

STUDENT, <i>b/n/f</i>	§	BEFORE A SPECIAL EDUCATION
PARENT,	§	
	§	
Petitioner,	§	
	§	
V.	§	HEARING OFFICER
	§	
YSLETA INDEPENDENT	§	
SCHOOL DISTRICT,	§	
	§	
Respondent.	§	FOR THE STATE OF TEXAS

DECISION OF THE SPECIAL EDUCATION HEARING OFFICER

**I.
STATEMENT OF THE CASE**

Petitioner, Student, *b/n/f* Parent (“Student” or “Petitioner”), filed a Request for Due Process Hearing (“Complaint”) with the Texas Education Agency (“TEA”), requesting a Due Process Hearing pursuant to the Individuals With Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. §1400 *et. seq.* Student asserted multiple issues in student’s Complaint against Ysleta Independent School District (“Respondent” or “the District” or “YISD”), alleging that the District denied Student a free and appropriate public education (“FAPE”) in the least restrictive environment (“LRE”) based upon the following substantive and procedural violations of IDEIA occurring from August 2010 through the date of Student’s Complaint:

1. YISD misused physical restraint with Student for unauthorized purposes and without following procedures or adequately training staff;
2. YISD failed to document all incidents in which restraint was used and to inform Student’s Parent of all such incidents;
3. YISD’s conduct has led to the escalation of Student’s negative behaviors over the past year and an increase, rather than decrease, in the use of restraints;
4. YISD has denied Student non-educational benefits related to student’s development of appropriate social skills, behavior control, and learning behaviors;
5. YISD’s acts and omissions, in failing to inform Student’s Parent of required information, a) deprived the Parent of her right to participate in the educational process on behalf of Student, and b) created an exception to the one-year statute of limitations;
6. YISD failed to conduct a meeting of Student’s admission, review, and dismissal committee (“ARDC”) upon Student’s transfer from *** Independent School District (“*** ISD”);

7. YISD failed to properly document Student's transfer ARDC meeting;
8. YISD failed to provide Student's Parent with required copies of all ARDC documentation;
9. YISD failed to create or implement an Individual Education Program ("IEP") for Student upon student's transfer from *** ISD;
10. YISD failed to conduct a functional behavior assessment ("FBA") of Student;
11. YISD failed to perform an appropriate counseling evaluation;
12. YISD failed to provide Student with appropriate counseling services;
13. YISD failed to provide appropriate accommodations for Student's hearing loss ***;
14. YISD failed to implement Student's use of assistive technology ("AT");
15. YISD failed to develop a behavior intervention plan ("BIP") or implement the BIP developed at *** ISD;
16. YISD failed to complete an FBA, an Occupational Therapy ("OT") assessment, a speech evaluation, and an assistive technology consultation as promised by Student's February 2012 ARDC; and
17. YISD failed to appropriately address Student's symptoms of *** and ***.

Student seeks a finding that exceptions to the Texas one-year statute of limitations preclude its enforcement, thereby allowing Student to recover for YISD's acts and omissions occurring from August 2010 through September 14, 2012, the date of the filing of the Complaint. Student seeks an order from the undersigned Hearing Officer requiring YISD to:

1. cease all physical restraints of Student, except in an emergency situation;
2. cease secluding Student;¹
3. provide Student with an independent education evaluation ("IEE"); an independent AT evaluation; an independent OT evaluation; an independent psychological evaluation, which would include an evaluation for a Pervasive Developmental Disorder; and independent medical evaluations to determine instructional and behavior management implications of Student's neurological and cardiac problems;²
4. use an outside behavior specialist to conduct an FBA and develop a BIP for Student;

¹ During the Due Process Hearing, YISD's counsel objected to this request for relief, asserting that it was not based upon any issue presented in this case (T.34-35).

² During the Due Process Hearing, YISD's counsel noted that Student's Complaint does not assert the inappropriateness of YISD's evaluations, which were conducted during the applicable one-year period; rather, Student simply requests that the Hearing Officer order YISD to fund the requested IEEs (T.35).

5. provide compensatory educational services; and
6. place Student in the LRE with all supplemental supports and services needed to provide student with adequate educational and behavioral progress.

II. PROCEDURAL HISTORY

Student filed student's Complaint on September 14, 2012, against YISD. TEA assigned the case Docket No. 009-SE-0912 and assigned the matter to the undersigned Hearing Officer. On September 14, 2012, the undersigned sent the Initial Scheduling Order to the parties stating that the pre-hearing telephone conference would convene on October 3, 2012, that the Due Process Hearing would take place on October 25, 2012, and that the Decision would issue by November 28, 2012. Due to conflicting schedules the pre-hearing telephone conference was re-scheduled to October 12, 2012.

On September 23, 2012, YISD filed its Response to Complaint addressing Student's issues and requested relief as well as 1) lodging the affirmative defense of the Texas one-year statute of limitations, and 2) requesting that Student produce all of Student's medical records that had not been previously produced to YISD.

On October 12, 2012, the parties convened the first pre-hearing telephone conference. In attendance were the following: 1) Ms. Yvonnilda Muñiz, Student's counsel; 2) Mr. Jose Martín, Respondent's counsel; 3) the undersigned Hearing Officer; and 4) the court reporter, who made a record of the telephone conference. The parties discussed the issues and re-scheduled the Due Process Hearing for January 15-17, 2013, the Disclosure Deadline for January 10, 2013, and extended the Disclosure Deadline to February 15, 2013. The parties reported that they had waived the Resolution Session in favor of mediation.

On December 10, 2012, Student's counsel filed a Motion to Withdraw as Attorney-In-Charge, asserting that her client had terminated the attorney-client relationship. YISD did not oppose the withdrawal, but did request a telephone conference with the Parent to ascertain whether Student would be hiring new counsel and whether additional time would be needed to prepare for the hearing. On December 10, 2012, the undersigned issued Orders 1) Granting Motion to Withdraw and 2) Convening Telephone Conference, which ordered the parties to convene a telephone conference no later than December 28, 2012.

On December 27, 2012, the parties convened the second pre-hearing telephone conference. In attendance were the following: 1) Student's Mother; 2) Mr. Martín, Respondent's counsel; 3) the undersigned Hearing Officer; and 4) the court reporter, who made a record of the telephone conference. The parties discussed the issues, discovery, continuance of the hearing, and other procedural matters. YISD made an oral request for a continuance of the January 15-17, 2013, Due Process Hearing to allow Student time to obtain new counsel and to respond to Respondent's pending discovery requests. Student's Parent did not oppose this continuance request. Finding good cause, the undersigned granted the continuance and re-scheduled the hearing to February 11-13, 2013, the Disclosure Deadline to February 4, 2013, which extended the Decision Deadline to March 16, 2013. The undersigned Hearing Officer scheduled a third pre-hearing telephone conference for January 17, 2013, for a status update.

On January 17, 2013, the parties convened the third pre-hearing telephone conference. In attendance were the following: 1) Student's Mother; 2) Mr. Martín, Respondent's counsel; 3) the undersigned Hearing Officer; and 4) the court reporter, who made a record of the telephone conference. The parties re-addressed the hearing issues and whether Student had been able to obtain counsel. Over Respondent's objection, the undersigned scheduled a fourth pre-hearing telephone conference on February 1, 2013, to give Student two (2) more weeks to obtain counsel. YISD requested a continuance of the February 11-13, 2013, hearing due to scheduling conflicts. Finding good cause, the undersigned granted the requested continuance of the February 11-13, 2013, hearing.

On February 1, 2013, the parties convened the fourth pre-hearing telephone conference. In attendance were the following: 1) Student' Mother; 2) Mr. Martín, Respondent's counsel; 3) the undersigned Hearing Officer; and 4) the court reporter, who made a record of the telephone conference. Student's Parent informed all participants that Student did not have legal counsel and that the Parent would represent Student in the hearing. The parties discussed the status of possibly resolved issues/requested relief and agreed to some document production. The parties re-scheduled the hearing for March 13-15, 2013, the Disclosure Deadline for March 6, 2013, and extended the Decision Deadline to April 15, 2013.

The Due Process Hearing convened on March 13, 2013, and concluded that day. Student was represented by student's Parent; YISD was represented by counsel, Mr. Jose Martín. Also in attendance throughout the hearing was ***, YISD's Special Education Coordinator. At the beginning of the hearing, YISD filed its Motion to Prohibit Introduction of Evidence Not timely Disclosed by Petitioner, asserting that Student had failed to provide any Disclosures by the March 6, 2013, deadline. YISD argued that under both TEX. ADMIN. CODE §89.1180(h) and 34 C.F.R. §300.512(a)(3), YISD had the absolute right to prohibit the introduction of any evidence at the hearing that was not disclosed by the Disclosure Deadline. Student's Parent acknowledged that she made no Disclosures to YISD or the Hearing Officer. Accordingly, the undersigned granted YISD's motion and informed all that other that the testimony of Student's Parent, Student would not be able to call any undisclosed witnesses or introduce any undisclosed documentary evidence. Student was allowed to cross-examine witnesses called by YISD and was provided the opportunity to refer any witness to documentary evidence introduced by YISD.

Student's Parent was sworn in and provided narrative testimony; YISD cross-examined the Parent. Upon completion of Student's case, Respondent introduced twenty-nine (29) exhibits and called eight (8) witnesses. At the conclusion of the hearing on March 13, 2013, the parties requested the opportunity to present written closing arguments and requested an extension of the April 15, 2013, Decision Deadline to accommodate such post-hearing filings. The undersigned Hearing Officer agreed to this request and issued an order providing for the submission of written closing arguments and extending the Decision Deadline to April 17, 2013. This Decision is timely rendered on April 17, 2013, and forwarded to the parties via mail on April 17, 2013.³

³ References to the Due Process Hearing Record are identified as follows: "T." refers to the Certified Court Reporter's Transcription of testimony made on March 13, 2013, and the numbers following refer to the pages within the Transcription. "R.#.#" refers to Respondent's Exhibits by number and page. Because Petitioner introduced no documentary evidence, there is no corresponding reference to Petitioner's exhibits.

III. FINDINGS OF FACT

1. YISD is a political subdivision of the State of Texas and a duly incorporated Independent School District. Student's residence is within the jurisdictional boundaries of YISD. YISD is responsible for providing Student FAPE under IDEIA and its implementing rules and regulations.
2. Student is a ***-year-old *** who attends *** School. Student has been enrolled in YISD since October 2010. Prior to enrollment in YISD, Student attended school in *** Independent School District and *** ISD during school years 2009-2010.

School Year 2009-2010:

3. On January 14, 2010, Student was evaluated by ***, which revealed that Student had been diagnosed with Attention Deficit Hyperactivity Disorder, Combined Type ("ADHD"), ***, and *** hearing loss *** (R.8.1). The report likewise indicated that Student had a history of severe behavior problems and was *** for such problems (R.8.1).
4. In February 2010, *** ISD conducted a Full and Individual Evaluation ("FIE") of Student (R.7). The evaluators determined that Student met the eligibility criteria for special education and related services based on an auditory impairment ("AI") and a diagnosis by Student's physician of ADHD. The evaluators noted that Student was demonstrating severe negative behaviors and showing delays in the acquisition of academic skills and in some developmental areas (R.7.21).
5. Because of Student's severe behavior problems, evidenced by tantrums, aggressive behaviors such as ***, hitting, ***, kicking, and throwing objects, *** ISD conducted a psychological evaluation of Student in April 2010 (R.8). Information obtained from the Parent during the psychological evaluation indicated a history of ***. The Parent also reported that Student was not taking any medication for the ADHD due to an allergic reaction.
6. The evaluators determined that Student presented with severe ADHD, oppositional defiant disorder, some emerging conduct disorder problems, and probable depression or ***, all of which interfered with Student's educational progress (R.8.4). The evaluation revealed that Student meets the eligibility criteria for special education services as Emotionally Disturbed ("ED"). The assessors recommended that Student be placed in a structured placement with more individual teacher support and supervision (R.8.4) and that student's ARDC develop an appropriate BIP to target inappropriate behaviors with positive reinforcement (R.8.7). Student's ARDC at *** ISD added the qualifying eligibility of ED (R.10.2).

School Year 2010-2011:

7. Student enrolled in YISD in August 2010. On August 27, 2010, Student's ARDC convened. The ARDC developed an interim placement for Student, as a transfer student, at *** School in the behavior intervention class ("BIC") (R.11.2). The ARDC provided

related services in the areas of AI *** and psychological services (R.11.4). Student's Parent acknowledged receipt of Procedural Safeguards (R.11.11) and signed the ARDC report in agreement (R.11.2).

8. On September 20, 2010, Student's ARDC met to update student's interim placement and to conduct student's annual ARDC (R.12.1). Student's Parent again acknowledged receipt of Procedural Safeguards (R.12.2). The ARDC reviewed Student's FIE as well as other records from prior districts. The ARDC continued Student's classifications of ED, OHI, and AI (R.12.3). The ARDC agreed to provide school health services related to ***, medication administration (if necessary), and *** (R.12.6). The ARDC determined that Student could not follow the District's Disciplinary Management Plan and would need a BIP (R.12.7). The ARDC discussed Student's negative behaviors, which typically followed a) a request or directive of the staff to begin work and b) Student's placement in an unstructured environment (R.12.8). The ARDC discussed various positive reinforcements to correct Student's behavior, such as allowing computer time, games with teachers, and access to Boys' Town Store (R.12.9).
9. BIC staff is trained in the Boys' Town behavioral methodology, which has a social skills reward component, as well as professionally accepted restraint techniques (T.76-8; 131). BIC staff also was trained annually in the Nonviolent Crisis Prevention Intervention Program ("NCI") (T.76-7). This program provides methods for preventing violence by first talking with the student to calm him or her down, with the goal that no restraint will be necessary (R.77).
10. On September 27, 2010, YISD issued Student's Comprehensive Special Education Evaluation, which recommended that Student receive special education counseling as a related service to increase behavioral adjustment, social development, and emotional adjustment (R.5.1). On October 4, 2010, YISD issued Student's Related Services report, which recommended that Student receive three (3) thirty-minute direct counseling sessions per nine (9) weeks (R.5.3).
11. On October 7, 2010, Student's ARDC met to modify Student's September 20, 2010, IEPs (R.13.1). Student's Parent again acknowledged receipt of Procedural Safeguards (R.13.2). The ARDC agreed to maintain the IEPs developed at the September 20, 2010, ARDC with additional goals and objectives. The ARDC developed IEPs for AI itinerant services (R.13.6) and special education counseling (R.13.8). Student would be using *** during class.

School Year 2011-2012:

12. Student's ARDC met on September 27, 2011, to review student's IEPs and update student's goals and objectives (R.16.46). The ARDC a) modified student's goals and objectives; b) modified student's BIP to target behaviors related to decreasing aggression, accepting criticism, and following directions; c) continued AI services; and d) obtained the Parent's consent for Student's three-year evaluation (R.16.46). Student's Parent again acknowledged her receipt of Procedural Safeguards (R.16.40).
13. Student's ARDC convened again on February 7, 2012, to discuss Extended School Year ("ESY") services (R.17.1) and the Parent's concerns about Student's BIC placement and

progress (R.17.5). Student's Parent again acknowledged her receipt of Procedural Safeguards (R.17.2).

14. Student's Parent complained that she was being called too frequently to come to the school to help manage Student's behaviors; that Student's teacher was not using *** routinely, which she believed increased student's negative behaviors; and that the Boys' Town strategies were not working (R.17.5-6). The ARDC agreed to perform an FBA during the school year to help determine the cause of student's behaviors (R.17.6). The ARDC also agreed to perform a speech evaluation, an OT evaluation, and to have the AI Itinerant Teacher train Student's teacher on the *** (R.17. 5-6). The ARDC discussed with the Parent problems in Student's lack of attendance and presented her with an attendance warning letter (R.17.6). The ARDC had consensus (R.17.7).
15. During school year 2011-2012, Student engaged in a plethora of negative behaviors. Student's Parent refused to administer any medication to address student's ED and ADHD disabilities and in fact, forbade the ARDC from mentioning the issue of medication in ARDC meetings (R.17.6). Student's aggressive behaviors injured *** (R.20) and threatened student's *** (T.84). As such, staff had to restrain Student on *** occasions during the 2011-2012 school year (R.21).
16. In March 2012, YISD's Licensed Specialist in School Psychology ("LSSP") performed an FBA (R.2). Information was gathered from Student's BIC teacher, student's Parent, and Student (R.2.2). The LSSP specifically targeted behaviors such as a) poor social skills dealing with peers, which may then escalate into further negative behaviors, and b) instigating problems with peers, such as pushing and making negative comments, while denying responsibility (R.2.2). These behaviors were reported to occur across all settings (R.2.2).
17. The LSSP conducted four (4) observations of Student during different days, times and settings. She noted that Student frequently interacted with the teacher one-on-one; Student exemplified off-task behaviors such as fidgeting in student's seat, jumping out of student's seat, standing beside student's desk, making disruptive noises, talking out, and *** (R.2.3 & 6); Student exemplified aggressive behaviors such as ***, throwing items, destroying school materials, and threatening others (R.2.6). The functions of Student's behavior are attention, escape from academics, and control (R.2.6). The LSSP hypothesized that Student engages in off-task behaviors to gain attention and avoid academic tasks; Student engages in aggressive behaviors as a result of student's need to control the situation and to express anger (R.2.6).
18. The LSSP made multiple recommendations for increasing Student's appropriate behavior: a) continue with a very structured environment and consistent routines; b) set well-defined limits, rules, and task expectations; c) continue use of the Boys' Town system by giving Student a lot of points for any appropriate on-task behavior; d) utilize tangible reinforcers that Student enjoys; e) offer choices; f) maintain close proximity to Student; g) teach problem-solving strategies and role-play consequences of behavior; h) teach alternative behaviors/positive social skills; i) consider self-improvement essays; j) direct over-activity into productive tasks within the classroom; k) initiate a cooling off period and allow Student a time and place to regain control; l) do not give in to Student's demands as student must know that there are rules and consequences for behavior

(R.2.7).

19. On March 5, 2012, YISD conducted an OT evaluation of Student (R.4). The assessors determined that Student's visual motor and perceptual skills are within normal limits (R.4.4). Student demonstrated some difficulty with handwriting legibility and issues concerning sensory processing, although the antecedents to Student's behavior issues did not appear to be related to sensory events (R.4.4). The assessor recommended that Student have extra breaks during the day to allow for movement, and that Student be provided alternative seating, such as ***. The OT and classroom staff would monitor Student's sensory issues. The assessor recommended two (2) fifteen- minute sessions per nine (9) weeks to assist with legibility of writing and to monitor sensory process skills (R.4.4).
20. In April 2012, YISD conducted a speech and language evaluation of Student to ascertain whether Student needed speech therapy ("ST") services (R.3). Student's hearing loss *** did not appear to affect student's speech (R.3.4). The assessment revealed that Student's receptive and expressive language skills are within the normal limits of student's chronological age. Although student's listening comprehension was weak, student's performance was still within the normal range (R.3.4). The assessors did not find an educational need for ST; accordingly, they did not recommend ST services (R.3.5).
21. Notwithstanding Student's problem behaviors, Student is academically sound and capable of performing at grade-level. Student has a low average I.Q. of *** (R.7.8-9). During school year 2011-2012, Student passed student's grade-level curriculum (R.28). There was no evidence that these grades were inaccurate or inflated.⁴ During fall 2011, Student was restrained nine (9) times; during spring 2012, Student was restrained six (6) times (R.21).
22. On ***, 2012, YISD had to restrain Student. Student's Parent witnessed some of this restraint and testified that she saw the Principal standing next to Student, who was face-down on the floor, holding Student by student's wrists and ankles, or "hogtied" (T.17). YISD staff who witnessed the restraint denied that the Principal ever touched Student and that Student was not restrained face down or "hogtied" (T.92, 100, 105-6, 135-36; R.21.32-3).
23. It was Student's teacher who restrained Student during this incident to prevent Student from kicking and hitting other students (T.110-12, 117-18). The Special Education Coordinator testified that Student's Parent informed her that she did not actually see the Principal restrain and "hogtie" Student; that information came to her from Student (T.72-3).
24. Student had a red mark on student's face but the nurse checked student out and found student to be okay (T.18, 38).
25. The ***, 2012, restraint was the only restraint witnessed by the Parent (T.39). Student's

⁴ During the Due Process Hearing, Student's Parent questioned the veracity of Student's grades in light of YISD's concerns that student was not doing student's work in school and the Parent's observation that student never brought home any work as homework (T.60).

Parent presented no additional evidence of other allegedly inappropriate or unlawful restraints.

Statute of Limitations:

26. The Texas Statute of Limitations period for bringing a Complaint under IDEIA is one (1) year. Two (2) exceptions allow for the tolling of the one-year statute of limitations: a) intentional, specific misrepresentations by a district that it had resolved the problem forming the basis of the Complaint; or b) failure by a district to provide the disabled student with information that the district was required to provide.
27. Student failed to prove that Respondent made intentional, specific misrepresentations that prevented the Parent from requesting a Due Process Hearing prior to September 14, 2012.
28. Student failed to prove that Respondent withheld required information from the Parent that prevented the Parent from requesting a Due Process Hearing prior to September 14, 2012.
29. The time period pertinent to this case began on September 14, 2011. Any of the claims related to acts and omissions occurring prior to September 14, 2011, are outside the applicable period. The following specific issues are patently outside the applicable period and are dismissed:
 - a. whether YISD failed to conduct a meeting of Student's ARDC upon student's transfer from *** ISD in fall 2010 (Issue No. 6);
 - b. whether YISD failed to properly document Student's transfer ARDC meeting (Issue No. 7);
 - c. whether YISD failed to create or implement an IEP for Student as a transfer student (Issue No. 9);
 - d. whether YISD failed to conduct an FBA upon Student's enrollment in fall 2010 (Issue No. 10);
 - e. whether YISD failed to perform an appropriate counseling evaluation on September 27, 2010 (Issue No. 11);
 - f. whether YISD failed to develop an appropriate BIP or implement the BIP from *** ISD upon Student's enrollment in YISD in fall 2010 (Issue No. 15).
30. There was insufficient evidence to support a finding that YISD misused physical restraint with Student for unauthorized purposes (T.16-19).
31. There was insufficient evidence to support a finding that YISD failed to follow procedures in using physical restraint with Student (T.16-17, 22).
32. There was insufficient evidence to support a finding that YISD failed to adequately train staff who used physical restraint with Student.

33. There was no, or insufficient, evidence to support a finding that YISD failed to document all incidents in which restraint was used with Student (T.19).
34. There was insufficient evidence to support a finding that YISD failed to inform Student's Parent of all restraints used with Student (T.19).
35. There was no, or insufficient, evidence to support a finding that YISD's use of physical restraints with Student led to the escalation of Student's negative behaviors.
36. There was no, or insufficient, evidence to support a finding that YISD denied Student non-educational benefits related to student's development of appropriate social skills, behavior control, and learning behaviors (T.24).
37. There was insufficient evidence to support a finding that YISD failed to provide Student's Parent with required information (T.24-26).
38. There was no, or insufficient, evidence that YISD failed to provide Student's Parent with required copies of all ARDC documentation (T.27).
39. There was no, or insufficient, evidence to support a finding that YISD failed to provide Student with appropriate counseling services (T.29, 48).
40. There was insufficient evidence to support a finding that YISD failed to provide appropriate accommodations for Student's hearing loss (T.29).
41. There was insufficient evidence to support a finding that YISD failed to implement Student's AT (T.29).
42. There was no, or insufficient, evidence to support a finding that YISD failed to develop an appropriate BIP for Student (T.30-31).
43. There was no, or insufficient, evidence to support a finding that YISD failed to complete an FBA, an OT assessment, a speech evaluation, and an AT consultation as promised by Student's February 2012 ARDC (T.32).
44. There was no, or insufficient, evidence to support a finding that YISD failed to appropriately address Student's symptoms of *** and *** (T.33).

YISD's Claim:

45. On May 17, 2012, Student filed a Request for Due Process Hearing with TEA, which was docketed as 274-SE-0512 and assigned to the undersigned Hearing Officer. This Complaint alleged generally the same issues that are in this pending matter; however, Student was represented by a different attorney. Ultimately, Student's attorney withdrew, and because Student's Parent failed to continue to participate in the due process proceeding, the undersigned Hearing Officer granted YISD's request for a dismissal for want of prosecution. The dismissal was rendered on August 27, 2012, and was rendered without prejudice to re-filing.

46. Student re-filed student's Complaint, the pending case, on September 14, 2012, and initially was represented by attorney Ms. Muñiz. On December 10, 2012, Ms. Muñiz withdrew as counsel for Student, asserting that Student's Parent had terminated the attorney-client relationship. Several extensions of time for the hearing were granted to allow Student's Parent time to hire new counsel, which never occurred.
47. During the course of this pending action, the parties engaged in mediation, and although many of the issues were settled, in theory, no settlement agreement was finalized. Student's Parent ***, which YISD viewed as a violation of the confidentiality pledge of the parties at the mediation.
48. During several pre-hearing telephone conferences, YISD requested that Student provide the Hearing Officer and YISD with a list of the issues that were, in fact, resolved by the mediation. The undersigned Hearing Officer requested that Student's Parent to send YISD a list of the issues that were resolved if, in fact, some issues were settled.⁵ Student's Parent did not send this information to YISD prior to the hearing.
49. Student's Parent failed to meet the Disclosure Deadline of March 6, 2013; accordingly, upon motion by YISD, the undersigned denied Student the right to introduce any undisclosed witness and documentary evidence at the March 13, 2013, Due Process Hearing.
50. During the hearing, YISD asserted that these acts and omissions unnecessarily protracted the final resolution of the issues in this case and greatly increased the cost of YISD's participation. YISD requested findings of fact in support of this claim but made no demand for an award of attorneys' fees that may be appropriate under such findings (T.120-21).
51. A school district may recover reasonable attorneys' fees if it is a prevailing party against a parent who files a complaint or subsequent cause of action that was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. Districts must have evidence of improper motive. The filing of multiple similar due process complaints and lack of cooperation can help show motivation to harass, cause delay, or increase the cost of litigation.
52. In this case, the acts and omissions of Student's Parent in both due process filings do not support a finding that Student's complaints were filed for any improper purpose.

IV. DISCUSSION

A. THE ONE-YEAR STATUTE OF LIMITATIONS APPLIES TO THIS CASE.

IDEIA provides that a parent must request a due process hearing within two (2) years of the date the parent knew, or should have known, about the alleged action that forms the basis of the complaint. However, the two-year statute of limitations may be more or less if the state

⁵ By correspondence dated February 20, 2013, the undersigned advised Student's Parent that although she was under no legal obligation to provide the requested information to YISD, her doing so would possibly streamline the hearing by excluding those issues over which no controversy continued.

adopts an explicit time limitation for filing a request for due process hearing. 20 U.S.C. §1415(f)(3)(C); 34 C.F.R. §300.511(e); 300.507(a)(1)(2). Texas has adopted such an explicit time limitation: a parent must file a request for due process hearing within one (1) year of the date the complainant knew, or should have known, about the alleged action that forms the basis of the complaint. 19 TEX. ADMIN. CODE §89.1151(c); *Tex. Advocates Supporting Kids With Disabilities*, 112 S.W.3d 234 (Tex. App. – Austin 2003, no pet.).

IDEIA allows very narrow exceptions to its time limitations: 1) the statute of limitations shall not apply if a parent was prevented from requesting a due process hearing due to specific misrepresentations by the local district that it had resolved the problem forming the basis of the complaint; 20 U.S.C. §1415(f)(3)(D)(i); 34 C.F.R. §300.511(f)(1); and/or 2) the statute of limitations shall not apply where a parent failed to exercise his/her right to a due process hearing because the local district withheld information that it is required to provide to the parent. 20 U.S.C. §1415(f)(3)(D)(ii); 34 C.F.R. §300.511(f)(2). The information that a district is required to provide is specific and includes, *inter alia*, copies of procedural safeguards. 20 U.S.C. §1415(d); 34 C.F.R. §300.504(a).

Student argued that the one-year statute of limitations is not applicable to student's claims against YISD because it withheld information that it was required to provide to the Parent. Specifically, Student asserted that YISD failed to provide Student's Parent with written notice when it used restraints in dealing with Student's behaviors, as required by 19 TEX. ADMIN. CODE §89.1053(e).⁶ Student presented no evidence in support of this claim.

Section 89.1053(e) requires a district to inform the parents of a disabled student that a restraint has been used. Ideally, the district will provide a verbal notification on the day the restraint occurred. Written notification of the use of the restraint must be placed in the mail addressed to the parent, or otherwise provided, within one (1) day of the use of restraint. Student had the burden of proving that the alleged violation of Section 89.1053(e) tolled the one-year statute of limitations. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F.Supp.2d 918, 945 (W.D. Tex. 2008), *rev'd in part on other grounds*, *El Paso Indep. Sch. Dist. v. Richard R.*, 591 F.3d 417 (5th Cir. 2009). Student failed to meet this burden of proof when student presented no evidence in support thereof.

Additionally, the record does establish that YISD provided Student's Parent with multiple copies of the Procedural Safeguards. A district is required to provide parents with a copy of the Procedural Safeguards only one (1) time a year, except that a copy also shall be given to the parents: (i) upon initial referral or parental request for an evaluation; (ii) upon the first occurrence of the filing of a due process complaint; and (iii) upon request of the parent. 20 U.S.C. §1415(d)(1)(A).

YISD presented evidence that it provided the Parent with multiple copies of the Procedural Safeguards at every required juncture: August 27, 2010; September 20, 2010; October 7, 2010; October 26, 2011, and February 7, 2012. The content of these Procedural Safeguards provided the Parent with statutory notice of her rights, including the right to request a due process hearing, within one (1) year of the accrual of a claim. With each delivery of a copy of the Procedural

⁶ Student argued additionally that YISD's failure to provide Student's Parent with signed September 27, 2011, ARDC documents, identifying Student's services, placement, and consent for evaluation, provides an exception to the Texas one-year Statute of Limitations. This argument is moot in that the alleged omissions on the September 27, 2011, ARDC documents occurred within the one-year timeframe applicable to this case.

Safeguards, the statute of limitations for IDEIA violations “commence without disturbance.” *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F.Supp.2d at 945.

Student did not carry the burden of proving entitlement to toll the one-year statute of limitations. 20 U.S.C. §§1411-1419. Having determined that the one-year statute of limitations applies to this case, the remaining analysis concerns YISD’s alleged substantive and procedural IDEIA violations between September 14, 2011, and September 14, 2012.

B. STUDENT FAILED TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT YISD DENIED STUDENT FAPE.

IDEIA mandates that all state school districts receiving federal funding must provide all handicapped children a free, appropriate, public education. The United States Supreme Court, in *Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 175, 102 S.Ct. 3034 (1982), established a two-part test for determining whether a school district has provided a student FAPE: 1) the school district must comply with the procedural requirements of IDEIA, and 2) the school district must design and implement a program “... reasonably calculated to enable the child to receive educational benefits.”

A procedural violation of IDEIA does not result in the denial of FAPE unless it results in the loss of educational opportunity to the student or seriously infringes upon the parent’s opportunity to participate in the provision of FAPE to the student. 34 C.F.R. §300.513; *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003).

A substantive violation of IDEIA depends on whether the school district’s program has provided the student with the requisite educational benefit. IDEIA does not require an education that maximizes a student’s potential; rather, the school district must provide an education reasonably calculated to enable the child to achieve some benefit. “Some benefit” means an educational program that is meaningful and provides 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.” *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 Indep. Sch. Dist. 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 Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000). In determining whether a child is receiving FAPE, the *Rowley* Court insisted that the reviewing court must not substitute its concept of sound educational policy for that of the school authorities. *Rowley*, 458 U.S. at 206.

It is well-settled that a parent, who challenges a public school program in a legal action under IDEIA, has the burden of providing, by a preponderance of the evidence, that procedural and/or violations occurred, which deprived the student of FAPE. *Tatro v. State of Texas*, 703 F.2d 832 (5th Cir. 1983), *aff’d*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 U.S. 528 (2005).

In this case, there is very little evidence to support any of the seventeen (17) issues asserted by Student against YISD. Student’s Parent was clearly concerned about one (1) restraint, which occurred on ***, 2012, and was witnessed by the Parent. The only other issue that was supported by a modicum of evidence dealt with Student’s allegations that student’s teachers were not allowing, or requiring, Student to use student’s *** in class.

1. Student Failed to Prove That the *, 2012, Restraint Was Inappropriate or Unlawful.**

19 TEX. ADMIN. CODE §89.1053(b)(2) defines “restraint” as “the use of physical force or a mechanical device to significantly restrict the free movement of all or a portion of the student’s body.” Restraints are authorized for use in an emergency, which is defined as “a situation in which a student’s behavior poses a threat of (A) imminent, serious physical harm to the student or others; or (B) imminent, serious property destruction.” 19 TEX. ADMIN. CODE §89.1053(b)(1).

Student’s Parent testified that she witnessed the ***, 2012, restraint. She testified that she observed the Principal standing over Student, who was lying face down on the floor. She testified that in addition to standing over the Student, the Principal was also holding student by student’s hands and feet. She testified that Student told her that before she witnessed the restraint, the Principal had “hogtied” student.

YISD staff contradicted this testimony. YISD staff testified that the Principal never restrained Student, let alone “hogtied” student. They testified that it was Student’s teacher who restrained student with the aid of another staff member. They testified that Student was restrained for hitting and kicking other students. They testified that Student was never in danger of injury and that the red mark on student’s face was declared by the nurse to be inconsequential. They testified that if Student, or any other child who was restrained, complained of injury, student would be taken to the nurse immediately.

In considering the sworn testimony of the parties and witnesses, the documentary evidence introduced during the hearing, and the plausible inferences drawn therefrom, I find that YISD did not inappropriately or unlawfully restrain Student on ***, 2012. Likewise, in light of the facts that 1) Student’s Parent never witnessed another restraint, and 2) Student’s Parent presented no evidence of any other restraint, all proffered violations relating to YISD’s use of restraint with Student are denied.

2. Student Failed to Prove That Student’s Inconsistent Use of * Denied Student FAPE.**

Student has an auditory impairment ***. Student has been receiving AI services from the District’s Itinerant AT Teacher since student’s enrollment in August 2010.

During the February 7, 2012, ARDC, Student’s Parent expressed concerns that YISD was not requiring Student to use student’s *** in the classroom as required by student’s IEP. The Parent’s sole evidence related to this issue was her testimony that when she came to the school, Student was not ***.

YISD staff testified that upon Student’s enrollment with the District, student’s ARDC adopted the *** ISD AI IEP, which provided Student with some direct services and use of a ***. This type of AI device consists of ***. YISD utilized the *** device until spring 2012 when Student moved into another classroom.

Student’s new BIC classroom ***, which made using *** device inappropriate as *** would *** students and staff. Accordingly, the Itinerant AI Teacher switched Student to *** in which ***.

Student did not like *** (T.62). Staff encouraged Student to use the headset, but student’s reaction was to ***. Further, Student would become frustrated and throw and break ***, apparently

on many occasions (T.62-63). Ultimately, YISD staff determined that Student did not need *** in the BIC setting every hour of the school day.

While Student's Parent did not prove that YISD failed to implement Student's *** consistently, the District's testimony clarified that Student was not using the *** every day, although the amount of inconsistency was not established.

The Parent presented no evidence to support a finding that Student's failure to use *** every day resulted in a loss of educational opportunity. To the contrary, YISD staff testified that Student did not have an educational need for *** every day for several reasons: Student indicated that student did not need *** (T.114-15, 163-64); Student had developed self-advocacy skills in relation to student's hearing loss and could signal the teacher when student could not hear (T.63); Student's classroom had a high degree of one-on-one instruction (T.64); Student's teacher and staff saw no need for *** on a daily basis in student's setting, but could see a need for the device if Student was part of a larger general education classroom (T.165). Accordingly, even though YISD did not consistently require Student to use ***, no denial of FAPE is established.

3. Student Failed to Prove the Remaining Issues Pled in the Complaint.

Student failed to present any probative evidence in support of the remaining issues set forth in student's Complaint. There was no probative evidence that 1) YISD failed to document all incidents in which restraint was used and to inform Student's Parent of all such incidents (Issue No. 2); 2) YISD's over-use of restraints caused Student's negative behaviors to escalate (Issue No. 3); 3) YISD denied Student non-educational benefits related to student's development of appropriate social skills, behavior control, and learning behaviors (Issue No. 4); 4) YISD failed to perform an appropriate counseling evaluation (Issue No. 11); 5) YISD failed to provide Student with appropriate counseling services (Issue No. 12); 6) YISD failed to complete an FBA, an OT assessment, a speech evaluation, and an AT consultation as promised by Student's February 2012 ARDC (Issue No. 16); and 7) YISD failed to appropriately address Student's symptoms of *** and *** (Issue No 17).

C. YISD FAILED TO PROVE THAT STUDENT'S PARENT PROTRACTED THE FINAL RESOLUTION OF THE PARTIES' DISPUTES BASED ON IMPROPER PURPOSES.

During the hearing, YISD asserted that Student's Parent had committed multiple acts and omissions that unnecessarily protracted the final resolution of the issues in this case and greatly increased the cost of YISD's participation. YISD requested findings of fact in support of this claim but specifically declined any award of attorneys' fees that may be appropriate under such findings (T.120-21).

34 C.F.R. §300.517(a)(1)(iii) provides that a court may award attorneys' fees to a prevailing school district if "the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." Districts must have evidence of improper motive. The filing of multiple similar due process complaints and lack of cooperation can help show motivation to harass, cause delay, or increase the cost of litigation. *Bethlehem Area Sch. Dist. v. Zhou*, 110 LRP 43218 (E.D. Pa. 07/23/10).

In this case, YISD asserted that the following acts and omissions committed by Student's Parent establish her improper motive in prolonging the litigation of the parties' issues: Student's filing, and ultimate dismissal for want of prosecution, of Docket No. 274-SE-0512, which alleged the same issues as are presented in this pending case; Student's re-filing of the same issues using a different attorney, who, like the attorney in the first case, ultimately withdrew from representing Student; Student's need for several extensions of time for the hearing to allow Student to hire new counsel, which never occurred; Student's failure to participate in the scheduled mediation in the first case; Student's ***; Student's failure to provide YISD with a list of the issues that Student believed were settled, which caused the parties to litigate all seventeen (17) issues; and Student's failure to make timely Disclosures by the March 6, 2013, Disclosure Deadline.

While the foregoing acts and omissions can be construed as frustrating, I do not find that they rise to the level required for a finding that Student's Parent filed two (2) Requests for Due Process Hearing "for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." The Parent's failure to participate in the first case after the attorney withdrew resulted in a dismissal without prejudice. The Parent immediately hired new counsel and filed the second complaint within a month of the dismissal of the former action. While Student's second attorney did, in fact, withdraw, Student's Parent continued in representing Student through the Due Process Hearing. The fact that Student failed to make required Disclosures does not necessary mean that such failure was "for any improper purpose." To the contrary, YISD activated its rights and successfully precluded Student's introduction of any undisclosed witness or documentary evidence.

V. CONCLUSIONS OF LAW

1. The one-year statute of limitations applies in this case. 20 U.S.C. §1415(f)(3)(D)(ii); 34 C.F.R. §300.511(f)(2). All of Student's claims arising before September 14, 2011, are dismissed as outside the one-year statute of limitations.
2. YISD's educational program is presumed to be appropriate. As the party challenging the educational program provided to Student by YISD, Student bears the burden of proof and must show more than a *de minimis* deprivation of educational benefit. *Schaffer v. Weast*, 126 S.Ct. 528 (2005); *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd*, 468 U.S. 883 (1984); *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000). Student failed to meet this burden in asserting that YISD employed inappropriate and unlawful restraints with Student on ***, 2012; Student failed to meet this burden in asserting that YISD's allowing Student to inconsistently use student's *** deprived student of educational benefit.
3. YISD had the burden of proving that Student's due process filings were presented for an improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. 34 C.F.R. §300.517(a)(1)(iii). YISD failed to meet this burden. *Bethlehem Area Sch. Dist. v. Zhou*, 110 LRP 43218 (E.D. Pa. 07/23/10).

**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 is DENIED. Further, and 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 Respondent is DENIED.

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

**VII.
NOTICE TO PARENTS**

The Decision of the Hearing Officer is final and appealable to state or federal district court.

Signed this the 17th day of April 2013.

/s/
Deborah Heaton McElvaney
Special Education Hearing Officer

COPIES SENT TO:

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DHM:cgc
07943/Decision

SYNOPSIS

Issue No. 1: Whether the Texas one-year statute of limitations applies in this case.

Ruling: For Respondent. Petitioner failed to prove that Respondent withheld information related to Student's restraints, Procedural Guidelines, or any other information required to be given to the parents. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F.Supp.2d 918, 945 (W.D. Tex. 2008), *rev'd in part on other grounds*, *El Paso Indep. Sch. Dist. v. Richard R.*, 591 F.3d 417 (5th Cir. 2009). Student failed to meet this burden of proof when student presented no evidence in support thereof.

Citation: 20 U.S.C. §1415(d); 20 U.S.C. §1415(f)(3)(D)(ii); 34 C.F.R. §300.504(a); 34 C.F.R. §300.511(f)(2); 19 TEX. ADMIN. CODE §89.1053(e).

Issue No. 2: Whether Respondent failed to provide Student with FAPE by improperly restraining Student.

Ruling: For Respondent. Student's ***, 2012, restraint was conducted in compliance with the operative rules. Student was properly handled; the restraint was commenced to avoid Student's hurting fellow students; Student was not injured; the restraint was properly reported.

Citation: 19 TEX. ADMIN. CODE §89.1053(b)(1) & (2)

Issue No. 3: Whether Respondent's allowing Student's inconsistent use of student's *** denied Student FAPE.

Ruling: For Respondent. The evidence did not prove that Respondent's inconsistent use of *** prevented Student from making educational progress. Student continued to signal student's teacher when student needed help hearing; student continued to progress without the consistent use of the device; no evidence supported loss of educational benefit.

Citation: *Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 175, 102 S.Ct. 3034 (1982); 34 C.F.R. §300.513; *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000).

Issue No. 4: Whether Respondent is entitled to a finding that Student improperly protracted the litigation of the parties' issues for an improper purpose.

Ruling: For Petitioner. Student's acts and omissions do not rise to the level required for such a finding. The Parent's failure to participate in the first case after the attorney withdrew resulted in a dismissal without prejudice. The Parent immediately hired new counsel and filed the second complaint within a month of the dismissal of the

former action. While Student's second attorney did, in fact, withdraw, Student's Parent continued in representing Student through the Due Process Hearing. The fact that Student failed to make required Disclosures does not necessary mean that such failure was "for any improper purpose." To the contrary, YISD activated its rights and successfully precluded Student's introduction of any undisclosed witness or documentary evidence.

Citation: 34 C.F.R. §300.517(a)(1)(iii)