WEBINAR FOR N.Y. IMPARTIAL HEARING OFFICERS (IHOS)
STATUTE OF LIMITATIONS FOR FILING FOR THE HEARING

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I. IHO Significance

- statute of limitations ("SOL") seems to be a technical adjudicative issue

- but, as the case scenario exemplifies, it has major practical effects on the parties, especially in terms of 1) whether the claims are viable, and, if so, 2) the length of liability for compensatory education or other equitable remedies (and the scope of evidence for determining or calculating this liability)

- and, as the other sections of this outline amplify, SOL similarly has major consequences for the IHO in terms of scope of evidence for the hearing and complicated determinations and calculations in terms of the applicable standards

- thus, the purpose of this webinar is to familiarize IHOs with the various issues and standards for applying SOL to typical cases, using the facts of one NY FAPE court decision as an example for application and discussion

II. Overall Organizing Framework

- review of case scenario
- definition and purposes of SOL
- triggering date of SOL
- exceptions to the triggering date
- other issues – e.g., admission of prior proof
- discussion applying these sub-issues to the case scenario
- review and revision of practice pointers

N.B. The footnoted case citations for courts in the **New York** jurisdiction are in **bold font**. As of now, similar to compensatory education, neither the Second Circuit nor published decisions within New York's jurisdiction have addressed various key components for the SOL at the IHO stage.[1] As the footnoted citations herein make clear, a recent Third Circuit decision, *G.L. v. Ligonier School Authority*, has served to stimulate national recognition of this issue, but case law from various jurisdictions, including New York, warrant careful customization, with IHOs having the lead position in reaching a clearer crystallization of the applicable standards.

[1] The SOL for other stages, including for the SRO and judicial stages, including the substantial relevant case law concerning the SOL for attorneys' fees, are a separate matter not covered herein.

III. Case scenario via timeline[2]

- 1989: birth of K.H.
- 1991: parental loss of custody to grandmother due younger brother testing positive for cocaine upon birth
- 1993 (pre-K): NYC DOE evaluation and preschool sp. ed. services
- 1994 (kgn.) – reevaluation – SLD classification – sp. ed. class
- 1995 (gr. 1) – same placement w. grandmother participation
- 1996 (gr. 2): same placement – reevaluation revealing negligible academic progress and significant behavioral difficulties – changed classification from SLD to ED w. grandmother participation – new sp. ed. class
- 1998 (gr. 4): reevaluation – added classification of ID based on IQ of 61 w. grandmother participation – changed to an ID sp. ed. class
- 1999 (gr. 5): mother regained custody – reevaluation including psychiatric report w. added diagnosis of ADHD – two-week psychiatric hospitalization at end of school year, adding diagnosis of ODD
- 2000 (gr. 6): day treatment placement at psychiatric center – another evaluation removed ID classification based on IQ of 74 and found improved behavior but no academic progress
- 2001 (gr. 7): changed placement to sp. ed. class in middle school w. mother participation
- 2003 (gr. 8): reevaluation – limited behavioral progress but not academic progress (e.g., reading)
- 2004 (gr. 9): teacher recommended vocational placement based on low academic achievement (1st grade level in reading and 3rd grade level in math) – reevaluation w. IQ of 84

[2] **K.H. v. N.Y.C. Dep't of Educ., 63 IDELR ¶ 295 (E.D.N.Y. 2014).**

- 2005 (gr. 10): change of placement to alternate assessment program at career development center – ongoing attendance problems

- 2008 (age 19): discharged from program due to continued truancy and parent's lack of response

- 2009-10 (ages 20 & 21): no IEPs or services

- May 2010: private neuropsychological evaluation including IQ of 74 and diagnoses including dyslexia, dysgraphia, and dyscalculia (and "DSM-IV diagnoses" of Learning Disorder NOS, Cognitive Disorder NOS, and Mixed Receptive-Expressive Communication Disorder)

- June 2010 (a few weeks after 21st birthday): K.H. filed for an impartial hearing, seeking relief, including compensatory education, for denial of FAPE for entire school career

District responds to complaint that 1) parents' case is untimely based on the IDEA's SOL, and, alternatively, 2) the scope of evidence and liability is limited to the last two years (starting June 2008).

Parent[3] counter-argues that the triggering date for the SOL was May 2010 and the district is liable for the entire period since 1994 based on 1) one or both of the two explicit exceptions in the IDEA, 2) the implicit exceptions of equitable tolling or continuing violations, or 3) the underlying violation, or action, starting in 1994. Alternatively, parent argues that if you accept district's asserted June 2008 triggering date that the period extends at least two year's before that date based on the IDEA's SOL language (i.e., a "2+2" period).

[3] Assume stipulation that parent and student are jointly asserting K.H.'s interests/rights.

IV. Definition and purposes of SOL generally

- a legislative expression of policy that prohibits litigants from bringing claims after a period of time, which destroys any right and remedy of the potential claimant[4]

  - to avoid staleness of evidence[5] (i.e., memories and records become incomplete or inaccurate)

  - to allow for repose[6] (i.e., at some reasonable point present and planned actions require a stable foundation of the past)

- procedurally, an affirmative defense rather than a jurisdictional prerequisite[7]

  - consequently, the burden of persuasion for the SOL is on the district[8] (though shifted to the parents for the exceptions to the SOL)[9]

  - however, failure to include it in the required response to the complaint does not constitute waiver, at least when district provides advance notice to the parent of this defense (e.g., at the prehearing)[10]

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[4] See, e.g., Estate of Busch v. Ferrel-Duncan Clinic, Inc. 700 S.W.2d 86, 56 A.L.R.4th 451 (Mo. (1985).

[5] See, e.g., Ochs v. Fed. Ins. Co., 447 A.2d 153, 36 A.L.R.4th 349 (N.J. 1982).

[6] *Id*. For the application of these purposes to the IDEA, see, e.g., Holden v. Miller-Smith, 28 F Supp. 3d 729, 735 (W.D. Mich. 2014) ("The two-year period [under the amended IDEA] permits plaintiffs to exercise their rights . . . within a reasonable period of time, protects potential defendants from a protracted fear of litigation, and promotes judicial efficiency by preventing . . . courts from having to litigate stale claims").

[7] See, e.g., **M.G. v. N.Y.C. Dep't of Educ., 15 F. Supp. Ed 296, 304, 306 (S.D.N.Y. 2014)** (citing **Somoza v. N.Y.C. Dep't of Educ., 583 F.3d 106, 111 (2d Cir. 2008)).**

[8] **K.H. v. New York City Dep't of Educ., 63 IDELR ¶ 295, at *14 (E.D.N.Y. 2014).**

[9] See, e.g., Reg'l Sch. Unit 51 v. Doe, 920 F. Supp. 2d 168 (D. Me. 2013); G.I. v. Lewisville Indep. Sch. Dist., 61 IDELR ¶ 298 (E.D. Tex. 2013); J.L. v. Ambridge Area Sch. Dist., 622 F. Supp. 2d 257 (W.D. Pa. 2009).

[10] **R.B. v. N.Y.C. Dep't of Educ., 57 IDELR ¶ 155, at *5 (S.D.N.Y. 2011)** (relying alternatively on the inapplicability of the FRCP until judicial level). *But cf*. Downingtown Area Sch. Dist., 116 LRP 5716 (Pa. SEA Jan. 4, 2016) (applying waiver subsequently at the hearing level, reasoning "in the absence of guidance, I conclude that affirmative defenses must be raised sometime before the conclusion of the evidentiary hearing").

V. IDEA provisions for SOL

- "Timeline for requesting hearing":

  > A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.[11]

- "Type of procedures – the complaint":

  > sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint [as provided above], in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.[12]

[11] 20 U.S.C. § 1415(f)(3)(C). New York mirrors, rather than differs from, the IDEA SOL. **N.Y. EDUC. LAW § 4401(1)(a).**

[12] *Id*. § 1415(b)(6)(B).

VI. Triggering Date for SOL

- "knew or should have known" (KOSHK) date[13] - then counting forward to date of filing

  - compare a "look back" period from the date of filing (common but incorrect practice)

- of the necessary facts of the "alleged action" that forms the basis of the complaint

  - "accrual"[14] when the parent has "the necessary information"[15] (at least in compensatory education cases) specific to the particular claim[16]

  - "injury" is awareness of risk of monetary loss = unilateral placement (in tuition reimbursement case)[17]

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[13] See, e.g., G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 604 n.2 (3d Cir. 2015) (citing Jana K v. Annville-Cleona Sch. Dist., 39 F. Supp. 3d 584, 596 (M.D. Pa. 2014)).

[14] See, e.g., **Somoza v. N.Y.C. Dep't of Educ., 538 F.3d 106, 114–15 (2d Cir. 2008); G.W. v. N.Y.C. Dep't of Educ., 61 IDELR ¶ 14, at *14 (S.D.N.Y. 2013), *aff'd mem*., 554 F. App'x 56 (2d Cir. 2014); K.H. v. N.Y.C. Dep't of Educ., 63 IDELR ¶ 295, at *14**; **R.B. v. N.Y.C. Dep't of Educ., 57 IDELR ¶ 155, at *4 (S.D.N.Y. 2011).** *But cf. G.L. v. Ligonier Sch. Dist.*, 802 F.3d. at 613 n.10 (eschewing nuances re "accrual" as immaterial).

[15] **K.H. v. N.Y.C. Dep't of Educ., 63 IDELR at *18** (citing Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1288 (11th Cir. 2008) ("the facts necessary," or "the critical facts"). *But cf*. Bell v. Bd. of Educ. of Albuquerque Pub. Sch., 50 IDELR ¶ 285 (D.N.M. 2010) (not when action taken was wrong); J.P. v. Enid Sch. Dist., 53 IDELR ¶ 112 (W.D. Okla. 2009) (not when it was actionable).

[16] See, e.g., **C.B. v. Pittsford Cent. Sch. Dist., 50 IDELR ¶ 149, at *16 (W.D.N.Y. 2010)** (concluding that parent's complaint about one alleged defect in the IEP "does not support the conclusion that she knew about the injury of which she now complains").

[17] **R.B. v. N.Y.C. Dep't of Educ., 57 IDELR at *4** (citing pre-IDEA 2004 decision in M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221 (2d Cir. 2003)). This per se approach in tuition reimbursement cases is not entirely precise because 1) the date of the unilateral placement is not necessarily identical to the underlying action, and 2) it arguably could be the date of deposit, the date of the end of the school year, or the first day of attendance at the private school.

VII. Explicit Exceptions[18]

- misrepresentation

  if the parent was prevented from requesting the hearing due to—
  (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint[19]

  - the prevailing view is to require proof of intent[20] + causation of delayed KOSHK[21]

- information withholding

  if the parent was prevented from requesting the hearing due to—(ii) the local educational agency's withholding of information from the parent that was required under this [IDEA] subchapter to be provided to the parent[22]

  - the prevailing view is to prove withholding of required procedural notices[23] + causation of delayed KOSHK[24]

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[18] For the burden of persuasion, see *supra* notes 8–9 and accompanying text.

[19] 20 U.S.C. § 1415(f)(3)(D).

[20] See, e.g., D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 (3d Cir. 2012) ("plaintiffs must show that the school intentionally misled them or knowingly deceived them regarding their child's progress"); *see also* Z.H. v. Lewisville Indep. Sch. Dist., 65 IDELR ¶ 106 (E.D. Tex. 2015), *adopted*, 65 IDELR ¶ 147 (E.D. Tex. 2015); Ms. S. v. Reg'l Sch. Unit 72, 64 IDELR ¶ 202 (D. Me. 2014), *adopted*, 65 IDELR ¶ 140 (D. Me. 2015).

[21] See, e.g., Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630 (S.D. Ind. 2011); *cf*. **G.W. v. N.Y.C. Dep't of Educ., 61 IDELR ¶ 14, at *15 (S.D.N.Y. 2013), *aff'd mem*., 554 F. App'x 56 (2d Cir. 2014)** (applying brief but-for analysis for KOSHK).

[22] 20 U.S.C. § 1415(f)(3)(D). The threshold step is proof of withheld information. See, e.g., **G.W. v. N.Y.C. Dep't of Educ., 61 IDELR at *15** (finding that the district did not withhold the information at issue from the parent).

[23] See, e.g., D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 (3d Cir. 2012); *see also* Z.H. v. Lewisville Indep. Sch. Dist., 65 IDELR ¶ 106 (E.D. Tex. 2015), *adopted*, 65 IDELR ¶ 147 (E.D. Tex. 2015); Avila v. Spokane Sch. Dist., 64 IDELR ¶ 171 (E.D. Wash. 2014); G.I. v. Lewisville Indep. Sch. Dist., 61 IDELR ¶ 298 (E.D. Tex. 2013); Swope v. Cent. York Sch. Dist., 58 IDELR ¶ 32 (M.D. Pa. 2012); C.H. v. Nw. Indep. Sch. Dist., 815 F. Supp. 2d 977 (E.D. Tex. 2011); Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630 (S.D. Ind. 2011); Hooker v. Dallas Indep. Sch. Dist., 56 IDELR ¶ 232 (N.D. Tex. 2011); El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918 (W.D. Tex. 2008); *cf*. **M.G. v. N.Y.C. Dep't of Educ., 15 S. Supp. 3d 296, 306–07 (S.D.N.Y. 2014)** (concluding that parents' allegation that they had not received the procedural safeguards notice in their native language plausibly qualified for this exception, without addressing whether the information is limited to the required notices and without definitively deciding whether the exception applied here).

VIII. Other, Asserted Exceptions

- equitable tolling - the general view is to regard this exception as inapplicable under the IDEA (in light of the express exceptions)[25]

- minority tolling - the general view, again, is against its applicability under the IDEA[26]

- continuing violations - the general view is similarly adverse to its applicability under the IDEA[27] (although applying the last two years indirectly may de facto use this theory)

But cf. S.H. v. Plano Indep. Sch. Dist., 487 F. App'x 850, 864 (5th Cir. 2012) (applying this exception to required membership of IEP team).

[24] See, e.g., D.K. v. Abington Sch. Dist., 696 F.3d at 247–48; *see also* M.M. v. Lafayette Sch. Dist., 767 F.3d 842 (9th Cir. 2014); Reyes v. Manor Indep. Sch. Dist., 67 IDELR ¶ 33 (W.D. Tex. 2016). Alternatively, a federal court in New York used the second prong for procedural denials of FAPE. **R.B. v. N.Y.C. Dep't of Educ., 57 IDELR at *6** (requiring loss of educational opportunity or serious deprivation of parental opportunity for meaningful participation).

[25] See, e.g., D.K. v. Abington Sch. Dist., 696 F.3d at 248; Holden v. Miller-Smith, 63 IDELR ¶ 153, (W.D. Mich. 2014); D.C. v. Klein Indep. Sch. Dist., 711 F. Supp. 2d 739 (S.D. Tex. 2010); *cf*. Breanne v. S. York Cnty. Sch. Dist., 665 F. Supp. 2d 504 (M.D. Pa. 2009) (denying its applicability at least "under the circumstances present here"); L.P. v. Longmeadow Pub. Sch., 59 IDELR ¶ 169 (D. Mass. 2012) (finding it inapplicable in the absence of extraordinary circumstances).

[26] See, e.g., D.K. v. Abington Sch. Dist., 696 F.3d at 248; Reyes v. Manor Indep. Sch. Dist., 67 IDELR ¶ 33 (W.D. Tex. 2016); Baker v. S. York Area Sch. Dist., 53 IDELR ¶ 214 (M.D. Pa. 2009); *cf*. Breanne v. S. York Cnty. Sch. Dist., 665 F. Supp. 2d 504 (M.D. Pa. 2009) (denying its applicability at least in the factual circumstances of this case); Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669 (S.D.N.Y. 2011) (rejecting this doctrine for pre-IDEA 2004 claims, while noting split in judicial authority during that silent period). *But cf*. Michelle K. v. Pentucket Reg'l Sch. Dist., 79 F. Supp. 3d 361 (D. Mass. 2015) (applying to claims filed by now-adult student and seemingly tangential to exhaustion ruling).

[27] See, e.g., D.K. v. Abington Sch. Dist., 696 F.3d at 248; E.F. v. Newport Mesa Unified Sch. Dist., 65 IDELR ¶ 265 (C.D. Cal. 2015); Jefferson Cnty. Bd. of Educ. v. Lolita S., 977 F. Supp. 2d 1091 (N.D. Ala. 2013), *aff'd on other grounds*, 581 F. App'x 760 (11th Cir. 2014); Bell v. Bd. of Educ. of Albuquerque Pub. Sch., 50 IDELR ¶ 285 (D.N.M. 2010). *But cf*. Jana K. v. Annville-Cleona Sch. Dist., 39 F. Supp. 3d 584 (M.D. Pa. 2014) (applying purportedly distinguishable use of continuing violations to fill out the 2+2 analysis in a child find case).

IX. Duration and Effect

- if timely filed, is the period a maximum of two years after the KOSHK[28] or does it also extend, per the two parts of the statutory provision, up to two years before the KOSHK (i.e., a 2+2 year period) for the violation[29]?

    - although not yet addressed in the NY jurisdiction, the likely answer is a 2-year, not 2+2 year, period

- instead, if timely filed, is the scope of the relevant period for the denial of FAPE[30] or at least the remedy[31] open-ended?

    - the relevant period for the remedy extends back before the KOSHK but the exact boundary is not yet clearly settled

        ex. the "alleged action" for the denial of FAPE to be remedied may be longer than the period of filing[32]

        ex. the qualitative approach for calculating compensatory education may be longer (or shorter) and the period for the denial of FAPE[33]

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[28] G.L. v. Ligonier Sch. Dist. Auth., 802 F.3d at 625.

[29] See, e.g., Jana K. v. Annville-Cleona Sch. Dist., 39 F. Supp. 3d 584 (M.D. Pa. 2014); Morgan M. v. Penn Manor Sch. Dist., 64 IDELR ¶ 309 (E.D. Pa. 2015) (all overruled by *G.L.*).

[30] **K.H. v. N.Y.C. Dep't of Educ., 63 IDELR at *18** (finding KOSHK triggered claims spanning entire 14-year period of eligibility).

[31] G.L. v. Ligonier Sch. Dist. Auth., 802 F.3d at 625 (concluding that "when a school district has failed in that responsibility and parents *have* taken appropriate and timely action under the IDEA, then that child is entitled to be made whole with nothing less than a 'complete' remedy" (citing Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 244 (2009)).

[32] G.L. v. Ligonier Sch. Dist. Auth., 802 F.3d at 625–26 (ruling that "assuming parents timely file that complaint and liability is proven, Congress did not abrogate our longstanding precedent that 'a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem'").

[33] *Cf.* **Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 457 (2d Cir. 2015)** (dicta citing Reid v. Dist. of Columbia, 401 F.3d 516 (D.C. Cir. 2005)); **M.W. v. N.Y.C. Dep't of Educ., 66 IDELR ¶ 71, at *4 (S.D.N.Y. 2015)** (citing both *E. Lyme* and *Reid*). See the materials from the January 2014 webinar as to the requisite standard and the calculation approach for compensatory education.

X. Other Issues

- inconsistent and potentially distracting meaning of "accrual" in the SOL context[34] – KOSHK or underlying action?

- admission of evidence for prior period – within IHO's discretion for background only[35]; however, unclear how this general rule applies to the prior period for the denial of FAPE and/or its remedy[36]

- prehearing procedures or, in their absence, IHO actions at the inception of the hearing to determine whether SOL is at issue and, if so, the specific contours in terms of (1) triggering date, (2) exceptions, (3) the alleged action (or FAPE denial), and/or (4) remedy, including stipulations

[34] G.L. v. Ligonier Valley Sch. Auth., 801 F.3d at 613 n.13 (acknowledging different interpretations but finding it unnecessary to resolve them in this case).

[35] See, e.g., Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1086 (9th Cir. 2002); Indep. Sch. Dist. No. 413 v. H.M.J., __ F. Supp. 3d __ (D. Minn. 2015); J.Y. v. Dothan City Bd. of Educ., 63 IDELR ¶ 33 (M.D. Ala. 2014); Dep't of Educ., State of Haw. v. R.H., 61 IDELR ¶ 127 (D. Haw. 2013); A.I. v. Dist. of Columbia, 402 F. Supp. 2d 152 (D.D.C. 2005); *cf.* Phyllene v. Huntsville City Bd. of Educ., __ F. App'x __ (11th Cir. 2015) (allowing evidence from beyond the limitations period to establish child find violation upon reevaluation).

[36] See *supra* notes 32–33 and accompanying text.

XI. Practice Pointers

- Keeping in mind that the burden to raise the issue of the SOL is on the district, presumably prior to witness stage and that *G.L.* is not binding in New York (and that *K.H.* is of limited authority), be ready to follow up quickly to instruct the parties your expectations as for specific and timely arguments and evidence as to the KOSHK, the underlying action, and any other SOL factors that may be at issue. In such cases, encourage stipulations to limit the areas of dispute, and consider whether bifurcation with a timely interim order would be appropriate instead of integrating this issue with the rest of the case.

- If the triggering date is at issue, make sure the evidence as to the KOSHK is sufficiently specific as to when the parents had the necessary facts as to the particular claim.

- If exceptions are at issue, recognize their judicially construed narrowness.

- If you determine that the parents timely filed one or more claims, recognize that the period for the denial of FAPE and its remedy may (or may not) be longer than the period between the KOSHK and the filing date, depending on the determined date of the alleged action and, at least if compensatory education is warranted, the applicable approach.

    - For pure tuition reimbursement cases, the periods typically coincide, starting with the date of the unilateral placement.

    - However, for cases where compensatory education is at issue (with or without tuition reimbursement for a different period), make sure that the evidence and the briefs address the period for the denial of FAPE and the calculus for and of the amount.

- Make extra efforts for thorough fact finding and legal conclusions for SOL determinations, because appeals are likely until the courts in your jurisdiction arrive at more a more clearly settled state of the law for these significant and nuanced issues.