PRE-PUBLICATION COPY; FOR USE BY N.Y. HEARING OFFICERS ONLY WITHOUT DISSEMINATION

Of Mouseholes and Elephants: The Statute of Limitations for Impartial Hearings Under the Individuals with Disabilities Education Act

Perry A. Zirkel*

The Individuals with Disabilities Education Act (IDEA)[1] provides funding for special education along with a detailed set of requirements for state and local agencies.[2] For example, it specifies various procedural safeguards, including the right to an impartial hearing.[3] The IDEA has been the avenue of frequent litigation.[4] Due to the rather robust application of the exhaustion doctrine in IDEA cases,[5] the impartial hearing is, for the most part, the exclusive gateway for

*Perry A. Zirkel (Ph.D., J.D., U. Connecticut; LL.M., Yale U.) is university professor emeritus of education and law at Lehigh University. This article will appear in a 2016 issue of the JOURNAL OF THE NATIONAL ADMINISTRATIVE LAW JUDICIARY.

[1] 20 U.S.C. § 1400 *et seq*. (2012). Originally enacted as the Education of the Handicapped Act of 1970, Pub. L. 91-230, 84 Stat. 1725 (codified as amended in scattered sections of 20 U.S.C.)

[2] *See generally* Perry A. Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA*, 282 EDUC. L. REP. 767 (2012), for a systematic overview of the various features of the IDEA, including the procedural safeguards, in comparison to Section 504 and the Americans with Disabilities Act.

[3] 20 U.S.C § 1415(f); *see also* Zirkel, *supra* note 2 at 768; *see generally* Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3 (2010) (snapshot of the varying state systems administrative adjudications for the IDEA pursuant to cooperative federalism); Perry A. Zirkel, Zorka Karanxha & Anastasia D'Angelo, *Creeping Judicialization of Special Education Hearings?: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27 (2007) (tracing gradual legalization of the impartial hearing process under the IDEA).

[4] *See, e.g.*, Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1 (2011) (revealing the upward trajectory of IDEA litigation within the relatively level trend of K–12 litigation within the past three decades); Tessie Rose Bailey & Perry A. Zirkel, *Frequency Trends of Court Decisions under the Individuals with Disabilities Education Act*, 28 J. SPECIAL EDUC. LEADERSHIP 3 (2015) (computing states' relative IDEA judicial decisions rankings); *cf.* Perry A. Zirkel, *Longitudinal Trends in Impartial Hearings under the IDEA*, 302 EDUC. L. REP. 1 (2014) (computing the relative rankings of the states for due process hearing decisions under the IDEA).

[5] 20 U.S.C. § 1415(l) (2012). *See* Louis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction under the Individuals with Disabilities Education Act: Lessons from the Case Law and Proposals for Congressional Action*, 29 J. NAT'L ADMIN. L. JUDICIARY 349 (2009), for a comprehensive overview, including the relatively narrow exceptions, of

IDEA litigation.[6]

In turn, one of the significant threshold issues for the impartial hearing is the applicable statute of limitations (SOL), including its starting point, duration, and effect. The recent Third Circuit Court of Appeals decision in *G.L. v. Ligonier Valley School District Authority*[7] illustrates the SOL's high-stakes significance under the IDEA for plaintiff parents, defendant districts, and impartial hearing officers (IHO). Assessing the decision's importance and potential implications requires a systematic, comprehensive, and relatively concise canvassing of the relevant IDEA provisions and related case law. The frame of reference for this case law analysis is the prevailing practice of IHOs to apply the SOL as the window for the issues and, for the most part, the evidence and relief under the IDEA.

Prior to the 2004 amendment of the IDEA,[8] the statute and its extensive regulations[9] were silent regarding the SOL at the hearing level. Because most jurisdictions lacked a corollary state law addressing the SOL at the hearing level, courts utilized a borrowing approach to fill this gap

---

this exhaustion provision as applied to IDEA claims. The application to this provision to non-IDEA claims is a separate matter, although it reinforces its relative rigorousness. *See, e.g.,* Peter J. Maher, *Caution on Exhaustion: The Courts' Misinterpretation of the IDEA's Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA But Not by the IDEA*, 44 CONN. L. REV. 259 (2011). Finally, for the intersection of exhaustion and SOL, *see, e.g.*, Molina v. Bd. of Educ. of Los Lunas Sch., 67 IDELR ¶ 18 (D.N.M. 2015).

[6] *See, e.g*., Perry A. Zirkel, *Trends in Impartial Hearings under the IDEA: A Follow-Up Analysis*, 303 EDUC. L. REP. 1 (2014); Perry A. Zirkel, *Longitudinal Trends in Impartial Hearings under the IDEA*, 302 EDUC. L. REP. 1 (2014) (computing states' relative IDEA due process hearing decisions rankings).

[7] 802 F.3d 601 (3d Cir. 2015). A month after the decision, the Third Circuit denied the defending district's motion for rehearing en banc.

[8] 118 Stat. 2647, 2803 (P.L 108-446, § 302(a)(1)) (Dec. 4, 2004).

[9] 34 C.F.R. §§ 300.1–300.818 (2014).

based on the applicable state's analogous law, resulting in a wide variety of results.[10]

However, the 2004 IDEA amendment filled this gap, providing SOL provisions for both the hearing and judicial levels.[11] The purpose of this article, in light of the practical significance and the limited literature addressing the IDEA's hearing level SOL,[12] is to provide a current and concise overview of the case law addressing this specific issue.[13] Part I provides the basic nature and purpose of SOL generally, and specifically how SOL applies to the IDEA's impartial

---

[10] *See* Perry A. Zirkel & Peter J. Maher, *The Statute of Limitations under the Individuals with Disabilities Education Act*, 175 EDUC. L. REP. 1 (2003), for a snapshot of each state's pre-IDEA SOL period for both the hearing and court levels.

[11] *See infra* notes 19, 21 and accompanying text, for impartial hearings SOL. *See* 20 U.S.C. § 1415(i)(2)(B) for the judicial level SOL which requires filing for judicial review within ninety days of the IHO's decision unless a state law specifies a different period.

[12] *See, e.g.*, Jennifer R. Valverde, *A Poor IDEA: Statute of Limitations Decisions Cement Second Class Remedial Scheme for Low Income Children with Disabilities in the Third Circuit*, 41 FORDHAM URB. L.J. 599 (2013) (advocating for Congress and the courts to adopt the approach that the IDEA statute of limitations constitute a filing deadline that does not limit the scope of compensatory education relief).

[13] In contrast, the scope of this article does not extend to the more extensive case law concerning the IDEA SOL for the judicial stage generally. *See, e.g.*, Blunt v. Lower Merion Sch. Dist., 767 F.3d 247 (3d Cir. 2014); M.R. v. Ridley Sch. Dist., 744 F.3d 112 (3d Cir. 2014); J.H. v. Nevada City Sch. Dist., 65 IDELR ¶ 77 (D. Nev. 2015); Boatright v. Sch. Bd. of Polk Cnty., 52 IDELR ¶ 101 (M.D. Fla. 2009); *cf.* Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669 (S.D.N.Y. 2011) (SOL for unexhausted claims). Moreover, it does not extend to the even more extensive case law concerning the IDEA SOL for the judicial stage as applied to attorneys' fees claims. *See, e.g.*, D.G. v. New Caney Indep. Sch. Dist., 806 F.3d 310 (5th Cir. 2015); Meridian Joint Sch. Dist. No. 2 v. D.A., 792 F.3d 1054 (9th Cir. 2015); Walhovd v. Bellflower Unified Sch. Dist., 526 F. App'x 803 (9th Cir. 2013); Bd. of Educ. of Evanston-Skokie Cmty. Consol. Sch. Dist. v. Luca, 66 IDELR ¶ 135 (N.D. Ill. 2015); Doe v. Boston Pub. Sch., 80 F. Supp. 3d 332 (D. Mass. 2015); Brittany O. v. Bentonville Sch. Dist., 64 IDELR ¶ 299 (E.D. Ark. 2015); Concepcion-Torres v. Puerto Rico, 43 F. Supp.3d 170 (D.P.R. 2014); Brown v. Dist. of Columbia, 64 IDELR ¶ 10 (D.D.C. 2014): T.T. v. Cnty. of Marin, 62 IDELR ¶ 49 (N.D. Cal. 2013); C.L. v. Lucia Mar Cent. Sch. Dist., 61 IDELR ¶ 224 (C.D. Cal. 2013); Horen v. Bd. of Educ. of City of Toledo, 950 F. Supp. 2d 246 (N.D. Ohio 2013); Northport Pub. Sch. v. Woods, 60 IDELR ¶ 154 (W.D. Mich. 2013). Another such exclusion is for the SOL for student claims under section 504 of the Americans with Disabilities Act. *See, e.g.,* P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009); Ripple v. Marble Falls Indep. Sch. Dist., 99 F. Supp. 3d 662 (W.D. Tex. 2015); T.L. v. Sherwood Charter Sch., 62 IDELR ¶ 284 (D. Or. 2014); Pagan-Negron v. Seguin Indep. Sch. Dist., 974 F. Supp. 2d 1020 (W.D. Tex. 2013); Kabacinski v. State of Del. Dep't of Educ., 62 IDELR ¶ 133 (D. Del. 2013); Gaudino v. Stroudsburg Area Sch. Dist., 61 IDELR ¶ 193 (M.D. Pa. 2013); Horen v. Bd. of Educ. of City of Toledo, 948 F. Supp. 2d 793 (N.D. Ohio 2013); Brown v. Napa Valley Sch. Dist., 59 IDELR ¶ 291 (N.D. Cal. 2012); J.W. v. Johnston Cnty. Bd. of Educ., 59 IDELR ¶ 246 (E.D.N.C. 2012); Baker v. S. York Area Sch. Dist., 53 IDELR ¶ 214 (M.D. Pa. 2009).

hearings. Parts II–IV addresses the elements of the SOL statutory provisions in terms of the triggering date, the exceptions, and the duration and effect of the SOL, including the importance of *G.L. v. Ligonier Valley School District Authority*.[14]

I. SOL GENERALLY AND AS SPECIFICALLY APPLIED TO IDEA IMPARTIAL HEARINGS

The SOL general nature and purposes, as Zirkel and Maher observed, are:

> "Statute of limitations" is 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.[15] It applies specifically to a particular action in law or equity, whether civil or criminal. Its purposes are to 1) to require that claims be advanced while the evidence to rebut them is not stale, and 2) to penalize dilatoriness for the sake of repose.[16]

As a result of the 2004 amendments, the IDEA contains two provisions regarding the IHO-level SOL.[17] In this context, SOL has these same basic purposes as in civil law more generally.[18] The first provision, under the caption "timeline for requesting hearing" is:

> 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

---

[14] 802 F.3d 601 (3d Cir. 2015). The overall focus here will be on the hearings where the parents are the filing party, which is the typical posture. However, the IDEA's SOL provisions also apply to districts that file more than a negligible proportion of IDEA impartial hearings. *See, e.g.*, Cathy A. Skidmore & Perry A. Zirkel, *Has the Supreme Court's Schaffer Decision Placed a Burden on Hearing Officer Decision-Making under the IDEA*, 35 J. NAT'L ADMIN. L. JUDICIARY (forthcoming 2015) (finding that districts filed eighteen percent of a sample of IDELR-published IHO decisions from 1978 to 2013).

[15] Zirkel & Maher, *supra* note 10, at 2 (citing Estate of Busch v. Ferrel-Duncan Clinic, Inc., 700 S.W.2d 86 (Mo. 1985).

[16] Zirkel & Maher, *supra* note 10, at 2 (citing Ochs v. Fed. Ins. Co., 447 A.2d 153 (N.J. 1982)).

[17] *See infra* notes 19, 21 and accompanying text. The 2006 regulations merely mirror the wording of these two SOL provisions without elaboration. 34 C.F.R §§ 300.507(a)(2), 300.511(e) (2013).

[18] *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.").

State law allows.[19]

The second provision, under "types of procedures," provides the following specification for the request, referred to synonymously as "the complaint"[20]:

> 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 under this subchapter, 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.[21]

The remaining parts of this article address the case law specific to each of the features of this pair of provisions, including the exceptions and the durational issues in the Third Circuit's recent *G.L*. decision.[22] As a transitional threshold matter, the prevailing view is that the SOL is an affirmative defense.[23] Consequently, the burden of persuasion is on the party asserting the defense,[24] with the burden shifting to the party asserting exceptions to the SOL.[25]

II. TRIGGERING DATE

It is not uncommon for IHOs to follow the lead of courts to apply the IDEA SOL without

---

[19] 20 U.S.C. § 1415(f)(3)(C).

[20] *See, e.g.*, *id*. §§ 1415(b)(6), 1415(b)(8), 1415(c)(2)(A), 1415(d)(1)(A).

[21] *Id*. § 1415(b)(6)(B).

[22] G.L. v. Ligonier Valley Sch. Dist. Auth.*,* 802 F.3d 601 (3d Cir. 2015).

[23] *See, e.g.*, M.G. v. N.Y.C. Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 (S.D.N.Y. 2014) (citing Somoza v. N.Y.C. Dep't of Educ., 538 F.3d 106, 111 (2d Cir. 2008)).

[24] *See, e.g.*, K.H. v. N.Y.C. Dep't of Educ., 63 IDELR ¶ 295, at *16–17 (E.D.N.Y. 2014).

[25] *See, e.g.*, Reg'l Sch. Unit 51 v. Doe, 920 F. Supp. 2d 168, 197 (D. Me. 2013); G.I. v. Lewisville Indep. Sch. Dist., 61 IDELR ¶ 298, at *9 (E.D. Tex. 2013); J.L. v. Ambridge Area Sch. Dist., 622 F. Supp. 2d 257, 268 (W.D. Pa. 2008).

specific discussion or analysis, as a "look back" from the date of filing.[26] However, as the first aforementioned[27] statutory provision makes clear, the triggering date for the filing deadline is that upon which the parent "knew or had reason to know," which some courts have referred to as the "know or should have known" (KOSHK) date.[28] Moreover, the KOSHK is specifically connected in the statute to the "alleged action that forms the basis of the complaint."[29] In the cases to date, courts have variously interpreted this connection.[30] For example, taking a strict approach, one federal district court in an unpublished decision concluded that, based on the plain language of the statute, this limitations period is "two years from the date that the parents knew of the complained-of action, not two years from the date that the parents knew the action taken was wrong."[31] Similarly, another federal court clarified that the KOSHK is specific to the action,

---

[26] *See*, *e.g.*, C.B. v. Special Sch. Dist., 636 F.3d 981 (8th Cir. 2011); Davis v. Hampton Pub. Sch. Dist., 53 IDELR ¶ 231 (E.D. Va. 2009), *aff'd mem*., 352 F. App'x 780 (4th Cir. 2009); Indep. Sch. Dist. No. 413, Marshall v. H.M.J. *ex rel.* A.J., M.N., No. CIV. 14-2114 JRT/HB, 2015 WL 4744505 (D. Minn. Aug. 11, 2015); Coleman v. Pottstown Sch. Dist., 983 F. Supp. 2d 543 (E.D. Pa. 2013); Pass v. Rollinsford Sch. Dist., 928 F. Supp. 2d 349 (D.N.H. 2013); Swope v. Cent. York Sch. Dist., 58 IDELR ¶ 32 (M.D. Pa. 2012); Littman v. Livingston Twp. Sch. Dist., 55 IDELR ¶ 139 (D.N.J. 2010); *cf.* Hooker v. Dallas Indep. Sch. Dist., 55 IDELR ¶ 166 (N.D. Tex. 2010) (parallel state law but for one-year period).

[27] *See supra* text accompanying note 19.

[28] *See*, *e.g.*, G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d at 604 n.2.

[29] *Id*.

[30] In some cases, the underlying action is clear-cut. *See, e.g*., Mittman v. Livingston Twp. Bd. of Educ., 55 IDELR ¶ 139 (D.N.J. 2010) (identifying the action as the IEP team's exiting the child from special education). However, defining in KOSHK date in tuition reimbursement cases in a similarly per se way as the time of the unilateral placement, *e.g.*, R.B. v. Dep't of Educ. of N.Y.C., 57 IDELR ¶ 155, at *4 (S.D.N.Y. 2011) (citing M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221 (2d Cir. 2003), which was based on section 1983 accrual), is imprecise because 1) it is not necessarily identical to the underlying action, and 2) the date of the unilateral placement 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).

[31] Bell v. Bd. of Educ. of Albuquerque Pub. Sch., 50 IDELR ¶ 285, at *15 (D.N.M. 2010). Although the IDEA SOL applies equally to the school district, in this case the parents were the filing party. Moreover, in this case the action was the district's individualized education program (IEP) classification of the child, whereas it was not until much later that the parents knew or had reason to know that this action was allegedly a misclassification. Based on undisputed evidence that the parents know of the child's

not when it was actionable.[32] Representing a more forgiving approach, more than one other court, including the Eleventh Circuit Court of Appeals, interpreted the KOSHK as not applying until the parents have the necessary facts of the alleged violation.[33] Finally, using language that originated with section 1983 federal civil rights claims,[34] various other courts reached mixed results based on the more ambiguous translation of the target KOSHK event as the "injury."[35]

The determination of the KOSHK date is critical but problematic regardless of the semantic formulation of the underlying action. A Pennsylvania case serves as an example.[36] The student, who had a lifelong gastrointestinal condition that caused cyclic vomiting, experienced continuing difficulties in school starting in kindergarten based in part on health-related attendance issues.[37] His parents withdrew him for parochial schooling in grades one

---

classification upon the development of the first IEP, the court concluded that the period began to run at that earlier date, thus expiring before the filing of their hearing request. The court alternatively used the term "accrue" for the start of the period. *Id*. at *17.

[32] J.P. v. Enid Sch. Dist., 53 IDELR ¶ 112, at *5 (W.D. Okla. 2009) (concluding that the triggering date is "when the parent 'knew or should have known about the alleged action that form the basis of the complaint,' and not when the parent becomes aware that the school district's actions are actionable").

[33] *See*, *e.g.*, Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275 (11th Cir. 2008); K.H. v. N.Y.C. Dep't of Educ., 63 IDELR ¶ 295 (E.D.N.Y. 2014); Gwinnett Cnty. Sch. Dist. v. A.A., 54 IDELR ¶ 316 (N.D. Ga. 2010). The *K.H*. court similarly referred to the start of this period as "claim accrual." K.H. v. N.Y.C. Dep't of Educ., 63 IDELR at *14.

[34] *See*, *e.g.*, Alexopulos v. Riles, 784 F.2d 1408, 1411 (9th Cir. 1986) ("Under federal law a cause of action generally accrues when a plaintiff learns of the injury which is the basis of his action."). The bridge in the New York cases was M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221 (2d Cir. 2003).

[35] *See*, *e.g.*, G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d at 607, 611; Lauren G. v. W. Chester Area Sch. Dist., 906 F. Supp. 2d 375 (E.D. Pa. 2012); R.B. v. Dep't of Educ. of N.Y.C., 57 IDELR ¶ 155 (S.D.N.Y 2011); C.B. v. Pittsford Cent. Sch. Dist., 54 IDELR ¶ 149 (W.D.N.Y. 2010). All of these cases refer to the triggering of the SOL in terms of accrual. Lauren G. v. W. Chester Area Sch. Dist., 906 F. Supp. 2d at 386; R.B. v. Dep't of Educ. of N.Y.C., 57 IDELR at *4; C.B. v. Pittsford Cent. Sch. Dist., 54 IDELR at *16; *see also* Somoza v. N.Y.C. Dep't of Educ., 538 F.3d 106, 114 (2d Cir. 2008) (bridging the pre-IDEA 2004 and the IDEA 2004 SOL).

[36] Centennial Sch. Dist. v. S.D., 58 IDELR ¶ 45 (E.D. Pa. 2011).

[37] *Id.* at *2.

through four and, after hospitalization, again in grades seven through nine.[38] The parents filed for an impartial hearing on January 23, 2009, in the middle of grade twelve.[39] The IHO used a look back period to eliminate the period before the middle of grade ten.[40] For the remaining two-year period, the IHO ruled in the parent's favor, concluding that the district should have identified the student as eligible under the IDEA and provided him with the required free appropriate public education (FAPE).[41] Upon both parties' appeal, the court cited the aforementioned[42] Oklahoma case for the KOSHK reference point, which in this case was "[the district's failure] to respond sufficiently and effectively to concerns expressed by parents about a child's functioning in school."[43] The parents contended that they did not have actual or constructive knowledge of the alleged denial of services until 2008.[44] The district argued that the KOSHK date was far earlier because they would have known of their right to request an evaluation by either checking the annual notice of IDEA rights that the district published in the local newspaper and included on the parent calendars or consulting an attorney.[45] However,

---

[38] *Id.* at *2–3.

[39] *Id.*

[40] *Id.* at *2. The IHO in this case did some mental manipulations before ultimately arriving at a look back period. More specifically, first finding the KOSHK to be in 2001, the IHO reasoned that every day of alleged denial of FAPE was a separate action, thus ultimately concluding that "every date up to January 23, 2007, two years back from the date Parents filed the instant complaint on January 23, 2009, is untimely." *Id*.

[41] *Id.*

[42] *See supra* note 32.

[43] Centennial Sch. Dist. v. S.D., 58 IDELR at *5.

[44] *Id.*

[45] *Id*. at. *6.

apparently viewing the complaint as including a child find claim,[46] the court reasoned that "a reasonable inference from the evidence is that the District's failure to provide [the] parents with a 'permission to evaluate form' . . . could have led them to believe that: (1) [the student] had no rights under the IDEA; or (2) a request for an evaluation or a meeting with an attorney would be fruitless."[47] As a result, the court concluded that the KOSHK date was "at least at the end of 2006–2007," thus making their complaint timely.[48] However, although not entirely clear, the effect of this determination in this case appears to have been to merely confirm the two-year denial of FAPE, whereas an alternative interpretation would be to extend the remedy back to whenever the district had reason to evaluate the student as eligible.[49]

It is likely that school districts and parents will separately try to document or otherwise solidify proof of the triggering date and action that favors their position. Such evidence will include not only the documented history of the case but also the testimony at the hearing. For example, in a recent New Hampshire case, the guardian's testimony was the key in determining the SOL for her challenge to the IEPs for grades nine, ten, and eleven.[50] Specifically, the guardian testified on direct examination that when she signed the IEP for grade nine, she did so to confirm her participation, but not to agree with the contents because she "felt that [the student]

---

[46] For the reasonable suspicion and reasonable period requirements of child find; *see*, *e.g.*, Perry A. Zirkel, *"Child Find": The Lore v. the Law*, 307 EDUC. L. REP. 574 (2014).

[47] Centennial Sch. Dist. v. S.D., 58 IDELR at *6.

[48] *Id*. at *7. It may be argued that the court's reasoning contradicted its recited standard, because the parent knew of the alleged failure much earlier but did not realize that this action (or in this case, inaction) was actionable until the designated time (or at the time they finally did consult an attorney and file for a hearing).

[49] Oddly straddling the fence between child find and FAPE, the court declined to rule on whether the student was eligible for services under the IDEA. *Id*. at *8 n.12.

[50] Pass v. Rollinsford Sch. Dist., 928 F. Supp. 2d 349 (D.N.H. 2013).

needed more."[51] The court concluded that this testimony preponderantly proved that she discovered the district's alleged violation on the date of signing the IEP, "thus triggering the running of the limitations period."[52] Because she did not request a hearing until two and a half years later, she was time-barred from challenging the ninth grade IEP but not the two subsequent IEPs.[53] Similarly, evidence of whether and when the district provided the parents with the procedural safeguards notice may be critical as to the triggering date.[54]

III. EXCEPTIONS

The IDEA specifies two exceptions. Additionally, parties seeking to avoid being time-barred have asserted the alternative theories of equitable tolling, minority tolling, and continuing violations.[55]

Statutory Exceptions

1. Misrepresentation. The first of the IDEA's two explicit exceptions concerns misrepresentation, specifically providing that the SOL shall not apply under the following circumstances: "if the parent was prevented from requesting the hearing due to—(i) specific

---

[51] *Id*. at 364.

[52] *Id*. The court accorded weight to the guardian's contention that "a parent or guardian who lacks expertise in the field of special education may not recognize an IEP's deficient design until the IEP is implemented and problems begin to emerge," but concluded that her testimony that she immediately appreciated the IEPs defects as even weightier. *Id*. at 365 n.8. For another such determination, see Jefferson Cnty. Bd. of Educ. v. Lolita S., 977 F. Supp. 2d 1091, 1123 (N.D. Ala. 2013), *aff'd on other grounds*, 581 F. App'x 760 (11th Cir. 2014) (reasoning that the parent, who was "not a novice to the special education system, having other children who were involved in special education," had reason to know of her child find claim when she received the students failing grades).

[53] 928 F. Supp. 2d 349 at 364.

[54] *See, e.g.,* Marc V. v. N.E. Indep. Sch. Dist., 455 F. Supp. 2d 577, 591 (W.D. Tex. 2006) (upholding the IHO's determination that the KOSHK date was when the parents' received the procedural safeguards notice).

[55] *See infra n*otes 90–96 and accompanying text.

misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint."[56] This language includes not only specific misrepresentations but also a causal connection (via "prevented") and a limiting predicate (i.e., resolving the underlying action).[57]

The leading case thus far is the Third Circuit's published decision in *D.K. v. Abington School District*.[58] For the "specific misrepresentation" element, the court agreed with most of the district courts in the circuit[59] that intent, not merely negligence, was required. Thus, the Third Circuit ruled that to qualify for this exception "plaintiffs must show that the school intentionally misled them or knowingly deceived them regarding their child's progress."[60] Applying this exception, the *D.K.* court concluded that the various conferences and other communications with the parents fell "well short" of not only the intentional or knowing requirement, but also the problem-resolution requirement.[61] Thus, the *D.L.* court did not the aforementioned[62] third essential element—causation.

The causation element was the undoing of the parents' assertion of this exception in a

---

[56] 20 U.S.C. § 1415(f)(3)(D) (2012).

[57] *Id.*

[58] 696 F.3d 233 (3d Cir. 2012).

[59] *Id.* at 245 (citing I.H. v. Cumberland Valley Sch. Dist., 842 F. Supp. 2d 762 (M.D. Pa. 2012); Evan H. v. Unionville-Chadds Ford Sch. Dist., 51 IDELR ¶ 157 (E.D. Pa. 2008)). The court did not cite two other prior pertinent lower court rulings: Sch. Dist. of Philadelphia v. Deborah A., 52 IDELR ¶ 67 (E.D. Pa. Mar. 24, 2009), *aff'd on other grounds*, 422 F.3d 766 (3d Cir. 2011) (agreeing with the narrow interpretation); J.L. v. Ambridge Area Sch. Dist., 622 F. Supp. 2d 257 (W.D. Pa. 2009) (adopting a broader view).

[60] D.K. v. Abington Sch. Dist., 696 F.3d at 246.

[61] *Id*. at 247.

[62] *See supra* text accompanying note 57.

pre-*D.K*. district court decision in Indiana.[63] In this case, the court expressed doubt but did not definitively decide whether the alleged testing information violations constituted misrepresentation, concluding that the parents failed to show how this asserted misrepresentation prevented the parents from requesting a hearing within the prescribed period.[64] Similarly, the causation requirement led to the failure to qualify for this exception in a post-*D.K*. decision in Pennsylvania.[65]

Conversely, the intent requirement was fatal for parents in various lower court decisions post-*D.K*. First, in two successive decisions within the Third Circuit, federal district courts ruled that the parents failed to prove the requisite intentional or knowing misrepresentation.[66] Second, the federal district court in Maine followed *D.K.* to require intentionality, which the parents failed to prove.[67] Third, a federal district court decision in Texas, which has a one-year limitations period[68] per the IDEA express allowance,[69] followed a pre-*D.K*. decision in Texas to

---

[63] Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630 (S.D. Ind. 2011).

[64] *Id*. at 643–44.

[65] Shadie v. Forte, 61 IDELR ¶ 40, at *5 (E.D. Pa. 2013), *aff'd on other grounds sub nom* Shadie v. Hazleton Area Sch. Dist., 580 F. App'x 67 (3d Cir. 2014)).

[66] Coleman v. Pottstown Sch. Dist., 983 F. Supp. 2d 543, 569 (E.D. Pa. 2013), *aff'd on other grounds*, 581 F. App'x 141 (3d Cir. 2014); W.H. v. Schuykill Valley Sch. Dist., 954 F. Supp. 2d 315 (E.D. Pa. 2013). In *Coleman*, the court rejected the parents' contention that *D.K*. extended the standard to egregious misstatements or willful indifference, concluding that this argument was unconvincing and, in any event, lacking in preponderant proof in this case. *Id.* at 569 n.57. The effect of the *Coleman* court's ruling was to uphold the IHO's look-back time bar against the claims beyond the two-year period prior to filing. *Id*. at 569. In *W.H*., the court relied on the lower court decisions that foreshadowed *D.K*. (*supra* note 59), although the effect was less clear in terms of the application of the two-year period. W.H. v. Schuykill Valley Sch. Dist., 954 F. Supp. 2d at 318, 324 (exclusion of 2008–2009, which was largely beyond the two-year look-back period).

[67] Ms. S. v. Reg'l Sch. Unit 72, 64 IDELR ¶ 202 (D. Me. 2014), *adopted*, 65 IDELR ¶ 140 (D. Me. 2015).

[68] 19 TEX. ADMIN. CODE § 89.1151(c) (2013).

[69] *See supra* text accompanying notes 19, 21.

apply and find unproven a similarly strict, although not precisely stated, standard.[70]

In the only available decision thus far where the parents succeeded in their assertion of the misrepresentation exception, a federal district court concluded that the district's knowing misstatement to the parents about its evaluation obligation interfered with the parents' filing the complaint.[71] However, this court's application of the exception confirmed rather than contradicted the conclusion that its scope is relatively narrow.

2. Information-Withholding. The second of the two exceptions concerns information-withholding, specifically providing that the SOL does not apply under the following circumstances: "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."[72] Again, as the leading decision, the Third Circuit in *D.K*. interpreted this exception narrowly, concluding that parents could satisfy it 1) "only by showing that the school failed to provide them with a written notice, explanation or form specifically required by the IDEA statutes and regulations,"[73] and 2) this withholding

---

[70] Z.H. v. Lewisville Indep. Sch. Dist., 65 IDELR ¶ 106 (E.D. Tex. 2015), *adopted*, 65 IDELR ¶ 147 (E.D. Tex. 2015) (ruling that mere disagreements about the child's evaluation were insufficient and noting that the KOSHK date was unproven) (citing C.H. v. Nw. Indep. Sch. Dist., 815 F. Supp. 2d 977 (E.D. Tex. 2011)) (ruling that the alleged misrepresentations either were not before the prescribed SOL period or were not at the requisite level of bad faith or not proven).

[71] Ravenswood City Sch. Dist. v. J.S., 870 F. Supp. 2d 780 (N.D. Cal. 2012). For the knowing element, the court reasoned as follows: "The [d]istrict knew or had reason to know that its statement . . . was erroneous given the fact that it had previously litigated and lost the same argument." *Id*. at 789. For the causation, or interference, element, the court deferred to the IHO's credibility-based findings. *Id*. However, a subsequent decision in Maine interpreted this decision more narrowly, concluding that "[i]n *Ravenswood*, no question was raised as to whether the school district's misrepresentations to the parent were intentional." Ms. S. v. Reg'l Sch. Unit 72, 64 IDELR ¶ 202, at *10 (D. Me. 2014), *adopted*, 65 IDELR ¶ 140 (D. Me. 2015).

[72] 20 U.S.C. § 1415(f)(3)(D) (2012).

[73] D.K. v. Abington Sch. Dist., 696 F.3d at 246.

"caused [the parents'] failure to request a hearing . . . on time."[74] Applying this exception, the court concluded that 1) the documents that the parents identified as not having received—the procedural safeguards notice and permission to evaluate form—were not required under the circumstances of their child, and 2) even if they had been required, the parents had failed to show the requisite causation.[75]

The causation requirement was also fatal to the parents' information-withholding exception claim in a subsequent Ninth Circuit decision.[76] In this case, the Ninth Circuit ruled that the district failed to provide the parents with certain required student progress data, but this violation did not establish the asserted exception because "[t]he parents fail[ed] to demonstrate how receipt of [this] data, and for that matter the [allegedly belated] notice of procedural safeguards . . . would have caused them to file the due process complaint earlier."[77] In a Pennsylvania case, the court concluded that the parents failed to prove both the requisite causation and the required withheld information.[78] Moreover, focusing on the information element, a lengthening line of court decisions has limited this second exception to the procedural

---

[74] *Id*. The court derived this "causation requirement" from the "prevented" language that is the lead-in for both exceptions. *Id*.

[75] *Id.* at 247–48.

[76] M.M. v. Lafayette Sch. Dist*.,* 767 F.3d 842 (9th Cir. 2014); *see also* Shadie v. Forte, 61 IDELR ¶ 40, at *5 (E.D. Pa. 2013), *aff'd on other grounds sub nom* Shadie v. Hazleton Area Sch. Dist., 580 F. App'x 67 (3d Cir. 2014) (citing the "'high threshold'" that *D.K*. established).

[77] M.M. v. Lafayette Sch. Dist., 767 F.3d at 859. For the assuming *arguendo* reference to the procedural safeguards notice, the court upheld the IHO's credibility finding, because it met the requisite "careful and thorough" standard for judicial deference, that the district had provided this required notice on a timely basis. *Id*. The effect in this case was to uphold the IHO's otherwise unchallenged "look back" bar of any claims more than two years before the date of filing the complaint. *Id*.

[78] W.H. v. Schuykill Valley Sch. Dist., 954 F. Supp. 2d 315, 323 (E.D. Pa. 2013)); *cf*. G.W. v. Rye City Dep't of Educ., 61 IDELR ¶ 14 (S.D.N.Y 2013) (unproven withholding of information).

safeguards requirements of the IDEA, which none of these plaintiff-parents fulfilled.[79]

In contrast, relatively few parents have hurdled the prevailing standards for the information withholding exception. First, in an Alaska case, the federal district court duly deferred to the IHO's decision that the parent qualified for this exception "under the unique facts of this case."[80] The district provided a notice of procedural safeguards that suggested a three-year period rather than the one-year SOL that is applicable under Alaska law, which appeared to be the key factual finding.[81] Second, in the aforementioned case that primarily relied on the misrepresentation exception,[82] the court additionally and briefly ruled that the failure to provide the parents with the procedural safeguards notice triggered the information-withholding exception.[83] Third, in the strongest decision in the parents' favor, the Fifth Circuit ruled that the district's failure to include the required members of the IEP team that caused the parents not to

---

[79] *See*, *e.g.*, Z.H. v. Lewisville Indep. Sch. Dist., 65 IDELR ¶ 106, at *8–9 (E.D. Tex. 2015), *adopted*, 65 IDELR ¶ 147 (E.D. Tex. 2015); Avila v. Spokane Sch. Dist., 64 IDELR ¶ 171, at *8–9 (E.D. Wash. 2014); G.I. v. Lewisville Indep. Sch. Dist., 61 IDELR ¶ 298, at *10 (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, 986 (E.D. Tex. 2011); Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644–45 (S.D. Ind. 2011); Hooker v. Dallas Indep. Sch. Dist., 56 IDELR ¶ 232, at *5 (N.D. Tex. 2011); Sch. Dist. of Philadelphia v. Deborah A., 52 IDELR ¶ 67, at *5 (E.D. Pa. 2009); El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 944–45 (W.D. Tex. 2008); D.G. v. Somerset Hills Sch. Dist., 559 F. Supp. 2d 484, 492 (D.N.J. 2008); *cf.* Moyer v. Long Beach Unified Sch. Dist., 60 IDELR ¶ 126, at *10 (C.D. Cal. 2013); Baker v. S. York Area Sch. Dist., 53 IDELR ¶ 214 (M.D. Pa. 2009) (limiting the procedural safeguards failure to the relevant period). The effect of most of these rulings was to apply an otherwise unchallenged "look-back" bar of any claims more than two-years before the date of filing the complaint. For an exception to this line of decisions, *see infra* note 84 and accompanying text.

[80] Matanuska-Susitna Borough Sch. Dist. v. D.Y., 54 IDELR ¶ 52, at *3 (D. Alaska 2010).

[81] *Id*. For the Alaska law, *see* ALASKA STAT. § 14.30.193(a) (West 2014).

[82] *See supra* text accompanying note 56.

[83] Ravenswood City Sch. Dist. v. J.S., 870 F. Supp. 2d 780, 789 (N.D. Cal. 2012). The cursory analysis did not address the causation element. *Id*.

file on time fulfilled the information-withholding exception.[84] Finally, a federal district court in Maine concluded that the failure to provide the parents with the procedural safeguards notice at the relevant time, regardless of the district's good faith and any previous such notice, fulfilled the information and causation elements of this exception.[85]

The only other examples were for more limited success. In an Idaho case, the court dismissed the case without prejudice based on the parents' failure to exhaust the impartial hearing provision of the IDEA. In doing so, the court provided nonbinding but rather strongly worded guidance that the withholding exception should apply because the district failed to provide the procedural safeguards notice upon a change in the student's placement.[86] Somewhat similarly, in a Georgia case, the court concluded that the parents pled sufficient facts to survive the motion to dismiss her claim of this exception,[87] but the court warned that the subsequently developed record could yield a different outcome.[88] In any event, all of these cases confirmed rather than contradicted the prevailing and relatively narrow interpretation of the scope of information under this exception.[89]

Other Asserted Exceptions

---

[84] S.H. v. Plano Indep. Sch. Dist., 487 F. App'x 850, 864 (5th Cir. 2012). *But cf*. Reyes v. Manor Indep. Sch. Dist., 67 IDELR ¶ 33, at *5–6 (W.D. Tex. 2016) (following *S.H. v. Plano Indep. Sch. Dist*. based on broader information interpretation but ultimately distinguishing it based on causation factor).

[85] Reg'l Sch. Unit 51 v. Doe, 920 F. Supp. 2d 168, 197–203 (D. Me. 2013).

[86] Kelly O. v. Taylor Crossing Pub. Charter Sch., 61 IDELR ¶ 295, at *10 (D. Idaho 2013) ("because the school failed to provide [the] parents with notice on how to present such claims, they should not now be time barred from doing so. . . . [The] district may not be out of the 'deep doo doo' just yet.").

[87] Jenkins v. Butts Cnty. Sch. Dist., 984 F. Supp. 2d 1368, 1379 (M.D. Ga. 2013) (basing this conclusion on the district's alleged failure to provide the required prior written notice and procedural safeguards notice).

[88] *Id*. at 1379 n.15.

[89] *See supra* note 79.

Parents have attempted to import other exceptions beyond the two explicit IDEA SOL exceptions. However, in light of Congress's choice to limit the express exceptions to this tandem pair,[90] the legislative history,[91] and the administrative agency interpretation,[92] the prevailing judicial view is that the common law doctrines of equitable tolling[93] and minority tolling[94] do not apply. Similarly, for the same reasons,[95] the weight of judicial authority thus far has rather clearly favored the inapplicability of the continuing violations theory in IDEA SOL cases.[96]

---

[90] *See*, *e.g.*, D.K. v. Abington Sch. Dist., 696 F.3d 233, 248 (3d Cir. 2012) (citing the canon of construction of *exclusio unis*).

[91] *See*, *e.g.*, *id*. (citing S. REP. 108-85, at 40 (2003)).

[92] *See*, *e.g*., *id*. (citing 71 Fed. Reg. 46,540, 46,697 (Aug. 14, 2006)).

[93] *See*, *e.g.,* D.K. v. Abington Sch. Dist., 696 F.3d at 248; Holden v. Miller-Smith, 28 F. Supp. 3d 729, 735–36 (W.D. Mich. 2014); D.C. v. Klein Indep. Sch. Dist., 711 F. Supp. 2d 739, 746–47 (S.D. Tex. 2010); *cf*. Breanne v. S. York Cnty. Sch. Dist., 665 F. Supp. 2d 504, 512–13 (M.D. Pa. 2009) (denying its applicability at least "under the circumstances present here"); L.P. v. Longmeadow Pub. Sch., 59 IDELR ¶ 169, at *11 (D. Mass. 2012) (finding it inapplicable in the absence of extraordinary circumstances). The effect of most of these decisions, including *D.K*., was to apply an otherwise unchallenged "look-back" bar of any claims more than two-years before the date of filing the complaint.

[94] *See*, *e.g.*, D.K. v. Abington Sch. Dist., 696 F.3d at 248; Reyes v. Manor Indep. Sch. Dist., 67 IDELR ¶ 33, at *5 (W.D. Tex. 2016); Baker v. S. York Area Sch. Dist., 53 IDELR ¶ 214, at *5 (M.D. Pa. 2009); *cf*. Breanne v. S. York Cnty. Sch. Dist., 665 F. Supp. 2d 504, 513 (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, 691 (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, 372–73 (D. Mass. 2015) (applying to claims filed by now-adult student and seemingly tangential to exhaustion ruling). For a comprehensive analysis of the IDEA that supports the non-applicability of minority tolling, *see* Lynn Daggett, LeeAnn Gurysh & Perry A. Zirkel, *For Whom the School Bell Tolls But Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act*, 38 U. MICH. J.L. REFORM 717 (2005).

[95] *See*, *e.g*., J.L. v. Ambridge Area Sch. Dist., 622 F. Supp. 2d 257, 268–69 (W.D. Pa. 2008).

[96] *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, at *12 n.6 (C.D. Cal. 2015); Jefferson Cnty. Bd. of Educ. v. Lolita S., 977 F. Supp. 2d 1091, 1124 (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, at *14–16 (D.N.M. 2010). *But cf*. Jana K. v. Annville-

IV. DURATION AND EFFECT

The duration of the SOL for the impartial hearing under IDEA 2004 is clearly two years, except for the few states that have adopted a different period,[97] as the pertinent provision expressly permits.[98] The first problem is that contrary to typical practice of a look-back application from the date of the hearing request,[99] the period counts forward from the KOSHK date.[100] The second problem is the issue of whether the tandem provision in the IDEA[101] establishes a two-year limit in the opposite direction from the KOSHK date or, if not, what the limit in the past is for the scope of the hearing.

In a recent published decision, the Third Circuit Court of Appeals reversed the so-called

---

Cleona Sch. Dist., 39 F. Supp. 3d 584, 598–600 (M.D. Pa. 2014) (applying purportedly distinguishable use of continuing violations to fill out the 2+2 analysis in a child find case); K.H. v. N.Y.C. Dep't of Educ., 63 IDELR ¶ 295, at *17–18 (E.D.N.Y. 2014) (applying similarly confusing accrual analysis to find FAPE claim not time barred for at least 14 years). The effect of most of these decisions, including *D.K.*, was to apply an otherwise unchallenged "look-back" bar of any claims more than two-years before the date of filing the complaint. *See also* D.C. v. Mount Olive Twp. Bd. of Educ., 63 IDELR ¶ 78 (D.N.J. 2014).

[97] A leading example is the Texas law, which specifies a period of one year from the KOSHK date. *See supra* note 68. A variation is Alaska's one-year period from "the date that the school district provides the parent with written notice of the decision with which the parent disagrees." *See supra* note 81. As an example in the opposite direction, Kentucky provides for a period of three years from the KOSHK. KY. REV. STAT. ANN. § 157.224(6) (West 2013). In contrast, most states that specified a different period have revised their laws to conform to the IDEA's 2004 amendments. *See, e.g.,* Ms. S. v. Reg'l Sch. Unit 72, 64 IDELR ¶ 202, at *6–9 (D. Me. 2014) (citing ME. CODE R. 07-071, ch. 101, § XVI.13.E–F, which changed the limitations period from four to two years); K.H. v. N.Y.C. Dep't of Educ., 63 IDELR ¶ 295, at *3 (E.D.N.Y. 2014) (citing N.Y. EDUC. LAW § 4401(1)(a) (2013), which changed limitations period from one to two years). As a variation, Hawaii changed from 90 days to the two-year IDEA limitations period with an exception: hearing requests for tuition reimbursement have a 180-day period. K.D. *ex rel.* C.L. v. Dep't of Educ., State of Haw., 665 F.3d 1110, 1121 (9th Cir. 2011); Teresa L. v. Dep't of Educ., Haw., 325 F. App'x 583, 584 (9th Cir. 2009) (citing HAW. REV. STAT. § 302A-443(a) (2011)).

[98] *See supra* text accompanying note 19.

[99] *See supra* note 26 and accompanying text.

[100] *See supra* text accompanying notes 27–28.

[101] *See supra* note 21 and accompanying text.

"2+2" ruling of the lower court, which, along with a few other district courts in Pennsylvania,[102] interpreted the plain language of the pair of SOL provisions in IDEA 2004 as extending not only up to two years forward, but also up to two years back, from the KOSHK date.[103] Instead, based on the statutory text, legislative history, and agency interpretation, the Third Circuit concluded that the two provisions refer, although "inartful[ly],"[104] to the same two-year filing-deadline for a due process complaint after the KOSHK date.[105] Thus, the court resolved the first issue by reemphasizing that the two-year filing deadline is forward from the KOSHK date, not either forward from the date of injury or a look back from the date of filing.[106] Moreover, the Third Circuit similarly cited *D.K*. to make clear that "parental vigilance is vital" to this filing deadline, suggesting a relatively strict approach to the prescribed period and sole exceptions.[107]

Even more significantly, contrary to the two-year limitation on the other side of the KOSHK date in the "2+2" approach, the Third Circuit adopted a rather open-ended interpretation of the retrospective scope of a timely filed complaint.[108] In contrast to the common although not

---

[102] *See, e.g.,* Jana K. *ex rel.* Tim 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).

[103] G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d at 601, 614-15 (3d Cir. 2015).

[104] *Id* at 605; *see also id*. at 625 ("the inconsistent language reflects nothing more than a drafting error in [Congress's] reconciliation process").

[105] *Id*. at 616–25.

[106] *Id*. at 625 (citing D.K. v. Abington Sch. Dist. 696 F.3d 233, 248, 254 (3d Cir. 2012).

[107] *Id*. For example, the court warned that "parents may not, without satisfying one of the two statutory exceptions, knowingly sit on their rights or attempt to sweep both timely and expired claims into a single 'continuing violation' claim brought years later." *Id*.

[108] *Id*. at 625–26. The *G.L* court made clear its analysis consisted of two successive parts by characterizing the "upshot" of its analysis as "two-fold" and by stating its concluding holding in as a tandem, flowchart-like sequence. *Id*. at 625. This second part of the panel's decision was the primary focus of the district's unsuccessful motion for a rehearing en banc. For example, characterizing this

universal practice of various IHOs and courts of applying the filing period on a look-back basis as the scope of the claim,[109] the Third Circuit ruled—based on its pre-IDEA 2004 compensatory education standard[110] and the IDEA 2004's legislative history[111]— that the limitations period "is not a cap on a child's remedy for timely-filed claims that happen to date back more than two years before the complaint is filed."[112] And, as the counter-weight for the strict-on-parent approach for the filing period,[113] the court extracted from its past decisions a strict-on-district

---

ruling as a "significant loophole" with "potentially far-reaching implications," the district's motion argued, "the *G.L*. Panel's opinion creating a de facto 'continuing violation' extension of the IDEA."

[109] Illustrations of this application are available in the cases identified *supra* note 26. Providing further reinforcement of this application are the rather consistent line of cases that allocate to the IHO's discretion the admission of evidence for the time before the filing period but only for background, not liability. *See, e.g.,* Phyllene W. v. Huntsville City Bd. of Educ., No. 15-10123, 2015 U.S. App. LEXIS 18911 (11th Cir. Oct. 30, 2015); Indep. Sch. Dist. No. 413 v. H.M.J. *ex rel.* A.J., M.N., No. CIV. 14-2114 JRT/HB, 2015 WL 4744505 (D. Minn. 2015); Dep't of Educ., State of Haw. v. E.B., 45 IDELR ¶ 249, at *5 (D. Haw. 2006). The limited exception for this interpretation is for the calculation of compensatory education in jurisdictions that use the qualitative approach and only in cases where the amount "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place" exceeds the hour-for-hour duration of the denial of FAPE within the applicable period. Reid v. Dist. of Columbia, 401 F.3d 516, 524 (D.C. Cir. 2005). For an example of such a situation, *see* Cent. Sch. Dist. v. K.C., 61 IDELR ¶ 125, at *11 & n.6 (E.D. Pa. 2013).

[110] G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d at 618–19 (citing M.C. *ex rel*. J.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 396-97 (3d Cir. 1996)). However, this standard was based on the district's, not the parent's KOSHK date, and it introduced the inconsistently interpreted concept of "accrual."

[111] *Id*. at 624 (citing 150 Cong. Rec. S11851 (daily ed. Nov. 24, 2004) (statement of Sen. Tom Harkin)). With regard to the legislative history, the court also cited Valverde, *supra* note 12, at 643–46. Interestingly, although Valverde, who is a clinical professor serving primarily low-income clients, advanced this view of the legislative history, her ultimate recommendation was for Congress to amend the IDEA's remedial scheme to codify compensatory education on a broadened basis to rectify this economic inequity and make this intent clear. *Id*. at 668. Both the court and Valverde also cited *Robert R. v. Marple Newtown School District*, 44 IDELR ¶ 186 (E.D. Pa. 2005), but this case was based on the pre-IDEA SOL and only cited the IDEA 2004 legislative history as indirect support for its interpretation of the prior Third Circuit decisions.

[112] G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d at 616. In contrast, the common practice (*supra* note 26) provides a clear cut-off that, with the limited exception for the qualitative calculation of compensatory education, yields a period that may well be longer than the Third Circuit's answer to the triggering issue of *G.L*., but may well be shorter than the Third Circuit's answer for *G.L*.'s remedial issue.

[113] *See supra* text accompanying note 107.

application for this remedial period.[114]

But how far back does this pre-KOSHK date period go? By focusing on the remedy, or "the redress available for timely-filed claims,"[115] the Third Circuit left the answer open to interpretation.[116] For example, in one part of the opinion the court appeared to extend the remedial boundary to "claims not yet reasonably knowable,"[117] yet in another part the court appeared to reaffirm its early and repeated standard for compensatory education that the boundary is "the point that the school district 'knows or should know of the injury to the child."[118] The rubbery and not clearly defined elasticity of the remedial period is further evident in the court's citation of its prior compensatory education rulings,[119] including the potential eight-year period in *Ridgewood Board of Education v. N.E.*[120] Moreover, the facts in *G.L.* are not particularly helpful because the KOSHK date and timeliness of the filing were effectively

---

[114] G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d at 625-26 (citing M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996)).

[115] *Id.* at 612.

[116] For an alternate open ended approach, *see, e.g.*, K.H. v. N.Y.C. Dep't of Educ., 63 IDELR ¶ 295, at *18 (E.D.N.Y. 2014) (finding KOSHK triggered claims spanning entire 14-year period of eligibility).

[117] *Id.* at 617. For further dicta in the opinion that suggested an open-ended approach, *see id*. at 620 ("any claim for [a] violation, however far back it dates.") and *id.* at 618 (citing a previous Third Circuit case, that "'nothing in the text or history suggest[s] that relief under IDEA is limited *in any way* . . . .'" *Id.* (emphasis added)).

[118] *Id*. at 618 (citing, e.g., D.F. v. Abington Sch. Dist., 694 at 499; M.C. v. Cent. Reg'l Sch. Dist., 81 F.3d 389, 396–97 (3d Cir. 1996)).

[119] *Id*. at 620. Moreover, by citing the D.C. Circuit's decision and standard in Reid v. District of Columbia, 401 F.3d 516, 518 (D.C. Cir. 2005), the Third Circuit reinforced the present ambiguity as to whether it has replaced the quantitative with the qualitative approach for calculating compensatory education. For an overview of these two approaches, *see, e.g.*, Perry A. Zirkel, *The Two Competing Approaches for Calculating Compensatory Education under the IDEA*, 257 EDUC. L. REP. 550 (2010). For an earlier Third Circuit example of this ambiguity, *see* Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 715 (3d Cir. 2010). For a discussion of the seeming transition, *see* Jana K. v. Annville-Cleona Sch. Dist., 39 F. Supp. 3d 584, 606–08 (E.D. Pa. 2014).

[120] 172 F.3d 238 (3d Cir. 1999).

beyond dispute[121] and the student's enrollment started for a relatively limited period before the KOSHK date.[122]

For this "elephant" in *G.L.*'s SOL room,[123] the arguably appropriate approach is to define the back-side boundary as the reasonably determined start of the alleged violation. More specifically, based on the statutory specification of "the alleged action that forms the basis of the complaint"[124] and the *G.L.* opinion's repeated reference to "the injury,"[125] including its "practical example" of a three-year child find claim reasonably discovered by the parents at the end of the third year,[126] IHOs and courts need to look first at the language of the complaint[127] and

---

[121] G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d at 606.

[122] After spending the previous year in parochial school, the student reenrolled in the district in September 2008, and the KOSHK date was March 9, 2010, which was when the parents withdrew the student from the district and enrolled him in a cyber charter school. *Id.* at 605–06. Soon after September 2008, the student's parent requested an evaluation, which is the earliest point to which they could stretch their child find claim, as reflected in their claim for denial of FAPE. *Id*. at 606. The IHO, following prevailing practice, limited the FAPE and, thus, remedial analysis, to the two-year window before the January 9, 2012 filing date, thereby excluding the 2008-2009 school year and the first half of the 2009-10 school year. *Id*. at 607. Although the IHO ruled that the district had not denied FAPE for the three months within the window that he was enrolled in the district, the effect of *G.L.* on remand is to open up the window for the requested compensatory education to an inexactly defined period that is limited, again by enrollment considerations, to an outermost possible boundary of September 2008. Although the applicable window, if the case does not end in settlement, likely extends to this September start based on the alleged child find injury and the relatively limited period, the precise point that *G.L.* intends for other cases is a relatively open question.

[123] *Id*. at 617 (reiterating the judicial expression about not hiding "'elephants in mouseholes'") (citing *E.P.A. v. EME Homer City Generation*, *L.P.*, 134 S. Ct. 1584, 1612 (2014) (Scalia, J., dissenting)). In comparison, *G.L.*'s resolution of the first, triggering issue is a relative mousehole.

[124] *See supra* text accompanying notes 19, 21.

[125] *E.g.,* G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d at 604–05, 607, and 611.

[126] *Id*. at 613–14. Seemingly synonymous, the court also referred to this action more than once as the "violation." *Id*. at 614–15 and 621.

[127] The IDEA requires that the complaint state "the nature of the problem of the child relating to [the] proposed initiation or change, including facts relating to such problem" and, "to the extent known and available to the party at the time," its proposed resolution. 20 U.S.C. § 1415(b)(7)(A)(ii)(III–(IV)).

ultimately decide the alleged action that they knew or should have known. This second determination may be at least as significant as determining the KOSHK date.[128] This action date serves as the boundary for not only the basis of the FAPE-denial remedy[129] but also, except for discretionary background information,[130] the scope of admissible evidence.

A more definitive identification of the outer boundary, or the date of KOSHK "action," awaits further litigation in not only the Third Circuit, which has been the locus of most of the case law to date,[131] but also courts in other jurisdictions, which did not automatically or universally adopt its corresponding initiative for compensatory education.[132] Moreover, the IDEA's administering agency, the U.S. Department of Education's Office of Special Education

---

[128] On an overlapping or alternative basis, this determination amounts to a revisiting of the more complete analysis of the KOSHK triggering date. *See supra* text accompanying note 29. Indeed, it may be seen as the same KOSHK, showing the importance of determining the alleged action, because it serves as the starting point to determine 1) when the parent knew or should have known about it and, thus, whether the filing was timely, and 2) if timely, the period for the evidentiary basis for the remedy.

[129] Moving back from the focus on the action, which in compensatory education cases is the denial of FAPE, the aforementioned limited exception of the qualitative approach (*supra* note 109) applies to the remedy, which is the focus in *G.L.*

[130] *Id.*

[131] Another reason that IHOs and courts in the Third Circuit are likely to face this issue imminently is that two of the three states in the region, Pennsylvania and New Jersey rank fifth and sixth in IHO decisions and second and sixth in court decisions under the IDEA. Zirkel, *supra* note 4, at 10; Bailey & Zirkel, *supra* note 4, at 7.

[132] The Second Circuit does not share the Third Circuit's position on the requisite denial of FAPE, at least for plaintiff-students beyond age twenty-one. *See*, *e.g.*, P. v. Newington Bd. of Educ., 512 F. Supp. 2d 89 (D. Conn. 2007), *aff'd on other grounds*, 546 F.3d 111 (2d Cir. 2008) (citing Garro v. Dep't of Educ., 23 F.3d 734 (2d Cir. 1994)); *cf*. V.M. v. N. Colonie Sch. Dist., 954 F. Supp. 2d 102 (N.D.N.Y. 2013) (citing Mrs. C. v. Wheaton, 916 F.2d 69 (2d Cir. 1990)); J.A. v. E. Ramapo Sch. Dist., 603 F. Supp. 2d 684 (S.D.N.Y. 2009) (also citing Mrs. C. v. Wheaton). Moreover, the Third Circuit's original approach to the calculation of compensatory education is now the minority view. *See*, *e.g.,* Bd. of Educ. of Fayette Cnty. v. L.M., 478 F.3d 307, 318 (6th Cir. 2007); Reid v. Dist. of Columbia, 401 F.2d 516, 526 (D.C. Cir. 2005); *see also* Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 291 EDUC. L. REP. 1, 6 n.49 (2013) (citing more recent cases).

Programs (OSEP) may provide guidance.[133]

Meanwhile, in the Third Circuit and in those jurisdictions that follow its lead, the filing party will be very careful in its drafting of the complaint to define not only the alleged KOSHK date but also the scope of the underlying action's scope so as to maximize the odds in favor of both the timeliness of the request and the extent of the remedy. The resolution of these issues is high stakes for the parties in terms of liability and for IHOs in terms of the chronological scope of the evidence within the already taxed forty-five day limit for the decision.[134] It is also predicable that these twin SOL issues will be particularly problematic in cases that include child find claims for compensatory education relief.[135] Finally, for the second of these two issues, one cannot help but wonder how the Third Circuit's ruling squares with the primary purposes of a SOL.[136]

---

[133] Letter to Zirkel, 66 IDELR ¶ 288 (OSEP 2015):

> The [*G.L.*] Court also held that neither provision limits remedies to injuries that occurred within two years before the KOSHK date, and that, if parents timely file a complaint and liability is proven, the entire period of the violation should be remedied. In light of the Court's decision, the Department is continuing to deliberate to determine whether further guidance is necessary.

[134] 300 C.F.R. § 300.515(a) (2013). Approximately half of all adjudicated hearings do not meet the forty-five day deadline without extensions, with particularly high proportions in the active states of California (93%), Pennsylvania (81%), and New York (77%). U.S. GOVERNMENT ACCOUNTABILITY OFFICE, SPECIAL EDUCATION: IMPROVED PERFORMANCE MEASURES COULD ENHANCE OVERSIGHT OF DISPUTE RESOLUTION 24–25 (Aug. 2014), http://www.gao.gov/assets/670/665434.pdf

[135] It is not happenstance that *G.L.*, the practical example it offered, and the several of the decisions that it cited, including *Forest Grove v. T.A.*, 557 U.S. 230 (2009), contained a child find claim and that most, unlike *Forest Grove*, were premised on compensatory education, not tuition reimbursement. Representing another ad hoc determination, child find amounts to ascertaining whether the district had reasonable suspicion of eligibility and, if so, when it was and whether the district conducted the evaluation within a reasonable period. *See*, e.g., Perry A. Zirkel, *"Child Find": The Lore v. the Law*, 307 EDUC. L. REP. 574 (2014).

[136] *See supra* text accompanying note 16.