The University of the State of New York

The State Education Department
State Review Officer
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No. 20-121

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:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Nathaniel R. Luken, Esq.

Law Offices of Irina Roller, PLLC, attorneys for respondent, by Irina Roller, Esq., and Vida M. Alvy, Esq.

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) which determined that respondent's (the parent's) daughter's pendency placement at the Shefa School (Shefa) was retroactive to the date of filing of the parent's due process complaint notice challenging the appropriateness of the district's recommended educational placement for the student for the 2019-20 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 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

Due to the procedural nature of this matter and the limited question presented to the IHO, there are few facts established outside of the parties' pleadings. Briefly, according to the parent's due process complaint notice, the student attended a nonpublic school for the student's 2015-16 (preschool) through 2017-18 (first grade) school years (Parent Ex. A at p. 3). The parent indicated

that, during the 2017-18 school year, the student was referred to the CSE for an initial evaluation (id.). The parent further noted that, on July 23, 2018, the CSE convened to conduct the student's initial review (id.). According to the parent, the CSE determined that the student was eligible to receive special education as a student with a learning disability and recommended that the student receive integrated co-teaching (ICT) services in all academic areas along with counseling services (id.). For the student's 2018-19 school year (second grade), the parent unilaterally placed the student at Shefa (see Parent Ex. B at pp. 14-15).[1] As discussed in detail below, the parent's unilateral placement of the student at Shefa for the 2018-19 school year was the subject of a prior administrative proceeding (2018-19 proceeding) (see Parent Ex. B).

For the school year at issue in the present matter, the 2019-20 school year, the parent again unilaterally placed the student at Shefa (Parent Ex. A at p. 4).

A. Due Process Complaint Notice and Subsequent Events

By due process complaint notice dated September 5, 2019, the parent asserted that the district failed to offer the student a FAPE for the 2019-20 school year (see Parent Ex. A).

Relevant to this appeal, the parent indicated that she would "invoke [her] right to pendency" based "[u]pon a favorable determination of the IHO" in the 2018-19 proceeding, which at that time was, "currently pending" (Parent Ex. A at pp. 2, 4). More specifically, the parent indicated that she filed a due process complaint notice for claims related to the student's 2018-19 school year and that, during the impartial hearing, the district conceded that it failed to offer the student a FAPE for the 2018-19 school year (id. at p. 4).[2] The parent also indicated that she "presented or w[ould] be presenting evidence at the next hearing day [in the 2018-19 proceeding] that Shefa was an appropriate placement for [the student]" (id.).

At the conclusion of the 2018-19 proceeding, an IHO issued a decision, dated April 14, 2020, finding that the district failed to offer the student a FAPE for the 2018-19 school year, that Shefa was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of an award of the costs of the student's tuition at Shefa, including related services and transportation, for the 2018-19 school year (Parent Ex. B at pp. 14-15, 18).[3]

[1] The Commissioner of Education has not approved Shefa as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] Although the parent indicated that her due process complaint notice in the 2018-19 proceeding was dated August 26, 2019 (Parent Ex. A at p. 4), the IHO decision issued in the 2018-19 proceeding indicates that the due process complaint notice was dated February 19, 2019 (Parent Ex. B at pp. 3, 20).

[3] The IHO also found that the district failed to offer the student a FAPE for the 2017-18 school year and awarded the student the cost of the student's related services for the 2017-18 school year (Parent Ex. B at pp. 3, 14, 18).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on April 24, 2020, and completed the pendency portion of the proceedings on that date (Tr. pp. 1-11).[4, 5] During the impartial hearing, the parties agreed that, as a result of the unappealed April 2020 IHO decision regarding the 2018-19 proceeding, Shefa became the student's pendency placement; however, the parties disagreed as to the date on which such change should be deemed effective (see Tr. pp. 4-6). The IHO and the parties agreed that the parties would proceed by submitting briefs to set forth their positions regarding when Shefa became the student's pendency placement (Tr. pp. 6-8).

In an undated brief, the district argued that the IHO should find that the district was responsible for maintaining the student's pendency placement at Shefa from April 14, 2020, the date of the unappealed IHO decision, until the conclusion of the current proceeding (Dist. Ex. 1 at p. 4). The district cited to Murphy v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354 (S.D.N.Y. 2000), aff'd, 297 F.3d 195 (2d Cir. 2002), which held that the district in that matter would not be responsible for funding the student's tuition for the time period between the start of the student's school year through the date of the SRO decision that changed pendency until the parent prevailed on the merits of the due process complaint notice (id. at p. 3). The district argued that the parent must prevail on the merits of her claim before the district could be required to fund the student's enrollment at Shefa from the start of the 2019-20 school year until April 14, 2020, the date of the unappealed IHO decision (id. at p. 4).

In a brief dated "May 8, 20[20],"[6] the parent argued that the IHO should find that the change in the student's pendency placement to Shefa should be deemed retroactive to the filing of the parent's due process complaint notice on September 5, 2019 (Parent Ex. O at p. 4). The parent argued that finding pendency retroactive to the date of filing of the parent's due process complaint notice would afford the student "stability and consistency" in the student's education which was the "precise aim of pendency" (id.). Additionally, the parent argued that the IHO should reach this conclusion because the April 2020 IHO decision was "delayed due to no fault of the [p]arent[]" and that it was "well-settled that a school district's obligation to maintain a student in his or her pendency placement runs from the date that the due process complaint notice was received even allowing for equitable considerations to exist warranting a further look-back due to a delay of [the IHO's final decision]" (id. at p. 5). To support her position, the parent cited to Arlington Central School District v. L.P., 421 F. Supp. 2d 692, 701 (S.D.N.Y. 2006), for the proposition that "[w]here an unduly delayed IHO decision in a prior proceeding results in a change in pendency, the parents are entitled to pendency tuition reimbursement from and after the date of the IHO's decision and may be equitably entitled to reimbursement from and after the date when the IHO should have

[4] There is no explanation in the hearing record why the first hearing date did not occur until seven months after the parent filed her due process complaint notice.

[5] A prehearing conference was held on June 4, 2020, at which the IHO informed the parties that the matter would proceed on the merits on September 11, 2020 if the parties did not settle and finalize the case prior to that date (Tr. p. 15; see Tr. pp. 12-18).

[6] The date as shown on the parent's brief of May 8, 2019 appears to be a typographical error.

entered their decision" (id.). The parent opined that in Arlington, the court reviewed Murphy, 86 F. Supp. 2d 354, and Mackey v. Board of Education of the Arlington Central School District, 386 F.3d 158 (2d Cir. 2004), and developed "the equitable right to Murphy/Mackey reimbursement" where the court must first determine a date on which the delayed decision should have been rendered, and retroactively reimburse the parents from that date, unless additional equitable considerations warrant otherwise (id. at p. 6). The parent argued that the April 2020 IHO decision "was substantially delayed past the timelines provided by the IDEA" and "the delay was unreasonably unfair to the prevailing [p]arent[]" (id.). Additionally, although the parent recognized that there were joint applications to extend the parties' compliance date for settlement negotiations, the parent argued that the delay in the IHO's decision was completely outside of the parent's control (id.). Accordingly, the parent requested that the IHO find that the equities favor an application of the "Murphy/Mackey rule" and require the district to reimburse the parent for the costs of the student's attendance at Shefa pursuant to pendency retroactive to September 5, 2019 through the entire 2019-2020 school year (id. at p. 7).

In an interim decision dated June 3, 2020, the IHO found that Shefa would be deemed the student's pendency placement as of September 5, 2019, the date of the parent's filing of the due process complaint notice for the 2019-20 school year (Interim IHO Decision at pp. 3-4). Initially, the IHO noted the two cases cited in the parent's closing brief, Murphy and Arlington in which there was an undue delay in the issuance of State-level administrative decisions (id. at p. 2). The IHO noted that the court in both of these cases determined that the change in the student's pendency placement should be deemed to have occurred on the date that the SRO decisions should have been issued rather than the date they were actually issued (id.). Applying this to the matter before her, the IHO noted that the unappealed IHO decision dated April 14, 2020, was also unduly delayed because after the parties submitted their post-hearing briefs on December 6, 2019 and agreed to extend the decision due date, the IHO did not render a decision until "five months later" (id. at p. 3). Additionally, the IHO opined that the "bureaucratic inadequacies" of the impartial hearing process causing an undue delay could be blamed on the parent (id.). The IHO also opined that the district could have shortened the impartial hearing process if it would have responded to the parent's 10-day notice, answered the parent's complaint, or initiated settlement discussions (id.). Thus, based on the "totality of circumstances," the IHO found that Shefa retroactively became the student's pendency placement on September 5, 2019, the date of the parent's filing of the due process complaint notice because it would be "unjust to penalize the [p]arent when faultless" (id. at pp. 3-4).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in finding that Shefa would be deemed the student's pendency placement as of September 5, 2019, the date of the parent's filing of the due process complaint notice for the 2019-20 school year. Initially, the district agrees that the student's pendency placement is at Shefa; however, the district argues that this change in pendency occurred on April 14, 2020, the date of the IHO decision in the 2018-19 school year proceeding. Next, the district argues that the IHO's reliance on Murphy to find that the issuance of the April 2020 IHO decision was unduly delayed was misplaced because the record reflected that adjournments in the 2018-19 proceeding were obtained at the request, and with the consent, of the parties or for good cause, unlike Murphy. Nevertheless, the district argues that, even if the April 2020 IHO decision

was unduly delayed, the IHO's interim order on pendency lacks analysis as to when the unappealed IHO decision should have been issued. Next, the district argues that the IHO's analysis was faulty and relied on facts not in evidence. The district also argues that the parent's claim that the filing of the due process complaint notice triggered pendency was contradicted by a statement in the September 2019 due process complaint notice that the parent would invoke pendency "upon a favorable determination of the IHO" in the matter relating to the 2018-19 school year. Next, the district cites to Ventura de Paulino v. New York City Department of Education, 959 F.3d 519 (2d Cir. 2020), for the proposition that, at the time of the filing of the due process complaint notice, the student's pendency placement was the program offered by the district and that the student's pendency placement did not change until the IHO issued his decision in the 2018-19 proceeding on April 14, 2020. Thus, the district argues that the IHO erred in finding that Shefa became the student's pendency placement on September 5, 2019.

In an answer, the parent responds to the district's allegations and requests that the district's request for review be dismissed and that the IHO's interim order on pendency be upheld. Additionally, the parent objects to the additional documentary evidence submitted by the district for consideration on appeal and argues that the district's reliance on Ventura De Paulino is misplaced. The parent also attaches additional documentary evidence to her answer.

In a reply, the district objects to the parent's additional documentary evidence.[7, 8]

V. Applicable Standards

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 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]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino, 959 F.3d at 531; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey, 386 F.3d at 163, citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47

[7] With its request for review, the district submits as additional evidence four documents identified as SRO exhibits A-D (see Req. for Rev.; SRO Exs. A; B; C; D). SRO exhibits A-D consist of "Order[s] of Extension" by the IHO in the 2018-19 proceeding (SRO Exs. A-D). With her answer, the parent also submits as additional evidence, emails regarding delays in scheduling the hearing in the 2018-19 proceeding identified as SRO Exhibit 1 (see Answer; SRO Ex. 1). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the "Order[s] of Extension" and emails related to the 2018-19 proceeding were available at the time of the pendency hearing in the present matter and are not necessary to resolve the question of whether the student's pendency placement at Shefa should be deemed retroactive to the filing of the student's due process complaint notice, and, therefore, I decline to exercise my discretion to consider these exhibits as additional evidence.

[8] The district also points out in its reply that the parent's answer was not properly verified, which defect the parent promptly cured.

[S.D.N.Y. 2013]; 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. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 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., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 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. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; 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 (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO 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).

VI. Discussion—Pendency

Turning to the crux of the district's appeal, the parties agree that, as a result of the issuance of the April 2020 IHO decision in the 2018-19 proceeding, Shefa became the student's educational placement for purposes of pendency (Req. for Rev. ¶ 7; Answer ¶ 22; Parent Ex. B).[9] However, the question in this case is whether the IHO erred in finding that Shefa should retroactively be deemed the student's pendency placement as of September 5, 2019, the date of the parent's filing of the due process complaint notice for the student's 2019-20 school year.

Once a student's "then current educational" placement or pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino, 959 F.3d at 532; Schutz, 290 F.3d at 483-84; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington, 421 F. Supp. 2d at 697; Murphy, 86 F. Supp. 2d at 366; Letter to Hampden, 49 IDELR 197). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings," S.S., 2010 WL 983719, at *1 [emphasis in the original]). And upon a pendency changing event, such changes apply "only on a going-forward basis" (id.). With that said, it has been held that in certain circumstances a court may, on equitable grounds, retroactively adjust a student's pendency placement if a state-level administrative decision in a parent's favor was not issued in a timely manner (see Mackey, 386 F.3d at 164-66; Arlington, 421 F. Supp. 2d at 701; O'Shea, 353 F. Supp. 2d at 457-58; Murphy, 86 F. Supp. 2d at 366-67).

Although the IHO cites to Murphy and Arlington to explain her finding that Shefa retroactively became the student's pendency placement on September 5, 2019, the date of the parent's filing of the due process complaint notice for the current school year at issue, these cases are distinguishable from the present case. In Murphy, the court held that the SRO decision was delayed for nearly three months for "reasons unknown" and "without the consent" of the parents and, thus, the date of the student's change in placement for purposes of pendency became the date the SRO should have rendered its decision (86 F. Supp. 2d at 367). Similarly in Arlington, the court held that the SRO took eight months to reach his decision and there was no suggestion in the hearing record that the parents either consented to or in any way contributed to the delay (421 F. Supp. 2d at 702). Thus, the court held that the parents were entitled to reimbursement from the

[9] Prior to that change, because the parent challenged the school year in which the student was initially found eligible for special education in the 2018-19 proceeding (see Parent Exs. A at p. 3; B at p 3), which was still pending when the parent initiated the current proceeding, the student's pendency placement was governed by State regulation, which provides that "[d]uring the pendency for any due process proceeding relating to the evaluation and initial placement in special education . . . the student shall not be evaluated and shall remain in the then current educational placement of such student or, if applying for initial admission to a public school, shall be placed in the public school program until all such proceedings have been completed" (8 NYCRR 200.5[m]; see 20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[b]).

beginning of the school year, notwithstanding the fact that the SRO issued his decision eight months later (id. at 703).

Even assuming that the above-referenced line of cases addressing the consequences of delayed State-level administrative decisions apply in the case of an allegedly delayed IHO decision, there was an insufficient record before the IHO in the present matter to support a finding that the IHO's decision in the 2018-19 proceeding was untimely, let alone to determine on what date it should have been issued. Moreover, the facts of Murphy and Arlington are distinguishable from the present case in that in Murphy and Arlington there was no evidence that the parents consented to the delay in the issuance of the SRO decision.

An IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may be granted consistent within regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). Pursuant to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]).

To be sure, the 2018-19 proceeding was prolonged. According to the April 2020 IHO decision: the parent filed a due process complaint notice on February 19, 2019; the IHO that presided over the impartial hearing was assigned on April 30, 2019; the impartial hearing was held on August 26, 2019, and November 1, 2019; and closing briefs were submitted on December 6, 2019 (Parent Ex. B at p. 3). However, the April 2020 IHO decision also reflects that "adjournments [were] granted at the request and with the consent of the parties, or for good cause" and to give the parties an opportunity to submit written closing statements (Parent Exs. B at p. 3). The parent also acknowledged in her pendency brief to the IHO in the present matter that both parties consented to the extension of the compliance date in the 2018-19 proceeding (Parent Ex. O at p. 2).[10] The IHO did not have before her documentation of the extensions granted in the 2018-19 proceeding on which to base a finding that the April 2020 decision was untimely. Further, in determining that the date for the change in stay put placement was the earlier date of the filing of the due process complaint notice on equitable grounds, the IHO also relied on her view of the district's litigation strategy in the 2018-19 proceeding (see Interim IHO Decision at p. 3). I am aware of no authority that would support this broader application of the Murphy and Arlington line of cases.[11]

[10] In her answer to the district's appeal, the parent argues that she did not consent to extensions granted after the submission of the parties' closing briefs to the IHO in the 2018-19 proceeding (see Answer ¶¶ 2-3). However, as regulations permit an IHO to grant an extension requested by either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]) and assuming that the district requested the extensions, the lack of the parent's consent to these extensions, alone, would not be enough to deem the extensions inconsistent with State regulation or warrant a finding that the April 2020 decision was untimely as a result.

[11] Specifically, the IHO cited the district's failure to respond to the parent's concerns or engage in settlement

Accordingly, the evidence in the hearing record does not support the IHO's finding that Shefa be deemed the student's pendency placement retroactive to September 5, 2019, the date of the parent's filing of the due process complaint notice, rather than on April 14, 2020, the date of the unappealed IHO decision in the 2018-19 proceeding. While the parent is not entitled to the costs of the student's tuition at Shefa pursuant to pendency, she "may obtain retroactive reimbursement for [her] expenses" if it is determined that the district failed to offer the student a FAPE, Shefa is an appropriate unilateral placement, and equitable considerations weigh in favor of an award of reimbursement (see Ventura de Paulino, 959 F.3d at 536). Indeed, if there is merit to the parent's allegation in the due process complaint notice that the CSE did not convene to develop an IEP for the student for the 2019-20 school year, the district will be hard-pressed to avoid a determination that it denied the student a FAPE (see Parent Ex. A at pp. 3-4). And if the student's needs and the program and services delivered at Shefa have remained relatively constant compared to those examined in the 2018-19 proceeding, the parent likewise should be able to easily meet her burden with respect to the appropriateness of the unilateral placement (see Parent Ex. B at p. 15).

VII. Conclusion

For the reasons noted above, the evidence in the hearing record does not support the IHO's determination that Shefa be deemed the student's pendency placement retroactive to the date of the due process complaint notice. Although the district is not responsible for the costs of the student's tuition at Shefa for the entirety of the 2019-20 school year pursuant to pendency, the parent can still prevail on the merits of her claims for the 2019-20 school year.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the interim IHO decision, dated June 3, 2020, is modified, by reversing that portion which found that Shefa would be deemed the student's pendency placement retroactive to September 5, 2019, the date of the parent's filing of the due process complaint notice for the 2019-20 school year; and

discussions, and its failure to present witness testimony in the 2018-19 proceedings (IHO Decision at p. 3). Further, in noting delays in the 2018-19 proceeding, the IHO acknowledged "well-publicized delays in the [district's] impartial hearing process" (id.). The IHO's expressed frustration is not misplaced—it is immensely wasteful of scarce public resources to continue to congest the due process system dockets with litigated cases, especially when the district does not attempt to mount a legitimate defense to a parent's allegations. As to the delay, the IHO was almost certainly referring to a now well-documented problem in the district in which it has been noted that "New York exceeds by 63 percent the next most active state (California) with due process complaint filings. Additionally, within New York State, the overwhelming majority of due process complaints are filed in New York City. In the 2018-2019 school year, 10,189 special education due process complaints were filed in New York State; of these, 9,694 filings, or 95 percent, were in New York City. That amount is expected to increase during the 2019-2020 school year. This unprecedented volume of special education due process complaints is overwhelming the New York City due process system" (N.Y. Reg., July 29, 2020, at p. 15). With that said, the IHO's application of the Murphy/Arlington line of cases to attempt to address this frustrating state of affairs was without sufficient support in the hearing record in this instance.

IT IS FURTHER ORDERED that the district is responsible for the costs of the student's tuition at Shefa pursuant to pendency placement as of April 14, 2020, the date of the unappealed IHO decision in the 2018-19 proceeding, until the conclusion of the current proceeding.

Dated: **Albany, New York**
September 18, 2020

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SARAH L. HARRINGTON
STATE REVIEW OFFICER