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SPECIAL EDUCATION IN URBAN SCHOOLS: IDEAS FOR A
CHANGING LANDSCAPE

A Poor IDEA: Statute of Limitations Decisions Cement Second-Class Remedial Scheme for Low-Income Children with Disabilities in the Third Circuit

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**A POOR IDEA: STATUTE OF LIMITATIONS
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REMEDIAL SCHEME FOR LOW-INCOME
CHILDREN WITH DISABILITIES IN THE
THIRD CIRCUIT**

*Jennifer Rosen Valverde**

Introduction	600
I. Identifying the Affected Population: The Relationship Between Socioeconomic Status, Disability, and Educational Outcomes	605
A. The Links Between Socioeconomic Status, Child Development, and Educational Outcomes	608
B. The Link Between Socioeconomic Status and Disability	612
C. The Link between Disability and Educational Outcomes	615
D. The Intersection of Socioeconomic Status, Disability, and Educational Outcomes.....	617
II. Overview of the IDEA’s Remedial Scheme	624
A. Tuition Reimbursement	626
B. Compensatory Education.....	627
III. Application of the IDEA 2004’s Statute of Limitations to Compensatory Education Claims in the Third Circuit.....	631
A. Timelines for Filing Special Education Claims Pre- IDEA 2004.....	631

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B. Courts' Misapplication and Overly Restrictive Interpretation of the IDEA 2004's Statute of Limitations and its Exceptions in Compensatory Education Matters	635
1. Application of the IDEA 2004's Statute of Limitations	637
a. Courts Improperly Restrict Adjudication of Compensatory Education Claims to Two Years Prior to the Date the Complaint Was Filed.....	638
b. Courts Improperly Restrict Adjudication of Compensatory Education Claims to Two Years Prior to the KOSHK Date Regardless of the Scope of the Claim.....	640
2. Application of Equitable Tolling to the IDEA following the 2004 Amendments	649
3. The Third Circuit's Interpretation of Exceptions to the Statute of Limitations.....	652
IV. Application of Third Circuit Courts' Opinions to Case Studies	653
A. The Case of Aaron.....	654
B. The Case of Asia	658
V. Remedying Inequalities in the Remedial Scheme.....	662
Conclusion.....	668

INTRODUCTION

The Individuals with Disabilities Education Act (IDEA, or the Act), enacted in 1975 as the Education of All Handicapped Children Act (EAHCA),¹ was widely praised as landmark civil rights legislation providing equality in educational opportunity to children with disabilities.² For decades preceding the law's passage, school districts routinely denied children with disabilities an adequate

1. See Pub. L. No. 94-142, 89 Stat. 773 (1975).

2. Under the IDEA, and for purposes of this Article, a "child with a disability" is defined as a child "(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A) (2012); see Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 426-29 (2012) (discussing the history behind the enactment of the EAHCA).

education.³ They provided no educational assistance or accommodations to children in school, “warehoused” children in institutions thereby segregating them from their non-disabled peers, or excluded them from school altogether.⁴

In the years following the U.S. Supreme Court’s historic 1954 decision in *Brown v. Board of Education*,⁵ individual and class action lawsuits across the country challenged the exclusion of students with disabilities from school on equal protection and other grounds.⁶ Two seminal federal district court decisions, *Pennsylvania Ass’n for Retarded Children v. Pennsylvania* and *Mills v. Board of Education*, significantly transformed the education landscape by granting children with disabilities access to an adequate, publicly supported education, and by instituting due process and procedural protections for parents and children.⁷ Plaintiffs in these cases successfully argued for extension of the Supreme Court’s reasoning in *Brown* to school-age children with disabilities who were denied proper educational programs and services, specifically that “separate but equal” is “inherently unequal” and that education “is a right which must be made available to all on equal terms.”⁸ The end result was the promulgation of the Education of All Handicapped Children Act, now known as the IDEA.

Nearly forty years later, tremendous progress has been made both in educating children with disabilities and in safeguarding their right to an appropriate education.⁹ Yet, despite the myriad of benefits stemming from its aim to create equality in educational opportunity

3. See S. REP. NO. 104-275, at 6 (1996) (stating that prior to the enactment of the EAHCA, approximately one million children were excluded from attending public schools and four million children did not receive any educational services); see also 20 U.S.C. § 1400(c)(2) (2012) (noting that “the educational needs of millions of children” were not being met).

4. See S. REP. NO. 104-275 (1996).

5. 347 U.S. 483 (1954).

6. See, e.g., *Pa. Ass’n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257, 1258 (E.D. Pa. 1971); see also *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 878 (D.C. Cir. 1972) (holding that the Washington, D.C. public school system cannot exclude children with disabilities from regular education programs unless they are provided with adequate alternative services and due process protections); *Pa. Ass’n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 302–03 (E.D. Pa. 1972) (enjoining the state from denying children with disabilities access to a free and appropriate program of education).

7. See *supra* note 6.

8. See, e.g., *Mills*, 348 F. Supp. at 874–75 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

9. See generally H.R. Con. Res. 329, 111th Cong. (2010) (enumerating the successes of the IDEA).

for children with disabilities, the IDEA has inadvertently advanced inequality on the ground of socioeconomic status.¹⁰ Children living in poverty have higher rates of disability¹¹ and poorer educational outcomes than their middle and upper class peers.¹² While the IDEA provides a detailed framework of special education rights for parents and their children with disabilities,¹³ low-income parents' ability to enforce those rights successfully is, at best, a challenge and, at worst, an impossible feat.¹⁴ Adding insult to injury, on the occasions that parents succeed in their enforcement efforts, remedies available under the IDEA often do not compensate low-income children adequately for the harms that occurred and potential lifelong consequences that ensue.¹⁵ The failure to properly educate children with disabilities results in dramatic costs not only to the children affected and their families, but also to society.¹⁶

10. This Article focuses on inequality under the IDEA stemming from socioeconomic status only. For more information on race-based inequalities under the IDEA, see, e.g., N.J. COUNCIL ON DEVELOPMENTAL DISABILITIES, *STILL SEPARATE AND UNEQUAL: THE EDUCATION OF CHILDREN WITH DISABILITIES IN NEW JERSEY 18–20* (2004), available at http://www.edlawcenter.org/assets/files/pdfs/issues-special-education/Still_Separate_and_Unequal.pdf (discussing, in part, the overrepresentation of minority students in segregated special education settings); Carla O'Connor & Sonia D. Fernandez, *Race, Class, and Disproportionality: Reevaluating the Relationship Between Poverty and Special Education Placement*, 35 *EDUC. RESEARCHER* 6 (2006) (arguing that school culture and organization place minority youth at risk for special education placement by perceiving them as academically and behaviorally deficient).

11. See MARY WAGNER ET AL., *THE CHILDREN WE SERVE: THE DEMOGRAPHIC CHARACTERISTICS OF ELEMENTARY AND MIDDLE SCHOOL STUDENTS WITH DISABILITIES AND THEIR HOUSEHOLDS 47* (2002), available at http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf; see also Patricia A. Massey & Stephen A. Rosenbaum, *Disability Matters: Toward a Law School Clinical Model for Serving Youth with Special Education Needs*, 11 *CLINICAL L. REV.* 271, 281 (2005) (noting that low-income families are fifty percent more likely to have a child with a disability than higher income families).

12. See generally Patrice L. Engle & Maureen M. Black, *The Effect of Poverty on Child Development and Educational Outcomes*, 1136 *ANN. N.Y. ACAD. SCI.* 243 (2008); see also *infra* Part I.A (discussing the links among socioeconomic status, child development and educational outcomes).

13. See generally 20 U.S.C. §§ 1400–1482 (2012).

14. This statement is based on the author's personal experience representing low-income parents of children with disabilities in special education matters.

15. See generally *infra* Part I.

16. See HARRY J. HOLZER ET AL., *THE ECONOMIC COSTS OF POVERTY IN THE UNITED STATES: SUBSEQUENT EFFECTS OF CHILDREN GROWING UP POOR 1* (2007), available at http://www.americanprogress.org/wp-content/uploads/issues/2007/01/pdf/poverty_report.pdf (estimating that child and youth poverty cost the country \$500 billion per year in lower economic output, increased health costs, and greater criminal justice costs); see also HARRY J. HOLZER, PENNY WISE, POUND FOOLISH: WHY TACKLING CHILD POVERTY DURING THE GREAT RECESSION MAKES ECONOMIC

The Third Circuit, once considered a progressive and favorable bastion for parents and children in the special education arena,¹⁷ more recently has joined the “pro-school” movement,¹⁸ eroding the special

SENSE 4 (2010), available at http://www.americanprogress.org/wp-content/uploads/issues/2010/09/pdf/hit_childpoverty.pdf; LYNN A. KAROLY, ET AL., EARLY CHILDHOOD INTERVENTIONS: PROVEN RESULTS, FUTURE PROMISE, at xxv (2005), available at http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG341.pdf (finding a rate of return on investment of \$1.26 to \$17.07 for every dollar spent on early childhood intervention, with the greatest cost-benefit ratios associated with programs that engage in longer-term follow-up); Engle & Black, *supra*, note 12, at 244 (noting that low-income students are at higher risk of not graduating from high school, resulting in a sixteen percent reduction in earnings from 1975–2005); Michael Lipkin, *Evaluating Universal Preschool*, CHI. TONIGHT (Mar. 19, 2013), <http://chicagotonight.wttw.com/2013/03/19/evaluating-universal-preschool> (quoting Nobel Prize winning economist, James Heckman, stating that children who participated in the Perry Preschool Project had a rate of return on investment of “7 to 10 percent per annum for each dollar invested,” beating the stock market).

17. The Third Circuit is the only federal court of appeals to use the “meaningful benefit standard” exclusively in defining a free and appropriate public education, and the only one that requires a student’s Individualized Education Program, the vehicle for delivering an appropriate education to a student with a disability, to provide significant learning. *See* Ronald D. Wenkart, *The Rowley Standard: A Circuit by Circuit Review of How Rowley Has Been Interpreted*, 247 WEST’S EDUC. L. REP. 1, 17 (2009); *see also* Perry A. Zirkel, *Compensatory Education Under the Individuals with Disabilities Education Act: The Third Circuit’s Partially Mis-Leading Position*, 110 PENN ST. L. REV. 879, 881 n.18 (2006). Additionally, for many years the Third Circuit was among the minority of courts that authorized monetary damages as a viable remedy for IDEA violations through § 1983 enforcement of the IDEA. The Circuit was also among the few venues that left open the possibility of obtaining monetary damages directly under the IDEA. *See, e.g.*, *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 252–53 (3d Cir. 1999) (affirming the right to bring claims for monetary damages in special education matters under section 504 of the Rehabilitation Act, the IDEA, and § 1983); *W.B. v. Matula*, 67 F.3d 484, 494 (3d Cir. 1995) (holding monetary damages are available in special education matters brought under section 504 of the Rehabilitation Act, the IDEA, and § 1983). *But see* *A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791, 802 (3d Cir. 2007) (holding Congress did not intend to make § 1983 available to remedy violations of the IDEA and section 504); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 827 F. Supp. 2d 409, 424–25 (E.D. Pa. 2011) (on remand) (holding that compensatory damages are not available under the IDEA).

18. *See, e.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 300 (2006) (holding that expert fees are not recoverable costs for prevailing parents under the IDEA’s fee-shifting provision); *see also* *Schaffer ex rel. Schaffer v. West*, 546 U.S. 49, 62 (2005) (holding that under the IDEA, the burden of proof in an administrative hearing challenging an IEP is not automatically on the school district, but on the party seeking relief); Samuel R. Bagenstos, *The Judiciary’s Now-Limited Role in Special Education*, in *FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY’S ROLE IN AMERICAN EDUCATION* 121, 125 (Joshua M. Dunn & Martin R. West eds., 2009) (opining that the *Schaffer* and *Arlington* decisions “are part of a ‘pro-school’ trend”); Terry Jean Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?*, 45 URB. LAW. 281,

education rights of those living in poverty. Nowhere is this more evident than in the Third Circuit's changed approach to the remedial framework afforded to impoverished parents and their children with disabilities who wrongfully have been denied essential special education programming and services for lengthy periods of time. This Article proposes that courts' misreading and misapplication of the IDEA's 2004 statute of limitations and overly restrictive interpretation of its exceptions have whittled away the already limited remedies available for children with disabilities without financial means, depriving them of adequate recourse. These are many of the same children who have the greatest need for proper special education services, based on demographics and research evidencing links between poverty, child development, disability, and educational outcomes.¹⁹ Approximately two-thirds of children with disabilities found eligible for special education across the country live in households earning less than \$50,000, and nearly one-half of those families have incomes falling at or below the federal poverty line.²⁰

This Article begins with a summary of research findings regarding the intersection of poverty, disability, and educational outcomes. Data specific to Newark, New Jersey, where this author works, is cited, at times, to provide context. Part II provides a brief overview of the remedies accessible under the IDEA and focuses in particular on the availability of the remedial scheme to families with limited financial resources in the Third Circuit. Part III explores the language of the IDEA's 2004 statute of limitations provision and exceptions, and analyzes the Third Circuit's interpretation and application of these provisions in recent compensatory education²¹ cases. Part IV presents two case studies illustrating the chilling effects of these decisions on the ability of parents without means and their

295 (2013) (noting "what has been largely a constricting trend in interpretation of the IDEA," with limited exceptions).

19. See generally *infra* Part I.

20. See WAGNER ET AL., *supra*, note 11, at 29.

21. "Compensatory education" is defined as a remedy that may be awarded to a child with a disability who wrongfully has been denied appropriate special education and related services. See Lester H. *ex rel.* Octavia P. v. Gilhool, 916 F.2d 865, 873 (3d Cir. 1990). It is designed to redress prior denials of a FAPE by helping IDEA-eligible children with disabilities recoup educational progress lost due to a school district's delay in offering or failure to provide proper educational programming and services. See *id.* The award may take the form of additional programs and services beyond the eligible child's entitlement to an appropriate education. See *id.*; see also *infra* Part III.

children to obtain necessary compensatory special education²² and related services.²³ Part V concludes with a proposal for legislative action in the form of an explicit enumeration of compensatory education as a remedy and creation of a separate statute of limitations for compensatory education matters consistent with legislative intent and the Third Circuit's prior broad remedial approach. The proposal aims to rectify the impact of inequality based on socioeconomic status currently in the IDEA's remedial scheme.

I. IDENTIFYING THE AFFECTED POPULATION: THE RELATIONSHIP BETWEEN SOCIOECONOMIC STATUS, DISABILITY, AND EDUCATIONAL OUTCOMES

Understanding the data on the interrelationship of socioeconomic status, disability, and educational outcomes is critical to forming an accurate picture of the potential numbers of young people with disabilities poorly served by the IDEA's inferior remedial scheme. While research abounds on the links between poverty and education, poverty and disability, and disability and education, few studies have examined the intersection of all three factors simultaneously. The interrelationship may be extrapolated, however, by examining the bifactor associations in tandem. Each of these associations is discussed in turn below. Together, they paint a bleak portrait of the lives and futures of many children.

Poverty in the United States has increased in recent years—a likely consequence of the 2007 economic downturn.²⁴ In 2010, 22% of children between the ages of 0–17 lived in poverty (defined as having an annual income of \$22,113 for a family of four).²⁵ The rate grew by 5% since 2006, when 17% lived in poverty.²⁶ Significantly, nearly

22. “Special education” is defined as “specially designed instruction . . . to meet the unique needs of a child with a disability” and provided at no cost to parents. 20 U.S.C. § 1401(29) (2012).

23. “Related services” are “developmental, corrective, and other supportive services[,] including speech-language pathology[,] . . . physical and occupational therapy, . . . [and] social work services . . . as may be required to assist a child with a disability from special education.” § 1401(26)(A).

24. See ANNIE E. CASEY FOUNDATION, 2011 KIDS COUNT DATA BOOK 12 (2011), available at http://www.aecf.org/~media/Pubs/Initiatives/kids%20count/123/2011kidscountdataBook/2011kcdb_final.pdf [hereinafter 2011 KIDS COUNT DATA BOOK].

25. See FORUM ON CHILD AND FAMILY STATISTICS, AMERICA'S CHILDREN IN BRIEF: KEY NATIONAL INDICATORS OF WELL-BEING 6 (2012), available at http://www.childstats.gov/pdf/ac2012/ac_12.pdf.

26. See *id.* The child poverty rate continued to grow thereafter to twenty-three percent in 2011. See ANNIE E. CASEY FOUND., 2013 KIDS COUNT DATA BOOK 7

one-half of these children lived in extreme poverty in households with incomes at or below 50% of the federal poverty level, defined in 2010 as a yearly household income of \$11,057 for a family of four.²⁷

Great inequalities exist in the distribution of child poverty based on race and ethnicity. Of the children living in poverty in 2010, 39% were African-American non-Hispanic, 35% were Hispanic, and 12% were white.²⁸ These racial and ethnic differences are not surprising in light of 2009 data showing that the median wealth of white households was twenty times greater than that of African-American households and eighteen times greater than that of Latino households.²⁹ Children in poverty are more likely to live in single-parent households as well.³⁰

The numbers are even more sobering in areas with high concentrations of poverty. For example, 18% of all New Jersey children lived at or below the federal poverty level in 2011, defined as an annual household income of \$22,350 for a family of four.³¹ That same year, approximately 50% of children under the age of five (more than 13,000 children) in the city of Newark lived in households with incomes at or below the federal poverty level.³² More than 6500 children in Newark lived in extreme poverty, with household incomes less than or equal to 50% of the federal poverty level.³³

The location of a family's residence further influences a parent's ability to provide for basic needs due to cost of living differentials across the country. To illustrate, a 2008 study by the Legal Services of New Jersey Poverty Research Institute found that for many New Jersey residents, including those residing in Newark, the "real cost of living" was nearly three times the federal poverty line and the

(2013), *available at* <http://datacenter.kidscount.org/files/2013KIDSCOUNTDataBook.pdf> [hereinafter 2013 KIDS COUNT DATA BOOK].

27. *See* FORUM ON CHILD AND FAMILY STATISTICS, *supra* note 25, at 6.

28. *See id.* (clarifying that these percentages refer to respondents who indicated only one racial identity, thus those who identified with more than one racial identity are not accounted for in the percentages).

29. *See* Rakesh Kochhar et al., *Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics*, PEW RES. SOC. & DEMOGRAPHIC TRENDS (July 26, 2011), <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics>.

30. *See* Jonathan Bradshaw, *Poor Children*, 17 CHILD. & SOC'Y 162, 170 (2003) (finding 44% of poor children live in single-parent households and 55% of children in single-parent households are poor).

31. *See* ADVOCATES FOR CHILDREN OF N.J., NEWARK KIDS COUNT 2012–2013, at 11 (2013), *available at* <http://www.acnj.org/admin.asp?uri=2081&action=15&di=2386&ext=pdf&view=yes>.

32. *See id.*

33. *See id.*

minimum wage.³⁴ According to the 2013 Economic Policy Institute's Family Budget Calculator, which was created to estimate the cost of "getting by," a family of four (two parents with two children) residing in Newark requires an annual income of \$80,568 to "secure a basic, yet modest, standard of living."³⁵ This requirement is a far cry from the 2013 federal poverty level of \$23,550 for a family of four.³⁶

Sadly, these numbers likely do not offer a full view of the widespread economic and material hardship in the United States. The U.S. Census Bureau has been accused of "undercounting" people who live in poverty, due in part to an outdated federal definition of the term.³⁷ In reality, those living between 100–200% of the federal poverty level also experience economic and material hardship and cannot meet basic family needs for food, shelter, healthcare, and

34. See DIANA M. PEARCE, THE REAL COST OF LIVING IN 2008: THE SELF-SUFFICIENCY STANDARD FOR NEW JERSEY 7–12 (2008), available at <http://www.selfsufficiencystandard.org/docs/New%20Jersey%202008.pdf> (using real-world assumptions to measure the real cost of living, and defining the real cost of living as the income needed for a family with a certain composition living in a certain location to adequately meet their basic needs without public or private assistance).

35. See *Family Budget Calculator*, ECON. POL'Y INST., <http://www.epi.org/resources/budget> (last visited Dec. 18, 2013); see also *Beyond the Poverty Line: The High Cost of 'Getting By' in New Jersey*, N.J. STAR LEDGER (July 21, 2013), http://blog.nj.com/perspective/2013/07/the_high_cost_of_getting_by_in.html (citing the Economic Policy Institute's \$80,000 estimate of the cost of "getting by" for a family of four in New Jersey, and defining "getting by" as having enough income to secure a basic, modest, standard of living in the community, including the costs of basic needs such as housing, child care, food, transportation, and taxes, *without saving any money*).

36. *2013 Federal Poverty Guidelines*, FAMILIES USA, <http://www.familiesusa.org/resources/tools-for-advocates/guides/federal-poverty-guidelines.html> (last visited Dec. 18, 2013).

37. See 2011 KIDS COUNT DATA BOOK, *supra* note 24, at 11 ("Low income families are defined as those with incomes below 200% of the federal poverty level."); see also ANNIE E. CASEY FOUNDATION, 2009 KIDS COUNT DATA BOOK 13 (2009), available at http://www.aecf.org/~media/Pubs/Other/123/2009KIDSCOUNTDataBook/AEC186_2009_KCDB_FINAL%2072.pdf (explaining that when the poverty measure was introduced in the 1960s, it was defined as three times the annual cost of food, which was considered to represent 33% of a household budget). Today, food expenses account for only 10–20% of a household budget and the formula for setting the poverty rate does not include expenses for other family needs such as child care, transportation, and health insurance. *Id.*; see Bernard P. Dreyer, *To Create a Better World for Children and Families: The Case for Ending Childhood Poverty*, 13 ACADEMIC PEDIATRICS 83, 83–84 (2013), available at docs.cmhnetwork.org/download.php?id=539 (identifying failure to account for changes in expense rates and the effects of regional variations on the cost of living as two major weaknesses in U.S. measures of poverty).

childcare, among other expenses.³⁸ Researchers and economic analysts have labeled families with incomes at or below 200% of the federal poverty level as “low-income” as opposed to poor.³⁹ When low-income families are included in the equation, a shocking 76% of children under the age of five lived in low-income Newark households in 2011.⁴⁰ Across the country that same year, over 32 million children lived in low-income households (at or below 200% of the federal poverty level, defined as \$45,622 for a family of four), comprising 45% of all U.S. children.⁴¹

A. The Links Between Socioeconomic Status, Child Development, and Educational Outcomes

Poverty is not only an issue of economics. Extensive research has found that children raised in low-income families are less likely to achieve success; in fact, the greater their exposure to economic hardship, the greater their risk of failure.⁴² Studies have identified links between poverty and adverse outcomes for children in numerous areas, including: physical health; mental, emotional, and behavioral health; cognitive development; language development; and educational attainment and academic achievement.⁴³

38. See 2011 KIDS COUNT DATA BOOK, *supra* note 24, at 11; see also HEATHER BOUSHEY ET AL., *HARDSHIPS IN AMERICA: THE REAL STORY OF WORKING FAMILIES 2* (2001), available at http://www.epi.org/files/page/-/old/books/hardships_intro.pdf. Of families with incomes falling under 200% of the federal poverty line, nearly 30% faced at least one critical hardship, e.g., food insecurity, eviction, lack of access to essential medical care. *Id.* More than 72% had at least one serious hardship, e.g., food concerns, insufficient child care, use of emergency room for medical care, and these families experienced almost the same incidence of critical and serious hardships as families living at or below the poverty line. *Id.*

39. See 2011 KIDS COUNT DATA BOOK, *supra* note 24, at 7.

40. See ADVOCATES FOR CHILDREN OF N.J., *supra* note 31, at 7, 11.

41. See 2013 KIDS COUNT DATA BOOK, *supra* note 26, at 21.

42. See 2011 KIDS COUNT DATA BOOK *supra* note 24, at 10; see also Nat'l Inst. of Child Health & Human Dev. Early Child Care Research Network, *Duration and Developmental Timing of Poverty and Children's Cognitive and Social Development from Birth Through Third Grade*, 76 CHILD DEVELOPMENT 795, 795 (2005) (citing studies demonstrating that children raised in “persistent or chronic poverty” fare worse in cognitive and social development and have poorer physical and mental health than those who experience only “transitory poverty”).

43. See Hirokazu Yoshikawa et al., *The Effects of Poverty on the Mental, Emotional, and Behavioral Health of Children and Youth*, 67 AM. PSYCHOLOGIST 272, 273 (2012) (reviewing literature on the effects of family poverty on mental, emotional, and behavioral health); see also Greg J. Duncan & Jeanne Brooks-Gunn, *Family Poverty, Welfare Reform, and Child Development*, 71 CHILD DEV. 188, 188 (2000) (summarizing literature on the likely effects of poverty on child development and life chances, and referencing “countless studies, books and reports” showing a correlation between children’s poverty and measures of child achievement, behavior

In the area of child development, studies have revealed the adverse effects of poverty on children's cognitive and language skills.⁴⁴ For example, researchers have identified disparities in the vocabulary range of children born to parents with advanced levels of education and income and those born to parents with less education and income at as early as eighteen months of age.⁴⁵ One study of language development revealed that Newark-born preschoolers' language proficiency falls far below national norms, with 62% of Newark three-year-olds scoring below the fifteenth percentile on a standardized test of English vocabulary, compared to national norms of 15% of three-year-olds scoring below the fifteenth percentile.⁴⁶ Still another study found that by age four, children living in poverty are on average

and health). However, the question remains whether the relationship is a causal one. Several models have been proposed to pinpoint specific causal factors for the association between socioeconomic status and development, health and well-being, such as the *direct effects model* (poverty influences development and education "by increasing risk factors [associated with poverty] and limiting protective factors"); the *family stress model* (positing that economic hardship leads to family stress which compromises parenting skills, thereby affecting development); and the *community influences model* (considering the characteristics and effects of low-income neighborhoods, including high density, crime, underfunded schools, and limited socialization opportunities). See Engle & Black, *supra* note 12, at 245-46. Still other models criticize the aforementioned paradigms for oversimplifying the impact of poverty. See, e.g., J. Lawrence Aber et al., *The Effects of Poverty on Child Health and Development*, 18 ANN. REV. PUB. HEALTH 463, 464 (1997) (noting the difficulty of untangling "the effect of poverty per se and the disadvantageous family structures common in poor families"); see also O'Connor & Fernandez, *supra* note 10, at 6-11 (arguing that current models conceptualizing the impact of poverty oversimplify the problem by failing to acknowledge the effects of culture and bias favoring white, middle class norms and thereby reinforcing disproportionality in the special education arena). Regardless of the causal factors, the adverse consequences are clear.

44. See Kimberly G. Noble et al., *Neurocognitive Correlates of Socioeconomic Status in Kindergarten Children*, 8 DEVELOPMENTAL SCI. 74, 83 (2005) (describing the association between socioeconomic status, cognitive ability and achievement as strong, and noting the sizeable effects of socioeconomic status on the language and executive functioning systems); see also Brian J. Bigelow, *There's an Elephant in the Room: The Impact of Early Poverty and Neglect on Intelligence and Common Learning Disorders in Children, Adolescents, and their Parents*, 34 DEVELOPMENTAL DISABILITIES BULLETIN 177, 202 (2006) (opining that most learning disorders are aggravated by or "actually caused in the presence of" persistent poverty, particularly in the early years); Jeanne Brooks-Gunn & Greg J. Duncan, *The Effects of Poverty on Children*, CHILD. AND POVERTY, Summer/Fall 1997, at 61 (finding that children living below the federal poverty level are 1.3 times more likely than their non-impovertished peers to have learning disabilities and developmental delays).

45. See ADVOCATES FOR CHILDREN OF N.J., *supra* note 31, at 7.

46. See BENDHEIM-THOMAN CENTER FOR RESEARCH ON CHILD WELLBEING, EARLY LANGUAGE DEVELOPMENT (2006), available at <http://www.fragilefamilies.princeton.edu/newark/Language%20development%20brief%20-%20UE.pdf>.

eighteen months behind their middle-class peers in cognitive skills (e.g., long term memory, attention abilities).⁴⁷ Researchers have determined that children raised in chronically impoverished families exhibit more behavior problems as well.⁴⁸

For school-age children, the detrimental effects of economic hardship persist. Numerous studies document the link between decreased school readiness⁴⁹ and economic hardship, revealing that poor and low-income children commence school at a “cognitive and behavioral disadvantage.”⁵⁰ This gap typically widens over time, and thus differences in school readiness can have lifelong consequences: “School readiness has been shown to be predictive of virtually every educational benchmark (e.g., achievement test scores, grade retention, special education placement, dropout, etc.).”⁵¹ Researchers have examined the converse as well, finding that higher socioeconomic status correlates with better academic outcomes for children, particularly in the areas of cognition and school measures, but also in behavioral and health measures.⁵² It is significant to note that the achievement gap between children from low- and high-income households increased by as much as 40% for children born in 2001 compared to children born twenty-five years prior, while the racial gap narrowed.⁵³

47. See THE CHILDREN’S AID SOCIETY, ANNUAL REPORT: INSPIRE/ASPIRE 2 (2012), http://www.childrensaidsociety.org/files/upload-docs/CAS_AR_web_0.pdf.

48. See Engle & Black, *supra* note 12, at 244 (citing evidence from the National Institute of Child Health and Human Development Early Child Care Research Network).

49. See H.B. Ferguson et al., *The Impact of Poverty on Educational Outcomes for Children*, 12 PEDIATRIC CHILD. HEALTH 701, 701 (2007) (defining school readiness as requiring “physical well-being and appropriate motor development, emotional health and a positive approach to new experiences, age-appropriate social knowledge and competence, age-appropriate language skills, and age-appropriate general knowledge and cognitive skills”).

50. *Id.* at 701–02.

51. See Engle & Black, *supra* note 12, at 244 (quoting E. ZIGLER, ET AL., A VISION FOR UNIVERSAL PRESCHOOL EDUCATION 21 (2006)).

52. See Ferguson et al., *supra* note 49, at 702. For example, a 2011 study found that over 80% of African-American, Latino, and Native American fourth graders were not proficient in reading, compared to 58% of white students. See 2013 KIDS COUNT DATA BOOK, *supra* note 26, at 26. When examining the effects of income, 82% of low-income students were not reading proficient, versus 52% of higher income peers. See *id.* The percentage breakdowns based on race and economics were nearly identical when examining eighth graders’ math proficiency as well. See *id.* at 26, 27.

53. See Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, EDUC. LEADERSHIP, May 2013, at 10.

Children living in low-income households also are at greater risk of leaving school prior to graduation.⁵⁴ In some economically deprived communities, nearly 30% of youth do not graduate from high school,⁵⁵ almost 75% of low-income students and students of color who enroll in higher education after high school do not earn a degree,⁵⁶ and only 8% of children born into poverty graduate from college by age twenty-five.⁵⁷ Significantly, 40% of African-American and Latino students attend schools where 70–100% of students are poor, in contrast to one out of every thirty white students.⁵⁸

High school dropouts are at much higher risk of unemployment, substance use and abuse, and incarceration than their peers who graduate.⁵⁹ Notably, young people of higher socioeconomic status are more likely to get back on track after dropping out of school when compared to their peers living in low-income households.⁶⁰ The combined effects of poverty and education create an unending cycle: “Poverty limits the chances of educational attainment, and at the

54. See Dan Bloom, *Programs and Policies to Assist High School Dropouts in the Transition to Adulthood*, 20 FUTURE OF CHILD., Spring 2010, at 92.

55. See THE CHILDREN’S AID SOCIETY, *supra* note 47, at 6 (stating that in the United States, one low-income student drops out of high school every 26 seconds and, in the communities served by Children’s Aid Society, almost 1/3 of adolescents do not graduate from high school).

56. See *id.* at 8.

57. See *id.* at 1.

58. See GARY ORFIELD, REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE 15 (2009), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf>; see also ROBERT BALFANZ & NETTIE LEGTERS, LOCATING THE DROPOUT CRISIS, at v (2004), available at <http://www.csos.jhu.edu/crespar/techReports/Report70.pdf> (finding nearly 50% of African American students, nearly 40% Latino students, and only 11% white students attend high schools where graduation is not the norm).

59. See DAN BLOOM & RON HASKINS, HELPING HIGH SCHOOL DROPOUTS IMPROVE THEIR PROSPECTS 1 (2010), available at http://futureofchildren.org/futureofchildren/publications/docs/20_01_PolicyBrief.pdf; see also Carolyn Hughes & Selete K. Avoke, *The Elephant in the Room: Poverty, Disability, and Employment*, RES. & PRACTICE FOR PERSONS WITH SEVERE DISABILITIES, Spring/Summer 2010, at 6. For example, a 2007 study found that more than 50% of high school dropouts between the ages of 16 and 19 had no paid employment. See Bloom, *supra* note 54, at 91; see also Carolyn Hughes, *Poverty and Disability: Addressing the Challenge of Inequality*, CAREER DEV. & TRANSITION FOR EXCEPTIONAL INDIVIDUALS, May 2013, at 40 (discussing the “near 50% unemployment rate of Black urban male high school dropouts”). Another study revealed that more than two-thirds of state prison inmates did not have a high school diploma. See Bloom, *supra* note 54, at 91; see also CAROLYN WOLF HARLOW, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), available at <http://www.prisonpolicy.org/scans/bjs/ecp.pdf> (reporting that 68% of prison inmates did not obtain a high school diploma).

60. See Bloom, *supra* note 54, at 92.

same time, educational attainment is one of the prime mechanisms for escaping poverty.”⁶¹

B. The Link Between Socioeconomic Status and Disability

Similar to the interplay between poverty and education, disability has been described as “both a cause and an effect of poverty.”⁶² There is a higher prevalence of poverty among persons with disabilities,⁶³ and children living in poverty are at high risk for disability.⁶⁴ In 2010, approximately 19%, or 56.7 million, of the nearly 304 million United States non-institutionalized civilian population reported having one or more disabilities.⁶⁵ That same year, approximately 28.6% of persons with disabilities, ages 15–64, lived in poverty, as opposed to 14.5% of non-disabled persons.⁶⁶

With respect to children, 8.4% of non-institutionalized young people under age fifteen, or 5.2 million, had a disability in 2010, with approximately half having a severe disability.⁶⁷ More than 25% of children with disabilities live in households with incomes at or below the federal poverty line.⁶⁸ As is the case for children living in poverty,

61. Engle & Black, *supra* note 12, at 243.

62. Hughes & Avoke, *supra* note 59, at 5; *see also* Susan L. Parish et al., *Material Hardship in U.S. Families Raising Children with Disabilities*, 75 EXCEPTIONAL CHILD. 75, 73 (2008) (“Poverty—through exposure to environmental hazards—leads to disability, and disability—by way of increased financial burdens—leads to poverty.”).

63. *See* Hughes, *supra* note 59, at 38.

64. *See* Carla A. Peterson et al., *Meeting Needs of Young Children at Risk for or Having a Disability*, EARLY CHILDHOOD EDUC. J., March 2010, at 509, 512 [hereinafter *Meeting Needs*]; *see also* Carla A. Peterson et al., *Early Head Start: Identifying and Serving Children with Disabilities*, TOPICS IN EARLY CHILDHOOD SPECIAL EDUC., June 2004, at 76 (discussing the high risk of poor developmental outcomes for children living in poverty, and associations between poverty and poorer development in cognition, poorer health, higher rates of learning disabilities, and developmental delays).

65. MATTHEW W. BRAULT, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2010 HOUSEHOLD ECONOMIC STUDIES 5 (2012), *available at* <http://www.census.gov/prod/2012pubs/p70-131.pdf>.

66. *Id.* at 12.

67. *Id.* at 13.

68. *See* Parish et al., *supra* note 62, at 71 (adding that children with disabilities are “significantly more likely to live in families that are considered to be poor”); *see also* Marcia K. Meyers et al., *The Cost of Caring: Childhood Disability and Poor Families*, 84 SOC. SERV. REV. 209, 219 (studying the cost of caring for children with disabilities in families living in poverty and finding that childhood disability is “considerably more prevalent among current and recent welfare recipients than in the general population”).

children with disabilities are more likely to live in households headed by single parents.⁶⁹

Poverty-associated risk factors affecting health and development—such as food insecurity, harmful housing conditions, insufficient stimulation, and poor access to educational and other resources—can place low-income children at greater risk for developing disabilities and exacerbate pre-existing disabilities.⁷⁰ Moreover, childhood disability can cause or worsen financial and material hardship, as families often must bear additional disability-related costs, including specialized treatments, services, daycare, transportation, equipment, and technologies.⁷¹ It also may hinder employment opportunities for parents and caregivers due to the need to stay home and care for their children.⁷² Yet, these same children are less likely to receive disability-related services and more likely to confront barriers to accessing them.⁷³ One study found that families of children with disabilities were “79% more likely to report that they worried that food would run out; 94% more likely to report having cut or skipped meals due to money; 73% more likely to have been unable to pay their rent in the past year; and 78% more likely to have had phone service disconnected in the past year.”⁷⁴

Just as with young people living in low-income households, young people with disabilities have low graduation rates and are less likely to pursue post-secondary education,⁷⁵ limiting opportunities for future

69. See Glenn T. Fujiura & Kiyoshi Yamaki, *Trends in Demography of Childhood Poverty and Disability*, 66 EXCEPTIONAL CHILD 187, 191 (2000) (finding a strong association between disability risk and single-parent household status, but adding that the greater disability rate among children of color seems to be associated with the disproportionate representation of poor and single-parent households in the minority community, for no additional risk was correlated with racial or ethnic minority status when poverty and family status were statistically controlled).

70. See Hughes & Avoke, *supra* note 59, at 8.

71. See Eric Emerson, *Poverty and People with Intellectual Disabilities*, 13 MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES RES. REV. 107, 109 (2007); see also Meyers et al., *supra* note 68, at 229–30 (finding the direct and indirect costs of caring for a child with a disability have significant adverse effects on the family’s economic well-being); Parish et al., *supra* note 62, at 72.

72. See Emerson, *supra* note 71, at 109.

73. See Peterson et al., *supra* note 64, at 509.

74. See Emerson, *supra* note 71, at 108 (citing Susan L. Parrish et al., *Economic Implications of Caregiving at Midlife: Comparing Parents with and Without Children with Disabilities*, 42 MENTAL RETARDATION 413 (2004)).

75. See Hughes & Avoke, *supra* note 59, at 7. For instance, a New York City study included young people with disabilities among the five cohorts of youth at high risk of leaving school without a diploma. See LAURA WYCKOFF ET AL., DISCONNECTED YOUNG PEOPLE IN NEW YORK CITY: CRISIS AND OPPORTUNITY 6–7 (2008), available at http://www.issuelab.org/click/download1/disconnected_young_

success. In 2010, only 34% of working-age people with disabilities had a high school diploma, and only 12% had earned a bachelor's degree or higher.⁷⁶ As a result, adults with disabilities are more likely to experience poverty as well.⁷⁷

According to the Bureau of Labor and Statistics, 69.7% of persons *without* disabilities were employed in June 2013, compared with 20.2% of persons *with* disabilities.⁷⁸ Adults with disabilities who work tend to be underemployed or receive wages that are below the federal poverty level.⁷⁹ Likewise, nearly 50% of adults who experience poverty for at least one year have a disability, as do more than 66% of adults who experience persistent poverty.⁸⁰

Even when studies control for income, people with disabilities remain “much more likely to experience various forms of material hardship—including food insecurity, not getting needed medical or dental care, and not being able to pay rent, mortgage, and utility bills—than people without disabilities.”⁸¹ This finding extends across

people_in_new_york_city_crisis_and_opportunity (listing the other four cohorts as young immigrants, youth involved with the juvenile justice system, youth involved with the foster care system, and young mothers).

76. See WILLIAM ERICKSON ET AL., 2010 DISABILITY STATUS REPORT, UNITED STATES 6 (2012), *available at* <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1561&context=gladnetcollect>; *see also* WYCKOFF ET AL., *supra* note 75, at 6 (reporting that 12,000–15,000 New York City students with disabilities, ages 14–21, leave school without a diploma). Another study found that only 31% of young people with intellectual disabilities were employed post high school and only 7% attended postsecondary school as a sole post-school activity. *See* Hughes, *supra* note 59, at 39. For more information on the postsecondary experiences of young people with disabilities, *see generally* LYNN NEWMAN ET AL., THE POST-HIGH SCHOOL OUTCOMES OF YOUNG ADULTS WITH DISABILITIES UP TO EIGHT YEARS AFTER HIGH SCHOOL: A REPORT FROM THE NATIONAL LONGITUDINAL TRANSITION STUDY-2 (NLTS2) (2011), *available at* http://www.nlts2.org/reports/2011_09_02/nlts2_report_2011_09_02_complete.pdf.

77. *See* Hughes, *supra* note 59, at 39 (noting that adults with disabilities have a greater likelihood of experiencing poverty's adverse effects, including food insecurity, poor housing and medical care, and difficulty paying bills).

78. *Economic News Release: June 2013*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/news.release/archives/empst_07052013.htm (scroll down to “Table A-6”).

79. *See* Hughes & Avoke, *supra* note 59, at 9.

80. *See* SHAWN FREMSTAD, HALF IN TEN: WHY TAKING DISABILITY INTO ACCOUNT IS ESSENTIAL TO REDUCING INCOME POVERTY AND EXPANDING ECONOMIC INCLUSION 11 (2009), *available at* <http://www.cepr.net/documents/publications/poverty-disability-2009-09.pdf> (defining persistent poverty as having a household income at or below the federal poverty level for at least thirty-six months out of a forty-eight-month period).

81. *See id.* at 2.

all racial and ethnic groups.⁸² Thus, the combination of poverty and disability can create a situation of double jeopardy for those affected, doubling the challenges they face.

C. The Link between Disability and Educational Outcomes

Students with disabilities receiving special education services continue to “lag behind their nondisabled peers in educational achievements, are often held to lower expectations, are less likely to take the full academic curriculum in high school, and are more likely to drop out of school.”⁸³ No studies have examined the overall effectiveness of the special education system to determine if, in fact, it works. Empirical and anecdotal evidence, however, support the conclusion that several aspects of the system *do not work*, leaving many children with disabilities unidentified or misclassified, receiving inappropriate programming and services, or not receiving programming and services at all.⁸⁴

For example, when comparing students with and without disabilities in the area of achievement, grade-level assessments for reading and math showed large gaps in performance. One study found that on high school twelfth grade assessments, 64% of students with disabilities tested as not proficient in reading and 76% tested as not proficient in math, in contrast to rates of 24% and 34% respectively for students without disabilities.⁸⁵ Studies also have found that students with disabilities who spend more time in general education classrooms tend to have better attendance, perform closer to grade-level, and perform better on achievement tests than those educated in pull-out settings.⁸⁶ Yet, African-American students with disabilities are half as likely to be placed in general education settings than their white peers,⁸⁷ and are more likely to be educated in

82. See Hughes, *supra* note 59, at 39.

83. Laudan Aron & Pamela Loprest, *Disability and the Education System*, FUTURE OF CHILD., Spring 2012, at 97.

84. See, e.g., *id.* at 103 (positing that variation across states in disability identification rates suggests that there are many factors other than prevalence of disability at play, and suggesting that the “often perverse, financial incentive structures” in the special education system influence if and how students with disabilities are identified and served).

85. See *id.* at 113.

86. See Alfredo Artiles et al., *Justifying and Explaining Disproportionality, 1968–2008: A Critique of Underlying Views of Culture*, 76 EXCEPTIONAL CHILD. 279, 285 (2010).

87. See *id.*

segregated settings even when they have the same classification as their white peers.⁸⁸

As mentioned above, students with disabilities are more likely to leave school prior to graduation.⁸⁹ While on average 11% of high school students drop out of school, approximately 50–60% of students classified as having emotional or behavioral disabilities leave high school without a diploma, as do more than 30% of students with learning disabilities.⁹⁰ Studies report even higher dropout rates for youth with disabilities in detention or correctional facilities.⁹¹ When students with disabilities do graduate, they are less likely to receive a traditional high school diploma⁹² or to attend or complete post-secondary schooling,⁹³ increasing their likelihood of facing economic and material hardship in the future.

88. See N.J. COUNCIL ON DEVELOPMENTAL DISABILITIES, *supra* note 10, at 19. Racial and ethnic disparities exist in other areas as well. See *id.* at 18 (reporting that African-American students are three times as likely to be classified as having mental retardation compared to white students and twice as likely to be classified as having multiple disabilities and emotional disturbance, but less likely than white students to be classified as having a speech or language impairment).

89. See Martha Thurlow et al., *Students with Disabilities Who Drop out of School—Implications for Policy and Practice*, NAT'L CTR. SECONDARY EDUC. & TRANSITION (2002), available at <http://www.ncset.org/publications/printresource.asp?id=425> (reporting that the dropout rate for students with disabilities is approximately double that of students without disabilities).

90. See Artiles et al., *supra* note 86, at 285; see also Suzanne E. Kemp, *Dropout Policies and Trends for Students with and Without Disabilities*, 41 ADOLESCENCE 235, 236 (2006) (noting that 50–59% of students with emotional/behavioral disorders and 32–26% of students with learning disabilities drop out of school).

91. See *id.* (estimating that 30–70% of youth with disabilities in detention and correctional institutions drop out of school).

92. See Aron & Loprest, *supra* note 83, at 113 (reporting that in 2005, 46% of students with disabilities graduated with a regular diploma versus 75% of non-disabled students); see also Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107, 136 (2011) (reporting that only 39% of students with disabilities ages 16–21 receive a regular high school diploma, with the percentage dropping based on certain classifications—e.g., only 24% of students with emotional disturbance earn a high school diploma).

93. NEWMAN ET AL., *supra* note 76, at 16–20 (2011) (explaining that enrollment of young adults with disabilities in post-secondary schooling varies widely based upon type of disability and type of post-secondary schooling). For example, in a 2009 survey, approximately 66% of young adults with a learning disability or speech/language impairment reported enrolling in post-secondary schooling, whereas only approximately 30% of students with mental retardation or multiple disabilities so enrolled. In contrast, approximately 67% of young adults without disabilities reported enrolling in post-secondary schooling. See *id.* Notably, young adults with disabilities were twice as likely to have enrolled in or attended a two-year college or vocational school as opposed to a four-year college, and almost one-third had enrolled in more than one type of postsecondary schooling. See *id.* at 21.

D. The Intersection of Socioeconomic Status, Disability, and Educational Outcomes

Just as the effects of poverty are cumulative, so too are the effects of learning⁹⁴—“consequences at one stage in a child’s development can hinder development at a later stage.”⁹⁵ Thus, the longer a child with a disability fails to receive proper remediation, the more likely the disability may become ingrained and less responsive, or even unresponsive, to treatment.⁹⁶ As described above, each of the associations between poverty and education, poverty and disability, and disability and education, alone, can have devastating outcomes. Operating simultaneously, these links may magnify the risk of dire consequences even further.⁹⁷ When one considers the potential lifelong effects of a school district’s failure to provide proper special education and related services to a child with a disability living in poverty, the need for an appropriate remedy becomes eminently clear.

Additionally, young adults with disabilities from households with an annual income over \$50,000 were more likely than those from households with an annual income of \$25,000 or less ever to have been enrolled in postsecondary education (70% higher income, versus 50%). *See id.* at 21. *But see* Aron & Loprest, *supra* note 83, at 114 (noting that studies have found adults with disabilities have “significantly” lower rates of postsecondary school completion than adults without disabilities).

94. Deborah Lowe Vandell et al., *Do Effects of Early Child Care Extend to Age 15 Years? Results from the NICHD Study of Early Child Care and Youth Development*, 81 CHILD DEV. 737, 751 (2010) (noting that a link between higher achievement during the early and adolescent years is no surprise due to the cumulative nature of school achievement); *see also* DONALD J. HERNANDEZ, DOUBLE JEOPARDY: HOW THIRD-GRADE READING SKILLS AND POVERTY INFLUENCE HIGH SCHOOL GRADUATION 3–4, 9 (2011), *available at* <http://www.aecf.org/~media/Pubs/Topics/Education/Other/DoubleJeopardyHowThirdGradeReadingSkillsandPoverty/DoubleJeopardyReport040511FINAL.pdf> (citing results of a longitudinal study of approximately 4000 students finding that those who are not proficient readers by third grade are four times more likely to leave school without a diploma than proficient readers, and finding that those who do not master basic skills by third grade are six times more likely to leave school without a high school diploma. The rate was even higher for African-American and Hispanic students living in poverty).

95. Yoshikawa et al., *supra* note 43, at 274.

96. *See id.*; *see also* *Early Intervention for Children with Disabilities Works, Report Finds: Letter No. 142*, [Oct.] Accommodating Disabilities Decisions (CCH) No. 143 (Oct. 3, 2003), 2003 WL 26457054 (discussing the analogous findings of the National Early Intervention Longitudinal Study, which, according to then Assistant Secretary for Special Education and Rehabilitative Services, Robert Pasternack, provided further evidence that “the earlier we identify children with disabilities and provide [sound] interventions, the better chance they have of reaching their full potential”).

97. *See, e.g.*, Hernandez, *supra* note 94, at 3 (describing the combined effects of reading poorly and living in poverty as placing children in “double jeopardy”).

Despite the challenges, all hope is not lost for these children. Numerous studies over the last two decades have found that early, intensive, prolonged intervention can affect language, cognition, and social development dramatically,⁹⁸ which can narrow the socioeconomic performance gap in these key areas and provide benefits that last into adulthood.⁹⁹ Additionally, researchers have opined that, “children living in poverty benefit more than others from early educational settings that are high quality, with children with special educational needs demonstrating longer-term benefits.”¹⁰⁰ Instances exist where early intervention has succeeded in preventing a future need for intervention.¹⁰¹ The timing, duration, and appropriateness of intervention, however, are critical components of success,¹⁰² with both early and ongoing interventions necessary for remediation: “[i]t is unrealistic to think of earlier intervention as an alternative to later intervention when problems have become established: both are needed.”¹⁰³

98. See P.A. Howard-Jones et al., *The Timing of Educational Investment: A Neuroscientific Perspective*, 2S DEVELOPMENTAL COGNITIVE NEUROSCIENCE S18, S19 (2012); see also Engle & Black, *supra* note 12, at 248 (reporting that research reveals that high-quality preschool services combined with parent involvement and improvement in health status can significantly affect a child’s language and cognitive skills by the age of five).

99. See Howard-Jones et al., *supra* note 98, at 19; see also Noble et al., *supra* note 44, at 84 (reviewing studies finding long-term benefits of early childhood programs including “persistent, cost-effective effects on academic achievement”).

100. Howard-Jones et al., *supra* note 98, at 23.

101. See *id.* (reporting examples in which early intervention succeeded in preventing a need for later intervention).

102. See, e.g., Sally E. Shaywitz et al., *The Education of Dyslexic Children from Childhood to Young Adulthood*, 59 ANN. REV. PSYCHOL. 451, 463, 467 (2008) (finding that for children with dyslexia who receive interventions after second grade, “it is more challenging to bring [them] up to expected grade levels once they fall behind,” and that while “significant improvements in reading can still occur,” evidence reveals less-consistent positive results than for those who receive intervention during the younger years); see also Allyson P. Mackey et al., *Environmental Influences on Prefrontal Development*, in PRINCIPLES OF FRONTAL LOBE FUNCTION 146 (Donald T. Struss & Robert T. Knight eds., 2012), available at https://courses.cit.cornell.edu/rdr98/papers/Mackey_Bunge_Raizada_Stuss_and_Knight_2nd_Ed_2012.pdf (reporting that a high degree of plasticity for language appears to taper off at age eight or earlier); Margje van der Schuit et al., *Early Language Intervention for Children with Intellectual Disabilities: A Neurocognitive Perspective*, 32 RES. DEV. DISABILITIES 705, 705, 711 (2011) (finding that early intervention produced substantial developmental gains in children with intellectual disabilities where the intervention was prolonged and occurred across different settings, but that when intervention and assessment stopped, additional growth slowed greatly).

103. JUNE STATHAM & MARJORIE SMITH, ISSUES IN EARLIER INTERVENTION: IDENTIFYING AND SUPPORTING CHILDREN WITH ADDITIONAL NEEDS 12 (2010),

Notwithstanding the aggregate adverse effects of the intersection of poverty, education, and disability on child outcomes, and the proven success of early appropriate interventions, low-income parents of children with disabilities face major obstacles in obtaining proper educational programming and services for their children. These obstacles often relate to power imbalances that arise from differences between school district personnel and parents in education level, knowledge base, language, and access to expertise, including legal counsel.¹⁰⁴ The power imbalances create an unequal playing field that favors school districts and impedes parental participation in their children's education, particularly for poor or low-income parents.¹⁰⁵ The imbalances also restrict parents' ability to advocate successfully in the special education arena, thereby hindering access to appropriate special education programming and services.¹⁰⁶

To illustrate, a 2003 study of the United States population's literacy skills found that 86% of persons aged 25–29 who are not high school-educated or the equivalent “may be considered to have limited literacy.”¹⁰⁷ Researchers also have discovered that parents of children with disabilities have lower rates of educational attainment than the

available at http://www.ioe.ac.uk/about/documents/TCRU_Issues_in_Earlier_Intervention.pdf.

104. See Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 172–173 (2005) (describing the current special education system as yielding “lower payoffs for needier families, which are on average less endowed with bargaining power and therefore less capable of taking advantage of participation opportunities” in their child's education); see also Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1432 (2011) (explaining how the IDEA's private enforcement system results in wealthier parents of children with disabilities obtaining superior services compared to low-income parents of children with disabilities).

105. See Carmen Gomez Mandic et al., *Readability of Special Education Procedural Safeguards*, 45 J. SPECIAL EDUC. 195, 200 (2012) (positing that “parents of children with disabilities who are most vulnerable to poor educational, social, and employment outcomes—those from disadvantaged backgrounds—may also be those most likely to experience difficulty being involved in the children's education,” and citing to studies demonstrating the ways in which literacy features of the special education system may actually impede parental participation in their children's education).

106. See Chopp, *supra* note 2, at 438 (“[W]hen parents do not have the skills or resources to advocate for their children, the IEP team becomes one-sided . . . school districts make the educational decisions for the disabled child, and the parents—without knowing the alternatives—are left with an IEP into which they had very little input.”).

107. Mandic et al., *supra* note 105, at 198 (“limited literacy” is determined by scoring at “below basic” or “basic” levels in prose literacy, making one likely to experience “considerable difficulty in performing tasks that required [him/her] to integrate or synthesize information from complex or lengthy texts”).

general population and, thus, are more likely to have limited literacy skills.¹⁰⁸ In accordance with the IDEA, school districts must provide parents of children with disabilities with a written copy of their procedural safeguards¹⁰⁹ one time per year, with some exceptions.¹¹⁰ The procedural safeguards serve as an informational resource for parents: “These documents represent the primary way in which schools provide written notice to parents of their right and their children’s rights in the special education system.”¹¹¹ They must be written in the parents’ native language, unless it is clearly infeasible for a school district to do so, and written in an “easily understandable” manner.¹¹² Disturbingly, despite these requirements, studies have found that more than 50% of procedural safeguards are written at the college reading level and 40% at the graduate or professional level, rendering the information contained therein difficult and sometimes impossible to understand, even for those with higher level literacy skills.¹¹³

Further exacerbating the problem, special education evaluation reports, testing scores, the Individualized Education Program (IEP),¹¹⁴ special education state regulations, and administrative hearing rules with which parents must comply when formally challenging school district actions all are written in discipline-specific,

108. *See id.* at 198, 200.

109. Procedural safeguards provide an explanation of the special education rights of children with disabilities and the rights of their parents. Examples include the rights to notice, to review school records, to participate in meetings, and to file a complaint. *See generally* 20 U.S.C. §§ 1400–1482 (2012); 34 C.F.R. §§ 300.500–300.538 (2013).

110. *See* 20 U.S.C. § 1415(d)(1)(A) (providing that school districts must make a copy of the procedural safeguards available to parents of children with disabilities one time per year, as well as upon initial referral of a child for an evaluation, parental request for an evaluation, filing of a complaint and parental request for a copy of the safeguards).

111. *See* Mandic et al., *supra* note 105, at 196.

112. *See* 20 U.S.C. § 1415(d)(2).

113. Mandic et al., *supra* note 105, at 200; *see also* Julie L. Fitzgerald & Marley W. Watkins, *Parents’ Rights in Special Education: The Readability of Procedural Safeguards*, 72 *EXCEPTIONAL CHILD* 497, 506 (2006) (finding that only 4–8% of parents’ rights documents were written at or below the recommended seventh to eighth grade reading level, making them too difficult for average people to comprehend).

114. The “individualized education program” is a written statement for each child with a disability that sets forth the child’s strengths and educational needs and provides, among other things, a description of the special education and related services the child requires in order to make educational progress. *See* 20 U.S.C. § 1414(d).

technical jargon.¹¹⁵ As such, they typically require higher level literacy skills for comprehension.¹¹⁶ Adding the variable of English as a second language to the mix impedes parental participation as well, and further cements power imbalances in favor of school districts.¹¹⁷

In addition to the harmful effects of differences in education levels, knowledge base, and language, the high cost of challenging school district decisions regarding the provision of a free and appropriate public education (FAPE) to children with disabilities renders successful advocacy, or even the ability to advocate, unattainable for many.¹¹⁸ Parents frequently require outside experts to help translate and better understand the highly technical, discipline-specific language used in a child's evaluation reports and teacher or service provider recommendations.¹¹⁹ To challenge the presumed "expertise" of school district professionals in formal dispute resolution processes, parents must obtain outside testing, classroom observations, review of school records, and expert reports and testimony.¹²⁰ Hearings typically occur over many days and may result in lost time at work,

115. This information is based on my personal experience as a special education attorney representing low-income parents of children with disabilities in special education matters; *see also* Pasachoff *supra* note 104, at 1439–40 (2011) (noting that poor families tend to be less aware of their special education rights and the "meaning of particular diagnoses").

116. *See* Mandic et al., *supra* note 105, at 200 ("[W]hen literacy and language demands exceed people's skills, access to information, services, and rights is compromised.").

117. *See, e.g.*, Nydia Torres-Burgo et al., *Perceptions and Needs of Hispanic and Non-Hispanic Parents of Children Receiving Learning Disabilities Services*, 23 BILINGUAL RES. J. 373, 379 (1999) (finding that school districts significantly less often explained IDEA rights to parents in their native language of Spanish, and significantly less often asked parents if they understood their children's IEPs than they did for non-Hispanic parents.).

118. This information is based on my personal experience as a special education attorney representing low-income parents of children with disabilities in special education matters. For background, see Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 115 n.309 (2012) (theorizing that "because of the advocacy skills and resources of their parents," students from middle class and high income families enjoy special education benefits to a greater extent than children from impoverished families). For additional background, see Pasachoff, *supra* note 104, at 1417 ("[E]vidence suggests that children from wealthier families enforce their rights under the [IDEA] at higher rates than do children in poverty . . .").

119. This information is based on my personal experience as a special education attorney representing low-income parents of children with disabilities in special education matters.

120. *Id.*

additional childcare costs, and other expenses, including the cost of legal representation.¹²¹

Parents of children with disabilities from low-income households confront extremely difficult odds when challenging school districts for failing to educate their children properly. Few receive the help of an attorney, due to continual underfunding of the legal services system. According to Legal Services of New Jersey, approximately one in every four state residents qualifies for free legal services; at current funding rates, however, there is only one legal services attorney for every 11,000 eligible clients, resulting in thousands of social and legal problems that go unaddressed each year.¹²² Fewer than ten attorneys in New Jersey routinely provide free legal representation to low-income parents of children with disabilities in special education matters, and even fewer accompany a parent through a due process hearing¹²³.¹²⁴ As a result, low-income parents typically are left to challenge school districts on their own.¹²⁵

While parents of children with disabilities from low-income households are less likely to receive legal assistance in pursuing special education challenges against school districts, legal representation is one of the greatest determinants of success in a special education due process hearing.¹²⁶ According to an Illinois study, parents won approximately 50% of special education due process hearings when represented by a lawyer; without legal representation, they won only 16.8% of hearings.¹²⁷ These numbers

121. *Id.*

122. *See The New Jersey Legal Services System at a Glance*, LEGAL SERVICES N.J. (July 22, 2013), <http://www.lsnj.org/PDFs/Glance.pdf>.

123. A due process hearing is a trial-like legal proceeding in which all parties have an opportunity to present evidence and make arguments before an impartial administrative law judge. The judge then issues a decision which is considered final but appealable. *See generally* Cali Cope-Kasten, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & EDUC. 501 (2013) (describing and evaluating the IDEA's due process hearing mechanism in detail).

124. This number does not include private attorneys who occasionally handle special education matters pro bono. *See* LEGAL SERVS. CORP., LEGAL SERVICES CORPORATION 2012 FACT BOOK 18–19 (2013), *available at* http://www.lsc.gov/sites/lsc.gov/files/LSC/lscgov4/AnnualReports/2012_Fact%20Book_FINALforWEB.pdf (noting that out of the approximately 809,000 cases closed nationwide by LSC in 2012, 0.7% were education matters, and 0.2%, or just short of 2000 cases, pertained to special education matters).

125. *See* MELANIE ARCHER, ACCESS AND EQUITY IN THE DUE PROCESS SYSTEM: ATTORNEY REPRESENTATION AND HEARING OUTCOMES IN ILLINOIS 1997–2002, at 6 (2002), *available at* <http://www.dueprocessillinois.org/Access.pdf>.

126. *See id.* at 7.

127. *See id.*

are further discouraging when one considers that attorneys represent school districts in 94% of due process hearings, and parents in only 44% of these matters.¹²⁸ Due to the cost and shortage of free legal representation in special education matters, wealthy parents access the private enforcement scheme of the IDEA more than low-income parents.¹²⁹ Notably, “[w]hen poor children enforce their rights at lower rates than wealthier children, the dynamics tend to lead to better services for wealthier children.”¹³⁰ In light of these power imbalances and cost impediments, it is no wonder that more and more school districts seek to contain expenses by limiting or reducing services for those with the quietest voices.

Society should invest its time, money, and resources in fully implementing the IDEA’s mandate to provide every child with a disability with a FAPE in the least restrictive environment, and improving the timeliness and appropriateness of educational interventions. Until society cures the ills at the front end of the system, however, legislators and the courts must strengthen remedies on the back-end for low-income children with disabilities who wrongfully have been denied appropriate special education and related services. More than ten years of admittedly anecdotal experience on the part of this author reveals that, in some low-income communities, school districts factor into the cost-benefit-risk analysis the likelihood they will get caught or taken to task for denying children with disabilities desperately needed programming and services to which they are entitled.¹³¹ Because so few parents of children with disabilities in these communities have the necessary support, knowledge, skills, and resources to successfully challenge school districts, some districts play the odds and routinely win; even when school districts lose, the cost seldom is so great that it deters them from playing the odds again and again.¹³² In so doing, these

128. *See id.* Although this study did not examine family income and the need for free legal services, one may posit, though not conclude, that based on the shortage of free legal counsel in special education matters, many parents who did not have legal representation came from low-income households.

129. *See Pasachoff, supra* note 104, at 1417–18.

130. *Id.* at 1419; *see also* Chopp, *supra* note 2, at 447 (“Where there are finite resources, these resources will be allocated to those who advocate most forcefully for them, i.e., to the children whose parents have the wherewithal and financial means to enforce their children’s due process rights.”).

131. Since 2001, the author has represented low-income parents of children with disabilities in special education matters as a clinical professor in the Education and Health Law Clinic at Rutgers University School of Law-Newark.

132. Samuel R. Bagenstos, *Where Have All the Lawsuits Gone? The Shockingly Small Role of the Courts in Implementing the Individuals with Disabilities Education*

school districts perpetuate inequality in the special education system based on socioeconomic status. This Article proposes that a first step in breaking the cycle is providing an adequate remedial scheme for the children affected.

II. OVERVIEW OF THE IDEA'S REMEDIAL SCHEME

The IDEA is the primary federal law governing the education of children with disabilities.¹³³ It offers federal funding to states in exchange for states' commitment to implement a special education program that abides by the Act's mandates.¹³⁴ In accordance with the law, states must provide eligible students with disabilities between the ages of three and twenty-one with a "free and appropriate public education"¹³⁵ in the least restrictive environment.¹³⁶ To be eligible for programming and services under the IDEA, a child must have a statutorily recognized disability, and the disability must adversely affect the child's ability to learn such that the child requires special education and related services.¹³⁷ Once a child is found eligible, the school district must develop an Individualized Education Program (IEP) that is designed to meet the child's unique needs.¹³⁸ The IEP serves as the primary vehicle for the implementation of a child's

Act 12 (Faculty Working Paper Series No. 08-12-05, 2008) (noting that, on average, school districts spend nine dollars per classified student on litigation costs in one year).

133. In addition to the IDEA, other anti-discrimination legislation such as section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012), and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2012), ensures access to an appropriate education for students with disabilities.

134. *See* 20 U.S.C. § 1411 (2012) (authorizing grants to states for provision of special education and related services to children with disabilities in accordance with the IDEA).

135. *See* 20 U.S.C. § 1401(9) (2012); *see also id.* § 1412(a)(1)(A). A "free and appropriate public education" is defined as "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982) (requiring states to provide only a minimum floor of educational opportunity to students, not the best education possible).

136. *See* § 1412(a)(5)(A); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1213 (3d Cir. 1993) (holding that the Act's "least restrictive environment" mandate requires school districts to educate children with disabilities *with* children without disabilities to the maximum extent appropriate).

137. *See* § 1401(3) (defining an eligible student with a disability as a student who needs special education and related services due to mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, specific learning disabilities, or other health impairments); *see also* § 1401(26), (29).

138. *Rowley*, 458 U.S. at 181.

special education and related services; it is a written plan that sets forth, among other things, the child's present levels of performance, the child's educational strengths and needs, the programs and services the child will receive, and the measurable goals the child is expected to attain.¹³⁹

The Act provides detailed procedural safeguards to protect the rights of parents and children.¹⁴⁰ Among the procedural safeguards, states must implement methods for parents and guardians to challenge the identification, evaluation, classification, programming, and provision of a FAPE to their children in the event they disagree with school district decisions.¹⁴¹ This includes providing processes for the filing of a complaint with the state, a request for mediation, an impartial due process hearing, and/or bringing a civil action.¹⁴²

When a parent of a child with a disability brings an action against a school district, either in the form of a due process hearing or a civil action, the IDEA (and prior versions of the Act) grants judges broad discretion in their remedial authority. The IDEA provides that the court "shall grant such relief as [it] determines is appropriate."¹⁴³ Through litigation over the course of more than thirty-five years, the Third Circuit has translated this authority into the following types of relief: equitable remedies of tuition reimbursement and/or compensatory education, general declaratory relief,¹⁴⁴ injunctive relief,¹⁴⁵ and, for a limited time, monetary damages.¹⁴⁶ Parents may obtain these forms of relief through the administrative hearing process, with the exception of monetary damages and attorneys' fees and costs.¹⁴⁷ Relevant to this Article are the remedies of tuition

139. See § 1401(14); see also *id.* § 1414(d).

140. See generally 20 U.S.C. §§ 1400–1482 (2012).

141. See *id.*

142. See *id.*

143. 20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. 300.516(c)(3) (2013).

144. Examples of declaratory relief include a court's determination that a child is eligible for special education and related services, or that a school district provided a FAPE to a child with a disability.

145. For example, injunctive relief may be awarded in actions regarding the IDEA's "stay put" provision by requiring school districts to continue paying for programming and services for a child pending resolution of the dispute.

146. The Third Circuit previously permitted awards of monetary damages, using § 1983 to enforce the IDEA. See generally *supra* note 17 and accompanying text. Since damages are no longer an available remedy in the Third Circuit, I will not discuss them here.

147. For a detailed discussion of the remedial authority of hearing officers in special education disputes, see generally Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2011).

reimbursement and compensatory education, and both are discussed in more detail below.

A. Tuition Reimbursement

Aside from declaratory and injunctive relief, tuition reimbursement is the primary remedy courts may award to parents of children with disabilities. The U.S. Supreme Court established tuition reimbursement as a form of equitable relief in IDEA matters in 1985 with its decision in *School Committee of the Town of Burlington v. Department of Education*.¹⁴⁸ There, the Court held that when a school district develops an inappropriate IEP for a student and the parent unilaterally opts to pay for and place the student in a private school instead, the court has the authority to award tuition reimbursement, provided that the parent demonstrates the appropriateness of the unilateral placement.¹⁴⁹ The Court determined that reimbursement does not qualify as monetary damages because it merely requires the school district to pay for programming and services the district should have paid at the outset had it developed an appropriate IEP for the student.¹⁵⁰ To hold otherwise would provide a right without a remedy.¹⁵¹ Recognizing the “ponderous”¹⁵² nature of the review process, the Court opined that a parent should not have to keep his or her child in an inappropriate educational program.¹⁵³ The Court cautioned, however, that parents who unilaterally change their children’s placements act at their own financial risk, as there is no guarantee of reimbursement.¹⁵⁴

Eight years later, in *Florence County School District Four v. Carter ex rel. Carter*, the Court extended the right to tuition reimbursement to students placed unilaterally by their parents in non-state-approved private schools.¹⁵⁵ The Court permitted an award of tuition reimbursement as long as the parent demonstrated the inappropriateness of the school district’s IEP and the appropriateness of the private school placement.¹⁵⁶ Subsequent rulings in the Third

148. 471 U.S. 359, 369 (1985).

149. *See id.*

150. *See id.* at 370–71.

151. *See id.* at 370 (finding that a “child’s right to a free appropriate education . . . would be less than complete” if the court refused to allow tuition reimbursement as an available remedy under IDEA).

152. *See id.* at 370.

153. *See id.* at 373–74.

154. *See id.*

155. 510 U.S. 7, 13 (1993).

156. *See id.* at 15–16.

Circuit and Supreme Court further refined the requirements for and restrictions on tuition reimbursement as a remedy in unilateral placement cases. For example, the Third Circuit held that a private placement need not be perfect, only appropriate,¹⁵⁷ and that the private placement does not have to develop an IEP for the student.¹⁵⁸ With respect to restrictions on the remedy, the Third Circuit held that a court may deny reimbursement on equitable grounds if a parent fails to cooperate with the school district in its attempt to provide the student with a FAPE.¹⁵⁹

Congress codified tuition reimbursement as a remedy for the denial of a FAPE in its 1997 amendments to the IDEA.¹⁶⁰ The IDEA restricts this right by permitting courts to reduce or deny reimbursement when a parent fails to provide proper notice of intent to unilaterally place a child in a private school and seek reimbursement, or a parent acts unreasonably (e.g. does not cooperate or acts in bad faith).¹⁶¹ Therefore, in tuition reimbursement cases, the onus for identifying a problem's existence and notifying the school district of the problem rests with parents, and courts may reduce or deny the remedy if the parent fails to adhere to these requirements.

For those without means, tuition reimbursement has remained an elusive remedy. Without the financial ability to pay for special education programming and services outside the school district, low-income families of children with disabilities had only declaratory and injunctive relief available. While these forms of relief serve to remediate present and future harms, they do not compensate children with disabilities for past denials of proper programming and services.

B. Compensatory Education

The remedy of compensatory education evolved out of the realization that no form of recompense existed for parents unable to “front” the costs of unilateral placement or outside services for their

157. *See* Warren G. v. Cumberland Cnty. Sch. Dist., 190 F.3d 80, 84 (3d Cir. 1999).

158. *See* Lauren W. *ex rel.* Jean W. v. DeFlaminis, 480 F.3d 259, 276 (3d Cir. 2007).

159. *See* C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 71–73 (3d Cir. 2010) (holding that where parents refused to allow the District to conduct speech and language evaluations on their child, repeatedly delayed and then failed to attend IEP meetings, and failed to notify the District that they had unilaterally placed their child in a private school, equitable considerations warranted the denial of tuition reimbursement).

160. Act of June 4, 1997, Pub. L. No. 105-17, 111 Stat. 37 (codified as amended at 20 U.S.C. § 1412(a)(10)(C)(iii) (2012)).

161. *Id.*

children.¹⁶² It is designed to redress prior denials of a FAPE by helping IDEA-eligible children with disabilities recoup educational progress lost due to a school district's delay in offering, or failure to provide, proper educational programming and services.¹⁶³ Compensatory education may take different forms, such as afterschool instruction to a school-age student or additional programming and services for a student beyond the age of twenty-one.¹⁶⁴

The first major case awarding compensatory education involved a school district's failure to provide a FAPE for three years to a child with severe learning and behavioral issues stemming from a brain tumor.¹⁶⁵ The child's family could not afford to pay for private options.¹⁶⁶ The Eighth Circuit extended the *Burlington* rationale by requiring the school district to pay expenses it should have paid all along had it educated the child properly.¹⁶⁷ To support its holding, the Eighth Circuit determined that school districts should not escape from liability merely because a parent is unable to pay the cost of a private education; to opine otherwise would contradict Congressional intent and the Supreme Court's decision in *Burlington*.¹⁶⁸ Thus, compensatory education became the primary means of redress for children denied a FAPE who remain in inappropriate educational programs due to their parents' financial inability to cover the costs of private schooling and services.¹⁶⁹

The Third Circuit adopted the Eighth Circuit's rationale in 1990, in *Lester H. ex rel. Octavia P. v. Gilhool*, reasoning that Congress "did not intend to offer a remedy only to those parents able to afford an

162. See *Lester H. ex rel. Octavia P. v. Gilhool*, 916 F.2d 865, 872-73 (3d Cir. 1990) (holding that courts have the authority to grant compensatory education as a remedy, following the rationale of the Eighth Circuit, which held that a school district should not escape liability for providing educational programming and services to a child with a disability simply because the parent could not provide them, as "Congress did not intend the child's entitlement to a *free* education to turn upon her parent's ability to 'front' its costs" (quoting *Miener v. Missouri*, 800 F.2d 749, 752-53 (8th Cir. 1986)).

163. See *id.* at 872.

164. See *supra* note 21 (defining "compensatory education").

165. See *Miener*, 800 F.2d at 751.

166. See *id.*

167. See *id.* at 753.

168. See *id.* at 753. The Second Circuit, in *Burr v. Ambach*, similarly concluded that compensatory education was a necessary remedy under IDEA because Congress would not have intended to "create a right without a remedy." 863 F.2d 1071, 1078 (2d Cir. 1988), *vacated and remanded on other grounds sub nom.*, *Sobol v. Burr*, 492 U.S. 902 (1989).

169. Some parents also may choose not to front the costs of programming and services even if they are financially able.

alternative private education.”¹⁷⁰ Numerous Third Circuit decisions followed, further defining the contours of compensatory education as a remedy.¹⁷¹ Pursuant to these decisions, a parent must demonstrate that the IEP is not appropriate, but need not show bad faith on the part of the school district.¹⁷² In addition, a child with a disability may be entitled to compensatory education even if not classified previously as eligible for special education.¹⁷³ To the detriment of parents, courts also have held that there must be a substantive violation of the child’s right to a FAPE in order to qualify for a compensatory education award; procedural violations alone do not justify this remedy.¹⁷⁴

To measure the amount of a compensatory education award, the Third Circuit determined that a child with a disability is entitled to receive compensatory education and related services for the duration of the FAPE deprivation minus the reasonable time needed for the school district to correct the problem.¹⁷⁵ The court established that “the right to compensatory education should accrue from the point that the *school district* knows or should know”¹⁷⁶ of the denial of a FAPE. In doing so, the court placed the onus of identifying a FAPE denial squarely on school districts, reasoning that “a child’s entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem).”¹⁷⁷

In essence, over the last twenty years, a parent’s socioeconomic status has become the primary factor determining which of the two equitable remedies—tuition reimbursement or compensatory education—a parent may access. Although courts have used both remedies widely throughout the 1990s and 2000s, Congress elected to codify only the former. In fact, the only reference to compensatory services as a remedy appears in the IDEA 2004 federal implementing regulations as a potential remedy within a state’s internal complaint

170. See Lester H. *ex rel.* Octavia P. v. Gilhool, 916 F.2d 865, 873 (3d Cir. 1990).

171. See, e.g., Michael P. *ex rel.* P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 738 (3d Cir. 2009); Ridgewood Bd. of Educ. v. N.E. *ex rel.* M.E., 172 F.3d 238, 249–50 (3d Cir. 1998); Carlisle Area Sch. v. Scott P., 62 F. 3d 520, 537 (3d Cir. 1995).

172. See *Scott P.*, 62 F.3d at 537.

173. See *Ridgewood*, 172 F.3d at 249–50.

174. See *P.P.*, 585 F.3d at 738.

175. See M.C. *ex rel.* J.C. v. Central Reg’l Sch. Dist., 81 F.3d 389, 397 (3d Cir. 1996).

176. *Id.* at 396–97 (emphasis added); see also Lauren W. *ex rel.* Jean W. v. Deflaminis, 480 F.3d 259, 272 (3d Cir. 2007); *Ridgewood*, 172 F.3d at 250.

177. *M.C.*, 81 F.3d at 397.

resolution process.¹⁷⁸ Congress' failure to codify compensatory education as an available remedy, while devoting significant attention to the rights and responsibilities of parents and children with disabilities unilaterally placed in private school, relegates compensatory education to a second class status with significant implications. Foremost, because the Act does not list compensatory education as a remedy, school districts have no duty to include it in the procedural safeguards or other materials they distribute to parents.¹⁷⁹ As set forth in Part I, parents rely on procedural safeguards to understand the special education system and their rights. As a result, many do not even know this remedy exists.¹⁸⁰

Moreover, children unilaterally placed by their parents in private schools presumably receive a FAPE immediately following placement, giving them an "immediacy of benefits"¹⁸¹ unavailable to students for whom compensatory education is the only available remedy. As a result, children with disabilities living in low-income households are forced to remain in allegedly inappropriate educational programs, at times for years, pending the dispute

178. See 34 C.F.R. § 300.151(b)(1) (2013) ("In resolving a complaint in which the [state educational agency] has found a failure to provide appropriate services, a [state educational agency] . . . must address—(1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement) . . ."). The 1999 version of the federal regulations provided an award of monetary reimbursement or "other corrective action appropriate to the needs of the child" as remedies for the denial of appropriate services. 34 C.F.R. § 300.660(b) (1999). The 1999 version further directed that a complaint must allege a violation that occurred

not more than one year prior to the date that the complaint is received . . . unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received.

34 C.F.R. § 300.662 (1999, repealed 2006); see Doug Goldberg, *OSEP Letter to Margaret Kohn, 17 EHLR 522 (1990)*, SPECIAL EDUC. ADVISOR (July 10, 1990), <http://www.specialeducationadvisor.com/osep-letter-to-margaret-kohn-17-ehlr-522-1990> (providing that compensatory education is an appropriate means to remedy a prior FAPE denial, and adding, "Further, compensatory education may be the only means through which children forced to remain in an inappropriate placement due to their parents' financial inability to pay for an appropriate private placement would receive FAPE.").

179. See Hyman et al., *supra* note 92, at 129–30.

180. See *id.*

181. Ralph D. Mawdsley, *Post Forest Grove Parental Reimbursement for Private School Placements: What about Parents Who Cannot Afford the Cost of Such Placements?*, 292 EDUC. LAW REP. 1, 20 (2013).

resolution process,¹⁸² “leaving less time to close gaps left open or widened by the denial of FAPE.”¹⁸³ These children often do not recoup this critical education and development time, no matter the quality or quantity of services courts award on the back end.¹⁸⁴ Furthermore, disparities exist in measuring these two remedies. Courts typically calculate and award tuition reimbursement based on years spent in the private placement while measuring compensatory education in terms of service hours or days of instruction missed,¹⁸⁵ resulting in, at times, a significantly reduced award. As children with disabilities in low-income households disproportionately rely on compensatory education as their sole remedy for the denial of a FAPE, they suffer the most from the adverse effects of this second-class cure.

III. APPLICATION OF THE IDEA 2004’S STATUTE OF LIMITATIONS TO COMPENSATORY EDUCATION CLAIMS IN THE THIRD CIRCUIT

As this Part demonstrates, the last decade has brought a marked change in the Third Circuit’s approach to compensatory education as a remedy. Recent opinions indicate misapplication and excessively restrictive interpretation of the IDEA 2004’s statute of limitations provision and its exceptions. These decisions exhibit a 180-degree shift in Third Circuit courts’ approach to remedies under the IDEA, and unfairly limit the remedial options available to children from low-income households.

A. Timelines for Filing Special Education Claims Pre-IDEA 2004

Prior to the 2004 amendments, the IDEA did not impose any time limits on bringing special education administrative level claims or civil actions. To counter this omission, the Third Circuit issued several decisions during the 1990s delineating parameters for the time period

182. See Seligmann & Zirkel *supra* note 18, at 299 (“[I]t remains true that from the start of a dispute to its final resolution, much time can elapse especially during a court proceeding.”). Additionally, in my experience, I have seen several examples of cases taking more than two years to make it through the administrative hearing process alone, not including appeal.

183. Seligmann & Zirkel, *supra* note 18, at 296.

184. See *generally supra* Part I.

185. See Zirkel, *supra* note 17, at 896.

in which a claim may be filed.¹⁸⁶ In so doing, the court took divergent positions in tuition reimbursement suits and compensatory education actions regarding the timeframe for filing a complaint, the responsibility for identifying a FAPE denial, and the starting point for the accrual of a claim.

As to the timeframe for filing a complaint seeking tuition reimbursement, the Third Circuit in *Bernardsville Board of Education v. J.H.* held that a parent's failure to initiate administrative grievance procedures more than one year following unilateral placement "without mitigating excuse . . . is an unreasonable delay."¹⁸⁷ The court based its decision on the rationale that school districts are entitled to notice, in the form of initiation of review proceedings within a reasonable time, of a parent's intent to unilaterally place a child and seek reimbursement.¹⁸⁸ Such notice allows the district to determine whether it should continue to review and revise the IEP: "[T]he right of review contains a corresponding parental duty to unequivocally place in issue the appropriateness of an IEP."¹⁸⁹

In contrast, the Third Circuit in *Ridgewood* refused to extend the statute of limitations on tuition reimbursement claims to the filing of first level (administrative) compensatory education claims.¹⁹⁰ The court held that any time limits on the filing of compensatory education claims did not accrue until after administrative proceedings had concluded.¹⁹¹ Due to the IDEA's requirement that parents exhaust their administrative remedies prior to filing a claim in state or federal court,¹⁹² compensatory education claims typically escaped application of time limits on filing to the benefit of parents.

In the 1997 amendments to the IDEA, Congress added notice requirements and conditions on reimbursement, effectively placing the duty to identify a FAPE denial on parents in tuition

186. See, e.g., *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 158 (3d Cir. 1994) (discussing, in 1994, the Third Circuit's interpretation of the appropriate timeframe for filing a tuition reimbursement claim); see also *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 250-51 (3d Cir. 1999) (discussing, in 1999, the Third Circuit's interpretation of the statute of limitations for compensatory education claims).

187. *J.H.*, 42 F.3d at 158.

188. See *id.* at 158.

189. *Id.* at 162.

190. See *Ridgewood*, 172 F.3d at 250.

191. See *id.* at 251; see also *Jeremy H. ex rel. Hunter v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 280-81 (3d Cir. 1996).

192. See *Jeremy H.*, 95 F.3d at 281 (citing the IDEA's mandate that an aggrieved party must exhaust the state's administrative procedures prior to bringing an IDEA claim in state or federal court, unless doing so would be futile).

reimbursement cases.¹⁹³ For example, a court may limit or deny reimbursement if a parent fails to inform the school district, at the last IEP meeting, of his intent to place the child in a private school and seek reimbursement, or does not provide written notice to the school district ten business days before the child's removal.¹⁹⁴ As long as a parent complies with the IDEA's notice requirements, the child's start date at the unilateral placement becomes the starting point for the accrual of the tuition reimbursement claim.¹⁹⁵

As explained in Part II above, the Third Circuit placed the duty to identify problems with the identification, evaluation, placement, and provision of a FAPE exclusively on school districts in actions involving compensatory education.¹⁹⁶ “[I]t is the responsibility of the child's teachers, therapists, and administrators—and of the multidisciplinary team that annually evaluates the student's progress—to ascertain the child's educational needs, respond to deficiencies, and place him or her accordingly.”¹⁹⁷ The vesting of this responsibility squarely in school districts coincided with the IDEA's mandates: given that school districts have an affirmative duty to identify, evaluate, and provide a FAPE to all eligible children,¹⁹⁸ by extension, they also have a duty to identify situations in which they have failed to provide a FAPE. Following this rationale, the Third Circuit determined that a compensatory education claim accrues from the time that the school district knows, or should have known, of the FAPE denial.¹⁹⁹

193. See 20 U.S.C. § 1412(a)(10)(C) (2012); see also, e.g., *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 72 (3d Cir. 2010) (finding that parents acted unreasonably by failing to notify the school district in a timely manner of their intent to seek tuition reimbursement for the unilateral placement of their child in a private school, and therefore denying the parents' reimbursement claim).

194. See § 1412(a)(10)(C)(iii)(I). *But see* § 1412(a)(10)(C)(iv) (excusing a parent from the notice requirement if he is illiterate and cannot write English, if compliance would cause physical or serious emotional harm to the child, or if the school prevented the parent from giving notice).

195. See generally § 1412(a)(10)(C).

196. See *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996); see also *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 250 (3d Cir. 1999).

197. *M.C.*, 81 F.3d at 397.

198. See § 1412(a)(1), (3) (describing states' duty to ensure that a FAPE is available to all children with disabilities ages three to twenty-one and requiring that all children with disabilities be identified, located, and evaluated for special education eligibility).

199. See *M.C.*, 81 F.3d at 396; see also *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 272 (3d Cir. 2007); *Ridgewood*, 172 F.3d at 250–51.

The Third Circuit's disparate positions on time limits for filing claims and determining when claims accrue in tuition reimbursement and compensatory education matters are solidly grounded in logic. Filing requirements such as parental notice and time limits for tuition reimbursement claims are common sense, because the school district may be held responsible for paying substantial sums of money retroactively (and often, once the decision is rendered, prospectively).²⁰⁰ For this reason, the Third Circuit, and Congress in the 1997 Amendments to the IDEA, permitted reduction and even denial of tuition reimbursement in the event a parent acts unreasonably or in bad faith.²⁰¹ Notably, however, the Third Circuit did not place prior notice requirements and time limits on first-level compensatory education claims. In compensatory education matters, school districts are not placed in the same position of risk,²⁰² for children typically remain in their same allegedly inappropriate educational program for the duration of the dispute, and remedies come in the form of additional future programming and services.²⁰³ Some have posited that these disparate positions stem from ad-hoc decision-making,²⁰⁴ proposing that the only difference between the two remedies lies in a parent's election of which one to choose—"the financial risk of a unilateral private placement . . . [or] forego[ing] this risk [and awaiting] the outcome of the Act's 'ponderous' review process."²⁰⁵ Those espousing this view fail to recognize that, for families without means, *no choice exists*.

This Article proposes the contrary view, namely that the Third Circuit intentionally employed distinct approaches. The court's opinions resulted from recognition that while tuition reimbursement and compensatory education are both equitable remedies that stem

200. See Zirkel, *supra* note 17, at 895–96 (describing the parent's "high stakes unilateral action" in tuition reimbursement cases as "warranting clear notice to the district of its last-chance opportunity to have the IEP team to resolve the matter, thus avoiding the mutual risk of undue costs").

201. See 20 U.S.C. § 1412(a)(10)(C)(iii)(III); see also, e.g., *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 72 (3d Cir. 2010) (denying tuition reimbursement due to parents' unreasonable conduct).

202. See Zirkel, *supra* note 17, at 896 (describing the level of risk as "less acute" in matters regarding compensatory education)

203. *But see Ferren C. v. Sch. Dist.*, 595 F. Supp. 2d 566, 569 (E.D. Pa. 2009) (noting that in past disputes between the parties regarding compensatory education, the school district created a trust fund in the amount of over \$200,000 to be used for compensatory education and related services).

204. See Zirkel, *supra* note 17, at 893 (describing the Third Circuit's disparate treatment of tuition reimbursement and compensatory education as an "ad hoc framework").

205. *Id.* at 894.

from the IDEA's "broad grant for appropriate relief" and "are premised on a denial of the eligible child's entitlement to FAPE,"²⁰⁶ they differ substantially in their availability, application and effects. As such, they require disparate treatment.²⁰⁷

B. Courts' Misapplication and Overly Restrictive Interpretation of the IDEA 2004's Statute of Limitations and its Exceptions in Compensatory Education Matters

The Third Circuit's distinct treatment of the remedies of tuition reimbursement and compensatory education persisted until the implementation of the 2004 IDEA amendments, when Congress added a statute of limitations to the Act.²⁰⁸ The statute of limitations sets a time limit on the filing of claims regarding special education identification, evaluation, placement, or the provision of a FAPE.²⁰⁹ The amended IDEA provides, in pertinent part:

(C) 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

206. *See id.* at 894.

207. Disparate treatment of tuition reimbursement and compensatory education claims is not unique to the Third Circuit. Although the IDEA did not include a statute of limitations prior to the 2004 amendments, the U.S. Department of Education (DOE), in the IDEA's implementing regulations, distinguished the two remedies in terms of the timing for filing claims. Following codification of tuition reimbursement as a remedy in 1997, the DOE included statute of limitations language in the 1999 regulations, in a reference to state complaint procedures. The regulations stated that a complaint must allege a violation occurring "not more than one year prior to the date that the complaint is received . . . unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received." 34 C.F.R. § 300.662 (repealed 2006). In addition, rather than treat these remedies similarly, Congress opted not to codify compensatory education in either the 1997 or the 2004 amendments while including detailed language regarding tuition reimbursement, *see* 20 U.S.C. § 1412(a)(10), despite the fact that courts had been awarding compensatory education in special education matters for more than twenty years.

208. *See* 20 U.S.C. § 1415(f)(3)(C)-(D) (2012).

209. *See* § 1415(b)(6), (f)(3)(C)-(D); *see also* Lynn M. Daggett et al., *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, 722 (2005) (defining statutes of limitations as serving many purposes, including "imposing finality on the litigation system, giving potential defendants an end to their potential liability, and avoiding litigation of disputes involving stale evidence").

explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.²¹⁰

The Act delineates two exceptions to the timeline:

(D) Exceptions to the timeline. The timeline described in subparagraph (C) shall not apply to a parent 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; or

(ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.²¹¹

Congress also amended the procedural safeguards section concerning the opportunity for a party to file a complaint, requiring that that states establish and maintain procedures including:

(6) An opportunity for any party to present a complaint—

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which 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.²¹²

The new statutory language superseded the Third Circuit's decision in *Bernardsville Board of Education v. J.H.*²¹³ by creating a two-year statutory time limit on reimbursement filings. It also overrode portions of the court's earlier decision in *Ridgewood*²¹⁴ by implementing a statute of limitations on the filing of compensatory education claims at the administrative level. Litigation following implementation of this new provision initially focused on retroactive

210. § 1415(f)(3)(C).

211. § 1415(f)(3)(D)(i)–(ii).

212. § 1415(b)(6).

213. 42 F.3d 149, 151 (3d Cir. 1994).

214. 172 F.3d 238 (3d Cir. 1999).

application of the statute to claims arising prior to the IDEA 2004's passage but filed after the Act's effective date.²¹⁵

In the last few years, the focus of litigation in Third Circuit courts has shifted to the application of the statute of limitations to compensatory education claims and parsing out the provision's exceptions. These recent federal district and appellate court decisions, discussed in detail below, demonstrate courts' confusion and resultant misapplication of the statute of limitations, and their overly restrictive interpretation of the exceptions. The decisions further constrict the availability of compensatory education as a remedy, to the particular detriment of low-income children with disabilities, and exhibit an almost complete reversal in the Third Circuit's prior broad approach to compensatory education claims.

1. *Application of the IDEA 2004's Statute of Limitations*

In applying the IDEA 2004's statute of limitations, Third Circuit courts err in two respects, both of which result in improper restrictions on the consideration of compensatory education claims. First, several courts misstate the statute of limitations as limiting compensatory education claims to actions that occurred no more than two years prior to *the date the complaint was filed*.²¹⁶ Second, some courts, while properly tolling the statute of limitations from the date the plaintiff knew or should have known about the alleged action forming the basis of the complaint (hereinafter referred to as the "knew or should have known" date or "KOSHK" date), erroneously restrict consideration of compensatory education claims to a maximum of two years prior to the KOSHK date, regardless of the actual scope and duration of the claim.²¹⁷ The first restriction reflects a misreading of the statute, while the second reflects statutory

215. See, e.g., *Evan H. v. Unionville-Chadds Ford Sch. Dist.*, No. 07-4990, 2008 WL 4791634 (E.D. Pa. Nov. 4, 2008) (concluding that the statute of limitations applies to claims filed after the Act's effective date, even if based on actions occurring prior to the enactment of IDEA 2004). In 2010 the Third Circuit resolved the retroactivity issue in *Steven I. v. Central Bucks School District*, holding that the statute of limitations applies to claims filed after the Act's effective date for actions and violations occurring prior to the effective date. 618 F.3d 411, 412 (3d Cir. 2010).

216. See, e.g., *H.M. ex rel. B.M. v. Haddon Heights Bd. of Educ.*, 822 F. Supp. 2d 439, 446-47 (D.N.J. 2011); see also *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 244 (3d Cir. 2012); *Munir v. Pottsville Area Sch. Dist.*, No. 3:10-cv-0855, 2012 WL 2194543, at *12 n.6 (M.D. Pa. June 14, 2012), *aff'd*, 723 F.3d 423 (3d Cir. 2013).

217. See, e.g., *I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 774 (M.D. Pa. 2012); see also *G.L. v. Ligonier Valley Sch. Dist. Auth.*, No. 2:13-cv-00034, 2013 U.S. Dist. LEXIS 180923, at *19-20 (W.D. Pa. Dec. 30, 2013).

misinterpretation and contravenes the plain meaning of the statute, the legislative history of the Act,²¹⁸ and Third Circuit precedent.

a. Courts Improperly Restrict Adjudication of Compensatory Education Claims to Two Years Prior to the Date the Complaint Was Filed

As previously stated, the IDEA 2004's statute of limitations, set forth at 20 U.S.C. § 1415(f)(3)(C), requires a party to file a complaint within two years of the *date the parent or public agency knew or should have known* about the alleged action²¹⁹ that forms the basis of the complaint. Several courts, however, (in dicta) have misread § 1415(f)(3)(C) together with § 1415(b)(6)(B) (procedural safeguard concerning the filing of a complaint) as barring courts from adjudicating any IDEA claims that occurred more than two years prior to the *date the petition was filed*.²²⁰ For example, in *H.M. ex rel. B.M., v. Haddon Heights Board of Education*, the court incorrectly states that because the plaintiffs filed their petition on June 5, 2008, they could seek recovery only for claims arising after June 5, 2006,²²¹ two years prior to the *date of filing* (as opposed to the KOSHK date). The court similarly errs in *L.G. and E.G. ex rel. E.G. v. Wissahickon School District*, stating, "Under IDEA's amended statute of limitations, a court may consider alleged denials of a FAPE occurring for a two-year period prior to parents' *request for a due process*

218. See generally S. REP. NO. 108-185 (2003).

219. Courts define "action" as the date the plaintiff learned or should have learned of the injury, as opposed to the date the plaintiff knew the conduct of the school district was actionable. See, e.g., *Centennial Sch. Dist. v. S.D. ex rel. Daniel D.*, No. 10-CV-4129, 2011 WL 6117278, at *5 (E.D. Pa. Dec. 8, 2011) (finding the statute of limitations accrues on plaintiff's knowledge of the injury and not plaintiff's knowledge of the law); see also *Bantum v. Sch. Dist.*, No. 10-4195, 2011 WL 1303312, at *4 n.7 (E.D. Pa. Apr. 5, 2011) ("[P]laintiff has two years from the date she learned or should have learned of her injury to request that the School District provide her with a due process hearing.").

220. See, e.g., *H.M.*, 822 F. Supp. 2d at 446-47 (confirming that where plaintiffs filed their petition on June 5, 2008, they could seek recovery for claims that arose up to two years prior, i.e., June 5, 2006); see also *D.K.*, 696 F.3d at 244 (noting that plaintiffs' claims are restricted to conduct following January 8, 2006, two years prior to the January 8, 2008 date plaintiffs filed their initial due process petition); *Munir*, 2012 WL 2194543, at *12 n.6 (noting that the court will not consider any claim arising prior to August 12, 2007 where the plaintiff filed the petition for due process on August 12, 2009); *L.G. & E.G. ex rel. E.G. v. Wissahickon Sch. Dist.*, Nos. 06-0333, 06-3816, 2011 WL 13572, at *7 n.5 (E.D. Pa. Jan. 4, 2011) ("Under IDEA's amended statute of limitations, a court may consider alleged denials of a FAPE occurring for a two-year period prior to parents' request for a due process hearing.").

221. See *H.M.*, 822 F. Supp. 2d at 446-47 (barring consideration of testimony that supported claims predating two years prior to the date of filing).

hearing.”²²² Significantly, the Third Circuit, in *D.K. v. Abington School District*, reinforces this misreading of the statute when it states, “Plaintiffs do not dispute that because they requested a due process hearing on January 8, 2008, the statute of limitations generally would limit their claims to the School District’s conduct after January 8, 2006.”²²³

Even if the courts read § 1415(f)(3)(C) together with § 1415(b)(6)(B), and interpreted the language as restricting adjudication of *all* compensatory education claims regardless of their scope or duration (a proposition that this Article does not advocate, except for illustrative purposes only), courts would have to consider, at the very least, all claims arising during the two years prior to the KOSHK date,²²⁴ *not* the date of filing the petition.²²⁵ To illustrate the distinction, consider a parent who learns of an ongoing FAPE violation causing harm to his child on January 1, 2010 (the KOSHK date) and the violation had occurred in a continuous manner for three years prior to that time. If the parent files a complaint within the two-year statute of limitations period (i.e., by January 1, 2012), he should be permitted to date the claim for compensatory education at least as far back as January 1, 2008, two years prior to the KOSHK date. One court recently referred to this interpretation as the “2+2” analysis: “[I]t allows two years after the KOSHK date for a plaintiff to file a due process complaint, and the period of up to two years before the KOSHK date for which [sic] plaintiffs may allege IDEA violations occurred,” allowing courts to consider, at most, a four-year IDEA claim.²²⁶ In contrast, according to the *H.M.* and *L.G.* opinions, the parent could date the claim back to January 1, 2010 only (two years prior to the *date of filing*), which would deprive the child of two additional years of compensatory education. Although the courts’

222. *L.G.*, 2011 WL 13572, at *7 n.5 (improperly stating the rule when discussing whether the IDEA’s statute of limitations replaces the equitable limitations imposed before 2004) (emphasis added); *see also Munir*, 2012 WL 2194543, at *12 n.6 (stating, in dicta, that the court will not consider any claim arising prior to August 12, 2007 where the plaintiff filed the petition for due process on August 12, 2009).

223. *D.K.*, 696 F.3d at 244.

224. *See* 20 U.S.C. § 1415(b)(6)(B) (2012).

225. The propriety of this strict interpretation, presented for hypothetical purposes only, is highly questionable, although at least one district court has followed this rationale. *See, e.g., I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 774 (M.D. Pa. 2012) (holding that plaintiff’s compensatory education claims arising before June 8, 2008 are barred where the parent’s “knew or should have known” date was found to be June 8, 2010).

226. *See G.L. v. Ligonier Valley Sch. Dist. Auth.*, No. 2:13-cv-00034, 2013 U.S. Dist. LEXIS 180923, at *10–11 (W.D. Pa. Dec. 30, 2013).

erroneous reading of the statute of limitations in these cases had no direct bearing on the resolution of the issues being litigated, it creates confusion and misleads other courts²²⁷ and the public.²²⁸

b. Courts Improperly Restrict Adjudication of Compensatory Education Claims to Two Years Prior to the KOSHK Date Regardless of the Scope of the Claim

Courts' application of "2+2" analysis creates further confusion regarding the interrelationship of § 1415(f)(3)(C) and § 1415(b)(6)(B) and their application to compensatory education claims. Relying on "2+2" analysis, Third Circuit courts restrict consideration of compensatory education claims, and thus the scope of awards, to the two-year period prior to the KOSHK date, regardless of whether the claim began more than two years prior but was ongoing up to and during the two-year period and timely filed.²²⁹ As discussed below, these decisions contradict the plain meaning of the relevant statutory provisions, evince a misinterpretation of the statute, contravene the legislative history of the IDEA, and negate years of Third Circuit precedent.

Lower courts in two recent cases misconstrue the interplay of § 1415(f)(3)(C) and § 1415(b)(6)(B) as preventing courts from hearing any claims that predate the two-year period prior to the KOSHK date. In *I.H. v. Cumberland Valley School District*, the parent filed a petition, on August 25, 2010, seeking compensatory education for her child dating back to March 2007, three years prior.²³⁰ The hearing officer determined that the parent's KOSHK date for purposes of the

227. See, e.g., *id.* at *19–20 (concluding that the hearing officer made an error of law when it held plaintiff's claims for relief were limited to the two years prior to the date the petition was filed, but certifying the issue for interlocutory appeal to the Third Circuit on the question of the proper statutory interpretation and application of 20 U.S.C. § 1415(f)(3)(C) together with § 1415(b)(6)(B)). Significantly, no other federal court of appeals has addressed this issue to date.

228. For example, in recent years the attorneys in the Education and Health Law Clinic have heard numerous mediators, administrative law judges and legal counsel for boards of education assert that a child cannot receive an award of more than two years of compensatory education under the statute of limitations, regardless of case circumstances.

229. See *G.L.*, 2013 U.S. Dist. LEXIS 180923, at *13–15; see also *I.H.*, 842 F. Supp. 2d at 773–74.

230. *I.H.*, 842 F. Supp. 2d at 774 (limiting consideration of claims regarding the denial of a FAPE to those occurring for a two-year period prior to the parents' KOSHK date).

statute of limitations was June 8, 2010,²³¹ and thus limited the compensatory education claim to June 8, 2008, two years prior.²³² The district court affirmed, reasoning that while § 1415(f)(3)(C) controls the limitations period for filing an action, § 1415(b)(6)(B) “provides a *limitations period for the scope of the action*, that is, which alleged violations or harms may be included in the complaint.”²³³ The court in *G.L. v. Ligonier Valley School District*, guided by the *I.H.* decision, similarly concluded that § 1415(f)(3)(C) and § 1415(b)(6)(B) should be read separately, defining the former as a time limit on filing for a hearing, and the latter as a “look-back” period for purposes of liability.²³⁴ Both courts espouse that the two-year “limitations period for the scope of the action,”²³⁵ or “look-back” period,²³⁶ precludes courts from adjudicating any IDEA claims for actions that occurred more than two years before the KOSHK date even if they were ongoing to the two-year period.²³⁷

As explained above, § 1415(f)(3)(C) is the IDEA’s statute of limitations provision and sets a two-year timeline from the KOSHK date to request a hearing. If a parent waits more than two years after the KOSHK date to request a hearing, and the opposing side raises the statute of limitations as an affirmative defense, the court will time-bar the claim unless the parent meets one of the delineated exceptions.²³⁸ In contrast, § 1415(b)(6)(B) is found in the procedural safeguards section of the IDEA and details the content of a complaint. Section 1415(b)(6)(B) provides, in relevant part, that any party may present a complaint alleging a violation that occurred not more than two years prior to the KOSHK date.²³⁹ Significantly, the plain language of § 1415(b)(6)(B) does not expressly limit the duration or scope of the claims, provided the complaint alleges a violation that occurred within the two-year period. As such, if a timely filed complaint sets forth a violation that occurred in the two-year period before KOSHK date, but the claim commenced prior to the two-year period and was ongoing, nothing in the language of the

231. *Id.* (noting that the parties agreed that the date the parent had learned, from an independent evaluation paid for by the district, that the child was not receiving a FAPE was the “knew or should have known date”).

232. *See id.*

233. *Id.* (emphasis added).

234. *See G.L.*, 2013 U.S. Dist. LEXIS 180923, at *13–15.

235. *I.H.*, 842 F. Supp. 2d at 774.

236. *G.L.*, 2013 U.S. Dist. LEXIS 180923, at *13.

237. *See id.* at *14–15; *see also I.H.*, 842 F. Supp. 2d at 774.

238. 20 U.S.C. § 1415(f)(3)(C)–(D) (2012).

239. § 1415(b)(6)(B).

IDEA restricts courts from adjudicating the claim in its entirety. To interpret the IDEA as foreclosing courts' adjudication of such timely filed, ongoing claims defies the plain language of § 1415(b)(6)(B) even when read together with § 1415(f)(3)(C)–(D), and contradicts the legislative history of the Act (as discussed in greater detail below). Moreover, this interpretation, advanced by the *I.H.* and *G.L.* courts, creates a right without a remedy, in contravention to the U.S. Supreme Court's opinions in *Burlington*²⁴⁰ and, more recently, in *Forest Grove School District v. T.A.*²⁴¹

In defining § 1415(b)(6)(B) as a limitation on the scope or duration of claims, the *I.H.* and *G.L.* courts appear to interpret the provision not as an extension or restatement of the statute of limitations set forth in § 1415(f)(3)(C), but rather as a jurisdictional limitation on courts' ability to hear IDEA claims.²⁴² This distinction is critical. When a filing requirement is deemed jurisdictional, it cannot be modified, and plaintiff noncompliance with the requirement results in an absolute bar to consideration of the claims.²⁴³ In contrast, the Third Circuit considers a statute of limitations an affirmative defense and subject to equitable modifications.²⁴⁴

To determine if a statutory provision is jurisdictional, courts look to congressional intent by considering the language, legislative history, and purpose of the statute.²⁴⁵ Factors considered include whether the provision explicitly uses the term "jurisdiction," whether it appears in the same section as the statute of limitations or in the statutory section on jurisdiction, and whether it is subject to modification.²⁴⁶ Here, the two-year time limit in § 1415(b)(6)(B)

240. *See* Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 (1985) (explaining that "by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy" and to find other otherwise would make a "child's right to a free and appropriate public education . . . less than complete.")

241. *See* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 238 (2009) ("[A]bsent any indication to the contrary, what relief is 'appropriate' must be determined in light of the Act's broad purpose of providing children with disabilities a FAPE . . ."); *see also* Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 527 (2007) ("[T]he Act does not *sub silentio* or by implication bar parents from seeking to vindicate the rights accorded to them . . . Through its provisions for expansive review and extensive parental involvement, the statute leads to just the opposite result.")

242. Notably, neither court addresses the jurisdictional issue directly.

243. *See* Miller v. N.J. State Dep't of Corr., 145 F.3d 616, 617–18 (3d Cir. 1998).

244. *See id.* at 618.

245. *See id.*

246. *See id.*; *see also* Wall Twshp. Bd. of Educ. v. C.M., 534 F. Supp. 2d 487, 493 (D.N.J. 2008).

appears to have “jurisdictional significance”²⁴⁷ by virtue of its placement in the statute. Nevertheless, this significance is diminished for several reasons. First, Congress refers to the limitation as a “time limitation,”²⁴⁸ not a jurisdictional limitation. Second, the limitation does not appear in the section of the IDEA that confers jurisdiction on the courts, namely § 1415(i)(3). Finally, and most importantly, § 1415(b)(6)(B) permits states to disregard the two-year limit in favor of their own time prescriptions, undermining any arguments that Congress intended that the provision be jurisdictional.²⁴⁹ “Time prescriptions created by state laws cannot be jurisdictional because ‘[o]nly Congress may determine a lower federal court’s subject matter jurisdiction.’”²⁵⁰ Therefore, courts should accord the two-year time limit set forth in § 1415(b)(6)(B) no jurisdictional significance.

Since § 1415(b)(6)(B) cannot be considered jurisdictional, the purpose and significance of the provision remain in question. Third Circuit courts in *L.G.* and *D.K.* refer generally to the “statute of limitations” as justification for restricting the scope of IDEA claims to two years prior to the date of filing the petition²⁵¹ (courts’ incorrect tolling of the statute of limitations to the date of filing the petition is discussed at length above). If Congress intended that courts treat § 1415(b)(6)(B) as merely a restatement of the statute of limitations set forth at § 1415(f)(3)(C), the time limit may be pled as an affirmative defense only, and cannot serve as a jurisdictional bar that limits the scope of claims.²⁵² This interpretation of the statutory language

247. See *C.M.*, 534 F. Supp. 2d at 492.

248. See *Miller*, 145 F.3d at 618 (distinguishing between jurisdictional limitations and statutes of limitations).

249. Cf. *C.M.*, 534 F. Supp. 2d at 493 (finding that the IDEA’s ninety-day appeals timeline set forth at 20 U.S.C. § 1415(i)(2)(B) (2012) is not jurisdictional because the statute permits states to disregard the timeline and create their own, whereas only Congress may determine the subject-matter jurisdiction of the federal courts).

250. *Id.* (citing *Bowles v. Russell*, 551 U.S. 205, 217 (2007)). It should also be noted that the *G.L.* court’s reliance on other federal statutes, including look-back provisions, is misplaced, because Title VII of the Civil Rights Act of 1964, cited in *G.L.* as an example, has a look-back provision that cannot be modified by the states, whereas the IDEA provision at issue here can be so modified. Compare 20 U.S.C. § 1415(b)(6)(B) (2012) (directing that state-imposed time limits for “presenting [a] complaint” supersede the two-year time limit delineated in the Statute), with 42 U.S.C. § 2000e-5(g)(1) (2012) (directing that back-pay liability for employers, under Title VII, “shall not accrue from a date more than two years prior to the filing of a charge,” yet not allowing for consideration of state-imposed time restrictions).

251. See *L.G. & E.G. ex rel. E.G. v. Wissahickon Sch. Dist.*, Nos. 06–0333, 06–3816, 2011 WL 13572, at *7 n.5 (E.D. Pa. Jan. 4, 2011). See generally *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 244 (3d Cir. 2012).

252. See *Miller*, 145 F.3d at 617–18.

coincides with the Third Circuit's finding that statutes of limitation "regulate secondary conduct, i.e., the filing of a suit, not primary conduct, i.e., the actions that gave rise to the suit."²⁵³

While much of the language of § 1415(b)(6)(B) mimics § 1415(f)(3)(C), supporting the statutory interpretation that the former provision merely restates the latter, some differences exist.²⁵⁴ Interestingly, in the first House Report proposing amendments to the IDEA as part of the 2004 reauthorization process, the only time limit on IDEA claims appears in the procedural safeguards section later codified in § 1415(b)(6)(B).²⁵⁵ The Report provides that states must have procedures including an opportunity to present complaints, which "set forth a violation that occurred not more than one year before the complaint is filed."²⁵⁶ In the comments to the Report, Congress refers to this new language as a "statute of limitations," stating that "[t]he bill includes a statute of limitations of one year from the date of the violation."²⁵⁷ Thus, Congress appears to be stating *the same proposition in two different ways*—a complaint must set forth a violation that occurred no more than one year prior to the date a parent files, and a parent must file a complaint within one year of the date of the violation.

The later Senate Report adds specific statute of limitations language, subsequently codified in § 1415(f)(3)(C), and amends the § 1415(b)(6)(B) language in what appears to be an attempt to make the two provisions consistent.²⁵⁸ In so doing, the Senate replaces the one-year time limit referenced in the House Report with a two-year limit.²⁵⁹ The Senate also changes the date for tolling the statute of limitations from the date of filing a complaint to the KOSHK date.²⁶⁰

253. *Steven I. v. Cent. Bucks Sch. Dist.*, 618 F.3d 411, 414 n.7 (3d Cir. 2010).

254. *Compare, e.g.*, § 1415(b)(6)(B) ("The procedures required by this section shall include . . . an opportunity for any party to present a complaint . . . which 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 . . ."), *with* § 1415(f)(3)(C) ("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 . . .").

255. *See* H.R. REP. NO. 108-77, at 36 (2003).

256. *Id.*

257. *Id.* at 116.

258. *Compare* S. REP. NO. 108-185, at 40 (2003), *with* § 1415(f)(3)(C), *and* § 1415(b)(6)(B).

259. *Compare* H.R. REP. NO. 108-77 at 36, *with* S. REP. NO. 108-185, at 40.

260. *Compare* H.R. REP. NO. 108-77 at 36 (2003), *with* § 1415(f)(3)(C), *and* § 1415(b)(6)(B).

This change in the tolling date significantly alters the interrelationship of the two provisions. To illustrate, requiring that the complaint set forth a violation that occurred no more than two years prior to the date of filing, and requiring that a complaint be filed within two years of the date a violation occurred, is to state the same two-year time limitation in different ways. In contrast, requiring that a complaint set forth a violation that occurred no more than two years prior to the KOSHK, and requiring that a complaint be filed within two years of the KOSHK date, creates two potentially very different timeframes.²⁶¹ Notably, the Senate Report comments neither refer to § 1415(b)(6)(B) nor define the provision's purpose apart from their discussion of the statute of limitations in § 1415(f)(3)(C).²⁶² This leads one to posit that Congress, when adding the language of § 1415(f)(3)(C) and changing the date and time period for tolling in § 1415(b)(6)(B) to coincide with § 1415(f)(3)(C), may have intended § 1415(b)(6)(B) to serve as nothing more than a restatement (or elaboration) of, the statute of limitations, with no (or limited) separate weight or effect.²⁶³

Courts' confusion regarding the language and purpose of § 1415(b)(6)(B) and its relationship with § 1415(f)(3)(C) provides a valid basis for examining the IDEA's legislative history to ascertain Congress's intent.²⁶⁴ The legislative history plainly reveals that Congress did not intend to limit the scope of ongoing compensatory education claims as long as such claims were timely filed:

This new provision is not intended to alter the principle under IDEA that children may receive compensatory education services . . . First, the statute of limitations will bar consideration of

261. Compare § 1415(b)(6)(B) with § 1415(f)(3)(C).

262. See generally S. REP. NO. 108-185.

263. See *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 242 (2009) (finding that several statutory clauses within IDEA were not restrictive or exclusive and instead, were "best read as elaborating on the general rule that courts may order reimbursement when a school district fails to provide a FAPE by listing factors that may effect a reimbursement award.").

264. A court may examine the legislative history of a statute where the statutory language is inconclusive or ambiguous. See *Carteret Sav. Bank, F.A. v. Office of Thrift Supervision*, 963 F.2d 567, 578 (3d Cir. 1992) (examining the legislative history of the statute in question where the statutory language was found to be "not conclusive"); see also *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs.*, 149 F.3d 227, 233 (3d Cir. 1998) (holding that the statute at issue was not ambiguous, and declining, therefore, to consider the legislative history behind the statute's passage in the court's opinion). But see *G.L. v. Ligonier Valley Sch. Dist. Auth.*, No. 2:13-cv-00034, 2013 U.S. Dist. LEXIS 180923, at *8 (W.D. Pa. Dec. 30, 2013) (concluding that the plain meanings of § 1415(b)(6)(B) and § 1415(f)(3)(C) are clear such that the court need not examine statutory purpose or legislative history).

claims where: (1) the allegation relates to conduct or services that are more than two years prior to the commencement of due process on the basis of that conduct or those services, or upon the unilateral placement of the child in a private school or with a private service provider, and (2) during that two year period, either (a) the services are not alleged to have been at cost or inappropriate, or (b) the conduct is not alleged to have been appropriate. *In essence, where the issue giving rise to the claim is more than two years old and not ongoing, the claim is barred; where the conduct or services at issue are ongoing to the previous two years, the claim for compensatory education services may be made on the basis of the most recent conduct or services and the conduct or services that were more than two years old . . . at the time of the due process or the private placement.*²⁶⁵

To illustrate the distinction between “2+2” analysis and what Congress intended, per the legislative history, consider again the example described above of the parent who learns of a FAPE violation causing harm to his child on January 1, 2010 (the KOSHK date), and seeks compensatory education as a remedy. The violation commenced three years prior to the KOSHK date (on January 1, 2007), and was ongoing for at least three years. Following “2+2” analysis, the parent cannot pursue any claims for actions occurring more than two years prior to the KOSHK date. As a result the child loses the right to an entire year of compensatory education. Following the legislative history of the IDEA, however, the parent can pursue claims for the full three years prior to the KOSHK date because the violation was ongoing up until and through the two-year period prior to the KOSHK date.

The legislative history here coincides with Third Circuit precedent, as aptly expressed by the court in *Robert R. v. Marple Newton School District*: “[T]he limitations period placed on claims for compensatory education by the 2005 amendment to the IDEA was not meant to limit the period which the hearing officer could consider when a due process hearing was timely brought.”²⁶⁶ Significantly, several lower courts in the Third Circuit reiterated this “broad approach to a child’s entitlement to compensatory education” claims²⁶⁷ in the years immediately following implementation of IDEA 2004, and again as

265. S. REP. NO. 108-185, at 40 (2003) (emphasis added).

266. *Robert R. v. Marple Newton Sch. Dist.*, No. Civ.A. 05-1282, 2005 WL 3003033, at *4 (E.D. Pa. Nov. 8, 2005) (emphasis added); see also S. REP. NO. 108-185, at 41 (supporting consideration of ongoing compensatory education claims as long as they are timely filed).

267. *Id.*

recently as 2013.²⁶⁸ Furthermore, the legislative history aligns with U.S. Supreme Court precedent barring restrictive interpretation of the IDEA where conflicting congressional intent exists,²⁶⁹ and mandating that parents have an adequate remedy to redress the denial of a FAPE.²⁷⁰

Finally, Third Circuit courts' recent decisions limiting the scope of compensatory education claims to the two years prior to the plaintiff's KOSHK date²⁷¹ negate years of precedent concerning the accrual of compensatory education claims.²⁷² As discussed in Part II, the date that a school district knew or should have known of a FAPE violation determines when a compensatory education claim accrues, and is the starting point for measuring the claim's scope or duration, i.e., the FAPE denial.²⁷³ More recent cases, however, erroneously shift the duty to identify a FAPE denial from school districts to parents (as plaintiffs).²⁷⁴ Consider the following example to better understand the effects of this shift. If a school district knows or should have known of its failure to provide a FAPE to a student in 2007, but the

268. *See, e.g.*, *Central Sch. Dist. v. K.C.*, Civil Action No. 11-6869, 2013 WL 3367484, at *12 n.6 (E.D. Pa. July 3, 2013) (“We also agree with the conclusion reached by several courts within this district, that the IDEA’s statute of limitations does not apply to limit the permissible period of compensatory educational awards.”); *Robert R.*, 2005 WL 3003033, at *4 (concluding that a parent’s due process claims seeking five years of compensatory education filed in June 2003 were not barred if timely brought, and citing five additional courts in the Eastern District of Pennsylvania as having adopted the reasoning that there is “no limitations period, whether equitable or legal, on a disabled child’s claim for compensatory education pursuant to the IDEA” (quoting *Amanda A. v. Coatesville Area Sch. Dist.*, No. Civ.A. 04-4184, 2005 WL 426090, at *6 (E.D. Pa. Feb. 23, 2005))). All of these cases, however, save one decision issued in 2013, involved the issue of retroactive application of the statute of limitations provision.

269. *See* *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 243-45 (2009).

270. *See id.*; *see also* *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 370 (1985).

271. *See, e.g.*, *I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 774 (M.D. Pa. 2012). Other cases similarly espouse limiting compensatory education claims to two years from the date of filing the petition, but do not provide any support for these statements made in dicta. *See* *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 244 (3d Cir. 2012); *H.M. ex rel. B.M. v. Haddon Heights Bd. of Educ.*, 822 F. Supp. 2d 439, 446-47 (D.N.J. 2011); *L.G. & E.G. ex rel. E.G. v. Wissahickon Sch. Dist.*, Nos. 06-0333, 06-3816, 2011 WL 13572, at *7 n.5 (E.D. Pa. Jan. 4, 2011).

272. *See, e.g.*, *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 250 (3d Cir. 1999); *see also* *M.C. ex rel. J.C. v. Central Reg’l. Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996).

273. *See* *Ridgewood*, 172 F.3d at 250.

274. *See e.g.*, *I.H.*, 842 F. Supp. 2d at 774; *see also* *G.L. v. Ligonier Valley Sch. Dist. Auth.*, No. 2:13-cv-00034, 2013 U.S. Dist. LEXIS 180923, at *13 (W.D. Pa. Dec. 30, 2013).

parent does not learn of the action until 2011 (and timely files thereafter), the courts in *Ridgewood* and *M.C.* permit the parent to date the compensatory education claim all the way back to 2007. In contrast, the courts in *I.H.* and *G.L.* preclude adjudication of any claims for violations that occurred more than two years prior to the plaintiff's KOSHK date (limiting the claims in this example to 2009), and thereby deprive the student of two additional years of compensatory education. By requiring parents to bear responsibility for identifying a FAPE violation, the courts absolve school districts of any and all duty to identify the failure to provide a FAPE. Hence, courts tacitly encourage school districts not to share FAPE violations with parents, and improperly limit the scope of compensatory claims and awards, in contravention to seminal Third Circuit precedent.²⁷⁵

In light of Congress's clarity in the IDEA's legislative history and relevant Third Circuit precedent, the courts clearly err in recent decisions by barring consideration of compensatory education claims that commenced more than two years prior to the parent's KOSHK date without regard to case circumstances. Perhaps the language of § 1415(b)(6)(B), together with § 1415(f)(3)(C), confused the courts regarding the weight and effect, if any, to accord to the former provision. Perhaps the nearly identical "knew or should have known"²⁷⁶ language that appears in both the statutes of limitation and precedential Third Circuit opinions confounded the courts, leading them to conclude that the accrual analysis for compensatory education claims set forth in case precedent could not be reconciled with the language of the IDEA 2004 (a point with which this Article disagrees below in Part V). Notwithstanding the courts' reasoning, low-income children with disabilities who experience lengthy FAPE denials suffer the consequences of courts' erroneous interpretations of this provision.

275. See, e.g., *Ridgewood*, 172 F.3d at 250; *M.C.*, 81 F.3d at 396–97.

276. Any party has the opportunity to present a complaint setting 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 for the complaint . . . [subject to application of] the time line described in subsection (f)(3)(D)." 20 U.S.C. § 1415(b)(6)(B) (2012) (emphasis added). This provision applies to the plaintiff in the action. *Id.* According to Third Circuit precedent, a child's right to compensatory education accrues from the point that *the school district knows or should know* of its failure to provide a FAPE. See *M.C.*, 81 F.3d at 396–97; see also *Ridgewood*, 172 F.3d at 250. Thus, the starting point for measuring the duration of a FAPE denial and the corresponding scope of a compensatory education claim is when *the school district knows or should have known* of the violation.

2. *Application of Equitable Tolling to the IDEA following the 2004 Amendments*

In addition to the courts' improper limitations on the consideration and duration of compensatory education claims, the Third Circuit in 2012 further restricted the availability of compensatory education by ending use of equitable tolling in IDEA matters.²⁷⁷ Equitable tolling permits courts to postpone application of statutory limitations for a period of time under certain circumstances.²⁷⁸ These doctrines offered a means for plaintiffs to obtain lengthy compensatory education awards that otherwise may have been barred by strict (mis)application of the statute of limitations.²⁷⁹

The Third Circuit banned two equitable tolling doctrines in particular: the continuing violations doctrine and statutory tolling for minors.²⁸⁰ The continuing violations doctrine applies where a defendant's conduct is part of a "continuing practice."²⁸¹ Under this doctrine, an action is considered timely "so long as the last act evidencing the continuing practice falls within the limitation period; in such instance, the court will grant relief for the earlier related acts that would otherwise be time barred."²⁸² Statutory tolling for minors

277. *See* D.K. v. Abington Sch. Dist., 696 F.3d 233, 254 (3d Cir. 2012).

278. *See, e.g.*, F.P. v. New Jersey, No. 00-2217(JWB), 2001 U.S. Dist. LEXIS 25212, at *13 (D.N.J. June 28, 2001) (finding failure to provide a FAPE over time should be treated as an ongoing continuing practice); Jeffrey Y. v. St. Mary's Area Sch. Dist., 967 F. Supp. 852, 855 (W.D. Pa. 1997) (permitting application of the continuing violations doctrine to IDEA matters). *But see* J.L. v. Ambridge Area Sch. Dist., 2008 U.S. Dist. LEXIS 13451 (W.D. Pa. Feb. 22, 2008) (limiting exceptions to those found in the statute, thereby banning use of the continuing violations doctrine in IDEA matters).

279. The application of equitable tolling for minors and the continuing violations doctrine to special education cases is particularly critical for certain populations of children, e.g., children with disabilities in foster care, who routinely do not have someone serving as a "parent" to advocate on their behalves, despite surrogate parent appointment procedures in the Act. *See* Daggett et al., *supra* note 209, at 736, 744 (discussing the critical role of parents in the special education process and recognition by Congress and the Supreme Court that "the IDEA's effectiveness depends on parents' involvement in their children's special education, specifically including the exercise of the procedural safeguards assigned to them on behalf of their children"); *see also* Jennifer Rosen Valverde, *A New IDEA for Improving the Education of Children with Disabilities in Foster Care: Applying Social Work Principles to the Problem Definition Process*, 26 CHILD. L. RIGHTS J. 14 (2006) (discussing educational challenges unique to children with disabilities in foster care, including those arising from the lack of a "parent" designee for special education purposes).

280. *See* D.K., 696 F.3d at 254.

281. *See* Brenner v. Local 514, United Bhd. of Carpenters & Joiners, 927 F.2d 1283, 1295 (3d Cir. 1991).

282. *Id.*

keeps the door open to relief for young people by delaying the application of time limits on filing until attaining the age of eighteen.²⁸³ In the IDEA context, statutory tolling for minors created a mechanism for young adults with disabilities, who were denied a FAPE prior to attaining the age of majority, to assert their own rights to compensatory education upon their eighteenth birthday.²⁸⁴

In assessing the use of equitable tolling post-IDEA 2004, the Third Circuit examined the legislative history of the 2004 amendments to the IDEA as well as the regulatory history.²⁸⁵ The court found the history instructive on the question of whether equitable tolling doctrines apply: “[T]he legislative and regulatory history of the 2004 amendments to the IDEA makes clear that only the enumerated statutory exceptions may exempt a plaintiff from having his claims time-barred by the statute of limitations.”²⁸⁶ The court failed, however, to examine a critical section of the Congressional Record that distinguishes the continuing violations doctrine from other equitable tolling doctrines.²⁸⁷ The section overlooked by the court clearly expresses Congress’s intent to permit application of the

283. See N.J. STAT. ANN. § 2A:14-21 (West 2000) (providing that the statute of limitations for minors tolls until the minor reaches the age of majority).

284. See, e.g., *Wayne County Reg’l. Educ. Serv. Agency v. Pappas*, 56 F. Supp. 2d 807 (E.D. Mich. 1999) (tolling the statute of limitations for minor with a severe mental disability in a special education matter). *But see Strawn v. Mo. State Bd. of Educ.*, 210 F.3d 954 (8th Cir. 2000) (finding that tolling the statute of limitations for a minor frustrates the purpose of the IDEA). The U.S. Supreme Court’s holding in *Winkelman v. Parma* that the IDEA affords separate and enforceable rights to parents and children offers further support for the application of minority tolling within the IDEA context. See 550 U.S. 516 (2007).

285. See *D.K.*, 696 F.3d at 248. Significantly, the court’s decision to examine the legislative history of the statute of limitations for this purpose opens the door to examining the legislative history for purposes of determining whether courts should limit the consideration and duration of ongoing compensatory education claims that are timely filed.

286. *Id.* The court quotes Senate Report No. 108-185 as stating, “The committee does not intend that common law determinations of statutes of limitations override this specific directive.” *Id.* (quoting S. REP. NO. 108-185, at 40 (2003)). The court also quotes the Federal Register as stating, “It is not necessary to clarify that common-law directives regarding statutes of limitations should not override the Act or State regulators timelines . . . because the Act and these regulations prescribe specific limitation periods which superseded common law directives in this regard.” *Id.* (quoting 71 Fed. Reg. 46,540, 46,697 (Aug. 14, 2006)). The court fails to reconcile these statements with Congress’s prior assertion that “where the conduct or services at issue are ongoing to the previous two years, the claim for compensatory education services may be made on the basis of the most recent conduct or services and the conduct or services that were more than two years old at the time of due process or the private placement,” S. REP. NO. 108-185, at 40, which, some may argue, is identical to, and supporting application of, the continuing violations doctrine.

287. See *D.K.*, 696 F.3d at 248.

continuing violations doctrine to timely filed compensatory education claims where such claims commenced prior to the two-years before the KOSHK date but were ongoing to that date.²⁸⁸ As a result, the court determined that plaintiffs cannot circumvent the statute of limitations by relying on equitable tolling doctrines available under state law.²⁸⁹

The Third Circuit's elimination of equitable tolling from the IDEA remedial repertoire "strips away the rights of children who were subject to systemic and long-term denials of FAPE and had parents who were not able or willing to assert their rights."²⁹⁰ Despite this effect, the Third Circuit determined that Congress never intended for these doctrines to "save claims otherwise foreclosed by the IDEA statute of limitations" and that the doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) prevents their application.²⁹¹ The court's invocation of *expressio unius* in *D.K.* is flawed in two critical respects. First, the doctrine typically applies where no contrary legislative intent exists,²⁹² while here, the legislative history of the IDEA reveals such contrary intent.²⁹³ Second, the doctrine's application reads otherwise unexpressed limitations into the statute, in conflict with the Supreme Court's broad approach to interpreting the IDEA, including the reading of its provisions as "elucidative rather than exhaustive."²⁹⁴ Nevertheless, the court's invocation of *expressio unius* to ban equitable tolling transformed the IDEA 2004's two codified exceptions to the statute of limitations into a last savior of sorts. Unfortunately, the court's extremely narrow interpretation of the exceptions makes them nearly impossible to satisfy, rendering them virtually useless for parents of children with disabilities and saving few.

288. See S. REP. NO. 108-185, at 40.

289. See *D.K.*, 696 F.3d at 248.

290. Hyman et al., *supra* note 92, at 132.

291. *D.K.*, 696 F.3d at 248.

292. See *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of contrary legislative intent.").

293. See *supra* notes 286-88 and accompanying text.

294. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 242 (2009).

3. *The Third Circuit's Interpretation of Exceptions to the Statute of Limitations*

The Third Circuit, in defining the exceptions to the IDEA 2004's statute of limitations, foreclosed the last remaining avenues for children experiencing lengthy FAPE denials to obtain adequate awards of compensatory education. As a result, the court cemented the second-class remedial status available to children living in poverty or low-income households under the IDEA.

In interpreting the specific misrepresentations exception, the Third Circuit determined that plaintiffs "must show that the school intentionally misled them or knowingly deceived them regarding their child's progress."²⁹⁵ The court reasoned that "in the absence of a showing of 'misrepresentation' akin to intent, deceit, or egregious misstatement, any plaintiff whose teachers first recommended behavioral programs or instructional steps short of formal special education might evoke the exception" which would essentially "swallow the rule."²⁹⁶ The court further stated that a high threshold is necessary, for otherwise "mere optimism in reports of a student's progress would toll the statute."²⁹⁷

In the court's attempt to counter one extreme—that a school district professional's "mere optimism" will successfully toll the statute—it advanced the other extreme—that a parent must show the misrepresentation was intentional. Demonstrating "intentionality" requires a plaintiff to sufficiently prove the school district personnel's subjective state of mind.²⁹⁸ Considering the fact that school districts are both the producers and the keepers of all evidence (i.e. school records), meeting this threshold is, at best, extremely difficult, and at worst, an impossible feat. Following the Third Circuit's rationale, a child's teacher or service provider may offer an incomplete or inaccurate picture of a child, or gloss over a child's failure to make progress, as long as he can show that it was unintentional and merely a display of hopefulness. This excessively high standard also encourages school district personnel to base their opinions on

295. *D.K.*, 696 F.3d at 246; *see also* *Evan H. v. Unionville-Chadds Ford Sch. Dist.*, No. 07-4990, 2008 WL 4791634, at *6 (E.D. Pa. Nov. 4, 2008) ("Plaintiffs must establish not that the District's evaluations of the student's eligibility under IDEA were objectively incorrect, but instead that the District subjectively determined that the student was eligible for services under the IDEA but intentionally misrepresented this fact to the parents.").

296. *D.K.*, 696 F.3d at 24–46.

297. *Id.* at 245.

298. *See id.* at 245 (citing *Evan H.*, 2008 WL 4791634, at *6 n.3).

subjective measures of progress, as opposed to objective ones. Without objective measures, a parent cannot challenge the subjectivity of a district's opinions.

With regard to the withholding of information exception, the court held that “only the failure to supply statutorily mandated disclosures can toll the statute of limitations,” and thus parents must show that a school district “failed to provide them with a written notice, explanation, or form specifically required by the IDEA statutes and regulations.”²⁹⁹ As a result, a school district's withholding of substantive information—e.g., available programs, the student's educational progress, teacher observations, and reports—does not satisfy the rule.

In addition to showing that the school district knowingly or intentionally misled the parent about the child's progress, or that the district failed to provide the parent with the procedural safeguards or required notices, the parent must show causation. Specifically, the parent must prove “that the misrepresentations or withholding *caused* his failure to request a hearing or filing a complaint on time.”³⁰⁰ Failure to do so results in denial of the exceptions.

In comparing the Third Circuit's interpretation of and approach to the IDEA's remedial scheme pre and post-IDEA 2004, the 180-degree shift becomes clear. The court's prior tendency to broadly construe the statute in favor of parents and children with disabilities has transformed into a constriction of rights and remedies at the expense of the very same children the Act aims to protect. Children with disabilities whose families are socioeconomically disadvantaged have no choice in remedies and pay the price.

IV. APPLICATION OF THIRD CIRCUIT COURTS' OPINIONS TO CASE STUDIES

To illustrate the adverse effects of these decisions, this Article applies some of the Third Circuit's recent positions on the statute of limitations to two anecdotal case studies³⁰¹ from the Education and Health Law Clinic at Rutgers University School of Law-Newark (formerly known as the Special Education Clinic).³⁰² The Education

299. *Id.* at 246.

300. *Id.*

301. Client names, identifying information, and certain case facts have been changed to protect client privacy and preserve confidentiality.

302. The Education and Health Law Clinic provides free legal representation to indigent parents of children with disabilities (and adult students) in special education, early intervention, and school discipline matters. In addition, through a new medical-

and Health Law Clinic represented Aaron, an adult student, and the mother of Asia, a minor child, in their special education matters. These two cases represent a microcosm of thousands that go unheard³⁰³ due to many reasons, including parents' lack of knowledge and awareness of available programs and services, eligibility requirements, their rights and those of their children, as well as lack of ability, confidence, and/or outside assistance in asserting their rights.³⁰⁴

A. The Case of Aaron

Consider first the case of Aaron, a nineteen-year-old male student with severe language and learning disabilities. Aaron sought help from the Clinic because he was nearing graduation and wanted to learn how to read. He found the Clinic with the help of a former public school teacher who had taken Aaron under her wing and tried to advocate on his behalf with the school district to obtain additional special education supports and services. When the former teacher

legal-social work partnership known as the H.E.A.L. (Health, Education, Advocacy and Law) Collaborative with the Rutgers-N.J. Medical School's Outpatient Pediatrics Department, students in law and social work partner with medical professionals to address the legal and social needs of pediatric patients with disabilities and their families in an effort to improve overall child and family health and well-being. Demographically, the Clinic's client population is comprised of parents and adult students who are predominantly African-American and Latino; some are new immigrants and speak limited or no English, whereas others have lived in the same urban poor communities for generations. They are mostly female, and may be mothers, grandmothers, great-grandmothers, or aunts. They frequently have their own histories of disabilities and/or current health concerns. They have little to no money, as few are employed, and all have household incomes falling at or below 150% of the federal poverty level, currently \$35,325 per year for a family of four. They may face hunger and poor nutrition, deplorable housing conditions or homelessness, and may be forced to choose between paying for gas, electricity, food, or transportation on any given day. For more information on the Rutgers School of Law Newark Education and Health Law Clinic, see *Education and Health Law Clinic*, RUTGERS SCH. L.—NEWARK, <http://law.newark.rutgers.edu/clinics/special-education-clinic> (last visited Dec. 18, 2013).

303. Other examples of case studies from the Education and Health Law Clinic involve children who are "suspended indefinitely" due to unaddressed emotional and behavioral disabilities; children who are profoundly deaf and have no verbal language, taught by teachers who know no sign language, and yelled at for not listening; children who are mislabeled and treated for attention deficit disorder and behavior problems when they actually suffer from severe auditory processing disabilities; children denied vision modifications or Braille instruction despite minimal light perception and legal blindness; or children placed on home instruction because no one at the school wants to take responsibility for maintaining their feeding tubes or administering seizure medications by injection.

304. See generally *supra* Part I.

reached a roadblock in her advocacy efforts, she contacted the Clinic for assistance.

Aaron lived in a poor neighborhood in New Jersey. He was a first-generation American, and his parents, now divorced, immigrated to the United States from the Dominican Republic shortly before his birth. His primary language at home is Spanish. Although he lived at home with his mother and stepfather, his relationships with family members, except his younger brother, were so strained that he asked that all correspondence be sent to an alternate address. Aaron's mother and stepfather provided him with food and shelter; he paid for other expenses such as his cell phone and transportation by holding an after-school job stocking shelves.

Aaron told the Clinic that he had received special education help all through his schooling, but could not name his classification or the services or programming he received. When asked if his mother might know this information, he shook his head and explained that she spoke limited English, had a fifth grade education, and tended to sign papers without understanding them. Aaron further described his father as "out of the picture" and remarked that his stepfather had nothing to do with his upbringing or schooling.

Aaron characterized his greatest concerns as his difficulty understanding others when they talk and his inability to read. School records provided by his teacher/advocate indicated that he was classified as Multiply Disabled³⁰⁵ due to unspecified specific learning disabilities³⁰⁶ and a communication impairment.³⁰⁷ Despite the IDEA's requirement that students with disabilities be reevaluated for eligibility every three years,³⁰⁸ the school district had not evaluated Aaron since age thirteen. Prior testing indicated that when he was in

305. Under New Jersey Special Education Regulations, "multiply disabled" is defined as the "presence of two or more disabling conditions, the combination of which causes such severe educational needs that they cannot be accommodated in a program designed solely to address one of the impairments." N.J. ADMIN. CODE § 6A:14-3.5(c)(6) (West, Westlaw through Dec. 2013).

306. New Jersey Special Education Regulations define "specific learning disability" as, "a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." N.J. ADMIN. CODE § 6A:14-3.5(c)(12).

307. New Jersey Special Education Regulations define "communication impairment" as a disorder of language in the areas of "morphology, syntax, semantics and/or pragmatics/discourse" adversely affecting the student's educational performance. N.J. ADMIN. CODE § 6A:14-3.5(c)(4).

308. See N.J. ADMIN. CODE § 6A:14-3.8(a) (West, Westlaw through Dec. 2013).

the seventh grade, he read at a first grade level; however, more recent teacher reports placed his reading abilities at a third or fourth grade level.

The Clinic immediately requested, and the school district agreed to provide, independent evaluations in the areas of speech and language, auditory processing, and reading as well as educational and psychological testing. Results indicated that Aaron had a low average to near borderline IQ, a severe auditory processing disorder,³⁰⁹ a severe expressive and receptive language disorder,³¹⁰ and a reading disability. He performed at a second to third grade level in testing in most subjects, with the exception of reading, in which he performed at a first grade level. A review of Aaron's school records obtained from the district revealed, among other concerns, IEP goals and objectives that had been cut and pasted from one year to the next with no indicia of progress; unexplained termination of speech and language services when he was ten years old; failure to provide specialized reading instruction to address his decoding disability; and no accommodations, modifications, or assistive technology to assist Aaron with his auditory processing deficits.

On Aaron's behalf, the Clinic attended an IEP meeting with the school district to discuss his concerns. When the district refused to address them, the Clinic filed a petition for a due process hearing³¹¹ on Aaron's behalf; as a nineteen-year-old, Aaron had the right to sue on his own, and satisfied the statute of limitations by filing his complaint within two years of his eighteenth birthday, the earliest time at which he could be deemed to "know or should have known" of the action forming the basis of his complaint.³¹² Over the next six months, the

309. An "auditory processing disorder" is a "difficulty in the perceptual processing of auditory information in the central nervous system" (i.e., dysfunction in the way the brain processes auditory information as opposed to deafness or hearing impairment that concern how one hears information), resulting in language and learning difficulties. See *(Central) Auditory Processing Disorders* AM. SPEECH-LANGUAGE-HEARING ASSOCIATION, <http://www.asha.org/docs/html/tr2005-00043.html#sec1.3> (last visited Dec. 18, 2013).

310. An "expressive language" disorder is characterized by difficulties with the expression of language, including the sharing of thoughts, emotions, and ideas, whereas a "receptive language disorder" is characterized by difficulty understanding others. See *Speech and Language Disorders and Diseases*, AM. SPEECH-LANGUAGE-HEARING ASSOCIATION, <http://www.asha.org/public/speech/disorders> (last visited Dec. 18, 2013).

311. See *supra* note 123 (detailing a "due process hearing").

312. Following Third Circuit courts' definition of the "action forming the basis of the complaint," Aaron's KOSHK date likely would have been found as the date he received the results of the independent evaluations and learned of the injury. See *generally supra* note 218 and accompanying text.

Clinic engaged in active negotiations with the district to obtain a new educational program and an acceptable compensatory education settlement. For leverage, the Clinic used the district's *nine-plus year* failure to identify the denial of a FAPE and failure to provide appropriate programming and services to Aaron (using the date on which the district terminated speech and language services as the accrual date for the compensatory education claim). Additionally, the Clinic relied on New Jersey's tolling provision for minors, which allowed the time limit for filing a complaint to be tolled until Aaron reached the age of majority, and the continuing violations doctrine, which permitted Aaron to date his claim back for multiple years during which the district's conduct was ongoing. The Clinic also couched its legal argument in the Third Circuit's broad interpretation of the remedial scheme, especially as it applied to the remedy of compensatory education, evidenced in case precedent.³¹³

In the end, the parties settled, without litigation, on six years of extensive compensatory education and related services for Aaron. These services included a specialized reading program provided one-on-one by a certified reading specialist up to four times per week, weekly individualized speech and language therapy, daily basic skills instruction taught one-on-one by a certified special education teacher, up to four years of college or post-high school vocational programming of his choosing at the district's expense (including the cost of all materials, transportation, and other fees), assistive technology, and more. Despite the extensive settlement Aaron received, based on research, no amount of compensatory education could ever place him into the position he would have been in had the district provided Aaron with proper programming and services all along. To date, Aaron has advanced to a near fifth grade level in math, a near sixth grade level in reading, completed a trade school program of his choosing (at the district's expense), and obtained the necessary certification to practice his new vocation.

Had Aaron's case occurred today, the result would have differed greatly. Aaron would have received two years of compensatory education programming and services following the courts' language in *H.M.*,³¹⁴ *L.G.*,³¹⁵ and *D.K.*,³¹⁶ or between three and four years

313. See generally *supra* Part II.B.

314. See *H.M. ex rel. B.M. v. Haddon Heights Bd. of Educ.*, 822 F. Supp. 2d 439, 446–47 (D.N.J. 2011).

315. See *L.G. & E.G. ex rel. E.G. v. Wissahickon Sch. Dist.*, Nos. 06–0333, 06–3816, 2011 WL 13572, at *7 n.5 (E.D. Pa. Jan. 4, 2011).

316. See *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 244 (3d Cir. 2012).

following “2+2” analysis.³¹⁷ Aaron likely would have stopped receiving his regular (non-compensatory) special education programming during the year he turned twenty-one, and would have exited from the special education system with a third to fourth grade reading level and high third grade math level at most.³¹⁸ Based on these levels, he likely would not have been able to understand his teachers’ oral instructions in the vocational program, or been able to read and understand the materials needed to complete the program and obtain his certification. Aaron probably would have ended up another poverty statistic, as opposed to an employed, contributing member of society. While one may try to minimize the significance of Aaron’s case by arguing that it is merely an anomaly, from my years of experience in the field, I can say that I have seen similar facts in at least ten percent of my cases. Moreover, for every case that the Clinic accepts, there are countless others that never see the light of day.

B. The Case of Asia

Asia’s situation differed greatly from Aaron’s, but also is not uncommon. Her mother, Ms. Jones, first approached the Clinic when Asia was a twelve-year-old, sixth grade student in an urban public school. When we met, Ms. Jones said that she knew “in her bones” that Asia was not receiving the educational programming and services she needed, but could not articulate why she felt that way. Ms. Jones confided that she had trusted the school district for nearly six years, believing teachers and staff when they said Asia was receiving the *non-special education supports* she needed. She admitted that, until recently, she did not know that she could “go after” the school district for refusing to educate Asia properly. When asked if she ever received a copy of her special education rights from the district (i.e. procedural safeguards), she said she recalled receiving a booklet but did not understand much of what it said.

Asia’s early history was significant. Her biological mother was a drug addict and had received no prenatal care. Asia was born seven weeks premature, with crack-cocaine in her system. She experienced withdrawal symptoms following birth and spent her first eight weeks in the neonatal intensive care unit. Ms. Jones, at age sixty, adopted Asia at age two. Over the years, doctors diagnosed Asia with

317. See *G.L. v. Ligonier Valley Sch. Dist. Auth.*, No. 2:13-cv-00034, 2013 U.S. Dist. LEXIS 180923, at *10–11 (W.D. Pa. Dec. 30, 2013).

318. These numbers are extrapolated from Aaron’s performance and progress reports following receipt of compensatory education and related services.

Attention Deficit Hyperactivity Disorder³¹⁹, Bipolar Disorder³²⁰, and Oppositional Defiant Disorder.³²¹ Her behaviors and moods ranged widely, from calm and kind to manic episodes during which she engaged in uncontrolled fits of crying and screaming and, at times, destroyed property. Doctors had not yet been able to determine the appropriate mix of pharmaceutical and therapeutic interventions to help her.

Ms. Jones first requested help for Asia from the school district when she was six years old due to her out-of-control behaviors both at school and at home. The school district had contacted Ms. Jones often over the years for Asia's misbehavior, and alternated between suspending Asia and requiring that Ms. Jones accompany Asia to school and sit next to her in the classroom for weeks on end to ensure that she behaved. However, the district never put the suspension notices in writing. Later, when the Clinic asked about the district requiring Ms. Jones to accompany Asia to school, the district responded that Ms. Jones did so voluntarily and at her own initiative.

The district rejected Ms. Jones' initial request for non-specific help on the grounds that the timing of the request fell at the end of the school year and no teacher had expressed concerns about Asia. At the end of the following school year, when Asia was seven, Ms. Jones again asked for help, but the district told her that since Asia's problems were behavioral in nature, there was nothing they could do. Instead, they advised Ms. Jones to get Asia therapy outside of school, to which Ms. Jones agreed.

During this time, Ms. Jones lost her job due to the numerous calls she received from Asia's school during work hours and missed days resulting from accompanying Asia to school or removing Asia from school at the district's behest. In the months that followed, Ms. Jones' own health began to deteriorate—she became depressed and gained

319. Attention Deficit Hyperactivity Disorder (ADHD) is a chronic condition affecting one's ability to sustain attention and resulting in hyperactivity and impulsive behavior. See *Attention-Deficit/Hyperactivity Disorder (ADHD) in Children*, MAYO CLINIC, <http://www.mayoclinic.com/health/adhd/DS00275> (last visited Dec. 18, 2013).

320. Bipolar disorder, formerly known as manic depression, is a mental illness that is characterized by episodic high and low moods. See *Bipolar Disorder*, WEBMD, <http://www.webmd.com/bipolar-disorder/mental-health-bipolar-disorder> (last visited Dec. 18, 2013).

321. Oppositional Defiant Disorder is "a condition in which a child displays an ongoing pattern of uncooperative, defiant, hostile, and annoying behavior toward people in authority. The child's behavior often disrupts the child's normal daily activities, including activities within the family and at school." *Oppositional Defiant Disorder*, WEBMD, <http://www.webmd.com/mental-health/oppositional-defiant-disorder> (last visited Dec. 18, 2013).

weight, thus aggravating her diabetes, and she developed high blood pressure and other health-related concerns. These health concerns impacted her ability to find employment, and she soon found herself in debt and in danger of eviction. She began relying on public assistance, including SSI for Asia and food stamps to pay for their basic needs. They were forced to move, resulting in an inter-district change of schools for Asia.

At the new school, when Asia was ten, Ms. Jones asked for help again. This time, she was sent to the school's Intervention and Referral Services (I&RS) team to discuss possible interventions. The I&RS team met with Ms. Jones and they agreed to try different behavioral interventions, including a point system, to rectify the behaviors. Six months passed with no change, so Ms. Jones and the I&RS team together referred Asia for a special education (child study team) evaluation. A meeting was held, at which time members of the district's special education department informed Ms. Jones that they would not evaluate Asia because the I&RS interventions had not been implemented fully and the I&RS documentation was incomplete. At the same time, the district assured Ms. Jones that I&RS was resolving the problem behaviors and there was no need for special education assistance. Over the next eighteen months, Ms. Jones bounced back and forth between the I&RS team and the child study team as she tried to work with them and do what they asked and instructed her to do, to no avail. She contacted the Clinic for help after learning about us from Asia's therapist in the after-school behavioral program.

Within two months of the Clinic's involvement, the district, at the Clinic's urging, completed an expedited evaluation of Asia and found her eligible for special education and related services. Testing revealed that Asia, then twelve years old, had an average to low average IQ, but was performing academically at approximately a third grade level across the board. Shortly before a meeting with the school district to determine Asia's eligibility for special education, she was hospitalized in an inpatient psychiatric unit due to "explosive" behavior. A dispute then arose between the district and Ms. Jones over the proper classification for Asia, which further delayed the eligibility process for another two months. When the parties finally agreed to a classification, the school district developed an IEP that proposed placement at another public school in the same town—the same one Asia had attended previously. Ms. Jones refused to agree to the IEP because she felt that this school could not address Asia's needs appropriately.

The Clinic, on behalf of Ms. Jones, then filed a request for a due process hearing against the school district. The petition asked for Asia's immediate placement in a private school specializing in educating children with severe emotional and behavioral problems, and compensatory education and related services due to the district's failure to identify, evaluate, classify, and provide Asia with proper educational programming and services over a six-year period. Shortly thereafter, Asia was again admitted to the crisis unit at the local hospital. This time, the state's behavioral health program stepped her down into a residential program, where Asia remains to this day.

The parties ultimately settled Asia's case without having to proceed to a hearing. During negotiations, the Clinic relied on Third Circuit precedent placing the duty to identify the denial of a FAPE on school districts and the courts' authority to award broad relief in the area of compensatory education where the violation was ongoing. The Clinic also relied on the exceptions to the statute of limitations provision to justify Ms. Jones's failure to file for due process earlier. First, the Clinic argued that the child study team's repeated assertions that I&RS interventions were properly addressing Asia's behavior problems induced Ms. Jones to trust that the district was providing Asia with the educational supports and services she required. Second, the Clinic asserted that the district withheld necessary information from Ms. Jones about Asia's failure to make educational progress and her non-responsiveness to I&RS interventions. The parties ultimately agreed to a substantial compensatory education settlement allowing Asia to access additional educational programming and services up to and beyond age twenty-one.

Just as with Aaron's case, had Asia's matter arisen today, the settlement size would have been vastly reduced. Earlier Third Circuit precedent and the exceptions to the statute of limitations served as valuable, essential bargaining chips for the Clinic in negotiating the settlement's terms. Although one cannot predict the future, it appears that no matter the breadth of the compensatory education award, Asia will not be put in the same position in which she would have been had the school district properly identified and addressed her behavioral concerns and their adverse impact on her education from the outset. However, the Third Circuit's recent restrictions on the availability of compensatory education as a remedy would have hurt her even more.

V. REMEDYING INEQUALITIES IN THE REMEDIAL SCHEME

Courts in the Third Circuit, through misreading, misstatements, misapplication, and restrictive interpretation of the statute of limitations, its exceptions, and the procedural safeguards have fortified the second-class status of the IDEA remedial scheme for children from low-income households. The question of how to address this issue remains. The statistics presented in Part I demonstrate that the proper education of children with disabilities in low-income households is a complex issue requiring a multi-faceted response. Moreover, as stated previously, significant efforts must be made to cure the ills at the front end of the system for, until this occurs, the disheartening outcomes will not change. In the interim, however, we must strengthen available remedies for low-income children with disabilities denied a FAPE. To this end, I have several recommendations.

First and foremost, Congress must codify the remedy of compensatory education in the next reauthorization³²² of the Act.³²³ Without such codification, school districts have no duty to notify the public of the remedy's availability, which results in the denial of essential information to an entire class of people for whom compensatory education and related services is the only form of recompense. Congress's continuing failure to codify compensatory education and to delineate parameters for accessing, interpreting, and applying the remedy, has reinforced the remedy's status as a second-class cure.³²⁴

To illustrate, by including tuition reimbursement in the Act, Congress set forth the right to the remedy as well as the limitations on accessing and enforcing it. In this manner, Congress protects both parents and school districts. Parents must abide by notice

322. The IDEA originally was scheduled for reauthorization in 2011 but the process has been postponed to at least 2014. *See* NAT'L SCH. BDS. ASS'N, INDIVIDUALS WITH DISABILITY EDUCATION ACT (IDEA): EARLY PREPARATION FOR REAUTHORIZATION (2013), available at <http://www.nsba.org/Advocacy/Key-Issues/SpecialEducation/NSBA-Issue-Brief-Individuals-with-Disabilities-Education-Act-IDEA.pdf>.

323. *See* Hyman et al. *supra* note 92, at 156 (recommending codification of compensatory education as a remedy in the statute to ensure that parents without means are aware of this remedial option).

324. One may posit that since compensatory education is an equitable remedy, it need not be codified as it falls under the IDEA's broad remedial relief. However, the same may be said about tuition reimbursement, also an equitable remedy, yet codified within the Act. Perhaps the distinction exists because those who can afford to unilaterally place children in private schools have a louder voice in Congress than those who cannot front the costs, but that topic is outside the purview of this Article.

requirements and behave reasonably or else risk reduction or denial of reimbursement. Similarly, school districts are on notice that parents know of the remedy and will use it when they are financially able. Codification of tuition reimbursement serves as a valuable deterrent by placing school districts, particularly those in communities where parents can afford to “front” the costs of programs and services, on notice of substantial financial risk in the event they fail to provide a FAPE. The IDEA also details certain instances where a court must or may be prevented from reducing or denying a tuition reimbursement claim,³²⁵ thereby adding an additional level of protection to parents who invoke the remedy.

In contrast, the Act affords parents no notice of the availability of compensatory education as a remedy, nor does it offer parents seeking this remedy any additional protections. Yet, the IDEA does impose requirements on parents for accessing and using the remedy. By applying the IDEA 2004’s statute of limitations provision to compensatory education claims, Congress sets rules on how to request a form of relief, and limits access to the relief without informing the public of the remedy’s availability or providing any guidance regarding what it is and how to obtain it. In essence, Congress limits the remedy without stating it exists, which is akin to putting the proverbial cart before the horse. One easily can see how this might result in children being denied the full benefit of the remedy due to a parent’s failure to invoke the remedy within required timelines.

In addition to codifying the remedy of compensatory education, Congress should create a separate statute of limitations for these claims. The current two-year statute of limitations on tuition reimbursement claims makes sense. Logic dictates that parents should give school districts proper notice of their intent to unilaterally place their child and seek reimbursement, and two years is ample time for them to file for reimbursement from the district. Clearly, parents know when they unilaterally place their children in private school. Thus, the “should have known” language of the provision has limited or no application to tuition reimbursement claims. Moreover, parents who are able to bear the costs of educational programs and

325. *See* 20 USC §1412(a)(10)(C) (2012) (e.g., where a school district prevents a parent from providing required notice or parents do not receive notice/procedural safeguards from the school district). Courts also may choose not to reduce or deny reimbursement where a parent is illiterate, cannot write in English, or compliance with notice requirements would have resulted in serious emotional harm to the child. *See id.*

services typically are financially stable, better educated, and more capable of understanding the IDEA's procedural safeguards.³²⁶ These factors, coupled with the presumption that parents who unilaterally place their children in private school are more able to access and pay for legal assistance, make the two-year limitations period even more reasonable. In contrast, as stated earlier, approximately two-thirds of children with disabilities live in households that qualify as (or are just over) low-income and are at high risk of experiencing the myriad harmful effects of the correlation between low socioeconomic status, disability and poor educational outcomes.³²⁷ These are the same children for whom compensatory education is the sole available remedy for the denial of a FAPE. They are more likely to reside in single-parent households,³²⁸ and suffer the ill effects of power imbalances between their parents and their school districts resulting from differences in educational attainment, knowledge base, language and access to legal or other expert assistance.³²⁹ To impose a flat two-year limitation on these parents when filing for compensatory education, without informing them of the remedy and offering an opportunity for courts to consider the factors discussed in Part I that influence parents' ability to access the remedy and advocate, is to deprive them of adequate, equal recourse.

In creating the statute of limitations for compensatory education claims, Congress should set a time limit that offers both a bright line rule to protect school districts *and* flexibility to protect parents of children with disabilities and adult students. To accomplish this task, this Article proposes that Congress establish a two-year statute of limitations for the filing of compensatory education claims *triggered solely by the date the parent knows of the alleged action that forms the basis of the complaint.*³³⁰ In so doing, Congress could include a

326. *See generally supra* Part I.

327. *See* WAGNER ET AL., *supra* note 11.

328. *See* Bradshaw, *supra* note 30; *see also* Fujiura & Yamaki, *supra* note 69.

329. *See generally supra* Part I.D.

330. Courts in the Third Circuit do not appear to have struggled with identifying the point at which a parent "knew" of the conduct, as in some cases parents and school districts agree on this date, and in others courts have defined the date as when the parent obtained legal representation or obtained the results of an independent evaluation that revealed a contrary view than that espoused by the District. *See, e.g.,* I.H. *ex rel.* D.S. v. Cumberland Valley Sch. Dist., 842 F. Supp. 2d 762, 774 (M.D. Pa. 2012) (finding that the "knew or should have known date" for requesting a hearing was the date the guardian learned, from independent evaluations, that the child was not receiving proper educational services); *see also* Lauren G. v. W. Chester Area Sch. Dist., 906 F. Supp. 2d 375, 387 (E.D. Pa. 2012) (finding that parents knew of

rebuttable presumption of knowledge in certain situations, which parents could produce evidence to overcome, to avoid the potential for needless litigation over the rule's application. Examples of such situations include where a parent retained the assistance of legal counsel for the explicit purpose of pursuing a case against the school district for the denial of a FAPE, or a parent obtained the results of independent evaluation reports indicating that the child's current special education programming and services are not appropriate.³³¹ Elimination of the "should have known" requirement coincides with the minimal (to non-) use of that triggering language in the tuition reimbursement context. Moreover, until the courts succeed in developing a "reasonable person standard" that applies to parents of low-income children with disabilities and incorporates those factors discussed in Part I, courts should refrain from making any determination of whether a parent "should have known" of the alleged action or violation.

The inclusion of a new exception exempting from the time limit parents who know of the action forming the basis of the complaint, but demonstrate that circumstances otherwise impeded timely filing, is critical to this proposed statute of limitations. To this end, Congress should mandate the development of uniform regulations that provide a non-exhaustive list of factors a court may consider in determining whether this new exception applies to a particular case. Factors should include a parent's socioeconomic status, level of educational attainment, disability and health status, literacy and comprehension levels, native language issues, cultural norms (e.g. in certain cultures, teachers are given the utmost respect and their opinions are not challenged), access to outside expertise and legal representation, and the readability of the procedural safeguards, to name a few. Congress should instruct courts to conduct an individualized inquiry into the application of this exception, including the parent's unique factual circumstances, just as courts do in determining the appropriateness of a child's IEP. This exception to the rule is essential to protect children where a parent, due to circumstances beyond his control, is unable to file in a timely fashion. In addition to this exception, Congress should extend application of the IDEA 2004's statute of limitations' exceptions to compensatory education claims, but issue guidance on defining and applying the

injury at or about the time they removed their child from school and retained legal counsel for purposes of determining if the special education harm was actionable).

331. *See, e.g., id.*

exceptions to avoid and overcome the Third Circuit's excessively restrictive interpretation.

Once Congress codifies the remedy of compensatory education in the IDEA, the proposed separate statute of limitations, and exceptions, it must safeguard the scope of this remedy from restriction, provided a complaint is timely filed. In other words, Congress should include its intent (which was consistent with prior Third Circuit precedent) within the language of the IDEA proper. Specifically, the IDEA should be amended to permit consideration of compensatory education claims that occurred more than two years before the KOSHK date, but were ongoing to the two-year period prior to that date, as long as such claims are filed in accordance with time limits. Congress also should expressly permit the use of equitable tolling, including the continuing violations doctrine (in accordance with the legislative history) and statutory tolling for minors. Disallowing consideration of ongoing compensatory education claims and the use of statutory tolling for minors penalizes children with disabilities for their parent's circumstances in contravention to Third Circuit precedent.³³² It perpetuates the vicious cycle of poor statistical outcomes for low-income children with disabilities and provides a green light to school districts to deny children a FAPE because of the unlikelihood they will be challenged for so doing, and the small amount of recompense they will have to provide (at most, two years) if such challenge succeeds.³³³

Finally, as we await the reauthorization process to make the above-described changes to the statute, Third Circuit courts should reexamine recent opinions applying the IDEA 2004 statute of limitations to compensatory education matters and interpreting the exceptions together with the Act's legislative history and Third Circuit precedent. In the coming months, the Third Circuit will have

332. See, e.g., *M.C. ex rel. J.C. v. Central Reg'l. Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996). (“[A] child's entitlement to special education should not depend upon the vigilance of the parents . . .”).

333. School districts likely will argue that the flexibility provided in the proposed statute of limitations will open the door to excessive litigation and expose school districts to tremendous costs. In reality, however, fewer than one percent of students receiving IDEA services participated in full hearings in 2008–2009, and considering the issues discussed in Part I, it is highly unlikely that these numbers will change greatly in the near future without significant changes in these circumstances. See Hyman et al., *supra* note 92, at 120 (noting that only 2033 of the nearly seven million children receiving special education services through Parts B and C of the IDEA actually participated in full hearings leading to a final decision in 2008–2009, yet politicians and policy makers focus most on the alleged “cost” of due process); see also Bagenstos, *supra* note 132.

opportunity to examine the interrelationship of 20 U.S.C. § 1415(f)(3)(C) and § 1415(b)(6)(B), thanks to the *G.L.* court's certification of the issue for interlocutory appeal.³³⁴ In ruling on these issues, the courts should reconcile the language of the provisions, the guiding principles set forth in the statute, the legislative history, and Third Circuit precedent.

First, the courts should properly apply the two-year timeline for filing a complaint, set forth in § 1415(f)(3)(C), to the filing party's KOSHK date in accordance with the language of the provision. Second, courts should read § 1415(b)(6) to mean that if an alleged denial of a FAPE both started and ended more than two years before the KOSHK date, and the court finds that the parent knew or should have known of the alleged action forming the basis of the complaint, then the claim is barred. If the parent did not know (or should not have known) of the action, or if the claim occurred more than two years before the KOSHK date but was ongoing to the prior two years, then the claim should be considered in its entirety. This interpretation is consistent with both the language of the IDEA and the legislative history. Some may argue that this interpretation is simply an application of the continuing violations doctrine in disguise, and perhaps it is. By the same token, the Third Circuit should not have eliminated this doctrine through its ban on the use of equitable tolling because, in so doing, the court contradicted the stated intent of the legislators.

Third, the language of *M.C.* and *Ridgewood* determining the accrual of a compensatory education claim as the date the school district knew or should have known of the denial of a FAPE remains good law. It does not conflict with either the language of IDEA 2004 or the Act's legislative history. As explained earlier, placement of the duty to identify the denial of a FAPE solely on school districts coincides with the Act's requirement that school districts have the affirmative duty to identify, evaluate and provide a FAPE to eligible children. The statute of limitations' requirement that a parent or school district file a complaint within two years of the KOSHK date has no effect on the compensatory education accrual date. In other words, while the statute of limitations applies to the timeframe for filing the complaint, it should not be applied to determine the starting point for measuring a compensatory education claim or to limit consideration of the scope of a claim as long as the claim is timely

334. Order Including Certification Pursuant to 28 U.S.C. § 1292(b), *G.L. v. Ligonier Valley Sch. Dist. Auth.*, No. 2:13-cv-00034, 2013 U.S. Dist. LEXIS 180923 (W.D. Pa. Dec. 30, 2013), ECF No. 56.

filed. The court should adhere to case precedent on this point, and cease its misapplication of the statute of limitations in compensatory education matters.

CONCLUSION

The Third Circuit's dramatic shift in its approach to compensatory education claims has significantly restricted access to an essential remedy for children with disabilities in low-income households, and removed a critical deterrent for school districts to comply with the IDEA's mandates. The proposed recommendations ask Congress to follow the lessons of early Third Circuit precedent in amending the IDEA's remedial scheme, and align with the articulated findings and purposes of the Act. The plights of and poor outcomes for children with disabilities in low-income households coupled with principles of fundamental fairness dictate that Congress and the courts interpret and apply the remedy of compensatory education broadly while balancing the equities in applying a statute of limitations to such claims. To do otherwise will serve only to perpetuate inequality for those living in poverty, and encourage school districts to hedge their bets in determining whether to provide a FAPE, to the detriment of too many voiceless children, their families, and society at large.