

DOCKET NO. 367-SE-0704

***** B/N/F MR. & MRS *** & ***,
Petitioner**

**BEFORE A SPECIAL
EDUCATION
HEARING OFFICER
FOR THE STATE OF TEXAS**

VS.

**KLEIN INDEPENDENT SCHOOL
DISTRICT, Respondent**

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

I. Statement of the Case

Petitioner,***, *b/n/f* Mr. & Mrs.*** (Petitioner” or “***”), requested a Due Process Hearing pursuant to the Individuals With Disabilities Education Act (“IDEA”), 20 U.S.C. §1400 *et. seq.*, contending that Klein Independent School District (“Respondent” or “Klein” or “the District” or “KISD”) denied *** a free, appropriate, public education (“FAPE”) when it substantively and procedurally violated IDEA. Specifically, *** alleges that 1) Klein substantively violated IDEA by designing and implementing IEPs from July 8, 2003 to February 2004 that were not reasonably calculated to provide *** with an appropriate education; and 2) Klein procedurally violated IDEA by a) failing to timely convene an ARD Committee meeting in fall 2003; b) addressing additional issues at ***’s May 2004 ARD; c) failing to provide Ms. *** with copies of evaluations prior to convening ARD Committee meetings; d) failing to provide Ms. *** with report cards or IEP updates; and 5) performing an evaluation of *** without parental consent. ¹ Petitioner seeks compensatory services and reimbursement for attorneys’ fees and related costs.

II.

Procedural History

On July 8, 2004, the Texas Education Agency received the Request for Due Process Hearing filed by Petitioner and assigned the case Docket No. 367-SE-0704. On July 12, 2004, Docket No. 367-SE-0704 was assigned to the undersigned Hearing Officer. On July 19, 2004, the parties were notified that the prehearing telephone conference would be held on August 4, 2004, that the Due Process Hearing was scheduled for August 13, 2004, and that the Decision due date was August 22, 2004.

On August 4, 2004, the telephone conference convened as scheduled. In attendance were the following: 1) Ms. Rhoda Nelson, counsel for Respondent; 2) Ms. ***, Petitioner’s parent; 3) Mr. Jeffrey L. Rogers, counsel for Respondent; 4) Dr. ***, Assistant Special Education Director for Respondent; 5) the court reporter; and 6) the undersigned

¹ The one-year statute of limitations precludes recovery from any violations of IDEA prior to July 8, 2003. Specific allegations that fall outside this limitations period are discussed within.

Hearing Officer. During the telephone conference the parties discussed the issues and scheduled the Due Process Hearing for September 23-24, 2004, and extended the Decision Deadline to October 3, 2004.

The Due Process Hearing convened as scheduled on September 23-24, 2004. In attendance throughout the Hearing were the following: 1) Ms. Rhoda Nelson, counsel for Respondent; 2) Assistant Special Education Director for Respondent; 5) the court reporter; and 6) the undersigned Hearing Officer.

On the first day of the Hearing, Petitioner called six witnesses: 1) Dr. ***, Assistant Special Education Director for KISD; 2) Ms. ***, Speech and Language Pathologist for KISD and ***'s teacher in PALS; 3) Ms. ***, an Educational Diagnostician for KISD who tested ***; 4) Ms. ***, Licensed School Psychologist with KISD; 5) Ms. ***, Licensed Specialist in School Psychology with KISD; and 6) Ms. ***, Occupational Therapist with KISD. On the second day of the Hearing, Petitioner call four new witnesses and re-called Dr. ***: 1) Ms.***, Special Education Coordinator for KISD, 2) Ms. ***, Speech Pathologist for KISD who tested ***; 3) Dr. ***, a medical doctor who teaches *** in the Early Childhood Program in KISD; and 4) Ms. ***, ***'s mother. The District cross-examined most of these witnesses and called one witness on direct examination, Ms. ***, who evaluated *** in Spring 2004.

At the conclusion of the Hearing, the parties agreed to file written closing arguments by October 25, 2004. The parties and Hearing Officer agreed to extend the Decision deadline to November 1, 2004. Per the request of Petitioner, the briefing deadlines were extended to November 8, 2004, and the Decision Deadline was extended to November 23, 2004.

III. Findings Of Fact

1. *** is a *** year-old boy who resides with his parents within the Klein Independent School District.
2. *** meets the special education eligibility category of speech impaired ("SI"). *** has a mild-to-moderate communication disorder in expressive language.
3. *** currently is enrolled in the *** Program with KISD for part of the day and in a private Montessori School for two hours per day.
4. When *** was *** years old, he was identified with an expressive language delay. His parents placed him in the Keep Pace Program, which is a private, early childhood intervention program. *** received four hours per month of one-on-one speech services. ***'s program focused on problems in articulation and combining words into phrases.
5. *** left the Keep Pace Program in spring 2003 and enrolled in KISD. On February 13, 2003, KISD administered a Full Individual Speech and Language Evaluation.

The assessor administered the Preschool Language Scale – 3 (“PLS-3”) to assess ***’s listening and speaking skills. *** scored *** average on both the Auditory Comprehension (78) and Expressive Communication (73) tests, resulting in a total language score of ***, which placed him in the *** range.² The evaluator determined that *** was SI, manifesting a mild-to-moderate communication disorder in expressive language that affected his ability to verbally interact with peers and adults. The assessor recommended that *** be placed in the District’s PALS program and receive speech therapy for the expressive language disorder.

6. On March 26, 2003, ***’s ARD Committee convened for his annual ARD to review this evaluation, as well as information from other agencies and the parents, and to develop IEPs and placement for *** from March 2003 through March 2004.
7. ***’s March 26, 2003, ARD Committee determined that *** met the eligibility criteria as SI and developed IEP goals in the area of communication. *** was placed in the District’s PALS Program, and the Committee recommended that *** attend two times per week. *** was to begin the PALS program on March 31, 2003. Per the parent’s request, the ARD Committee authorized ***’s attendance at PALS for only one time per week, although the program generally required a minimum of two times per week. ***’s ARD Committee did not recommend extended year services (“EYS”) over the Summer 2003.
8. ***’s mother was unable to attend the ARD in person but did participate by phone and agreed that the ARD Committee could convene in this manner. On that same date written notice of this ARD was sent to ***’s parents along with a copy of the District’s “Notice of Procedural Safeguards” and a “Consent for Initial Placement.” Ms. *** executed these documents, attesting that a) she agreed with the committee’s actions and b) she received an explanation of her rights as well as a copy of the procedural safeguards.
9. PALS is a class devoted primarily to working with students who have manifested only a speech problem. Ms. *** developed it and she was ***’s teacher in spring 2003. *** did not start PALS until April 7, 2003. Between that date and the last day of school, *** only attended PALS approximately six times: April 7, 9, 28; May 5, 12, and 14, 2003. At the end of the year, and noting that *** had only attended PALS a few times during the spring 2003 semester, Ms. *** recommended that *** attend PALS two times per week in fall 2003. She also suggested to the parents that *** be enrolled in preschool and receive private speech therapy during the summer 2003.
10. *** did not receive EYS services during summer 2003. His ARD Committee had previously determined that he did not need such services and his parents never requested them.

² The average score for each test is 85. Per the assessor, these scores did not provide a severity rating. The severity rating of *** was a subjective calculation on the part of the assessor.

11. In fall 2003, *** returned to the PALS class and again had Ms. *** as his teacher. *** enrolled in PALS two days per week, two hours per session. Between August and December 2003, *** attended PALS approximately twenty times. From the beginning of that semester, Ms. *** was noting that *** was more active, even aggressive at times; he was sometimes inattentive; he did not always follow directions; he did not seem aware of appropriate body-space – he was in others' faces and space/area; he was having articulation problems.
12. On October 27, 2003, Ms. *** administered the Chicago Early Assessment. This is a criterion-referenced test that was administered to all children in PALS to assess skill level in the following areas: gross and fine motor, language, visual discrimination, and memory. Mr. *** was in attendance on October 27, 2003, when part of the test was administered. *** showed weaknesses in three areas of the test: gross motor, language, and memory. Based upon these results, Ms. *** convened a pre-assessment ARD (“PARD”), which determined that *** needed additional evaluating. The PARD noted that *** continued to be SI and requested an FIE a) to ascertain whether *** is also learning disabled (“LD”); and b) to update his speech/language, intellectual achievement.***’s parents provided consent for the FIE.
13. The FIE was completed on December 11, 2003, by a multidisciplinary team utilizing multiple instruments to evaluate ***. Ms. *** administered the PLS-4, which showed that *** had both Auditory Comprehension (***) and Expressive Communication (***) problems, resulting in a total language score of ***. Ms. *** found that *** had a communication disorder characterized by language and that such disorder was severe. An intelligence test was administered and rendered an overall intellectual functioning level of ***, which places *** in the *** range. The achievement assessment manifested no discrepancy between ***’s intellectual skills and his pre-academic achievement in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematics calculation, and mathematical reasoning. The team found no serious emotional problems. Based upon these assessments, the multidisciplinary team found that *** was SI but not LD.
14. The multidisciplinary team recommended that an ARD Committee convene a) to determine individual grading criteria and procedures for ***’s participation in extracurricular activities; b) to determine ***’s appropriate placement to facilitate his IEP; c) to provide *** with preferential seating, reduced distractions, multi-sensory instruction, involvement in demonstrations, manipulative materials, and positive reinforcement. The team recommended that *** receive speech therapy to improve his language skills. The team also noted that *** has gross and fine motor skills that are within *** limits and as such, *** could function in PALS.
15. ***’s ARD Committee convened on January 12, 2004, to analyze the FIE results, the speech/language results, as well as other information provided by Ms. *** and

's teacher. The ARD Committee developed goals and objectives in the areas of language/communication and attention. The ARD Committee did not recommend EYS for summer 2004. The ARD Committee again recommended placement in PALS with speech therapy thirty minutes per week. The ARD Committee reached consensus, although Ms. *** stated she wanted to re-convene in the near future to discuss all options. Ms. *** subsequently provided notes for inclusion in the Report, which indicated that she did not agree with the recommendations of the Committee. *** was very concerned about the change in ***'s language severity rating between the February 13, 2003, PLS -3 administered by Ms. *** and the PLS-4 administered by Ms. *** on November 7, 2003. Between February 2003 and November 2003, ***'s language severity scale *** from "*" to "****."

17. On January 26, 2004, ***'s ARD Committee re-convened. Ms. *** wanted *** placed in an Early Childhood Program for more intensive work on his language delays. The ARD Committee did not recommend such placement but did provide her with information to visit classes. The ARD Committee determined to re-convene in a month to discuss progress.
18. On February 5, 2004, ***'s ARD Committee reconvened. The Committee placed *** in the Early Childhood Program requested by ***'s parents. The Committee also obtained consent for evaluation in the areas of speech/language, achievement, functional behavior, and the pre-school comprehensive individual speech and language assessment ("CELF"). *** was placed in the Early Childhood Program at his home school, which included time in the speech/language lab.
19. On February 17, 2004, approximately eleven days after *** entered the Early Childhood Program, Ms. *** assessed *** using the CELF. *** achieved a score of *** on the receptive language test, which is ***, and *** on the expressive language test, which is *** average, giving him an overall language score of ***. Ms. *** found that *** has a communication disorder in expressive language. She rated this severity as ***.
20. Following the February 2004 ARD, *** was administered a non-verbal intelligence test without the consent of the parents. This was an error on the part of the District. The results of this evaluation were purged from ***'s record and not considered by subsequent ARD Committees. This was a *de minimis* procedural violation.
21. On April 21, 2004, ***'s ARD Committee convened to review evaluations completed after the February ARD and to discuss whether *** should be carried as noncategorical LD. The Committee developed a Behavior Intervention Plan ("BIP") and again decided not to label *** LD. The Committee did not recommend EYS. But for the EYS recommendation, Ms. *** concurred with the Committee.
22. On May 13, 2004, ***'s ARD Committee convened. The Committee recommended Occupational Therapy ("OT") and Physical Therapy ("PT") evaluations. The Committee recommended summer services four times per week plus in-home

parent training two times in the summer. The Committee purged the results from the nonverbal intelligence test given without consent.

23. On September 8, 2004, ***'s ARD Committee convened to review the results of his OT/PT evaluations. These evaluations did not find delays in gross or fine motor skills. *** continues in the program developed by his May 2004 ARD Committee.
24. The evidence is insufficient to establish that *** regressed in the PALS program.
25. The evidence is insufficient to establish that *** regressed over summer 2003.
26. The evidence is insufficient to establish that *** to make academic and nonacademic progress while enrolled in PALS.
27. The evidence is insufficient to establish that ***'s placement in PALS was not the least restrictive environment.
28. The evidence is insufficient to establish that ***'s program and placement in PALS was not determined and implemented in collaboration with key stakeholders.
29. The evidence is insufficient to establish that the District committed a procedural violation when ***'s May 2004 ARD Committee convened and discussed items not listed on the notice.
30. The evidence is insufficient to establish that the District committed a procedural violation when it failed to provide Ms. *** with a copy of ***'s evaluation results prior to convening the January 12, 2004, ARD.
31. The evidence is insufficient to establish that the District failed to appropriately evaluate *** in December 2003.
32. The goals and objectives prepared between July 8, 2003, and February 5, 2004, are measurable and individualized for ***.
33. There are no general education services available to special education children ***'s age.

IV. Discussion

This case involves a *** young child and his parents' introduction into the world of special education services required to be provided by the District. Unfortunately, this initial encounter between the parties was acrimonious in their respective endeavors to identify ***'s learning style and problems, develop programs to appropriately address those problems, and work together to insure that *** makes academic progress in these critical early years.

Under IDEA, all state school districts receiving federal funding must provide all handicapped children FAPE. 20 U.S.C. §1412(1) & 1414(d). The determination of whether a school district has provided a student with FAPE is two-fold: 1) the school district must comply with the procedural requirements of IDEA, and 2) the school district must design and implement a program "... reasonably calculated to enable the child to receive educational benefits." *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175, 206-207 (1982).

In this case, Petitioner has alleged violations under both FAPE prongs. Notwithstanding the plethora of issues propounded by Petitioner, the real complaint deals with the District's decision in March 2003 to place *** in its PALS program and to continue to place him in that program into spring 2004 even though the parents had lost faith in its appropriateness for ***.³ From that core issue flows many allegations of substantive and procedural violations of IDEA, none of which rise to the level condemned by IDEA.

A.

Petitioner's Program And Placement Between July 8, 2003, and February 5, 2004, Were Appropriate.

Petitioner first argues that ***'s placement in the PALS program between March 2003 and February 2004 was inappropriate for the following reasons: 1) it was based upon deficient testing;⁴ 2) *** was automatically placed in PALS based upon his SI label with no consideration to additional needs he might have; 3) ***'s parents were never provided with information regarding the full continuum of services that were available to him beyond PALS; 4) *** regressed between March 2003 and November 2003 because he had no EYS during summer 2003 and PALS was not meeting his educational needs; and 5) ***'s goals and objectives are infirm because they are neither measurable nor individualized. The record does not support these contentions.

To ascertain the educational benefits of an IEP, the reviewing entity must examine whether the student has received the "basic floor of opportunity, or access to specialized instruction and related services, which are individually designed to provide educational benefit to the handicapped child." *Hendrick Hudson Central School District v. Rowley*, 458 U.S. at 200-01. Although the school district need only provide "some educational benefit," the educational program must be meaningful. *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997). The educational benefit cannot be a mere modicum or *de minimis*. It must be likely to produce progress, not regression or trivial educational advancement. *Houston Independent School District v. Bobby R. and Caius R.*, 200 F.3d 341, 347 (5th Cir. 2000).

³ The PALS program was developed by KISD and targets speech problems in young children. Young children with more significant disabilities, such as autism, learning disabilities, etc., would not be placed in this program. Rather, they would be placed in the more restrictive Early Childhood Program.

⁴ Petitioner claims that at least after October 27, 2003, the District should have assessed Petitioner's articulation, conducted OT/PT evaluations, conducted a functional behavioral assessment, and investigated the effect of ***'s asthma on his educational progress.

In *Cypress-Fairbanks Independent School District v. Michael F.*, the Court set forth four factors that can aid in evaluating whether a student is receiving the “basic floor of opportunity, or access to specialized instruction and related services which are individually designed to provide educational benefit” to that student: 1) whether there is an individualized program based on the student's assessment and performance; 2) whether the individualized program is administered in the least restrictive environment (“LRE”); 3) whether the services are provided in a coordinated and collaborative manner by the key stakeholders; and 4) whether positive benefits are demonstrated both academically and non-academically.

1. *'s Individualized Program Was Based On His Assessments And Performance.**

***'s first ARD Committee reached consensus in March 2003, determining that PALS was the appropriate placement and this decision was based on the information provided by Ms. ***, ***'s prior service providers, and ***'s testing results on the first speech/language evaluation performed by Ms. *** in February 2003.⁵ There was no indication from any documentation reviewed by the ARD Committee or from Ms. *** that *** was in need of EYS that first summer of 2003.⁶

In fall 2003, Ms. *** began to notice new negative behaviors. It was time for her to administer the Chicago assessment to ***, an assessment she administered to all children in PALS. This test evaluated ***'s skill level in the following areas: gross and fine motor, language, visual discrimination, and memory. Based upon this assessment, which showed that *** had weaknesses in three areas, gross motor, language, and memory, Ms. *** convened a PARD. The PARD requested a FIE a) to ascertain whether *** is LD and b) to update his speech/language, intellectual achievement. ***'s parents provided consent for the FIE.

The FIE was completed on December 11, 2003, by a multidisciplinary team utilizing multiple instruments to evaluate ***. Ms. *** administered the PLS-4, which showed that *** had both Auditory Comprehension (***) and Expressive Communication

⁵ Ms. *** administered the PLS-3, which showed that *** had a mild/moderate communication disorder in the area of expressive language, although her test did reveal *** scores on receptive language as well

⁶ On March 26, 2003, ***'s ARD Committee convened for his annual ARD to review this evaluation, as well as information from other agencies and the parents, and to develop IEPs and placement for *** from March 2003 through March 2004.

⁷ ***'s March 26, 2003, ARD Committee determined that *** met the eligibility criteria as SI and developed IEP goals in the area of communication. *** was placed in the District's PALS Program, and the Committee recommended that *** attend two times per week. *** was to begin the PALS program on March 31, 2003. Per the parent's request, the ARD Committee authorized ***'s attendance at PALS for only one time per week, although the program generally required a minimum of two times per week. ***'s ARD Committee did not recommend extended year services (“EYS”) over the Summer 2003.

⁶ Any claims related to events prior to July 8, 2003, are outside the statute of limitations. This information is provided for background purposes only.

(**) problems, resulting in a total language score of **. Ms. ** found that ** had a communication disorder characterized by language and that such disorder was severe. An intelligence test was administered and rendered an overall intellectual functioning level of **, which places ** in the ** range. The achievement assessment manifested no discrepancy between **’s intellectual skills and his pre-academic achievement in oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematics calculation, and mathematical reasoning. The team found no serious emotional problems. Based upon these assessments, the multidisciplinary team found that ** was SI but not LD.

The multidisciplinary team recommended that an ARD Committee convene to determine **’s appropriate placement to facilitate his IEP and to discuss other options, such as preferential seating, reduced distractions, multi-sensory instruction, involvement in demonstrations, manipulative materials, and positive reinforcement. The team recommended that ** receive speech therapy to improve his language skills. The team also noted that ** has gross and fine motor skills that are within ** limits and as such, ** could function in PALS.

Based upon these recommendations, **’s ARD Committee convened on January 12, 2004, and developed goals and objectives in the areas of language/communication and attention; recommended placement in PALS with speech therapy thirty minutes per week; saw no reason for additional OT/PT assessments; and did not recommend EYS for Summer 2004. **’s ARD Committee met again on January 26, 2004, and February 5, 2004. At that point, the ARD Committee placed ** in the Early Childhood Program requested by **’s parents, where he remains today.

Clearly, **’s ARD Committee has accepted the testing that it recommended and crafted IEPs to conform to the test results. Not to be forgotten is the fact that ** was barely ** years old when all of this testing began. As teachers have noted problems or as the parents have made requests, ** has been evaluated and his educational assessments have been based thereon.

2. **’s PALS Program Was Administered In The Least Restrictive Environment.

Petitioner’s claim that **’s placement in PALS was not the LRE for ** does not make sense. Ms. ** wanted, and obtained, **’s placement in the Early Childhood Program in February 2004. This is by far *more* restrictive than the PALS class in which ** had been enrolled the previous nine months. In the PALS setting, ** and his peers shared speech problems, which were the targets for remediation, but generally, these children manifested no other disabilities. In the Early Childhood Program, ** is placed with students who are more disabled than he, thereby creating a more restrictive environment.

Petitioner argues that statements on **’s IEPs, that he will spend the remainder of the day in regular education, indicate that when this did not occur, he was deprived of an LRE placement, *i.e.*, placement in some regular education classroom. The District

established that these statements meant nothing more than participation with friends and family. There is no mainstreaming or regular education placement for children ***'s age.

3. * 's Services Were Provided In A Coordinated And Collaborative Manner By The Key Stakeholders.**

Ms. *** contends that she never received progress reports or report cards for *** while he was in PALS. Although Ms. *** maintained notes on progress, behavior, etc., she did not transfer these to Ms. *** on a daily or weekly basis.

While it certainly would have been a good idea for Ms. *** to send these notes in some form or fashion to Ms.***, the record does reveal that much discussion regarding ***'s progress ensued during the Fall 2003 semester. In fact, it was Ms. *** who first alerted the parents that *** was manifesting some new behaviors. It was Ms. *** who requested additional testing after she administered the Chicago and noted weaknesses.

Additionally, it is clear that the key stakeholders worked very closely and, although it did not appear to be so to the parents, they worked efficiently. When there was even a hint of a need for additional assessments, they were done. The parents consented to all of the assessments requested by ***'s ARD Committee and never withheld that consent.⁷ When the assessments called for additional services, they were developed. Of course, the place of delivery was hotly debated after fall 2003.

Petitioner claims that the District withheld information regarding available services in lieu of PALS. However, the record clearly established that Ms. *** knew about the Early Childhood Program and she knew that it was not a recommended placement for a child with the minimal disabilities that *** was evidencing. It was never a simple choice of PALS vs. Early Childhood. The District explained many times that placing *** in the Early Childhood class would not be the LRE for ***.

4. * Made Academic And Non-Academic Progress.**

Petitioner claims that *** actually regressed while in PALS. A key reference for this contention is the different severity rating given by Ms. *** after she completed the PLS 4 in November 2003. In February 2003 she found him to have a *** communication problem; in November 2003, she found his communication problems to be ***. Notwithstanding these findings, the testimony established severity ratings do not indicate regression or progress. In this case, they were the subjective findings of ***'s teacher as to what degree his communication problems would affect his educational performance before and after working with him.

Ms. *** explained that the PLS looks at listening and expressive skills in a structured setting. It is designed for small children as a subjective assessment. Many

⁷ The only test administered without consent was the IQ test done in spring 2004. This was an error on the part of the District and the results were purged from ***'s file.

factors can impact the assessment, such as the cooperation provided by the child and his prior experiences. The severity rating is not a mathematical calculation. Rather, it is based upon the assessor's observations of the child.

When Ms. *** first evaluated *** on the PLS-3 in February 2003, she did not know him well. In making her determination that he had a *** communication problem, she relied on and considered information from his previous early childhood programs, as well as information from Ms.*** which showed that *** was exposed to two languages in the home – his nanny spoke only Spanish. Additionally, *** was only *** years, *** months when he took the PLS–3 and had not been exposed to much educational opportunity. He had serious bouts of hearing infections. Based upon all of these factors, Ms. *** found *** to have a severity rating of***. Her assessment did not change during the spring 2003 semester because *** only attended PALS approximately six times.

When school began in fall 2003, and *** was regularly attending PALS two times per week, Ms. *** noticed new behaviors that troubled her. She communicated her concerns to ***'s parents, tested him, found him to have problems in gross motor, language, and memory skills, and referred him for additional testing for learning disability and a speech/language assessment. She found his communication problem to be in the *** category versus the *** category. However, this did not signal regression or lack of progress. It resulted from Ms. ***'s time working with ***, seeing him demonstrate new behaviors, and understanding his communication style. Even with the severity rating of “***,” this still did not indicate that he needed placement in the Early Childhood Program over PALS.

On February 17, 2004, Ms. *** assessed *** using the CLEF. *** achieved a score of *** on the receptive language test, which is***, and *** on the expressive language test, which is ***, giving him an overall language score of ***. Ms. *** concurred with previous testing that *** has a communication disorder in expressive language. She rated this severity as ***, which was the same rating recorded by Ms. *** the previous year.

Contrary to Petitioner's claims of regression, the testimony revealed that *** did, in fact, make progress while in the PALS program. He achieved and made progress on his goals and objectives. *** needed re-direction at times to respect the space of others and to stay on task, but such re-direction was readily obtained.

B

Petitioner Failed To Prove That The Alleged Procedural Violations Were More Than *De Minimis*.

In analyzing whether procedural violations constitute a denial of FAPE, courts have looked at the injury caused by the violations. *Salley v. St. Tammany Parish School Board*, 57 F.3d 458 (5th Cir. 1995) (Procedural violation in not advising the parents of their right to formal evaluation did not affect the parents' decision regarding their child's education); *Weil v. Board of Elementary & Secondary Education*, 931 F.2d 1069 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 306 (1991) (Procedural violation in not providing the

parents with written notice of the change in the student's school results in *de minimis* injury because the school scheduled a meeting with the parents within weeks of the transfer, an act the school would have been compelled to do had the parents received prior notice and requested a due process hearing.)

In this case, Petitioner alleges numerous procedural violations, contending that singularly or cumulatively, they equate to violations of IDEA. Specifically, Petitioner alleges the following denied *** FAPE: 1) the District failed to convene an ARD Committee meeting in the fall of 2003 when it was seeking to perform additional assessments of ***; 2) the May 2004 ARD Committee discussed additional items to the surprise of Ms. ***; 3) the District failed to provide Ms. *** with a copy of ***'s evaluation prior to convening the January 2004 ARD; and 4) the District conducted an intelligence assessment in spring 2004 without first obtaining parent consent.⁸ The first three alleged violations have absolutely no merit.

34 CFR 300.344 sets forth the members of an ARD Committee. Section 300.533 authorizes this Committee to review the child's need for additional evaluations and allows such review to be done without a meeting. Testimony at the Hearing showed that Mr. *** was in the classroom when Ms. *** conducted the Chicago on October 27, 2003. She immediately convened a PARD, obtained agreement to conduct the additional assessments, and garnered Mr. ***'s written consent for the additional assessments.

34 CFR 300.345 provides that the notice of an ARD Committee meeting must set forth the purpose, time, location of the meeting, as well as who will be in attendance. These are general requirements that, by their nature, allow for impromptu statements or agreeing to discuss additional matters. A comparison of the subject Notice with the ARD Report and Minutes reveals no violation of Section 300.345 and Ms. *** made no statement in the Minutes of any concern related to the matters discussed.

As to Ms. ***'s concern that she did not received copies of ***'s evaluations prior to the January 12, 2004, ARD, even Ms. *** testified that this was not really a problem. She did have the opportunity to review these evaluations and ***'s ARD Committee reconvened two more times to discuss, in part, these evaluations. While it would have been better for Ms. *** to receive these in time to digest their results prior to the ARD, there was no requirement that this be done.

The District does agree that the intelligence test administered in spring 2004 was done so without parental consent. This is a procedural violation; however, to what extent does this act deny *** FAPE? A procedural error is not a FAPE violation unless it results in a loss of educational opportunity or infringes on the parents' right to participate in the ARD process. *Adam J. v. Keller ISD*, 328 F.3d 811-12 (5th Cir.).

⁸ Petitioner also alleges procedural errors as follows: 1) transportation was never offered Ms. *** for transporting *** to and from PALS during Spring 2003; b) the ARD Committee did not convene to discuss EYS for *** during Summer 2003. These alleged violations are outside the statute of limitations and will not be considered.

In this case, the District agreed that it had erroneously tested *** on the intelligence test and purged ***'s educational record of such test results. Accordingly, the District's error in testing was *de minimis*.

To prevail in this proceeding, it was incumbent on Petitioner 1) to overcome the presumption that ***'s IEP and placement in PALS were appropriate and 2) to show more than a *de minimis* procedural violations of IDEA. These burdens were not met.

V. Conclusions Of Law

1. *** is a student who is eligible for special education services, based upon his classification of speech impairment, as mandated under the provisions of IDEA and its implementing regulations. 20 U.S.C. §1400 *et seq.*
2. ***'s program and placement between July 8, 2003, and February 5, 2004, were appropriate and reasonably calculated to enable him to receive educational benefits. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 175, 206-207 (1982); *Cypress-Fairbanks Indep. School District v. Michael F.*, 118 F.3d 245, 245 (5th Cir. 1997).
3. The procedural violation committed by the District was *de minimis* and did not prevent *** from receiving FAPE. *Adam J. v. Keller ISD*, 328 F.3d 811-12 (5th Cir.); *Salley v. St. Tammany Parish School Board*, 57 F.3d 458 (5th Cir. 1995).

VI. Order

Based upon the record of this proceeding and the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the relief requested by Petitioner be DENIED.

Finding that the public welfare requires the immediate effect of this Decision, the Special Education Hearing Officer makes it effective immediately.

SIGNED this 23rd day of November 2004.

Deborah Heaton McElvaney
Special Education Hearing Officer

DOCKET NO. 367-SE-0704

***** B/N/F MR. & MRS *** & ***,
Petitioner**

**BEFORE A SPECIAL
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HEARING OFFICER FOR THE
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VS.

**KLEIN INDEPENDENT SCHOOL
DISTRICT, Respondent**

SYNOPSIS

ISSUE: *Whether Respondent denied *** FAPE by placing him in the early childhood program, PALS, between March 2003 and February 2004.*

C.F.R. CITATION: 34 C.F.R. 300.300; 300.350; 300.550-553

HELD: For Respondent. ***'s program and placement in PALS provided him access to specialized instruction and related services that were individually designed to provide educational benefit: 1) *** had an individualized program in the PALS setting based upon his assessments and finding that he is speech impaired; 2) the PALS program was the least restrictive environment to address ***'s speech impairment; 3) the services were provided in a coordinated and collaborative manner by the key stakeholders; and 4) *** received positive benefits academically and non-academically.

ISSUE: *Whether Respondent procedurally violated FAPE by failing to convene an ARD Committee when it was seeking to perform additional assessments.*

C.F.R. CITATION: 34 C.F.R. 300.344; 300.533.

HELD: For Respondent. There is no requirement that an ARD Committee convene for a meeting just to discuss additional testing. ***'s father and other members of his team informally decided he needed testing and the parents gave consent.