No. 99-3590

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRENDA DEAN BIRMINGHAM,
By her Guardian, Rose Birmingham

Appellants,

v.

THE OMAHA SCHOOL DISTRICT, et al.

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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INTEREST OF THE UNITED STATES

This case poses questions regarding the proper interpretation and application of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq. The statute is enforced by the United States Department of Justice and the United States Department of Education, which promulgates IDEA regulations and issues interpretive letters. 20 U.S.C. 1406, 1417. The United States has filed amicus briefs in a number of IDEA cases. See, e.g., Cedar Rapids v. Garrett F., 522 U.S. 66 (1999); Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982); Marie O. v. Edgar, 131 F.3d 610 (7th Cir. 1997).

STATEMENT OF THE ISSUES

1. Whether the district court adopted the proper state statute of limitations for a claim of denial of special educational services under the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq.

2. Whether a school must continue to offer educational services under the IDEA to otherwise eligible students between the ages of 18 and 21 who have not met the academic criteria for normal graduation by age 18 but who have nonetheless been given "early graduation."

3. Under what circumstances a school may cease providing educational services under the IDEA to an otherwise eligible student based on the student's desire to withdraw from school.

STATEMENT OF THE FACTS

1. Plaintiff Brenda Birmingham is a student with mental retardation and cerebral palsy. In September 1994, the school and Brenda's mother, Rose, agreed that Brenda would graduate with the class of 1996, when she would be nineteen. Birmingham v. Omaha Sch. Dist., No. 98-3030 (W.D. Ark. Aug. 25, 1999), slip op. 3.

In late April 1995, when Brenda was eighteen, she moved out of her mother's house and was placed into the State's temporary protective custody after reporting to school officials that her mother abused her. Ibid. Soon thereafter, school officials decided that it would be in Brenda's best interest to quit school immediately and focus on independent living skills in a community

independent living program. Id. at 4. After consulting with a state social worker, the school scheduled Brenda for "early graduation" later that month. Ibid. When school officials asked Brenda if she would like to graduate with the current class, she said that she would. Ibid. When notified of this decision, Brenda's mother objected and attempted to complain to the school board. Id. at 5.

On May 15, 1995, without finding any abuse, the probate court permitted Brenda to place herself voluntarily in long-term protective custody of the State, which allowed her to continue to live on her own. Ibid. At the end of May, the school system "graduated" Brenda, and she ceased receiving educational services. Two months later, however, Brenda returned home to her mother, who complained to the State Department of Education about the early graduation. Ibid. The Department eventually denied her claim. Id. at 5-6.

2. On April 27, 1998, Brenda's mother filed this action in federal court, raising claims under the IDEA,[1/] Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and 42 U.S.C. 1983. Birmingham v. Omaha Sch. Dist., 17 F. Supp. 2d 859, 860 n.1 (W.D. Ark. 1998); slip op. at 1-2. She requested damages, a

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[1/] Since the events at issue in this action, Congress has amended the IDEA, and the Department of Education has issued revised regulations. See IDEA Amendments of 1997, Pub. L. No. 105-17; 64 Fed. Reg. 12,406, 12,418 (Mar. 12, 1999). The district court applied the version of the law in effect at the time of the events. See Birmingham v. Omaha Sch. Dist., 17 F. Supp. 2d 859, 860 n.1 (W.D. Ark. 1998). Unless otherwise noted, citations in this brief to the IDEA and its implementing regulations refer to those in effect in 1995.

declaration that her daughter's right to a free appropriate public education had been violated, attorney's fees, and "any further relief that the court deems just and proper." Slip. op. at 2.

3. The district court decided the case in two separate opinions based on the written stipulations of the parties. In the first decision, the court dismissed as time-barred plaintiff's claims brought directly under the IDEA. 17 F. Supp. 2d at 867. Because the IDEA does not contain a statute of limitations, the district court adopted the 30-day statute of limitations in the Arkansas Administrative Procedures Act (AAPA), Ark. Code Ann. §§ 25-15-212(a) and 25-15-212(b)(1), which governs petitions for judicial review of state agency adjudications, as the most analogous state limitation consistent with federal policy. 17 F. Supp. 2d at 866.

In a subsequent decision, however, the court addressed the merits of plaintiff's IDEA and Section 504 claims, denying both. Relying on the Eighth Circuit's decision in Digre v. Roseville Schools Independent District No. 623, 841 F.2d 245, 250 (1988), the district court held that although plaintiff could not press her IDEA claims directly, she could prosecute them indirectly through Section 1983.[2/] On the merits, the district court denied

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[2/] The district court presumably concluded that the Section 1983 claim alleging violations of IDEA statutory rights was not time-barred, because the Eighth Circuit applies Arkansas' three-year statute of limitation for general personal torts to all Section 1983 claims. Ketchum v. City of West Memphis, 974 F.2d 81, 82 (1992).

the IDEA claim on the grounds that plaintiff sought only damages, which, in the Eighth Circuit, are not available under the IDEA. Slip. op. at 8-9.

The district court also rejected plaintiff's Section 504 claim on the merits. Citing Thompson v. Board of Special School District No. 1, 144 F.3d 574, 580 (8th Cir. 1998), the court held that to prevail in her Section 504 education claims, plaintiff was required to show "bad faith or an exercise of gross misjudgment." Slip. op. at 10.[3/] The court concluded that no such finding could be made in this case because of the student's agreement to graduate, the school's determination that graduating early was in the student's best interest, the probate court's decision to allow the student to decide to move out of her mother's home, the agreement of a state social worker to the early graduation, and the results of the state administrative investigation denying plaintiff's claims. Id. at 11.

SUMMARY OF ARGUMENT

The district court erroneously applied a 30-day statute of limitations borrowed from the Arkansas Administrative Procedures Act, Ark. Code Ann. § 25-15-212, to plaintiff's IDEA claims. The AAPA is not analogous to claims for a denial of statutory rights under the IDEA, and, in any event, the brevity of the limitation

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[3/] The court neither discussed the applicability of specific regulations addressing disabled students' rights to educational services under Section 504, see 45 C.F.R. 84.3(k) and 84.33, nor considered whether the "bad faith" or "gross misjudgment" standard applies to allegations of violations of regulatory requirements.

period conflicts with the underlying purposes of the remedial scheme Congress created under the IDEA.

The district court also erred in denying plaintiff's IDEA-based Section 1983 claim on the grounds that plaintiff requested only damages. The court's own description of plaintiff's complaint indicates that plaintiff also requested declaratory and injunctive relief, which are available under IDEA and Section 1983.

Finally, the district court's decision should not be affirmed on the alternative ground that the plaintiff's "early graduation" or her consent to early graduation were bases for denying her access to educational services. Under the IDEA, school districts must make a free appropriate public education available to qualified students between 18 and 22 until they have met state academic criteria for a regular diploma or exceeded maximum age limits. Brenda did not meet either of these standards. Moreover, the district court never addressed whether she waived, or was competent to waive, her right to educational services under the IDEA. These issues must be considered on remand.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S IDEA CLAIMS AS TIME-BARRED

A. Courts Look To Analogous State Statutes Of Limitations And Adopt The Most Appropriate Limitations Period Compatible With The Federal Statute's Purposes

As the district court correctly observed, the IDEA does not set time limitations for filing complaints under 20 U.S.C. 1415(e)(2). "When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." Wilson v. Garcia, 471 U.S. 261, 266-67 (1985).

"Accordingly, we must determine the 'most appropriate' * * * statute of limitations to apply * * *." Robbins v. Iowa Rd. Builders Co., 828 F.2d 1348, 1353 (8th Cir. 1987), cert. denied, 487 U.S. 1234 (1988). In doing so, courts begin with the assumption that a state statute of limitations governing the most analogous state cause of action is likely to be the "most appropriate for the federal action." Ibid. However, even the best state law analogy is often inexact and, therefore, may be inappropriate. Ibid. Moreover, even similar state statutes may enact a limitations period that is inconsistent with federal policy. "State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of

national policies." Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977).

In the context of IDEA claims, the limitations period must not frustrate or interfere with Congress's stated purposes "to ensure that all children with disabilities have available to them a free appropriate public education" and to "ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. 1400(d)(1)(A)-(B). "[A] state law is not 'appropriate' if it fails to take into account practicalities that are involved in litigating federal civil rights claims * * *." Burnett v. Grattan, 468 U.S. 42, 50 (1984). For this reason, the Supreme Court has "disapproved the adoption of state statutes of limitation that provide only a truncated period of time within which to file suit, because such statutes inadequately accommodate the complexities of federal civil rights litigation * * *." Fedler v. Casey, 487 U.S. 131, 139-40 (1988).

How these principles should be applied to cases raising claims under the IDEA has generated a divergence of positions among federal courts of appeals. The Second, Seventh, and D.C. Circuits, like the district court in this case, have adopted the short limitation periods available under state laws providing for judicial review of state agency adjudications.[4/] The Third, Fourth, and Fifth Circuits have adopted longer limitations periods generally applied to personal torts or statutory

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[4/] See Adler v. Education Dep't, 760 F.2d 454 (2d Cir. 1985); Powers v. Indiana Dep't of Educ., 61 F.3d 552 (7th Cir. 1995); Spiegler v. District of Columbia, 866 F.2d 461 (D.C. Cir. 1989).

claims.[5/] The First, Sixth, Ninth, and Eleventh Circuits have adopted different statutes of limitations depending on the nature of the IDEA claim. These courts generally apply the shorter limitation when plaintiffs object to the type of services being offered and have raised those claims in the state administrative process, and longer limits when there has been no state administrative review, or for claims of a complete denial of services or reimbursement for private school tuition or attorneys fees.[6/]

In our view, statutes providing for judicial review of agency adjudications, such as the one the district court adopted here, are insufficiently analogous to the IDEA cause of action, and the related time periods are excessively truncated, to provide an appropriate limitations period for filing claims in federal court under the IDEA.

[5/] See Tokarcik v. Forest Hills Sch. Dist., 665 F.2d 443 (3d Cir. 1981), cert. denied, 458 U.S. 1121 (1982); Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987); Scokin v. Texas, 723 F.2d 432 (5th Cir. 1984).

[6/] See Murphy v. Timberlane Reg'l Sch. Dist., 22 F.3d 1186 (1st Cir. 1994); Amann v. Town of Stow, 991 F.2d 929 (1st Cir. 1993); Cleveland Heights Sch. Dist. v. Boss, 144 F.3d 391 (6th Cir. 1998); Hall v. Knott County Bd. of Educ., 941 F.2d 402 (6th Cir. 1991), cert. denied, 502 U.S. 1077 (1992); Janzen v. Knox County Bd. of Educ., 790 F.2d 484 (6th Cir. 1986); Dreher v. Amphitheater Unified Sch. Dist., 22 F.3d 228 (9th Cir. 1994); Alexopulos v. San Francisco Unified Sch. Dist., 817 F.2d 551 (9th Cir. 1987); Department of Educ. v. Carl D., 695 F.2d 1154 (9th Cir. 1983); Zipperer v. School Bd. of Seminole County, 111 F.3d 847 (11th Cir. 1997); JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1570 n.1 (11th Cir. 1991).

B. Cases Seeking Judicial Review Of State Agency Adjudications Are Not Analogous To De Novo Federal Civil Actions Under The IDEA

The district court's decision fails to account for the fundamental differences between judicial review of state agency adjudications and federal actions that require exhaustion of state administrative remedies.

The Arkansas Administrative Procedures Act provides for a typical system of judicial review of agency adjudications. Under it, a person aggrieved by an agency adjudication has a right to seek judicial review of the decision within 30 days of its issuance. Ark. Code Ann. §§ 25-15-212(a),(b)(1). The statute provides for direct judicial review of the agency decision, authorizing the court to affirm, reverse, or modify the agency adjudication or remand the case to the agency for further proceedings. Ark. Code Ann. § 25-15-212(h).

In contrast, the IDEA provides for a traditional civil action to enforce statutory rights but requires that a plaintiff first exhaust state administrative remedies before proceeding to federal court. See 20 U.S.C. 1415(f) (requiring that state administrative procedures "shall be exhausted"); Blackmon v. Springfield R-XII Sch. Dist., 1999 WL 1080901, at *5 (8th Cir. Dec. 2, 1999). Under the IDEA's exhaustion requirement, federal courts simply delay hearing the claim until the state process is complete; they do not review the state decision. Cf. Patsy v. Board of Regents, 457 U.S. 496, 511 (1982). That is, in ruling on an IDEA complaint, the federal court does not "affirm" or

"reverse" the administrative decision, nor does the IDEA authorize federal courts to remand cases to a state agency to conduct further evidentiary hearings or other proceedings. Compare 20 U.S.C. 1415(e)(2) with 20 U.S.C. 1416(b)(3);[7/] see also Tokarick, 665 F.2d at 451. Rather, the federal court issues a judgment on the merits of the plaintiff's IDEA claim and directly orders the school to provide an appropriate remedy. In addition, a plaintiff may, in some circumstances, bring an IDEA claim directly to federal court when exhaustion would be futile. See Honig v. Doe, 484 U.S. 305, 326-27 (1988). By contrast, appeal from an administrative adjudication must, by definition, be preceded by an administrative adjudication.

The structural differences between judicial review of agency adjudications and de novo adjudication following administrative exhaustion is also demonstrated in the scope of the judicial proceedings and the standards for decision. Under the AAPA, judicial review "shall be confined to the record," and the reviewing court may not hear testimony, receive additional evidence, or otherwise hold an evidentiary hearing. Ark. Code Ann. § 25-15-212(f) to 25-15-212(g). Under the IDEA, the administrative record is simply one piece of evidence to be considered by the court. 20 U.S.C. 1415(e)(2). The IDEA further provides that the court "shall hear additional evidence at the

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[7/] Congress knew how to grant a federal court such powers of review over an agency and did so in Section 1416(b) (providing for judicial review of decision by Secretary of Education to withhold payment from States for non-compliance with IDEA requirements).

request of a party * * *." 20 U.S.C. 1415(e)(2) (emphasis added).

The AAPA review process is limited, because the scope of review is narrow. Under the AAPA, the reviewing court is limited to determining whether the agency adjudication was in violation of law, exceeded agency statutory authority, was made "upon unlawful procedure," was "[n]ot supported by substantial evidence of record," or was "[a]rbitrary, capricious, or characterized by abuse of discretion." Ark. Code Ann. § 25-12-212(h). Under the IDEA, however, "[t]he level of deference accorded to the state proceedings is less than required under the substantial evidence test commonly applied in federal administrative law cases * * *." Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 610 (8th Cir. 1997), cert. denied, 523 U.S. 1137 (1998) (citation omitted). Instead, the court "is to make an independent decision of the issues based on a preponderance of the evidence, giving 'due weight' to the state administrative proceedings." Ibid. See also 20 U.S.C. 1415(e)(2). In enacting the IDEA, Congress specifically rejected statutory language that would have mirrored the deferential and limited standard of review applied under the federal Administrative Procedures Act. See Board of Educ. v. Rowley, 458 U.S. 176, 205 (1982).

That the underlying substantive law may require courts to give some deference to state officials does not convert the litigation into administrative review. Many constitutional claims brought pursuant to Section 1983 require courts to defer

to state officials as a matter of substantive constitutional law, but the Supreme Court has held that the appropriate analog for statute of limitations purposes remains cases seeking redress for a personal injury, not cases seeking judicial review of state agency decisions. See Owens v. Okure, 488 U.S. 235 (1989).

In requiring exhaustion, but providing for de novo adjudication in federal court, the cause of action under the IDEA is not particularly different from most forms of civil litigation. See McCarthy v. Madigan, 503 U.S. 140, 144-45 (1992) ("This Court long has acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts"). Thus, the Third Circuit has observed that:

> Both Title VI and the Rehabilitation Act, whose protection significantly overlaps with that of the [IDEA], embody statutory schemes which require exhaustion of administrative remedies. The implied causes of action which courts have recognized under those statutes, however, have not been characterized as appellate in nature.

Tokarcik, 665 F.2d at 449 (citations omitted). In another example, prisoners are required to exhaust state administrative remedies before filing Section 1983 claims in federal court, 42 U.S.C. 1997e(a), but their Section 1983 actions are subject to state statutes of limitation for personal injuries. See Owens, 488 U.S. at 251.

C. A 30-Day Statute Of Limitations For IDEA Claims Is Too Short To Accommodate The Policies Underlying The IDEA

Even if the AAPA provided an exact analog to the IDEA cause of action, the AAPA's limitations period is too truncated to accommodate the federal policies underlying the IDEA.

First, a short statute of limitations would interfere with attempts by the parents and school officials to seek an amicable resolution short of litigation by forcing the issue of litigation almost immediately upon completion of the state administrative process. See Janzen v. Knox County Bd. of Educ., 790 F.2d 484, 487-88 (6th Cir. 1986); Murphy v. Timberlane Reg'l Sch. Dist., 22 F.3d 1186, 1194 (1st Cir.), cert. denied, 513 U.S. 987 (1994); Tokarick, 665 F.2d at 452.

Second, 30 days is insufficient time to commence federal litigation to enforce often complex IDEA rights. The Supreme Court's analysis in a related situation is instructive. In Burnett v. Grattan, 468 U.S. 42, 46 & n.9 (1984), the Court rejected the adoption of short state deadlines for filing an employment discrimination administrative grievance as the appropriate statute of limitations periods for actions under the Civil Rights Acts, 42 U.S.C. 1981, 1983, and 1985. In doing so, the Court emphasized that "[a] state law is not 'appropriate' if it fails to take into account practicalities that are involved in litigating federal civil rights claims * * *." Id. at 50. In particular, the Court observed:

> Litigating a civil rights claim requires considerable preparation. An injured person must recognize the

> constitutional dimensions of his injury. He must obtain counsel, or prepare to proceed pro se. He must conduct enough investigation to draft pleadings that meet the requirements of federal rules; he must also establish the amount of his damages, prepare legal documents, pay a substantial filing fee or prepare additional papers to support a request to proceed in forma pauperis, and file and serve his complaint. At the same time, the litigant must look ahead to the responsibilities that immediately follow filing of a complaint. He must be prepared to withstand various responses, such as a motion to dismiss, as well as to undertake additional discovery.

Id. at 50-51 (footnote ommitted).

The analogy that the district court in this case drew between judicial review under the AAPA and federal litigation under IDEA similarly ignores the practical differences between the two regimes. Because AAPA review is severely restricted, little preparation is required before filing an action seeking judicial review. There is no new evidence to be developed, pleaded, or proved, since the AAPA review is conducted solely on the basis of the established administrative record. Ark. Code Ann. § 25-15-212(g). Under the IDEA, however, plaintiffs are not limited to the evidence presented in the administrative proceeding. 20 U.S.C. 1415(e)(2). It is common, therefore, for federal IDEA cases to involve evidence not offered at the state proceeding, including expert testimony. See, e.g., Tokarick, 665 F.2d at 451.

Any limitations period under the IDEA also must take into account the practical realities facing parents of children with disabilities. See id. at 452-53. The daily needs of a child with disabilities often place significant claims on parents'

attention and resources. In this case, the student is confined to a wheelchair, incontinent, needs assistance using the bathroom, has been diagnosed as having a mood disorder, and suffers from delusions at times (R. 70, Stipulation ¶ 15; Exh. 12). See also, e.g., Honig v. Doe, 484 U.S. 305, 312-13 (1988) (case involving student with physical abnormalities, speech difficulties, and "difficulty controlling his impulses and anger"); Cedar Rapids Community Sch. Dist. v. Garret F., 526 U.S. 66, 69 & n.3 (1999) (case involving quadrapeligic student needing constant one-on-one medical supervision, catherization, and external aids for breathing). These special needs place significant constraints on the time, energy, and financial resources of parents.

Due to the complexity of many educational issues, most of these parents will need to obtain counsel. Within the 30 days allowed under the AAPA, parents will need to find an attorney within the family's economic means or willing, after taking time to study the case, to accept a case where attorney's fees are contingent on prevailing. This attorney must also understand the requirements of the IDEA statute and regulations and be immediately available to investigate the case and draft and file a complaint within the next four weeks.[8/] Those parents who cannot locate or afford an attorney face the even more daunting

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[8/] This task is undoubtedly more formidable in smaller communities with fewer lawyers, such as Boone County, Arkansas. Cf. R. 70, Stipulation ¶ 4 (county school system has 150 students from grades 7-12).

task of discovering and complying with the federal rules for pleading, filing, and serving a complaint. A pro se parent must also either discover and comply with the paperwork requirements for filing in forma pauperis, or gather together a filing fee, typically over the course of no more than two paychecks.

Thus, imposition of a 30-day limitations period on IDEA claims will inevitably lead to the forfeiture of many valid claims, simply because the parents of students with disabilities will not be able to file a lawsuit within 30 days of an adverse agency decision.

The cost of such lost claims to the underlying purposes of the IDEA are substantial. Some cases may involve relatively minor issues. Others, however, will involve a loss of needed services for significant periods of time (even if the issue is revisited later), and dismissal of some cases will result in the complete and permanent forfeiture of the basic services Congress has found that students with disabilities need "to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. 1400(d)(1)(A). In this case, a student's right to up to three years of educational services is at stake.

For these reasons, numerous courts have concluded that 30 days is not sufficient to prepare for a federal lawsuit. See, e.g., Janzen, 790 F.2d at 487-88; Scokin v. Texas, 723 F.2d 432, 437 (5th Cir. 1984); Tokarick, 665 F.2d at 451; Schimmel v. Spillane, 819 F.2d 477, 482 (4th Cir. 1987).

The countervailing benefits of an abbreviated limitations period do not overcome these deficiencies. A 30-day limitation certainly is not required to protect defendants' interests in repose and avoiding stale evidence. See Wilson v. Garcia, 471 U.S. 261, 271, 280 (1985) (recognizing defendants' interests and affirming application of a three-year limitation period for a Section 1983 claim). The only other significant justification that could be advanced for an extremely brief limitations period is the need to resolve IDEA claims expeditiously. See, e.g., Department of Educ. v. Carl D., 695 F.2d at 1157 (quoting 121 Cong. Rec. 37,416 (1975) (remarks of Sen. Williams)). This interest underlies requirements, such as those at 34 C.F.R. 300.511, for prompt agency resolution of parental complaints. However, clearly Congress would not have thought it in the best interest of children to resolve disputes about their education quickly by causing the forfeiture of IDEA rights based on parents' understandable failure to comply with a very short statute of limitations. See Tokarick, 665 F.2d at 453-54.

Moreover, there are already significant incentives for quick action by parents, including the parents' interest in protecting the legal rights and education of their child, see Janzen, 790 F.2d at 488; Scokin, 723 F.2d at 437; Tokarick, 665 F.2d at 453, and, in this Circuit, the limitation of "appropriate relief" to equitable remedies which generally will be most effective when promptly secured. See Hoekstra v. Independent Sch. Dist. No. 283, 103 F.3d 624, 626 (1996), cert. denied, 520 U.S. 1244

(1997). See also Scokin, 723 F.2d at 437. In any case, prompt filing of a federal lawsuit does not guarantee prompt resolution of the claims. School Comm. of Town of Burlington v. Department of Educ., 471 U.S. 359, 370 (1985) ("A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed"); Tokarick, 665 F.2d at 453.

Several courts that have adopted short limitations periods have done so only because the courts concluded that school districts had an obligation to inform the parents specifically of the time limits for filing civil action. See Spiegler, 866 F.2d at 466; Powers v. Indiana Dep't of Educ., 61 F.3d 552, 559 (7th Cir. 1995). But see Schimmel, 819 F.2d at 482 (questioning whether the IDEA requires this notice). Others have noted the availability of equitable tolling under state law. Carl D., 695 F.2d at 1158; Livingston Sch. Dist. Nos. 4 & 1 v. Keenan, 82 F.3d 912, 917 (9th Cir. 1995). We believe that the most appropriate response is simply to reject such abbreviated limitations periods. See Schimmel, 819 F.2d at 482; Scokin, 723 F.2d at 438.[9/]

[9/] In 1997, after the events at issue in this case, Arkansas established a 30-day limitation for appeals to state court from agency decisions under the state IDEA equivalent. See Ark. Code Ann. § 6-41-216(g). Any state limitations period directed at a federal claim may well be found inappropriate as discriminatory against federal claims. See Burnett, 468 U.S. at 52 n.15 (citing with approval Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978) (rejecting Virginia's express one-year statute of limitations for Section 1983 claims as discriminating against a federal cause of action)). In any case, for the reasons stated above, the new 30-

(continued...)

D. Other Practical Considerations Militate Against A 30-day Limitations Period

In choosing an "appropriate" state limitations period, courts should also take into account "practical considerations." Wilson, 471 U.S. at 272; Owens, 488 U.S. at 242-243. In this case, two practical considerations favor a longer limitations period.

First, the proposed limitations period would be difficult to calculate in cases where there have been no administrative proceedings, either because exhaustion was excused as futile or because a requested hearing was never held. See Honig, 484 U.S. at 326-27; Monahan v. Nebraska, 645 F.2d 592, 597 (8th Cir. 1981), cert. denied, 460 U.S. 1012 (1983).

Second, a 30-day limitation period does not have practical consequences in the Eighth Circuit in light of this Court's decision in Digre v. Roseville Schools Independent District No. 623, 841 F.2d 245, 250 (1988). In that case, this Court concluded that 20 U.S.C. 1415(f) permits suits under 42 U.S.C. 1983 raising IDEA claims. In response to Owens v. Okure, 488 U.S. at 251, this Court has held that Arkansas' three-year statute of limitation for personal injury claims applies to all Section 1983 actions. Ketchum v. City of West Memphis, 974 F.2d 81, 82 (1992). Thus, any IDEA claim barred by a 30-day limitations period would remain viable for another two years and eleven months as a Section 1983 claim.

[9/](...continued)
day limit is also inconsistent with the purposes of the IDEA.

These practical and policy considerations, along with the significant differences between judicial review under the AAPA and an IDEA lawsuit in federal court, should lead this Court to reject importation of the AAPA 30-day review period for IDEA claims. In this case, the State's three-year statute of limitations period applied to Section 1983 actions provides for a practical and appropriate limitations period for IDEA claims.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S SECTION 1983 CLAIM

The district court dismissed plaintiff's IDEA-based Section 1983 claim on the ground that plaintiff sought only damages, which this Court has held are not available as "appropriate relief" for IDEA claims. Birmingham v. Omaha Sch. Dist., No. 98-3030 (W.D. Ark. Aug. 25, 1999), slip op. at 8-9 (citing Hoekstra v. Independent Sch. Dist. No. 283, 103 F.3d 624, 625-26 (8th Cir. 1996), cert. denied, 520 U.S. 1244 (1997)). The district court's holding was in error -- the court's own opinion clearly states that plaintiff requested declaratory relief and "any further relief that the court deems just and proper," slip. op. at 2, which would include traditional equitable relief requiring the school to provide the denied educational services. See School Comm. of Town of Burlington v. Department of Educ., 471 U.S. 359, 370 (1985); Miener v. Missouri, 800 F.2d 749, 754 (8th Cir. 1986). Because plaintiff's IDEA claims should not be time-barred under the appropriate limitations period and because plaintiff requested available relief, this Court should remand

the case for further consideration of plaintiff's claims on the merits.

III. PLAINTIFF'S "EARLY GRADUATION" DOES NOT PROVIDE AN ALTERNATIVE BASIS FOR AFFIRMING THE DECISION OF THE DISTRICT COURT

The district court's findings regarding plaintiff's Section 504 claim do not provide an alternative basis for affirming the dismissal of the IDEA claims. In particular, Brenda's "early graduation" is not, in itself, a basis for denying her IDEA claim.

The IDEA requires school districts to provide educational services to students between ages 18 and 21 unless "such requirements would be inconsistent with State law or practice * * * respecting public education within such age groups in the State." 20 U.S.C. 1412(2)(B). Under Arkansas law, "[t]he public schools of any school district in this state shall be open and free through completion of the secondary program to all persons in this state between the ages of five (5) and twenty-one (21) years * * *." Ark. Code Ann. § 6-18-202(a). Thus, providing Brenda services beyond her eighteenth year is fully consistent with state law or practice.

Nor is the school's decision to provide "early graduation" sufficient to end her entitlement. The district court did not consider whether Brenda had completed the secondary program at her high school, but the parties stipulated that Brenda had not (R. 70, Stipulation ¶ 15-19). Because she had not completed the secondary program and was only 18 years old, Brenda remained

entitled under Arkansas law and the IDEA to continue to receive educational services.

Recent clarifying revisions to the IDEA regulations provide further support for this conclusion. The new regulations permit schools to terminate educational services based on graduation only if the student has received a "regular high school diploma;" this exception "does not apply to students who have graduated but have not been awarded a regular high school diploma." 34 C.F.R. 300.122(a)(3) (1999).[10/]

Nor is the school's determination that Brenda had "achieved as much academically as she could considering her mental and physical condition," slip. op. at 4, grounds for denying her further educational services. The conclusion that Brenda's disability rendered her inappropriate for continuing education is exactly the decision Congress intended to take away from school officials by enacting the IDEA. See Timothy W. v. Rochester Sch. Dist., 875 F.2d 954, 960 (1st Cir.), cert. denied, 493 U.S. 983 (1989).

Furthermore, the consent of the state social worker assigned to Brenda while she was in the State's protective custody was

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[10/] The Secretary has cited this regulation as an "[e]xample[] of provisions of the regulations that incorporate prior Department interpretations of the statute * * *." 64 Fed. Reg. 12,406, 12,427 (Mar. 12, 1999). See also id. at 12,556 ("[I]f a high school awards a student with a disability a certificate of attendance or other certificate of graduation instead of a regular high school diploma, the student would still be entitled to FAPE until the student reaches the age at which eligibility ceases under the age requirements within the State or has earned a regular high school diploma. This clarification is consistent with the statute and final regulations.").

insufficient to justify the withdrawal of educational services. As an initial matter, the probate court did not appoint the State as Brenda's guardian in the "protective custody" hearing. More importantly, even if the State had intended to displace Brenda's mother's parental authority, the State itself could not act as guardian for Brenda for IDEA purposes; instead, the State would have been required to appoint a "surrogate parent" for Brenda.[11/]

IV. SCHOOLS MAY NOT DENY EDUCATIONAL SERVICES BASED ON THE "CONSENT" OF A STUDENT WHO IS NOT COMPETENT TO WAIVE RIGHTS UNDER THE IDEA

This Court should not affirm the denial of plaintiff's IDEA claim on the ground that Brenda consented to the "early graduation." The district court did not specifically address the legal and factual issues this claim raises and must do so on remand.

The IDEA requires States to ensure that a free appropriate public education is "available" to qualified students with disabilities. 20 U.S.C. 1412(1)(B). The statute does not specifically address the circumstances under which a student may decide, against the wishes of her parents, to decline to avail herself of this entitlement by withdrawing from school. This gap in the IDEA, like the gap created by the absence of a statute of limitations, should be filled by adopting state law rules regarding the competency of young people to make legal decisions

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[11/] See 20 U.S.C. 1415(b)(1)(B) (requiring appointment of surrogate parent for wards of the State); 34 C.F.R. 300.13 (as used in the IDEA, the term "parent" "does not include the State if the child is a ward of the State"); 34 C.F.R. 300.514 (qualifications for surrogates).

on their own behalf, so long as the state rule is compatible with federal law and policy. See Felder v. Casey, 487 U.S. 131, 139 (1988) (explaining that when "federal civil rights laws fail to provide certain rules of decision thought essential to the orderly adjudication of rights, courts are occasionally called upon to borrow state law"); Mrs. C. v. Wheaton, 916 F.2d 69, 73 (2d Cir. 1990).

Thus, whether Brenda was competent to waive her rights under the IDEA should be decided through reference to state law standards for competency. The IDEA and its implementing regulations provide for an orderly process for resolving disputes about a student's competency to withdraw from school through "early graduation." The decision to graduate or otherwise cease providing services to a student is a "change in placement" requiring parental notification. See 20 U.S.C. 1415(b)(1)(C); 34 C.F.R. 300.504(a)(1); Mrs. C., 916 F.2d at 72-73. See also Letter to Richards, 17 Education for the Handicapped Law Rep. 288 (Nov. 23, 1990) (attached hereto as Addendum);[12/] 34 C.F.R. 300.122(a)(3)(iii) (1999).[13/] A parent ordinarily[14/] may request a

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[12/] See Honig v. Doe, 484 U.S. 305, 325 n.8 (1988) (policy letter from Department of Education interpreting "change in placement" is entitled to deference).

[13/] This is true even if parental rights have been transferred to the student under the 1997 IDEA Amendments. See 20 U.S.C. 1415(m); note 14, infra.

[14/] The mechanism for contesting such decision may be more complicated if a student has reached the age of majority. Under the 1997 amendments to the IDEA, States may enact procedures to transfer parental rights under the IDEA to the student once the

(continued...)

due process hearing to contest the graduation if the parent believes that the graduation is inappropriate because the student does not meet state law criteria for a regular diploma, because the parent does not consent to the "early graduation" of a minor child, or because the parent does not believe that the student is competent to waive further educational services. See 34 C.F.R. 300.506(a). Cf. Mrs C., 916 F.2d at 73-74. The parent may present evidence at that hearing regarding the student's competency and, if not satisfied, seek relief in federal court under 20 U.S.C. 1415.

In this case, the district court should have determined whether Brenda was competent to decide to withdraw from school, applying the Arkansas standards for competency.[15/] See Ark. Code

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[14/](...continued)
student has reached the age of majority, after giving the student's parents prior notice. See 20 U.S.C. 1415(m) (1999). The statute explicitly excepts students who have "been determined to be incompetent under State law." Ibid. Thus, in a State with such a process, a parent who wishes to dispute a student's competency upon reaching age 18 should ordinarily do so upon receiving notice of the intent to transfer parental rights by pursuing state procedures for declaring the child incompetent. Even after a transfer has taken place, however, a parent could still seek appointment as guardian for the child under state law and become authorized to exercise the students' prerogatives under the IDEA. See, e.g., Ark. Code Ann. § 28-65-101 et seq. In this case, Arkansas had not enacted a transfer process consistent with Section 1415(m) at the time of Brenda's graduation and had not provided her mother notice of any intent to transfer parental rights.

[15/] Moreover, because the school was required to make educational services "available" to Brenda through her twenty-first year or until she had met the academic standards for regular graduation, if she requested to re-enroll during her period of eligibility, any denial based on the "early graduation" would also violate the statute.

Ann § 28-65-101 et seq. Because the district court disposed of plaintiff's claims on other grounds, it did not apply these standards to Brenda's case. Instead, the court simply considered Brenda's age, her apparent wishes at the time, and the probate court's decision to permit her to move voluntarily to a group home as evidence that the school had not acted in bad faith, a very different question. Slip op. at 11.

Whether Brenda was in fact competent to decide to withdraw from school is not at all clear. The parties stipulated that Brenda was mentally retarded, could not read or write, and performed math at a first grade level (R. 70, Stipulation ¶¶ 3, 15). And while the court noted that a state probate court found Brenda "competent and able to make decisions regarding where she lived and whether to place herself in the custody of [the State]," slip op. at 5, the parties also stipulated that even though the early graduation issue was raised before the probate court, the court made no findings about Brenda's competency to decide whether to graduate (R. 70, Stipulation ¶ 31). In any event, whether Brenda was competent is a question upon which she was entitled to a de novo consideration by the district court. See 20 U.S.C. 1415(e).

CONCLUSION

For the above stated reasons, the decision below should be vacated and remanded for consideration of plaintiffs claims under the IDEA on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2000, two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS were served by overnight mail, postage pre-paid, on the following counsel:

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I further certify that copies of the same brief were filed in accordance with Fed. R. App. P. 25(a)(2)(B)(i) by sending them to the Clerk of the United States Court of Appeals for the Eighth Circuit by overnight mail, postage prepaid, on February 4, 2000.

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