JURISDICTIONAL STATEMENT

This case comes before the Court on appeal from a Final Order entered on December 17, 1999 by the United States District Court for the Western District of North Carolina dismissing all of the plaintiff-appellant's claims. (JA 21, 45)

On January 14, 2000, the Plaintiffs-Appellees M. E. and P. E., on their behalf and on behalf of their son, C. E., filed a Notice Of Appeal. (JA 45)

Federal Court jurisdiction is based on 20 U.S.C. § 1415(i), The Individuals with Disabilities Education Act. The appellate jurisdiction of this court is based on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred by finding that the appellants had notice of a sixty day statute of limitations?

2. Whether the Court erred by finding that the school district did not waive the statute of limitations and was not estopped from relying upon the sixty day statute of limitations?

3. Whether the Court erred by holding that a sixty day statute of limitations does not undermine the public policy of the Individuals with Disabilities Education Act?

STATEMENT OF THE CASE

A. Nature of the Case

C.E. was a child with a disability. Pursuant to Individuals with Disabilities Education Act, his parents sought reimbursement for the special education program that they provided to their child.

The Plaintiff-Appellants filed a Petition requesting a special education due process hearing before an Administrative Law Judge of the North Carolina Office of Administrative Hearings. A hearing was scheduled. During the hearing, the Administrative Law Judge concluded that their request was made after the statute of limitations had run on their claim and that "The April 22, 1998 Petition filed in this matter is not a timely challenge as to any action taken by the Respondent prior to the sixty (60) days of that date. . . the sixty (60) day statute ran over two hundred days prior to the filing of this Petition" [and that] "the limitation for the filing of a petition is within sixty days (60) days of notice of the contested action." (JA 188) The Administrative Law Judge dismissed the case. (JA 188)

The parents asserted that they were not aware of this statute, were not provided with notice of the statute of limitations, and that a sixty day statute of limitations is void as against public policy.

The Administrative Law Judge's Decision was appealed to a State Level Review Officer who upheld the decision of the Administrative Law Judge finding

that "The Administrative Law Judge did not err in deciding that the Respondents' Motion for Summary Judgement be granted." (JA 199) The Appellants appealed to the U. S. District Court which upheld the Review Officer's ruling. (JA 44) The Appellants have filed the instant appeal to this Court of Appeals.

B. Course of Proceedings

On April 22, 1998 the parents requested a special education due process hearing. (JA 187) On September 30, 1998, the Administrative Law Judge granted the school district's Motion for Summary Judgment holding that the parents' request was filed after the statute of limitations had run. (JA 188) The parents appealed to a Review Officer who affirmed the decision of the Administrative Law Judge. (JA 199) The parents appealed to the U. S. District Court. Both parties filed Motions for Summary Judgment and supporting Memorandums of Law in regard to the sixty day statute of limitations. The Court held that the sixty day statute of limitations did not violate public policy, that it had run on the parents claims, and affirmed the decision of the Review Officer. (JA 44)

C. Disposition of the Court Below

On December 17, 1999, The Honorable Lacy H. Thornburg entered a Judgment dismissing "this case in its entirety" pursuant to his Memorandum and Order denying the Plaintiff's Motion for Summary Judgment and granting the Defendant's Motion for Summary Judgment. (JA 44)

STATEMENT OF FACTS

C.E. was born on January 10, 1992. Prior to the instant litigation, C.E. and his parents lived in Baltimore, Maryland. When C.E. "was approximately twelve to eighteen months old, M.E. became concerned about C.E. when she noticed that he would not speak, would not follow basic directions, and failed to make eye contact." On September 22, 1994 and September 23, 1994, C.E. was evaluated at Kennedy Kreiger Institute. (JA 69)

As a result of this evaluation, C.E. was diagnosed as having a pervasive developmental disorder (PDD) and developmental delays. C.E. displayed unusual food sensitivities, stereotypic behaviors, distractibility, and delayed social skills. Psychological testing placed his mental development at approximately half of his chronological age. (JA 69)

C.E. was unable to express his wants and rarely used spoken language spontaneously. His eye contact was poor, even with family members. He did not use toys appropriately and did not interact with others. (JA 70)

On October 18, 1994, when C.E. was two years, nine months old, an Individualized Family Service Plan (IFSP) was developed by the Baltimore County Public Schools pursuant to the Individuals with Disabilities Education Act. The IFSP recommended that C.E. receive three hours of special education a week as follows: two hours of individual special instruction and one hour of group special

instruction in the BCPS Infant and Toddlers Program. (*Erickson v Baltimore County Public Schools*, 2 ECLPR 231, Special Education Review Hearing, July 3, 1996, page 4.)

In December of 1994, the parents implemented a special education program utilizing a curriculum developed at the Lovaas Institute in Los Angeles, California. This program included thirty to thirty-five (30-35) hours of intensive therapy a week, fifty weeks a year, employed therapists, and was administered through Bancroft Rehabilitative Services in New Jersey. When this intensive program began, C.E. was nearly three years old. (JA 70)

This program was "expected to last approximately three years . . . (at) approximately $25,000 a year." With this intense therapy program, C.E. made good progress with remarkable gains and improvements in his skills. (JA 70)

On February 27, 1995 C.E. was diagnosed as autistic. (JA 70)

On March 9, 1995, Baltimore City Public Schools offered an updated IFSP/IEP that would provide two hours of individual special instruction and one hour of group instruction per week. The parents objected to this proposal of three hours a week and "requested reimbursement of the thirty-five to four hours of Lovaas instruction being provided in their home." (*Erickson* Review Hearing, supra, page 4)

The school district refused. On June 1, 1995 a special education due process hearing was held in Baltimore, Maryland. (*Erickson* Review Hearing, supra, page 2) The school district prevailed. On July 7, 1995, the parents appealed to the Office of Administrative Hearings in Maryland. (Note: this Baltimore, Maryland case then proceeded to the U. S. District Court and then to the Fourth Circuit. See *Erickson v. Board of Education of Baltimore County*, 162 F. 3d 289, 29 IDELR 478 (4th Cir. 1998))

In August, 1995, C.E. and his family moved to Asheville, North Carolina. One of C.E.'s therapists traveled to North Carolina to continue C.E.'s therapy and help implement the child's program in North Carolina. (JA 71)

On or about March 1, 1996, after the program was being implemented successfully in Asheville, North Carolina, C.E.'s parents requested that the Appellee, Buncombe County Public Schools, assume the cost C.E.'s special education. (JA 71)

In May, 1996 Buncombe County Public Schools began a program that included "consultative" occupational therapy for fifteen minutes a week; speech and language therapy for one hour a week; and "educational" services for one and a half hours a week in the child's home. (JA 72)

Like the earlier Maryland program, the North Carolina program offered minimal services.

On June 12, 1996, an IEP meeting was held. The school members of the IEP team proposed to send C.E. to the Autism Society of North Carolina - Western Chapter Program, in order to meet their obligation to provide C.E. with Extended Year Services. (JA 72)

The parents requested documentation about the "Western Chapter" program to enable consideration of this proposal. After reviewing the information provided by the school district and consulting with the professionals, who worked with C.E., the parents concluded that it would be detrimental for C.E. to be placed in the proposed summer program. The parents notified the school district about their concerns. (JA 73)

On July 3, 1996 the Maryland Office of Administrative Hearings issued the decision in the Maryland case, reversed the due process hearing officer, finding that:

> The evidence shows that the Child made dramatic progress as a result of his intensive individual therapy and that he clearly received educational benefit from the Lovaas program implemented in his home. The Lovaas program is proper under the Act even though the therapist employed by the Parents did not meet state educational certification criteria. Since the BCPS program was inadequate and inappropriate and the Lovaas program did not provide the Child with educational benefit, the parents are entitled to reimbursement for their Lovaas expenditures during the time that they lived in Baltimore County. (*Erickson* Review Hearing, supra., page 7)

The Baltimore, Maryland case continued after the parents moved to Buncombe County, North Carolina.[1]

During the summer and fall of 1996, meetings between the parents and the Buncombe County School staff were scheduled, canceled, rescheduled and held. (JA 73-74)

At the January 6, 1997 meeting the IEP team proposed an IEP that placed C.E. in Fairview Elementary School. The IEP committee members agreed to provide C.E.'s parents with data about the efficacy of their proposed program at Fairview Elementary School. (JA 74)

On February 19, 1997, the appellees provided the parents with a proposed IEP and data purporting to establish the efficacy of the Fairview program. (JA 75)

The proposed IEP was deficient in several areas and was designed with the intent to place C.E. into the existing program. The IEP lacked sufficient evaluation procedures and schedules, failed to provide information about the place where the services world be provided, failed to state service duration failed to consider a continuum of services and the least restrictive environment. The IEP team did not

[1] Despite the favorable ruling, the Board of Education of Baltimore County failed to comply with the Order of the Maryland Office of Administrative Hearings. The parents filed suit in the U. S. District Court in order to obtain enforcement of the Order of the Review Panel and recovery of costs and attorney's fees. Eventually the parents were reimbursed by the Board for their son's education in Maryland and expert witness fees. The District Court denied attorney's fees because the attorney was an "attorney-parent." The case was heard by this Court in regard to the issue of reimbursement of attorney's fees. On December 10, 1998 this Court held that an "attorney-

give appropriate consideration to the potential harmful effect that a change in C.E.'s special education program would have on him. (JA 75)

The proposed final IEP was never implemented. C.E. continued to receive minimal services from the school district, and continued to receive intense therapy from his home based "Lovaas" program.

Meetings continued to be held between the parents and school district.

On June 12, 1997 C.E. was re-evaluated. C.E. was no longer eligible for special education services and he was exited out of all special education. (JA 75) The school district found that C.E. was no longer eligible for special education services under the Individuals with Disabilities Education Act and the parents agreed. (JA 186)

On July 29, 1997, acting in the capacity of counsel for his son, PE wrote a strongly worded settlement demand letter to school board counsel. This letter contained the intense emotional flavor of a letter from a *pro se* parent, acting as counsel for his child. (JA 51) In the letter, PE described the gains made by his son in the home based program.

> As you are aware, Chase was successful in his Lovaas program. He was just retested. He is now functioning at or above age equivalent level in almost every area. Technically, he no longer qualifies for special educational services. He has gone from functioning at a 9-18 month old level at about

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parent" is barred from an award of fees. *Erickson v. Board of Education of Baltimore County*, 162 F. 3d 289, 29 IDELR 478 (4th Cir. 1998)

> age three (Sept. 1994) to functioning at a near average 5 +/- year old level (June 1997) in thirty miraculous months of his Lovaas program. (JA 54)

On August 7, 1997, counsel for the school district wrote that a counter offer would be forthcoming and that:

> Prior to making an offer, however, the Board of Education must be consulted and must approve the payment of any money. We expect to brief the Board on this matter and receive settlement authority, if any, within the next week. Your letter states that we must respond to your offer within ten (10) days or you will proceed immediately to due process. You, of course, have the right to file a due process petition at any time, however, the reality of school systems requires that the governing board be consulted and that process takes time.
>
> If you proceed to due process, please be aware that the IDEA was reauthorized by Congress in June and the new law contains new notice provisions and provisions regarding attorneys' fees that are now in effect. I am including a copy of the law in order to provide you with notice of these provisions. In addition, the North Carolina General Assembly has amended the mediation provisions of state law and I have included a copy of that legislation. (JA 63)

The Administrative Law Judge, State Level Review Officer, and U. S. District Court Judge have deemed that August 7, 1997 was the date that the statute of limitations began to run. (JA 27, 187, 197)

On August 8, 1997 school board counsel proffered a "conditional" settlement "counter-offer. Yet, if the parents accepted this "conditional" settlement, it could still be rejected by the school district later.

> The Board of Education has authorized the superintendent and me to make a settlement offer, however, any agreement we reach is subject to final approval by the Board. (JA 64)

This conditional settlement "counter-offer" was never approved by the Board. The conditional "counter-offer" was not accepted or rejected by the parents.

The August 7 and August 8, 1997 letters from school board counsel included no reference to a statute of limitations but noted that "You, of course, have the right to file a due process petition at any time. . ." (JA 63)

At no time were the parents provided with "prior written notice" of a statute of limitations for special education claims. The parents were never provided with a Handbook that contained information about any statute of limitations. The only Handbook provided directly to the parents was the July, 1993 Handbook that does includes no mention of a statute of limitations. (JA 151, 156)

A copy of the 1993 North Carolina Special Education Handbook on Parents' Rights was provided to Stephen Grabenstein, an attorney who attended an IEP meeting with the parents. This July, 1993 Handbook did not contain any reference to a statute of limitations. Later, this attorney was provided with another July, 1993 Handbook that included an addendum on the inside of the front cover that referenced the statute of limitations language. (JA 173) The statute of limitations language was not in the earlier Handbook. The difference between the two versions of the same Handbook was never brought to the attention of the parents or their counsel. (JA 152, 174)

On April 22, 1998, M.E. filed a due process petition with the Office of Administrative Hearing on behalf or herself and her son. (JA 187)

Both parties filed Motions, Memorandums of Law, affidavits, and amendments to affidavits prior to and during the due process hearing.

On September 9, 1998 the Administrative Law Judge heard opening statements and received testimony[2] from one witness. (JA 178-182, 184-185)

The Hearing resumed on September 14, 1998. At the beginning of the Hearing, the Administrative Law Judge heard argument on the school district's Motion for Summary Judgment to dismiss the parent's case because the statute of limitations barred their claim. He heard argument(JA 178) that school district Affiant Stephens was not present at the June 12, 1997 IEP meeting, despite the implied assertion in her affidavits. (JA 122, 147-148) The affidavits of M.E. and Grabenstein(JA 151, 173) contrasted with Stephens establish that facts were in dispute. At the conclusion of the argument, the Administrative Law Judge announced his decision and asked the school district to draft an Order granting their Motion for Summary Judgment on the grounds that the statute of limitations barred the claim of the Petitioners. (JA 178-182)

On September 30, 1998, the Administrative Law Judge granted the school district's Motion for Summary Judgment and dismissed the case. (JA 188)

[2] The testimony was taken out of order and is not related to the issue on appeal.

The case was appealed to a State Level Review Officer.

On December 3, 1998, the State Level Review Officer held that:

> 9. Since the child was a child without disabilities on August 8, 1997, and April 22, 1998, the Respondent was not required to provide the Petitioners with "prior written notice."
> . . .
> 11. The 60 day time limitation is stated in all copies of the Handbook on Parents' Rights provided to M.E. and P.E., and counsel, on numerous occasions by the Respondent.
>
> 12. The time period between August 8, 1997, the date on which the statutes of limitations began to run and April 22, 1998, when the Petitioners filed the Contested Case, without question exceeds the 60 day time limitation. (JA 197)
>
> The issue in this Contested Case is, "Whether the Petitioners' action is time barred by the applicable statute of limitations."
> . . .
> The Petition exceeded the 60 day APA limitation by 197 days. (JA 198)

The Review Officer upheld the findings of the Administrative Law Judge. (JA 198)

On January 4, 1999, having exhausted their administrative remedies, the parents, filed suit in the U. S. District Court for the Western District of North Carolina. (JA 1)

On September 16, 1999, after the appearance of new counsel, the Second Amended Complaint was filed. (JA 7)

The Second Amended Complaint asserted that the school district had an affirmative duty to provide notice of a sixty day statute of limitations, that the parents did not have notice, that the parents did not receive the mandated "prior

written notice" and that the school district was estopped to claim a statute of limitations defense. (JA 7-14)

An Answer was filed on October 1, 1999. (JA 5) On October 22, 1999, a Motion and Memorandum for Summary Judgment was filed by counsel for the parents and child. On November 23, 1999, a Motion and Memorandum for Summary Judgment was filed by the school district. On December 17, 1999, the District Court granted the school district's Motion for Summary Judgment, denied the parents and child's Motion for Summary Judgment and entered a Final Judgment on behalf of the appellee dismissing the case. (JA 44)

On January 14, 2000 a Notice of Appeal was filed in the U. S. District Court. (JA 45)

PRIOR WRITTEN NOTICE
SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act requires "Prior Written Notice" which "shall include a full explanation of the procedural safeguards" when an action is taken, or refused to be taken by a school district. The North Carolina Administrative Process Act requires that "notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the . . . time limit to file a contested case petition." The parents did not receive a specific written notice that informed them of the sixty day time limit. They did not know about the new Handbook policy relying on the North Carolina Administrative Process Act statute

of limitations. The sixty day statute of limitations had not run since the parents had not received written prior notice.

WAIVER AND ESTOPPEL
SUMMARY OF ARGUMENT

The school district is estopped to assert a statute of limitations defense. Counsel for the district advised the parents that they could file a special education due process hearing "at any time." The failure to provide clear notice of the new application of a sixty day statute of limitations, coupled with counsel's letter is a waiver of the statute.

PUBLIC POLICY
SUMMARY OF ARGUMENT

The U. S. Department of Education has stated that a short sixty day statute of limitations is against the public policy of Individuals with Disabilities Education Act. This Court has previously addressed the thirty / sixty day statute of limitations in the Virginia Administrative Process Act and found that the statute was in conflict with the public policy of the Individuals with Disabilities Education Act. This Court has balanced "speedy resolution" of special education disputes against the need to ensure that the rights of children and their parents are protected. In such balancing, this Court has held that a sixty day statute of limitations is void as against public policy.

PRIOR WRITTEN NOTICE
ARGUMENT

The District Court erred by finding that the parents had sufficient "Prior Written Notice" of a statute of limitations bar to their claim.

PRIOR WRITTEN NOTICE
STANDARD OF REVIEW

The dismissal of the due process hearing by the Administrative Law Judge was pursuant to a Motion for Summary Judgment and a review of affidavits and correspondence between counsel. The dismissal was upheld by the Review Officer. On appeal to the U. S. District Court, Motions for Summary Judgment were filed by the parties based on the administrative record. The District Court affirmed the dismissal based on a review of the affidavits and statute of limitations argument. The parents argued that they should have received "prior written notice" that would alert them to a statute of limitations, pursuant 20 U.S.C. § 1415(b)(3), (c) and (d). "Prior written notice" requires more than sending another Handbook to counsel.

At the initial due process hearing, the Administrative Law Judge held that:

> Under the facts of the case, the Respondent was not required to provide the Petitioners with "prior written notice" under IDEA in order for the applicable statute of limitations to begin running against Petitioners. (JA 188)

In the opinion of the Review Officer, notice was not required because:

> Since the child was a child without disabilities on August 8, 1997, and April 22, 1998, the Respondent was not required to provide the Petitioners with "prior written notice." (JA 197)

C.E. was a child with a disability until June 12, 1997, when he exited from special education and was placed in regular education. His parents were seeking reimbursement for the expenses they incurred by providing C.E. with an appropriate special education program. Because of this program, C.E. received benefit and was able to leave special education.

Aside from the Handbook given to counsel for parents, it is undisputed that the parents did not receive the "prior written notice" mandated in 20 U.S.C. § 1415(b)(3), (c) and (d).

Facts were in dispute in the affidavits. The school district asserted that the parents had notice of the statute of limitations. The parents swore otherwise.

The standard of review by this Court is de novo. A de novo review is proper if the proceedings below are viewed as a Motion to Dismiss, giving all inferences to the appellants, or viewed in the nature of a Motion for Summary Judgment. *Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993), cert. denied, 510 U.S. 1197 (1994). This Court recently stated that:

> Whether a party is entitled to summary judgment is a matter of law which we review de novo. (Cite omitted.*)* Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

matter of law. Fed. R. Civ. P. 56(c). *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 25 IDELR 621, at 626 (4th Cir 1997)

PRIOR WRITTEN NOTICE
DISCUSSION OF THE ISSUE

On June 4, 1997 the Individuals with Disabilities Education Act was amended. The statute relating to Notice and Written Procedural Safeguards state that:

20 U.S.C. § 1415

(b) The procedures required by this section shall include -

(3) written prior notice to the parents of the child whenever such agency--

(A) proposes to initiate or change; or
(B) refuses to initiate or change; the identification, evaluation, or educational placement of the child, in accordance with subsection (c), or the provision of a free appropriate public education to the child;
. . .

(c) Content of Prior Written Notice.--The notice required by subsection (b)(3) shall include--

(1) a description of the action proposed or refused by the agency;

(2) an explanation of why the agency proposes or refuses to take the action;

(3) a description of any other options that the agency considered and the reasons why those options were rejected;

(4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

(5) a description of any other factors that are relevant to the agency's proposal or refusal;

(6) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(7) sources for parents to contact to obtain assistance in understanding the provisions of this part.

(d) Procedural Safeguards Notice.--

(1) In general.--A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum--

(A) upon initial referral for evaluation;
(B) upon each notification of an individualized education program meeting and upon reevaluation of the child; and
(C) upon registration of a complaint under subsection (b)(6).

(2) Contents.--The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to--

(A) independent educational evaluation;
(B) prior written notice;
(C) parental consent;
(D) access to educational records;
(E) opportunity to present complaints;
(F) the child's placement during pendency of due process proceedings;
(G) procedures for students who are subject to placement in an interim alternative educational setting;

> (H) requirements for unilateral placement by parents of children in private schools at public expense;
> (I) mediation;
> (J) due process hearings, including requirements for disclosure of evaluation results and recommendations;
> (K) State-level appeals (if applicable in that State);
> (L) civil actions; and
> (M) attorneys' fees.

The sixty day North Carolina statute notes that "Notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure and the time limit to file a contested case petition."[3]

C.E.'s parents did not receive the "prior written notice." They were not advised of any newly applied state law or regulation that limited their rights or established a new statute of limitation. While the negotiations continued between the parties in 1996 and 1997, C.E. was making progress in his intensive home-based program. Because he received appropriate and intensive services, C.E. progressed to the point were he no longer needed special education services. The fact that C.E. made progress that eventually rendered him ineligible for special education was used by the Administrative Law Judge, the Review Officer and District Court Judge to support their decision that prior written notice was not required. The "Prior Written Notice" mandated by statute is not the same as a parent's Handbook.

[3] N.C. Gen. Stats. 150-23(f)

The main purposes of the Individuals with Disabilities Education Act is to provide children with a free appropriate education and "to ensure that the rights of children . . . and parents are protected."[4] While the appellants provided C.E. with an appropriate special education that prepared him for independent living, the rights of his parents have not been protected.

A sixty day statute of limitations encourages school districts to engage in drawn out negotiations and, after the sixty day timeline has passed, to discontinue negotiations and rely upon a statute of limitations defense. On the other hand, parents, will be engaged in establishing that the cause of action has not yet accrued, or, in the alternative, that the cause of action is continuing. As parents and school districts focus on tactics and strategy and pre-trial warfare, issues of substance and educational appropriateness will be lost.

WAIVER AND ESTOPPEL ARGUMENT

The Court erred by finding that the school district had not waived or was not estopped from relying upon a statute of limitations defense.

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[4] 20 U.S.C. § 1400(d) Purposes.--The purposes of this title are--
(1)

> (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;
> (B) to ensure that the rights of children with disabilities and parents of such children are protected; and (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

WAIVER AND ESTOPPEL
STANDARD OF REVIEW

Neither the Administrative Law Judge, Review Officer, nor U. S. District Court Judge heard any testimony in regard to whether the school district waived their statute of limitations defense. Affidavits and correspondence were reviewed.

On August 7, 1997, counsel for the school district responded to a settlement demand, noting that "You, of course, have the right to file a due process petition at any time, however, the reality of school systems requires that the governing board be consulted and that process takes time." (JA 63)

> If you proceed to due process, please be aware that the IDEA was reauthorized by Congress in June and the new law contains new notice provisions and provisions regarding attorneys' fees that are now in effect. I am including a copy of the law in order to provide you with notice of these provisions. In addition, the North Carolina General Assembly has amended the mediation provisions of state law and I have included a copy of that legislation. (JA 63)

The U. S. District Court found that "the amendment to which the attorney referred concerned new notice provisions for filing a due process petition." The amended Individuals with Disabilities Education Act requires that parents or their counsel provide notice of a claim. The July 29, 1997 comprehensive "ten day" settlement demand letter from the father was this "notice." Subsequent correspondence and enclosures from school board counsel did not include information about a newly applied statute of limitations.

The standard of review about whether the school district waived and / or is estopped to claim a statute of limitations defense as a result of their counsel's August 7, 1997 letter is a de novo matter of law.

WAIVER AND ESTOPPEL
DISCUSSION OF THE ISSUE

The school board attorney advised the appellants in writing that "You of course, have the right to file a due process petition **at any time** . . ."

Later, in a pre-trial Motion for Summary Judgment, the school district claimed that the parents were required to file their request for a due process hearing within sixty days of this August 8, 1997 letter. Apparently, school board counsel did not intend to mislead the plaintiffs but probably did not know about the Handbook revisions and new application of a sixty day statute of limitations.

However, counsel and their clients should be able to rely on representations of opposing counsel. The plaintiffs relied upon her statement and their own understanding of the law, to their detriment. By writing that: "You of course, have the right to file a due process petition at any time . . . ," the defendant waived a statute of limitations defense and is estopped to assert one. By the failure to provide notice of the "time limit to file a contested case petition,"[5] the school district is estopped to plead the statute.

[5] N.C. Gen. Stats. 150B-23(f)

It is unquestioned that had if the parents, or their counsel, had been aware of a sixty day statute of limitations, they would have requested a special education due process hearing within that time.

Moreover, the delay from August 8, 1997 until the date of their hearing request on April 22, 1998, did not prejudice the school district. C.E. was not receiving special education services during these months. This passage of time, approximately ten months after C.E. was exited from special education, gave both parties to an opportunity to determine whether C.E. would benefit from the regular education placement or, in the alternative, whether he may need additional special education services.

PUBLIC POLICY ARGUMENT

A sixty day statute of limitations violates the public policy of the Individuals with Disabilities Education Act and conflicts with existing Fourth Circuit case law.

PUBLIC POLICY STANDARD OF REVIEW

The Circuit Court does not owe deference to the District Court in a review of a question of law. A review of public policy and conflicts with existing precedent is de novo. *Pizzeria Uno Corp. v. Temple*, 747 F. 2d 1522, 1526 (4th Cir. 1984)

PUBLIC POLICY
DISCUSSION OF THE ISSUE

The North Carolina Department of Public Instruction has revised their Handbooks to incorporate a sixty day statute of limitations for special education due process hearings.

The law of this case and the statute of limitations issue is governed by:

- the legislative intent and purpose of the Individuals with Disabilities Education; and
- the statute of limitations opinions issued by the U. S. Department of Education; and
- the Fourth Circuit's statute of limitations case law, i.e., *Shook, Schimmel* and *Manning*.

The purposes of the [Individuals with Disabilities Education Act] . . . are - (1)(B) "to ensure that the rights of children with disabilities and parents of such children are protected . . ." (See 20 U.S.C. § 1400(d) Congressional Findings and Purpose)

U. S. Department of Education Letter Opinions

Two states have sought opinions from the U. S. Department of Education about timelines for requesting due process hearings and for appeals to Court.

In 1991, the New Hampshire legislature was considering a bill that stated:

> I. Any request for a due process hearing regarding individualized education plans to the department of education made in accordance with rules and under HSA 186-C:16, IV, shall be filed **within 60 days** of the date parents must sign documents indicating their assent to such plans. (Emphasis added)

The U. S. Department of Education's Office of Special Education and Rehabilitative Services was asked to issue an opinion about the legality of this proposed legislation. The June 19, 1991 response stated [in part] that:

> The proposed bill currently before the New Hampshire legislature that you have asked the Office of Special Education and Rehabilitative Services (OSERS) to review includes a number of provisions which, if enacted, would impose limitations on parents' due process rights under Part B. Because the proposal would impose limitations on the due process rights guaranteed parents by Part B, as well as limitations on the authority of Federal courts, it would, if enacted, create a number of conflicts with Federal law. Our concerns with the various individual provisions of the proposal are as follows:
>
> I. This paragraph would limit the filing of requests for due process hearings regarding individualized education programs (IEPs) to the 60-day period after the date parents must sign the documents indicating their assent to the IEP. Part B, however, grants parents the right to initiate due process on "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," without any time limitation on when that right can be exercised. 20 U.S.C. § 1415(b)(1)(E); 34 CFR § 300.506. Since we can envision many situations in which this 60-day time limitation would not be reasonable, e.g., problems with the IEP that would not be apparent until much further into the school year, we believe this provision would conflict with Part B. (Letter to Raskin, 17 EHLR 1116)

In 1997, the state of Wisconsin asked the federal government to respond to a proposed change in the state code. Wisconsin was proposing a one year limitation.

The Office of Special Education Programs conducted an analysis of case law that had developed between their earlier 1991 response and the instant 1997 letter.

A portion of the October 22, 1997 response to Dr. Pawlisch is below:

> The Office of Special Education Programs (OSEP) has completed its review of Wisconsin's 1997 Assembly Bill 261. The Bill provides that the written request for a hearing must be filed **within one year** after the proposal or refusal of the school board to initiate or change the child's multidisciplinary team evaluation, individualized education program, educational placement, or the provision of an appropriate special education program. The Bill also includes a proposed addition, which states that the limitation period would apply only if the parent of a child with a disability received notice of the right to appeal. (Emphasis added)
>
> Under current Wisconsin law, there is no specific limitation as to when a parent of a child with disabilities may file a written request with the Wisconsin Department of Public Instruction for a hearing to challenge the school board's proposal or refusal to initiate or change the child's multidisciplinary team evaluation, individualized education program, educational placement, or the provision of an appropriate special education program.
>
> The Individuals with Disabilities Education Act does not impose any time limitations. Under the Act, there is no statute of limitations for either requesting an administrative hearing or seeking judicial review. Although the Congress has created a federal statute of limitations for civil actions arising under Acts of Congress, its application is limited to laws enacted after 1990. 28 U.S.C. § 1658. However, OSEP previously indicated in a letter to Raskin, OSEP 1991, that a 60-day time limit for filing due process requests which had been proposed in New Hampshire would be an unreasonable limitation upon Federal law.
>
> Traditionally, Courts have imposed analogous State statute of limitations on both requests for due process hearings and judicial appeals of those hearing decisions. *Dell v. Bd. of Educ., Township High Sch. Dist*. 113, 32 F.3d 1053 (7th Cir. 1994); *Murphy v. Timberlane Regional Sch. Dist*., 22 F.3d 1186, 1192-1194 (1st Cir,. 1994); *Oak Park and River Forest High Sch. Dist. v. Ill. St. Bd. of Educ*., 886 F.Supp. 1417, (N.D.Ill. 1995) rev'd an other grounds,

> 79 F.3d 654 (7th Cir. 1996). One of the federal interests behind the borrowing of State limitations periods is to ensure that plaintiffs filing federal claims are not subjected to more stringent limitations than are imposed upon analogous State claims. See *Wilson v. Garcia*, 471 U.S. 261, 276 (1985).
>
> While we are not aware of any case that specifically addresses the relevant statute of limitations in Wisconsin, in reviewing this legislation, the proposed one-year limitations period should be compared to the most analogous State statute of limitations for claims arising under State law. **In enacting this limitation period for IDEA due process hearings, the State should not discriminate against federal claims by making the statute of limitations more restrictive for this federally protected right than for analogous State-based claims.** Further, the application of such limitations in particular cases must be decided by impartial hearing officers and the Courts. (29 IDELR 1088) (Emphasis added)

From these rulings issued by the U. S. Department of Education, it is clear that a sixty day limitation on a parent's request for a due process hearing is too short, and that any limitation period should be consistent with the state's general limitations, not more restrictive.

Fourth Circuit Caselaw

Schimmel v. Spillane, 819 F.2d 477, EHLR 558:331 (4th Cir. 1987) was related to whether Virginia's Administrative Process Act controlled the statute of limitations or whether it was controlled by Virginia's limitations period applicable to filing personal actions. This Court noted that "The EHA[6] provides no statute of limitations applicable to the filing of such actions." (*Schimmel,* supra. at 480)

[6] The Education for the Handicapped Act (EHA) has been amended several times and is now known as the Individuals with Disabilities Education Act.

In *Schimmel*, eight months after an adverse special education review decision, the parents filed suit in federal court. They sought reimbursement and prospective tuition for a special education placement.

> The school system moved to dismiss the Schimmels' complaint on the ground that it was barred by the applicable statute of limitations. The district court denied this motion. (supra. at 479)

The school district argued that the thirty day[7] "limitations period of the Virginia Administrative Process Act ("APA"), Va. Sup. Ct. R. 2A:2 and 2A:4, should be applied to bar the Schimmels' suit."

The Court discussed whether the scope of judicial review permitted by the state statute is similar to that provided by the federal law. If it is, and is not narrower, then the state statute initially passes muster, and on its face permits the limitations period provided in the state statute. However, a short limitations period is in "conflict with the federal policies underlying the EHA." (supra. at 482)

This Court conducted an extensive analysis of the statute of limitations case law.

> We note preliminarily that a number of other circuits have considered the proper statute of limitations to be applied in suits such as this one, which are brought in federal court pursuant to 20 U.S.C. Sec. 1415 (e)(2). Often, as in this case, federal courts must decide whether to apply a very short limitations period applicable to appeals from state agency rulings, and results in these cases have not been consistent. Compare *Janzen v. Knox County Board of Education*, 790 F.2d 484 [1985-86 EHLR DEC. 557:329]

[7] (". . . although the party has a period of sixty days within which to file suit.")

(6th Cir. 1986) (rejecting sixty-day statute of limitations for appeals from state administrative agency rulings and applying three-year statute of limitations); *Scokin v. Texas*, 723 F.2d 432 [1983-84 EHLR DEC. 555:385] (5th Cir. 1984) (rejecting thirty-day statute of limitations for appeals from state agencies to state courts and applying two-year statute of limitations for tort claims); and *Tokarcik v. Forest Hills School District*, 665 F.2d 443 [1980-81 EHLR DEC. 552:513] (3d Cir. 1981) (rejecting thirty-day statute of limitations and applying two-year statute of limitations), cert. denied, 458 U.S. 1121 (1982) with *Adler v. Education Department*, 760 F.2d 454 [1984-85 EHLR DEC. 556:397] (2d Cir. 1985) (applying four-month limitations period for appeals from state administrative agency decisions) and *Department of Education v. Carl D.*, 695 F.2d 1154 [1982-83 EHLR DEC. 554:301] (9th Cir. 1983) (applying thirty-day limitations period of Hawaii Administrative Procedures Act). Within this circuit, there is a similar split of authority. Compare *Kirchgessner v. Davis*, 632 F. Supp. 616 [1985-86 EHLR DEC. 557:339] (W.D. Va. 1986) (rejecting Virginia's thirty-day statute of limitations for appeals from state agency decisions and applying Virginia's catchall limitations period of one year) with *Thomas v. Staats*, 633 F. Supp. 797 [1985-86 EHLR DEC. 557:300] (S.D. W.Va. 1985) (applying four-month statute of limitations for West Virginia's writ of certiorari). (supra. at 480)

In determining the proper statute of limitations to be applied in this case, we recognize that we must choose the limitations period for the state cause of action most analogous to the federal cause of action asserted by the Schimmels, **so long as that limitations period does not conflict with underlying federal policies.** As the Supreme Court has stated, when a federal statute, such as 20 U.S.C. Sec. 1415 (e)(2), creates a right of action, but federal law provides no controlling statute of limitations, "the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim, provided that the application of the state statute would not be inconsistent with underlying federal policies." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 (1985). Applying this rule to the instant case, we must determine (1) whether Virginia law provides for a cause of action that is analogous to the cause of action created by 20 U.S.C. Sec. 1415 (e)(2); and (2) if so, whether application of the statute of limitations for such a state law claim would be inconsistent with the federal policies underlying the EHA. (supra. at 481) (Emphasis added.)

This Court noted that Virginia's Administrative Process Act, like North Carolina's Administrative Process Act, presumably applies.

> Like the EHA, Virginia law provides for administrative due process hearings to resolve disputes between school systems and parents of handicapped children concerning program placements and tuition eligibility. Va. Code Sec. 22.1-214 (B) and (C) (1985). The Virginia statute also provides that "[a]ny party aggrieved by the findings and decision made pursuant to the [due process] procedures . . . may bring a civil action in the [appropriate] circuit court. . . ." Id. Sec. 22.1-214(D). Thus, both the EHA, in 20 U.S.C. Sec. 1415 (e)(2), and the Virginia statute, in Sec. 22.1-214(D), confer the right to bring a civil action on persons who are aggrieved by the results of administrative due process hearings. When such a civil action is brought in a Virginia state court, the limitations period of the Virginia Administrative Process Act presumably applies.
>
> In determining whether a state-created cause of action is sufficiently analogous to the cause of action created by the EHA to justify application of the state limitations period, courts compare the scope of judicial review permitted under state law to the scope of judicial review provided in the EHA. See, e.g., *Adler*, 760 F.2d at 457-59; *Carl D*., 695 F.2d at 1157. When the scope of review provided under state law is narrower than the scope of review provided in the EHA, some courts have concluded that the state cause of action is not sufficiently analogous to the cause of action created by the EHA to permit application of the state statute of limitations. See. e.g., *Tokarcik*, 665 F.2d at 450-51; *Monahan v. Nebraska,* 491 F. Supp. 1074, [1980-81 EHLR DEC. 552:207] 1084-85 (D. Neb. 1980), modified on other grounds, 645 F.2d 592 [1980-81 EHLR DEC. 552:380] (8th Cir. 1981), cert. denied, 460 U.S. 1012 (1983). (supra. at 481)

Initially, the Court concluded that Virginia's cause of action language under Va. Code Sec. 22.1-214 (D) was sufficiently analogous to the cause of action created by the EHA to justify application of the limitations period specified in Va. Sup. Ct. R. 2A:2 and 2A:4.

The Court then addressed the public policy concerns.

> In our view, **however**, the district court was correct in refusing to apply this statute of limitations to bar the Schimmels' suit, because **application of this very short limitations period would conflict with the federal policies underlying the EHA**. Our most serious concern in this regard arises from the fact that many parents of handicapped children may not be represented by counsel in the administrative due process hearings that precede suit under the EHA. If parents are not represented by counsel at the due process hearings, then they may be unaware of and unfairly penalized by a very short limitations period for filing suit in a district court. Presumably, application of the statute of limitations under the Virginia Administrative Process Act would require previously unrepresented parents to obtain counsel and decide whether to file suit within thirty days of an adverse decision rendered in due process hearing. We think that requiring unrepresented parties to act in such haste would be unduly harsh, and would undermine the federal policy of permitting review of decision reached in administrative due process hearings in the federal courts. (supra. at 482) (Emphasis added.)

The Schimmels were represented by counsel. The court's analysis focused on concerns about parents of children with disabilities who were not represented by counsel. It seems clear that the court intended to establish a rule that the sixty day window is too short, without an exception that would differentiate between cases where counsel was or was not present.

In the case at bar, the parent, an attorney versed in special education law, was "unaware of . . . a very short limitations period . . ." This short limitations period contained in the North Carolina Handbook is unduly harsh to all parents, regardless of educational background and experience. Sixty days is too short a period for a parent to decide whether a special education due process hearing is appropriate and necessary. *Schimmel* stated:

> Our concern about imposing a very short statute of limitations upon parties who are not represented by counsel at administrative due process hearings is magnified by the fact that such parties may never be advised of the applicable limitations period. The EHA imposes on educational agencies a duty to inform parents or guardians of all procedural safeguards available to them under the EHA 20 U.S.C. Sec. 1415 (b)(1)(D). At least one court has extrapolated from this provision a requirement that educational agencies inform parents of the applicable limitations period for judicial review. See *Scokin*, 723 F.2d at 438. However, it is not clear to us from our reading of the statute that the EHA actually imposes such a duty on educational agencies. Indeed, in this case, the school system has argued that it had no duty to inform the Schimmels of the statute of limitations for filing suit. Moreover, we note that even though the court in *Scokin* believed that educational agencies are required to inform parents of the limitations period for judicial review, that court decided that "[r]ather than relying on equitable principles to relieve uninformed parents . . . we will simply apply a longer statute of limitations." *Scokin*, 723 F.2d at 438; cf. *Carl D.,* 695 F.2d at 1158 ("[E]quitable considerations might militate against the rigid enforcement of a thirty-day limitation period in cases where unrepresented parents or guardians are unaware of the availability of review of an adverse decision"). (supra. at 482)

The *Schimmel* Court continued this discussion about public policy concerns and "the very short limitations period" that undermines "federal policies." This Court claimed support from other courts:

> In addition to our concern that unrepresented parties not be unfairly penalized by a very short limitations period for filing suit, we note that other courts have identified other policies underlying the EHA that could be frustrated by application of a short statute of limitations. See, e.g., *Janzen*, 790 F.2d at 487-88 (application of sixty-day limitations period would effectively restrict independent review Congress intended courts to have; would inhibit collection of evidence necessary to orderly review; and would undermine EHA's policy of encouraging parents to participate in decisions affecting placement of handicapped children); *Scokin*, 723 F.2d at 437 (thirty-day statute of limitations would frustrate EHA's goal of encouraging parental involvement and could result in inappropriate placement of handicapped children, contrary to policies of EHA); *Tokarcik*, 665 F.2d at

> 451-53 (thirty-day limitations period would frustrate "statutory policy of cooperative parental and school involvement in placement determinations"; could lead to inappropriate placement decisions; and would limit the independent review courts are intended to exercise under the EHA). These additional concerns bolster our conclusion that application of the very short limitations period of the Virginia Administrative Process Act would be inappropriate in this case. (supra. at 482-483)

The Court analyzed other statute of limitations, and concluded that such short statutes "would undermine EHA's policy . . ."

When it was argued that the interest in prompt resolution took precedence over other federal policies, the Court disagreed:

> We are unwilling, however, to say that this interest in prompt resolution takes precedence over the other federal policies we have identified that could be undermined by application of a very short limitations period. In our view, the need for speedy resolution of disputes does not outweigh the risk that a very short statute of limitations may deny parties a fair opportunity to obtain judicial review of adverse decisions rendered in administrative due process proceedings. Furthermore, we believe that the natural desire of parents to secure an appropriate education for their children will motivate parents to seek such judicial review promptly. Other courts have agreed. See, e.g., *Janzen*, 790 F.2d at 488; *Scokin*, 723 F.2d at 437. (supra. at 483)

After *Schimmel*, the law in Virginia was that a one year statute applied to the filing of appeals in Court. In the case at bar, the parents filed a request for a special education due process hearing. In closing, the *Schimmel* Court held that the one year statute of limitations, was the proper balance for competing issues of public policy.

> In our opinion, the one-year statute of limitations applied by the district court in this case strikes an appropriate balance between the need for speedy resolution of disputes and the need to ensure that parties have a fair

> opportunity to obtain judicial review of administrative due process proceedings. Accordingly, we hold that the district court acted properly in applying this limitations period, and we affirm the district court's denial of the school system's motion to dismiss the Schimmels' complaint as time-barred.

Two years after *Schimmel*, this Court again addressed a statute of limitations argument, this time in a North Carolina case.

In *Shook v. Gaston County Board of Education*, 882 F. 2d 119, 121 (4th Cir. 1989) this Court found that the three year statute of limitations contained in N.C. Gen. Stats. 1-52(2) is the proper statute of limitations.[8] At that time, Virginia had a one year statute and North Carolina case law established a three year statute to file an action in court.

Last year, this Court again addressed a statute of limitations argument that specifically focused on the timeline to request a special education due process hearing.

The decision in *Manning v. Spillane*, 176 F. 3d 235, 30 IDELR 399 (4th Cir. 1999) was predictable, given the reasoning in *Schimmel*.

In March, 1993 Manning was suspended from school. In May, 1993 with the agreement of the parents, the school district placed the adult special education student into a residential special education program. A few months later, by

[8] N.C. Gen. Stats. 1-52(2). Three years - Within three years an action - - . . . (2) Upon a liability created by statute, either state or federal, unless some other time is mention in the statute creating it.

agreement, the school district placed Manning into Grafton School, an expensive private residential facility. More than a year later, without having first exhausted administrative remedies, Manning filed a complaint about the March 1993 suspension in federal court. The case was dismissed for failure to exhaust available administrative remedies. Almost two years later, in January, 1995, after Manning had graduated from school, he requested a special education due process hearing. Since the Virginia statute of limitations was one year, (per *Schimmel*), the case was dismissed at the due process level, review level, and by the U. S. District Court. The Fourth Circuit noted that:

> The state hearing officer, and later the state reviewing officer, held that Virginia's one-year statute of limitations, governing personal actions generally, applied. Va. Code § 8.01-248. They applied that Code section to the request for an administrative hearing. The reviewing officer also found that the filing of Mrs. Manning's federal court action in July 1994 tolled the statute of limitations, allowing Mrs. Manning a due process hearing concerning alleged violations for one year prior to July 29, 1994.
>
> Mrs. Manning then filed the current action in district court on August 24, 1995, seeking a declaratory judgment concerning the statute of limitations. The district court granted the school system's motion to dismiss the complaint, finding that Mrs. Manning's request for an administrative hearing under the IDEA was time barred. Like the state administrative officers, the district court applied the one year, catch-all statute of limitations of Va. Code § 8.01-248. The court further found that the claims could not have accrued after May 6, 1993. The court thus concluded that the plaintiff's original action was barred because it was filed in July 1994, which was over one year after May 1993.
>
> The plaintiff's sole contention on appeal is that the district court erred in applying the one-year statute of limitations to the request for an administrative due process hearing under § 1415(b)(2). The plaintiff argues

> that the IDEA and its implementing regulations reflect the intent of Congress that no statute of limitations applies. Specifically, the plaintiff relies on the IDEA's lack of an express limitations period. The plaintiff further contends that if a limitations period is to be borrowed, it should be Virginia's five-year limitation for written contracts. (*Manning*, supra at IDELR 400)

The Court discussed *Schimmel* finding that the limitations period of one year was "not inconsistent" with public policy.

> This circuit has already held that the limitations period of Va. Code § 8.01-248 applies in the context of judicial appeals from special education due process hearing decisions. *Schimmel v. Spillane*, 819 F.2d 477, 482-83 (4th Cir. 1987). In *Schimmel*, we relied on the Supreme Court's reasoning that when a federal statute creates a right of action, but federal law provides no controlling statute of limitations, "the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim, provided that the application of the state statute would not be inconsistent with underlying federal policies." (Cites omitted) We then affirmed the district court's decision that Va. Code § 8.01-248 was the appropriate limitations period for the state law claim most analogous to the Education of the Handicapped Act (now the IDEA) and that the limitations period was not inconsistent with the policies underlying the act. *Schimmel*, 819 F.2d at 483. (supra at 400-401)

The issue in *Manning*, and in the case at bar, is the limitations period within which a parent must request a special education due process hearing. The Court discussed New Hampshire's six year statute. This six year ruling was appealed to the U. S. Supreme Court and the petition was denied. New Hampshire had previously considered a sixty day limitations period. (Letter to Raskin, 17 EHLR 1116) The Court also discussed whether any statute of limitations applies to a request for a due process hearing.

> In this action, however, we must determine the appropriate limitations period, if any, controlling the original administrative due process hearing under the IDEA. This case is one of first impression in this circuit. As yet, only one other court of appeals has directly considered the question which has come to our attention. In *Murphy v. Timberlane Regional School District*, 22 F.3d 1186, 1192 (1st Cir.), cert. denied, 513 U.S. 987 (1994), the First Circuit determined that New Hampshire's six-year, catch-all limitation applicable to "personal actions" generally was the appropriate statute to be applied in IDEA administrative hearings. The court also concluded that application of this limitation did not conflict with the IDEA's purpose of providing a procedure by which parents and school systems can efficiently resolve disputes over a disabled child's education. *Murphy*, 22 F.3d at 1193-94. (supra at 401)
>
> We agree with the First Circuit's decision on this issue. A statute of limitations may apply no matter whether proceedings are brought in a judicial forum or in an administrative one. (Cite omitted) . . . The IDEA's lack of an express statute of limitations did not persuade the First Circuit in *Murphy* that no limitations period applied to special education due process hearings, and it does not so persuade us. (supra at 401)

In the preceding paragraph, the Fourth Circuit held that a statute of limitations should be applied to a request for a due process hearing, and did not take issue with the six year statute. However, when the Court rejected a proffered five year statute for Virginia and discussed a one year statute, the Court was aware that the one year statute in Virginia had changed to two years.

> In *Schimmel*, we also observed that the one-year statute of limitations "strikes an appropriate balance between the need for speedy resolution of disputes and the need to ensure that parties have a fair opportunity to obtain judicial review of administrative due process proceedings." *Schimmel*, 819 F.2d at 483. In this case, we are of opinion that the same one-year limitations period is not so prohibitively short in the administrative hearing context that it undermines the IDEA's policy of providing parents an opportunity to protect their disabled children's educational rights. Accordingly, application of Va. Code § 8.01-248 to requests for administrative due process hearings

> under the IDEA would not be inconsistent with underlying federal policy. (supra at 401)
>
> We thus conclude that the district court correctly applied the (one year) statute of limitations found in Va. Code § 8.01-248 to the plaintiff's request for an administrative due process hearing. (supra at 401)

In footnote two, this Court explained that the ruling is based on a one year statute because the facts of the case arose in 1993. In 1995, the Virginia statute changed to two years.

In footnote three, the Court commended the school district for not frivolously arguing either a thirty day or a sixty day statute of limitations.

> . . . [I]t is also noteworthy that Fairfax County does not claim that a 30 to 60-day statute of limitations applicable to review by courts of administrative orders should be the limitation of action which should apply here. See Va. Code of 1950 §§ 9-6.14:15 et seq.; Rules of the Supreme Court of Virginia, Appeals Pursuant to the Administrative Process Act, Rules 2A:2, 2A:4. (supra at 401)

A sixty day statute of limitations is too short and violates public policy.

CONCLUSION

A sixty day statute of limitations, to be properly applied, must include a mandate that the party have clear specific actual notice of the statute of limitations. However, a sixty day period of limitations violates the public policy of Individuals with Disabilities Education Act. This Court should find that the application of the North Carolina's Administrative Process Act's sixty day statute of limitations is void as against public policy and that the applicable statute was, and remains the

statute expressed in *Shook*, i.e., three years, unless or until the North Carolina General Assembly later develops a shorter statute of limitations that is consistent with Individuals with Disabilities Education Act.

ORAL ARGUMENT STATEMENT

Appellant requests oral argument and believes that it will be helpful to the Court in resolving the issues before it.

Respectfully Submitted

_____

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CERTIFICATE OF COMPLIANCE

I certify that this brief has been prepared using Fourteen point, proportionally spaced, Times New Roman, 14 point with Microsoft Word 2000.

Exclusive of the corporate disclosure statement; table of contents; table of citations; statement with respect to oral argument, and the certificate of service, the brief contains 10,382 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the court so directs, I will provide an electronic version of the brief and / or a copy of the word or line print-out.

_____

Peter W. D. Wright

CERTIFICATE OF SERVICE

I, Peter W. D. Wright, Counsel for the Appellants, hereby certify that on this ___ day of July, 2000, eight copies of this brief were filed in the Clerk's Office of the United States District Court, and two copies were mailed by U. S. Mail, first class, to Christopher Z. Campbell, Esq., counsel for the Appellees, Thomas J. Ziko, counsel for the Intervenor, Mark L. Gross, counsel for *Amicus Curiae*, and Elaine M. Whitford, Counsel for *Amicus Curiae*.

_____

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