OAH 80-1300-36337
MDE 20-005-H

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF EDUCATION

In the Matter of [Redacted], Student,

v.

[Redacted]
School District [Redacted].

ORDER ON MOTION REGARDING LIMITATIONS PERIOD

This matter is pending before Administrative Law Judge LauraSue Schlatter on a motion brought by [Redacted] (Student) to interpret the Individuals with Disabilities Education Act (IDEA) to allow claims for compensatory education in this matter, dating back to May of 2011. The Student's motion was filed on September 3, 2019. The [Redacted] School District (School District) filed its Response to the Student's Motion on September 10, 2019.

Andrea L. Jepsen, Student Law Center, LLC, appeared on behalf of the Student. Laura Tubbs Booth and Christian R. Shafer, Ratwick, Roszak & Maloney, P.A., appeared on behalf of the School District.

Pursuant to law, the administrative record, and for the reasons explained in the Memorandum below, the Administrative Law Judge

CONCLUDES:

1. 20 U.S.C. § 1415 (b) (6) (B) permits Parents or the School District to allege a violation of the IDEA that occurred up to two years before the Parents or School District knew or should have known of the alleged violation.

2. 20 U.S.C. § 1415 (f) (3) (C) requires Parents or the School District to file a due process complaint under the IDEA within two years of the time the Parents or the School District knew or should have known of an alleged violation of the IDEA.

3. The Parents in this case knew or should have known when the School District allegedly failed to provide them with the Student's Progress Reports as required by the Student's Individualized Educational Plan (IEP).

4. The Parents and Student in this case knew or should have known about alleged substantive inadequacies of the Student's Progress Reports and IEPs when their attorney advised them that the Progress Reports and IEPs were substantively inadequate.

Based on these Conclusions, and for the reasons explained in the Memorandum below,

IT IS HEREBY ORDERED:

1. The Student's Motion requesting the Administrative Law Judge to find that the limitations period extends back to May of 2011 is **DENIED**.

2. No later than September 27, 2019, the Student shall provide a notice of the specific dates that the Student and the Parents, knew, or should have known, of Progress reports required by applicable IEPs to be provided on or after August 19, 2017, that were not provided.

3. No later than September 27, 2019, the Student shall provide a notice of each Progress report that was provided but that the Student alleges was inadequate. The notice shall include the date the Progress report was provided to the Parents, as well as the date on which the Parents allege they knew or should have known that the Progress report was inadequate.

4. No later than September 27, 2019, the Student shall provide a notice of each IEP that was provided, but for which the Student alleges the goals and objectives were lacking baseline data or measurable standards for determining mastery. The notice shall include the date the IEP was provided to the Parents, as well as the date on which the Parents allege they knew, or should have known, that the IEP allegedly included goals and objectives lacking baseline data or measurable standards for determining mastery.

Dated: September 16, 2019

LAURASUE SCHLATTER
Administrative Law Judge

MEMORANDUM

I. Background

On August 19, 2019, Student filed a Due Process Hearing Complaint (Complaint). According to the Complaint, the Student is in the [redacted] grade. He has received special education services since he was [redacted], and currently receives special education under the speech/language impaired and other health disabilities categories. He is [redacted].[1] The School District describes the Student as happy, accommodating, and kind, with the ability to be compassionate toward others.[2] The Student uses an iPad [redacted].[3]

The Complaint alleges that the Student's parents (Parents) participated in mediation with the School District in May 2018, due to their concerns over the appropriateness of the Student's eligibility category and a proposed reduction in the Student's speech/language service minutes. During the mediation, the Parents learned that the Student was not receiving the speech and language services required by the IEP in effect in May 2018. The Parents consulted with an attorney, who reviewed documents the Parents provided. The attorney informed the Parents that there were "serious problems with the construction of goals and objectives, and progress reporting on those goals and objectives."[4]

According to the Complaint, as of May 2018, IEPs dating back to 2011 included goals and objectives that "lacked baseline data and in many cases . . . measurable standards for determining mastery."[5] In addition, the Student asserts that the District "failed to report on progress on goals and objectives as frequently as required" by the Student's IEP, or, where there was a progress report, the District "habitually provided no more than a statement that progress was being made without providing any data to support that conclusion."[6] Furthermore, the Complaint contends that most of the Student's goals included "no concrete data regarding [the Student's] ability to perform the skills in the goal at baseline."[7] Similarly, most "objectives associated with the deficient goals also do not contain baseline data." Lack of baseline data, according to the Complaint, prevents measurement of progress on the goal.[8] The Complaint alleges that the District "misrepresented that [the Student] was making adequate progress on goals and objectives when data showed that this was not true, or no data existed to support the claim."[9]

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[1] Complaint of [Redacted] at 2 (Aug. 19, 2019) (Complaint).
[2] School District Response to Complaint at 1 (Aug. 29, 2019) (Response).
[3] Response at 2.
[4] Complaint of [Redacted] at 2 (August 19, 2019) (Complaint).
[5] Complaint at 3.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id*.

The Student seeks compensatory educational services consisting of "at least 7500 hours" to remedy an estimated similar number of hours of "ineffective direct speech instruction, indirect speech instruction, and special education services."[10] At the first prehearing conference, the Student clarified that the allegation that the School District failed to provide speech services as specified in the Student's IEP is limited to the 2017-2018 school year, while the other claims span the time period from May 2011 through the date of the Complaint.[11]

The School District acknowledges that it failed to provide all the minutes of speech services required by the Student's IEP during the 2017-2018 school year. To remediate that failure, the School District offered to provide the Student with 20 hours of speech services in June 2019.[12]

II. Student's Arguments

The Student begins by describing his motion as a request that the Administrative Law Judge interpret the relevant federal statutory and regulatory provisions[13] "as creating a simple two-year statute of limitations turning on the date the family knew or should have known of the alleged action that forms the basis of a complaint."[14] The Student then goes on to explain the difference between types of statutes of limitations: (1) the occurrence rule – which begins the count within which an action must be brought with the date the event (in this case, an alleged violation of the IDEA) occurs; and (2) the discovery rule – which begins to count the time for bringing a claim when the claimant discovers the event occurred. The Student asserts that the limitations discovery rule "exists in part to preserve the claims of victims who do not know they are injured and who do not inquire as to any injury."[15]

The Student then acknowledges that some courts have interpreted the IDEA statutes as contemplating that an IDEA claim has: (1) an accrual date; (2) an allowance including two years prior to the accrual date within the claim; and (3) up to two years following the accrual date to request a due process hearing. The Student labels this the "2+2" rules and urges that this rule be rejected.[16]

The Student relies on *G.L. v. Ligonier Valley School Dist. Authority*,[17] in which the Third Circuit Court of Appeals engaged in extensive interpretation of 20 U.S.C. §§ 1415(b)(6) and (f)(3)(C), based on its conclusion that the two provisions are inconsistent with one another and cannot be reconciled or applied based on their plain language.[18] Following an in-depth analysis of Congressional intent, the court in *G.L.*

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[10] *Id.* at 5.
[11] First Prehearing Conference (Aug. 26, 2019) (Recorded). Complaint at 3.
[12] Response at 2.
[13] 20 U.S.C. §§ 1415(b)(6) and (f)(3)(C) and 34 C.F.R. §§ 300.507(a)(2) and .511(e).
[14] Student's Motion and Memorandum Regarding Statute of Limitations at 1 (Aug. 30, 2019).
[15] Motion at 3.
[16] *Id.*
[17] 802 F. 3d 601 (3rd Cir. 2015).
[18] *G.L.* at 615.

concluded that "once a violation is reasonably discovered by the parent, any claim for that violation, however far back it dates, must be filed within two years of the 'knew or should have known' date."[19] According to the court in *G.L.*, both sections 1415 (f)(3)(C) and (b)(6)(B) "reflect[] a traditional statute of limitations."[20] The Student cites a Ninth Circuit case that agrees with *G.L.,*[21] along with a recent unpublished Minnesota District Court case.[22]

In a footnote in the Memorandum in support of his Motion regarding the statute of limitations, the Student notes the statutory exceptions to the limitations provisions, which apply where a parent is prevented from filing a request for a due process hearing because: (1) the school district made specific misrepresentations that it resolved the problem that formed the basis of the complaint; or (2) the school district withheld information from the parent that was required to be provided to the parent. After restating the allegation that the District "repeatedly informed the family that the student was making progress on goals and objectives when it had no such data . . . ." the Student then asserts that the question of whether this prevented the family from filing a request for a due process hearing based on the District's specific misrepresentations or withheld required information "is a fact issue to be determined at hearing."[23]

III. School District's Arguments

A. Application of G.L.

The School District agrees with the Student that a due process complaint must be filed within two years of the date a parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint.[24] But the School District does not agree that 20 U.S.C. §1415(b)(6) permits a due process complaint to reach back beyond two years before the Student "knew or should have known" of the alleged violations.[25] The School District criticizes what it terms the Third Circuit's unilateral revision of the IDEA, and asserts, first, that the plain language of the federal law requires no interpretation, or, if it does, that the Third Circuit's interpretation violates the requirement that a statute "be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[26] According to the School District, the Third Circuit's interpretation of the IDEA's limitations provisions renders the language at 20 U.S.C. §1415(b)(6) "void and superfluous."[27]

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[19] *G.L.* at 620.
[20] *G.L.* at 612.
[21] Motion at 8. *Avila v. Spokane Sch. Dist. 81,* 852 F.3d 936, 941 (9th Cir. 2017).
[22] Motion at 8. *N.D.S. ex rel. de Campos Salles v. Acad. for Sci. & Agric. Charter Sch.,* No. 18-cv-0711, 2018 WL 6201725 at *3 (D. Minn. Nov. 28, 2018). The Student also cites cases from the Northern District of Ohio, the United States District Courts for the Districts of Maryland, and the District of Columbia. Motion at 9.
[23] Motion at 2.
[24] Response at 2.
[25] Response at 3.
[26] Response at 3. *Corley v. United States*, 556 U.S. 303, 314 (2009).
[27] Response at 3-4.

The School District argues that the Student exaggerates the extent to which other jurisdictions have adopted the reasoning in *G.L.*, and notes that the Eighth Circuit has not addressed the issue. Furthermore, the School District maintains, adopting the Third Circuit's approach would "create result results contrary to the purpose of the IDEA and the corresponding Minnesota statute providing for FAPE [Free and Appropriate Education] . . . ."[28] The School District emphasizes the notice and resolution aspects of the IDEA process, as reflected in the federal and corresponding Minnesota law, and as recognized by the Eighth Circuit. To permit a parent or school district to bring claims more than ten years after the parties have agreed on services for a child would undermine the purpose of the IDEA as it is understood in Minnesota, the School District reasons.[29] The School District adds that it would be prejudicial to school districts generally, and defeat the purpose of a statute of limitations, if a school district can be required to defend every action it has taken with respect to a student throughout that student's educational career.

B. Claims Relating to Progress Reports Due or Issued Prior to August 19, 2017

The School District challenges the notion that, until their attorney informed them about missing progress reports, the Parents did not know, or should not reasonably have been expected to know, about any progress reports that were required by IEPs, but not provided by the School District. The School District affirmatively asserts that the Parents knew, or should have known, how many progress reports were due each year, and when they were due. If certain progress reports were not produced, then, according to the School District, the parents would be presumed to know that the School District had failed to produce a required report, and the two-year limitations period would begin to run.

Similarly, the School District contends that "any claims pertaining to the contents of the progress reports are limited to the two years before the date of the Complaint" because the Parents are presumed to know what the progress reports said and had two years to object to those reports. Based on this argument, the School District asserts that any portion of the Student's due process complaint that relies on progress reports received before August 19, 2017 is untimely.[30]

The School District rejects the Parents' assertion that they "knew or should have known" about their due process claims in May 2018, when they first consulted a lawyer. The School District claims that, lacking evidence that the Parents needed an attorney to help them understand that the Student was not progressing appropriately, there is no basis to assume that it was only when the Parents spoke to an attorney that they realized that they "knew or should have known" that the progress reports they had received from the School District were inadequate.[31]

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[28] Response at 4-5. *See, e.g.*, Minn. Stat. § 125A.091, subds. 3a, 7 (allowing a parent to request a team meeting if the parent disagrees with any school district proposal; requiring a school district to offer a conciliation conference within 10 days of a parent's reject of a proposed IEP).
[29] Response at 4-5.
[30] Response at 6.
[31] Response at 7-8.

C. Exceptions to the Statute of Limitations

The School District argues that, for the misrepresentation exception to the limitations statute to apply, the Parents would have to demonstrate a specific misrepresentation and would have to show that the school district "intentionally misled them or knowingly deceived them."[32] Furthermore, the School District relies on *Abington* for the proposition that, in addition to demonstrating the elements of a misrepresentation and intentional misleading or knowing deception, the Parents would have to show that the School District's actions were the cause of the Parents' failure to timely request a hearing.[33]

As to the withholding of information, the School District argues that neither the Complaint nor the Student's instant Motion asserts that the School withheld information it was required to provide regarding procedural safeguards. Nor, according to the School District, did the Parents explain how any failure to receive progress reports prevented them from filing a due process complaint.[34] Therefore, the School District maintains that the instant Motion lacks any factual allegations to support application of either exception.

IV. Analysis

A. Discovery Rule

There is no dispute that both sections 20 U.S.C. §§ 1415(b)(6) and (f)(3)(C) are "discovery" limitations rules. Each provision is triggered when a parent or public agency "knew or should have known about the alleged action that forms the basis of the complaint . . . ."[35] The issue is whether the language at section 1415(b)(6) permits a timely-filed due process complaint to include all violations the District has allegedly committed over time.

B. Third Circuit Analysis

According to *G.L.*, the limitations period is only forward-looking. So long as the due process complaint is filed within two years of the time that the Student knew or should have known of the alleged violation, the complaint can encompass any claim, however far back it dates.

The Administrative Law Judge is not bound by *G.L.* The Eighth Circuit has not ruled on this issue, while two recent Minnesota federal district court cases have addressed it to varying degrees. In *N.D.S. by and through de Campos Salles v. Academy for Science and Agriculture,*[36] an unpublished case, Judge Schiltz approved the *G.L.* analysis, but only addressed that analysis insofar as it held that the two-year limitations period going forward is triggered when the parent knew or should have known about the

[32] Response at 7, *quoting D.K. v. Abington Sch. Dist.*, 696 F. 3d. 233, 246 (3rd Cir. 2012).
[33] Response at 7, *quoting D.K. v. Abington Sch. Dist.*, 696 F. 3d. 233, 246 (3rd Cir. 2012).
[34] Response at 8.
[35] 20 U.S.C. §§ 1415(b)(6) and (f)(3)(C).
[36] 2018 WL 6201725 at *3 (Nov. 28, 2018).

alleged action that forms the basis of the complaint, rather than when the school's unlawful action occurred.[37] More recently, in *Independent School District No. 283 v. E.M.D.H.*,[38] Judge Frank looked at 20 U.S.C. §1415 (b)(6)(B) and 34 C.F.R. §300.507(a)(2), and found that "because the Parents first requested a due process hearing on June 27, 2017, Defendants' claims would normally be limited to the District's conduct after June 27, 2015."[39]

The Administrative Law Judge agrees with Judge Frank that the language at 20 U.S.C. §1415 (b)(6)(B) and 34 C.F.R. § 300.507(a)(2) establish a two-year backward-looking limitations period for complaints filed within the two-year forward limitations period established by 20 U.S.C. §1415 (f)(3)(C). The key difference in the language between the two sections is that section (b)(6)(B) permits a party to present a complaint if it:

> (B) [] sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint . . . .

Section (f)(3)(C) allows a hearing under the following circumstances:

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint . . . .

The *G.L.* court rested its analysis in part on the notion that these two subparagraphs were contradictory, creating ambiguity, and they could not be understood without the court's interpretation. In arriving at its decision, the Third Circuit delved into the legislative history of these, and other sections of the IDEA. Regarding the history of limitations sections of the IDEA, the *G.L.* court said:

> Prior to 2004, the IDEA did not include a statute of limitations. [Citation omitted.] Congress found this problematic because parents could knowingly wait for many years to file complaints, resulting in school districts that were "often surprised by claims . . . involving issues that occurred in an elementary school program when the child may currently be a high school student." H.R. Rep 108-77, at 115 (2003).[40]

Another basis for the Third Circuit's decision in *G.L.* was the IDEA's broad grant of remedial power to the court under 20 U.S.C. § 1415(i) (2)(C)(iii).[41] The court was concerned that, in limiting the retroactivity of a claim under the IDEA, a cap would be applied to the remedy that the court could fashion for a child denied a longer period of

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[37] *N.D.S.* at *3.
[38] 357 F. Supp. 3d. 876, 888-889 (Jan. 2019).
[39] 357 F. Supp. 3d. 876, 889 (Jan. 2019). In the E.M.D.H. case, Judge Frank found that the statute of limitations should not apply because the School District had failed to provide the Parents with required notice of procedural safeguards. *Id.* at 889.
[40] *G.L.* at 608-609.
[41] *G.L.* at 619.

FAPE. Thus, the court looked to the equitable powers Congress provided it in the IDEA as a final justification for its interpretation of the statute of limitations language.[42]

The Administrative Law Judge rejects the Third Circuit's analysis for several reasons. First, the Administrative Law Judge disagrees that the language of the 20 U.S.C. §§ 1415 (b)(6)(B) and (f)(3)(C) creates ambiguity requiring statutory interpretation. Section (b)(6)(B) is a backward-looking limitations period, which uses the phrase "sets forth a violation that occurred not more than 2 years before . . . ."[43]

The meaning of this provision is clear. The backward-looking limitations period is two years before the time the parent knew or could have known of the violation. The language of (f)(3)(C) is equally clear. It is a forward-looking two-year limitations period, requiring that a Parent request a due process hearing "within 2 years of the date the parent or agency knew or should have known about the alleged action . . . ." Read together, these two provisions create an easily-understood limitations period. If, in November 2018, a parent became aware of an alleged violation that occurred in November 2016, the parent has until November 2020 to file a due process complaint. The scope of the complaint, including applicable remedies, could encompass the four-year period.

To read the statutes as the *G.L.* court has done is to completely ignore the language of 20 U.S.C. § 1415 (b)(6)(B), which specifies a violation "that occurred not more than 2 years before . . . ." Even where statutory interpretation is appropriate, it is not proper to engage in interpretation that fails to give effect to all of the provisions of the statute, leaving an entire provision inoperative and void.[44]

The *G.L.* analysis undoes the very thing that Congress stated it was trying to achieve by crafting a statute of limitations for the IDEA in the first place. It allows a party to bring a claim which encompasses the entire history of the Student and the School District, years after the fact, even years after the parties have agreed to the way in which they will work together. The two years from the time that the Parents "knew or should have known" is insignificant when compared to what could be a decade or more in some instances. In this case, the Student's claims would go back eight years.

C. Application of the Limitations Periods

The equitable powers on which the Third Circuit relied are not afforded to the Administrative Law Judge. Without direction from the Eighth Circuit to the contrary, the

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[42] *G.L.* at 619.

[43] Emphasis added.

[44] Response at 3. *Corley v. United States*, 556 U.S. 303, 314 (2009). The Administrative Law Judge notes that the federal rules on this point reflect the language of 20 U.S.C. 1415 (b)(6)(C), including the two-year limitation on past claims. 34 C.F.R. § 300.507(a)(2) states: "The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint . . . ." (Emphasis added.)

Administrative Law Judge relies on the plain language of the IDEA, reading it to create two compatible limitations periods, one reaching into the future two years, one into the past two years, both triggered by the time the Parent or School District "knew or should have known" of the alleged violation.

The Administrative Law Judge concludes that the Parents knew or should have known when they received the progress reports required by the IEPs. Therefore, any claims that the Parents did not receive such progress reports cannot pre-date August 19, 2017, and must be accompanied by their assertions that they knew or should have known of each claimed missing progress report. The Administrative Law Judge concludes it is possible that the Parents may not have known of violations based on the substance of the progress reports until they were advised of those violations by their attorney. Therefore, the Parents' claim that they knew or should have known of the alleged violations based on the substance of progress reports they received as of May 2018, when they were advised of the alleged violations by their attorney, can establish a date that triggers limitations periods as to those claims. To establish a date for this purpose, the Parents must specify a date rather than an entire month.

D. Exceptions to the Statute of Limitations

Finally, the Administrative Law Judge will not consider a claim by the Student during the hearing that the statutory exception to the limitations periods should apply in this case. The Student has presented no evidence to support a claim that the School District made a specific misrepresentation or intentionally misled or knowingly deceived him. Nor has the Complaint or the Student's Motion asserted that the School District withheld information it was required to provide regarding procedural safeguards. Contrary to the Student's footnote comment on this subject, this is not a matter to be developed at the hearing. Were that the case, there would be no reason to establish limitations periods, because all time periods would then be at play throughout all hearings. Limitations periods describe the scope of what is admissible at hearing, and what issues will be addressed. If a claim falls entirely outside the applicable limitations period, there is no viable claim and no basis for a hearing. The underlying factual assertions necessary to establish exceptions to application of a limitations period must be made prior to the hearing so that the parameters of the hearing can be established. A claim that an exception to the limitation period applies must be made prior to the hearing and must be supported by evidence. Therefore, the statute of limitations applies, as described in this Order.

L. S.