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PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

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IN RE: THE EDUCATIONAL ASSIGNMENT OF
DV

A STUDENT IN THE SCHOOL DISTRICT OF PHILADELPHIA
ODR FILE NUMBER 15698-14-15-KE

MEMORANDUM AND ORDER OF THE HEARING OFFICER
ON PARENT'S MOTION TO ORDER PENDENT PLACEMENT

This matter arises from a Complaint Notice (complaint) seeking relief under the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. (IDEA), section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §704 (section 504) and the Americans with Disabilities Act, 42 U.S.C. 12101 et seq. (ADA). Parents allege that the District failed to provide Student with a free appropriate public education (FAPE), among other matters.

Student is transitioning to kindergarten from Early Intervention (EI), but Parent has held Student back from school due to safety concerns. Parent asserts among other things that Student exhibits dangerous behaviors that interfere with learning, and that the District is not offering an appropriate kindergarten placement that is reasonably calculated to address Student's behavioral needs and keep Student safe. Parent moves for an interim order establishing the Student's placement pending the above captioned proceedings.

The District asserts that it has offered an appropriate and safe placement, which can and will implement Student's last agreed upon Individualized Education Program (IEP). It asserts that the IEP, last

revised in May 2014, is the pendent placement. It asks that I deny the request for an order establishing pendent placement, as the last agreed upon IEP is the pendent placement by law.

I conclude that the placement offered by the District for the period from now until finalization of a new IEP by a District-convened IEP team is inappropriate because it is not reasonably calculated to ensure the Student's safety. I order that the offered placement be supplemented by assigning an assistant to attend Student on a one-to-one basis, in close proximity, during the school day within the placement offered by the District.

FINDINGS OF FACT

1. Student is diagnosed and educationally classified under the IDEA with Autism. Student has a history of significant developmental delays in the areas of social, emotional, adaptive, physical, cognitive and communication development. (SD 7, 14.)
2. Student's educational needs include emotional development, social development and language, and sensory processing. Student exhibits tantrum behaviors that lead to safety concerns. Student needs to learn effective communication skills. Student lacks the ability to understand dangerous situations and behaviors. (NT 67-68; SD 7, 14.)
3. Student has a history of elopement, which was extinguished during Student's participation in early intervention services, but remains a risk factor. (NT 65-69; SD 7.)
4. Student's behaviors of concern include non-compliance, tantrums, physical aggression (hitting, kicking, smacking), self-injurious behavior (including punching Student's own head), climbing on furniture, and leaving Student's seat. (NT 56-61, 65, 71-73, 86-92, 122, 139-140; SD 7, 16; P 1.)
5. The Student's last agreed-upon placement is the early intervention IEP last revised in May 2014, with its accompanying NOREP and a behavior plan that was provided by different agency. This placement consisted of full-time instruction in an autistic support classroom. (NT 47-48, 80-85; SD 8, 9, 16.)
6. The May 2014 IEP and NOREP provided a classroom with approximately 9 students, staffed by a teacher, two assistants and two paraprofessionals. In addition, various related services providers would be present during the day. The average student-staff ratio was 9 to 5, not including the presence of related services providers. (NT 50-52.)
7. In addition to the average staffing ratio, the teacher in Student's classroom assigned one staff member to be with Student at all times, within a few feet proximity. This was not a one-to-one assignment, but a designated staff person was responsible specifically for Student's safety at all times during class. (NT 51-53, 59-60, 80-85, 93, 95, 104, 118, 142, 151.)

8. The early intervention classroom teacher considered Student a risk for elopement, and the classroom was equipped with a gate to prevent elopement. Close proximity of staff was also partially intended to address the risk of elopement. (NT 53-54, 80-92, 115-116.)
9. After breaks in schedule, Student had a history of regression in behavior and self-control. (NT 61-64.)
10. Student can be expected to exhibit regressed behavior due to the current extended period of time in which Student has been out of school. (NT 75-77, 80, 86-92, 151.)
11. Parent withdrew Student from Early Intervention services in August 2014, in anticipation of enrolling Student in the District's kindergarten classroom. (NT 49, 157-158; S 3, 15, 18.)
12. Student needs to graduate to kindergarten, due to Student's age and developmental status, and the risk that being with younger, less behaviorally controlled peers will cause regression in behavior and social skills. (NT 110, 145-146; S 7.)
13. Upon the Parent's request, the District provided a psychoeducational report and a draft re-evaluation report. (S 7, 30.)
14. The psychoeducational report recommended consideration of a one-to-one assistant for Student upon transition to kindergarten. (NT 168, 170-175; S 7.)
15. The District offered the Student transition to an autistic support kindergarten classroom, at a supplemental level of service. Supplemental placement is defined as between 40% and 79% of time spent in a special education setting. A one-to-one assistant was not offered pending completion of an evaluation report and IEP. (NT 163-166, 169-175, 179-190; S 9, 16, 24, 25, 28.)
16. The autistic support classroom into which Student would transition has two educational staff, and is expected to have eight students. Staff would be expected to position themselves in such a way as to be proximate to as many children in the classroom as require proximity. (NT 177-178, 195-199.)
17. The District did offer to provide a gate on the classroom doorway to prevent elopement. (NT 166.)
18. The District offered to require staff present in the classroom to position themselves in close proximity to Student as necessary in the discretion of the teacher. (NT 179-199.)
19. The District offered to provide other supports, accommodations and specially designed instruction to Student in the interim until the IEP could be finalized. (NT 179-199; S 28.)

DISCUSSION AND CONCLUSIONS OF LAW

The IDEA requires that any child with a disability remain in the "then-current educational placement ... or, if applying for initial admission to a public school ... be placed in the public school program until all ... proceedings have been completed." 20 U.S.C. §1415(j); 34 C.F.R. §300.518. This "stay put" mandate is subject to the exception that, if a hearing officer agrees that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents and it

will change the pendent placement requirement to the agreed upon placement. 34 C.F.R. §300.518(a), (d). The purpose of these provisions is to maintain the “educational status quo” until the disagreement between parent and school district is resolved. See Pardini v. Allegheny County Intermediate Unit, 420 F.3d 181, 190 (3d Cir. 2005). It is not determinative that the child is transitioning from one educational agency to another when “stay put” is invoked. Ibid.

In this matter, Parent asserts that there is no currently operative placement, because Student is transitioning from EI to kindergarten. Parent notes, and I find by a preponderance of the evidence, that Student was not in the EI program when the dispute over the District’s offered services arose, and that the practical consequences of retaining Student in the EI placement for another year would be harmful to Student. Thus, Student does not have a currently operative placement at the present time.

Where a child is transitioning from one special education setting to another, and it is manifest, as in the present matter, that retention (in the previous service under the last agreed upon placement and IEP) is not appropriate, the receiving setting is obligated to provide services that are comparable to those provided by the sending setting, during the pendency of the dispute. See Pardini v. Allegheny County Intermediate Unit, 420 F.3d above at 190; R.B. v. Mastery Charter School, 762 F. Supp. 2d 745, 761 (E.D. Pa. 2010), *aff’d*, 532 Fed. Appx. 136, 2013 U.S. App. LEXIS 15594 (3d Cir. 2013)(not precedential)(in *dicta*, asserting obligation of receiving agency to provide comparable services). Therefore, the issue for this motion is whether or not the District has offered a placement that provides comparable services to those that Student was receiving in the last agreed upon placement.

The focus of my inquiry for purposes of the above analysis is the safety of the child. This is what is the stumbling block between Parent and the District. The child exhibits behaviors that are frankly dangerous. The Student tantrums, losing self-control. The Student tries to climb on top of furniture, strikes, kicks and throws objects. The Student strikes Student’s own face, and the testimony was that this behavior was with some force, and raised a risk to the eyes. Student tries to elope, and sometimes succeeds, creating a grave danger to Student. Thus the issue for this motion is whether or not the District’s offered placement can provide safety protection comparable to that provided in the last agreed upon placement in the Early Intervention autistic support classroom.

There is no issue that the last agreed upon placement was the Early Intervention program implementing the IEP as revised in May 2014. This placement consisted of a full time autistic support classroom, with nine students being taught by five educational staff. The classroom had a gate at the doorway to prevent elopement.

The teacher, who testified in this matter, assigned one of the four remaining staff to be responsible for Student’s safety at all times. At times of greatest risk of dangerous behavior, the staff would be in “close proximity” to Student – that is, within a few feet of Student. The staff were familiar with Student and Student with them, so that they were able to calibrate their proximity to guard against Student’s ever present risk of elopement, self-injurious behavior or aggressive behavior toward others. The IEP was accompanied with a behavior support plan to address these risks.

The District’s offer, based on this record and upon a preponderance of the evidence, was not comparable in terms of the protective services discussed above. The District offered a placement in supplemental autistic support in Student’s nearest neighborhood school. Thus, the offer was not for full time assignment in an autistic support classroom, as was provided in Early Intervention. In fact, Parent could not be assured that Student would be in the autistic support classroom for more than 40% of the school day. If Student should be put in a regular education setting, there was no provision for assuring Student’s safety, based upon the evidence presented in this matter.

The classroom was fitted with a gate at the doorway, but I conclude that the classroom did not provide sufficient staffing to complement that physical barrier, as the Early Intervention program had provided.

Even when in that autistic support classroom, the level of staff availability provided for Student's safety was far less than that provided in the Early Intervention classroom. The early Intervention classroom provided five educational staff for nine students – a ratio of less than two students per staff member. The District classroom was expected to have eight children and two staff, including the teacher – a ratio of four to one. This is a palpable difference in the level of attendance and protection that could be reasonably expected for a child whose behavioral repertoire includes unpredictable dangerous behaviors.

The District staff were expected to provide “proximity”, similar to the staff regime in Early Intervention, but this must be viewed in light of the disparate staffing in the two settings. It is simply not reasonable to expect that a staff person expected to deal with four students, all of whom are by definition in need of specially designed instruction and accommodations, to provide the same degree of “proximity” that can be provided by a staff person responsible for two students – and sometimes only one. Despite the District Director's best efforts to show how that could be done, I conclude that it is not likely to be done, on this record.

The District suggests that the Early Intervention program's staffing is somehow less substantial because it was not provided by the Early Intervention agency – it was provided by a local behavioral health agency. I fail to see how this makes a difference. The staff were there, and they were directed by the Early Intervention teacher. There is no evidence that the difference in provider agencies would alter their provision of the services to which the teacher credibly testified.

The District argues that it was prepared to implement the Early Intervention IEP, last agreed upon. Nevertheless, its setting and the degree of autistic support were palpably different from those of the Early Intervention program, in whose setting that IEP was being delivered. The District did not show that the setting and lower staffing were capable of delivering that IEP and the accompanying behavior support plan. Weighing the evidence, I find that the Parent showed by a preponderance that the District's offered setting was not capable of providing comparable services to Student.

Consequently, I will order the District to provide a one-to-one assistant to be with Student during the period of pendency, or until the Parent and District agree to a change in this level of support that the IEP team recommends. I do not intend to make the one-to-one support a long term solution, if the Student's educational needs militate against one-to-one service. It may well be that such attendance will eventually engender prompt dependence, or that it will inhibit Student's ability to internalize behavioral controls that might otherwise enable Student to proceed to a less restrictive configuration in the autistic support environment or in a general education setting. If the IEP team, with Parent agreeing, concludes that it is time to fade or eliminate one-to-one support, I expect the Parent to do what is best for her child, and cooperate with any sound educational advice.

In my view, it is not determinative that the Early Intervention program did not provide a one-to-one support. It is not necessary to require an identical service for the pendent period. Rather, it is necessary to provide comparable services in the absence of a viable existing placement. In this case, the evidence is preponderant that Student's behavior is highly likely in the short term to be dangerous to self or others. The evidence showed, and I find, that the Student is likely to regress behaviorally due to the long period of time Student has been away from school, and due to the transition to kindergarten itself. It is entirely likely that the old, risky or dangerous behaviors will surface again, and that extraordinary safety measures will be needed, such as one-to-one support. Thus, I find that the closest approximation to

the Early Intervention program's level of protectiveness is the provision of a one-to-one paraprofessional for Student in the setting proposed by the District.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** **that** the District provide a one-to-one assistant to be with Student during the period of pendency, or until the Parent and District agree to change in this level of support that the IEP team recommends. .

Dated: March 2, 2015

William Culleton Esq.

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HEARING OFFICER