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## Exception Perception: The Third Circuit's Strict View of the Exceptions to the Statute of Limitations Under the Individuals with Disabilities Education Act

Samantha Peruto

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EXCEPTION PERCEPTION: THE THIRD CIRCUIT'S STRICT VIEW  
OF THE EXCEPTIONS TO THE STATUTE OF LIMITATIONS  
UNDER THE INDIVIDUALS WITH DISABILITIES  
EDUCATION ACT

SAMANTHA PERUTO\*

“[E]ducation is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. . . . [A] principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”<sup>1</sup>

I. INTRODUCTION

Daniel, a young boy from the suburbs of Philadelphia, struggled to keep up with his classmates in school.<sup>2</sup> Daniel exhibited issues with reading and demonstrated problems socializing with the other students.<sup>3</sup> His troubles began in kindergarten, which he attended for two years, and continued to third grade when Daniel was finally diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and offered appropriate accommodations by the school district.<sup>4</sup>

Thankfully, Congress has developed a statutory scheme whereby struggling students like Daniel will receive the proper services and education from an early age.<sup>5</sup> When services are denied, students may seek equitable remedies, such as compensatory education, to help them attain the

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\* J.D./M.B.A. Candidate, 2014, Villanova University School of Law; B.S. 2011 Saint Joseph's University. This Article is dedicated to the memory of my grandmother, Beatrice F. Nicoletti, a devoted teacher both inside and outside of the classroom. I would also like to thank: my parents for their endless love, support, and involvement in my education; my brothers, John and Vince, for their humor, encouragement, and friendship; and the editors of the *Villanova Law Review* for selecting this Article for publication and for their generous guidance and commitment to excellence.

1. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right, which must be made available to all on equal terms.”), *supplemented by* 349 U.S. 294 (1955); *see also* Perry A. Zirkel, *Does Brown v. Board of Education Play a Prominent Role in Special Education Law?*, 34 J.L. & EDUC. 255, 270 (2005) (noting that *Brown* represents “sea of change in the legal approach to students that based on group characteristics faced separation or exclusion”).

2. *See* *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 240–42 (3d Cir. 2012) (summarizing facts of student’s struggle through school).

3. *See id.* (discussing academic and behavioral issues).

4. *See id.* at 242 (discussing diagnosis and eligibility for specialized services).

5. Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2006).

same level of education as their classmates.<sup>6</sup> Unfortunately for Daniel and millions of other students, those remedies are unavailable when their parents fail to act within the statute's two-year limitations period.<sup>7</sup>

The Individuals with Disabilities Education Act (IDEA) serves to accommodate and protect the rights of disabled children by requiring public educational institutions to "identify and effectively educate" children with special needs.<sup>8</sup> To benefit from the IDEA, children must rely on parents and teachers to recognize their needs and advocate for their best interests.<sup>9</sup> Unfortunately, neither parents nor teachers can adequately advocate in isolation.<sup>10</sup> Rather, it "takes a village"—a collaboration between teachers capable of identifying disabled children (Child Find) and providing the free appropriate public education (FAPE) to those in need of specialized services, and parents willing and able to raise a flag when educational institutions fall short.<sup>11</sup>

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6. See *id.* § 1415(i)(2)(C)(iii) (requiring judges to award "such relief as the court determines is appropriate"); *infra* notes 151–57 and accompanying text (discussing compensatory education remedy).

7. See, e.g., *infra* notes 55–67 (discussing litigation surrounding this issue and how courts apply the statute of limitations).

8. See 20 U.S.C. § 1400(d) (listing purposes of Individuals with Disabilities Education Act); *id.* § 1401(3) (amended 2010) (defining "child with a disability" as "(i) with intellectual disabilities, [hearing, speech, language, or visual] impairments, 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"); D.K. v. Abington Sch. Dist., 696 F.3d 233, 244 (3d Cir. 2012) (noting effective education may require schooling outside public school systems' and school districts' duty to pay for child's education elsewhere if institution is unable to provide specialized services (citing P.P. *ex rel.* Michael P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 735 (3d Cir. 2009))); Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *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, 116 (2011) (acknowledging IDEA protection is available to all disabled students, including students in public and private schools, and those who are "homeless, or in a hospital, jail, prison, or foster care placement").

9. See Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1806 (2008) (noting children lack capacity to identify disabilities or understand how their needs differ from other students). The structure of IDEA forces children to rely on "their parents' willingness and ability to advocate for them." *Id.*

10. See Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 647 (2002) (discussing relative expertise of parents and educational institutions and need for team approach to maximize child's welfare).

11. See Judith Wilson, *A Conversation with Toni Morrison*, ESSENCE, July 1981, at 84 (statement by Toni Morrison) ("I don't think one parent can raise a child. I don't think two parents can raise a child. You really need the whole village."); cf. Phillips, *supra* note 9, at 1823–37 (discussing challenges and responsibilities facing both parents and educators in providing most effective education to disabled students). Child Find is the school district's obligation to identify, locate, and evaluate children in need of special education services. See 20 U.S.C. § 1412(a)(3). This obligation is "an affirmative one," and the IDEA does not require parents to request an evaluation of their child. See Reid *ex rel.* Reid v. District of Columbia, 401 F.3d 516, 518 (D.C. Cir. 2005) ("School districts may not ignore disabled stu-

Under the IDEA's current statutory scheme, parents have a short, two-year period to request a due process hearing for any alleged IDEA violations.<sup>12</sup> However, the limitations period will not apply under two exceptions: first, if the parents were unable to request the hearing due to specific misrepresentations made to the parents by the local educational agency (LEA) in regard to resolution of their child's disability; and second, if the LEA withheld information from the parents of the disabled child.<sup>13</sup> Unfortunately, several courts have been reluctant to apply these exceptions.<sup>14</sup>

In *D.K. v. Abington School District*,<sup>15</sup> the Third Circuit delineated the scope of the exceptions to the IDEA's statute of limitations for the first time.<sup>16</sup> When D.K.'s parents requested a due process hearing and alleged violations of the IDEA for the school district's failure to diagnose their child, they were unfortunately confronted with the IDEA's statute of limitations, which excluded the parents from claiming any conduct by the LEA that occurred more than two years prior to the hearing request.<sup>17</sup> Consequently, D.K.'s claim was barred because the school district's conduct that formed the basis for D.K.'s complaint fell beyond the two-year

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dents' needs, nor may they await parental demands before providing special instruction."); accord Hyman et al., *supra* note 8, at 116 n.46 (same). The duty "is triggered when [a school district] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability." Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001). The "Child Find" provision includes "[c]hildren who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. § 300.125(a)(2)(ii) (2000); see Hyman et al., *supra* note 8, at 116 n.47 (discussing examples of children exhibiting signs of disabilities, which trigger Child Find obligations).

12. See 20 U.S.C. § 1415(f)(3)(C),(D) (outlining timeline for requesting hearing and exceptions); *id.* § 1415(b)(6) (noting parents may request impartial due process hearing to resolve any issues "relating to the identification, evaluation, or educational placement of the child"); Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525 (2007) (noting issues addressed in complaint resolved by hearing officer during due process hearing); accord 22 PA. CODE § 14.162(b) (West, Westlaw through Mar. 2, 2013).

13. See 20 U.S.C. § 1415(f)(3)(D) (stating exceptions to timeline).

14. See *infra* notes 55–67 and accompanying text for a discussion of how courts interpret and apply the statute of limitations exceptions.

15. 696 F.3d 233 (3d Cir. 2012).

16. See generally *id.* (recognizing difficulties faced by district courts applying exceptions to IDEA claims); see also Jim Gerl, *Big Decision: Statute of Limitations*, SPECIAL EDUC. L. BLOG (Nov. 6, 2012, 10:05 AM), <http://specialeducationlawblog.blogspot.com/2012/11/big-decision-statute-of-limitations.html> (noting Third Circuit is first circuit to address IDEA statute of limitations); *Third Circuit First to Examine Scope of Two-Year Statute of Limitations in Section 504 Claims*, MAIELLO BRUNGO & MAIELLO, LLP, <http://www.mbm-law.net/newsletter-articles/third-circuit-first-to-examine-scope-of-two-year-statute-of-limitations-in-section-504-claims/2562/> (last visited Feb. 15, 2013) (noting Third Circuit also first to examine statute of limitations as applied to Section 504 claims under Rehabilitation Act).

17. See 20 U.S.C. § 1415(f) (allowing only two years to file request for due process hearing).

period reviewable by the court, and no exceptions applied to rescue the claim.<sup>18</sup>

The Third Circuit held that in order to toll the statute of limitations under the first exception, the school district must have knowingly and intentionally misrepresented information to the parents.<sup>19</sup> Alternatively, under the second exception, the LEA must have withheld statutorily required information from the parents.<sup>20</sup> For either exception to apply, the LEA's conduct must have *caused* the parents' failure to request a due process hearing within the two-year statute of limitations period.<sup>21</sup> The court also rejected any application of equitable tolling doctrines to the IDEA.<sup>22</sup>

While giving better guidance on application of the exceptions, the Third Circuit's holding is a stringent test, and limits parents' ability to overcome the statute of limitations.<sup>23</sup> The implications are far-reaching, as many families are unaware of IDEA violations until it is too late, making the remedies under the IDEA practically ineffective.<sup>24</sup> This decision places an even higher burden upon parents of disabled children to become more involved, informed, and aware, and to raise and resolve IDEA issues in a timely manner.<sup>25</sup>

This article examines how the Third Circuit's decision will impact future litigation of IDEA claims, outlines how parents may successfully navigate the statute's exceptions to toll the limitations period, and advocates for a broader interpretation of the exceptions in the future.<sup>26</sup> Part II examines the history of special education in the United States and the devel-

18. See *D.K.*, 696 F.3d at 240–42 (summarizing facts showing teachers allowed D.K. to continue through school despite difficulties); *id.* at 245–48 (holding no exception to statute of limitations applied).

19. For the Third Circuit's interpretation of the first exception, see *infra* notes 97–100 and accompanying text.

20. For the Third Circuit's interpretation of the second exception, see *infra* notes 101–03 and accompanying text.

21. For the Third Circuit's analysis of causation under the statute, see *infra* notes 104–06 and accompanying text.

22. See *D.K.*, 696 F.3d at 248 (providing further discussion of courts' rejection of equitable tolling under IDEA).

23. For a discussion of how the Third Circuit's decision will impact future litigation of IDEA claims for plaintiffs, see *infra* notes 111–29, 138–47 and accompanying text.

24. See *infra* notes 138–47 and accompanying text (discussing impact of decision on parental burdens under IDEA).

25. See generally Phillips, *supra* note 9 (arguing parents of disabled children need assistance to achieve optimal outcomes for their children due to complexities of IDEA system and child's disabilities); see also *infra* notes 138–47 and accompanying text (same).

26. For an analysis of the decision's impact on future litigation, see *infra* notes 111–29 and accompanying text; see also Lynn M. Daggett, Perry A. Zirkel & LeeAnn L. Gurysh, *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, 723 (2005) (defining tolling as “the suspension or interruption of the statute of limitations—in other words, temporarily putting the statute of limitations clock on hold”).

opment of the IDEA.<sup>27</sup> Further, Part II addresses how other courts have interpreted the IDEA's statute of limitations and its exceptions.<sup>28</sup> Part III explains the Third Circuit's decision in *D.K. v. Abington School District* in greater detail and examines the rationale behind the ruling.<sup>29</sup> Finally, Part IV critically analyzes the decision and provides guidance to practitioners, highlights policy issues on both sides of the dispute, and assesses the strengthened role of parents.<sup>30</sup>

## II. BACKGROUND

While this article examines a limitation on the IDEA, it is important to first understand the history of special education in the United States.<sup>31</sup> Prior to the IDEA—a relatively new piece of legislation—students with special needs were inadequately represented in the political process.<sup>32</sup> This section highlights the major changes in special education protection throughout the twentieth century, which eventually led to the enactment of the IDEA.<sup>33</sup> Further, this section explores the general principles of the IDEA, the role of parents in a child's education, and the statute of limitations.<sup>34</sup>

### A. *The Evolution of Special Education in the United States*<sup>35</sup>

Education plays a vital role in the development of society and shaping the future of the United States.<sup>36</sup> Despite its importance, special educa-

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27. For further discussion of the development of the IDEA and special education law in the United States, see *infra* notes 37–49 and accompanying text.

28. For an overview of the statute of limitations under the IDEA and interpretations thereof, see *infra* notes 50–67 and accompanying text.

29. For further discussion of the Third Circuit's analysis in *D.K. v. Abington School District*, see *infra* notes 68–106 and accompanying text.

30. For an in-depth discussion of the practical implications of *D.K. v. Abington School District* for practitioners, students, and parents, see *infra* notes 107–47 and accompanying text.

31. See *infra* notes 35–41 discussing developments in special education legislation in the United States.

32. See *infra* note 37 and accompanying text for a discussion of inadequate special education law in the twentieth century.

33. See *infra* notes 38–41 and accompanying text for brief highlights of legislative milestones leading to the IDEA.

34. See *infra* notes 42–67 and accompanying text for a detailed description of relevant IDEA provisions.

35. See Phillips, *supra* note 9, at 1809–13 (discussing developments leading to IDEA's enactment).

36. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (discussing importance of education in citizenship, culture, and living productive adult life); Phillips, *supra* note 9, at 1812–13 (discussing *Brown* decision's effect on changes in educational system in second half of twentieth century); Thomas A. Mayes, Perry A. Zirkel & Dixie Snow Huefner, *Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with Disabilities Education Act*, 108 W. VA. L. REV. 27, 36 (2005) (regarding IDEA as “the disability movement's *Brown v. Board of Education*”) (citation omitted) (internal quotation marks omitted).

tion was largely underrepresented in the political arena until the 1970s and the rise of the disability rights movement.<sup>37</sup> A major milestone for special education and disabilities advocates was Section 504 of the Rehabilitation Act of 1973, which disallowed any federally funded program from discriminating on the basis of disability.<sup>38</sup>

Shortly thereafter, Congress enacted the Education for All Handicapped Children Act (EAHCA) of 1975, subsequently renamed in 1990 as the Individuals with Disabilities Education Act (IDEA).<sup>39</sup> The IDEA was the result of a congressional finding that an exorbitant number of disabled children were inadequately educated, including millions who were

37. See Phillips, *supra* note 9, at 1809 (discussing public's lack of concern with special education until advocates fought to promote rights of disabled individuals). The 1970s was a decade of progress for special education advocates, especially in the classroom. See *id.* at 1809–12 (summarizing evolution of special education accommodation in 1970s). The movement sought to shift the public's conceptions of disabilities away from a medical perspective and towards a focus on using "existing social arrangements" to help rather than handicap disabled individuals. See *id.* at 1809 n.18 (citing RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 169–70, 178–79 (2d ed. 2001) (describing disability rights movement's goals and successes)). "[D]isability policy [prior to 1970] adhered to the medical model of disability 'in which people with disabilities were presumed unable to function independently in the mainstream of social, economic, and political life.'" *Id.* at 1809 (citation omitted). Two federal court decisions reiterated that children with disabilities have equal rights to public education as other children. See *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 875 (D.D.C. 1972) (declaring that financial hardship could not justify denying services to disabled children who are entitled to public education); *Pa. Ass'n for Retarded Children (PARC) v. Pennsylvania*, 334 F. Supp. 1257, 1259 (E.D. Pa. 1971) ("[M]entally retarded persons are capable of benefiting from a program of education and training."). The *PARC* and *Mills* decisions also gave parents of disabled children an opportunity to participate for the first time in the decision-making process in their child's education. See Phillips, *supra* note 9, at 1813 (discussing effect of *PARC* and *Mills* on legislation and parents' rights, which Congress previously neglected). For further discussion of parental roles in children's education under IDEA, see *infra* notes 45–49 and accompanying text.

38. See Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 394 (codified at 29 U.S.C. § 794(a) (2000)) ("No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."). Section 504 prompted a strong societal push towards accommodation of disabled individuals, specifically, students in public school systems. See Phillips, *supra* note 9, at 1810 (noting regulations framed Section 504 as "declaration of civil rights for disabled people"). Despite its success, members of Congress did not anticipate any extraordinary results from Section 504. See SCOTCH, *supra* note 37, at 54.

39. See Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1141–42 (codified as amended at 20 U.S.C. § 1400) (renaming EAHCA as Individuals with Disabilities Education Act); Phillips, *supra* note 9, at 1813 (confirming basic substantive law of EAHCA remained in IDEA after changing name). As of 2012, the IDEA served almost 6.5 million students with disabilities by providing specialized education services. See *Individuals with Disabilities Education Act (IDEA) Data*, DATA ACCOUNTABILITY CENTER, www.ideadata.org (last visited Feb. 16, 2013) (analyzing IDEA statistics).

“excluded entirely” from public school systems.<sup>40</sup> Finally, Congress recognized a disabled child’s right to special education, a step beyond Section 504 of the Rehabilitation Act.<sup>41</sup>

### B. *The Individuals with Disabilities Education Act*

#### 1. *Principles and Policies*

The IDEA is a federal special education statute that offers funding to state educational agencies (SEAs) that commit to adopt the necessary policies and procedures to comply with the IDEA’s twenty-five listed conditions.<sup>42</sup> In states receiving IDEA funding, schools must identify children requiring special education services (Child Find) and provide a FAPE to those students.<sup>43</sup> The FAPE must be tailored to the particular needs of the child through an individual educational program (IEP).<sup>44</sup>

The IDEA places a strong emphasis on the role of parents in a child’s education.<sup>45</sup> Prior to the IDEA, Congress recognized that schools, acting

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40. See 20 U.S.C. § 1400(c)(2) (2006) (listing reasons why educational needs of disabled children were not met prior to enactment); Mayes et al., *supra* note 36, at 36 (noting number of children excluded from adequate education was “intolerable”).

41. Compare 20 U.S.C. § 1400 (stating purpose of IDEA is to affirmatively “ensure . . . the rights of children with disabilities”), with 29 U.S.C. § 794 (forbidding exclusion on basis of disability for all federally funded programs, not solely educational institutions). See generally Perry A. Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA*, 282 EDUC. L. REP. 767 (2012) (comparing IDEA with Section 504 and Americans with Disabilities Act).

42. See 20 U.S.C. § 1412(a) (listing twenty-five conditions); Mayes et al., *supra* note 36, at 36–37 (noting conditions are intended to ensure disabled children in every IDEA funded state receive FAPE and describing how funds are allocated amongst state and local educational agencies).

43. See *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 244 (3d Cir. 2012) (describing IDEA obligations). “The IDEA protects the rights of disabled children by mandating that public educational institutions identify and effectively educate those children, or pay for their education elsewhere if they require specialized services that the public institution cannot provide.” *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 735 (3d Cir. 2009). See generally Thomas A. Mayes & Perry A. Zirkel, *State Educational Agencies and Special Education, Obligations and Liabilities*, 10 B.U. PUB. INT. L.J. 62 (2000) (describing obligations of IDEA funded states).

44. See 20 U.S.C. § 1414(d)(2)(A) (2006) (requiring IEP for students deemed eligible for special education services); 150 CONG. REC. E2103–02 (daily ed. Nov. 19, 2004) (statement of Rep. Michael M. Honda) (“Every child learns at his own pace and our educational system must be able to accommodate the needs of each individual student.”). The IEP need only be “reasonably calculated to enable the child to receive educational benefits.” *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206–07 (1982). The IEP is distinct from the FAPE in that an IEP is an *offering* of FAPE. See *I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 771 (M.D. Pa. 2012) (describing differences between FAPE and IEP to resolve FAPE obligation issue in cyber charter schools).

45. See, e.g., 20 U.S.C. § 1400(d)(1)(B) (acknowledging parents’ rights also protected under IDEA); *id.* §§ 1414(a)(1)–(2), 1415(a)–(c) (parent involvement in IDEA eligibility determinations); *id.* § 1414(a)(1)(D)(i)(I) (parental consent to provision of and placement in special education); *id.* § 1414(d)(1)(B) (parent in-



alone, frequently fail to satisfactorily treat disabled students.<sup>46</sup> Further, Congress found that incorporating parents in the educational process yields positive results.<sup>47</sup> Thus, Congress believed a central parental role would ensure the effectiveness of the IDEA and each student's educational program.<sup>48</sup> As a result, the IDEA provides for parent involvement in procedures including, but not limited to, IDEA eligibility determinations and requires parental consent to the provision of and placement in special education programs.<sup>49</sup>

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volvement on IEP teams); *id.* § 1415(b)(1) (parents' right to examine all records related to child and participate in all IDEA meetings); *id.* § 1415(b)(2)(A) (assigning surrogate parents when parents unknown); *id.* § 1415(k) (providing for parent involvement in discipline decisions).

46. *See, e.g.*, *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 873–76 (D.D.C. 1972) (requiring equality of access to education and preference for mainstream education after parents challenged statute that excluded mentally disabled children from education and training in public schools); *Pa. Ass'n for Retarded Children (PARC) v. Pennsylvania*, 343 F. Supp. 279, 302–03 (E.D. Pa. 1972) (same); *cf.* *Honig v. Doe*, 484 U.S. 305, 309–12 (1988) (discussing Congress's need to highlight parental participation in education because schools typically fail to consult parents concerning child's education). For further discussion of Congress's findings regarding inadequate education of disabled children, see *supra* note 37 and accompanying text.

47. *See* 20 U.S.C. § 1400(c)(5) (2000) (“Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home . . . .”); *cf.* 20 U.S.C. § 1400(c)(5) (2006) (adding to 2000 version of statute that “strengthening the role and *responsibility* of parents” increases effectiveness of education of children with disabilities) (emphasis added).

48. *See* Daggett et al., *supra* note 26, at 728 (“Congress’s purpose in creating the IDEA parent role and rights was utilitarian. . . . [And] essential to the success of the student’s education program.”); Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent’s Perspective and Proposal for Change*, 27 U. MICH. J.L. REFORM 331, 362 (1994) (“[T]he history of the Act makes it apparent that policymakers viewed parental involvement in decisions affecting the child as the primary means by which earlier abuses were to be corrected.”). For further discussion and analysis of all IDEA provisions concerning parents, see Daggett et al., *supra* note 26, at 728–35.

The high burden on parents under the IDEA is justified because their “strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children’s best interests in most circumstances.” Buss, *supra* note 10, at 647. Therefore, control over the education of children traditionally remains within the family. *See* *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that Amish parents need not comply with compulsory education laws). *But see* Buss, *supra*, note 10, at 647 (arguing that law should not give absolute deference to parents because state interests in educating children and promoting social welfare sometimes justify interference with traditional parental authority).

49. *See* 20 U.S.C. § 1415(a)–(c) (2006) (noting parental involvement in IDEA eligibility determinations); *id.* § 1414(a)(1)(D)(i)(I) (providing for parental consent to placement in special education programs). For more examples of parental involvement under the IDEA, see *supra* note 45.

## 2. *The Statute of Limitations and its Exceptions*

In 2004, Congress amended the IDEA to include, among other provisions, a statute of limitations.<sup>50</sup> The IDEA indicates that parents should request the 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.”<sup>51</sup> This addition reflects Congress’s desire for prompt filing and resolution of IDEA claims and a uniform statute of limitations across all states.<sup>52</sup>

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50. See Daggett et al., *supra* note 26, at 766 (discussing all 2004 amendments). Prior to 2004, the IDEA did not specify the time limits for filing for due process hearings. See *id.* at 748 (noting lack of textual time limits in pre-2004 IDEA). Absent federal guidance, most courts borrowed from analogous state statutes of limitations. See *id.* (noting states could also borrow from analogous federal statutes of limitations or use equitable principles, but few courts exercised these options). Courts adopting analogous state statutes generally adopted the torts statutes of limitations, which are typically two or three years. See *id.* at 748 n.180 (noting, however, that tort statutes of limitations are not obviously analogous to IDEA claims, especially given vast differences in parental roles under IDEA); see generally Allan G. Osborne, Jr., *Statutes of Limitations for Filing Lawsuits Under the IDEA: A State by State Analysis*, 191 EDUC. L. REP. 545 (2004) (discussing each state’s statute of limitations period prior to IDEA 2004). However, under the 2004 amendments, the IDEA still permits states to adopt the state statute of limitations. See 20 U.S.C. § 1415(f)(3)(C) (2006) (allowing two year timeline to request due process hearings, “or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.”); S.H. *ex rel.* A.H. v. Plano Indep. Sch. Dist., 487 F. App’x 850, 862–64 (5th Cir. 2012) (adopting Texas statute of limitations, but same exceptions and other substantive IDEA provisions applied).

Congress enacted IDEA 2004 on December 3, 2004, but the statute specified that only certain provisions would take effect on that date. See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108–446, 118 Stat. 2647 (noting all sections, except as otherwise stated, became effective in December 2004). Others, including the statute of limitations, took effect on July 1, 2005. See *id.* (specifying sections becoming effective July 2005). Applying the statute of limitations retroactively to conduct occurring prior to July 2005 proved to be a confusing issue for many district courts, but is beyond the scope of this article. See Steven I. v. Cent. Bucks Sch. Dist., 618 F.3d 411, 412 n.1 (3d Cir. 2010) (resolving in favor of district). Compare Evan H. *ex rel.* Kosta H. v. Unionville Chadds Ford Sch. Dist., No. 07-4990, 2008 WL 4791634, at \*4 (E.D. Pa. Nov. 4, 2008) (concluding IDEA 2004 statute of limitations applied retroactively to claims filed after July 1, 2005, even if conduct occurred prior to that date), and D.K. v. Abington Sch. Dist., No. 08-4914, 2010 WL 1223596, at \*4 (E.D. Pa. Mar. 25, 2010) (same), Breanne C. v. S. York Cnty. Sch. Dist., 665 F. Supp. 2d 504, 511–12 (M.D. Pa. 2009) (same), Sch. Dist. of Phila. v. Deborah A., No. 08-2924, 2009 WL 778321, at \*4 (E.D. Pa. Mar. 24, 2009) (same), with J.L. v. Ambridge Area Sch. Dist., No. 06-1652, 2009 WL 1119608, at \*10 (W.D. Pa. April 27, 2009) (holding IDEA 2004 statute of limitations does not apply to claims filed after July 1, 2005 where conduct occurred prior to that date), Laura P. v. Haverford Sch. Dist., No. 07-5395, 2008 WL 5000461, at \*12 (E.D. Pa. Nov. 21, 2008) (same), and Tereance D. v. Sch. Dist. of Phila., 570 F. Supp. 2d 739, 745–49 (E.D. Pa. 2008) (same).

51. 20 U.S.C. § 1415(f)(3)(C); see also 34 C.F.R. § 300.511(e) (2012) (emphasis added).

52. See Daggett et al., *supra* note 26, at 769 (discussing various theories of congressional intent behind statute of limitations in IDEA 2004); *id.* at 749

The 2004 amendments specify two exceptions that limit the applicability of the statute of limitations.<sup>53</sup> The limitations period will not apply when the parents of the disabled child are:

- [P]revented from requesting the due process hearing *due to*—
- (i) *specific misrepresentations* by the [LEA] that it had resolved the problem *forming the basis of the complaint*; or
  - (ii) the [LEA]’s withholding of information from the parent that was *required* under this subchapter to be provided to the parent.<sup>54</sup>

Courts have struggled to interpret these exceptions since their enactment, and many recognize that “statutory and regulatory guidance are lacking.”<sup>55</sup> Several courts have noted the statute’s preference to leave interpretation of “misrepresentations” to the “purview of the hearing officer.”<sup>56</sup> Thus, plaintiffs bear a tough burden of proving that the

nn.182–83 (discussing various limitations periods among several states (citing Perry Zirkel & Peter Maher, *The Statute of Limitations Under the Individuals with Disabilities Education Act*, 175 EDUC. L. REP. 1, 6–7 (2003))). Prior to the IDEA 2004, state statutes of limitations for IDEA claims varied from sixty days to five years. *See id.* at 749 n.182 (surveying court decisions and noting only North Carolina used sixty-day limitations period compared to longer periods in Third Circuit). Thus, the federal statute of limitations shortened the timeline for some jurisdictions. *See id.* (noting many jurisdictions adopted three-year timeline).

Moreover, prompt filing leads to prompt resolution, which serves a primary goal of the IDEA: to provide eligible students with FAPE as soon as possible. *See id.* at 769 (discussing legislative intent). Some argue the short deadline forces parents to become adversarial very quickly, which makes the educational process and parental role less effective. *See Cory D. v. Burke Cnty. Sch. Dist.*, 285 F.3d 1294, 1299 n.4 (11th Cir. 2002) (noting court decisions finding short limitations periods inconsistent with congressional goals). These critics argue the short timeline dilutes the “procedural rights’ effectiveness by denying parents sufficient time to consider and evaluate an adverse decision by school authorities.” *Id.* However, Congress clearly rejects this notion. *See* 20 U.S.C. § 1415(f) (imposing limitations period). For further discussion of the policy justifications for statutes of limitations, *see infra* notes 130–37 and accompanying text.

53. *See* 20 U.S.C. § 1415(f)(3)(D) (listing both exceptions).

54. *Id.* (emphasis added).

55. *I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 775 (M.D. Pa. 2012); *accord Evan H.*, 2008 WL 4791634, at \*6.

56. 71 Fed. Reg. 46,540, 46,706 (Aug. 14, 2006) (to be codified at 34 C.F.R. pts. 300–01). “We do not believe it is appropriate to define or clarify the meaning of ‘misrepresentations’ . . . .” *Id.*; *see, e.g., J.L. ex rel. J.L. v. Ambridge Area Sch. Dist.*, No. 06-1652, 2009 WL 1119608, at \*12 (W.D. Pa. Apr. 27, 2009), *abrogated on other grounds by Steven I. v. Cent. Bucks Sch. Dist.*, 618 F.3d 411 (3d Cir. 2010). The Fifth Circuit noted that Congress properly left educational policies and procedures in the hands of state and local officials. *See S.H. ex rel. A.H. v. Plano Indep. Sch. Dist.*, 487 F. App’x 850, 855 (5th Cir. 2012) (citing *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 377 (5th Cir. 2003)). *But see Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 252 (5th Cir. 1997) (noting that federal district courts review hearing record “virtually de novo,” despite limited role of circuit courts).

exceptions are met, and courts must undertake a “highly factual inquiry” to determine whether either exception applies.<sup>57</sup>

To toll the statute of limitations under the first exception, most courts required an intentional, knowing misrepresentation, while others allow mere negligence.<sup>58</sup> Courts refuse to allow the action for which the IDEA claim was brought to be a sufficient action to toll the statute of limitations because “doing so would allow the exception to become the rule, and the limitations period would be all but eliminated.”<sup>59</sup> However, the Western District of Pennsylvania allowed mere negligent misrepresentation to toll the statute of limitations where the school district *should have known* of the student’s disability.<sup>60</sup>

The second exception speaks only of *statutorily required* information, which includes a procedural safeguards notification.<sup>61</sup> The procedural safeguards notice includes a full explanation of the parents’ rights under

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57. *J.L.*, 2009 WL 1119608, at \*4. The parents bear the burden of proving that the exceptions apply to the case. See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (placing burden of proof “properly . . . upon the party seeking relief”); *Mayes et al.*, *supra* note 36 (discussing various circuits’ leading cases on burdens of proof).

58. *Compare Evan H.*, 2008 WL 4791634, at \*6 (“[A]t the very least, a misrepresentation must be intentional in order to satisfy the first [exception]”), and *I.H.*, 842 F. Supp. 2d at 775 (same), with *J.L.*, 2009 WL 1119608, at \*11–12 (allowing negligent misrepresentation to toll limitations period). In most courts, a misrepresentation must be more than a merely inadequate evaluation of a student. See *I.H.*, 842 F. Supp. 2d at 775. In *I.H.*, the court held that a school district’s inadequate evaluation of a student, resulting in a failure to accommodate the student’s disabilities, is not an intentional, or even negligent, misrepresentation. See *id.*

59. *I.H.*, 842 F. Supp. 2d at 775 (indicating that without more, action forming basis of claim itself was insufficient, but not indicating what additional information was required); see *Evan H.*, 2008 WL 4791634, at \*6 n.3 (“Such an exception would swallow the rule established by the limitation period.”).

60. See *J.L.*, 2009 WL 1119608, at \*11–12 (relying on Pennsylvania law allowing intentional, negligent, or innocent misrepresentation).

61. See 20 U.S.C. § 1415(d)(2) (2006) (requiring procedural safeguards notification to include full explanation of safeguards written in native language of parents and in easily understandable manner). The notification must contain an explanation of the procedural safeguards available to parents relating to several aspects of the child’s education, including “the opportunity to present and resolve complaints . . . .” See *id.* (listing all available topics for procedural safeguards notice). The notice must also include the time period for parents to file complaints, information regarding the agency’s ability to resolve the complaint, and available mediation remedies. See *id.*

Further, the complaint must affirmatively allege the information was statutorily required for the court to apply the exception. See *I.H.*, 842 F. Supp. 2d at 774–75 (refusing to apply second exception where plaintiffs alleged school’s failure to promptly evaluate child prevented guardians from understanding nature of child’s disabilities, but did not indicate any statutorily required information was withheld). The type of information contemplated under the second exception does not include information that would have stemmed from an evaluation that might affect how parents understand the nature of a disability. See *id.* (holding information from evaluations insufficient to toll limitations period). Failing to promptly evaluate the child is the IDEA violation itself, which cannot be the basis for tolling the statute of limitations. See *id.*

the IDEA relating to their child's education, including a description of the relevant timelines.<sup>62</sup> Parents are entitled to this information in only three circumstances: "(1) the student is referred for, or the parents request an evaluation; (2) the parents file a complaint; or (3) the parents specifically request the forms."<sup>63</sup>

Finally, even if a school district misrepresented or withheld information, that conduct must have *prevented* the parents from requesting the hearing (the "causation requirement"), further limiting application of the exceptions.<sup>64</sup> For example, consider a situation in which a school district withholds the procedural safeguards notice from parents of a disabled student who are entitled to the information.<sup>65</sup> Because the parents do not have the procedural safeguards notification, they are unaware of their right to request a due process hearing or file a complaint against the school district and therefore do not request a hearing within the two-year statutory timeline.<sup>66</sup> Under these circumstances, the withholding of information prevented the parents from requesting the hearing within the limitations period and the statute of limitations would be tolled under the second exception.<sup>67</sup>

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62. See 20 U.S.C. § 1415(d) (listing required information); see also Kotler, *supra* note 48, at 362 (arguing procedural safeguards ensure educators do not act unilaterally unless informed parents relinquish responsibility). Compare *Evan H.*, 2008 WL 4791634, at \*7 (holding plaintiffs allegations that school district withheld information not statutorily required was insufficient to toll statute of limitations), with *S.H. ex rel. A.H. v. Plano Indep. Sch. Dist.*, 487 F. App'x 850, 862–64 (5th Cir. 2012) (holding failure to include required individuals in ARDC meeting constituted withholding of required information).

63. *D.K. v. Abington Sch. Dist.* 696 F.3d 233, 247 (3d Cir. 2012) (citing 20 U.S.C. § 1415(d)). Unfortunately, unless parents are entitled to this information in one of the three circumstances, parents are uninformed about the availability of specialized services for their child. See *Evan H.*, 2008 WL 4791634, at \*7 ("Section 1415(d) . . . states how and when a [procedural safeguards notice] must be made available to parents and details what information such a notice must contain. It does not refer to any of the substantive information, regarding specific services available to a student and a particular student's educational progress . . .").

64. See, e.g., *S.H.*, 487 F. App'x at 862–63 (distinguishing cases where school districts withheld information, but did not prevent parents from requesting hearing).

65. See *supra* text accompanying note 62 (listing circumstances entitling parents to notification).

66. See, e.g., *D.G. v. Somerset Hills Sch. Dist.*, 559 F. Supp. 2d 484, 492 (D.N.J. 2008) (applying second exception where parents requested evaluation and school failed to provide procedural safeguards notice, thus denying parents of information about right to file complaint or request due process hearing).

67. See, e.g., *S.H.*, 487 F. App'x at 862 (applying second exception where parents were unaware of IDEA procedures).

## III. THE THIRD CIRCUIT'S APPROACH

In *D.K. v. Abington School District*, the Third Circuit closely scrutinized D.K.'s entire educational history in the district.<sup>68</sup> Ultimately, the court applied the same strict standard adopted by a majority of district courts.<sup>69</sup> The following discussion shows how the Third Circuit used the facts presented to conclude D.K.'s educational background did not justify any exception to the IDEA's statute of limitations.<sup>70</sup>

A. *Facts of D.K. v. Abington School District*

In *D.K. v. Abington School District*, the plaintiffs, D.K.'s parents, appealed a district court decision, affirming the state agency's decision that the public school district did not violate the IDEA by failing to designate a struggling student as disabled.<sup>71</sup> The student, D.K., began kindergarten in the fall of 2003.<sup>72</sup> During his first year, D.K. exhibited difficulties in the classroom, including both behavioral issues and reading problems.<sup>73</sup> The school district recommended that D.K. repeat kindergarten before moving on to first grade.<sup>74</sup> At this time, the school district's psychologist noted that D.K.'s behavior was not uncommon amongst children his age, and D.K.'s issues did "not necessarily indicate a disorder."<sup>75</sup>

In D.K.'s second year, he made little progress with his behavioral issues, despite improved math and reading skills.<sup>76</sup> To address these concerns, D.K.'s teachers did not conduct a functional behavioral assessment, but rather implemented informal behavior plans in the classroom.<sup>77</sup>

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68. See *infra* notes 70–95 and accompanying text for a detailed discussion of D.K.'s education in the school district.

69. See *infra* notes 97–98 and accompanying text for a discussion of the Third Circuit's standard.

70. See *infra* notes 99–106 and accompanying text for a discussion of the court's application of the standard to D.K.'s educational background.

71. See *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 243 (3d Cir. 2012) (quoting district court's opinion that "the [School] District had insufficient reason to believe that D.K. was a student with a mental impairment") (alteration in original).

72. See *id.* at 240 (noting D.K. attended Copper Beech Elementary in Abington, Pennsylvania).

73. See *id.* (noting that two school district psychologists, Drs. Suzanne Grim and Jan Kline, stated D.K. "failed to progress in . . . following oral directions, listening to and acknowledging the contributions of others, exhibiting self-control, following rules, producing neat and legible work, completing class work [on time], and using non-instructional time appropriately").

74. See *id.* (noting D.K. attended half-day kindergarten program in year one and full day program in year two).

75. See *id.* (discussing findings of Dr. Suzanne Grim and school principal Dr. Jan Kline).

76. See *id.* (noting D.K.'s difficulty controlling himself, as he experienced forty-three tantrums in only two months and turned in rushed and incomplete assignments).

77. See *id.* (noting behavior plans, including sticker chart and system using popsicle sticks, yielded beneficial results as D.K. played well with classmates throughout school year and performed well academically).

D.K.'s parents were optimistic about the behavior plans, but by the end of the year, both parents and teachers expressed major concerns about D.K.'s ability to handle a first grade environment.<sup>78</sup>

Despite those concerns, D.K. advanced to first grade where his behavioral problems continued.<sup>79</sup> D.K.'s teachers recommended measures that D.K.'s parents could take at home to address these issues but did not discuss the possibility of a formal evaluation.<sup>80</sup> A subsequent conference in December 2005 revealed D.K. was still struggling with behavioral issues but was not yet a candidate for formal testing because he was not failing academically.<sup>81</sup>

D.K.'s parents requested an evaluation of D.K. in January 2006, the results of which indicated D.K. was not in need of special education services.<sup>82</sup> Though still struggling, D.K. continued to advance through the school system.<sup>83</sup> He continued to show progress academically, but his behavioral interactions with other students remained troublesome.<sup>84</sup>

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78. *See id.* at 241 (noting concerns about advancing to first grade stemming from little behavioral progress in second kindergarten year).

79. *See id.* (discussing parent-teacher conference held only two months after beginning first grade where D.K.'s teacher informed his parents that he was copying work from other students, "was unable to recall instructions, exhibited poor organizational and planning skills," and other behavioral issues).

80. *See id.* (noting conference held in November 2005 for purpose of addressing D.K.'s behavioral weaknesses).

81. *See id.* (noting that D.K.'s teacher told parents that formal evaluation may be option down the road). Due to his poor social skills, the school district placed D.K. in a special social skills group. *See id.* The school's psychologist, Dr. Grim, claimed D.K. was "on par with" other students in the group. *See id.* The social skills group, however, was not the result of a formal evaluation or diagnosis. *See id.* (noting D.K. was not yet evaluated at this time, but parents requested evaluation later that month).

82. *See id.* (noting school district did not evaluate D.K. until April 24, 2006). The school district, through Dr. Grim, administered several tests including a cognitive ability test, a visual-motor integration test, a Wechsler Intelligence Scale for Children Fourth Edition, and a Wechsler Individual Achievement Test Second Edition. *See id.* (describing testing). Dr. Grim also observed D.K. in his classroom and used the Behavior Assessment System for Children (BASC) to assess whether D.K. suffered from ADHD. *See id.* The tests revealed D.K. did not need special education services because his scores placed him in "average and low-average ranges." *Id.* At this time, the school did not provide a functional behavioral assessment (FBA), which D.K.'s parents believed rendered the April 2006 evaluation inadequate. *See id.* at 249-51 (noting inadequate evaluation as one basis of parents' claims of Child Find violations). However, the court found the testing legally adequate because the IDEA does not require an FBA under these circumstances. *See id.* at 251. Moreover, the fact that subsequent testing reveals a disability does not automatically render prior testing legally inadequate. *See id.* (noting IDEA and regulations do not require FBA testing during initial testing for suspected disabilities).

83. *See id.* at 241 (noting D.K. began second grade in fall of 2006 after his parents approved results of April 2006 evaluation and signed Notice of Recommended Education Placement form).

84. *See id.* (noting D.K. fought with other children on playground and bus). D.K.'s parents disagreed with the school district regarding D.K.'s progress in

Around March 2007, Dr. Linn Cohen, a private therapist, notified the school district and D.K.'s teachers that D.K. needed special educational placement and should be formally retested.<sup>85</sup> At the end of the school year, D.K.'s father notified the school district that D.K. had been diagnosed with "auditory processing" and "sensory stimulation" problems.<sup>86</sup> That summer, the parents requested a second formal evaluation, hoping for a more comprehensive result.<sup>87</sup>

D.K. was finally diagnosed with ADHD in September 2007 by a private pediatric neurological evaluation obtained by D.K.'s parents.<sup>88</sup> In November 2007, the school district finally retested D.K. and found him eligible for special education services.<sup>89</sup> On November 30, 2007, the school district offered an IEP.<sup>90</sup>

Pursuant to the IDEA, D.K.'s parents requested a due process hearing on January 8, 2008, challenging the school district's conduct since D.K. began school.<sup>91</sup> The state agency hearing officer denied the claims and the district court affirmed.<sup>92</sup> The district court held that the statute of

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school. *See id.* (describing both parties' opinions on progress). His parents claimed that the extra reading and math help D.K. received was insufficient and that D.K. still struggled academically. *See id.* Conversely, the school district believed he made "considerable progress." *Id.*

85. *See id.* (noting D.K. had been seeing Dr. Cohen since January). Dr. Cohen "was [e]xtremely convinced" D.K. needed special placement." *Id.* The school district discussed the results of their prior evaluation with Dr. Cohen, yet she still recommended re-testing. *See id.*

86. *See id.* at 242 (describing parents' actions at end of D.K.'s second grade year).

87. *See id.* (noting D.K.'s parents requested evaluation before beginning of third grade, but D.K. was not tested until November 2007 by school district).

88. *See id.* (describing diagnosis and findings). Dr. Peter Kollros diagnosed D.K. in September 2007, two months after his parents requested the school's evaluation, but still months before the school actually performed its own evaluation, despite the request. *See id.* at 241–42 (describing timeline of events). Dr. Kollros opined, "D.K.'s 'learning would be enhanced if he were to have the [usual accommodations] for children with ADHD," such as preferential seating, testing in distraction-free environments, and various other supports. *Id.* at 242. Still, D.K. waited two more months for the school's evaluation. *See id.*

89. *See id.* at 242 (noting school district classified D.K. as student with "other health impairment"). *See generally Individuals with Disabilities Education Act (IDEA) Data, supra* note 39 (analyzing statistics of disability classifications under IDEA and other related statistics).

90. *See D.K.*, 696 F.3d at 242 (noting that while district offered IEP in November, it would not be implemented until March 2008, almost four years after D.K. began schooling).

91. *See id.* (noting requested award of compensatory education for September 2004 through March 2008, when D.K.'s IEP would be implemented); *supra* note 12 and accompanying text (describing parents' right to due process hearing); *infra* notes 151–57 and accompanying text (describing compensatory education remedy).

92. *See D.K.*, 696 F.3d at 242–43 (noting that appeals panel also affirmed hearing officer's decision and found no abuse of discretion). Because the parents had exhausted all administrative remedies, they sought review of the hearing officer and appeals panel's decisions in the district court. *See id.* at 242 (describing deci-



limitations barred plaintiffs' claims arising from conduct before January 8, 2006, two years before the due process hearing request, and neither exception to the statute of limitations applied.<sup>93</sup>

D.K.'s parents appealed to the Third Circuit, arguing that the exceptions to the statute of limitations should apply.<sup>94</sup> The plaintiffs argued under the first exception that the school district misrepresented D.K.'s success by advising D.K.'s parents that D.K.'s issues could be resolved through alternative means "short of special education placement" (i.e., the behavioral plans).<sup>95</sup> Under the second exception, the parents argued the school district's failure to provide a permission to evaluate form and a procedural safeguards notice until January 5, 2006 constituted a withholding of information sufficient to toll the statute of limitations.<sup>96</sup>

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sions at administrative level). In cases arising under the IDEA, courts give "'due weight' and deference to the findings in the administrative proceedings." P.P. *ex rel.* Michael P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 734 (3d Cir. 2009) (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982)). Giving "due weight" requires a modified de novo review, which considers factual findings from administrative proceedings to be prima facie correct. See S.H. v. State-Operated Sch. Dist., 336 F.3d 260, 270 (3d Cir. 2003).

93. See *D.K.*, 696 F.3d at 242–43 (describing district court's decision). The district court agreed with the hearing officer that the school district did not violate its obligations to identify students requiring special education (Child Find). See *id.* The court reasoned that prior to D.K.'s second evaluation and ADHD diagnosis, there was no sufficient reason to believe D.K. had a mental impairment because children develop at different rates, and D.K.'s difficulties were not so pronounced during his early school years. See *D.K. v. Abington Sch. Dist.*, No. 08-4914, 2010 WL 1223596, at \*7 (E.D. Pa. Mar. 25, 2010). Further, the court held the school district did not fail to provide a FAPE before November 2007 because the school was not required to conduct a functional behavioral assessment during the initial April 2006 evaluations. See *id.* at \*8–9 (finding testing legally adequate). The court also rejected the plaintiffs' request to introduce additional evidence. See *id.* at \*10–11.

94. See *D.K.*, 696 F.3d at 244 (noting parents argued, alternatively, that equitable tolling doctrines should apply). The parents did not dispute that the statute of limitations generally would limit their claims to conduct after January 8, 2006 because they requested the due process hearing on January 8, 2008. See *id.* They merely argued the application of the exceptions and equitable tolling doctrines. See *id.* (rejecting application of equitable tolling doctrines); accord Daggett et al., *supra* note 26, at 768–79 (discussing application of equitable tolling doctrines to IDEA and related policy issues).

95. *D.K.*, 696 F.3d at 244–45; see also Brief and Appendix Volume I of Appellants at 23, *D.K. v. Abington Sch. Dist.*, 696 F.3d 233 (3d Cir. 2012) (No. 10-2189), 2011 WL 6800592 [hereinafter Brief for Appellants] (arguing behavioral plans were "inadequately-developed").

96. See *D.K.*, 696 F.3d at 245, 247 (listing plaintiffs' arguments under second exception and noting school district did not provide documents until after parents requested evaluation in January 2006); Brief for Appellants, *supra* note 95, at \*24 ("[T]he District, in the face of [D.K.]'s well-documented educational needs . . . failed to provide [the forms] until approximately January 8, 2006 . . .").

B. *Third Circuit Applies a Strict Standard*<sup>97</sup>

Applying the standard set forth by several district courts, the Third Circuit adopted the majority view that plaintiffs “must show that the school intentionally misled them or knowingly deceived them regarding their child’s progress” to satisfy the first exception.<sup>98</sup> Here, the first exception did not apply because the record showed that the school initiated several conferences with D.K.’s parents to notify them of his poor performance.<sup>99</sup> Moreover, the school’s proposed solutions and suggestion of an evaluation in the future did not constitute a misrepresentation with an intent to deceive, but rather an intent to help D.K.<sup>100</sup>

Analyzing the second exception, the court relied on the statute’s plain language and only examined whether the parents were denied any statutorily required information.<sup>101</sup> The plaintiffs argued the school’s failure to provide a permission to evaluate form and a procedural safeguards notification until after their requested evaluation in January 2006 consti-

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97. While this article discusses only the court’s application of the statute of limitations exception, see *D.K.*, 696 F.3d at 249–53 for the court’s analysis of the alleged IDEA violations on the merits.

98. *D.K.*, 696 F.3d at 246. “[T]he alleged misrepresentation . . . must be intentional or flagrant rather than merely a repetition of an aspect of the FAPE determination.” *Id.* at 245 (alterations in original) (internal quotation marks omitted). The court distinguished inadequate evaluations from specific misrepresentations, stating, “Plaintiffs must establish not that the [school’s] evaluations of the student’s eligibility under IDEA were objectively incorrect, but instead that the [school] subjectively determined that the student was eligible for services under IDEA but intentionally misrepresented this fact to the parents.” *Id.* (alterations in original) (citations omitted). Thus, D.K.’s parents could not successfully argue that a faulty evaluation in April 2006, or a failure to evaluate prior to that time, was equivalent to the school subjectively determining D.K. was disabled but misrepresenting that information to the parents. *See id.* (describing difference between parents’ argument and standard).

Moreover, the court reiterated the legislators’ preference to leave such determinations to the discretion of the hearing officer. *See supra* note 56 and accompanying text (describing statute’s deference to hearing officers and refusal to define “misrepresentation”). Therefore, while required to delineate the scope of the exceptions, the court owed significant deference to the hearing officers. *See id.* Such decisions are only reviewed for clear error. *See supra* note 92 (describing standard of review at judicial level).

99. *See D.K.*, 696 F.3d. at 247 (noting numerous conferences held with D.K.’s parents “specifically aimed” to address D.K.’s issues, implying school’s desire to involve parents rather than intention to deceive or mislead).

100. *See id.* (noting school district merely proposed solutions, but did not confidently express such solutions would resolve D.K.’s issues). The court also reasoned that because the behavioral plans did yield some improvement and the results of those plans were accurately reported to D.K.’s parents, no intentional misrepresentation could be established. *See id.* Thus, the court construed the exceptions to apply when the school’s conduct works against the progress of the child rather than to advance the child’s education. *See id.* (implying intent to help D.K.). For further discussion of the court’s multi-factor test, see *infra* notes 111–13 and accompanying text.

101. *See D.K.*, 696 F.3d at 246–48 (describing statutory language as requiring “little elaboration”).

tuted an impermissible withholding of information.<sup>102</sup> However, the school was not required by statute to provide such information prior to that point.<sup>103</sup>

Finally, the court added that even if the two exceptions did apply, the parents could not establish the school district's conduct caused their failure to request the due process hearing within the two-year period.<sup>104</sup> The evidence of D.K.'s parents' request for an evaluation showed they knew of their right to an evaluation.<sup>105</sup> The court established that where "parents were already fully aware of their procedural options, they cannot excuse a late filing by pointing to the school's failure to formally notify them of those safeguards."<sup>106</sup>

#### IV. CRITICAL ANALYSIS: THE IMPACT OF *D.K. v. ABINGTON SCHOOL DISTRICT* ON PRACTITIONERS, POLICY, AND PARENTS

Prior to *D.K. v. Abington School District*, no circuit court had interpreted the exceptions to the statute of limitations so explicitly.<sup>107</sup> The Third Circuit's decision is thus beneficial to practitioners because it clarifies some prior inconsistencies amongst the district courts.<sup>108</sup> However, the decision established a stringent test, which will have the practical effect of limiting the number of cases in which parents may successfully toll the statute of limitations.<sup>109</sup>

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102. See *id.* at 247 (describing plaintiffs' claim against school district under second exception).

103. See *id.* (noting limited circumstances in which information is required); *supra* note 63 and accompanying text (listing when parents are entitled to information).

104. See *D.K.*, 696 F.3d at 247–48 (finding school's conduct, even if sufficient under either exception, did not cause parents to delay hearing request).

105. See *id.* at 248 (noting fact of parents' "unprompted" evaluation request indicates knowledge of IDEA procedures and rights). Moreover, even if the parents were not independently aware of their right to an evaluation, the fact that D.K.'s teachers suggested an evaluation as a future option imputes knowledge to the parents of that right. See *id.* (imputing knowledge of right to parents). Therefore, the parents could not claim that their lack of knowledge of the right to an evaluation caused their failure to request a hearing sooner. See *id.* (refusing to allow parents' purported ignorance of evaluation right to satisfy causation requirement).

106. *Id.* at 246–47; accord *S.H. ex rel. A.H. v. Plano Indep. Sch. Dist.*, 487 F. App'x 850, 862–63 (5th Cir. 2012).

107. See *D.K.*, 696 F.3d at 245 ("[T]he scope of these exceptions is an issue of first impression for United States Courts of Appeals."); Gerl, *supra* note 16 (noting Third Circuit is first to address exceptions to statute of limitations, making *D.K.* case "a big deal").

108. See *Parents Ability to Extend the Two-Year Statute of Limitations Under the IDEA Has Now Been Significantly Limited by the Third Circuit Court of Appeals*, FOX ROTHSCHILD EDUCATION ALERT (Oct. 2012), <http://www.foxrothschild.com/newspubs/newspubsArticle.aspx?id=15032387446> (noting significant litigation surrounding exceptions since statute of limitations added to IDEA in 2004).

109. See *id.* (noting parents will have great difficulty establishing that exception to statute of limitations should apply in future cases).

A. A “Highly Factual Inquiry”: Deconstructing the Third Circuit’s Approach<sup>110</sup>

To invoke the first exception under this strict test, parents will first have to show that the school was aware of the extent of the disability or the adequacy of the proposed solutions.<sup>111</sup> Next, the school must have *actual knowledge* that its representations of the student’s progress or disability are untrue or inconsistent with the school’s own assessments.<sup>112</sup> The court’s use of “inconsistent” is vague and undefined, thus leaving room to dispute any discrepancies found between the school’s knowledge and the information communicated to parents.<sup>113</sup>

The Third Circuit indicated that circumstances showing the school intended to help the student’s progress promote a finding that the school did not knowingly misrepresent information.<sup>114</sup> For instance, the court highlighted the fact that the school district conducted several conferences with D.K.’s parents intending to notify them about their son’s poor performance.<sup>115</sup> Also, the parents were kept apprised of all improvements and challenges throughout his schooling, and the district sought parental permission and input at every step.<sup>116</sup> Considered as a whole, the circumstances imply the school wanted to help D.K., not hinder his progress.<sup>117</sup>

The court did not, however, indicate which facts, if changed, could yield an alternative result.<sup>118</sup> For example, it is unclear whether the court placed much weight on whether additional conferences were routine procedure for the school district, or if extra conferences show an additional

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110. See *supra* text accompanying note 57 (describing analysis as “highly factual inquiry”).

111. See *D.K.*, 696 F.3d at 247 (noting this actual knowledge is required to show intentional misrepresentation). If the basis of parents’ claim is a faulty evaluation that did not reveal a disability, the school district could not logically know the extent of the disability. See *id.* (finding no misrepresentation where school did not know D.K. had ADHD prior to November 2007). Further, parents could not show the school had knowledge of the adequacy of the behavioral programs. See *id.*

112. See *id.* at 246 (reasoning that requiring actual knowledge of inconsistencies between representations to parents and actual evaluations best represents language and intent of IDEA provisions, rather than mere negligence).

113. See *Inconsistent Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/inconsistent> (last visited July 13, 2013) (defining inconsistent as “lacking consistency” and including synonyms such as “disagreeing,” “discrepant,” and “inharmonious”).

114. See *D.K.*, 696 F.3d at 247 (outlining facts contributing to finding that no misrepresentation made to D.K.’s parents).

115. See *id.* (noting teachers’ detailed descriptions of D.K.’s “misconduct, frustration, challenges, and development” to parents).

116. See *id.* at 240–42 (outlining parental involvement and communication during early education years).

117. See *id.* at 247 (noting these facts “fall well short” of type of misrepresentation required to toll statute of limitations under first exception).

118. See *id.* (discussing facts in their entirety to support conclusion, but not indicating which facts were most persuasive or compelling).

effort to get the parents involved.<sup>119</sup> Thus, litigants should closely scrutinize the information disclosed in conferences as compared to other facts or circumstances known to the school that could show a disability, but were not communicated to the parents.<sup>120</sup> Any inconsistencies could arguably support a misrepresentation claim.<sup>121</sup>

Further, the school district's expressed confidence to parents that proposed solutions would be effective helps plaintiffs invoke the first exception.<sup>122</sup> In *D.K.*, the school district proposed solutions but never expressed any confidence in the effectiveness of the solutions, although they did yield some improvement.<sup>123</sup> The Third Circuit placed significant weight on the district's silence regarding the plans' efficacy, and it further implied that expressing confidence in the effectiveness of programs that do not yield favorable results would more likely be a misrepresentation than no expression of confidence at all.<sup>124</sup>

The most compelling fact is likely whether the school district suggests an evaluation might be necessary down the road.<sup>125</sup> The Third Circuit placed great emphasis on the fact that *D.K.*'s teachers suggested a future evaluation to impute knowledge to *D.K.*'s parents of their right to an evaluation.<sup>126</sup> This suggests that if the teachers did not recommend a future evaluation, the parents would not have known of their right to the evaluation, thus defeating the rationale used in the Third Circuit's causation analysis.<sup>127</sup> Moreover, if the district recommended an evaluation and the

119. *See id.* (discussing conferences).

120. *See supra* notes 112–13 and accompanying text (discussing court's vague use of "inconsistent" to compare information in determining misrepresentations).

121. *See D.K.*, 696 F.3d at 246 (noting school's knowledge of inconsistencies is required).

122. *See id.* at 247 ("The School District proposed solutions, but it did not imply, let alone state with any confidence, that these measures would succeed or eliminate the eventual need for an evaluation."). Thus, if the school did imply the measures would succeed, the balance might have tipped towards a misrepresentation. *See id.* (using school's level of confidence in proposed solution as factor in determining whether school made misrepresentation). However, stating with confidence would presumably be even more persuasive. *See id.*

123. *See id.* (noting behavioral plans did help *D.K.* improve and school district reported favorable results to parents).

124. *See id.* (using effectiveness of behavioral plans as evidence that even if teachers implied or expressed confidence in plans, no inconsistencies between teachers' expressions and actual results justify finding misrepresentation).

125. *See id.* (noting evaluation suggestion is relevant to both misrepresentation and causation analyses).

126. *See id.* (using evaluation suggestion as support for conclusion that no misrepresentation occurred). While not necessarily dispositive, the fact of the suggestion indicates the teachers were unaware of an actual disability because no formal evaluation or diagnosis occurred and the teachers were not intending to communicate to the parents that they had resolved the issue, but rather they were unsure whether an issue even existed. *See id.*

127. *See id.* (noting parents' knowledge of right to evaluation implied school district's failure to notify could not have caused parents' delay in requesting due process hearing).

parents decided to request the evaluation immediately, they would have been entitled to a procedural safeguards notification explaining the timelines for challenging the district's decisions.<sup>128</sup> Then, the parents would have known of the two-year timeline and would have been able to file a timely hearing request.<sup>129</sup>

### B. *Consistent with Congressional Intent and Public Policy*

While the statute of limitations is a tough hurdle to overcome, the Third Circuit's approach is consistent with Congress's intent in adding the statute of limitations in 2004 and with the general purpose of all statutes of limitations.<sup>130</sup> First, Congress sought to motivate parents to be involved with their child's education, and Congress's imposition of a statute of limitations forces parents to stay involved and resolve issues quickly.<sup>131</sup> Moreover, the longer a child remains in an ill-suited educational environment, the more the purpose of the statute is evaded.<sup>132</sup> By setting a two-year limit, Congress envisioned quicker resolution of these issues so that children, the ultimate beneficiaries of the IDEA, would be placed in suitable programs.<sup>133</sup> The Third Circuit's approach reinforces this deadline, decreasing the number of cases falling under an exception and furthering congressional intent.<sup>134</sup>

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128. See *supra* note 63 and accompanying text (describing three circumstances in which parents are entitled to procedural safeguards notification).

129. See, e.g., *D.G. v. Somerset Hills Sch. Dist.*, 559 F. Supp. 2d 484, 492 (D.N.J. 2008) (suggesting information about timelines would have helped parents file timely request); *Ravenswood City Sch. Dist. v. J.S.*, 870 F. Supp. 2d 780, 788–89 (N.D. Cal. 2012) (same).

130. See *Daggett et al.*, *supra* note 26, at 768–69 (outlining Congress's intent and purpose for adding uniform statute of limitations); see also *supra* note 52 and accompanying text for a discussion of congressional intent behind the IDEA limitations period.

131. See *Daggett et al.*, *supra* note 26, at 769 (discussing Congress's desire for IDEA disputes to be resolved more promptly than other federal litigation).

132. See *id.* (noting short deadline best serves primary goal of IDEA to provide eligible students with appropriate programs as quickly as possible). Moreover, Congress's strong emphasis on the parental role under the IDEA is intended to ensure each student eligible under the IDEA receives the most effective educational program possible. See *id.* at 728 (noting consistency between congressional intent and imposition of limitations period). Requiring parents to request the hearing in a short amount of time ensures students are placed into the appropriate special education programs as quickly as possible because it is typically the parents requesting the hearing. See *id.*

133. See *id.* at 769 (“This choice of fairly short time periods suggests that Congress thought that prompt resolution of IDEA disputes best served the IDEA’s primary goal of providing eligible students with appropriate educational programs . . . .”); see also *supra* note 52 (addressing counterarguments and problems with shorter deadline).

134. See generally *D.K. v. Abington Sch. Dist.*, 696 F.3d 233 (3d Cir. 2012) (tightening standards for exceptions to IDEA, thus limiting cases in which exceptions apply).

Second, statutes of limitations are intended to weigh the balance between protecting the interests of individuals bringing the claims and the courts' interests in avoiding stale cases.<sup>135</sup> Thus, the Third Circuit's decision respects that while parents of disabled children should have their day in court, they must do so within a limited time to avoid burdening courts with overdue cases where relevant evidence may be difficult or even impossible to find.<sup>136</sup> However, courts should still consider "whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances."<sup>137</sup>

### C. *Parents Face Higher Burdens, Students Face Harsh Results*

The Third Circuit's interpretation also places a very high burden of responsibility on the parents.<sup>138</sup> It requires parents to be aware of their rights and responsibilities from the very beginning and quickly file a hearing request at the first sign of any IDEA violation.<sup>139</sup> The rule makes two critical assumptions.<sup>140</sup> First, it assumes parents have sufficient knowledge of the IDEA to be able to recognize a violation.<sup>141</sup> Second, it assumes

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135. See *Johnson v. Ry. Express Agency*, 421 U.S. 454, 463–64 (1975) (“[Statutes of limitations] reflect[ ] a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.”).

136. See *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (“[Statutes of limitations] promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”).

137. *Id.* at 427 (noting congressional intent is indicated by “the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act”).

138. See *supra* notes 45–49 (discussing active parent role envisioned by Congress).

139. See 20 U.S.C. § 1415(f)(3)(C) (2006) (requiring parents to request hearing within two years of date parents knew or should have known about action forming basis of complaint). If D.K.’s parents requested the due process hearing at the first sign of a violation, the court would have evaluated the school district’s conduct on the merits of the IDEA claims in the two-year period immediately preceding the date the parents requested the hearing. See *D.K.*, 696 F.3d at 244–48 (discussing time period reviewable by court). However, this assumes the parents would recognize a potential violation and know of their right to request a hearing. *Cf. id.* (imputing knowledge of right to evaluation to parents where teacher mentioned future evaluation).

140. See Phillips, *supra* note 9, at 1823–36 (discussing IDEA’s “dangerous assumptions”).

141. See *id.* at 1829–32 (discussing parents’ lack of knowledge about educational options and disabilities); Stanley S. Herr, *Special Educational Law and Children with Reading and Other Disabilities*, 28 J.L. & EDUC. 337, 374 (1999) (noting special education requires complex and specialized training and services, making few parents competent to effectively advocate for their children); Kotler, *supra* note 48, at 372–73 (noting many parents are unaware how quickly their children should be progressing academically, which inhibits their ability to recognize problems).

parents recognizing a violation would know of their right to a due process hearing or other remedies.<sup>142</sup>

The parental burden will have a harsh impact on students without involved or informed parents.<sup>143</sup> While D.K.'s parents were fortunate enough to hire private therapists, many families without means will not have the same advantages.<sup>144</sup> Moreover, many families go through the process of filing IDEA claims without a lawyer.<sup>145</sup> As a result, they are unable to establish their case, nonetheless meet their burden of proof to overcome the statute of limitations.<sup>146</sup> Thus, perhaps the Third Circuit has pushed the statute's purpose too far—giving parents too much credit and assuming parents are more involved and informed than practically possible.<sup>147</sup>

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142. See David M. Engel, *Law, Culture, and Children with Disabilities: Education Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 179 (1991) (discussing parents' lack of knowledge about children's substantive educational rights). Parental participation in children's education seems to be the exception, not the rule. See *id.*; see also Buss, *supra* note 10, at 648 (“[N]ot all parents are this competent and self-sacrificing.”); Phillips, *supra* note 9, at 1823 (noting parents rarely request due process hearings).

143. See generally Hyman et al., *supra* note 8 (discussing how parents without access to lawyers and advocates will be most harmed by statute requiring active parental involvement). Low-income, poorly educated parents will be most affected, as research shows few school districts comply with the requirement that procedural safeguards notices be issued in easy-to-read language that may be understood by persons without a college education. See *id.* at 132 (citations omitted). However, placing the burden on parents is consistent with Congress's findings about effectiveness of parental involvement. See *supra* note 47 and accompanying text (discussing congressional findings regarding parents).

144. See Hyman et al., *supra* note 8, at 144 (noting low income families cannot pay experts or afford services to establish records necessary to win on IDEA claim at judicial level).

145. See M. Brendhan Flynn, *In Defense of Maroni: Why Parents Should Be Allowed to Proceed Pro Se in IDEA Cases*, 80 IND. L.J. 881, 881 (2005) (“Should the ability to pay for the services of an attorney determine which students have a better chance of receiving [a FAPE] because they can afford an attorney . . . ? I think we would all agree that the answer to that question is a resounding ‘no.’”); Hyman et al., *supra* note 8, at 113 (“Access to attorneys in the special education realm is relatively rare.”). The national special education bar is small, comprised mainly of solo practitioners and small firms. See *id.* at 113 n.22.

146. See Hyman et al., *supra* note 8, at 144 (“Those families cannot pay experts, will not have access to IEEs, and cannot afford to purchase the services on an up-front basis to establish a record of progress and success.”); see also R.B. *ex rel.* F.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 942–43 (9th Cir. 2007) (noting that expert testimony of persons who frequently interact with student, such as physicians and other service providers, help establish plaintiffs' case); Pacht v. Seagren, 453 F.3d 1064, 1067, 1072–73 (8th Cir. 2006) (illustrating how parents frequently introduce testimony of educational experts to establish case).

147. See Phillips, *supra* note 9, at 1827–28 (discussing obstacles to effective parental advocacy). The IDEA presumes that parents are both capable of and willing to advocate for children. See *id.* However, many parents are reluctant to challenge school officials, who are presumed to have greater knowledge of educational programs and effectiveness. See *id.*; see also Herr, *supra* note 141, at 366 (“[P]arental participation is often limited because of excessive parental deference



D. *Competing Purposes*

The Third Circuit's approach to the statute of limitations renders the IDEA's available remedies virtually unattainable to well-deserving students like D.K.<sup>148</sup> Courts fear that interpreting the exceptions broadly will make the statute of limitations practically meaningless.<sup>149</sup> However, interpreting the exceptions so narrowly arguably limits the IDEA's ability to achieve its very purpose—to effectively educate children with disabilities by promptly placing them in appropriate special education programs.<sup>150</sup>

For example, the equitable remedy of compensatory education is triggered when a school knew or should have known a student was receiving an inappropriate education.<sup>151</sup> Unfortunately, when the statute of limitations interferes—when the parents request a due process hearing more than two years after the denial of a FAPE—this remedy is unavailable because the denial of a FAPE alone is insufficient to toll the statute of limitations under either exception.<sup>152</sup> Thus, where a school should have known—or even did in fact know—about a student's disability, the IDEA affords no relief absent a showing of a knowing misrepresentation or withholding of required information.<sup>153</sup>

Consequently, a school could prevent plaintiffs from successfully asserting the first exception merely by performing minimal evaluations.<sup>154</sup>

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to professional educational judgment . . . ."); Kotler, *supra* note 48, at 361 (“[T]he belief that educators have superior knowledge . . . may lead to deference [by parents] to their decisions.”). Parents are also hesitant to advocate for their child's FAPE for “fear of retaliation against the student; a desire to maintain good relations with the school; cultural norms that place educators in positions of unquestioned authority; feelings of shame about having a child with a disability; and a sense of powerlessness.” Hyman et al., *supra* note 8, at 135 n.150 (citations omitted).

148. See *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 248–53 (3d Cir. 2012) (precluding award of compensatory education because conduct within two year limitations period did not constitute IDEA violation).

149. See *supra* note 59 and accompanying text (discussing courts' fear of broad exceptions swallowing rule).

150. See *supra* notes 39–44 and accompanying text (discussing purposes and development of IDEA).

151. See *Lester H. v. Gilhool*, 916 F.2d 865, 873 (3d Cir. 1990) (“[C]ompensatory education . . . cures the deprivation of a handicapped child's statutory rights . . . .”); Perry A. Zirkel, Commentary, *Compensatory Education Services Under the IDEA: An Annotated Update*, 190 EDUC. L. REP. 745, 745 (defining compensatory education as “in-kind special education and other related services for denials of a [FAPE]”); see also *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 739 (3d Cir. 2009) (describing circumstances allowing compensatory education remedy).

152. See *supra* note 59 and accompanying text (noting courts' refusal to allow IDEA claim itself to overcome statute of limitations).

153. See *D.K.*, 696 F.3d at 251 n.6 (noting that conduct occurring outside of two-year limitations period is not even considered in determining IDEA violations and therefore, no remedy is available as long as limitations period applies).

154. See, e.g., *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d 635, 661 (S.D.N.Y. 2011) (recognizing Child Find does not require formal evaluation of

Basic evaluations may not reveal any disability at all, which precludes a plaintiff from arguing that the school knowingly misrepresented information about the disability.<sup>155</sup> Granted, this argument assumes the school would take advantage of parents' tendency to request due process hearings more than two years after the alleged IDEA violation occurred.<sup>156</sup> Conversely, if the parents filed within the two-year timeline, the school might face a tougher challenge.<sup>157</sup>

## V. CONCLUSION

The importance of education in our society is undeniable.<sup>158</sup> The Supreme Court recognized that “[a]n educated populace is essential to the political and economic health of any community, and a state’s efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state’s citizenry is well-educated.”<sup>159</sup> Therefore, in assessing the Third Circuit’s interpretation of the statute of limitations’ exceptions, it is important to consider which interests should prevail under the circumstances: the legislature’s interest in providing a free public education for disabled children, or the courts’ interest in excluding stale claims?<sup>160</sup>

While credible arguments can be made for each side, the Third Circuit’s test remains.<sup>161</sup> Future litigants should take care to closely scrutinize the facts of the case, focusing especially on any inconsistencies that

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*every struggling student*); A.P. *ex rel.* Powers v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 226 (D. Conn. 2008) (noting failure to diagnose struggling students at earliest moment is not always actionable given difficulty of diagnosing disabilities and experts’ competing definitions of disabilities).

155. *See P.P.*, 585 F.3d at 738–39 (noting while evaluations should be tailored to student’s specific problems, evaluations need not identify and diagnose every possible disability). *But see* G.D. *ex rel.* G.D. v. Wissahickon Sch. Dist., 832 F. Supp. 2d 455, 465–67 (E.D. Pa. 2011) (noting evaluation of student with significant behavioral problems overemphasized student’s academic success, giving insufficient weight to behavioral problems, rendering testing inadequate and insufficient to satisfy Child Find obligations).

156. *See supra* notes 142–46 (discussing typical barriers to parental action).

157. *See, e.g., P.P.*, 585 F.3d at 739 (analyzing award of compensatory education where parents filed within statutorily required timeline). Because the parents did not have to bear the burden of proving that exceptions to statute of limitations applied, the court thus placed more emphasis on whether the school provided appropriate education to the student in compliance with IDEA principles. *See id.*

158. *See supra* note 1 and accompanying text (highlighting education’s importance).

159. *Mueller v. Allen*, 463 U.S. 388, 395 (1983).

160. *Compare supra* notes 130–37 (describing Congress’s purpose in establishing statute of limitations period in IDEA and purposes of limitations periods in general), *with supra* notes 36–49 (describing purpose of IDEA to protect rights of disabled students). *But see* Daggett et al., *supra* note 26, at 739 n.129 (noting IDEA encourages settlements, which are resolved more quickly, but also sometimes result in less than full FAPE for children).

161. *See supra* notes 97–106 and accompanying text (discussing Third Circuit’s interpretation of statute of limitations exceptions under IDEA).

may be highlighted to support a finding that the school misrepresented information to the plaintiffs.<sup>162</sup> Further, to effectively advocate for their clients, attorneys specializing in education law should make an effort to disseminate knowledge of the rules, to inform parents of their rights, and encourage prompt filing of complaints.<sup>163</sup>

Moving forward, litigation of similar issues will likely arise in neighboring circuits.<sup>164</sup> For the sake of disabled children, it is essential to raise awareness of these issues and promote solutions to benefit these students.<sup>165</sup> After all, “no greater benefit can be bestowed upon a long benighted people than giving to them . . . the means of useful education.”<sup>166</sup>

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162. See *supra* notes 110–29 and accompanying text (explaining factual analysis).

163. See *supra* notes 141–47 and accompanying text (discussing parents’ lack of knowledge as barrier to effective advocacy and prompt resolution of claims within two-year timeline).

164. See *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 245 (3d Cir. 2012) (noting Third Circuit was first to address scope of limitations exceptions, but also discussing inconsistent cases in other circuits).

165. See Hyman et al., *supra* note 8, at 145–61 (proposing solutions for families without means); Phillips, *supra* note 9, at 1837–51 (proposing statutory revisions and supplemental programs).

166. Frederick Douglass, Blessings of Liberty and Education (Sept. 3, 1894), available at <http://teachingamericanhistory.org/library/document/blessings-of-liberty-and-education>.