Child Find: The "Reasonable Period" Requirement*

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The identification stage under the Individuals with Disabilities Education Act (IDEA)[1] includes not only eligibility but also child find.[2] Unlike child find under the original 1975 legislation, which concerned the institutional need to made free appropriate public education (FAPE) available to eligible students beyond as well as within the schools, the modern meaning is an individual matter.[3] More specifically, the courts have filled in the gaps within the relatively cryptic references to child find in the current IDEA legislation[4] and regulations[5] to establish two successive components of child find that culminate in the obligation to evaluate the child for eligibility.[6] The first triggering component is *reasonable suspicion*, i.e., determining when the school district had reason to suspect that the child might qualify under the essential eligibility elements under the IDEA.[7] The second, successive component is initiating the evaluation of the

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[1] 20 U.S.C. §§ 1401 *et seq*. (2013).

[2] For the broader sequence of overlapping obligations, the IDEA refers to "identification, evaluation, and educational placement" along with "the provision of free appropriate public education." 20 U.S.C. §§ 1415(b)(1), 1415(b)(3)(A), and 1215(b)(6)(B). For an examination of evaluation, which is the closest component to identification, see, e.g., Perry A. Zirkel, *The Law of Evaluations under the IDEA*, 297 Ed.Law Rep. 637 (2013). See, e.g., Clover Sch. Dist., 114 LRP 29307 (OCR 2014) (reasoning as follows: "Optimally, as little time as possible should pass between the time when the student's possible eligibility is recognized and the district's conducting the evaluation. However, an unreasonable delay results in discrimination against students with disabilities because it has the effect of denying them meaningful access to educational services provided to students without disabilities.").

[3] See, e.g., Perry A. Zirkel, *"Child Find": The Lore v. the Law*, 307 Ed.Law Rep. 574 (2014).

[4] 20 U.S.C. § 1412(a)(3)(A) (2012) (requiring states to identify, locate, and evaluate children with disabilities, including those who are homeless or wards of the state); *id*. § 1412(a)(10)(A) (providing specificity for child find of parentally placed private school children).

[5] 34 C.F.R. § 300.111 (2013) (adding migrant children and "[c]hildren who are suspected of being a child [eligible], even though they are advancing from grade to grade"; *id*. §§ 300.131–300.134 (paralleling statutory specifics for parentally placed private school children) and 300.140 (providing exception from non-jurisdiction of hearing officer process).

[6] See Zirkel, *supra* note 3, at 575.

[7] The basic elements are 1) meeting the criteria of one of more of the recognized classifications under the IDEA, and 2) by reason thereof, needing special education. 34 C.F.R. § 300.8(a) (2013). The courts have developed more complicated and at least partly inconsistent analyses and applications at a more micro level. See,

child within a *reasonable period*.[8] Although a recent article provides a systematic analysis of the reasonable suspicion component,[9] the literature lacks such an analysis of the reasonable period case law. The purpose of this brief article is to provide a practical synthesis of this relatively limited case law, with a focus on determining the general length of this reasonable period.

A comprehensive search and systematic assessment revealed five necessary and appropriate threshold caveats. These delimitations clarify the appropriate scope and overall nature of this still developing case law.

Serving as the first caveat, the Third Circuit announced in one of the earliest pertinent cases that the duration of this period is an ad hoc matter. More specifically, the court provided this warning: "We are not unmindful of the budgetary and staffing pressures facing school officials, and we fix no bright-line rule as to what constitutes a reasonable time in light of the information and resources possessed by a given official at a given point in time."[10] Thus, in the context of child find the appropriate specification of this period is the form of an approximate range rather than a definitive duration.

Second, the selection of the pertinent case law revealed a similarly un-bright line for the boundaries of the applicable court decisions.[11] For example, various cases that concerned child find and reasonable time warranted exclusion, because 1) they provided insufficient

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e.g., Robert A. Garda, *Untangling Eligibility Requirements under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441 (2004); Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147 (2007); Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 125 n. 193 (2009).

[8] See Zirkel, *supra* note 3, at 577–78.

[9] Perry A. Zirkel, *The "Red Flags" for Child Find under the IDEA: Separating the Law from the Lore*, __ EXCEPTIONALITY (forthcoming).

[10] *W.B. v. Matula*, 67 F.3d 484, 501, 104 Ed.Law Rep. 28 (3d Cir. 1995).

[11] The courts have been less than less than careful in differentiating the reasonable-period from the reasonable-suspicion rulings. For example, more than one court has cited *Department of Education v. Cari Rae I.*, 158 F. Supp. 2d 1190, 156 Ed.Law Rep. 924 (D. Haw. 2001) for a reasonable-period violation. See, e.g., *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 950–51, 236 Ed.Law Rep. 679 (W.D. Tex. 2008); *Reg'l Sch. Dist. No. 9 v. Mr. M.*, 53 IDELR ¶ 8 (D. Conn. 2009). Yet, the court in *Cari Rae I.* exclusively ruled on the reasonable-suspicion component.

information[12]; 2) they specifically addressed, instead, alleged violations in completing the evaluation[13]; or 3) they otherwise avoided deciding this issue by focusing on other matters.[14]

Third, although the start of this period is the triggering date of reasonable suspicion, the courts have not been entirely clear and consistent as to whether the specific ending point is the date of obtaining consent or some other step in the initiation of the evaluation process.[15] The differences appear to be attributable in part to the level of judicial scrutiny and the nature of state policies or local policies for evaluation.[16]

Fourth, even if the district exceeds the reasonable period standard, it is a per se, i.e., automatic substantive violation of the IDEA the courts consider the violation to be procedural,

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[12] See, e.g., *Johnson v. Upland Sch. Dist*., 26 F. App'x 689, 161Ed.Law Rep. 798 (9th Cir. 2002); *D.A. v. Meridian Joint Sch. Dist. No. 2*, 62 IDELR ¶ 205 (D. Idaho 2014); *W.H. v. Schuykill Valley Sch. Dist*., 954 F. Supp. 2d 315, 300 Ed.Law Rep. 192 (E.D. Pa. 2013) (not clearly differentiating reasonable suspicion from reasonable period); *J.S. v. Shoreline Sch. Dist.*, 220 F. Supp. 2d 1175, 170 Ed.Law Rep. 264 (W.D. Wash. 2002) (extending the issue to timely implementation of the IEP); *Hawkins v. Dist. of Columbia*, 539 F. Supp. 2d 108 (D.D.C. 2008) (focusing instead on the district's insufficient excuse for failing to comply with a previous hearing officer decision).

[13] See, e.g., *M.B. v. Hamilton Se. Sch. Dist*., 668 F.3d 851, 277 Ed.Law Rep. 60 (7th Cir. 2011); *C.G. v. Dist. of Columbia*, 924 F. Supp. 2d 273, 295 Ed.Law Rep. 580 (D.D.C. 2013); *J.P. v Anchorage Sch. Dist*., 260 P.3d 285, 271 Ed.Law Rep. 1077 (Alaska 2011); *cf. Hupp v. Switzerland Sch. Dist.*, 912 F. Supp. 2d 572, 293 Ed.Law Rep. 352 (S.D. Ohio 2012) (conflating regulatory deadlines for evaluation and IEP).

[14] See, e.g., *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 F. App'x 887, 286 Ed.Law Rep. 131 (5th Cir. 2012) (ruling that in any event the child was not entitled to any relief in the absence of an affirmative determination of eligibility); *Ridley Sch. Dist. v. M.R.,* 680 F.3d 260, 280 Ed.Law Rep. 37 (3d Cir. 2012) (focusing on the reasonable time after a previous evaluation that determined non-eligibility before reasonable suspicion again arises); *P.P. v. W. Chester Area Sch. Dist*., 585 F.3d 727, 250 Ed.Law Rep. 517 (3d Cir. 2009) (finding a 72-day delay in obtaining consent but focusing instead on the district's compliance with institutional, or collective, child find and harmless procedural error).

[15] *E.g., compare W.B. v. Matula*, 67 F.3d 484, 140 Ed.Law Rep. 28 (3d Cir. 1995) (referral for evaluation), *with Lazerson v. Capistrano Unified Sch. Dist.,* 56 IDELR ¶ 213 (C.D. Cal. 2012) (formal plan for the evaluation and the completion date of the evaluation). The difference between these varying end points would only be significant in close cases, i.e., those close to the applicable range. Conversely, the following incidental conclusion would appear to be limited to clear violations:

> The six month delay referenced by the Third Circuit in *Matula* was measured between the notice of behavior indicating a qualifying disability and referral for an evaluation. In this case, delay of almost twelve months separates such behavior from the *completion* of the evaluation. The Court sees no legally significant difference between the two.

O.F. v. Chester Upland Sch. Dist., 246 F. Supp. 2d 409, 418 n.3, 175 Ed.Law Rep. 445 (E.D. Pa. 2002).

[16] See, e.g., *Lazerson v. Capistrano Unified Sch. Dist*., 56 IDELR ¶ 213 (C.D. Cal. 2012) (finding violation based on the length of time between the triggering date and providing the parents with a formal assessment plan, which California law required within 15 days).

thus in some cases—depending on the circumstances—amounting to harmless error.[17]

Finally, the courts largely have provided only cursory attention to this issue.[18] Thus, the case law is not yet fully crystallized in either depth of analysis or quantity of cases.

Yet, within this context, courts have provided a sufficient initial framework for guidance in future cases.[19] Figure 1 provides a graphic representation of the applicable case law to date.

[INSERT FIGURE 1 APPROXIMATELY HERE]

This figure suggests that, pending further case law developments, the boundary between non-violations and violations is the initial area of 1–7 weeks, depending on the particular circumstances and jurisdiction of the case.[20] Moreover, although the courts have not made it clear,[21] the date of parental consent would appear to be the appropriate ending point of this period in the absence of specification in state law, because this date is used as the starting date for the specified period for completion of the next stage, which is the eligibility evaluation.[22]

In conclusion, the proactive or preventive approach would be to err on the cautious, or clearly No Violation, side for the reasonable period; however, viewed objectively in terms of overall contours of this case law doctrine, reasonable period, like reasonable suspicion,[23] is an "it

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[17] See, e.g., *P.P. v. W. Chester Area Sch. Dist*., 585 F.3d 727, 250 Ed.Law Rep. 517 (3d Cir. 2009) (student would have remained in private school); *Horen v. Bd. of Educ*., 63 IDELR ¶ 290 (N.D. Ohio 2013) (parents refused to participate in the entire process); *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 270 Ed.Law Rep. 664 (D.D.C. 2011) (parents refused consent); *E.M. v. Pajaro Valley Unified Sch. Dist*., 53 IDELR ¶ 41 (N.D. Cal. 2008) (court upheld district's resulting determination that student was not eligible).

[18] See, e.g., *D.A. v. Houston Indep. Sch. Dist*., 716 F. Supp. 2d 603, 615 (N.D. Tex. 2009); *New Paltz Cent. Sch. Dist. v. St. Pierre*, 307 F. Supp. 2d 394, 401, 186 Ed.Law Rep. 753 (N.D.N.Y. 2003) (deferring to the hearing officer without citation or discussion of applicable case law standards).

[19] See, e.g., *El Paso Indep. Sch. Dist. v. Richard R*., 567 F. Supp. 2d 918, 950–51, 236 Ed.Law Rep. 679 (W.D. Tex. 2008) (canvassing applicable court decisions as the framework to determine whether the period at issue was reasonable, with due differentiation of the reasonable-suspicion step).

[20] Adding further support to this framework was a federal district court ruling, which was vacated on other grounds on appeal, that the requisite period was not a bright line but within "a few months" after the triggering date of reasonable suspicion. *D.G. v. Flour Bluff Indep. Sch. Dist*., 832 F. Supp. 2d 755, 765, 280 Ed.Law Rep. 132 (S.D. Tex. 2011), *vacated*, 481 F. App'x 887, 286 Ed.Law Rep. 131 (5th Cir. 2012).

[21] See *supra* note 14 and accompanying text.

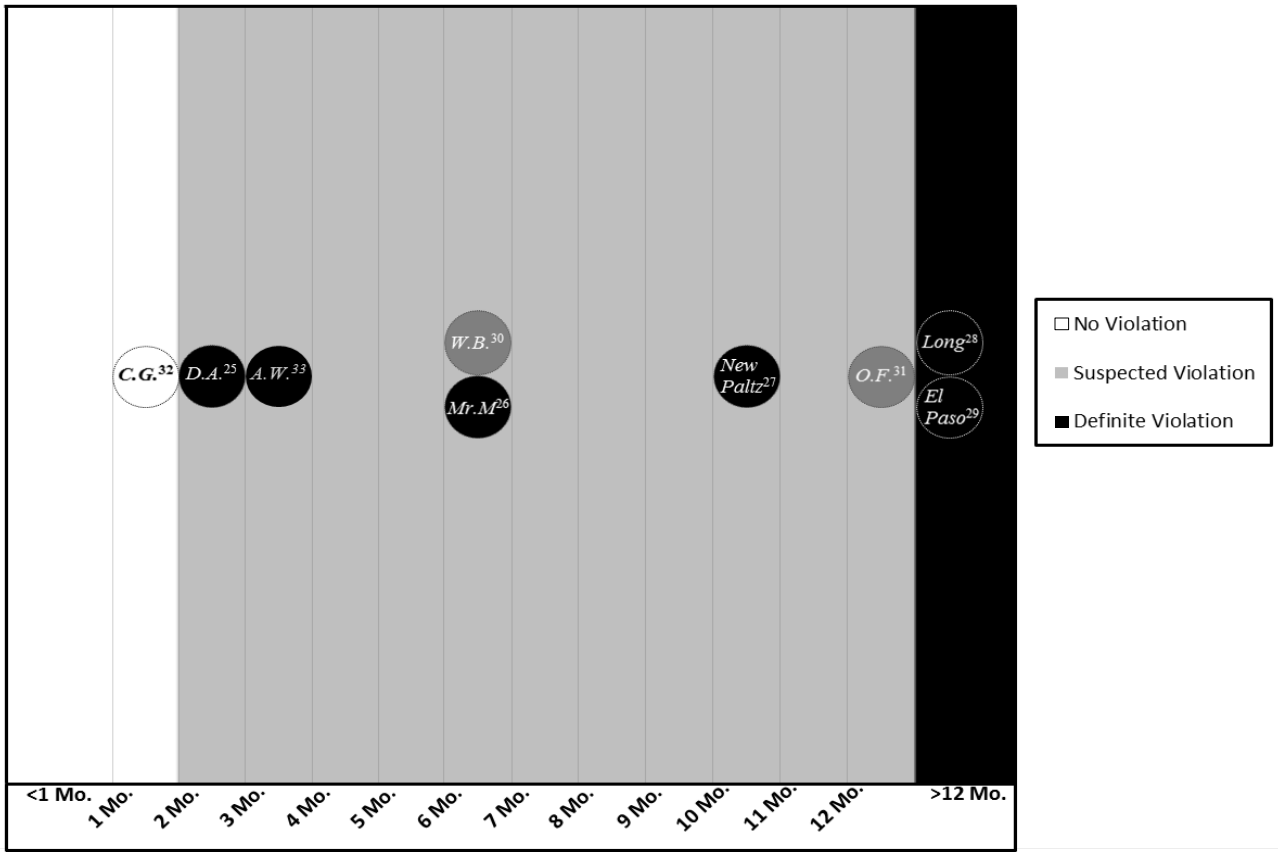
[22] 34 C.F.R. § 300.301(c) (2013). Conversely, one of the factors in determining the length of the reasonable period in each case would be parental cooperation or delay in responding to the request for consent.

[23] See Zirkel, *supra* note 9.

depends" issue that generally provides more latitude in length and consequences[24] than most practitioners may consider to be best practice. The choice, including the gray area beyond two months, depends not only on the particular circumstances that would signal a violation but also the risk-management posture of the district. Certainly, "the sooner, the better" is the proverbial wisdom, but the case law to date reveals that reasonable does not equate to optimal.

[24] See *supra* note 16 and accompanying text. As the case law specific to the foundational reasonable suspicion component, the mitigation or nullification of the consequence is particularly pronounced in the absence of a determination that the child is eligible under the IDEA. See, e.g., *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 F. App'x 887, 286 Ed.Law Rep. 131 (5th Cir. 2012); *M.A. v. Torrington Bd. of Educ.*, 980 F. Supp. 2d 245, 304 Ed.Law Rep. 384 (D. Conn. 2014).

Figure 1: Acceptable Range of Duration of a Reasonable Period



[25] *D.A. v. Houston Indep. Sch. Dist*., 716 F. Supp. 2d 603 (N.D. Tex. 2009).

[26] *Reg'l Sch. Dist. No. 9 v. Mr. M.*, 53 IDELR ¶ 8 (D. Conn. 2009).

[27] *New Paltz Cent. Sch. Dist. v. St. Pierre*, 307 F. Supp. 2d 394, 186 Ed.Law Rep. 753 (N.D.N.Y. 2003).

[28] *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 270 Ed.Law Rep. 664 (D.D.C. 2011).

[29] *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 237 Ed.Law Rep. 679 (W.D. Tex. 2008).

[30] *W.B. v. Matula*, 67 F.2d 484, 104 Ed.Law Rep. 28 (3d Cir. 1995) (denying district's motion for summary judgment, thereby being a triable issue).

[31] *O.F. v. Chester Upland Sch. Dist*., 246 F. Supp. 2d 409, 175 Ed.Law Rep. 145 (E.D. Pa. 2002) (denying district's motion for summary judgment, thereby being a triable issue).

[32] *C.G. v. Five Town Cmty. Sch. Dist*., 47 IDELR ¶ 132 (D. Me. 2007), *aff'd on other ground*s, 513 F.3d 279, 229 Ed.Law Rep. 18 (1st Cir. 2008).

[33] *A.W. v. Middleton Area Sch. Dist.,* 65 IDELR ¶ 16 (M.D. Pa. 2015).