



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

By Fax and U.S. Mail

JUN 25 2002

Dr. Norena A. Hale
Director, Division of Special Education
Minnesota Department of Children, Families
and Learning
1500 Highway 36 West
Roseville, Minnesota 55113-4266

Dear Dr. Hale:

Thank you for your e-mail letter dated June 7, 2002 responding to OSEP's June 4, 2002 letter, which requested that Minnesota revise its 30-day limit for appealing due process hearing decisions to state court under Minnesota Statute 125A.09 (which cross-references Minnesota's administrative procedures act (APA) in Minnesota Chapter 14). OSEP's request is based on applicable law in the U.S. Court of Appeals for the Eighth Circuit, which specifically rejected a 30-day limit because it conflicted with the policies and purposes of the Individuals with Disabilities Education Act (IDEA). *Birmingham v. Omaha School Dist. et al*, 220 F.3d 850 (8th Cir. 2000).

Minnesota distinguished the 30-day limit of Minn. Stat. 125A.09 as applying to appeals of due process hearing decisions and not IEP decisions. However, the Eighth Circuit in *Birmingham* specifically rejected as too short 30 days to file in court and made no distinction between an appeal of a due process hearing decision and a school district's decision.

In *Birmingham*, the Eighth Circuit specifically reviewed the Arkansas APA and rejected it not only because its 30-day limit was too short and undermined the IDEA but also because the nature of the review provided for under the Arkansas APA was not analogous to the judicial review rights of parties under the IDEA. The Arkansas APA differed from judicial review under the IDEA because (1) it did not provide for independent review but rather for affirmance, reversal or modification; (2) the scope of review was more limited (reversal only for one of six stated conditions) and not "an independent decision of the issues based on a preponderance of the evidence"; and (3) the standard for admitting additional evidence was different under the Arkansas APA and the IDEA.

Similarly, as we noted on the original issues chart, judicial review under Minnesota's APA is also narrower than judicial review under the IDEA as required under §615 of IDEA and 34 CFR §300.512(b). Specifically, MN Chapter 14.67 and 14.68 limit whether and when additional evidence can be admissible. MN Chapter 14.69 limits the scope of

review by neither allowing for independent review (by requiring affirmance or reversal or modification based on seven enumerated conditions similar to the Arkansas APA), nor allowing Minnesota courts to base their decisions on the preponderance of the evidence. Thus, the judicial review provided for by Minnesota is inconsistent with the federal judicial review rights under §615 of the IDEA.

We take no position on what other Minnesota statute might be considered analogous to the appeal of a due process hearing under the IDEA. Rather, we are requiring that you conform your time period to the holding of the Eighth Circuit that a 30-day limit for filing a civil action in court under the IDEA is too short.

Thus, please provide to us by no later than close of business June 27, 2002:

- (1) confirmation that (a) Minnesota will either revise or delete its 30-day limit from Minn. Stat. §125A.09 (which cross-references Minn. Chapter 14) and from any Part B eligibility documents and (b) the scope of judicial review for IDEA cases will be consistent with §615 of the IDEA and 34 CFR §300.512(b) and not Minn. Chapter 14;
- (2) the timeline by which (1)(a) above will be accomplished no later than June 30, 2003; and
- (3) the methods Minnesota will use to provide notice of its 30-day time limit change and judicial review to school districts and parents.

Kindly fax a courtesy copy of your response to Dr. Joleta Reynolds at 202-260-0416. If you have any questions, please contact Dr. Reynolds at 202-205-5507.

Sincerely,



Stephanie Lee,
Director,
Office of Special Education Programs



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JUN 25 2002

Dr. Melody Bounds
Bureau Director
Program Improvement and Outreach
Mississippi State Department of Education
P.O. Box 771
Jackson, Mississippi 39205-0771

Dear Dr. Bounds:

This responds to Mississippi Special Assistant Attorney General Avery Lee's June 12, 2002 letter responding to OSEP's June 4, 2002 letter, which requested that Mississippi revise its 30-day limit for appealing due process hearing decisions to federal or state court. As you know, OSEP's request is based on current law in the U.S. Court of Appeals for the Fifth Circuit, which specifically rejected a 30-day limit because it is "inconsistent with the purposes of the [Individuals with Disabilities Education Act (IDEA)]." *Skokin v. Texas*, 723 F.2d 432, 438 (5th Cir. 1984).

Mississippi responded that *Skokin* was "inapplicable" because in *Skokin*, the Fifth Circuit was borrowing an analogous state statute to apply to IDEA appeals whereas Mississippi has enacted a state statute specifically addressing IDEA appeals. We have reviewed your explanation and applicable law including the *Skokin* decision and we reiterate our request that Mississippi revise or delete Mississippi's 30-day limit from page VII-16 of its policies and procedures and from any other Mississippi eligibility documents under Part B of the IDEA containing such a requirement.

The enactment of a State statute specific to IDEA appeals cannot usurp the review required by the U.S. Supreme Court, which has set forth a specific standard of review. *Wilson v. Garcia*, 471 U.S. 261 (1985); *DelCostello v. Int'l Bd. of Teamsters*, 462 U.S. 151, 158-159 & n. 13 (1983); *Tokarcik*, 665 F.2d. 443, 454 (3rd Cir. 1981) ("in dealing with a cause of action arising under federal law, the state statute which is to be borrowed and how it is to be applied are federal law questions, and are determined by federal statutory policy"). Where a federal statute (such as the IDEA) does not provide for a specific limitation period, courts may borrow from federal or state limitation periods by (1) identifying the most analogous statute of limitations based on the type of case and (2) determining whether the time limit set forth in that statute is consistent with the underlying purposes and policies of the federal statutory right, here the IDEA. *Wilson*, 471 U.S. at --; *DelCostello*, 462 U.S. at 158-159. Mississippi cannot through its legislature avoid the Fifth Circuit's determination that 30 days is too short a time period

because it is inconsistent with the policies underlying the IDEA. Specifically, forcing parents to decide whether to file an appeal within 30 days would be inconsistent with the goal of preventing inappropriate placements. Parents who have not previously retained a lawyer would be particularly disadvantaged by such a short time limit.

We take no position on what other Mississippi statute might be considered analogous to the appeal of a due process hearing under the IDEA. Rather, we are requiring that you conform your time period to the holding of the Eighth Circuit that a 30-day limit for filing a civil action in court under the IDEA is too short.

Thus, please provide to us by no later than close of business June 27, 2002, confirmation that Mississippi will either revise or delete its 30-day limit from its Part B eligibility documents, the timeline by which this will be accomplished no later than June 30, 2003 and the methods Mississippi will use to provide notice of this time limit change to school districts and parents. Kindly fax a courtesy copy of your response to the attention of Dr. JoLeta Reynolds at 202-260-0416.

If you have any questions, please contact Dr. JoLeta Reynolds at 202-205-5507.

Sincerely,



Stephanie Lee,
Director,
Office of Special Education Programs

cc: (by fax)
Avery Mounger Lee
Special Assistant Attorney General for the
Mississippi Department of Education



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

By Fax and U.S. Mail

Ms. Melodie Friedebach
Coordinator of Special Education Services
Division of Special Education
Missouri Department of Elementary & Special Education
P.O. Box 480
Jefferson City, Missouri 65102-0580

JUN 25 2002

Dear Ms. Friedebach:

Thank you for your June 11, 2002 e-mail responding to OSEP's June 4, 2002 letter, which requested that Missouri revise its 30-day limit for appealing due process hearing decisions to state court under Missouri Chapter 536, RSMo. OSEP's request is based on applicable law in the U.S. Court of Appeals for the Eighth Circuit, which specifically rejected a 30-day limit because it conflicted with the policies and purposes of the Individuals with Disabilities Education Act (IDEA). *Birmingham v. Omaha School Dist. et al*, 220 F.3d 850 (8th Cir. 2000).

Missouri responded that it has revised other conflicting time periods in its eligibility documents and distinguishes the 30-day limit of Chapter 536, RSMo. as applying to "judicial review of a due process hearing decision" and not to the school district's decision (as was the case in *Birmingham*). However, the Eighth Circuit in *Birmingham* specifically rejected as too short 30 days to file in court and made no distinction between an appeal of a due process hearing decision and a school district's decision.

In *Birmingham*, the Eighth Circuit specifically reviewed the Arkansas APA and rejected it not only because its 30-day limit was too short and undermined the IDEA but also because the nature of the review provided for under the Arkansas APA was not analogous to the judicial review rights of parties under the IDEA. The Arkansas APA differed from judicial review under the IDEA because (1) it did not provide for independent review but rather for affirmance, reversal or modification; (2) the scope of review was more limited (reversal only for one of six stated conditions) and not "an independent decision of the issues based on a preponderance of the evidence"; and (3) the standard for admitting additional evidence was different under the Arkansas APA and the IDEA.

Similarly, as we noted on the original issues chart, Missouri's APA is limited in that it limits both the scope of review to one of seven stated conditions (see RSMo.536.140.2 (1)-(7)) and when evidence can be admissible (see RSMo.536.140.4 which allows a court to "hear and consider additional evidence if the court finds that such evidence in the

exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the agency"). It is also unclear if Missouri courts have authority to make an independent decision given RSMo. 536.140.2 and 5. While we appreciate that Missouri has in its most recent eligibility document submission added the language of 34 CFR §300.512(b) to page 54 of its Procedural Safeguards policies and procedures, it is unclear whether Missouri can through its Procedural Safeguards document modify the standards set forth in Missouri's APA.

We take no position on what other Missouri statute might be considered analogous to the appeal of a due process hearing under the IDEA. Rather, we are requiring that you conform your time period to the holding of the Eighth Circuit that a 30-day limit for filing a civil action in court under the IDEA is too short.

Thus, please provide to us by no later than close of business June 27, 2002:

- (1) confirmation that (a) Missouri will either revise or delete its 30-day limit from its Part B eligibility documents and (b) p. 54 of the revised Procedural Safeguards document which contains the language of §615 of the IDEA and 34 CFR §300.512(b) will be followed as a matter of Missouri law by courts over Subsections 2, 4, and 5 of Missouri's APA at RSMo. 536;
- (2) the timeline by which (1)(a) above will be accomplished no later than June 30, 2003; and
- (3) the methods Missouri will use to provide notice of its 30-day time limit change and judicial review to school districts and parents.

Kindly fax a courtesy copy of your response to Dr. Joleta Reynolds at 202-260-0416. If you have any questions, please contact Dr. Reynolds at 202-205-5507.

Sincerely,



Stephanie Lee,
Director,
Office of Special Education Programs