IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Appeal No. 11-4201

AMBER BLUNT, on behalf of herself and all others similarly situated; CRYSTAL BLUNT; MICHAEL BLUNT, on their own behalf and THE CONCERNED BLACK PARENTS OF MAINLINE INC; THE MAINLINE BRANCH OF THE NAACP,

Plaintiffs-Appellants,

v.

LOWER MERION SCHOOL DISTRICT

Defendants-Appellees

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:07-cv-3100

BRIEF OF APPELLANTS

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I. STATEMENT OF JURISDICTION

Appellants appeal three rulings in two intermediate orders that became final on October 20, 2011 when the District Court entered a final judgment that disposed of all claims then remaining. (A. 39)[1] On February 15, 2008, the District Court entered a Memorandum (A. 42.1-.41) and Order (A. 42-45) that dismissed all claims of Appellants Amber, Crystal, and Michael Blunt (collectively, the "Blunt Family"). (*See* A. 42.21-.26.) On August 19, 2009, the District Court entered a Memorandum (A. 42.46-.68) and Order (A. 42.69) that dismissed Appellants' claims in the Third Amended Complaint against the Pennsylvania Department of Education ("PDE") and dismissed Appellant Concerned Black Parents, Inc. ("CBP") for lack of standing.[2]

Appellants timely filed their Notices of Appeal on November 18, 2011. (A. 1-2, 40-41.) Subject-matter jurisdiction in the District Court was established pursuant to 28 U.S.C. §§ 1331, 1343; 20 U.S.C. § 1415(i)(3)(A); 29 U.S.C. § 794a; and 42 U.S.C. §§ 2000d, 12188. This Court has jurisdiction under 28 U.S.C. § 1291 over final orders issued by the District Court.

[1] All Joint Appendix citations in this brief are to the Joint Appendix filed in Docket No. 11-4200.

[2] CBP is erroneously identified in the caption as Concerned Black Parents of Mainline Inc.

II. STATEMENT OF ISSUES

1. *Whether the District Court erred when it dismissed the claims of CBP for lack of standing even though (a) CBP suffered injury in fact when it diverted its resources from other activities to address Appellees' actions and (b) there are individuals who possess the indicia of membership in CBP who themselves have standing to bring suit.*

Suggested answer: Yes

Preserved for review: A. 3124-28; 3232-57.

2. *Whether the District Court erred when it dismissed all of Appellants' claims against PDE on the grounds that the claims were barred by a 2005 settlement even though (a) Appellants asserted claims that accrued after the effective date of the settlement and (b) the factual predicates for Appellants' claims differ from the factual predicates of the settled case.*

Suggested answer: Yes

Preserved for review: A. 640-50; 3252 n.19.

3. *Whether the District Court erred in retroactively applying a 90-day filing deadline that became effective on July 1, 2005, even though the Blunt Family had requested a due process hearing and completed a two-day hearing at a time when a longer filing deadline was in effect.*

Suggested answer: Yes

Preserved for review: A. 152-86; 224-66; 267-83.

III. RELATED CASES & PROCEEDINGS

All proceedings related to this case were assigned to a single docket in the District Court, No. 2:07-CV-3100 (E.D. Pa.). The plaintiffs filed two separate appeals in this Court. The present appeal, assigned to Docket No. 11-4201, addresses the claims of the Blunt Family and CBP, and the claims of all Appellants against PDE. The related appeal, assigned to Docket No. 11-4200, addresses the other claims of Appellants Lydia Johnson, Carol Durrell, Chantae Hall, Saleema Hall, Christine Dudley, Walter "Jon" Whiteman, Eric Allston, June Coleman, Richard Coleman, Lynda Muse, and Quiana Griffin.

Both appeals have been consolidated with the cross-appeal filed by Lower Merion School District (Docket No. 11-4315) for purposes of appellate proceedings. This case has not previously been before this Court.

IV. STATEMENT OF SCOPE OF REVIEW

The District Court applied an incorrect legal standard to all three issues on appeal, and therefore this Court's review is plenary.

V. STATEMENT OF THE CASE

Appellants are an advocacy organization, Concerned Black Parents, Inc. ("CBP"), along with current and former African-American students of the Lower

Merion School District ("LMSD) and their parents, including the Blunt Family.[3] Appellants filed this action under Title VI, 42 U.S.C. §2000d; under 42 U.S.C. § 1983 to seek redress for LMSD's discriminatory practices that violate the Fourteenth Amendment of the United States Constitution; and under Pennsylvania law pursuant to the District Court's supplemental jurisdiction. Appellants also sought redress for violations of statutes designed to protect students who are disabled or who are regarded as disabled, namely the IDEA, 20 U.S.C. §§ 1400 *et seq*. ("IDEA"), Title II of the ADA, 42 U.S.C. §§ 12101 *et seq.* , and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. In their Third Amended Complaint, Appellants named as defendants LMSD and the Lower Merion School Board (collectively, the "District Defendants"), along with PDE. (A. 486-536 (Third Amended Complaint).)

1. The Concerned Black Parents Appeal

On August 5, 2008, Appellants filed their Third Amended Complaint. The complaint alleged facts concerning CBP's standing, including its injuries and its membership. (*See* A. 509-12 at ¶¶ 107-114.) The District Defendants answered the

[3] This description of the case and the facts in this brief is limited to the unique legal issues pertaining to CBP, PDE, and the Blunt Family. The separate brief filed by the Appellants in Case No. 11-4200 contains a more detailed description of the case and the facts and is incorporated herein by reference.

complaint and filed a Motion for Partial Judgment on the Pleadings on August 15, 2008. The motion did not raise the issue of CBP's standing.[4] (A. 562-72.)

No party briefed the issue of CBP's standing until May 20, 2009. LMSD raised the issue in its brief in opposition to Plaintiffs' Motion for Class Certification. (*See* A. 3131-35; *see also* A. 3252-55 (CBP's reply)). Although a motion to dismiss had not been filed, the District Court accepted LMSD's argument and dismissed CBP for lack of standing on August 19, 2009. (A. 42.49-.54.) The District Court stated that CBP had not "demonstrated" that it suffered an "injury in fact" sufficient to confer standing upon it in its own right. The Court reasoned that CBP is not itself "a student with disabilities in the School District" and that "[i]ts injuries are more akin to an abstract, ideological interest in the litigation as opposed to the necessary 'personal stake in the outcome' of the controversy necessary to confer standing." (A. 42.52 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).) The Court also held that since CBP's corporate bylaws state that "[t]he Corporation shall have no members," it does not have standing to bring suit on behalf of its members, because it has none. (A. 42.54.)

[4] Both the District Defendants and PDE asserted CBP's lack of standing in their affirmative defenses. (A. 557 at ¶ 19; 573.36.)

2. The Appeal from the Dismissal of Claims Against PDE

On August 5, 2008, Appellants asserted claims in their Third Amended Complaint against PDE for violations of the IDEA, ADA, Section 504, and Title VI of the Civil Rights Act of 1964, among other causes of action. (A. 523-31.) The IDEA count alleges that PDE failed to meet its supervisory, monitoring, and complaint-procedure obligations under federal law. (A. 523-26.) The ADA and Section 504 counts allege that PDE discriminated against Appellants on the basis of disability. (A. 526-28.)The Title VI count alleges, inter alia, that PDE deliberately and purposefully allowed the Lower Merion School District ("LMSD") to make educational decisions on impermissible racial bases and to systematically discriminate against African-American students by placing them in special education settings apart from and inferior to those of their Caucasian peers. (*See* A. 529-31.)

The claims against PDE are based on facts that, as alleged in the Third Amended Complaint, occurred over many years, including the following discrete incidents that occurred on or after September 19, 2005:

- LMSD reevaluated Appellant Lydia Johnson in January 2006, gave her misleading advice that spring as to her eligibility for graduation, and failed to meet her individualized education needs during the 2006-07 academic year (A. 491-92 at ¶¶ 22-25);

- In March 2007, LMSD reevaluated Appellant Chantae Hall, failed to address all appropriate areas of concern, and continued to place her in inappropriate segregated classrooms (A. 496-97 at ¶¶ 48-50);
- LMSD reevaluated Appellant Jonathan Whiteman in November 2006 but failed to make indications on his IEP consistent with the findings of the reevaluation report or to implement an effective behavior support plan (A. 497-98 at ¶¶ 54-55);
- Appellant Ricky Coleman was born on March 18, 1999 (A. 502 at ¶ 74), and in 2006-07—his second-grade year—LMSD placed him in racially segregated special education classes (A. 506 at ¶ 92);
- Beginning in September 2006, Ricky Coleman's mother, Appellant June Coleman, began paying $160 per month, out of pocket, for private tutoring because of her dissatisfaction with the services LMSD was providing (A. 507 at ¶ 96).

PDE answered the Third Amended Complaint. A. 573.1-.37. It never filed a motion to dismiss. Instead, in opposition to Appellants' motion for class certification, it contended that Appellants' "claims are precluded by the *Gaskin* settlement in which each one participated as a class member." (A. 640; *see* A. 640-50.) The "*Gaskin* settlement" (A. 3458-3504) was an agreement resolving the class action captioned *Gaskin, et al. v. Commonwealth of Pennsylvania*, 94-cv-4048

(E.D. Pa.).[5] Appellants responded to PDE's argument in their reply brief in support of their motion for class certification. (*See* A. 3252 n.19.)

On August 19, 2009, the District Court dismissed PDE as a defendant in the opinion and order that denied Appellants' motion for class certification. (A. 42.46.) The District Court held that the plaintiffs' claims against PDE "are barred by the court approved, class action settlement in the [*Gaskin*] case." (A. 42.62-.63, .68.) The District Court stated "that all of the named plaintiffs here were class members in the *Gaskin* action." (A. 42.66.) It held that the claims here and in *Gaskin* "arise from a 'common nucleus of operative facts,' that is, discrimination against the learning disabled" (A. 42.68 (quoting *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d Cir. 2001)).) It reasoned that "'a judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action.'" (A. 42.65 (quoting *In re Prudential*, 261 F.3d at 366).) It concluded that "to the extent there are claims here that were not brought in *Gaskin*, these claims are barred by the released entered into by the plaintiffs in *Gaskin*." (A. 42.68.)

3. The Blunt Family Appeal

As set forth in the First Amended Complaint, the Blunt Family's claims concern a decision of the Pennsylvania Special Education Due Process Appeals

[5] PDE had raised this issue as an affirmative defense. (A. 573.33.)

Review Panel (the "Appeals Panel") pursuant to the IDEA. (*See* A. 147 at ¶ 2(a).) Amber Blunt is a 2005 graduate of Lower Merion High School, where she was identified as a student with a Specific Learning Disability. (A. 96 at ¶ 14.) Crystal and Michael Blunt are her parents. (A. 93 at ¶ 1.) On April 8, 2005, LMSD rejected the Blunts' request that LMSD pay for a six-week remedial program required by West Chester University as a condition of Amber's admission. The Blunts argued that LMSD should pay for this program to compensate for the fact that LMSD failed to develop and implement transition services for Amber as required by the IDEA. (A. 133 at ¶ 176; *see also* A. 103 at ¶¶ 44-45.)

On April 11, 2005, Mr. and Mrs. Blunt requested a due process hearing under the procedures set forth in the IDEA. They sought relief from LMSD's failure to comply with the IDEA by failing to provide Amber with a free appropriate public education ("FAPE") (A. 133 at ¶ 177), including by placing her in below-grade-level math classes throughout her years in high school (*see* A. 100-02 at ¶¶ 29-39).

The due process hearing occurred over two days, the second of which was June 20, 2005. (A. 133-34 at ¶ 178; A. 210.) On July 25, 2005, the Hearing Officer issued a decision in favor of the Blunts (A. 210-23) determining that LMSD had "failed to address Student's math needs in a timely manner" and had "not met its burden with respect to appropriate transition plans." (A. 219; *see also* A. 221 ("In

summary, the problem is that the Student's transition plans are more akin to 'a la carte' menus than to 'plans.' The various transition pieces are neither coordinated not designed as a plan to actually achieve any particular outcomes.").)

Both the Blunt Family and LMSD timely appealed the Hearing Officer's decision to the Pennsylvania Special Education Due Process Appeals Review Panel, which issued its decision on August 31, 2005. (A. 190-203.) The Appeals Panel found that "the hearing officer erred as a matter of law in finding a FAPE violation in terms of the failure to identify and program for Student's math-related needs" (A. 198; *see also id.* (noting that it is "a fairly close call")); upheld the finding that LMSD had failed to provide adequate transition services, but reduced the compensatory education award (*see* A. 199-202).

The Blunt Family filed a civil action in the District Court on July 30, 2007 to take issue with the determination of the Appeals Panel. (A. 42.23, 66.) The District Defendants moved to dismiss the First Amended Complaint on October 8, 2007. (A. 152-86.) On February 15, 2008, the District Court dismissed all of the Blunt Family's claims, including their claim under the IDEA, pursuant to Federal Rule of Civil Procedure 12(b)(6). (A. 42.21, .42-.45.) The District Court cited amendments to the IDEA that had taken effect on July 1, 2005. (A. 42.21-.22 & n.6). Those amendments shortened the deadline to appeal an adverse decision by the Appeals Panel in federal court from two years to ninety days. The District Court held that

the ninety-day period, not the two year period, applied to the Blunt Family's appeal, and that their claims under the IDEA were therefore late (A. 26).

VI. STATEMENT OF FACTS

1. The Concerned Black Parents Appeal

CBP is a non-profit corporation organized under Pennsylvania law whose purposes include promoting equity and excellence in the response of school districts to the needs of diverse student populations; addressing issues related to education for populations identified as minority and/or African American; and identifying, monitoring, and informing parents about educational issues impacting disadvantaged students, their families, and the community at large. (A. 509-10 at ¶ 107.) CBP had been operating as an organization in LMSD for about 13 years as of 2008, and it conducts its business in Ardmore, Pennsylvania. (A. 510 at ¶ 108.)

CBP's Bylaws state that "[t]he Corporation shall have no members." (A. 3213.) CBP President Loraine Carter testified that the organization is "grassroots" and "parent-led," and that individuals involved with the organization typically act as and refer to themselves as "members" of CBP. (A. 3168.) Members of CBP's Board of Directors are parents of African-American LMSD students and/or are African-American alumni of LMSD schools. (A. 3165-66.) CBP's members "are residents of the Lower Merion School District and current and former parents or students of the District," including named Appellants Crystal Blunt, Carol Durrell,

Christine Dudley, June Coleman, and Lynda Muse. (A. 510 at ¶ 108.) CBP's membership consists of people who have chosen to associate themselves with the organization, not "every African American in Lower Merion." (A. 3168.) "CBP br[ought] this action on its behalf and on behalf of its members . . . ." (A. 510 at ¶ 107.)

CBP has limited financial resources. (*See* A. 3169 (Ms. Carter testifying that that from December 1, 2005 through March 1, 2006, CBP had income of approximately $1090 and expenses of $1106.65).) CBP has made expenditures from its own resources to host renowned educational consultants and experts to provide information to Appellants, class members, the community in general, and LMSD administrators and staff about the significance of the federal and state laws concerning the education of children and to provide promising practices and successful strategies for educating under-served children in LMSD. (A. 510 at ¶ 109.) CBP has had to increase sharply its expenditures in this area of advocacy as awareness of the inferior quality of LMSD's dual system of education has risen and as CBP has sought to protect its members from the adverse impact of this phenomenon. (A. 510 at ¶ 110.) Because of Appellee's actions, CBP has been forced to expend its resources to support Appellants, CBP members, and putative class members by attending meetings pertaining to Individualized Education

Programs, Section 504, and discipline; court hearings; and parent-teacher conferences with and/or on behalf of, inter alia:

a. Appellants Chantae Hall, Eric Allston, Amber Blunt, Ricky Coleman, and Walter Whiteman;
b. CBP members Lilly Mae Clark, Betty Jackson, Suzette Harper, Lynda Muse, Devica Jackson, Annette Taylor, and June Jackson; and
c. putative class members Michael Blunt, Bernard Pierce, Zachary Ray, Brandon Downs, Aginah Allston, and Joshua Tate.

(*See* A. 510-11 at ¶ 111.)

CBP has further expended its resources to produce, publish, and disseminate information to Appellants and putative class members concerning issues that affect the teaching-learning process for under-served children in LMSD, including but not limited to:

a. The Conciliation Agreement between LMSD and the Pennsylvania Human Relations Commission in which the District promised, inter alia, to eradicate the disproportionate suspension of African-American students as compared to White students;
b. The video "Mainline Education Monologues; Dreams Deferred or Realized," a 45-minute video produced by CBP to highlight the issue of racial inequality in LMSD's provision of education, which has shown on

public and local-access television and been distributed to area colleges and universities;

c. The racial graffiti and symbols which were promulgated at both LMSD high school and middle school buildings and which took the efforts of the CBP and the Mainline Branch of the National Association for the Advancement of Colored People, Inc., to make public;

d. A community Newsletter and News Notes to disseminate the compilations of data on: the racial disparities in discipline, suspension and expulsion of African-American students in LMSD; the underachievement of African-American students in LMSD; and the unnecessary segregation of African American students with disabilities in LMSD.

(A. 511 at ¶ 112.) CBP has had to organize writing seminars, career-advising seminars, SAT-preparation classes, and financial-aid seminars to help LMSD students navigate the college-application process and to prepare for college. (A. 511 at ¶ 113.)

CBP does not charge for the services that it provides; instead, CBP collects funds by having fundraising activities and collecting donations from its members. (A. 512 at ¶ 114; *see also* A. 3168 (Ms. Carter testifying that many people within

CBP's "broader membership . . . . have made contributions in one way or another").)

2. The Appeal from the Dismissal of Claims Against PDE

Gaskin was a federal class action filed in 1994 that sought to enforce the Least Restrictive Environment requirement (LRE) in every school in the Commonwealth; that is, to assure that students with disabilities in Pennsylvania are included in regular classrooms with supplementary aids and services to the maximum extent appropriate. (A. 783-84 at ¶ 6 (*Gaskin* Complaint) ("Plaintiffs seek injunctive relief in the form of an order to PDE to assure that school district personnel are adequately trained to educate students with disabilities in regular classes with supplementary aids and services and to assure that students with disabilities have access, to the maximum extent appropriate, to supplementary aids and services in regular classrooms.").) The complaint stated claims under the IDEA, the ADA, and Section 504. (*See* A. 875-80 (*Gaskin* Complaint "Claims" section).) The *Gaskin* named plaintiffs were students with disabilities or groups advocating on behalf of students with disabilities. (*See* A. 42.63.) One of the named plaintiffs was an African-American student (A. 649), and none were plaintiffs in this case. The allegations of the *Gaskin* named plaintiffs concerned their exclusion from regular classroom environments because of their disabilities, and/or the unavailability in regular classroom environments of supplementary aids

and services. (*See, e.g.*, A. 791 at ¶ 25 ("Despite the Gaskins' persistent advocacy, the district has not agreed to full inclusion for [their daughter] Lydia, nor has it agreed to obtain the training and technical assistance its teacher[s], particularly its regular education teachers, need to learn how to include Lydia."); A. 795 at ¶ 38 ("John was provided with no supplementary aids and services in the regular classroom and his regular education teachers did not even know he was a special education student."); A. 798 at ¶ 46 ("For his entire school career, the school district has never offered Hasan the opportunity to be a member of a classroom with nondisabled students.").)

In September 2005, the District Court in *Gaskin* approved a settlement agreement (A. 3458-504). The document, titled "Settlement Agreement and General Release" (A. 3458), includes the following release:

> In consideration of the performance of PDE's obligations under the Settlement Agreement, the plaintiffs, individually and collectively hereby remise, release, and forever discharge each of the defendants . . . from all actions and causes of action, suits, grievances, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, claims and demands whatsoever in law or equity, known or unknown, foreseen or unforeseen, particularly those which were or could have been set forth in *Gaskin v. Pennsylvania Department of Education*, No. 94-CV-4048 (E.D. Pa.), or which any of the plaintiffs **ever had or now has**, or which that plaintiff's heirs, executors, administrators, successors, attorneys, or assigns, or any of them hereafter can, shall, or may have, for or by reason of any cause, matter, or thing whatsoever **arising out of or related to the claims brought by the plaintiffs against the defendants in the *Gaskin* case from the beginning of the world to the effective date of the Settlement Agreement**; except that claims against a local school

> district in which that school district is not acting as PDE's employee, assign or agent shall not be barred.

(A. 3490-91 (emphases added).)

Elsewhere the agreement states that "the parties, by entering into this Settlement Agreement, agree to the following terms and conditions fully and comprehensively to settle and resolve all outstanding claims asserted in or relating to the *Gaskin* lawsuit" (A. 3460) and that PDE was providing consideration "for a full, final, and complete release of all claims that the plaintiffs asserted or could have asserted against any and all of the defendants arising out of or relating directly or indirectly to the causes of action asserted in *Gaskin*" (A. 3486). The settlement became effective September 19, 2005 (A. 42.64) and remained in effect until September 19, 2010 (*see* A. 3493).

3. The Blunt Family Appeal

All relevant facts are included in the Statement of the Case, *supra*.

VII. SUMMARY OF THE ARGUMENT

The District Court erred when it held that (a) CBP lacked standing in its own right because the injuries it alleged were insufficiently tangible and too abstract, and (b) CBP's legal status as a non-member corporation under Pennsylvania corporation law deprives it of standing to represent its constituents in federal court.

The District Court erred by reading the scope of the release in the *Gaskin* agreement so broadly as to release PDE from Appellants' claims accruing after the

effective date of the *Gaskin* agreement and from claims alleging PDE's failure appropriately to supervise and monitor the actions of LMSD, particularly LMSD's disproportional placement of African-American students in special education and lower-level courses.

The District Court incorrectly applied an amendment to the IDEA that took effect only after the Blunt Family's due process complaint was filed and after the two days of hearings were concluded. The amendment, which shortened the deadline for filing a federal complaint from two years to 90 days, should not have been applied retroactively to bar the IDEA claim.

VIII. ARGUMENT

1. CONCERNED BLACK PARENTS, INC. HAS STANDING TO ASSERT AN APPEAL ON ITS OWN BEHALF AND ON BEHALF OF ITS INDIVIDUAL MEMBERS.

This Court has explained that

> an organization or association may have standing to bring suit under two circumstances. First, an organization may be granted standing in its own right to seek judicial relief from *injury to itself* and to vindicate whatever rights and immunities the [organization or] association itself may enjoy. Alternatively, an association may assert claims on behalf of its members, but only where the record shows that the organization's *individual members themselves have standing to bring those claims*.

Pa. Prison Soc'y v. Cortes, 508 F.3d 156, 162-63 (3d Cir. 2007) (alteration in original) (internal quotation marks and citations omitted). CBP satisfies both tests for organizational standing.

A. CBP Has Shown Sufficient Injury to Itself from Appellees' Acts to Confer Standing.

To establish standing for injury to itself, an organization must satisfy three elements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (alterations in original) (footnote, internal quotation marks, and citations omitted). The District Court relied only on the first of the three *Lujan* factors to dismiss CBP for lack of standing.

The Supreme Court has long recognized that "organizations are entitled to sue on their own behalf for injuries they have sustained." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). In *Havens*, the Court found that an organization named Housing Opportunities Made Equal ("HOME") had standing under the Fair Housing Act of 1968 because "if, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services

for low- and moderate-income home-seekers, there can be no question that the organization has suffered injury in fact." *Id.* at 366-67, 379.

The injuries alleged by CBP are very similar to those alleged in *Havens*. In *Havens*, HOME alleged that it had "'been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services'" and that it "'had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices.'" *Id.* at 379 (alteration in original) (quoting HOME's complaint). Like HOME, CBP alleges that Appellees' policies and practices have frustrated its mission and have caused it to divert its limited resources from its various other activities in order to address those policies and practices. (*E.g.*, A. 510 at ¶ 110 ("CBP's expenditures in this area of advocacy have risen sharply over the last five years as awareness of the inferior quality of LMSD's dual system of education has risen and as it seeks to protect its members from the adverse impact of this phenomena."); A. 511 at ¶ 112 ("CBP uses its resources to produce, publish and disseminate information to Plaintiffs and class members concerning issues that affect the teaching-learning process for under-served children in the District . . . .").)

The District Court acknowledged that an organization can plead and prove injury in its own right but held that the injuries alleged by CBP " are more akin to an abstract, ideological interest in the litigation as opposed to the necessary

'personal stake in the outcome' of the controversy necessary to confer standing" (A. 42.52.) The court cited *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972), where although the complaint contained allegations about the harmful effects to the environment from a proposed Disney development in the Mineral King Valley, *see id.* at 734, it did not complain any allegations about harm to the Sierra Club itself or its members:

> [t]he Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use [the] Mineral King [Valley] for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.

Id. at 735. Instead, the only "injury" the Sierra Club alleged was "change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area." *Id.* at 734.

Here, by contrast, CBP has alleged and shown that it has had to divert time, money, and energy from its other goals and missions in order to address Appellees' actions. "Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests, *see Sierra Club v. Morton*, 405 U.S., at 739." *Havens*, 455 U.S. at 379; *see also Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) ("Because it will divert resources from its regular activities to educate voters about the requirement

of a photo identification and assist voters in obtaining free identification cards, the NAACP established an injury sufficient to confer standing to challenge the statute."); *Robinson v. Block*, 869 F.2d 202, 207, 210 n.9 (3d Cir. 1989) (finding standing under *Havens* for an organization of welfare recipients that "has been forced to expend time, money and resources advocating on behalf of recipients denied or threatened with denial of benefits"). The interests CBP seeks to protect in this case are at the core of the organization's purpose, which is, inter alia, to promote equity and excellence in the response of school districts to the needs of diverse student populations; to address issues related to education for populations identified as minority and/or African American; and to identify, monitor, and inform parents about educational issues impacting disadvantaged students, their families and the community at large. (A. 509-10 at ¶ 107.) As such, CBP has more than an "abstract, ideological interest" in the alleged practices. (A. 42.52.) Rather, it has "a 'personal stake' in the litigation." *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005) (Alito, J.) (quoting *The Pitt News v. Fisher*, 215 F.3d 354, 360 (3d Cir. 2000)).

B. CBP Has Standing on Behalf of its Constituents

The Supreme Court has instructed that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are

germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

The District Court recognized that an organization can establish standing on behalf of its members but held that CBP cannot demonstrate this type of standing because it is organized under Pennsylvania law as a non-member non-profit corporation, as is reflected in the corporation's bylaws. (A. 42.54.)

The District Court's analysis conflicts with the case law of the United States Supreme Court and of this Court which recognize that a corporation can have "members" even though it is not formally organized as a membership corporation. In *Hunt*, the association found to have standing was not "a traditional voluntary membership organization." 432 U.S. at 344; *see also id.* ("[W]hile the apple growers and dealers are not 'members' of the Commission in the traditional trade association sense, they possess all of the indicia of membership in an organization."). Following *Hunt*, this Court has emphasized that it would be a "formalistic argument" that "lacks merit" to insist that organizations cannot have standing "because their charters prohibit them from having members." *Pub. Interest Research Grp. v. Magnesium Elektron*, 123 F.3d 111, 119 (3d Cir. 1997);

see also id. ("To meet the requirements of organizational standing, [the organizational plaintiffs] need only prove that their members possess the 'indicia of membership' in their organizations." (quoting *Hunt*, 432 U.S. at 344)).

Courts of Appeals in other circuits have similarly followed *Hunt* to instruct that "indicia of membership" may give a non-membership organization standing. *E.g.*, *Disability Advocates, Inc. v. N.Y. Coalition for Quality Assisted Living, Inc.*, 675 F.3d 149, 159 (2d Cir. 2012); *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1111 (9th Cir. 2003); *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C. Cir. 2002); *Doe v. Stincer*, 175 F.3d 879, 885-86 (11th Cir. 1999); *Friends of the Earth v. Chevron Chem. Co.*, 129 F.3d 826, 829 (5th Cir. 1997); *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 586 (6th Cir. 1995).

The key "indicia of membership" include whether the organization's constituents hold a large degree of decision-making responsibility, *Liberty Res., Inc. v. Phila. Hous. Auth.*, 528 F. Supp. 2d 553, 563 (E.D. Pa. 2007); whether the constituents "possess a franchise in the choice of the organization's board, are qualified to serve on the board, and finance its activities," *City of Phila. v. Beretta U.S.A.*, 126 F. Supp. 2d 882, 896 n.10 (E.D. Pa. 2000), *aff'd on other grounds*, 277 F.3d 415 (3d Cir. 2002); and whether the constituents' association with the organization is voluntary, *Friends of the Earth*, 129 F.3d at 829.

The key indicia of membership are present in this case. CBP's Board of Directors includes African Americans who are parents of LMSD students and/or alumni of LMSD schools. (A. 3165-66.) CBP's "members" are its principal source of funding. (A. 512 at ¶ 114; *see also* A. 3168 ("They have made contributions in one way or another.").) Its membership consists only of people who have chosen to associate themselves with the organization, not all black parents in the area. (A. 3168.) In sum, CBP's "constituents do possess many indicia of membership—enough to satisfy the purposes that undergird the concept of associational standing: that the organization is sufficiently identified with and subject to the influence of those it seeks to represent as to have a personal stake in the outcome of the controversy." *Or. Advocacy Ctr.*, 322 F.3d at 1111 (internal quotation marks and citation omitted).

For all the reasons stated above, the District Court's order dismissing Concerned Black Parents should be reversed and the case remanded for further proceedings.

2. THE DISTRICT COURT ERRED IN ITS READING OF THE *GASKIN* SETTLEMENT TO BAR THE CLAIMS OF APPELLANTS IN THIS CASE.

A. The *Gaskin* Agreement Does Not Bar Claims Against PDE That Accrued After September 19, 2005.

By its plain language, the *Gaskin* agreement releases only those claims that accrued prior to the date the agreement took effect. (A. 3490-91 (specifying that

the release applies to any claims "which any of the plaintiffs ever had or now has . . . from the beginning of the world to the effective date of the Settlement Agreement . . . .").) *See, e.g.*, *Bowersox Truck Sales & Serv. v. Harco Nat'l Ins. Co.*, 209 F.3d 273, 279-80 (3d Cir. 2000) ("Only the present tense appears in the relevant portions of the release. Harco's argument would have us reword the release and insert the future tense that is now absent."). This plain-text reading of the release is consistent with public policy. *Geraghty v. Ins. Servs. Office*, 369 F. App'x 402, 406 (3d Cir. 2010) ("Generally, courts will not interpret a release to bar a claim that had not accrued as of the date of signing." (citing *Bowersox*, 209 F.3d at 279)). Such public-policy considerations apply with special force in the context of civil-rights statutes. *Cf. Bolden v. SEPTA*, 953 F.2d 807, 826 n.27 (3d Cir. 1991) (en banc) (Alito, J.) ("[R]ights under Title VII and the Fair Labor Standards Act may not be prospectively waived . . . ." (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981))). At oral argument before the District Court, PDE conceded that the *Gaskin* agreement "can't release future claims." (A. 1001.)

The District Court simply assumed, without analysis, that all of Appellants' claims had arisen before the effective date of the *Gaskin* agreement. This was in error. Many of Appellants' claims are based on Individualized Education Programs ("IEPs") or reevaluations that LMSD completed after September 2005. These are

documents that, as a matter of law, must be prepared anew every one to three years. *See generally* 20 U.S.C. § 1414(d)(4)(A) (requiring that IEPs be reviewed and revised "not less frequently than annually"); *id.* § 1414(a)(2)(B)(ii) (requiring new reevaluations "at least once every 3 years"); 22 Pa. Code § 14.124(c) ("Students with disabilities who are identified as mentally retarded shall be reevaluated at least once every 2 years."). For example, Appellant Lydia Johnson alleged that LMSD completed a reevaluation of her in January 2006, gave her advice about graduation that was misleading in light of the 2006 reevaluation report, and placed her in an inadequate and inappropriate classroom setting during the 2006-2007 school year. (A. 491-92 at ¶¶ 22-25.) Similarly, in 2007 LMSD conducted a reevaluation of Appellant Chantae Hall that failed to address all appropriate areas of concern and led to her continued placement in inappropriate segregated classrooms. (A. 496-97 at ¶¶ 48-50.) After its November 2006 reevaluation indicated that Appellant Walter Jonathan Whiteman had behavior problems that impacted his learning, LMSD failed to indicate the issue on his IEP and, instead of implementing an effective behavior support plan to enable him to benefit from participating in the general education curriculum, suspended him with no plan to implement positive behavior approaches to reduce the number of suspensions. (A. 497-98 at ¶¶ 54-55.) And LMSD placed Appellant Ricky

Coleman in racially segregated special education classes in the 2006-2007 school year, his second-grade year. (A. 506 at ¶ 92.)

Each of the above claims accrued after the effective date of the *Gaskin* agreement. Nor are these claims examples of violations that began before the *Gaskin* agreement but persisted afterward; they are based on Appellees' discrete actions after September 2005, and they would not have been actionable—because they had not yet happened—before the *Gaskin* agreement took effect. Appellants should be allowed to pursue these claims against PDE.

B. Appellants' Claims Were Not Within the Scope of the *Gaskin* Release and Should Not Have Been Dismissed.

As the District Court apparently recognized, the *Gaskin* release was not a general release, notwithstanding its title. Nonetheless, the District Court concluded that the *Gaskin* release barred Appellants' claims because the claims in both cases "arise from a 'common nucleus of operative facts,' that is, discrimination against the learning disabled." (A. 42.68 (quoting *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d Cir. 2001)).) Because of the erroneous conclusion that there was a common nucleus of operative facts, the court further held that that the Appellants' claims "could have been asserted [in *Gaskin*] since the discrimination against the named plaintiffs existed at that time." (A. 42.68.) [6]

[6]Among other things, this assertion is factually incorrect as *Gaskin* was filed on June 30, 1994 (A. 883), predating nearly every factual allegation in this case, and

This was in error. In analyzing whether a claim arises from a common nucleus of operative facts, "[t]he key inquiry is whether the factual predicate for future claims is identical to the factual predicate underlying the settlement agreement." *Freeman v. MML Bay State Life Ins. Co.*, 445 F. App'x 577, 579 (3d Cir. 2011). Here, the facts necessary to prove the claims in *Gaskin* were completely different from those in this case, notwithstanding the facially similarity that the individual plaintiffs in both cases alleged they were disabled or regarded as disabled.[7] Appellants' claims concern PDE's failure to monitor and remediate the placement of African-American students in special education or below-grade courses at disproportionate rates and the differential treatment Appellants received because they were black students. (A. 523-31.)

The *Gaskin* complaint alleged different facts and did not involve Title VI or any allegations of race discrimination. The plaintiffs alleged that PDE "does not require school districts to train their own staff in [inclusive] practices nor to demonstrate mastery of inclusive education" (A. 863 at ¶ 212); that PDE had not promoted an integrated system of regular and special education (A. 864 at ¶ 215);

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predating the birth of Appellant Ricky Coleman by almost five years (A. 502 at ¶ 74).

[7] That one of the twelve student-plaintiffs in *Gaskin* happened to be African American (A. 649) did not somehow convert *Gaskin* into a race-discrimination lawsuit.

that "PDE has failed to assure the availability of a *full continuum of educational placements* to afford students with disabilities the opportunity to be educated in regular classes with supplementary aids and services to the maximum extent appropriate" (A. 865 at ¶ 217 (emphasis added); and that PDE has failed to exercise such general supervisory powers over school districts as withholding federal funds, bringing suit, or instituting a "method for determining whether due process hearing decisions are implemented" (A. 869 at ¶¶ 230-231; A. 874 at ¶ 250).

In support of its ruling, the District Court cited *In re Prudential* for the proposition that the "bar by agreement of the parties can extend not only to claims that were not presented but even to those that could not have been presented in the class action." (A. 42.65 (citing 261 F.3d at 366)). But the *Gaskin* settlement does not purport to bar claims that could not have been presented in that case. The language of the agreement makes clear that it intends to bar only those claims that *were* or *could have* been asserted in *Gaskin*. (*See* A. 3490 (limiting the claims released to those "arising out of or related to the claims brought by the plaintiffs against the defendants in the *Gaskin* case"); A. 3460 ("[T]he parties, by entering into this Settlement Agreement, agree to the following terms and conditions fully and comprehensively to settle and resolve all outstanding claims asserted in or relating to the *Gaskin* lawsuit."); A. 3486 (stating that PDE was providing

consideration "for a full, final, and complete release of all claims that the plaintiffs asserted or could have asserted against any and all of the defendants arising out of or relating directly or indirectly to the causes of action asserted in *Gaskin*").)[8]

For all the reasons stated above, the District Court's order dismissing PDE should be reversed and the case remanded for further proceedings.

3. THE DISTRICT COURT ERRED IN RETROACTIVELY APPLYING A 90-DAY DEADLINE FOR FILING IN FEDERAL COURT TO A CASE THAT HAD COMMENCED WHILE A TWO-YEAR DEADLINE WAS IN EFFECT.

Until July 1, 2005, a parent in Pennsylvania had two years after the conclusion of the administrative proceedings in which to file a civil action in District Court under the version of the IDEA then in effect ("IDEA-1997"). (*See* A. 42-22 n.6 (explaining that courts borrowed Pennsylvania's two-year deadline for initiating "an action seeking judicial review of an administrative proceeding").) On July 1, 2005, new amendments to IDEA went into effect ("IDEA-2004"). Pub. L. No. 108-446 § 302(a)(1), 118 Stat. 2647, 2803 (2004). IDEA-2004 provided that

[8] Moreover, the court's reliance on *In re Prudential* takes the phrase "could not have been presented" out of context. In the context of that case, the phrase refers to claims that are beyond the jurisdiction of the federal courts as a matter of law, such as those barred by the Anti-Injunction Act. It does not apply to claims that could not have been presented because of practical or existential considerations, e.g., the events had not yet occurred or the affected class members had not yet been born. *See In re Prudential*, 261 F.3d at 366 (citing *Class Plaintiffs v. Seattle*, 955 F.2d 1268 (9th Cir. 1992); *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 336 (2d Cir. 1985); *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982)).

"[t]he party bringing the action [to challenge the decision] shall have 90 days from the date of the decision of the hearing officer to bring such an action . . . ." 20 U.S.C. § 1415(i)(2)(B). Here, faced with two possible deadlines, either of which could have applied, the District Court chose the shorter: one that went into effect after the Blunt Family's claim was filed and that had the effect of barring their claim.

As the United States Supreme Court has long recognized, there is a presumption against statutes being applied or interpreted to have retroactive effect. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." (footnotes omitted)); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law."). Although changes in procedural rules raise less concern about retroactivity than changes to substantive law, *see Landgraf*, 511 U.S. at 275, the same policy considerations factor into the analysis of both types of changes, *see id.* at 275 n.29 ("[W]e do not restrict the presumption against statutory retroactivity to cases involving 'vested rights.' . . . Nor do we suggest that concerns about

retroactivity have no application to procedural rules."); *Chenault v. U.S. Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994) (Aldisert, J.) ("Regardless of whether a statute is 'substantive' or 'procedural,' it may not apply to cases pending at the time of enactment if the new statute would prejudice the rights of one of the parties. If it is procedural, application may not result in a manifest injustice." (internal quotation marks and citation omitted)). Courts are particularly wary of finding an ambiguous statute to have retroactive effect when it threatens to "sweep away settled expectations suddenly and without individualized consideration." 511 U.S. at 266. Congress's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Id.*

The Supreme Court has articulated a two-part test for determining when and under what circumstances a statute should be applied retroactively. "[T]he first step . . . is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively." *INS v. St. Cyr*, 533 U.S. 289, 316 (2001) (citing *Martin v. Hadix*, 527 U.S. 343, 352 (1999)). "The standard for finding such unambiguous direction is a demanding one. Cases where this Court has found truly 'retroactive' effect adequately authorized by statute involved statutory language that was so clear that it could sustain only one interpretation." *Id.* at 316-17 (citation omitted).

The second step is to "determine whether [the new statute] produces an impermissible retroactive effect . . . ." *Id.* at 320 (citing *Landgraf*, 511 U.S. at 270). This inquiry "demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 321 (quotation marks and citations omitted). Among the conditions sufficient for finding retroactivity are when a statute "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . ." *Id.* at 321 & n.46 (quotation marks and citations omitted). "[T]he judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 321 (quotation marks and citations omitted).

Applying the first step of the two steps here, there is no "unambiguous direction" from Congress that the IDEA-2004's deadline for filing a federal action is retroactive. The statute states simply that it "shall take effect on July 1, 2005," Pub. L. No. 108-446 § 302(a)(1), 118 Stat. 2647, 2803 (2004). It does not contain any statement that it does have retroactive effect; it does not state whether it applies to new cases or to those few cases, like this one, that are in mid-stream. *See Lawrence Twp. Bd. of Educ. v. New Jersey*, 417 F.3d 368, 370 (3d Cir. 2005) ("[A]mendments to the IDEA have prospective application only"). *See generally*

Landgraf, 511 U.S. at 257 ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.").

The second step, the functional and practical analysis, must take into account the fact that there had been no guidance—and there still is no case law on point—that would guide a litigant and provide notice about how the change in deadlines would be applied. *Cf. Smith by & Through Townsend v. Special Sch. Dist., No. 1*, No. CIV 4-96-685, 24 IDELR 1003, at n.10 (D. Minn, Aug. 7, 1996) (in the related, but conceptually separate question of the application of the statute of limitations, citing the important consideration of certainty: "The Court notes that it finds particularly unworkable the solution of some courts to determine the applicable IDEA limitations period on a case-by-case basis. This method is sure to breed satellite litigation and create unnecessary uncertainty. . . . [T]he legislative purpose to [assure that all children with disabilities have available to them . . . a free appropriate public education] is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters. . . ." (second alteration in original) (internal quotation marks and citation omitted)), *aff'd*, 184 F.3d 764 (8th Cir. 1999).

The functional and practical analysis also must balance the cost of excluding the Blunt family's claim against extremely narrow effect of the holding: such a

holding applies only to those administrative cases that were commenced before July 1, but were completed afterward—a narrow universe given the short timetable required of administrative hearing officers for their holding hearings and issuing decisions. *See generally Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 116 (1st Cir. 2003) (noting "IDEA's policies favoring prompt resolution of disputes in order to expedite the provision of FAPE to children who may be at a formative stage of their intellectual development").

This Court's decision in *Steven I. v. Central Bucks School District*, 618 F.3d 411 (3d Cir. 2010), on the facially similar, but quite different issue of a shortened *statute of limitations* (as opposed to the deadline for initiating a federal action following an adverse administrative decision) illustrates the unfairness of the result in this case. In *Steven I*, a different provision added by IDEA-2004 imposed a new limitations period of two years in which families could file an administrative complaint to seek redress for conduct by a school district. 618 F.3d at 413 (discussing 20 U.S.C. § 1415(f)(3)(C)). The plaintiff, Steven I., complained of conduct going back to the 1992-93 school year, but waited until May 1, 2007—nearly two years after the effective date of the amendments—to bring any claim at all. *Id.* at 412-13. He argued that the new limitations period should not be applied retroactively to bar suits for *conduct* that occurred prior to the effective date. *See id.* at 414.

In its analysis, this Court considered whether the new limitations period even had retroactive effect; and that question turned on whether the new law provided fair notice and a reasonable time for people to take advantage of the prior, longer limitations period. *See id.* at 414-16. The Court held that there was sufficient notice because there was "a seven-month 'grace period' in[] this statute" before the new limitations period would go into effect, giving families an opportunity to file claims for conduct that preceded the new limitations period. *Id.* at 415. Because of this notice, the Court concluded that the issue of retroactivity did not come into play at all. *Id.* at 416. The Court also made note of the potentially irrational distinctions that could result from a rule that applied to conduct that occurred only after the effective date of the new statute. *Id.* at 416 n.9.

Here, by contrast, there was not the same sort of clear notice. Instead, there was, at best, an ambiguity as to which time period applied to a claim that had already been filed with a full hearing completed; reasonable counsel could differ on whether the time period effective on and after July 1, 2005 did or did not apply to a complaint already filed, no matter how carefully they tracked all new enactments. Moreover, the potential for far-reaching and irrational outcomes noted by the Court in *Steven I.* are not in play here. Specifically, there is no risk here that a case could arise in which the oldest and newest claims would be justiciable but not claims of medium age. *See id.*

For all these reasons, this Court should reverse the District Court's dismissal of the Blunt family's IDEA claim based on its holding that the deadline for appealing from an administrative decision to federal court was measured by the provisions of IDEA-1997, rather than the deadline in effect prior to July 1, 2005; and it should remand the case to the District Court for further proceedings.

IX. CONCLUSION

Appellants respectfully request that this Court reverse and remand the orders dismissing Concerned Black Parents for lack of standing; dismissing the claims against the Pennsylvania Department of Education as barred by the settlement in *Gaskin*; and dismissing the Blunt family's IDEA claims as untimely filed.

Respectfully submitted,

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Dated: December 18, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)-(C) because this brief contains 8,965 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point Times New Roman, a proportionally spaced typeface, using Microsoft Word 2007 word-processing software.

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CERTIFICATE OF ADMISSION TO BAR

I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF SERVICE

I, Benjamin D. Geffen, hereby certify that on this date, I caused a true and correct copy of Brief of Appellants to be served via the Court's Electronic Case Filing system and to the following:

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Also, I hereby certify that on this date, I caused ten true and correct copies of the Brief of Appellants to be hand-delivered to the following:

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24 IDELR 1003
24 LRP 3774

William Smith, by and through his parent and legal guardian, Ada Townsend, Plaintiff v. Special School District No. 1, (Minneapolis), and Peter Hutchinson, in his official capacity as Superintendent, and Bruce Johnson, in his official capacity only as Commissioner of the Minnesota Department of Children, Families and Learning, Defendants

U.S. District Court, Minnesota

4-96-685

August 7, 1996

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405.020 Rehabilitation Act (Section 504), Cause of Action Under Section 504
355.055 Personnel, School Administrators

Related ruling reported at 23 IDELR 1069.

Case Summary

A state court's dismissal of various special education claims filed by a student with disabilities was due to untimely service--- a dismissal for lack of jurisdiction, not a dismissal on the merits. Therefore, res judicata did not bar the student's federal court lawsuit, as no judgment on the merits of the claims had been reached.

A student with learning disabilities, a sleep disorder and emotional problems moved from one school district (district 1) to another (district 2). After the move, the student continued to attend a program run by district 1 for a short period of time. The student, through his mother, requested a due process hearing alleging he was denied a FAPE by both school districts. A level I hearing officer denied district 1's motion to dismiss and bifurcated the hearing. District 1 appealed to a level II hearing officer, who granted the motion to dismiss. The student's appeal to state court was dismissed. The student then filed a complaint in federal district court, alleging violations of the IDEA, the ADA, Sections 504, Section 1983, Section 1985, and the state human rights act. The complaint named as defendants district 1, the superintendent of district 1, and the Commissioner of the Minnesota Department of Children, Families and Learning (Commissioner). The defendants filed motions to dismiss.

HELD: for the student, in part.

Initially, the magistrate judge rejected the defendant's assertion that the student's claims were barred by res judicata, as the student's similar claims had been dismissed by a state court on the basis of untimely service---a procedural issue, not a dismissal on the merits. The court accepted the defendants' contention that the student's IDEA claims were barred by the statute of limitations under a 30-day appeal period from the date of the hearing officer's decision which was "borrowed" from the state administrative procedures statute. Nor did equitable tolling apply, as the student was represented by an attorney who specialized in education law and was aware of the 30-day state limitations period. The Section 1983 and 1985 claims were timely, having been filed well within the 6-year period allowed by state law. The student's state human rights act claim was likewise timely, as it was filed within the relevant one year statute of limitations. Since the student was a minor at the conception of the complaint, the statute of limitations with respect to his ADA and Section 504 claims was suspended pursuant to state law until the student was eighteen, and therefore, these claims were also timely.

Next, the court determined that the student's complaint set forth a valid claim under the ADA and Section 504. The complaint alleged the student was "dismissed, suspended or excluded from school" on various occasions as a result of his disabilities. The court noted the requirement that the student show either "bad faith or gross misjudgment" in order to prove a violation of the ADA and/or Section 504. Since the student might be able to demonstrate the required elements of a violation under either statute, the court denied the district's motion to dismiss those claims. The student's Section 1983 claim was dismissed for failure to state a claim, as the student did not establish the required policy or custom of the district that denied the student any constitutional right. The student's Section 1985 claim against the district was also dismissed by the court, as it failed to allege the district's actions were motivated by racial or class-based discrimination. Since this failure was easily correctable, the court granted the student leave to amend. The court denied the motion to dismiss the student's state human rights law claims, due to the survival of some of the student's federal law claims. In denying the district superintendent's motion to dismiss the student's Sections 1983 and 1985 claims against him, the court concluded the student alleged sufficient facts in support of his claims that, if proven, would entitle the student to relief. Because the student did not allege any claims against the Commissioner of the State Department of Children, Families and Learning, the court granted the Commissioner's motion to be dismissed from the lawsuit.

Judge / Administrative Officer

Ann D. Montgomery, United States District Judge.

Full Text

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Memorandum Opinion and Order

Introduction

On December 11, 1995, Plaintiff William Smith ("Plaintiff Smith"), by and through his parent and legal guardian, Ada Townsend commenced this action under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*; § 504 of the 1973 Rehabilitation Act, 29 U.S.C. § 794; 42 U.S.C. §§ 1983 and 1985; and the Minnesota Human Rights Act against Defendants Special School District No. 1 ("SSD1") and Peter Hutchinson ("Hutchinson"), in his official capacity as Superintendent of SSD1, as well as against Bruce Johnson ("Johnson"), in his official capacity as Commissioner of the Minnesota Department of Children, Families, and Learning ("MDCFL"), alleging claims based on his treatment while a student as SSD1. Currently before the Court are Defendants SSD1's and Hutchinson's motion to dismiss and Defendant Johnson's separate motion to dismiss. For the reasons set forth below, the Court will grant each motion in part.

Background

I. Parties

Plaintiff Smith is a disabled minor. *See* Complaint, ¶ 3. He has learning disabilities, a sleep disorder and emotional problems. *Id.* Ada Townsend is Plaintiff Smith's mother and legal guardian. *Id.*

Defendant SSD1 is the school district for the City of Minneapolis in Hennepin County, Minnesota. It is Minnesota's largest school district.

Defendant Hutchinson is a member of Public Strategies Group, Inc., a private corporation which has a unique contract to provide superintendent services to SSD1.

Defendant Bruce Johnson is the Commissioner of the MDCFL.[1] The MDCFL was created for the purpose of increasing the capacity of Minnesota communities to measurably improve the well-being of children and families. As part of its duties, the MDCFL through the Commissioner, appoints hearing review officers to conduct various hearings to ensure that appropriate programs are being provided for children with disabilities.

II. IDEA and Minn. Stat. § 120.17.

Under federal law, each handicapped child is entitled to a free appropriate public education ("FAPE"). *See* 20 U.S.C. § 1400(c). To achieve this goal, Minn. Stat. § 120.17, the state law through which the IDEA is implemented, provides that each school district shall provide special instruction and services for disabled children. *See* Minn. Stat. § 120.17, subd. 1. In determining the appropriate special instruction and services for a child, the district must develop an individualized education plan ("IEP") for the student. *Id.* at subd. 3a.

If a parent or guardian believes that a student is not receiving an appropriate special education program, the parent or guardian has a two-step administrative review process available to raise objections. At step one, the parent or guardian may request an impartial due process hearing. *Id.* at subd. 3b(e). This hearing, also known as a Level I hearing, takes place before an impartial hearing officer mutually agreed upon by the parent and school district or appointed by the Commissioner of the MDCFL if the parties cannot agree. *See* Minn. Stat. 120.17, subd. 3b(e). The decision of the hearing review officer must be rendered no more than 45 calendar days from the date of the receipt of the request for a hearing, unless an extension is granted pursuant to a request of the parties. *Id.* at subd. 3b(f).

If any party is dissatisfied with the hearing officer's decision, that party may appeal for a Level 2 hearing

to a hearing review officer within 30 calendar days of the receipt of the initial written decision. *Id.* at subd. 3b(g). The hearing review officer is selected by the Commissioner. *Id.* at subd. 3b(i). The Level 2 proceeding is a review of the Level I decision, although additional evidence may be received if necessary. *Id.* at subd. 3b(g). The hearing review officer's decision must be rendered within 30 calendar days after the filing of the appeal.

If either party is dissatisfied with the Level 2 decision, that party may appeal the decision to the Minnesota Court of Appeals, pursuant to Minn. Stat. § 120.17, subd. 3b(h), or to Federal District Court, pursuant to 20 U.S.C. § 1415(e).

III. Facts of this Case

Plaintiff William Smith is a student with disabilities. During the majority of his schooling,[2] Plaintiff was a student in the Defendant SSD1. In October, 1994, he moved with his mother from a residence in Defendant SSD1 to one in Independent School District No. 271 (Bloomington School District). He insists he moved for the purpose of obtaining better educational services to meet his special education needs. *See* Complaint, at ¶ 6. He alleges he was denied a FAPE by SSD1 in several ways including: (1) being denied counseling services, despite being classified as having an emotional or behavioral disorder; (2) being dismissed, suspended and excluded from school on numerous occasions without being provided any educational services or being provided supplementary aides to reduce his suspensions and dismissals; (3) not having an IEP, or having an incomplete IEP until approximately seventh grade; and (4) not receiving a FAPE while incarcerated or involuntarily placed in programs located within the residential borders of SSD1. *See* Complaint, ¶¶ 7-10. He also alleges that despite his move to Bloomington, he continued to attend a technical college program in SSD1 during the full fall semester of the 1994-95 school year, during which time he had no IEP or an incomplete IEP. *Id.* at ¶ 11.

On June 7, 1995, Plaintiff requested a special education due process hearing against both SSD1 and the Bloomington School District under Minn. Stat. § 120.17, subd. 3(b)(e) and the IDEA.

Hearing Officer Janice Frankman was appointed by the Commissioner to preside at the Level 1 hearing in both of Plaintiff's cases. At a pre-hearing conference on June 20, 1995, SSD1 moved for an order dismissing it as a party. *See* Frankman's Order Denying Motions to Dismiss at 1. Both the Bloomington School District and Plaintiff filed memoranda in opposition to SSD1's motion. Subsequently, on July 3, 1995, Frankman denied SSD1's motion to dismiss. At the same time, she bifurcated the hearing of the two cases to permit SSD1 to seek an interlocutory appeal. *Id.* at 2.

Thereafter, SSD1 sought the appointment of a Level 2 hearing review officer to review ALJ Frankman's denial of its Motion.[3] *See* Complaint, at ¶ 15. A Level 2 hearing review officer was then appointed by the MDCFL. *Id.* at ¶ 16. After SSD1 briefed the issues in its appeal and Plaintiff, by letter, challenged the hearing review officer's jurisdiction to hear the appeal, the hearing review officer issued her decision which determined that SSD1 had the right to an interlocutory appeal and which granted SSD1's motion to dismiss.

After an appeal to the Minnesota Court of Appeals was dismissed for lack of timely service, Plaintiff filed his Complaint in Federal Court.

Both Defendants SSD1 and Peter Hutchinson and Defendant Bruce Johnson have brought motions to dismiss. Defendants SSD1 and Peter Hutchinson raise five grounds in support of their motion to dismiss under Federal Rule of Civil Procedure 12(c).[4] They allege: (1) Plaintiff's claims are precluded by res judicata; (2) Plaintiff's claims are untimely; (3) there is no subject matter jurisdiction over Plaintiff's

IDEA claims; (4) Plaintiff's non-IDEA claims must be dismissed for failure to state a claim upon which relief may be granted; and (5) claims against Defendant Hutchinson must be dismissed for failure to state a claim upon which relief may be granted and qualified immunity. Meanwhile, in support of his 12(b)(6) motion, Defendant Johnson argues that Plaintiff's Complaint should be dismissed because: (1) it is untimely; (2) it is barred by res judicata; (3) even assuming that facts alleged are true, Plaintiff would not be entitled to any relief; (4) the MDCFL's dissemination of information to hearing review officers was not contrary to law; and (5) the MDCFL's parent procedural safeguards brochure provides adequate notice to parents and guardians.

This Court has jurisdiction to decide Plaintiff Smith's federal claims pursuant to 28 U.S.C. § 1331 and his state claims pursuant to 28 U.S.C. § 1367.

Discussion

I. Standard of Review

In considering a motion to dismiss, the pleadings are construed in a light most favorable to the plaintiff, and the facts alleged in the complaint must be taken as true. *Hamm v. Groose,* 15 F.3d 110, 112 (8th Cir. 1994); *Ossman v. Diana Corp.,* 825 F.Supp. 870, 879-80 (D. Minn. 1993). Any ambiguities concerning the sufficiency of the claims must be resolved in favor of the plaintiff. *Ossman,* 825 F.Supp. at 880. A complaint should be dismissed "only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations."*Frey v. City of Herculaneum,* 44 F.3d 667, 671 (8th Cir. 1995) (citations omitted). "A motion to dismiss should be granted as a practical matter . . . only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief."*Id.*

II. Res Judicata

Both Defendants SSD1 and Hutchinson as well as Defendant Johnson allege that Plaintiff's Complaint should be dismissed on res judicata grounds. They allege that since essentially the identical claims were already dismissed by the Minnesota Court of Appeals, Plaintiff should not be able to relitigate in this forum.

Under Minnesota law, res judicata is considered "a finality doctrine which dictates that there be an end to litigation."*Sondel v. Northwest Airlines, Inc.,* 56 F.3d 934, 937-38 (8th Cir. 1995), *quoting Dorso Trailer v. American Body & Trailer,* 482 N.W.2d 771, 773-74 (Minn. 1982). The doctrine states that:

[a] judgment on the merits constitutes an absolute bar to a second suit for the same cause of action, and is conclusive between parties and privies, not only as to every other matter which was actually litigated, but also as to every matter which might have been litigated therein.

Id., quoting Dorso Trailer, 482 N.W.2d at 774. Moreover, a prior state court decision receives the same preclusive effect in federal court as it would receive in state court. *See* 28 U.S.C. § 1738.[5] However, "[r]es judicata should not be rigidly applied; rather, it focuses on whether its application results in an injustice against the party to be precluded."*Sondel,* 56 F.3d at 938.

The Eighth Circuit Court of Appeals has set forth a four-part test to determine when res judicata bars relitigation of a claim: (1) the first suit must result in a final judgment on the merits; (2) the first suit must be based on proper jurisdiction; (3) both suits must involve the same nucleus of operative facts; and (4) both suits must involve the same parties or their privies. *Kolb v. Scherer Brothers Financial Services*

Co., 6 F.3d 542, 544 (8th Cir. 1993).

In this case, the only dispute between the parties is whether the Minnesota Court of Appeals's dismissal of Plaintiff's appeal as untimely was a final judgment on the merits. It is uncontroverted that this suit involves the same nucleus of operative facts as the prior appeal and that this suit involves the same parties or their privies. Thus, assuming no injustice to Plaintiff, if the prior dismissal was an adjudication on the merits, then this suit would be barred by res judicata.

In support of their argument, Defendants point to two factors. First, they assert that under Minnesota Rule of Civil Procedure 41.02(c), a dismissal for any reason other than for lack of jurisdiction, for forum non conveniens, or for failure to join a party indispensable pursuant to Rule 19, is a dismissal on the merits, unless the court specifies otherwise in its order. Second, they argue that the dismissal by the Minnesota Court of Appeals was most analogous to a dismissal based on statute of limitations grounds which has been determined to be a dismissal on the merits. *See Nitz v. Nitz,* 456 N.W.2d 450, 452-53 (Minn. Ct. App. 1990).

In opposition, Plaintiff contends that the dismissal was for want of jurisdiction which is not a dismissal on the merits. *See Charchenko,* 47 F.3d at 984-85 ("an involuntary dismissal by a court for lack of jurisdiction may not be a bar [to a subsequent suit] if the jurisdiction's rule is patterned after Federal Rule of Civil Procedure 41(b)").

In deciding whether the prior dismissal was on the merits, the Court must look to the law of Minnesota. *Kolb,* 6 F.3d at 544. After the Level 2 hearing review officer dismissed Plaintiff's claims on August 4, 1995, he appealed the decision to the Minnesota Court of Appeals. Under Minn. Stat. § 120.17 subd. 3b(h), an appeal of a hearing review officer's decision to the Minnesota Court of Appeals must be in accordance with Minn. Stat. Ch. 14, the chapter concerned with administrative procedures. Under Minn. Stat. § 14.63, an aggrieved party seeking judicial review in the Minnesota Court of Appeals must file a petition for a writ of certiorari with the Court of Appeals and serve the petition on the state agency not more than thirty days after the party receives the final decision and order of the agency. Concomitantly, copies of the writ of certiorari must also be served upon all parties to the proceeding before the agency. *See* Minn. Stat. § 14.64. However, the statute does not establish a time for service upon the parties.

In reaching its decision to dismiss Plaintiff's appeal as untimely, the Minnesota Court of Appeals determined that since the time for service on other parties mandated by Minn. Stat. § 14.64 is not specified by statute, the Court must employ its rules of appellate procedure to provide the time for service. *See* Order of Chief Judge Edward Touissant, attached to Complaint. The Court further explained that under Minn.R.Civ.App.P. 115.03 service on other parties must be accomplished no later than thirty-three days after the decision under appeal is mailed. *Id.* Since the decision under appeal was mailed on August 4, 1995 and service was not accomplished until September 15, 1995, the Court of Appeals found that service was untimely. Accordingly, the appeal was dismissed for untimely service. *Id.*

Minnesota Courts have determined that if a writ is not timely issued or served, the writ must be discharged for lack of jurisdiction. *See Matter of Ultraflex Enterprises' Appeal,* 494 N.W.2d 89, 90-91 (Minn. Ct. App. 1992), *Roseville Educ. Ass'n. v. Independent School District No. 623,* 391 N.W.2d 846, 849 (Minn. 1986) (issuance of a writ within the required time is a jurisdictional prerequisite to judicial review); *Matter of the License Applications of Polk County Ambulance Service,* 548 N.W.2d 300 (Minn. Ct. App. 1996). Since Plaintiff's appeal was dismissed because the petition and writ were not timely served, the dismissal must be construed as being for want of jurisdiction. Therefore, the dismissal was not on the merits and, accordingly, this appeal is not barred by res judicata.[6] *See* Minn.R.Civ.P. 41.02(c) and *Charchenko,* 47 F.3d at 984-85.

III. Statute of Limitations

A. IDEA

In this case, the hearing review officer rendered her decision on August 4, 1995. Plaintiff subsequently filed the instant action on December 11, 1995. Defendants argue that Plaintiff's IDEA claims are barred on statute of limitations grounds. Although IDEA does not establish a limitations period, Defendants contend the Court should adopt the most closely analogous limitations period. This period is argued to be the thirty-day limitations period that governs judicial review of adverse state agency decisions, including appeals from adverse decisions by hearing review officers under the IDEA and Minnesota Stat. § 120.17, under the Minnesota administrative procedures act. *See* Minn. Stat. § 14.63. Plaintiff resists this argument by asserting that no statute of limitations should be applied, or, in the alternative, that a one-year statute of limitations be adopted.

The IDEA does not set a limitations period for lawsuits brought under its terms. "In such situations we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to 'borrow' the most suitable statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitation under state law, provided that it is not inconsistent with federal law or policy to do so."*Amann v. Town of Stow,* 991 F.2d 929, 931 (1st Cir. 1993) (citations omitted).

No Eighth Circuit Court of Appeals case has addressed the issue of the appropriate statute of limitations for IDEA cases. Moreover, the other Circuit Courts of Appeals are split. Some Courts have adopted Defendants' proposal and applied the generally short statute of limitations for judicial review of administrative decisions. *See Livingston School Dist. Nos. 4 and 1 v. Keenan,* 82 F.3d 912, 916 (9th Cir. 1996) (action under the IDEA challenging an administrative hearing officer's decision is more analogous to judicial review of an administrative appeal than to an action upon a liability created by statute. Differences in the standard of review are "relatively minor" given the district court's quasi-appellate role under section 1415(e)(2). Applying a short judicial review limitations period is consistent with the IDEA's policy of prompt resolution of questions.); *Amann,* 991 F.2d at 931-32 (Massachusetts Administrative Procedures Act contains the "most analogous" state law cause of action to the civil action authorized by § 1415(e)(2), thus thirty-day limitations period is applicable); *Spiegler v. District of Columbia,* 866 F.2d 461, 464-65 (D.C. Cir. 1989) (After the Supreme Court's decision in *Board of Education v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034 (1982) which indicated that some deference should be afforded to state administrative proceedings, suit under § 1415(e)(2) is sufficiently analogous to an appeal from an administrative decision such that a 30-day limitations period should be applied. Thirty-day period is consistent with the Act's goal of prompt resolution of disputes.) *Dell v. Board of Education, Township High School District 113,* 32 F.3d 1053, 1059-61 (7th Cir. 1994) (the Illinois School Code, with its 120-day limitations period, is most closely analogous to the IDEA and is also consistent with the IDEA's policy of "prompt, rather than protracted, resolution of disputes"); and *Adler by Adler v. Education Dept. of State of New York,* 760 F.2d 454 (2nd Cir. 1985) (state laws process for reviewing administrative decisions involving handicapped children was most analogous to IDEA action, thus four-month period adopted. Symmetry of having same statute of limitations period for both state and federal claims also cuts in favor of 120-day period).

Conversely, other Courts have determined that longer limitations periods are more appropriate. *See Scokin v. State of Texas,* 723 F.2d 432, 437-38 (5th Cir. 1984) (Thirty-day period for review of administrative decisions is inconsistent with the federal policies underlying the IDEA, court adopted a two-year period generally applicable to tort claims); and *Monahan v. State of Nebraska,* 491 F.Supp. 1074, 1084-85, *vac. in part on other grounds* 645 F.2d 592 (8th Cir. 1981) (differences in the standard

of review between the Nebraska administrative review statute and review by the district court under IDEA require that the state administrative review statute not be adopted. Thirty-day limitations period would also run counter to policies effectuated by IDEA).

Finally, a third group of courts have taken the position that the statute of limitations should be determined on a case-by-case basis weighing the facts of each case. *See Murphy v. Timberlane Regional School District,* 22 F.3d 1186, 1192-93 (1st Cir. 1994) (based upon facts and procedural posture, six-year statute of limitations for personal injury suits applied); *Janzen v. Knox County Board of Education,* 790 F.2d 484, 489 (6th Cir. 1986) (selection of limitations period for IDEA claims must be done on a case-by-case basis; three-year period adopted).

In this case, the review contemplated by the IDEA is most analogous to review under Minnesota's Administrative Procedures Act ("APA").[7] Both the IDEA and the APA contemplate that the review will be based primarily on the record of the administrative proceedings.[8] *See Livingston School,* 82 F.3d at 916 ("administrative record is usually the principal evidence before the reviewing court in either IDEA actions or administrative appeals"); *Spiegler,* 866 F.2d at 465 (district court has a "quasi-appellate role under section 1415(e)(2)") and Minn. Stat. § 14.68 ("the review shall be confined to the record").

The fact that a district court must accept additional evidence at the request of a party does not sufficiently distinguish the IDEA action in district court from appellate review. First, as noted *supra,* the administrative record is normally the principal piece of evidence. Second, Minn. Stat. § 14.67 provides the Minnesota Court of Appeals a means of permitting the parties to submit additional evidence in a review of an administrative decision.[9] While more cumbersome and more restrictive than in federal court, the opportunity to present additional evidence, and in fact obtain further administrative review, compels a finding that appellate review of administrative decisions by the Minnesota Court of Appeals is similar to the review conducted by a Federal District Court.

Finally, while the standards of review are different, *cf.* § 1415(e)(2) (preponderance of the evidence), *with* Minn. Stat. § 14.69(e), (f) (unsupported by substantial evidence in view of the entire record as submitted; or arbitrary or capricious), both require the reviewing court to defer to the agency's substantive determinations. *See Spiegler,* 866 F.2d at 466. Consequently, a suit under § 1415(e)(2) is sufficiently analogous to an appeal from an administrative decision under Minn. Stat. §§ 14.63-.69 to permit the borrowing of the thirty-day limitations period for such appeals. *See* Minn. Stat. § 14.63.

As set forth in the cases *supra,* the thirty-day limitations period is consistent with the federal policies underlying the IDEA. Prompt resolution of IDEA disputes is imperative because of the harm caused to the disabled child by delay in establishing an appropriate program. In the final Senate debate on the legislation, Senator Harrison Williams of New Jersey, its principal author, stated:

I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development. Thus, in view of the urgent need for prompt resolution of questions involving the education of handicapped children it is expected that all hearing and review conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable consistent with a fair consideration of the issues involved.

121 Cong.Rec. 37,416 (1975) (*quoted in Spiegler,* 866 F.2d at 467 and *Livingston School,* 82 F.3d at 916-17). Permitting parties an extended period to file their claims in federal court will, in the end, work

to the detriment of disabled students by leaving unresolved the course of their educational programs.

The thirty-day limitations period is also appealing because of the symmetry it creates with appeals to the Court of Appeals from administrative decisions under Minn. Stat. § 120.17. Under the IDEA, an aggrieved party may appeal to either federal or state court after exhausting administrative procedures. If an aggrieved party in Minnesota appeals to state court, she is permitted thirty days, from the date she received the hearing review officers' decision, to file a writ of certiorari with the Minnesota Court of Appeals. Establishing the identical limitations period for resort to United States District Court will assist in the administration of Justice by eliminating potential confusion for aggrieved parties. With thirty-day limitations periods in both federal and state courts, an aggrieved party will be aware that any action must be taken within thirty days.[10]

Any perceived harshness imposed by the relatively short thirty-day limitations period can be alleviated through equitable tolling in appropriate cases. *Livingston School,* 82 F.3d at 917, *see also Anderson v. Unisys Corp.,* 47 F.3d 302, 306 (8th Cir. 1995). This, however, is not such a case. Plaintiff was represented by counsel from the time he filed his initial request for a due process hearing until the present. In addition, his counsel has previously represented that she practices substantially, if not exclusively, in school law. Plaintiff's counsel was also aware of the thirty-day period for appeal to the Minnesota Court of Appeals. In addition, other courts' "borrowing" of statutes of limitations from administrative appeal processes in IDEA cases were readily available for her review. Thus, Plaintiff's counsel could not be "surprised" that a thirty-day limitations period might be borrowed. Therefore, equitable tolling is not warranted in this case.[11]

Based upon the foregoing, Plaintiff's IDEA claims are dismissed on statute of limitations grounds. The IDEA claims were required to be filed within thirty-days of the decision by the hearing review officer. The claims were not filed for over four months after the August 4, 1995 decision. Accordingly, the IDEA claims are time-barred.[12]

B. §§ 1983, 1985, ADA, § 504, Minnesota Human Rights Act

Defendants argue that Plaintiffs claims under 42 U.S.C. §§ 1983 and 1985; Title II of the ADA, 42 U.S.C. §§ 12131-12134; § 504 of the 1973 Rehabilitation Act; and the Minnesota Human Rights Act, are all barred by the applicable statutes of limitations. They allege that each of the claims should be deemed to have a one-year statute of limitations. Since Plaintiff moved to Bloomington in October, 1994 and did not file this lawsuit until December 11, 1995, they contend that Plaintiff's claims were not timely made. Plaintiff opposes Defendants' argument insisting that his efforts to exhaust his administrative requirements under the IDEA should toll any limitations period.

1. § 1983 & § 1985

Neither § 1983 nor § 1985 provide a specific statute of limitations. Thus, like with the IDEA analysis, the courts must "borrow" a limitations period. In *Wilson v. Garcia,* 471 U.S. 261, 105 S.Ct. 1938 (1985), the Supreme Court determined that § 1983 claims are most closely analogous to claims for personal injuries. *Id.* at 281, 105 S.Ct. at 1949. The Court felt that "[i]t is most unlikely that the period of limitations applicable to [personal injury claims] ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect."*Id.,* 105 S.Ct. at 1949. Later, the Supreme Court clarified *Wilson* by holding that "where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions."*Owens v. Okure,* 488 U.S. 235, 250, 109 S.Ct. 573,

582 (1989).

Courts interpreting the Supreme Court's decisions have concluded that in Minnesota § 1983 claims are governed by the six-year limitations period of Minnesota's personal-injury statute, Minn. Stat. § 541.05, subd. 1(5). *Egerdahl v. Hibbing Community College,* 72 F.3d 615, 618 (8th Cir. 1995); *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County, Minnesota,* 867 F.Supp. 1430, 1436-37 (D. Minn. 1994) ("in the wake of *Owens,* . . . [t]he court agrees that the six year limitations period found in Minnesota's residual statute for personal injury actions applies to section 1983 claims").

Based upon the above, it is clear that Minnesota's residual six-year limitations period for personal injury actions applies to Plaintiff's § 1983 claims.[13] Therefore, the § 1983 claims were timely filed.

In addition, courts have found that § 1985 claims, like § 1983 actions, are governed by state statutes of limitations for personal injury actions. *See Bougher v. University of Pittsburgh,* 882 F.2d 74 (3rd Cir. 1989) ("[b]ecause section 1985(3) violations necessarily involve a conspiracy to deprive another of rights, privileges, and immunities, the underlying deprivations sound in tort"); *McDougal v. County of Imperial,* 942 F.2d 668, 673 (9th Cir. 1991) (actions under § 1985 are designed to remedy the same types of harms as actions under § 1983, thus actions under § 1985 are governed by the same statute of limitations as § 1983 action); *Penn v. Iowa State Board of Regents,* 999 F.2d 305, 307 (8th Cir. 1993) ("[t]he parties agree that the applicable statute of limitations for section 1983 and section 1985 claims is the two-year statute of limitations for personal injury"); *Kaster v. State of Iowa,* 975 F.2d 1381, 1382 (8th Cir. 1992) ("[t]he district court held, and the parties now agree, that Iowa's two-year personal injury statute of limitations applies to this action [under §§ 1983, 1985 & 1986]"); and *Horton v. Marovich,* 925 F.Supp. 540, 543 (N.D. Ill. 1996) ("the two-year personal injury statute of limitations that applies to section 1983 also applies to section 1985(3) actions"). Thus, Plaintiff's § 1985 claim is also controlled by Minnesota's residual six-year limitations period for personal injury actions. Accordingly, it is not time barred.

2. ADA, § 504 and the Minnesota Human Rights Act

Defendant SSD1 contends that these claims are governed by a one-year statute of limitations and are time barred because this lawsuit was not filed for more than one year after Plaintiff moved to Bloomington.

Plaintiff's claim under the Minnesota Human Rights Act is controlled by a one-year statute of limitation. Minn. Stat. § 363.06, subd. 3. In addition, it is at least arguable that a one-year statute of limitations should also apply to Plaintiff's ADA and § 504 claims. *See McCullough v. Banch Banking & Trust Co.,* 35 F.3d 127, 130-32 (4th Cir. 1994) (Finding that state personal injury statute is not most analogous to § 504 Rehabilitation Act claim, but instead determining that a North Carolina statute, which was specifically designed to address employment discrimination on the basis of handicap or disability, was more analogous to § 504. Thus, 180-day limitations period of the North Carolina statute was employed); *but see Cheeney v. Highland Community College,* 15 F.3d 79, 81 (7th Cir. 1994) (two-year statute of limitations governing personal injury suits in Illinois applies to claims brought under the Rehabilitation Act); *Baker v. Board of Regents of the State of Kansas,* 991 F.2d 628, 632 (10th Cir. 1993) ("[b]ecause a section 504 claim is closely analogous to section 1983, we find that section 504 claims are best characterized as claims for personal injuries"); *Hickey v. Irving Independent School District,* 976 F.2d 980, 982-83 (5th Cir. 1992) ("Of the state law claims governed by the Texas statutes of limitations, we find that personal injury claims are most nearly analogous to the discrimination claims authorized by the Rehabilitation Act."); *Morse v. University of Vermont,* 973 F.2d 122, 127 (2nd Cir. 1992) ("we now hold that actions under § 504 of the Rehabilitation Act are governed by the state statute of limitations

applicable to personal injury actions"); and *see also Doe v. County of Milwaukee,* 871 F.Supp. 1072, 1078 (E.D. Wis. 1995) ("Because Title II [of the ADA], like the Rehabilitation Act, §§ 1983, 1981 and 1985, offers broad-ranging protection against a wide variety of forms [of], discrimination, the six-year limitations period [under Wisconsin law for injury to character or other rights] applies. . . . ").

Nevertheless, even assuming the adoption of a one-year statute of limitations, Defendant SSD1's argument is flawed for two reasons. First, while Plaintiff moved to Bloomington in the fall of 1994, his Complaint alleges that he continued to attend programs in SSD1 throughout the fall semester of the 1994-1995 school year. *See* Complaint, ¶ 11. Since the fall semester extended beyond December 11, 1994, his lawsuit filed on December 11, 1995 fell within the necessary one-year period required by the Minnesota Human Rights Act and arguably the ADA and § 504 of the Rehabilitation Act.

In addition, Plaintiff Smith was a minor at the time he instituted this action. Thus, Plaintiff was under a disability as defined in Minn. Stat. § 541.15(a)(1) such that the running of the statute of limitations was suspended until he reached the age of eighteen. While this tolling provision was not adopted by the Court for purposes of Plaintiff's IDEA claim because it ran counter to one of the prime underlying federal policies of the IDEA, no such impediments exist as to Plaintiff's other federal claims. Thus, the tolling provision of Minn. Stat. § 541.05 is adopted for purposes of Plaintiff's ADA and § 504 claims. *See Hickey,* 976 F.2d at 983-84. Accordingly, Plaintiff's claims under the ADA, § 504 of the Rehabilitation Act and the Minnesota Human Rights Act are not barred on statute of limitations grounds.

IV. SSD1's Allegation of Plaintiff's Failure to State a Claim

Plaintiff asserts claims against SSD1 based on Section 504, the ADA, section 1983 and section 1985. SSD1 alleges that Plaintiff has failed to state a claim upon which relief may be granted under any of these causes of action. Thus, SSD1 insists that these claims must be dismissed. In addition, SSD1 asserts that Plaintiff's claim under the Minnesota Human Rights Act should be dismissed for lack of supplemental jurisdiction.

A. § 504 and Title 11 of the ADA

Section 504 provides in pertinent part:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

See 29 U.S.C. § 794(a). The Eighth Circuit Court of Appeals has determined that while the Rehabilitation Act is broader than the IDEA, because it applies to a wide-range of federally funded activities, it is also narrower than the IDEA because it does not "impose an affirmative-action obligation on all recipients of federal funds."*Monahan v. State of Nebraska,* 687 F.2d 1164, 1170 (8th Cir. 1982) (citation omitted). "Section 504, instead, is simply a prohibition of certain conduct on the part of recipients of federal financial assistance."*Id.* Thus, in the context of education of children with disabilities, the Eighth Circuit has found that either "bad faith or gross misjudgment" should be shown before a § 504 violation can be made out. *Id., see also Heidemann v. Rother,* 84 F.3d 1021, 1032 (8th Cir. 1996).

Similarly, Title 11 of the ADA provides that, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity," 42 U.S.C. § 12132.

Moreover, "[t]he remedies, procedures, and rights set forth in [§ 504 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." Courts analyzing claims under Title II of the ADA have found that the standards applicable to the Rehabilitation Act also apply to claims under Title II of the ADA because "Title II of the ADA essentially extends the anti-discrimination prohibition embodied in section 504 to all actions of State or local governments."*Dertz v. City of Chicago,* 912 F.Supp. 319, 325-26 n. 2 (N.D. Ill. 1995); *Helen L. v. DiDario,* 46 F.3d 325, 331 (3rd Cir. 1995). Accordingly, for purposes of this motion, the Court will assume Plaintiff must establish either bad faith or gross misjudgment before an ADA claim under Title II can be shown. *But see Peterson v. Hastings Public Schools,* 31 F.3d 705, 708 (8th Cir. 1994) (where the Court affirmed the District Court's use of a burden-shifting analysis on an ADA, Title II claim).

Taking the allegations in the Complaint as true, as the Court must, SSD1's motion must be denied. Plaintiff alleges that he was "frequently dismissed, suspended or excluded from school because of his disabling condition."*See* Complaint, ¶ 26. If true, these actions would amount to the "denial of the benefits" of SSD1's services or programs for purposes of the Rehabilitation Act or Title II of the ADA. Moreover, it is possible that Plaintiff can show both that these allegations are true and also the requisite elements of bad faith or gross misjudgment. This is simply not a case where the Plaintiff has included allegations that show on the face of the complaint that there is some insuperable bar to relief with respect to the § 504 and ADA claims against SSD1. *City of Herculaneum,* 44 F.3d at 671. Accordingly, SSD1's motion to dismiss these claims must be denied.

B. § 1983

School districts can be liable under § 1983 if the district has an official custom or policy which causes an individual to suffer a constitutional harm. *Thelma D. by Delores A. v. Board of Education of the City of St. Louis,* 934 F.2d 929, 932 (8th Cir. 1991). "Official policy involves a deliberate choice to follow a course of action made from among various alternatives by an official who has the final authority to establish governmental policy."*Jane Doe A. v. Special School District of St. Louis County,* 901 F.2d 642, 645 (8th Cir. 1990) (citations omitted). The existence of a custom may be found in "persistent and widespread . . . practices . . . [which are] so permanent and well settled as to [have] the force of law."*Thelma D.,* 934 F.2d at 932, *quoting Monell v. Dep't. of Social Services,* 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36 (1978) *see also Hoekstra v. Independent School Dist. No. 283,* 916 F.Supp. 941, 946-47 (D. Minn. 1996).

SSD1 argues that its motion should be granted because Plaintiff has not set forth any policy or custom of SSD1 which violates his rights. Meanwhile, Plaintiff insists that SSD1 does have a custom of denying "special education hearings to any black children who requested same on June 7, 1995 and who were not living in the district at the time of the request for hearing or if residing in the district, were not attending school in the district."*See* Pl.'s Mem. in Opp. at 22.

In his Complaint, Plaintiff alleged no custom or policy which caused him to suffer a harm. Moreover, it is obvious that the "custom" described by Plaintiff in his brief is so narrow as to be incapable of being a "persistent and widespread practice that is permanent and well-settled." Instead, Plaintiff is attempting to transform his alleged denial of a due process hearing into a § 1983 claim against SSD1. This event, in and of itself, is not sufficient to create liability against SSD1 under § 1983. Accordingly, SSD1's motion will be granted.

C. § 1985

A civil conspiracy is defined as "a combination of two or more persons acting in concert to commit an unlawful act or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another and an overt act that results in damage."*Rotermund v. United States Steel Corp.,* 474 F.2d 1139, 1145 (8th Cir. 1973). To establish a conspiracy under 42 U.S.C. § 1985(3) as alleged by Plaintiff, a plaintiff must prove:

that the defendants did (1) conspire . . . (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . that one or more of the conspirators (3) did, or caused to be done, any act in furtherance of the object of [the] conspiracy, whereby another was (4a) injured in his person or property or (4b) deprived of having and exercising any right or privilege of a citizen of the United States.

Marquart v. Lodge 837, International Association of Machinists and Aerospace Workers, 26 F.3d 842, 853-54 (8th Cir. 1994). A plaintiff "must allege with particularity and specifically demonstrate will material facts that the defendants reached an agreement."*City of Omaha Employees Betterment Ass'n. v. City of Omaha,* 883 F.2d 650, 652 (8th Cir. 1989). However, a plaintiff need not demonstrate that each participant knew the "exact limits of the illegal plan . . . " and can prevail if a "jury could infer from the circumstances a 'meeting of the minds' or understanding among the conspirators to achieve the conspiracy's aims."*Hampton v. Hanrahan,* 600 F.2d 600 (7th Cir. 1979), *quoted in Putman v. Gerloff,* 701 F.2d 63, 65 (8th Cir. 1983).

The "purpose" element of the § 1985 conspiracy requires the plaintiff to prove a class-based "invidiously discriminatory animus."*City of Omaha,* 883 F.2d at 652. "[T]here must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."*Griffin v. Breckenridge,* 403 U.S. 88, 102, 91 S.Ct. 1790, 1798 (1971).

In his claims for relief, Plaintiff failed to allege that SSD1 conspired with anyone to deprive him of the equal protection of the laws. Moreover, Plaintiff, while claiming to be a disabled minor of African-American heritage, did not allege that SSD1's actions were motivated by some "racial, or . . . otherwise class-based, invidiously discriminatory animus."*Id.* Instead, Plaintiff merely alleged that his rights were violated under § 1985(3). Thus, Plaintiff has failed to state a claim under § 1985(3). *See Senegal v. Jefferson County,* 785 F.Supp. 86, 89 (E.D. Tex. 1992); *Lucas v. New York City,* 842 F.Supp. 101, 104 (S.D. N.Y. 1994).

Nevertheless, since Plaintiff did allege SSD1's involvement in a conspiracy in the facts portion of the Complaint and because his failure to allege a racial or other class-based invidiously discriminatory animus is easily curable, the Court will accept Plaintiff's request to amend the Complaint. *See* Plaintiff's Mem. at 23. Thus, Plaintiff will be granted twenty days from the date of thus Order to amend his Complaint to state a claim under § 1985(3).

D. Minnesota Human Rights Act

Defendant's motion to dismiss this claim is dependent upon the dismissal of all of Plaintiffs federal claims. Since some of his federal claims will survive this motion, Defendant's motion to dismiss Plaintiff's Minnesota Human Rights Act claim will be denied.

V. Bruce Johnson's Allegation of Plaintiff's Failure to State a Claim for Relief

Defendant Johnson contends that the claims made by Plaintiff, even if true, would not entitle Plaintiff to relief. Thus, he seeks to have Plaintiff's Complaint dismissed.

A. § 1983

42 U.S.C. § 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Section 1983 creates no substantive rights, but merely provides a remedy for the deprivation of existing constitutional or statutory rights. *Boldthen v. Independent School District No. 2397,* 865 F.Supp. 1330, 1335 (D. Minn. 1994). "To state a claim under section 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States."*Buckley v. Barlow,* 997 F.2d 494, 495 (8th Cir. 1993), *quoting West v. Atkins,* 487 U.S. 42, 48, 108 S.Ct. 2250, 2255-56 (1988).

"Neither a State nor its officials acting in their official capacities are 'persons' under § 1983."*Hafer v. Melo,* 502 U.S. 21, 26, 112 S.Ct. 358, 362 (1991) (citations omitted). However, "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State."*Id.* (citations omitted), *see also Henne v. Wright,* 904 F.2d 1208, 1211 n. 2. (8th Cir. 1990) ("[i]n an action for prospective relief . . . state officials sued in their official capacity are treated as "persons" under section 1983").

In this case, Plaintiff has alleged violations of the IDEA in support of his § 1983 action. While Defendant Johnson asserts that Plaintiff's claims fail to state a claim upon which relief may be granted, it is clear, that if true, Plaintiff has alleged violations of federal law. Thus, it cannot be said that Plaintiff can prove no set of facts consistent with his allegations that would entitle him to relief. Accordingly, Defendant Johnson's motion to dismiss Plaintiff's § 1983 claim must be denied.[14]

B. § 1985

At this juncture, the Court is unwilling to find that Plaintiff can prove no set of facts in support of his § 1985(3) claim. Thus, for the reasons stated *supra* in section III(C), this Court will allow Plaintiff to amend his Complaint to allege that Defendant Johnson's actions were motivated by a class-based "invidiously discriminatory animus."

However, to survive judgment, Plaintiff will need to come forward with material facts to support his conspiracy allegations. Overextended inferences and unsupported allegations will not suffice to ward off summary dismissal.

VI. Defendant Peter Hutchinson

Defendant Peter Hutchinson moves to be dismissed from this lawsuit alleging that no claims were made against him and that he is shielded from Plaintiff's claims by qualified immunity.

In his Complaint, Plaintiff named Peter Hutchinson as a party Defendant. However, he did not allege any claims against Mr. Hutchinson. Accordingly, Defendant Hutchinson is dismissed as a party.

Conclusion

Accordingly, based upon the foregoing, and all of the files, records and proceedings herein, IT IS

HEREBY ORDERED that:

1. Defendant Johnson's motion to dismiss (Doc. No. 6) is GRANTED IN PART.[15] Plaintiff's claim against Defendant Johnson premised on the IDEA is dismissed;

2. Defendant Special School District No. 1's and Peter Hutchinson's motion to dismiss (Doc. No. 21) is GRANTED IN PART. Plaintiff's IDEA and § 1983 claims against SSD1 are discussed and Defendant Hutchinson is also dismissed from this lawsuit; and

3. Plaintiff's remaining claims are as follows: Count I---a claim under § 1995 against SSD1; Count II---claims under the ADA, § 504, and the Minnesota Human Rights Act against SSD1; and Count III---claims under § 1983 and § 1985 against Defendant Johnson.

[1] On October 1, 1995, the Minnesota Department of Education ("MDE") was incorporated into the newly created MDCFL. The terms MDCFL and MDE will be used interchangeably throughout this memorandum.

[2] Plaintiff was 17 years old at the time his request for a due process hearing was filed on June 7, 1995.

[3] It is apparent from her Order that Administrative Law Judge Frankman was told by the Minneapolis School District that her Order would be appealed to the District Court. It was not appealed to Federal District Court and instead was actually appealed through administrative channels for a Level 2 review. The propriety of this review is an issue to be resolved in this case.

[4] Defendants SSD1's and Hutchinson's motion to dismiss has been styled as a motion for judgment on the pleadings under Fed.R.Civ.P. 12(c). However, the motion is in actuality a motion for failure to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6). However, because the motion was brought after their answer, they were unable to bring the motion under 12(b)(6). Nevertheless, Fed.R.Civ.P. 12(h)(2) specifically allows "[a] defense of failure to state a claim upon which relief can be granted . . . "to be made" . . . by motion for judgment on the pleadings. . . . "*See also Kornblum v. St. Louis County, MO.,* 48 F.3d 1031, 1038 (8th Cir. 1995); *Westcott v. City of Omaha,* 901 F.2d 1486, 1488 (8th Cir. 1990) and *Taylor v. United States Internal Revenue Service,* 915 F. Supp. 1015, 1017 (N.D. Iowa 1996). Moreover, a 12(c) motion is reviewed under the same standard as a 12(b)(6) motion. *See Westcott,* 901 F.2d at 1488, and *Taylor,* 915 F.Supp. at 1017-18.

[5] § 1738 provides in pertinent part that: "[s]uch . . . judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."*See also Charchenko v. City of Stillwater,* 47 F.3d 981, 984 & n.3 (8th Cir. 1995).

[6] The Defendants also assert that since § 1415(e)(2) of the IDEA provides dissatisfied parties the right to review in either a state court of competent jurisdiction *or* in Federal district court, Plaintiff is barred from proceeding in this forum because he already chose to proceed in State Court. They argue that the statute does not contemplate resort to both State court and Federal court. The three cases cited in conjunction with this argument do not support this proposition. First, in *Eberle v. Board of Public Education of the School District of Pittsburgh, PA,* 444 F.Supp. 41 (1977), the Court dismissed a suit under the Education for All Handicapped Children Act ("EHCA"), now renamed IDEA, finding that it did not have jurisdiction to review the placement of the plaintiff in a special education class when the placement occurred prior to the effective date of the EHCA. The second and third cases, *Coe v.*

Michigan Dept. of Educ., 693 F.2d 616, 617 (6th Cir. 1982) and *Scruggs v. Campbell,* 630 F.2d 237, 239 (4th Cir. 1980), merely stand for the proposition that an aggrieved party cannot file suits under IDEA in both state and federal courts simultaneously. That situation is not present here.

Moreover, while Plaintiff may have tried to choose a state forum, jurisdiction never vested in the Court of Appeals. Thus, Plaintiff did not actually litigate in a state forum. Accordingly, this argument is unavailing.

[7] No other federal statute was offered as an alternative from which to borrow a statute of limitations. Moreover, no other federal statute appears to be more analogous than the APA. *Dell,* 32 F.3d at 1058.

[8] 20 U.S.C. § 1415(e)(2) provides in pertinent part:

Any party aggrieved by the findings and decision made [in the administrative proceedings] shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

[9] Minn. Stat. § 14.67 provides:

If, before the date set for hearing, application is made to the court of appeals for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

[10] The Court notes that it finds particularly unworkable the solution of some courts to determine the applicable IDEA limitations period on a case-by-case basis. This method is sure to breed satellite litigation and create unnecessary uncertainty. Although addressing the broader § 1983 action, the Supreme Court's language in *Wilson v. Garcia,* 471 U.S. 261, 274-275, 105 S.Ct. 1938, 1946-47 can easily be applied to the IDEA, "the legislative purpose to [assure that all children with disabilities have available to them . . . a free appropriate public education] is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters. . . . The federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach [of choosing one limitations period for each State]."

[11] Plaintiff also asserts that his claim is not time barred because the statute of limitations is tolled while he is a minority. In support of his argument, he points to Minn. Stat. § 541.15(a)(1), which provides that a period of limitations is suspended when a plaintiff is less than 18 years old.

When federal courts borrow a state statute of limitations, the court also borrows the state's rules for tolling, unless to do so would be "incompatible with the federal policy underlying the cause of action under consideration."*Board of Regents v. Tomanio,* 446 U.S. 478, 485, 100 S.Ct. 1790, 1795 (1980). In

this case, borrowing Minnesota's tolling provision as it relates to those of a minority age would be completely incompatible with the federal policy of prompt resolution of IDEA disputes. *See Alexopulos v. San Francisco Unified School District,* 817 F.2d 551, 555 (9th Cir. 1987), *but cf. Shook v. Gaston County Board of Education,* 892 F.2d 119, 121-22 (4th Cir. 1989). Moreover, since an IDEA claim will almost always accrue to someone younger than 18, the tolling provision is inconsistent with the cause of action. Having a short limitations period leads to parties asserting their claims in a timely manner and leads to prompt resolution. Permitting parties to wait, if they choose, until they reach the age of 18 would defeat one prime purpose of IDEA. Accordingly, the tolling provision will not be borrowed.

[12] Plaintiff's IDEA claims are also subject to dismissal because he was not a student at the time he filed his request for a due process hearing. Minn. Stat. § 120.17, subd. 1 requires that each school district provide special instruction and services "for children with a disability who are residents of the district and who are disabled. . . . " As part of its duty, a resident district must provide the parents the opportunity to obtain an impartial due process hearing when they object to a proposed assessment, placement, transfer, addition or denial of educational services. Minn. Stat. § 120.17, subd. 3b(e)(1-5).

At the time of his request for a hearing, Plaintiff was not a resident of SSD1. Thus, SSD1 was not responsible for providing Plaintiff with special instruction and services and was not required to provide an IDEA due process hearing to Plaintiff. *See Thompson v. Board of the Special School District No. 1,* No. 3-95-1083 (D. Minn. July 31, 1996); *Byrd III v. Independent School District No. 11,* 3-95-139 (D. Minn. March 23, 1995.). *Monahan v. State of Nebraska,* 687 F.2d 1164, 1168 (8th Cir. 1982). In addition, Plaintiff's requested hearing was not for any proposed action by SSD1 and was instead aimed at allegedly deficient services previously provided. This type of complaint is not covered by Minn. Stat. § 120.17, subd. 3b(e). *Thompson,* at 6. Like the Court in *Thompson,* this Court finds the Minnesota Court of Appeals's decision in *H.M. v. Special School District No. 1* (Unpublished Slip. Op., May 14, 1996) unpersuasive. Accordingly, Plaintiff's IDEA claims must also be dismissed because Plaintiff had no right to a hearing under the IDEA or Minn. Stat. § 120.17 against SSD1.

[13] Minn. Stat. § 541.05, subd. 1(5) provides that, "Except where the uniform commercial code otherwise prescribes, the following actions shall be commenced within six years: (5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated."

[14] In a footnote, Defendant Johnson insists that Plaintiff § 1983 claim is precluded by the IDEA because the IDEA is a "comprehensive and exclusive remedial scheme which precludes reliance upon a cause of action under section 1983."*Quoting, Dept. of Educ. of the State of Hawaii v. Katherine D.,* 727 F.2d 809, 820 (9th Cir. 1983). It is no surprise that the cited case precedes the year 1986. For in 1986, Congress, in response to a Supreme Court decision, amended the IDEA to state specifically that the IDEA is not the exclusive avenue through which parents may enforce the rights of their handicapped children. *See Digre v. Roseville Schools Independent District No. 623,* 841 F.2d 245, 249 (8th Cir. 1988). Subsection 1415(f) provides:

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Moreover, in interpreting this provision, the Eighth Circuit Court of Appeals in *Digre* found that a § 1983 action based on alleged violations of IDEA may be brought. *Digre,* 841 F.2d at 250.

It is apparent that Defendant Johnson's argument is about ten years too late.

[15] Matters outside the pleading were presented to the Court by Defendant.Johnson. In accordance with Fed.R.Civ.P. 12(b), these matters were excluded and not reviewed by the Court. Accordingly, this motion remained a motion to dismiss under Rule 12(b)(6) and was not converted into a summary judgment motion.

Statutes Cited

20 U.S.C. 1400(c)
20 U.S.C. 1415(e)
Fed.R.Civ.P. 12(c)
Fed.R.Civ.P. 12(b)(6)
28 U.S.C. 1331
28 U.S.C. 1367
28 U.S.C. 1738
Fed.R.Civ.P. 41(b)
20 U.S.C. 1415(e)(2)
42 U.S.C. 1983
42 U.S.C. 1985
29 U.S.C. 794(a)
42 U.S.C. 12131-12134
42 U.S.C. 12132
42 U.S.C. 1985(3)

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