No. 00-7358

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PEARL MURPHY & THEODORE MURPHY,

Plaintiffs-Appellees

v.

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD
OF EDUCATION,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING
APPELLEES AND URGING AFFIRMANCE

BILL LANN LEE
Acting Assistant Attorney General

MARK L. GROSS
THOMAS E. CHANDLER
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-3728

JUDITH WINSTON
General Counsel

SUZANNE SHERIDAN
Attorney
United States Department
of Education

TABLE OF CONTENTS

PAGE

INTEREST OF THE UNITED STATES. 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 11

ARGUMENT

I. PARENTS NEED NOT EXHAUST THEIR ADMINISTRATIVE REMEDIES BEFORE SEEKING TO ENFORCE THE IDEA'S STAY-PUT PROVISION 13

II. A SCHOOL DISTRICT IS FINANCIALLY RESPONSIBLE FOR A CHILD'S PRIVATE PLACEMENT FROM THE DATE THE STATE REVIEW OFFICER FINDS THAT THE PARENTS' PRIVATE PLACEMENT WAS APPROPRIATE 18

CONCLUSION 28

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES: **PAGE**

A.P. v. McGrew, No. 97-5876, 1998 WL 214706 (N.D. Ill. Apr. 24, 1998) 23-24

Board of Educ. v. Brett Y., 959 F. Supp. 705, (D. Md. 1997) 23

Board of Educ. v. Illinois State Bd. of Educ., 10 F. Supp. 2d 971 (N.D. Ill. 1998) 23

Board of Educ. v. Rowley, 458 U.S. 176 (1982) 1-2

Carl v. Mundelein High Sch. Dist., 1993 WL 787899 (N.D. Ill. 1993) 14

Cedar Rapids Comm. Sch. Dist. v. Garret F., 526 U.S. 66 (1999) 1

Cole v. Metropolitan Gov't, 954 F. Supp. 1214 (M.D. Tenn. 1997) 13-14

Clovis Unified Sch. Dist. v. California Office of Admin. Hearings, 903 F.2d 635 (9th Cir. 1990) . . .22, 23-24

Digre v. Roseville Schs. Indep. Sch. Dist., 841 F2d 245 (8th Cir. 1988) 13

Doe v. Brookline Sch. Comm., 722 F.2d 910 (1st Cir. 1983) 14-15

Drinker v. Colonial Sch. Dist., 78 F.3d 859 (3d Cir. 1996) 4

F.N. v. Board of Educ., 894 F. Supp. 605 (E.D. N.Y. 1995) 16

Florence County Sch. Dist. v. Carter, 510 U.S. 7 (1993) 18-19

Heldman v. Sobol, 962 F.2d 148 (2d Cir. 1992) 15

Henry v. School Admin. Unit No. 29, 70 F. Supp. 2d 52 (D.N.H. 1999) 15, 23, 24

Honig v. Doe, 484 U.S. 305 (1988) 15, 17

Marie O. v. Edgar, 131 F.3d 610 (7th Cir. 1997) 1

CASES (continued): **PAGE**

Matthew K. v. Parkland Sch. Dist., No. 97-6636, 1998 WL 8400 (E.D. Pa. Feb. 26, 1998) . . . . passim

Mayo v. Baltimore City Pub. Sch., 40 F. Supp. 2d 331 (D. Md. 1999) 25-27

Murphy v. Arlington Cent. Sch. Dist., 86 F. Supp. 2d 354 (S.D.N.Y. 2000) . . . . .passim

Muller v. Committee on Special Educ., 145 F.3d 95 (2d Cir. 1998) 27

Mrs. W. v. Tirozzi, 832 F.2d 748 (2d Cir. 1987) 15-16

School Comm. of the Town of Burlington v. Department of Educ., 471 U.S. 359 (1996). . . . . passim

Schlude v. Northeast Cent. Sch. Dist., 892 F. Supp. 560 (S.D.N.Y. 1995). 16

Stacey G. v. Pasadena Indep. Sch. Dist., 695 F.2d 949 (5th Cir. 1983) 14-15

Schuhloff v. Pine Plans Cent. Sch. Dist., No. 99-3518 (S.D.N.Y. Mar. 1, 2000) 25

Susquentia Sch. Dist. v. Raelee S., 96 F.3d 78 (3d Cir. 1996) . . . . passim

St. Tammany Parish Sch. Bd. v. Louisiana, 142 F.3d 776 (5th Cir. 1998) 23, 28

T.H. v. Board of Educ., No. 98-4633, 1998 WL 850819 (N.D. Ill. Apr. 24, 1998) 23, 24

T.H. v. Board of Educ., 55 F. Supp 2d 830 (N.D. Ill. 1999) 24

Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119 (2d Cir. 1998) 2

STATUTES: **PAGE**

Individuals with Disabilities Education Act (IDEA),
20 U.S.C. 1400 1
20 U.S.C. 1400(c) 2
20 U.S.C. 1401 1
20 U.S.C. 1401(8) 2
20 U.S.C. 1406 1
20 U.S.C. 1414 2
20 U.S.C. 1414(d)(4) 2
20 U.S.C. 1415(f) 3
20 U.S.C. 1415(f)(1)(g) 3
20 U.S.C. 1415(g) 3
20 U.S.C. 1415(i)(2)(A) 3, 6, 16
20 U.S.C. 1415(i)(2)(B)(iii) 27
20 U.S.C. 1415(j) 2, 3, 16
20 U.S.C. 1417 1

N.Y. Educ. Law 4404(1) 3

N.Y. Educ. Law 4404(2) 3

N.Y. Educ. Law 4404(3) 3

REGULATIONS:

34 C.F.R. 300.514(c) .8, 10, 19

34 C.F.R. 300.552(b)(2) 2

64 Fed. Reg. 12615 (1999) 19

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 00-7358

PEARL MURPHY & THEODORE MURPHY,

Plaintiffs-Appellees

v.

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD
OF EDUCATION,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES AND URGING AFFIRMANCE

INTEREST OF THE UNITED STATES

This case presents issues under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., concerning the exhaustion doctrine and a public school system's financial responsibility for a child's private school tuition when the public school's proposed educational plan is found to be educationally deficient. The IDEA is an important civil rights statute for children with disabilities, and is enforced by the United States Department of Education, which is authorized to promulgate regulations and interpretive letters. 20 U.S.C. 1406, 1417. The United States has filed amicus briefs in a number of IDEA cases. See, e.g., Cedar Rapids Comm. Sch. Dist. v. Garrett F., 526 U.S. 66 (1999); Board of Educ. v. Rowley, 458 U.S. 176 (1982); Marie O. v. Edgar, 131 F.3d 610 (7th Cir. 1997).

QUESTIONS PRESENTED

1. Whether plaintiffs must exhaust their administrative remedies before bringing suit to establish their child's current educational placement under the IDEA's "stay-put" provision, 20 U.S.C. 1415(j).

2. Whether the school district is financially responsible for tuition payments once the state review officer holds that the public school's proposed IEP was deficient and the parents' private educational placement was appropriate under the IDEA.

STATEMENT OF THE CASE

1. a. The purpose of the IDEA is "to assure that all children with disabilities have available to them * * * a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. 1400(c). The "free appropriate public education" the Act requires is tailored to each child through implementation of an "individualized education program" (IEP). See 20 U.S.C. 1401(8) & 1414. The IEP is a written statement of the child's educational level, performance, and annual goals, and sets forth a program to meet those goals. See Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 122 (2d Cir. 1998) (discussing IEP). Each child's IEP must be reviewed annually and revised when appropriate. 20 U.S.C. 1414(d)(4). A child's placement must be based on the IEP. 34 C.F.R. 300.552(b)(2).

The Act envisions that the parents of a child with a disability and the local education agency will work together to

create the IEP. Should a disagreement arise relating to the child's evaluation or program, the Act provides the parents with numerous procedural safeguards. Specifically, parents are entitled to an "impartial due process hearing" conducted by the local or state educational agency to resolve their complaints regarding the educational services provided by the school district. See 20 U.S.C. 1415(f). The Act allows each State to determine whether it will provide a single-tier or two-tier administrative review process. 20 U.S.C. 1415(f)(1) & 1415(g). See School Comm. of the Town of Burlington v. Department of Educ., 471 U.S. 359, 367-368 (1985) (Burlington).

New York has a two-tier review process. The initial due process hearing is conducted before an "impartial hearing officer" (IHO) appointed by the Board of Education. N.Y. Educ. Law 4404(1). Either party has the right to appeal the decision of the IHO to a "state review officer" (SRO). N.Y. Educ. Law 4404(2). Once these administrative remedies are exhausted, either party may commence a civil action in state or federal court. N.Y. Educ. Law 4404(3); 20 U.S.C. 1415(g) & 1415(i)(2)(A).

b. One of the IDEA's most important procedural safeguards is the "stay-put" or "pendent placement" provision, 20 U.S.C. 1415(j). That provision provides that "during the pendency of any proceedings [arising out of a due process hearing], unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational

placement of such child[.]" This provision is designed to preserve the last proper placement, or the last placement on which the parents and school officials agreed, while review of the proposed new placement continues. This represents "Congress' policy choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved." Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864-865 (3d Cir. 1996).

The stay-put provision does not bar parents from unilaterally changing a child's placement. But such a unilateral change raises issues concerning the financial responsibility for the new placement pending resolution of the parents' challenge to the school district's proposed IEP and placement, particularly since review of a contested IEP may take years to run. See Burlington, 471 U.S. at 361. Where parents reject an IEP and unilaterally enroll their child in a private school, they are initially responsible for paying for the private schooling. Id. at 373. Whether the school district must ultimately reimburse the parents for the tuition, or pay the tuition prospectively, depends on what happens during the administrative and judicial review of the challenged IEP issue.

2. a. Plaintiffs Pearl and Theodore Murphy brought this action on behalf of their son, Joseph, a rising high school junior with a disability. Joseph completed the 1997-1998 school year in public school in the Arlington Central School District

(School District). The IEP proposed by the School District for the 1998-1999 school year called for Joseph to continue in the public school. Plaintiffs, however, rejected that proposal and on September 3, 1998, requested an impartial due process hearing. They also withdrew Joseph from the Arlington school and enrolled him at Kildonan, a private school. Joseph attended Kildonan during the 1998-1999 school year, and plaintiffs paid the approximately $20,000 tuition. See Murphy v. Arlington Cent. Sch. Dist., 86 F. Supp. 2d 354, 354-358 (S.D.N.Y. 2000) (decision below; summarizing factual background); App. A-240.[1/]

During the 1998-1999 school year, plaintiffs pursued their administrative claim that the IEP placing Joseph in the public school was inappropriate. On July 7, 1999, after several hearings, the initial hearing officer (IHO) issued his decision, holding that the proposed IEP for the 1998-1999 school year was inadequate to meet Joseph's needs and that Kildonan was an appropriate placement. The IHO also found that the School District was liable for Joseph's 1998-1999 tuition.

On August 18, 1999, the School District appealed the IHO's decision to the state review officer (SRO). On December 14, 1999, the SRO issued a decision agreeing that the IEP placing Joseph in the public school was not appropriate, finding that the services provided by Kildonan were appropriate under IDEA, and

---

[1/] References to "App. __" are to page numbers in the Appendix of Defendant-Appellant filed along with Appellant's opening brief. References to "Br. __" are to page numbers in Appellant's opening brief. References to "R. __" are to docket numbers on the district court docket sheet.

upholding the award of tuition reimbursement for the 1998-1999 school year at Kildonan. App. A-158 to A-173; 86 F. Supp. 2d at 360.

As a result of this decision, on January 24, 2000, the School District reimbursed the plaintiffs for Joseph's 1998-1999 tuition. Nevertheless, on April 14, 2000, the School District brought an action in New York state court seeking judicial review of the SRO's decision. 20 U.S.C. 1415(i)(2)(A). Thus, the merits of Joseph's appropriate IEP and placement for the 1998-1999 school year is currently in New York state court, where a decision is pending.

b. Although administrative consideration of Joseph's IEP and placement for the 1998-1999 school year continued until December 1999, September 1999 marked the beginning of the 1999-2000 school year. Thus, there was another IEP meeting between plaintiffs and the School District for the 1999-2000 school year. The School District again proposed placing Joseph in the public high school. Joseph’s parents did not accept this IEP and continued to enroll Joseph at Kildonan.

On January 7, 2000, plaintiffs requested an impartial due process hearing to challenge the appropriateness of the recommended public school placement and to seek reimbursement for the private tuition for the 1999-2000 school year. The IHO held hearings between February and June 2000, and a decision is pending.

3. This pro se action was filed in federal district court on August 8, 1999, while the School District's appeal of the IHO's decision concerning the IEP and placement for the 1998-1999 school year was pending before the SRO. Plaintiffs sought preliminary relief requiring the School District to pay for Joseph's private school tuition as a result of the IHO's decision that Kildonan was Joseph's appropriate placement. App. A-13. In January 2000, plaintiffs also moved to compel payment for the 1999-2000 school year. See R. 13.

4. On March 1, 2000, the district court issued its decision addressing the exhaustion doctrine and the financial responsibility for Joseph's private school tuition after his placement at Kildonan at the beginning of the 1998-1999 school year. 86 F. Supp. 2d 354; App. A-240. The latter issue implicated the question of Joseph's "current educational placement" under IDEA's stay-put provision. That is because when the child's "then-current educational placement" changes during the course of the parties' dispute, the financial responsibilities of the parties may also change. See id. at 361; App. A-240 to A-241. The district court noted that it was not addressing the merits of the placement disputes for either the 1998-1999 or 1999-2000 school years, since those matters were not before the court.[2/]

[2/] As noted, the appropriate placement for the 1998-1999 school year is now being adjudicated in New York state court (the School District's appeal of the SRO's final administrative decision). The appropriate placement for 1999-2000 is being adjudicated at (continued...)

a. The court first stated that parents seeking to invoke the IDEA's stay-put provision need not exhaust their administrative remedies. 86 F. Supp. 2d at 357; App. A-245. The court explained that if exhaustion were required, "it would defeat the purpose behind the stay-put provision, which determines the child's interim placement during the pendency of administrative proceedings." Ibid.

b. The court next held that the SRO's December 1999, decision that Kildonan was Joseph's appropriate educational placement for the 1998-1999 school year resulted in Kildonan being his "then-current educational placement" for purposes of the stay-put provision. See 86 F. Supp. 2d at 355-358; App. A-248 to A-252. The court cited the applicable regulation, which provides that:

> If the decision of a hearing officer in a due process hearing conducted by * * * a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes [of the stay-put provision.]

34 C.F.R. 300.514(c). The court explained that under this regulation, "once the SRO issued its decision in December 1999 * * * there was an “agreement” under [Section] 300.514(c) between Plaintiffs and the District * * * which changed Joseph's placement to Kildonan pending further proceedings." 86 F. Supp. 2d at 358; App. A-247.

[2/] (...continued)
the administrative level.

Although the School District conceded below that the SRO decision changed Joseph's "current" placement for purposes of the stay-put provision, it argued that the change was limited to issues concerning the 1998-1999 school year. In other words, the School District argued that Joseph's current placement for purposes of the stay-put provision reverted to the public high school for the 1999-2000 school year, as that placement was proposed in Joseph's 1999-2000 IEP. The court rejected this argument, stating that the "District has confused the concepts of current educational or pendent placement with what is ultimately determined to be the appropriate placement for the 1999-2000 school year." 86 F. Supp. 2d at 359; App. A-248.

c. Finally, the court addressed the financial responsibility for Joseph's private-school tuition. The court divided the case into three distinct time periods: (1) Joseph's placement at Kildonan for the 1998-1999 school year; (2) from the end of the 1998-1999 school year until the SRO's December 14, 1999, decision that Kildonan was the proper placement; and (3) from the date of the SRO's decision forward.

With respect to the first period, the court found that since the School District had reimbursed plaintiffs for the 1998-1999 private school tuition, and had not yet appealed the SRO's decision deeming Kildonan the appropriate placement, there was no present case or controversy concerning reimbursement of the 1998-

1999 tuition.[3] With respect to the second period, the court concluded that plaintiffs were not entitled to reimbursement until either it was certain that the School District was not appealing the SRO decision,[4] or a court upheld the decision. 86 F. Supp. 2d at 363; App. A-257.[5]

The issue presented in this appeal concerns the final period -- from the December 14, 1999, SRO decision forward. The court held that the School District was financially responsible for Joseph's education from the effective date of the SRO decision forward. 86 F. Supp. 2d at 367-368; App. A-261 to A-265; see note 6, infra. Citing decisions of several courts of appeals, the court stated that "once the SRO rendered its decision, there was an "agreement" changing Joseph's pendent placement to Kildonan. From that date forward, the District is responsible for maintaining that placement." Id. at 366; App. A-263. The

---

[3] As noted above, subsequent to the court's decision the School District did appeal the SRO's decision regarding the 1998-1999 placement to state court.

[4] Again, although it is now clear that the School District has appealed the SRO decision, at the time of the decision it was not.

[5] The court rejected plaintiffs' argument that the IHO decision constituted an "agreement" changing Joseph's current placement. The court stated that, pursuant to Section 300.514(c), in a two-tier administrative review system it is only the decision of the SRO, and not the IHO, that constitutes an "agreement." Therefore, plaintiffs remained in violation of the stay-put provision until the December 14, 1999, SRO decision, and reimbursement for periods prior to that date depended on whether that decision became final or was ultimately upheld on appeal. 86 F. Supp. 2d at 363-364; App. A-257 to A-258. Plaintiffs have not cross-appealed the court's conclusion that they were not yet entitled to reimbursement for the period prior to the December, 1999, SRO decision.

court explained that to hold otherwise would mean that parents who could not afford private placement would have to keep their child in a public placement even though the state administrative decision found that placement to be inappropriate. The court added that this "does not mean that the District must fund Joseph's tuition at Kildonan for the remainder of his education. However, until a new placement is established by either an actual agreement between the parents and the District, or by an administrative decision upholding the District's proposed placement which Plaintiffs choose not to appeal, or by a court, the District remains financially responsible [for placement at Kildonan]." Ibid.[6/]

5. On March 23, 2000, the School District filed a timely notice of appeal of the district court's March 1, 2000 order. App. A-267. In May 2000, the School District reimbursed Joseph's 1999-2000 tuition (an amount totaling $21,500). See App. A-278 to A-284.

SUMMARY OF THE ARGUMENT

The School District has challenged the district court's conclusion that IDEA's "stay-put" provision requires the school

---

[6/] There was an unusual twist to the court's holding. The court stated that because the SRO decision was delayed for three months without the consent of the plaintiffs, it would be unfair to penalize plaintiffs for that delay. Accordingly, since under the applicable regulations the SRO should have issued its decision by September 17, 1999, the court held that plaintiffs were entitled to reimbursement from that date, rather that the actual date of SRO decision. See 86 F. Supp. 2d at 367 & n.8; App. A-264 to A-265. The School District has not challenged this aspect of the lower court's decision.

district to fund Joseph's private education during judicial review of the SRO's administrative determination that the private school is Joseph's appropriate placement under IDEA. As an initial matter, the district court correctly concluded that exhaustion is not required in this case. Although the exhaustion requirement applies to challenges to a child's IEP, courts have consistently recognized that it does not apply to an action to establish the child's pendent placement under the stay-put provision or the financial responsibility that follows. That conclusion is supported by both the statutory structure and the notion that the stay-put rule is a protective mechanism intended to maintain the last proper placement during review of the IEP. The stay-put provision's purpose would be defeated if it could not be enforced during such administrative proceedings.

The district court also correctly concluded that a school district is responsible for the costs of a child's private placement from the time such placement becomes the "then-current educational placement" based on an agreement between school officials and parents, including when the agreement between the parties is the result of an SRO decision concerning appropriate placement. Under the applicable regulations, once the state review officer finds a specific placement appropriate, there is an "agreement" between the school officials and parents that that placement is the pendent placement during further proceedings for purposes of application of the stay-put provision. It further follows, as numerous courts have recognized, that the school

district is financially responsible for maintaining the child in that placement until the conclusion of judicial proceedings changing the placement. Otherwise, parents who cannot afford to front the money for their child's private placement would be forced to keep their child in a public placement that the state itself found to violate the IDEA.

ARGUMENT

I

PARENTS NEED NOT EXHAUST THEIR ADMINISTRATIVE REMEDIES BEFORE SEEKING TO ENFORCE THE IDEA'S STAY-PUT PROVISION

The School District first argues (Br. 14-19) that the district court lacked subject-matter jurisdiction because plaintiffs failed to exhaust their administrative remedies before bringing suit to enforce their rights under the stay-put provision. The district court correctly rejected this argument.

Although the exhaustion requirement applies to challenges to a child's proposed IEP, many courts have recognized that it does not apply to an action to establish the child's pendent placement under the stay-put provision or the financial responsibility that follows. As the Eighth Circuit explained, "although the ultimate dispute over [the child's] proper educational program * * * must be decided in the administrative due process proceedings, federal courts have authority to enter preliminary injunctions determining the placement of children during the pendency of state proceedings." Digre v. Roseville Schs. Indep. Sch. Dist., 841 F.2d 245, 250 (8th Cir. 1988) (also citing cases). The court in Cole v. Metropolitan Government, 954 F. Supp. 1214, 1222 (M.D.

Tenn. 1997), similarly found that the plaintiffs "did not have to exhaust their administrative remedies in order to show that the [stay-put] provision applied to them." The court explained that "the protection of the stay put rule would be of little benefit if the plaintiffs are forced to proceed with administrative remedies in order to apply it. As noted by the plaintiffs, the rule is intended to protect the student during the challenge to the change in placement." Id. at 1221.

Likewise, in Carl v. Mundelein High School District, No. 93-5304, 1993 WL 787899 (N.D. Ill. Sep. 3, 1993), plaintiffs sought a preliminary injunction to enforce the stay-put provision pending resolution of issues raised in a due process hearing. The court rejected defendant's argument that plaintiffs had not exhausted their administrative remedies, noting that if "the stay-put provision applies in this case, it is being violated each day [the child] is not in the program [the private placement]. There is no administrative remedy available for this violation[.]" Id. at *2. The court summarized that if the plaintiffs could enforce the stay-put provision only after all proceedings were concluded, the child "would be deprived of the benefits of the stay-put provision entirely." Ibid.; see also Doe v. Brookline Sch. Comm., 722 F.2d 910, 919 (1st Cir. 1983) (parent seeking to modify existing educational placement can file motion for preliminary injunction); Stacey G. v. Pasadena Indep. Sch. Dist., 695 F.2d 949 (5th Cir. 1983) (preliminary injunctive relief granted regarding placement during administrative

proceedings); Henry v. School Admin. Unit No. 29, 70 F. Supp. 2d 52, 57 (D.N.H. 1999) (noting decisions holding that the exhaustion requirement does not apply to claims for preliminary relief to alter or maintain an educational placement during an administrative challenge to an IEP); Matthew K. v. Parkland Sch. Dist., 1998 WL 84009 *2 n.3 (E.D. Pa. 1998) (plaintiff need not exhaust administrative remedies with regard to preliminary injunction to enforce pendent placement).

This conclusion is consistent with the principle that the exhaustion requirement does not apply where exhaustion would be futile because administrative procedures fail to provide adequate remedies. The Supreme Court relied on this principle in explaining that both parents and school officials could seek injunctive relief to enforce or alter the pendent placement of a child under the stay-put provision. Honig v. Doe, 484 U.S. 305 (1988) (suit to enjoin school from expelling students pending resolution of IEP). The Court explained that although "judicial review is normally not available * * * until all administrative proceedings are completed, * * * parents may bypass the administrative process where exhaustion would be futile or inadequate." Id. at 326-327; see also Heldman v. Sobol, 962 F.2d 148, 158-159 (2d Cir. 1992) (IDEA's exhaustion requirement does not apply where futile, citing Honig); Mrs. W. v. Tirozzi,

832 F.2d 748, 756 (2d Cir. 1987) (discussing exceptions to exhaustion doctrine).[7]

Thus, the district court correctly concluded that parents need not exhaust administrative remedies before seeking to enforce the stay-put provision or determine the child's current educational placement for purposes of application of the stay-put provision. The underlying purpose of the exhaustion doctrine -- limiting federal court actions to challenges to final state administrative agency decisions -- is not undermined by permitting federal actions to enforce the stay-put provision.

This conclusion is also consistent with the statutory structure. The provision requiring exhaustion, 20 U.S.C. 1415(i)(2)(A), falls under the subsection addressing the administrative procedures for challenging decisions made in the impartial due process hearings (e.g., the merits of an IEP). The stay-put provision is in a different subsection, 20 U.S.C. 1415(j). This strongly suggests Congress did not intend to apply the exhaustion provision to enforcement of the stay-put provision.

The School District offers little to support its argument to the contrary, except to recite the general rule that parties must

---

[7] The few cases suggesting the opposite conclusion arise in materially different circumstances. See Schlude v. Northeast Cent. Sch. Dist., 892 F. Supp. 560 (S.D.N.Y. 1995) (plaintiff must exhaust administrative remedies available through Commissioner of Education under state law, even though those remedies not part of the IDEA's procedural safeguards); F.N. v. Board of Educ., 894 F. Supp. 605 (E.D.N.Y. 1995) (exhaustion doctrine applies to action to enforce stay-put provision where child not yet determined to be "disabled").

exhaust their administrative remedies before seeking judicial review (Br. 14-18). There is no disagreement that that is true with regard to challenges to the merits of an IEP, but of course a different situation is presented here. The School District also makes the bare assertion that the stay-put provision is not an "independent source of subject matter jurisdiction." Honig and the other cases cited above make clear, however, that courts do have jurisdiction to enforce the stay-put provision in appropriate cases. Finally, the School District suggests that any exception to the exhaustion requirement in cases involving pendent placement under the stay-put provision applies only where the school is seeking to change the placement. That argument is not supported by Honig, see 484 U.S. at 327 (emphasizing that exception to exhaustion requirement turns on whether exhaustion would be futile or inadequate), or by logic. Whether the parents are seeking to prevent the school from removing a child from his pendent placement, or to establish a new placement as the pendent placement, they are seeking judicial enforcement of the stay-put provision.[8/]

[8/] The School District also suggests (Br. 4-5, 18) that the district court lacked jurisdiction because it twice previously dismissed the case, citing orders dated January 3, 2000 (App. A-192), and January 11, 2000 (App. A-197). The School District misreads the plain language of these orders, which simply state that the court would dismiss the case if there was no appeal of the SRO order by April 17, 2000. See, e.g., App. A-193, A-198.

II

A SCHOOL DISTRICT IS FINANCIALLY RESPONSIBLE FOR A CHILD'S PRIVATE PLACEMENT FROM THE DATE THE STATE REVIEW OFFICER FINDS THAT THE PARENTS' PRIVATE PLACEMENT WAS APPROPRIATE

The district court held that the Arlington Central School District was financially responsible for Joseph's private school tuition from the date of the SRO decision finding the parents' private placement was appropriate until that decision is changed by either agreement of the parties or a subsequent administrative or judicial decision. The School District does not dispute that the decision of the SRO constitutes an "agreement" establishing a new pendent placement at Kildonan (see, e.g., Br. 20, 22). Rather, the School District argues that it should not remain financially liable after the initial school year (1998-1999), since the appropriateness of the placement for the 1999-2000 year has not been established. The district court correctly rejected this argument.[9/]

[9/] Although the School District acknowledges that the SRO's decision constitutes an agreement changing the child's pendent placement, the New York State School Boards Association, as amicus, challenges this conclusion. The Association argues that because Kildonan is not a school approved by the state educational agency, it cannot be deemed an agreed upon placement. This issue was not addressed below or, as noted, raised by appellants. In any event, the argument lacks merit. In Florence County School District v. Carter, 510 U.S. 7 (1993), the Court held that reimbursement was not barred where the private school selected by the parents did not meet state standards. If these standards do not apply to private parental placements ultimately deemed appropriate upon review of state administrative decisions, see id. at 14, there is no reason they should apply to private placements that have been approved by the SRO as providing an "appropriate" education. Cf. ibid. As the Court in Carter noted, the IDEA "was intended to ensure that children with
(continued...)

1. As the district court correctly explained, the School District confuses the concepts of pendent placement for purposes of the stay-put provision and the ultimate issue of Joseph's appropriate placement. In view of 34 C.F.R. 300.514(c), although the SRO ruled only on the 1998-1999 IEP, his decision constitutes an "agreement" under Section 300.514(c) between the parents and school officials, and therefore the last "agreed upon" placement was Kildonan. Indeed, in Burlington the Court concluded that an administrative decision in favor of the parents and the private school placement "would seem to constitute an agreement by the State to change of placement." 471 U.S. at 372.[10] The fact that Joseph's IEP drawn by local school officials proposed a return to public school for 1999-2000 does not change Joseph's agreed upon placement. As the court stated, it would circumvent the purpose of the stay-put provision -- preserving the status quo pending resolution of placement disputes -- if the then-current placement for purposes of the stay-put provision was the new one the School District proposed for the following year. 86 F. Supp. 2d at 362-363; App. A-258 to A-259. Thus, under the stay-put provision, once the plaintiffs challenged Joseph's placement proposed in the

---

[9] (...continued)
disabilities receive an education that is both appropriate and free." Id. at 13. Moreover, there is no reason the school district cannot "agree" to a private parental placement that it could not provide itself under the regulations. Indeed, the "agreement" to which 34 C.F.R. 300.514(c) refers simply involves the child's pendent placement for purposes of the stay-put provision.

[10] 34 C.F.R. 300.514(c), effective May 11, 1999, followed the Supreme Court's decision. See 64 Fed. Reg. 12615.

1999-2000 IEP "the child [was] to remain in the then-current educational placement during the pendency of any proceedings, or, in this case, Kildonan." Id. at 360; App. A-251. In other words, although "the SRO decision determining that Kildonan was the appropriate placement for the 1998-1999 school year does not necessarily mean that Kildonan is the appropriate placement for the 1999-2000 term * * *, as a result of the SRO decision[] Kildonan is Joseph's stay-put placement until the placement dispute is resolved." Id. at 361. See Matthew K., 1998 WL 84009, at *7 & n.9 (designation of pendent placement not the same as the ultimate resolution of the child's proper placement for the following school year).

Numerous courts have held that once the SRO rules in the parents' favor that the private placement was the appropriate educational placement, the private placement becomes the pendent or stay-put placement and the school district is financially responsible for maintaining that placement until the conclusion of judicial proceedings changing the placement. For example, in Susquentia School District v. Raelee S., 96 F.3d 78 (3d Cir. 1996), the parents argued that once the state educational appeals panel (the analogue to the SRO here) ruled that the private placement was appropriate, the school district was obligated to pay for the private placement until the conclusion of the litigation. The court agreed, expressly rejecting the argument that "a pendent placement appropriate at the outset of administrative proceedings is fixed for the duration of the

proceedings and cannot be altered by an administrative ruling in the parents' favor." Id. at 84. The court explained that the stay-put provision could not be used "as a weapon by the * * * School District to force parents to maintain a child in a public school placement which the state appeals panel has held inappropriate." Ibid. The court concluded that "once there is state agreement with respect to pendent placement, a fortiori, financial responsibility on the part of the local school district follows. Thus, from the point of the panel decision forward -- academic years 1995-1996 and following -- [the child's] pendent placement, by agreement of the state, is the private school and [the School District] is obligated to pay for that placement." Ibid.

The Third Circuit also rejected the school district's argument that its financial responsibility was not immediate following the "agreement" to the new pendent placement. Noting that the Supreme Court in Burlington had upheld a parents' right to retroactive reimbursement for a private placement, the court concluded that "the policies underlying the IDEA and its administrative process favor imposing financial responsibility upon the local school district as soon as there has been an administrative panel or judicial decision establishing the pendent placement." Susquentia, 96 F.3d at 85. In Burlington the Court explained that it would be an empty victory, and not consistent with the child's right to a free appropriate public education, for a court to tell parents several years later that

they were correct in their private placement but could not be reimbursed for their expenses; thus, a court could award retroactive reimbursement as part of the "appropriate relief" available under the Act. 471 U.S. at 370. Similarly, the Third Circuit explained, the purpose of the Act "is not advanced by requiring parents, who have succeeded in obtaining a ruling that a proposed IEP is inadequate, to front the funds for continued private education." Susquentia, 96 F.3d at 87. Indeed, many parents cannot afford to front such funds. Thus, "[w]hile parents who reject a proposed IEP bear the initial expenses of unilateral placement, the school district's financial responsibility should begin when there is an administrative or judicial decision vindicating the parents' position." Id. at 86.

Other courts are in accord. The Ninth Circuit, in Clovis Unified School District v. California Office of Administration Hearings, 903 F.2d 635 (9th Cir. 1990), citing Burlington, held that the school district was responsible for the costs of the child's private placement during review of the administrative decision that the private placement was appropriate. The court stated that it was irrelevant that the parents placed the child in the private school unilaterally; under the stay-put provision, once there was an administrative decision that the private placement was appropriate, the school district was responsible for maintaining that placement until a court directed otherwise. Id. at 641. Likewise, in Matthew K., the court held that once the administrative decision established that the pendent

placement was the private school, financial responsibility on the part of the school district was immediate, and continued pending the outcome of proceedings brought under the Act. 1998 WL 84009, at *6-*8; see also Henry, 70 F. Supp. 2d at 59 ("if a local educational agency refuses to pay for the proposed interim placement but the parents obtain an order from the state educational agency approving the placement, the school district must pay for the placement from the date of the agency decision"); Board of Educ. v. Illinois State Bd. of Educ., 10 F. Supp. 2d 971 (N.D. Ill. 1998) (court may order either school district or state educational agency to bear costs of stay-put placement); Board of Educ. v. Brett Y., 959 F. Supp. 705, 713 (D. Md. 1997) (state administrative decision in favor of parents constitutes "agreement" by the State to a change in child's educational placement, thereby entitling the parents to a preliminary injunction requiring the Board to pay for the child's placement at private school); T.H. v. Board of Educ., No. 98-4633, 1998 WL 850819 (N.D. Ill. Dec. 3, 1998) (parents must be reimbursed from date of administrative decision forward until litigation concluded); cf. St. Tammany Parish Sch. Bd. v. Louisiana, 142 F.3d 776 (5th Cir. 1998) (assumes court can order payment of costs of interim placement to parents prior to merits decision, citing Susquentia); A.P. v. McGrew, No. 97-5876, 1998 WL 214706 (N.D. Ill. Apr. 24, 1998) (stay-put provision

contemplates imposing new obligations on school districts, citing Susquentia and Clovis).[11/]

In sum, as these cases make clear, once the SRO has determined that the private placement is the child's appropriate educational placement, the IDEA's mandate that the child is entitled to a "free appropriate public education" requires that the school district assume financial responsibility for that placement. As the Third Circuit concluded:

> The burden that such an approach [requiring families to front the cost of continued private education] would place on many families is overwhelming. The cost of private education * * * is substantial. Families without means would be hard pressed to pay for private education in what will almost invariably be the significant time lapse between a ruling in their favor and the ultimate close of litigation. * * * Without interim financial support, a parent's "choice" to have his child remain in what the state has determined to be an appropriate private school placement amounts to no choice at all. The prospect of reimbursement at the end of the litigation turnpike is of little consolation to a parent who cannot pay the toll at the outset.

[11/] Two related issues are implicated by these decisions. First, it is unclear whether a school district can recoup from the parents payment made to maintain the current educational placement if the school ultimately prevails on the merits of the child's proper placement. The court below expressly declined to address this issue, and therefore it is not before this Court. See 86 F. Supp. 2d at 367 n.9; App. A-265 n.9. Second, some cases hold that a decision by the first-tier hearing officer can also constitute an "agreement" under 34 C.F.R. 300.514(c), and thus that the school district's financial responsibility runs from that date. See, e.g., T.H. v. Board of Educ., 55 F. Supp. 2d 830, 845-846 (N.D. Ill. 1999). The court below concluded that only an administrative decision at the state level in a two-tier system could constitute such an agreement, and plaintiffs have not cross-appealed on that issue. 86 F. Supp. 2d at 363-364; App. A-258 to A-259.

Susquentia, 96 F.3d at 87.

2. The School District (Br. 21) relies on Schuhloff v. Pine Plans Central School District, No. 99-3518 (S.D.N.Y. Mar. 1, 2000),[12/] for the notion that an SRO's "holding regarding the validity of a private placement for one school year is limited to that school year." That, of course, is true with respect to review of the merits of a particular IEP. But again, the School District is confusing the concept of current educational placement for purposes of application of the stay-put provision with the ultimate determination of appropriate placement for the school year. Indeed, in Schuhloff, parents sought review in federal court of the merits of the SRO's decision that the private placement of their child was not appropriate. The court held that the private placement was appropriate, and therefore established it as the pendent placement; at the same time, the court noted that the pendent placement did not decide the child's appropriate placement under IEP's for subsequent school years, determinations the court correctly noted were "separate and independent" from the issue of pendency. Slip op. at 16 (citing Susquentia and Matthew K.).

The School District also suggests (Br. 23-24) that no prospective effect should be given to educational placement "agreements" achieved "by operation of law," i.e., pursuant to 34 C.F.R. 300.514(c), because parents will be given the incentive to

---

[12/] This is an unpublished slip opinion, which we were able to obtain only by contacting the district court Clerk's Office.

engage in protracted litigation to obtain free private school tuition, citing Mayo v. Baltimore City Public Schools, 40 F. Supp. 2d 331, 334 (D. Md. 1999). That argument would simply render Section 300.514(c) meaningless, since the stay-put provision only operates prospectively during resolution of the placement issue. Moreover, the litigation that would ensue after an SRO decision favorable to the parents would be at the behest of the school district, which could always move to expedite the proceedings if it deemed that necessary.

Further, when a school district is financially responsible for private tuition pursuant to Section 300.514(c) it is because the SRO has concluded that the private placement is the appropriate educational placement and the school system's proposed educational program is not. Thus, the parents are not getting some windfall; they are getting their child the free appropriate public education mandated by the Act. In any event, Mayo is inapposite. In that case, the court had ruled that the child's 1994-1995 private placement was appropriate, but expressly limited its decision to that school year. Settlement agreements were subsequently reached with respect to the 1995-1996 and 1996-1997 school years. In that context, the court concluded that there was no administrative decision creating a stay-put placement, and that the 1994-1995 determination did not

create automatic school board liability for ensuing years. Mayo, 40 F. Supp. 2d at 333-334.[13]

Finally, the School District suggests (Br. 24-28) that the award of prospective tuition is inappropriate because it constitutes an award of damages outside the scope of available remedies under the IDEA. In Burlington, however, the Court stated that the reimbursement of tuition did not constitute damages, but merely required the school district "to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." 471 U.S. at 370-371. The Court also emphasized that the Act authorizes a court to grant "such relief as the court determines is appropriate." Id. at 369 (provision now codified at 20 U.S.C. 1415(i)(2)(B)(iii)); see also Muller v. Committee on Special Educ., 145 F.3d 95, 104 (2d Cir. 1998) (emphasizing broad authority to grant appropriate relief). Although Burlington did not address prospective assessment of financial responsibility, the same principles apply. When an SRO determines that the private placement is appropriate, and therefore that placement becomes the child's current educational placement, the school district's payment of the private tuition is simply the school district providing the child the free appropriate public education the Act requires. See Burlington, 471 U.S. at 369. In short, an order requiring the payment of prospective tuition

---

[13] The court below also expressly distinguished Mayo. See 86 F. Supp. 2d at 361; App. A-252 to A-253.

pending judicial resolution of the merits of the placement issue is equitable relief, not damages, and thus within the court's remedial discretion. See also St. Tammany, 142 F.3d at 783 ("[r]eimbursement to parents for private school tuition (whether retroactive or pending a merits-decision) is an equitable remedy, which may be imposed in the discretion of the district court").[14/]

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

BILL LANN LEE
Acting Assistant Attorney General

MARK L. GROSS
THOMAS E. CHANDLER
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-3728

JUDITH WINSTON
General Counsel

SUZANNE SHERIDAN
Attorney
United States Department of Education

[14/] The School District also asserts (Br. 28-29) that the district court incorrectly permitted the pro se non-attorney parents to represent their son in this case, citing several Second Circuit cases disallowing similar arrangements. Although we take no position on this issue, we note that it is not clear whether the parents are representing their own interests or those of the child. Moreover, even if the School District is correct, it is not clear what relief it seeks or could ultimately obtain, other than an order requiring the child to obtain counsel or seek appointed counsel for future proceedings.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation set out in Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 7.0, and contains 6,971 words.

____

Thomas E. Chandler
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2000, two copies of the Brief for the United States as Amicus Curiae Supporting Appellees and Urging Affirmance were served by first-class mail, postage prepaid, on the following counsel of record:

Raymond G. Kuntz, P.C.
P.O. Box 396
Route 22, Hunting Ridge Mall
Bedford Village, New York 10506

Pearl & Theodore Murphy (pro se)
Reilly Road, Box 275
Lagrangeville, New York 12540

Jay Worona, Esq.
119 Washington Avenue
Albany, New York 12210

____
THOMAS E. CHANDLER
Attorney
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-3728