due process complaint notice (id.).[3] The IHO held that the district was obligated to pay for the student's pendency placement beginning on the first day of the school year at issue (id. at p. 5). The IHO reasoned that the unappealed 2008 IHO decision had the same effect as an SRO decision, which created an agreement between the parties that Mary McDowell was the student's placement (id. at pp. 3-5). The IHO determined that pendency was based upon when this agreement took place and not on the time of filing a due process complaint notice (id. at p. 4).

IV. Appeal for State-Level Review

The district appeals from the IHO's interim order on pendency, conceding that the student's pendency placement is Mary McDowell, but challenging the IHO's determination to the extent that the IHO found that its financial obligation began on the first day of school as opposed to the date of filing of the due process complaint notice.

V. Applicable Standards—Pendency

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education

[2] A prehearing conference was held January 29, 2014 (Tr. pp. 1-9).

[3] I note that at the impartial hearing, counsel for the parents indicated her "understand[ing] that the current state of the law, . . . indicates that pendency flows from the date the [due process complaint notice] was filed," but that she was requesting that the student's stay put placement be in effect continuously from the date of the unappealed IHO determination (Tr. pp. 27-28). The IHO thereafter indicated his uncertainty on that matter and requested that the parties provide briefing on the matter (Tr. pp. 28-30).

otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996]; Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not require that a student remain in a particular site or location (T.M. v. Cornwall Cent. Sch. Dist., 2014 WL 1303156, at *20 [2d Cir. Apr. 2, 2014]; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; G.R. v. New York City Dep't of Educ., 2012 WL 310947, at *6 [S.D.N.Y. Jan. 31, 2012]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The United States Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]). Moreover, a prior unappealed IHO's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007).

VI. Discussion

The parties agree that the student's then-current placement is Mary McDowell by virtue of an unappealed 2008 IHO Decision, which ordered the district to pay the student's tuition at Mary McDowell (Tr. at p. 27). The only dispute in this matter is when the district's obligation to pay

begins. The district argues that its obligation to pay according to the pendency provision of the IDEA began when the parents filed their due process complaint notice. The parents contend that the IHO correctly found that the district's pendency obligation began on the first day of school. The parents further argue that the district's obligation to pay tuition under the IDEA's pendency provision began with the unappealed 2008 IHO decision and continues thereafter until such time as a new agreed-upon placement is established.

The IHO relied on a case from the District of Connecticut for the proposition that pendency rights can be triggered before a due process hearing has been requested, which relies on a footnote from a summary order issued by the Second Circuit (see Doe v. East Lyme Bd. of Educ., 2012 WL 4344304, at *12-*13 [D. Conn. Aug. 14, 2012] citing A.S. v. Bd. of Educ., 47 Fed. App'x 615, 616 n.2 [2d Cir. 2002], adopted as modified by 2012 WL 4344301 at *2-*3 [D. Conn. Sept. 21, 2012]). The complete text of the footnote reads:

> Under the IDEA, a "stay put" is a procedural right that is activated as soon as the PPT reaches an impasse and is issued pursuant to 20 U.S.C. § 1415(j), which states: "during the pendency of any proceedings conducted pursuant to this section, 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."

(A.S. v. Bd. of Educ., 47 Fed. App'x at 616 n.2).[4]

Both the magistrate and district court decisions in Doe end the quotation at the penultimate clause, omitting the crucial textual language, "during the pendency of any proceedings" (see 2012 WL 4344304, at *13; 2012 WL 4344301, at *3). In fact, although the Magistrate Judge acknowledged statutory and regulatory language providing that a student's stay put rights are triggered by the filing of a due process complaint notice, she nonetheless relied on the footnote from A.S. for the proposition that the pendency entitlement took effect when the PPT reached an impasse (Doe, 2012 WL 4344304, at *13).

The two decisions in Doe appear to be the only two court cases that cite to the Second Circuit's decision in A.S. for the purpose of establishing when pendency rights attach. However, since 2002, the Second Circuit's holdings have made clear that this footnote is a minor anomaly and should not be relied upon as the definitive interpretation of the IDEA's stay-put provision for all cases. Recently, the Second Circuit noted that "the IDEA's pendency provision entitles a disabled child to 'remain in [his] then-current educational placement' while the administrative and judicial proceedings . . . are pending" (T.M. v. Cornwall Cent. School Dist., 2014 WL 1303156, at *2 [2d Cir. Apr. 2, 2014], quoting 20 U.S.C § 1415[j]). The Court also found that districts are required to implement a student's pendency placement "until the relevant administrative and judicial proceedings are complete," providing further support for the conclusion that a student's entitlement to pendency does not apply upon a parent's informal expressions of disagreement with a program but is triggered upon the formal commencement of administrative due process, which in this case is the filing of the due process complaint notice (T.M., 2014 WL 1303156, at *20; see

[4] In Connecticut, the PPT, or Planning and Placement Team, appears to be analogous to the function of a CSE or IEP team in New York (A.S., 47 Fed. App'x at 616).

M.R. v. Ridley Sch. Dist., 744 F.3d 112, 124 [3d Cir. 2014] [holding that a student's entitlement to a stay put placement comes into existence when "proceedings conducted pursuant to the IDEA begin"]; A.D. v. Hawaii Dep't of Educ., 727 F.3d 911, 915 [9th Cir. 2013] ["a stay-put placement is effective from the date a student requests an administrative due process hearing"]; Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526-27 [S.D.N.Y. 2011] [finding that the "plain language of the statute . . . suggests that the provision only applies 'during the pendency of any proceedings,' and not . . . before such a proceeding has begun"]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 643 [S.D.N.Y. 2011] [finding that a student's pendency entitlement was "triggered . . . when [the parents] filed the due process demand notice"]; Child's Status During Proceedings, 47 Fed. Reg. 46710 ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]; Application of the Dep't of Educ., Appeal No. 13-230). Furthermore, recent district court cases have not adopted the A.S. formulation of when a student becomes entitled to a stay-put placement, and most of the authority since then supports the proposition that the stay-put provision applies only during the pendency of proceedings (see, e.g., C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *6 [S.D.N.Y. Dec. 23, 2013]; K.L. v. Warwick Valley Cent. Sch. Dist., 2013 WL 4766339, at *2 & n.4 [S.D.N.Y. Sept. 5, 2013]).

After reviewing the IHO's analysis, I find that the district is correct in its contention that the IHO erred in determining that the district was responsible for the cost of the student's attendance at Mary McDowell for the period from the beginning of the 2013-14 school year until the filing of the due process complaint notice pursuant to the stay-put provision of the IDEA. The IHO determined that the district attempted to change the student's placement and concluded that there was no "equitable basis for denying the funding from the beginning of the school year as there does not seem to have been an inordinate delay with regard to filing for the hearing by the parents. Thus, pendency remains where the student has been attending and the [district] needs to fund it from the beginning of the school year" (IHO Decision at p. 5). Under the facts of this case, I disagree. The district sent an FNR on July 17, 2013 which recommended a change in placement (Dist. Ex. 7). On August 7, 2013, the parents notified the district of their intention to reenroll the student at Mary McDowell for the 2013-14 school year (Parent Ex. D at p. 1). This reenrollment was tantamount to a unilateral placement for the 2013-14 school year, and the parents did so at their own financial risk.

The IHO was mistaken in his analysis, and it was improper to find that the unappealed 2008 IHO decision awarding tuition reimbursement for the 2007-08 school year resulted in a perpetual obligation of the district to annually fund the student's placement regardless of whether an impartial hearing was requested (see Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 414-15 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006] [holding that parents must "put FAPE at issue" in each school year for which they seek tuition reimbursement by giving notice to the district]; see also Wood v. Kingston City Sch. Dist., 2010 WL 3907829, at *7 [N.D.N.Y. Sept. 29, 2010] [noting that reenrollment at a private school does not extinguish analysis of the elements applicable in a tuition reimbursement case]; S.W. v. New York City Dep't of Educ., 646 F.Supp.2d 346, 366 [S.D.N.Y.2009]; Application of the Dep't of Educ., Appeal No. 13-230).

The student was originally unilaterally placed at Mary McDowell in September 2007 by the parents, who continued the student's unilateral placement by signing an enrollment contract for the student's attendance at Mary McDowell for the 2013-14 school year, providing notice to the

district that they were placing the student at Mary McDowell, and indicating their intention to seek public funding therefore (Parent Exs. A; B; D; J). The hearing record contains no indication that the district ever agreed to fund the student's unilateral placement other than for purposes of pendency or limited stipulations of settlement.

That there may have been several other due process proceedings regarding the student that have been commenced and then concluded through settlement and withdrawal since the 2008 unappealed IHO decision is of no moment. As stated by the Ninth Circuit, "[the stay-put provision] does not guarantee a child the right to remain in any particular institution once proceedings have concluded[, and] . . . the stay-put order will lapse however the litigation concludes" (Marcus I. v. Dep't of Educ., 434 Fed. App'x 600, 602 [9th Cir. 2011]; Application of the Dep't of Educ., Appeal No. 13-230). Thus, if the parents wished to take full advantage of their right to public funding of the costs of the student's attendance at Mary McDowell in accordance with pendency beginning with the first day of school, they were required to file a due process complaint notice before the student began attending Mary McDowell during the 2013-14 school year, and neither the IHO nor the parents can rely on the IDEA's stay-put provision as the premise for recovery of tuition costs at Mary McDowell for a time when there was no pending proceeding. To hold otherwise would incentivize delaying the filing of a due process complaint notice until after the start of the school year, which would be at odds with the IDEA's statutory purpose of encouraging parents and district's to work together to meet the educational needs of disabled children and failing that, rely on thorough administrative due process hearing procedures with stringent deadlines (i.e. 45 days) to expediently resolve the remaining issues. The interpretation relied upon by the IHO and advanced by the parents, which in essence creates a new stay-put "look back period," also suffers from a serious flaw in that when read in conjunction with the two-year limitations period for commencing due process proceedings set forth in the IDEA and State law, this interpretation has no boundaries and would allow the stay-put provision to be manipulated to evade moving forward to addressing the merits of the case and incentivize conduct in which one waits to file for due process, knowing that a district would ultimately be forced to pay private unapproved school tuition by operation of law rather than based upon the merits of any claims.[5]

Finally, the IHO erred by applying equitable considerations to the facts of this case. To base a determination of a student's entitlement to a stay-put placement on equitable considerations would undermine its automatic nature, and a claim for public funding of a student's tuition pursuant to pendency must be evaluated separately from a claim for tuition reimbursement on the basis that the district failed to offer the student an appropriate IEP (see Mackey, 386 F.3d at 162). In both O'Shea and Mackey, relied upon by the IHO, the equitable considerations favorable to the parents were limited to the issue of timeliness of administrative decisions (O'Shea, 353 F.Supp.2d at 459;

[5] To be very clear, there is no indication whatsoever in the hearing record that the parents or their counsel were attempting to game the process in this manner by waiting until October 28, 2013 to file a due process complaint. The point is for illustrative purposes only and is made to demonstrate that the theory they advance, which may appear reasonable in some circumstances, is actually incorrect. If their interpretation were correct (which it is not), to ensure the ultimate recovery of Mary McDowell tuition for the entire school year in question, counsel for the parents would better serve the client by waiting until the last day of the 2013-14 school year and then filing for due process and demanding recovery for the entire year under pendency by operation of law as well as on the merits of their case. Such a tactic would not work under the correct interpretation, in which the pendency provision becomes operative upon the filing of a due process complaint.

Mackey, 386 F.3d at 165). Both cases clearly distinguish between a unilateral placement and a pendency placement (O'Shea, 353 F.Supp.2d at 459 ["pendency placement and appropriate placement are separate and distinct concepts"]; Mackey, 386 F.3d at 160-61 ["[a] claim for tuition reimbursement pursuant to the stay-put provision is evaluated independently from the evaluation of a claim for tuition reimbursement pursuant to the inadequacy of an IEP"]), and that an administrative proceeding must be pending for the IDEA's stay-put provision to apply (O'Shea, 353 F.Supp.2d at 456; Mackey, 386 F.3d at 160).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated February 20, 2014 is modified, by reversing those portions which determined that the district was obligated to pay for the costs of the student's tuition at Mary McDowell for the portion of the 2013-14 school year preceding the filing of the parents' due process complaint notice.

Dated: **Albany, New York**
May 7, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER