

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Hearing Officer
Final Decision and Order

HEARING

ODR File Number: 19666-17-18

Student's Name: N.L. **Date of Birth:** [redacted]

Dates of Hearing:
10/11/2017, 12/13/2017 and 12/14/2017

Parent:
[redacted]

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Pro Se

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Hearing Officer: Charles Jelley Esq. **Date of Decision:** 02/09/18¹

¹ The date on the cover sheet is inaccurate. The Decision, Order and Notice of Appeal was issued on February 9, 2018. This correction is made *nunc pro tunc* to conform the Cover Page to the date listed on the last page, which states the date of the decision is February 9, 2018.

The Student is a kindergarten age Student who is deaf and bilingual. The Parents submit that the District's 2017-2018 offer of a free appropriate public education (FAPE) as required by the Individuals with Disabilities Education Act (IDEA)² fails to meet the Student's unique individual circumstances. Specifically, rather than agreeing with the District's proposed placement in a Deaf and Hard-of-Hearing homeroom class in a general education school building, the Parents contend that the Student should advance from the current early intervention placement, in an approved private school, to a kindergarten class for deaf and hard-of-hearing students at the same approved private school.³ The Parents assert the Student should continue to receive direct instruction in American Sign Language (ASL) and that the Student needs to be educated in a deaf and hard-of-hearing world. The father and mother also fear that typical students will taunt or bully the Student.

The District counters that the proposed placement in a regular education school building, in the Deaf and Hard-of-Hearing homeroom class, with seven other kindergarten to second grade deaf peers, is appropriate.

The hearing took place over three sessions. To enable the Parents to effectively participate in the proceedings, a(n) [redacted] language interpreter was provided at each session. Additionally, one of the Parents' witnesses testified with the support of a sign language interpreter.⁴ The scheduling of the hearing sessions was delayed to accommodate the Parents', the District's and the interpreters' schedules. After reviewing all of the exhibits, hearing all of the testimony from multiple witnesses and rereading the transcript, I find the Parents failed to meet their burden of proof.⁵ Therefore, all of the Parents' IDEA FAPE claims are denied. The District's 2017-2018 IEP and proposed placement is appropriate.

² In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision. The Parents filed the action pursuant to the Individuals with Disabilities Education Act 20 U.S.C. §§ 1400-1482 and Section 504 of the Rehabilitation Act 29 U.S.C. § 794.

³ Student's Parents filed the complaint and the Parents both participated throughout the proceedings.

⁴ At the first session, the hearing officer received testimony in five different languages. The interpreters assisted this hearing officer to better understand the nuanced nature of the dispute and the proposed resolution.

⁵ References to the record will be made as follows: Notes of Testimony (N.T.), Joint Exhibits (J), Parent Exhibits (P-), School District Exhibits (S-), and Hearing Officer Exhibits (HO-).

Issues

1. During the 2017-2018 school year, did the District offer the Student an appropriate education; if not, should the hearing officer continue the Student in the pendent placement?

Findings of Fact

Background

1. The Student is a kindergarten-age student. The Student is diagnosed with a unilateral hearing loss in the left ear. The Parties agree the Student is eligible for special education and related services as a child with a hearing impairment (S-9, S-10).
2. The Student was born with [redacted conditions with physical abnormalities]. As a result [redacted], the Student is also diagnosed with atresia, which is the absence of an ear canal. The absence of an ear canal results in a maximum total conductive hearing loss in the left ear.
3. The Student has normal hearing in the right ear (S-9 p.2).
4. On April 4, 2014, when the Student was [approximately two-and-a-half years] old the Student was initially evaluated for IDEA Part B early intervention services (S-1, S-2, and S-3).
5. On April 28, 2014, the initial evaluation team determined the Student was eligible for special education (S-1, S-2, and S-3).
6. The team determined that an early intervention program of 5 hours and 45 minutes of daily hearing services, individual speech therapy for 30 minutes per week, group speech therapy for 30 minutes per week, consultative audiology therapy service, and services of a social worker was an appropriate program (S-1, S-2, and S-3).
7. On July 9, 2014, before the date of implementation, the Student's IEP was revised to provide for placement at an approved private school for deaf and hard-of-hearing students. After that, on April 21, 2015, the Student's IEP was updated at the annual IEP review process. The IEP continued to

provide for goals and specially-designed instruction at the approved private school (S-1, S-2, S-3, S-6, and S-7).

8. To address speech and communication skills needs the IEP update included the addition of American Sign Language (ASL) for 30 minutes per week in a group and two 15-minute individual sessions each week. The Student's group and individual speech services could be provided using either methodology. Otherwise, the services remained the same.
9. The Student's IEP targeted phonemic awareness, readiness skills, monitoring the Student's hearing aid, and self-advocacy skills related to telling adults if the hearing aid was working properly (S-6-, S-7).
10. In Spring 2016, the Parents initially indicated an intention to enroll the Student in the District for kindergarten. The District issued a permission to reevaluate (PTRE) and commenced the evaluation process (S-8, S-9).
11. The Parents subsequently exercised their option to have the Student remain in the early intervention program for an additional year (S-8, S-9).
12. On April 18, 2016, the Student's early intervention IEP was updated at an annual IEP review meeting. The April 2016 IEP contained ambitious goals, related services and specially-designed instruction. The IEP also addressed the Student's planned transition to the school-age program which would start in the fall of 2016 and carry over to the spring of 2017 (S-7).

The Approved Private School

13. The Student's classroom at the approved private school is described as implementing a spoken English approach to instruction with exposure to English through print, and some sign language support with ASL activities being used, at times, during the school day (S-7, S-8, N.T. pp.84-90).
14. The Student is in a class of four students, a teacher and an aide (N.T. 45-47).

15. The Student has a Cochlear Bone-Anchored Hearing device (BAHA 100).⁶ The Student uses the BAHA consistently through the school day. The Student can assemble the BAHA device and can independently get the band in place. At times the Student needs assistance to make sure the band is not twisted. Based on hearing aid checks performed by [a local hospital for children], in January 2015 and again on April 16, 2016, with the device in place and masking or covering the Student's right ear - the unaffected ear - the Student could indicate sound awareness in the borderline normal to mild decreased range in the affected ear while covering the Student's good ear. The Student was also able to demonstrate speech perception at 88 percent (P-1 P-2, S-8 p.8, N.T. pp.78-84).
16. At the early age of two-years seven months, the Student began to use sign language (S-7, S-8, S-9, N.T. pp.22-23).
17. Since the initial April 2014 IEP, the Student's primary means of oral communication is spoken English (S-7, S-8, S-9 p.3, N.T. pp.84-90).
18. The Student's uses spoken English, in the classroom, as the primary language for learning (S-9 pp.3-4). The Student uses ASL in conjunction with spoken English for clarification but does not use ASL by itself to communicate (N.T. pp.26-28, N.T. 67-70).
19. The Student understands [the Parents' language], speaks English and uses ASL to communicate with deaf peers⁷ (S-7, S-8, S-9 p.2, N.T. pp.26-28, N.T. 67-70).
20. In June 2016, when the Student was in the early intervention program, the Student was evaluated by a psychologist at the private school using the Kaufman Assessment Battery for Children Second Edition (KABC-II), to assess cognitive ability. On the KABC-II the Student obtained a nonverbal intelligence quotient (IQ) of 106, in the Average range. The Student performed exactly at expected age level, [redacted] and demonstrated solid age appropriate skills with Average scores on the subtests which measure

⁶ Hagr, A. (2007). BAHA: Bone-Anchored Hearing Aid. *International Journal of Health Sciences*, 1(2), 265–276 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3068630/>.

⁷ The Student's mother's primary language is [redacted]. The Student's father speaks English and [redacted] (S-7, S-8, S-9 p.2, N.T. pp.26-28, N.T. 67-70).

part-to whole reasoning, short term memory, attention to detail and conceptual reasoning (S-7 p.17, S-7 p.20).

21. On the Peabody Picture Vocabulary Test, Fourth-Edition, that had been administered in 2015, the Student earned a Standard Score (SS) of 43. When the assessment was readministered in 2016, the Student earned a SS of 76 in the Below Average range. While the SS 76 is Below Average, overall the results indicate the Student is making steady progress in reaching age appropriate receptive vocabulary skills in comparison to same age peers (S-7 p.12 S-7 p.17).
22. An informal language sample analysis was completed in November 2015 and April 2016 to evaluate the Student's grammatical sentence structures during spontaneous conversation. The language sample revealed a mean length of utterance of 4.16 words per utterance in November of 2015 and a mean length of utterance of 4.47 words per utterance in April of 2016. The results show that the Student is making slight progress in the ability to produce sentences with an increased number of words per utterance (S-7 p.12).
23. At the private school, the Student receives speech and language therapy two times per week for 30 minutes individually and one time per week for 30 minutes in a group in the classroom. The Student wears the BAHA during all hours of the school day. Speech therapy focuses on improving production of grammatical sentences, understanding and using prepositional concepts and improving word finding (S-7 p.12).
24. Although the proposed IEP did not include speech and language services, the District agreed, on the record, to provide the same level of speech and language services at the proposed placement (N.T. 30).

The District's June 2017 Evaluation

25. To assess the Student cognitive abilities, in June 2017, the District psychologist administered the Differential Ability Scales, Second Edition (DAS-2). The Student's Nonverbal Reasoning and Spatial subtest score reveal Average to Above Average skills with a significant strength noted on the Pattern Construction subtest SS of 121, in the Well Above Average range (S-9 p.10).

26. On the DAS-2, the Student earned an Average Matrices SS of 97. The Student earned an Average SS of 103 in Copying and a SS of 109 on Picture Similarities. The Student earned an Average SS of 97 on the Verbal Comprehension subtest and an Average SS of 106 in Naming Recall. The scores are consistent with the level expected for the Student's age (S-9 p.10).
27. The Student demonstrates appropriate school readiness skills regarding counting, letters, number recognition, color and shape identification. The Student demonstrated age-level naming and pattern recognition skills. (S-9 pp.4-7, S-7 pp.13-16).
28. The Student's socialization skills are age appropriate.
29. The Student's teachers' input into the reevaluation describes the Student as a very friendly, very social student who interacts extremely well and is extremely interested in interacting with peers (S-9 p.6, S-7 pp.13-17).
30. After reviewing the solid average assessment data, the team recommended that the Student receive age-appropriate accommodations which would encourage participation in the regular education curriculum with nondisabled peers. The reevaluation report team recommended ongoing support from a teacher for the deaf and hard-of-hearing (S-10 pp.10-11).

The District's Offer of FAPE

31. On June 20, 2017, the District issued an updated reevaluation report and a draft IEP; both documents were reviewed by the Parents at the IEP meeting. The IEP calls for the Student to receive reading, writing and mathematics in a Deaf and Hard-of-Hearing class with two other deaf and hard-of-hearing peers. To achieve the IEP goals, the District proposed a supplemental Deaf and Hard-of-Hearing support program, with participation in regular education, with typical peers, for a major portion of the school day (S-10).
32. A sign language interpreter would support the Student's participation in regular education for 1095 minutes a week (S-10 p.22).
33. The IEP includes present levels of academic achievement and functional performance (PLAAFP) (S-10 p.19).

34. The IEP includes measurable annual goals in reading, math and writing and a measurable annual goal to address the Student's hearing, academic and social circumstances (S-10 pp. 15-19).
35. The IEP includes assistive technology supports including a sound field or amplification system such as an FM System. The FM sound amplification system is available in all classes to facilitate the Student's participation in the regular education classroom (S-10 p.20).
36. Five to six weeks after the Student starts school, once the classroom teachers obtain updated individualized curriculum based baseline data in the regular education curriculum, the IEP team will reconvene and revise the IEP to address the Student's then current PLAAFP (N.T. pp.260-265).
37. The proposed placement/school building offers six different classes for deaf and hard-of-hearing students ranging from kindergarten through 8th grade. Three of the classes use the oral language approach while the other three classes use ASL as the primary strategy to teach communication skills. If the Student needs additional ASL instruction, participation in the other class is an option (N.T. pp.224-226).
38. The deaf and hard-of-hearing program at the proposed placement/school building also includes a cadre of six paraprofessionals who are trained in ASL and who provide ASL support in the regular and special education classrooms (N.T. pp.224-226).
39. A full time speech therapist, a nurse and a guidance counselor are assigned to the school building on a full time basis (N.T. p.227).
40. Throughout the school year, the building level teachers of the deaf provide the regular education teachers with inservice training on how to use and incorporate assistive technology devices in the regular education setting. The proposed teacher of the deaf also provides weekly emails to the regular education teachers on how to instruct deaf children in the regular education classroom (N.T. p.229).
41. To support the Student's audiology needs the teachers of the deaf have regular ongoing contact with the District's audiologist (N.T. pp.229-230).

42. The proposed teacher of the deaf for the Student has several years of experience in working with kindergarten students who use a BAHA for hearing support. When the students arrive at school the classroom teacher's morning routine includes individual one-on-one time with each student to ensure that each student's hearing aids are properly functioning (N.T. pp.263-266).
43. The teacher reviews the regular education teacher's lesson plans weekly to make sure the kindergarten students are capable of participating in the regular education activities (N.T. p.265).

Applicable Legal Principles

Credibility and Persuasiveness

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence, assessing the persuasiveness of the witnesses' testimony and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing Officers have the plenary responsibility to make express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses.⁸

All of the above findings are based on a careful and thoughtful review of the transcripts, a reading of all of the exhibits and a direct observation of each witness; therefore, the decision is based upon a preponderance of the evidence presented. While some of the material evidence may be circumstantial, the hearing officer can derive inferences of fact from the witnesses' testimony and the record as a whole. On balance, despite inconsistencies, the hearing officer found all of the witnesses' testimony represents their best recollection and understanding of the events.

⁸ See, *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

The Parents are clearly devoted, loving parents who have a genuine belief that varies from that of the District's professionals. All of the District personnel presented as committed professionals with genuine concern for the Student and the Student's education. It is a testament to the parties that they continue to meet and work collaboratively toward the Student's current educational program despite their opposing positions at the hearing.

IDEA Free Appropriate Public Education Principles

The IDEA and state and federal regulations obligate local education agencies (LEAs) to provide a "free appropriate public education" (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that this requirement is met by providing personalized instruction and support services that are reasonably calculated to permit the child to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is "reasonably calculated" to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.' " *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Recently, the U.S. Supreme Court considered the application of the Rowley standard anew, observing that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). The Court noted,

The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials but also by the input of the child's parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA [.] * * * A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. * * * As we observed in *Rowley*, the IDEA "requires participating States to educate a wide spectrum of handicapped children," and "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." *Andrew F.*, ___ U.S. ___, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 349-50 (2017)(italics in original)(citing *Rowley* at 206-09) (other citations omitted).

The *Andrew* Court explained that "an educational program must be appropriately ambitious in light of [the child's] circumstances... [and] every child should have the chance to meet challenging objectives." *Id.*, 137 S. Ct. at 1000, 197 L.Ed.2d at 351. This is especially critical where the child is not "fully integrated into the regular classroom." *Id.* The Court thus concluded that "the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.*, 137 S. Ct. at 1001, 197 L.Ed.2d 352. This standard is not inconsistent with the above interpretations of *Rowley* by the Third Circuit.

As *Andrew*, *Rowley*, and the IDEA make clear, the IEP must be responsive to the child's identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, the LEA is not obligated to "provide 'the optimal level of services,' or incorporate every program requested by the child's parents." *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012); *Andrew*, *supra*. Critically, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993); see also *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3d Cir. 2010) (same).

A team develops the IEP, and a child's educational placement must be determined by the IEP team based upon the child's IEP, as well as other relevant factors. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.116. Parents play "a significant role in the IEP process." *Schaffer, supra*, at 53. Indeed, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

However, numerous court decisions have noted that although Parents are members of the IEP team and entitled to full participation in the IEP process, they do not have the right to control it. *See, e.g. Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) [noting that IDEA "does not require school districts simply to accede to parents' demands without considering any suitable alternatives"]; *Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D.Md.2002) ["[P]arents who seek public funding for their child's special education possess no automatic veto over a school board's decision"]; *Rouse v. Wilson*, 675 F.Supp. 1012 (W.D.Va.1987); 34 C.F.R. Pt. 300 App. A, at 105 9 "The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive [a free appropriate public education]" and *A.G. v. Wissahickon School District*, 374 Fed. Appx. 330 (3d Cir. 2010)[[Did the district consider the "whole range of supplemental aids and services," including "efforts to modify the regular education program to accommodate" student].

Least Restrictive Environment

There is a strong and specific preference in the IDEA and its implementing regulations that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. §300.114(a)(2).

Discussion

The Parents presented testimony regarding their deeply held belief that the Student needs to be educated at the private school specializing in deaf education. There is no doubt that the Parents are loving, caring and highly supportive of the Student, but their testimony did not establish that the District's proposed program is

inappropriate. This hearing officer recognizes the Parents' relentless pursuit of necessary medical, educational, and community based treatments for the Student. Clearly one could not hope for more dedicated parents. However, it is also clear that the Parents, as a couple, are seeking what they were led to believe is the best possible program to address the Student's educational needs. However, what is also clear is that, because of the hard work of the IEP team members during the day and the Parents' endless pursuits of after school experiences, the Student has acquired the necessary skills to participate in an educational program in a public school.

The IDEA does not require districts to develop IEPs that "maximize the potential of handicapped children." Instead, the IDEA requires the provision of specially-designed instruction that yields educational benefit. See, *Rowley* and *Andrew*. The specially-designed instruction and related services must be "reasonably calculated" to provide the student with educational benefit. *Rowley* at 207-208. What the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

When the IEP and the placement are broken down into their essential core elements, I find the IEP and the proposed placement offer the Student FAPE. The present levels detail the Student's emerging average age appropriate kindergarten skills. The results of the June 2016 and the June 2017 evaluations demonstrate the Student has the prereadiness math, writing and reading skills to participate in the regular education curriculum with typical peers. The private school staff all agreed that the Student's personal and social development skills are age appropriate.

The IEP includes measurable annual goals in reading, math and writing. The IEP provides that the Student will receive reading and math in a one-on-three instructional grouping, from the teacher of the deaf, a student to staff ratio that is comparable to that at the private school. The Student's daily schedule allows the teacher to front load and pre-teach the skills the Student needs to be successful in regular education, diminishing the likelihood the Student will be unsuccessful in the regular education classroom.

The proposed school building includes a continuum of five other deaf and hard-of-hearing placements, which, if needed, are readily available to support the Student. With six deaf and hard-of-hearing classes in the building, the Student will have exposure to other deaf students who use a BAHA, ASL and oral communication

strategies. If the Student needs additional ASL support, some combination of participation in another class and/or additional ASL is a readily achievable option.

The IEP offers the Student the opportunity to participate in the regular education classroom with the support of a dedicated ASL interpreter. The IEP includes assistive technology supports including an FM sound field or amplification system in all of the Student's classrooms. As planned, the FM sound amplification system will facilitate the Student's equally effective participation in the regular education classroom. This combination of supports will enable the Student to benefit from participation in the least restrictive setting.

The proposed teacher of the deaf has significant experience teaching other students who relied on a BAHA device to hear. In fact, the teacher testified that once the students get off the bus, one of the first things she does is check with each student to ensure the hearing aid is properly working. To address the Parents' concern about ASL, the IEP includes the support of an ASL interpreter when the Student is in regular education.

Anticipating the Student's future needs, once the transition to the new school ends, the staff after five to six weeks of instruction will reconvene the IEP team to review the then existing data. The five to six week time span will allow all of the teachers to obtain updated individualized curriculum based baseline data. Building upon this refreshed profile, the IEP team will then revise the Student's updated PLAAFPs, measurable goals, ASL and speech needs. The forward thinking built-in review ensures that the Student's then current needs will be monitored and addressed in real time.

Based upon the existing data available, at the time the IEP was proposed, this intertwined bundle of related services, specially-designed instruction and measurable goals are ambitious enough to enable the Student to advance from grade to grade.

However, with all of the program and placement's positive components, this hearing officer is concerned about the lack of written ambitious goals and challenging objectives in the area of speech and language. While it is the District's practice to continue the level of speech and language supports provided at the private school until the District therapist works with the Student, nowhere in the four corners of the IEP does the IEP identify this verbal commitment. In fact, the document is silent when it comes to speech and language support. I find this error to be a procedural violation. Based upon the testimony of the witnesses, it is clear

that the District staff intended that the Student would receive the necessary speech and language services. Therefore, while the violation is troubling, I find that the procedural violation does not rise to the level of a deprivation of educational benefits to the Student or a violation that significantly impeded the Parents' opportunity for participation in the IEP process.⁹ Part of the Order will include a revision of the IEP to address the Student's speech and language needs with ambitious goals and challenging objectives.

Conclusion

The District staff provided a cogent and responsive explanation that shows that, in light of the Student's unique circumstances, the IEP, including the promised speech and language supports, is reasonably calculated to enable the Student to make appropriate progress. *Andrew* at 1002. The District staff forcefully explained how the specially-designed instruction, related services and measurable goals, in combination, satisfy the *Andrew* and *Rowley*, ambitious individualized substantive and procedural FAPE standard. *Andrew* at 1002.

Accordingly, this hearing officer now finds that the proposed June 2017 IEP was reasonably calculated to enable the Student to achieve passing marks and advance from grade to grade.

In sum, this hearing officer is compelled to conclude that the Parents failed to produce a preponderance of the evidence that the District failed to meet the IDEA FAPE standards for this Student. As such, there is no need to discuss whether the private school is appropriate or any equitable considerations.

For the reasons set forth above, I find that the Parents did not meet their burden of proof. Therefore, the Parent's IDEA claim is denied.

⁹ 20 U.S.C. § 1415(f)(3)(E)(ii). In the absence of an educational loss, the hearing officer still has authority to order prospective procedural relief. E.g., *Dawn G. v. Mabank Indep. Sch. Dist.*, 63 IDELR ¶ 63 (N.D. Tex. 2014) (citing 20 U.S.C. § 1415(f)(3)(E)(iii))

ORDER

And now this 9th day, of February 2018, by entering this final Order, and after a careful review of the exhibits, the testimony and rereading the transcript, the Parent's IDEA claim is denied. Pursuant to 20 U.S.C. § 1415(f)(3)(E)(iii), within 5 school days of the Student attending class at the school, the District is Ordered to update the IEP to include and provide the level of speech and language therapy the Student was then receiving at the private school geared toward ambitious goals and challenging objectives.

Date: February 9, 2018

Charles W. Jelley, Esq.
Hearing Officer
ODR FILE #19666-1617 KE¹⁰

Notice of Appeal

The Notice of Appeal of this Decision and Final Order was provided to the Parties as an attachment to the email forwarding the Decision to the Parties.

¹⁰ The case number listed under the hearing officer's name is mistaken. The ODR FILE #19666-1718 is the accurate ODR FILE Number. This correction is made *nunc pro tunc* to conform the case number on the Cover Page and the last page.