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Pennsylvania Special Education Hearing Officer

Final Decision and Order

CLOSED HEARING

ODR File Number 19917 17 18

Child's Name: M. H. **Date of Birth:** [redacted]

Dates of Hearing:

2/19/2018, 2/26/2018, 3/1/2018

Parents:

[redacted]

School District:

Pittsburgh School District, 341 S. Bellefield Avenue
Pittsburgh, PA 15213

Aimee Zundel, Esquire, 445 Fort Pitt Boulevard, Suite 503
Bethlehem, PA 15219
Counsel for the LEA

Hearing Officer: Michael J. McElligott **Date of Decision:** 3/30/2018

INTRODUCTION

Student (“student”)¹ is a pre-teen aged student who resides in the Pittsburgh School District (“District”). The parties agree that the student qualifies under the terms of the Individuals with Disabilities in Education Improvement Act of 2004 (“IDEIA”)² as a student with multiple disabilities.

Parents claim that the student was denied a free appropriate public education (“FAPE”) related to alleged deficiencies in the student’s placement and programming, both retrospectively and as proposed by the District.³

The District counters that at all times it has met its obligations to the student under IDEIA, both in terms of its past and proposed programming. Accordingly, the District argues that the parent is not entitled to remedy.

For the reasons set forth below, I find in favor of the District, although the order will contain directives to the student’s individualized education program (“IEP”) team regarding certain revisions to the student’s IEP.

ISSUES

Did the District deny the student FAPE
in its handling of the student’s [program] and/or placement?

¹ The generic use of “student”, rather than a name and gender-specific pronouns, is employed to protect the confidentiality of the student.

² It is this hearing officer’s preference to cite to the pertinent federal implementing regulations of the IDEIA at 34 C.F.R. §§300.1-300.818. *See also* 22 PA Code §§14.101-14.163 (“Chapter 14”).

³ Parent’s complaint made numerous claims for remedy. After the filing of the complaint, a complicated procedural history unfolded, as set forth below. That procedural history details the scope of the parent’s claims under consideration in this matter.

PROCEDURAL HISTORY

- A. In May 2016, following a multi-session special education due process hearing before another special education hearing officer, a decision was issued at ODR file #17076-1516. This decision included a ruling about the scope of the parents' claims in that complaint and covered a period of parents' claims from November 2013 through the date of that decision. (Hearing Officer Exhibit ["HO"]-1, HO-2).
- B. Parents appealed that decision to the federal District Court for the Western District of Pennsylvania ("Court"). In March 2017, the Court issued an opinion and order dismissing parents' complaint in appeal before the Court. (HO-3, HO-4).
- C. As set forth below in the *Findings of Fact* section, beginning in April 2017, after the Court issued its opinion and order, the parties collaborated on the student's educational programming.
- D. In November 2017, the parents filed the complaint which led to these proceedings. The initial hearing date was set for January 16, 2018. (HO-5, HO-5a).
- E. The undersigned hearing officer ("this hearing officer") communicated with the parents and counsel for the District about prehearing matters. (HO-6).
- F. Shortly after the filing of the parents' complaint, the District filed a motion to limit claims, based on *res judicata*, as to certain claims/time periods in the parents' complaint, a motion grounded in the determinations made during the prior round of special education due process. (HO-7).
- G. This hearing officer issued a ruling granting the District's motion in part and denying it in part. The scope of the hearing was limited to the period of the student's placement and programming after March 2017, as the determinations of the prior special education due process decision found no denial-of-FAPE and the stay-put provisions of IDEIA (34 C.F.R. §300.518) during the pendency of the federal Court proceedings addressed the appropriateness of the student's programming through the date of the Court's opinion and order. (HO-8).
- H. Specifically, the scope of the chronology and claims in parents' complaint was limited to claims related to the student's programming in April 2017

and thereafter, including the summer of 2017 and the current 2017-2018 school year. (HO-8).

- I. Parents filed a motion for reconsideration of this ruling, a motion which was denied. (HO-9).
- J. In December 2017, the parents, counsel for the District, and this hearing officer exchanged emails regarding the parties' engagement in the resolution meeting process (34 C.F.R. §300.510). (HO-10).
- K. In December 2017, this hearing officer clarified for parents the difference between hearing planning/decision-making and a request for legal advice. (HO-11).
- L. In early January 2018, parents requested rescheduling of the January 16th hearing date. The request was granted and a conference call was scheduled to discuss hearing-planning and hearing-preparation. (HO-12).
- M. The hearing was scheduled for two sessions, February 12th and 19th. (HO-13, HO-13a).
- N. On January 9th, this hearing officer and parents and counsel for the District engaged in a conference call of approximately 90 minutes to discuss the status of the hearing, to discuss preparations for the hearing, and to engage in detailed hearing planning. (HO-14).
- O. Based on the number of witnesses identified by the parents and counsel for the District, and the scope of the testimony, a third hearing session—February 26th— was added to conclude the hearing. (HO-15).
- P. In January 2018, this hearing officer clarified for parents how communications should flow between them and this hearing officer and counsel for the District, based on the substance of the communication. (HO-16).
- Q. In January 2018, this hearing officer clarified for parents when written communication about a particular issue is required. (HO-17).
- R. In early February 2018, parents requested rescheduling of the February 12th hearing session. The District objected. This hearing officer took no view of the email exchange between parents and counsel for the District as to characterizations of the parties' positions on rescheduling but cancelled the February 12th session and scheduled another session for February 23rd. (HO-18, HO-19).

- S. The parties were informed that the three February hearing sessions—February 19th, 23rd, and 26th—were to be considered dates-certain, given the fact that the student had been, at that point, in contested programming for a number of school years, and this hearing officer wished to move the hearing to decision without delay. (HO-19).
- T. Shortly after the rescheduling to February 23rd, the parents indicated that the student’s father was unavailable that day, so the rescheduled date for the third session was moved to February 27th, such that the hearing was to conclude over February 19th, 26th, and 27th. (HO-20, HO-21).
- U. The parents emailed their disagreement with the scheduling of the hearing and this hearing officer’s determination that the hearing needed to be concluded sooner rather than later. (HO-22, HO-23).
- V. The parents thereafter requested that this hearing officer recuse himself from the proceedings. This hearing officer declined to recuse himself. (HO-24, HO-25).
- W. The parents continued to object to proceeding, and this hearing officer reiterated his intention to do so. (HO-26).
- X. In the run-up to the initial February 19th hearing session, the teachers of the District authorized its bargaining unit to call a potential strike. Because if/when a strike might take place, this hearing officer revised the witness order for the February 19th hearing session in case certain witnesses were unavailable for the latter two February sessions. (HO-27).⁴
- Y. At 5:12 AM on the morning of February 19th, parents emailed to say that they would not attend the February 19th hearing session. (HO-28).
- Z. At the outset of the hearing session on February 19th, this hearing officer called out to parents. In the telephone conversation, made part of the record, the student’s father reiterated that they would not participate in that session. Parents were informed that the hearing session would proceed but that they would be provided with an expedited copy of the transcript so they knew what evidence had been introduced for their preparation and/or testimony at the two additional hearing sessions. (Notes of Testimony [“NT”] at 4-22).

⁴ Ultimately, the District and the teachers’ union agreed to a contract and averted a strike.

- AA. The February 19th session was held, with the testimony of five District witnesses. (NT at 4-206).
- BB. Following the February 19th hearing session, this hearing officer emailed a summary of the procedural course of the day at the hearing session. (HO-29).
- CC. In the days following the February 19th hearing session, this hearing officer shared emails with the parents and counsel for the District about witness-planning, specifically about arrangements for the participation of certain District witnesses who parents indicated (in the January 9th conference call) they wished to question but who the District did not have any questions for. Ultimately, parents did not reply for clarity on their intention to call/question these witnesses. (HO-30, HO-31).
- DD. Having received the expedited copy of the transcript from the February 19th hearing session, parents emailed views and commentary on the testimony of witnesses from that session. (HO-31).
- EE. The hearing session of February 26th was held, taking testimony from one witness, and parents did not attend. This hearing officer provided a summary of the procedural course of the day at the hearing session. The transcript was provided to the parents on an expedited basis. (HO-32; NT at 210-294).
- FF. After the February 26th session, the testimony of one witness (in addition to the hoped-for appearance and testimony of parents) remained to conclude the hearing. That witness, however, was suddenly unavailable for February 27th. Therefore, the final session of the hearing was rescheduled to March 1st. (HO-32, HO-32a).
- GG. The hearing concluded with the testimony of one witness at the March 1st session. (NT at 298-346).
- HH. In the days after the February 26th and March 1st hearing sessions, the parents sent emails with views and commentary of the witnesses from the various hearing sessions. Those emails are included here, but this hearing officer communicated to parents that such views and commentary could not be accepted as testimony. (HO-33, HO-34, HO-35).

FINDINGS OF FACT

1. The student has a number of significant medical conditions/diagnoses which have led to multiple needs and services in an educational setting. Specifically, the student is diagnosed with Spina Bifida, myelomeningocele with shunted hydrocephalus, Chiari II malformation, and cortical visual impairment. The student has a feeding tube, is non-verbal, non-ambulatory, and has toileting needs. The student engages in self-injurious behaviors. (School District Exhibit ["S"]-1, S-2, S-3, S-4, S-5, S-6, S-7, S-8).
2. Over the course of the student's educational career, the student has received educational services in a District-based placement, in a private facility, and through instruction in the home. (S-8).
3. In July 2015, prior to the filing of the special education due process complaint in the prior round of special education due process, the student was re-evaluated. The student was identified as a student with multiple disabilities, with needs in independent mobility, functional communication, self-feeding, and behavior for increased participation in learning and functional activities. (S-8, HO-1).
4. School attendance, whether at the District, at the private facility, or through in-home instruction, has been a consistent issue in the student's educational history. (S-8, S-19, S-20, S-30; NT at 156-170).
5. In June of 2016, after the issuance of the decision in the prior round of special education due process and pending the appeal to Court when the student's educational programming—instruction in the home— was determined by the stay-put provision of IDEIA, the student's IEP team met to revise the student's IEP. (S-14, S-15, S-16, S-17; HO-5).
6. The June 2016 processes did not lead to an agreement for revision of the student's IEP and stay-put program/placement remained in effect. (S-17).
7. In the spring of 2017, the District communicated with parents about the student's educational programming/placement, in the midst of which the Court issued its opinion and order. (S-30 at pages 25-51).
8. In June 2017, following the issuance of the Court's opinion and order, the District worked with the parents to schedule re-evaluation and IEP processes. (S-30 at pages 25-51).

9. Ultimately, in June 2017, the parties were able to hold a multi-disciplinary team to consider a District re-evaluation report (“RR”). (S-19).
10. The June 2017 RR repeated information from prior re-evaluations and indicated that the student’s absences interfered with an understanding of the student’s updated educational needs. Specifically, the RR indicated the following as a recommendation to the IEP team:

“Based on the information within this report, (the student)... is eligible for special education services as a student with Multiple Disabilities and requires services to address (the student’s) education and daily living skills across functional domains. Due to the significant amount of absences over the past seven years from medical issues, hospitalizations, and parent’s concerns with sending (the student) to school, the team is recommending a review of services to determine appropriate placement since these absences have impeded (the student’s) progress in all areas.” (S-19 at page 18).
11. In June 2017, the student’s IEP team met to consider the student’s programming. Parents participated by telephone. (S-19, S-20).
12. The parents indicated that they wished for the student to return to school-based programming instead of education in the home, but they disagreed with the District’s proposed placement, a District school specializing in the education of students with significant disabilities that implicated medical needs. The parents’ disagreement centered on the presence of certain employees at the proposed placement with whom parents had an apparently problematic relationship due to past involvement with the student and family when the student had attended there in the past. (S-20; HO-5; NT at 215-288).
13. The District had also made multiple requests for parental consent to speak with, or to obtain updated information from, medical providers to inform a current understanding of the student and the student’s needs. Consent was not, and as of the date the record closed, been provided by parents. (S-19, S-20, S-30).
14. The June 2017 IEP indicated in multiple places that absences and a lack of updated medical information was necessary to assess accurately the student’s educational needs. (S-20).
15. The present levels of functional performance in the June 2017 IEP were based on past evaluations and data from prior years while the

student was in the private placement and being instructed at home. (S-20).

16. The June 2017 IEP listed parents' concerns, based on communications over the preceding weeks, as a desire to see an increase in the student's expressive and receptive communication. Parents also voiced multiple concerns about the environment, layout, and staff of the District's specialized setting. The parents' input also included parents' concerns and insights from a December 2015 IEP meeting, held just [prior] to the commencement of the prior round of special education due process. (S-20).
17. The June 2017 IEP contained a positive behavior support plan to address self-injurious behavior (face-hitting, both forceful and non-forceful). (S-20).
18. The June 2017 IEP contained four instructional goals (one each in communication, mobility, following one-step directions, and object identification), and two goals in occupational therapy, and one goal each for behavior (reducing self-injurious behaviors) and physical therapy. Each goal contained multiple short-term objectives. (S-20).
19. The June 2017 IEP contained a variety of modifications and specially designed instruction to meet the student's needs. The IEP also provided that the student would receive individual speech and language, physical, and occupational therapies. (S-20).
20. The June 2017 IEP detailed the IEP team's agreement that the student should no longer receive instruction in the home. Given the complex mosaic of the student's needs, the IEP recommended a placement in the specialized District school. (S-20, S-21).
21. Through the summer of 2017, the parents and District continued to deliberate over the student's IEP and placement. (S-30; NT at 41-96, 215-288, 305-333).
22. After the commencement of the 2017-2018 school year, in the fall of 2017, the parties continued to communicate about the student's educational programming and placement, and the student's IEP team ultimately met in early October 2017. (S-30 at pages 54-63).
23. In October 2017, the parents and District agreed that the student required a specialized setting given the student's needs. (S-24).
24. The parents continued to resist a placement in the District's specialized school, and the District contacted a private specialized

program for potential enrollment. The potential private placement declined to accept the student. (S-24, S-25; NT at 305-333).

25. In November 2017, parents filed the special education due process complaint which led to these proceedings. Once again, the stay-put provisions of IDEIA provided that the student would remain in the current programming and placement—instruction in the home. The parents did not respond to the District to allow for arrangements for instruction in the home. (HO-5; S-30 at page 68-84).
26. In January 2018, the District attempted to arrange an IEP meeting to consider revisions to the June 2017 IEP to address the parents’ concerns about the student’s attendance at the District’s specialized school. (S-30 at pages 85-147).⁵
27. The January 2018 IEP was, in effect, the June 2017 IEP with significant revisions to address the parents’ concerns. (S-20; S-30 at pages 94-147).
28. The January 2018 IEP was revised to indicate that the student’s baseline data for present levels of academic achievement would be updated once the student had begun to attend a school setting (something the student had not done—at the private placement—since 2014) and that an assistive technology assessment would be conducted in the school setting. (S-30 at page 102).
29. The January 2018 IEP was revised to indicate that specialized lift-van transportation would be provided to and from school and that the student would have 1:1 nurse throughout the school day, including during transportation. (S-30 at page 109, 142).
30. The January 2018 IEP was revised to include the following paragraph as part of parents’ concerns:

“Parents have shared during team meetings convened from May 2017 through December 2017 that they have an ongoing concern with (the student’s) safety at (the District’s specialized school) stemming from a 2011 incident when (the student) attended that school previously. Parents are concerned with the potential for (the student’s) interaction with specific staff members at (the District’s specialized

⁵ The District revised the June 2017 IEP, so the “IEP Implementation Date” on page 1 of the IEP is June 6, 2017. For clarity in this decision, the IEP containing the January 2018 proposed revisions will be referred to as the “January 2018 IEP”. (S-30 at pages 94-147).

school) who were employed at the time of the 2011 incident. The...team [at the District's specialized school] has developed and proposed a safety plan to address the parents' concerns for when (the student) returns to school. Specifically, the safety plan indicates that (the student) will be assigned a one-to-one nurse so that [the student] does not have interaction with or receive nursing services from the current school nurse assigned to (the District's specialized school). Certain other paraprofessionals identified by the parents as people they have concern with will not have contact with (the student) either." (S-30 at page 111-112).

31. The safety plan in the January 2018 IEP is a four-page document developed to address the parent's concerns for the student in returning to the District's specialized school. Its most significant elements include the assignment of the 1:1 nurse, independently contracted-for and not a District employee, during transportation and throughout the school day, assignments for specific individuals (teacher, 1:1 nurse, paraprofessional), procedures for emergency response in various school settings, weekly staff meetings, parents' ability to communicate by phone or email as they see fit when they see fit, parents' ability to request any changes to the safety plan at any time or to reject any changes to the safety plan recommended by District staff, and the use of a daily communication sheet). (S-30 at pages 89-92).
32. The assignments and duties of specific District employees who the parents have particular concerns about do not allow those individuals to come into contact with the student, either at arrival or dismissal, or during the school day. One of the individuals is a District school nurse. That individual may be intermittently in the student's classroom when other students' feeding tubes or devices need to be attended to, but that individual would have no direct contact with the student. (NT at 215-288).
33. The goals and short-term objectives, and the related-service therapies, from the June 2017 IEP remained the same in the January 2018 IEP. (S-20, S-30 at pages 124-142).
34. At the same time that the District issued the January 2018 IEP, it sought permission to re-evaluate the student. (S-30 at pages 148-155).
35. The District's specialized school where it provides educational programming to students with complex medical and educational needs services approximately 70 students. Classrooms have a small student-to-teacher ratio and include multiple paraprofessionals. The building is

designed to accommodate students who have mobility, feeding, and toileting needs. (S-28, S-32; NT at 41-96, 100-151, 198-200, 215-288, 305-333).

36. The principal of the District's specialized school, who was not the administrator in charge of the school when the family had a negative experience there, presents as a caring and competent administrator who is deeply experienced in overseeing the type of specialized educational environment offered through that placement. (NT at 41-96, 215-288).

37. The teacher of the classroom where the student would attend presents as a deeply devoted and talented educator who would, this hearing officer is certain, provide outstanding instruction for the student and maintain a safe, effective classroom environment. Her testimony is highly credited. (S-33; NT at 100-151).

DISCUSSION AND CONCLUSIONS OF LAW

Denial of FAPE

To assure that an eligible child receives FAPE (34 C.F.R. §300.17), an IEP must be reasonably calculated to yield meaningful educational benefit to the student. Board of Education v. Rowley, 458 U.S. 176, 187-204 (1982).

'Meaningful benefit' means that a student's program affords the student the opportunity for significant learning in light of his or her needs (Endrew F. ex rel. Joseph F. v. Douglas County School District, 580 U.S. , 137 S. Ct. 29, 197 L. Ed. 2d 335 (2017); Ridgewood Board of Education v. N.E., 172 F.3d 238 (3rd Cir. 1999)), not simply *de minimis* or minimal education progress. (Endrew F.; M.C. v. Central Regional School District, 81 F.3d 389 (3rd Cir. 1996)).⁶

⁶ While in some parts of the United States the U.S. Supreme Court decision in Endrew F. presented a new and higher standard to gauge the appropriateness of special education programming, the standard laid out in Endrew F. has been,

Here, it is imperative that the student's educational programming and placement take a decisive turn away from the path on which it has been traveling. The parents have not made available to the District the student for a comprehensive evaluation or provided consent for the District to access medical documentation, or to speak with medical providers. The student has been receiving instruction in the home for multiple school years, first as a matter of default and then through the application of the stay-put provision of IDEIA as the parties have engaged in years-long special education litigation, at both the hearing and court levels. At this juncture, both parties agree that instruction in the home is not appropriate for the student and that the student requires educational programming in a school setting. Yet the parties once again find themselves unable to agree on the location of that programming and unable to arrange a private placement.

Therefore, this special education due process decision must cut the Gordian knot and provide clarity to the parents and the District as to the student's educational programming. As for the IEP, it is reasonably calculated to yield meaningful education benefit—that is, significant learning—to the student in light of the student's unique needs. The IEP team has devised goals and objectives to address the student's needs for functional progress in the areas of identified need, and the special education and related services are

largely, the longstanding standard enunciated by the Third Circuit Court of Appeals and has been the applicable standard to judge the appropriateness of special education programming in Pennsylvania.

designed to allow the student to progress toward those goals and to meet those objectives. The January 2018 IEP is appropriate.

Of course, the programming is less the crux of the dispute between the parties than the placement, the physical location where the student will receive educational programming. Here, the District's specialized school is appropriate to meet the student's needs. Yet the record is clear that the parents have deeply-held objections to such a placement. Simply put, their past experiences there have led them to hold an aversive view of that building and a vehement objection to certain employees who are assigned there.

The January 2018 IEP, however, significantly addresses the concerns presented by the parents. First, the roles and assignments of those specific individuals limit, if not eliminate, any potential encounter between those individuals and the student. Second, the safety plan proposed as part of the January 2018 IEP is a detailed and explicit response to ensure that the student's school day is safe, that the parents are regularly apprised of the student's day, that they have a voice in changes to the plan, and that the adults working with the student on a daily basis—the independent 1:1 nurse, the classroom teacher, and the classroom paraprofessionals, all in consultation with the building principal--are communicating about the student and the student's needs. Therefore, the safety plan as part of the January 2018 IEP makes the placement wholly appropriate.

Having said that, there are aspects of the safety plan which, while in no way problematic, can be revised to promote even more confidence in the plan,

and those revisions will be made part of the order accompanying this decision. Also, at least as presented on this record, the safety plan was a separate document brought into the January 2018 IEP by reference; the order accompanying this decision will require that the safety plan is part of the IEP (just as a positive behavior support plan, for example, might be made wholly and explicitly part of an IEP).

Two additional matters will also be addressed in the order: The student needs to undergo a comprehensive evaluation. An aspect of the order will address this, but parents are urged most emphatically to cooperate with the District by providing consent for a comprehensive re-evaluation and signed authorization to allow the District to discuss the student with medical providers to gain a current understanding of the student's needs. And to allow for all of this—hoped-for implementation of the January 2018 IEP in the District's proposed placement and the re-evaluation process—to unfold in the weeks to come, the operative dates of the IEP will be revised.

It is this hearing officer's hope that the parents and District will view this as an opportunity to re-set the trajectory of the student's educational programming. The January 2018 IEP, with the 1:1 nurse, appropriate transportation, a detailed safety plan (as tweaked below), and a dedicated classroom teacher, can and, this hearing officer is convinced, will provide the student with an appropriate program in a safe, effective educational setting. Let it begin.

Accordingly, for the reasons set forth above, the January 2018 IEP is an appropriate program for the student and the District's proposed placement in the specialized school, as outlined with the revisions of the January 2018 IEP, is appropriate.

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ORDER

In accord with the findings of fact and conclusions of law as set forth above, the District has not denied the student a free appropriate public education from the period beginning April 2017 and continuing through the date of this order.

The student's individualized education program shall be that program outlined in the draft IEP proposed by the District in January 2018 and found in this record at S-30, pages 94-147. The operative dates of this IEP shall be amended as follows:

- The IEP Team Meeting Date on page one shall be April 2, 2018.
- The IEP Implementation Date on page one shall be April 16, 2018.
- The Anticipated Duration Date on page one shall be April 15, 2019.
- The Projected Beginning Date and Anticipated Duration Date in Section VI of the IEP—modifications/specially designed instruction, related services, and supports for school personnel—shall be, respectively, April 16, 2018 and April 15, 2019.

The safety plan, found substantively at S-30 pages 89-92, in addition to reference in the IEP, shall be incorporated as part of the IEP. Additionally, the safety plan shall be revised as follows:

- on S-30 at page 89, in the paragraph beginning “Plan will be reviewed”, the safety plan shall be revised to read “Plan will be reviewed monthly by....”.
- on S-30 at page 91, in the paragraph beginning with the text “a student may be discussed”, the entire sentence beginning “If (the student’s) course of care seems” and ending “every other week” shall be deleted.
- on S-30 at page 91 the following paragraph shall be added as the last paragraph of the safety plan: “If (insert name of student) comes into direct contact with, or is directly assisted by, any of the individuals specifically named in the paragraph under the section ‘Reason for safety/emergency plan’, the principal will be immediately notified and will communicate this fact, including the circumstances of the interaction, to parents. As soon as reasonably practicable, the individuals named under the section ‘Persons responsible for developing the plan’, as well as parents, will meet in person or by telephone to discuss the circumstances of the interaction and will discuss how such interactions can be avoided in the future.”

Within five school days of the date of this order, the District shall seek permission from parents to conduct a comprehensive re-evaluation of the student. To the extent that, by April 23, 2018, parents have not granted permission by returning the permission-to-reevaluate form to the District, the District may proceed to perform a re-evaluation of the student as outlined in, and bounded by the limits of, the permission sought from parents.

Any claim not specifically addressed in this decision and order is denied.

Michael J. McElligott, Esquire

Michael J. McElligott, Esquire
Special Education Hearing Officer

March 30, 2018