No. 00-1101

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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M.E., et al.,

Plaintiff-Appellants

v.

BOARD OF EDUCATION FOR BUNCOMBE COUNTY,

Defendant-Appellee

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

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# RESPONSE OF THE UNITED STATES AS AMICUS CURIAE TO INTERVENOR-APPELLEE STATE OF NORTH CAROLINA'S BRIEF

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## ARGUMENT

The heart of the statute of limitations issue in this case is whether it is consistent with the purposes of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., to dismiss a lawsuit alleging violations of a disabled student's IDEA rights on the grounds that the student's parents failed to request an administrative hearing within 60 days of the school board's challenged decision.

The State argues (State Br. 6 & n.3) that the 60-day limit should be adopted because it represents the state legislature's considered judgment regarding the proper balance of interests, taking into account this Court's prior decision in Schimmel v.

Spillane, 819 F.2d 477 (4th Cir. 1987).[1/] But as discussed below, the state statute fails to create a limitations period consistent with the decisions of this Circuit, the policies underlying the IDEA, or the long-standing position of the federal agency charged to administer that Act.

A. This Court's Prior Precedents, And The Purposes Underlying The IDEA, Require Rejection Of A 60-Day Limitation Period For Requesting A Due Process Hearing

The State's brief largely ignores this Court's prior decisions in Schimmel and Manning v. Fairfax County School Board, 176 F.3d 235 (4th Cir. 1999), in urging this Court to reach a conclusion that cannot be squared with those cases. As we noted in our prior brief (U.S. Br. 15-18), in Schimmel this Court concluded that 30 or 60 days is simply not long enough to serve as a statute of limitations for filing IDEA lawsuits. 819 F.2d at 482-483 (rejecting 30-day limitation period); id. at 482 n.4 ("[W]e are not convinced that application of a 60-day limitations period would so far ameliorate the problems of unrepresented parties as to obviate the concerns expressed in this opinion."). In Manning, this Court concluded that there is nothing in the nature of administrative hearings and civil actions that would justify different limitations periods, 176 F.3d at 239, a

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[1/] Whether, as the State argues (State Br. 6 & n.3), the 1988 state law amendments creating a 60-day limitation period were, in fact, an attempt to respond to this Court's decision in Schimmel is questionable: the amendments retained a 30-day statute of limitation for IDEA civil actions like the one this Court explicitly rejected in Schimmel. See N.C. Gen. Stat. 115C-116(k) (civil actions must be filed within 30 days of administrative decision); 819 F.2d at 483.

principle the State appears not to dispute (see State Br. 15).[2/] The obvious implication of these two decisions of this Court, taken together, is that a 30- or 60-day limitation period for requesting a due process hearing is inadequate.

The State's basic response is to offer various reasons why it thinks this Court was wrong to conclude in Schimmel that a 30- or 60-day limitation period is too short. To start, the State cites (State Br. 12-14) a series of cases that disagree with this Court's holding in Schimmel, some of which this Court explicitly considered and rejected in Schimmel itself. See 819 F.2d at 480. As Schimmel recognized, whether a short limitations period for filing a civil action is consistent with the IDEA has been considered by numerous courts and the "results in these cases have not been consistent." 819 F.2d at 480. As the State takes pains to point out (State Br. 12-14), the division of authority has persisted. The State is wrong, however, in asserting (State Br. 14-15 & n.7) that adopting short limitations periods for filing civil actions represents the majority or modern view. In

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[2/] At times the State appears to dispute, however, Manning's application of statute of limitations borrowing principles. That is, the State appears to assert authority to directly legislate a limitations period for due process hearing requests (see State Br. 11 n.6. (arguing that the State has "the prerogative * * * to adopt limitations periods with respect to IDEA claims")). This issue need not be decided in this case: as the State concedes (State Br. 11 n.6), whether state law is directly applicable, or borrowed, it must in either case be consistent with federal law and policy. See Crosby v. National Foreign Trade Council, 120 S. Ct. 2288, 2293-2294 (2000); Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 159-163 (1987) (Scalia, J., concurring in the judgment); DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 158-159 & n.13 (1983).

fact, the district court decision the State quotes (State Br. 12-13) for this proposition was, itself, recently overruled by the Eighth Circuit. See Birmingham v. Omaha Sch. Dist., No. 99-3590, 2000 WL 1092858 (8th Cir. Aug. 7, 2000) (rejecting application of 30-day limitations period borrowed from state administrative procedures act in favor of the state three-year period for personal injury claims). In reality, seven Circuits have applied limitations periods of a year or longer to IDEA cases in various contexts.[3/] Only four Circuits have generally applied short limitation periods.[4/]

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[3/] This includes the Third, Fourth, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 251 (3d Cir. 1999) (two years); Tokarcik v. Forest Hills Sch. Dist., 665 F.2d 443, 454-455 (3d Cir. 1981) (two or six years); Schimmel v. Spillane, 819 F.2d 477, 483 (4th Cir. 1987) (one year); Scokin v. Texas, 723 F.2d 432, 438 (5th Cir. 1984) (two years); Hall v. Knott County Bd. of Educ., 941 F.2d 402, 407-408 (6th Cir. 1991) (one year); Janzen v. Knox County Bd. of Educ., 790 F.2d 484, 489 (6th Cir. 1986) (three years); Birmingham v. Omaha Sch. Dist., No. 99-3590, 2000 WL 1092858, at *2-*5 (8th Cir. Aug. 7, 2000) (three years); Dreher v. Amphitheater Unified Sch. Dist., 22 F.3d 228, 232 (9th Cir. 1994) (one year); Zipperer v. School Bd., 111 F.3d 847, 851-852 (11th Cir. 1997) (four years). Two of these Circuits apply different limitations periods depending on the nature of the IDEA claim and, in some instances, have applied short limitations periods to certain classes of claims. See Cleveland Heights-University Heights City Sch. Dist. v. Boss, 144 F.3d 391, 397 (6th Cir. 1998) (45 days); Department of Educ. v. Carl D., 695 F.2d 1154, 1157 (9th Cir. 1983) (30 days); see also JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1570 n.1 (11th Cir. 1991) (30 days) (in dicta).

[4/] This includes the First, Second, Seventh and D.C. Circuits. See Amann v. Town of Stow, 991 F.2d 929, 931-933 (1st Cir. 1993) (30 days); Adler v. Education Dep't, 760 F.2d 454, 457-458 (2d Cir. 1985) (four months); Powers v. Indiana Dep't of Educ., 61 F.3d 552, 555-559 (7th Cir. 1995) (30 days if actual notice of deadline is provided); Spiegler v. District of Columbia, 866 F.2d 461, 463-469 (D.C. Cir. 1989) (same).

Of course, any diversity of opinions among other courts is not grounds for disregarding the precedent in this Circuit. Moreover, on the question at issue in this case — whether a short deadline for requesting a due process hearing is consistent with the Act — every court of appeals that has addressed the issue has applied a longer period. See Strawn v. Missouri State Bd. of Educ., 210 F.3d 954, 957-958 (8th Cir. 2000) (two years); Manning, 176 F.3d at 239 (one year); Bernardsville Bd. of Educ. v. J.H., 42 F.3d 149, 158 (3d Cir. 1994) ("reasonable time" of, in that case, one year); Murphy v. Timberlane Reg'l Sch. Dist., 22 F.3d 1186, 1192-1193 (1st Cir. 1994) (six years); Alexopulos v. San Francisco Unified Sch. Dist., 817 F.2d 551, 555 (9th Cir. 1987) (three years).[5/]

In addition to citing case authority this Court rejected in Schimmel, the State repeats arguments this Court considered and found unpersuasive in that case. The State argues (State Br. 16-17, 23-24) that the short deadline is justified by a need for prompt resolution of IDEA disputes. As the Supreme Court has observed, "the interest in prompt resolution of disputes is vindicated by all statutes of limitations and always must be balanced against the countervailing interest in allowing valid

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[5/] The State suggests (State Br. 14) that in reauthorizing the IDEA in 1997, Congress "implicitly approved" of the decisions favorable to the State's position. But by this reasoning, of course, Congress also implicitly approved this Court's decision in Schimmel to the contrary, as well as the above cases specifically addressing the time in which to file a due process request. In reality, the reauthorization cannot be understood to approve any specific holding.

claims to be determined on their merits." Hardin v. Straub, 490 U.S. 536, 542 n.10 (1989). The question is whether the marginal advancement of this interest in prompt resolution of disputes is worth the cost of the inevitable loss of meritorious claims. In Schimmel, this Court answered that question in the IDEA context, concluding that "[w]e are unwilling * * * to say that this interest in prompt resolution takes precedence over the other federal policies we have identified that could be undermined by application of a very short limitations period." 819 F.2d at 483.

The State argues (State Br. 19-20), however, that the balance of interests in this case is different because parents in North Carolina are told of the deadline.[6/] It is true that the State's current notice procedures help reduce the chance that parents will forfeit their children's rights by missing a deadline due to ignorance of the rule. But simply notifying parents of a deadline does not mean that they will be able to comply with it, especially when the period is unduly short and filled with numerous claims on parents' attention. During the 60

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[6/] Ironically, while the State touts the protections of the state statute's notice requirements, it does not contend that the required notice was provided in this particular case. Here, not only did school's letters to plaintiffs fail to inform them that they had only 60 days to request a due process hearing (as required by N.C. Gen. Stat. § 150B-23(f)), but one letter contained the affirmatively misleading statement that the plaintiffs had "a right to file a due process petition at any time." M.E. v. Board of Educ., 88 F. Supp. 2d 493, 496 (W.D.N.C. 1999) (emphasis added).

days allotted, many parents will have to find an attorney[7/] whose fee they can afford, who understands the requirements of the IDEA statute and regulations, and who is immediately available to advise them, prepare the case, and present it at the due process hearing within a few weeks. See 34 C.F.R. 300.511 (hearing ordinarily must be held and a final decision rendered within 45 days of the request). Finding an attorney well-versed in the IDEA and its regulations can be particularly challenging and time-consuming in more rural areas. Once an attorney is found, the parents will have to decide whether to request a potentially expensive due process hearing.

While all of this is going on, the parents still must attend to the special needs of their disabled child. This may include finding an alternative placement for the child in light of the school's refusal to implement a proper IEP. See School Comm. v. Department of Educ., 471 U.S. 359, 370 (1985). As the Eighth Circuit recently noted, "[d]isabled children can require considerable parental attention, which leaves parents limited time to prepare a lawsuit. Borrowing a thirty-day limitations period would prevent many parents from bringing valid IDEA claims, simply because of their child's disability — an effect abhorrent to the IDEA." Birmingham, 2000 WL 1092858, at *4.

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[7/] Parents are often well-advised to obtain counsel, as the results of this hearing are extremely important and are given significant deference in any future civil action. See Board of Educ. v. Rowley, 458 U.S. 176, 206 (1982). The proceedings themselves are often long and complex, sometimes involving expert witnesses. See 34 C.F.R. 300.509(b)(1).

Thus, it is inevitable that many parents will fail to comply with a very short deadline, even if they are given notice of it, forfeiting critical educational rights Congress intended to guarantee their children. Importantly, the choice is not between a 60-day limitation and no deadline at all, or a limitation period that is unreasonably long. A too-long period for requesting a due process hearing would conflict with IDEA purposes just as much as a 60-day limitation. See Strawn, 210 F.3d at 957; Bernadsville, 42 F.3d at 158. The real question, then, is whether the marginal benefit of a very short limitations period compared to one that is somewhat longer (but not too long), is worth the cost of the inevitable loss of disabled children's important educational rights. In Schimmel, this Court rightly concluded that it was not. There is no reason to think that the risk of lost claims is so significantly reduced by the State's notice provision as to require a different result in the context of requests for due process hearings.

In any case, the notice does nothing to ameliorate the damage a short deadline does to "other policies underlying the [Act] that could be frustrated by application of a short statute of limitations." Schimmel, 819 F.2d 482. This includes "inhibit[ing] collection of evidence necessary to orderly review," discouraging cooperative relations between parents and schools, "limit[ing] the independent review courts are intended to exercise," and increasing the risk that children will be left in inappropriate placements by procedural default. 819 F.2d at

482-483. These reasons apply with equal vigor to time limits for due process hearings. For example, short deadlines may, in fact, lead to unnecessary administrative hearings by preventing parents from making more informed decisions by consulting with an attorney or education expert before requesting a hearing. A short deadline also reduces the possibility that the family and school, perhaps with the assistance of retained counsel, will be able to settle the dispute without resort to formal hearings.[8/] And, because the hearing ordinarily must be held within a few weeks of the request, see 34 C.F.R. 300.509(b)(1), a short deadline for requesting a hearing also has the effect of severely limiting parents' opportunity to collect evidence (for instance, arranging for an evaluation and testimony by an independent educational expert) and prepare for the hearing.

The State responds that such concerns are irrelevant because the parents in this particular case had notice of the deadline (State Br. 4-5 & n.1), were well-versed in the law and represented by counsel (State Br. 1-2, 17 n.9, 19-20), and had no

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[8/] The State argues (State Br. 20-21) that the 1997 amendments to the IDEA somehow ameliorate any concern that a short time limit will interfere with the cooperative relationship between schools and parents because the new amendments give parents more extensive rights to be involved in the educational decisions regarding their children. This simply demonstrates that parents, and their children, have more rights subject to unwarranted forfeiture by short time limits, not that those rights require less protection. If anything, the 1997 amendments emphasize the importance Congress attaches to the cooperative relationship between parents and the school — which is damaged by a short limitations period that forces parents to immediately resort to a litigation posture — by enacting, among other things, provisions to encourage mediation of disputes. See 20 U.S.C. 1415(d)(2)(i), 1415(e).

good reason for failing to file their due process request within 60 days (State Br. 7-8, 21-22). But these factual assertions are beside the point. The question for this Court involves the proper statute of limitation for all parents in all cases, not just this one. See Schimmel, 819 F.2d at 482 & n.3 (rejecting short limitations period, in part, because of concern about unrepresented parents even though the particular parents in that case were represented by counsel).

And, as this Court has stated with respect to IDEA cases generally, "requiring unrepresented parties to act in such haste would be unduly harsh, and would undermine the federal policy" underlying the IDEA. 819 F.2d at 482. This Court has repeatedly assumed that North Carolina's 30-day limitation period for IDEA civil actions is inconsistent with the IDEA. See Kirkpatrick v. Lenoir County Bd. of Educ., No. 99-1609, 2000 WL 792314, at *5 n.5 (4th Cir. June 20, 2000) ("To the extent the [plaintiffs] suggest that * * * the appropriate limitations period is thirty days, see N.C. Gen. Stat. § 115c-116(k), their argument is, in all likelihood, foreclosed by circuit precedent."); Shook v. Gaston County Bd. of Educ., 882 F.2d 119, 121 (4th Cir. 1989) (applying three-year limitation for an IDEA civil action in a North Carolina case). There is no reason to conclude that the State's similar 60-day limitations for requesting due process hearings is any more consistent with the Act. See Manning, 176 F.3d at 239.

B. The Department Of Education's Long-Standing Interpretation Of The IDEA Supports This Court's Prior Decisions Rejecting Short Time Limitations

Rejecting a 60-day limitation period for requesting due process hearings is also consistent with the Department of Education's long-standing position, expressed in interpretive letters. See Letter to J. Raskin, 17 Educ. for the Handicapped Law Rep. 1116 (June 19, 1991) (Addendum to U.S. Br. at 1); Letter to J. Pawlisch, 29 Educ. for the Handicapped Law Rep. 1088 (Oct. 22, 1997) (Addendum to U.S. Br. at 5). While those interpretive letters are not binding in themselves, see 20 U.S.C. 1406(c), the Supreme Court has held that they are entitled to some deference. See Honig v. Doe, 484 U.S. 305, 325 n.8 (1988); see also Christensen v. Harris County, 120 S.Ct. 1655, 1662-1663 (2000) ("[I]nterpretations contained in formats such as opinion letters are entitled to respect.") (citation and quotation marks omitted).

Respect for this agency interpretation is especially appropriate in this case. Whether or not 60 days is an unreasonably short time period is a matter of judgment, informed by the practical realities faced by parents and school administrators in the day-to-day administration of the Act. See Burnett v. Grattan, 468 U.S. 42, 50 (1986) ("A state law is not 'appropriate' if it fails to take into account practicalities."). As the agency charged with enforcing the statute, see 20 U.S.C. 1406, 1417, the Department has significant experience and

expertise in the practical application of the statutory scheme in school systems throughout the country.

The State argues, however, that the Department's interpretive letters do not support its position in this case. The State contends (State Br. 24-25 & n.12) that the objection in Letter to Raskin was not to the length of the state's limitation period, but to the scope of objections permitted. It then argues (State Br. 25 n.12) that when the Department stated, in Letter to Pawlisch, that 60 days was simply too short a time period for requesting a due process hearing, it "overlook[ed]" the true import of its prior letter. The Department has not overlooked or misunderstood the meaning of its own interpretive letters. Instead, in both cases, the Department gave a straight-forward answer to a simple question and concluded that "a 60-day time limit for filing due process requests * * * would be an unreasonable limitation upon Federal law." Letter to Pawlisch, supra, at 6.

The State argues (State Br. 6-7 n.4), however, that the Department of Education has implicitly approved its 60-day limitation period by not objecting to its previously submitted "state plan." Although the State makes assertions about dealings between the Department of Education and the State in its brief (State Br. 6-7 n.4), the full content of those interactions are not part of the record of this appeal. If they were, the record would show that although the State submitted materials cross-referencing the state administrative procedures act, it did not

include a copy of that statute or its time limitation in any of its submissions to the Department of Education (notwithstanding its obligation to do so, see 34 C.F.R. 300.110(b)(2)). In any case, even if the Department did not offer the State individualized guidance on this issue, the Department's rejection of a 60-day limitation period has been a matter of public record since at least 1991, when the Department issued Letter to Raskin. In its brief, the State acknowledges (State Br. 6 n.4) that it long has been aware of the Department's interpretive letters. It cannot fairly claim surprise at the Government's position now.[9/]

C. Even If A 60-Day Limitation Period Applies, That Period Did Not Run In This Case

The State does not dispute that the school never provided the detailed notice of its decision required by the IDEA and its implementing regulations. See 20 U.S.C. 1415(b)(1)(C) (1997); 34 C.F.R. 300.505 (1997). Nor, for that matter, did the school provide the notice required under state law to trigger the

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[9/] The Department's rejection of a 60-day limitations period in these letters is also consistent with Department regulations relating to special education complaints filed under 34 C.F.R. 300.662. The regulations require each State to have a process for investigating complaints regarding IDEA services. 34 C.F.R. 300.660. The regulations permit complaints regarding "a violation that occurred not more than one year prior to the date the complaint is received * * * unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received." 34 C.F.R. 300.662(c). While this complaint investigation procedure is distinct from the due process hearing regime, see 34 C.F.R. 300.661(c), the time limits set for investigative complaints are illustrative of the sorts of time limits the Department has considered appropriate for the investigation of similar complaints and are consistent with the positions taken in the Letters to Raskin and Pawlisch.

running of the limitations period under the state statute. See N.C. Gen. Stat. § 150B-23(f) ("The time limitation * * * shall commence when notice is given of the agency decision * * * . The notice shall be in writing * * * and shall inform the person of the right, the procedure, and the time limit to file a contested case petition.") (emphasis added). By failing to provide the required notices, the school board not only failed to inform plaintiffs that they had only 60 days to request a due process hearing (as required by state law), but also failed to notify them that the school board considered its August 8, 1997 letter to be its final decision (as opposed to another communication in a continuing dialogue) that would trigger the commencement of the limitations period under federal law. That is, if the school had provided the detailed and formal notice of its decision required by the IDEA, it would have been clear that the time for negotiations had ended and the time limit for requesting a due process hearing had commenced running. For the reasons explained in our prior brief (U.S. Br. 7-13), the school's failure to provide this notice prevents it from relying on a statute of limitations defense in this case.

## CONCLUSION

For the above stated reasons, the district court's decision should be reversed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2000, a copy of Response of The United States as Amicus Curiae to Intervenor-Appellee State of North Carolina's Brief was served by first-class mail, postage pre-paid, on the following counsel:

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