

# **Actions Founded on Statutory Liability: Adopting a Limitations Period for Attorneys' Fees Actions Brought Under the Individuals with Disabilities Education Act**

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## INTRODUCTION

The Individuals with Disabilities Education Act ("IDEA")<sup>1</sup> is a federal statute that provides money to state and local education agencies to help them provide education to children with disabilities. The IDEA requires that states that receive federal money provide a "free appropriate public education to all children with disabilities."<sup>2</sup> The IDEA also requires that states establish procedural safeguards for disabled students and their parents.<sup>3</sup> Those procedural safeguards include the right to a due process hearing before a state education agency if the school alters a student's educational program in ways with which the student's parents disagree.<sup>4</sup> Parents or schools who are aggrieved by the outcome of the due process hearing may bring a civil action in either state or federal court.<sup>5</sup> Parents who prevail in a

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1. 20 U.S.C. §§ 1400-1487 (2000).

2. *Id.* § 1412(a)(1)(A).

3. *Id.* § 1415(a).

4. *Id.* § 1415(f)(1).

5. *Id.* § 1415(i)(2)(A).

dispute with a school may bring an action for attorneys' fees;<sup>6</sup> however, schools may not, even if they prevail.<sup>7</sup>

Neither § 1415(i)(2)(A), providing for judicial review of administrative decisions, nor § 1415(i)(3)(B), providing for attorneys' fees, includes a statute of limitations. In the absence of congressional direction, state and federal courts have adopted a variety of limitations periods to govern the causes of action created by the IDEA.<sup>8</sup> Although there is disagreement among jurisdictions concerning the proper limitations period for both § 1415(i)(2)(A) actions ("administrative review actions") and § 1415(i)(3)(B) actions ("attorneys' fees actions"), there is certainty within most jurisdictions concerning what the proper limitations period is for administrative review actions.<sup>9</sup> However, there is still considerable uncertainty within many jurisdictions regarding the proper limitations period for attorneys' fees actions.<sup>10</sup>

This Note considers what should be the statute of limitations for attorneys' fees actions brought under the IDEA. Part I reviews the history and purpose of the IDEA, focusing on how the IDEA seeks to protect the rights of disabled students and their parents. Part II describes how courts determine an appropriate statute of limitations for a federal cause of action where Congress has not specified a limitations period. Part III examines which limitations periods courts have adopted for administrative review actions. Part IV considers which limitations period is appropriate for attorneys' fees actions.

This Note concludes that the proper limitations period for attorneys' fees actions is provided by state statutes of limitations for actions founded on statutory liability,<sup>11</sup> because an action for attorneys' fees is more analogous to an action provided by statute than to any other state cause of action. Further, the relatively lengthy limitations periods provided by those statutes are consistent with the purposes and operation of the IDEA.

Questions about limitations periods involve technical procedural issues. Uncertainty about limitations periods, however, creates substantive problems for

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6. *Id.* § 1415(i)(3)(B).

7. *Id.*; *Zipperer v. Sch. Bd.*, 111 F.3d 847, 851 (11th Cir. 1997); *see also* *Curtis K. v. Sioux City Cmty. Sch. Dist.*, 895 F. Supp. 1197, 1210 (N.D. Iowa 1995) (noting that § 1415(i)(3)(B) "provides for a cause of action for attorney fees, not by 'any aggrieved party,' but by a 'prevailing party'").

8. *See* STUDENTS WITH DISABILITIES AND SPECIAL EDUCATION LAW 165-76 (Patricia Grzywacz Walsh et al. eds., 19th ed. 2002); Allan G. Osborne, Jr., *Statutes of Limitations for Filing a Lawsuit Under the Individuals with Disabilities Education Act*, 106 EDUC. L. REP. 959, 961-67 (1996); Francis M. Dougherty, Annotation, *What Statute of Limitations Applies to Civil Actions Brought in Federal Court Under Education of the Handicapped Act (20 U.S.C.S. §§ 1400 et seq.) to Challenge Findings and Decisions of State Administrative Agencies*, 107 A.L.R. FED. 758 (1992).

9. *See* Dougherty, *supra* note 8.

10. To date, only the United States Courts of Appeals for the Sixth, Seventh, and Eleventh Circuits have considered the proper limitations period for actions for attorneys' fees. *See* *King v. Floyd County Bd. of Educ.*, 228 F.3d 622 (6th Cir. 2000); *Zipperer*, 111 F.3d at 851; *Rosemary B. v. Bd. of Educ.*, 52 F.3d 156 (7th Cir. 1995); *Reed v. Mokena Sch. Dist. No. 159*, 41 F.3d 1153 (7th Cir. 1994); *Dell v. Bd. of Educ.*, 32 F.3d 1053 (7th Cir. 1994).

11. *E.g.*, CAL. CIV. PROC. CODE § 338(a) (West 2003) (three years); FLA. STAT. ch. 95.11(3)(f) (2002) (four years); IND. CODE § 34-11-2-4 (1998) (two years).

parents who seek to vindicate their children's rights,<sup>12</sup> attorneys who work to promote the rights of disabled children,<sup>13</sup> and schools that must balance their budgets between the demands of education and litigation.<sup>14</sup> Determining which limitations period should apply to attorneys' fees actions requires an examination of both the structure and the goals of the IDEA.

### I. OVERVIEW OF THE IDEA

In 1970 Congress originally enacted the IDEA as the Education of the Handicapped Act ("EHA").<sup>15</sup> Congress amended the EHA in 1975 by passing the Education for All Handicapped Children Act of 1975 ("EAHCA").<sup>16</sup> The EAHCA included many procedural safeguards for handicapped children and their parents.<sup>17</sup> Congress added more procedural safeguards in the Handicapped Children's Protection Act of 1986 ("HCPA").<sup>18</sup> Among those safeguards was a section authorizing an award of attorneys' fees to parents of disabled children who prevailed in disputes with schools.<sup>19</sup> In 1990, Congress officially renamed the EHA the Individuals with Disabilities Education Act.<sup>20</sup>

One of the purposes of the IDEA is to help state and local education agencies provide disabled students with an education that will prepare them for employment and independent living.<sup>21</sup> The IDEA also seeks to protect the rights of disabled children and their parents.<sup>22</sup> Congress enacted the IDEA because it found that some disabled children did not receive an adequate public education, while other disabled children did not receive any public education.<sup>23</sup>

While considering the most recent amendments to the IDEA,<sup>24</sup> Congress reported the success of its programs: "The number of children with developmental disabilities in State institutions has declined by close to 90 percent. The number of young adults with disabilities enrolled in postsecondary education has tripled, and the unemployment rate for individuals with disabilities in their twenties is almost

12. See *Curtis K.*, 895 F. Supp. at 1201.

13. When Congress enacted the attorneys' fees provision of the IDEA, it recognized and approved of the fact that some awards of attorneys' fees would go to public interest lawyers. See S. REP. NO. 99-112, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1806.

14. See Allan G. Osbourne, Jr. & Philip DiMattia, Commentary, *Attorneys Fees Are Available for Administrative Proceedings Under the EHA*, 66 EDUC. L. REP. 909, 918 (1991).

15. Pub. L. No. 91-230, Title VI, 84 Stat. 175 (1970). For a brief history of the IDEA, see STUDENTS WITH DISABILITIES AND SPECIAL EDUCATION LAW, *supra* note 8, at 2. See also *Curtis K.*, 895 F. Supp. at 1205 n.3.

16. Pub. L. No. 94-142, 89 Stat. 774 (1975).

17. STUDENTS WITH DISABILITIES AND SPECIAL EDUCATION LAW, *supra* note 8, at 2.

18. Pub. L. No. 99-372, 100 Stat. 796 (1986).

19. STUDENTS WITH DISABILITIES AND SPECIAL EDUCATION LAW, *supra* note 8, at 2.

20. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(a), 104 Stat. 1103, 1141-42. This Note will refer to all legislation now codified at 20 U.S.C. §§ 1400-1487 as "the IDEA" unless referring specifically to one of the amendments described above.

21. 20 U.S.C. § 1400(d)(1)(A) (2000).

22. *Id.* § 1400(d)(1)(B).

23. *Id.* § 1400(c)(2).

24. Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (most recent substantive amendments).

half that of their older counterparts.”<sup>25</sup>

The IDEA has helped disabled children, their parents, and schools to achieve those results by providing money to states “to assist them to provide special education and related services to children with disabilities.”<sup>26</sup> States that receive money under the IDEA must provide a free appropriate public education (“FAPE”) to all disabled children between the ages of three and twenty-one with who reside in the state.<sup>27</sup> Schools must prepare an individualized education program (“IEP”) for each child with a disability.<sup>28</sup> The IEP must include a statement of how the child’s disability affects the child’s educational progress and a statement of goals for the child’s education.<sup>29</sup> The statement of goals must include a statement of what special services and aids the child will need, a statement of how the child will be integrated into regular classroom and extracurricular activities with nondisabled children, and an explanation of the circumstances, if any, in which a child will not participate in the regular curriculum with nondisabled children.<sup>30</sup> The team that creates the IEP must include the parents of the disabled child, at least one of the child’s regular education teachers (if it is possible for the child to participate in regular education), at least one of the child’s special education teachers, a representative of the local education agency, and, if possible, the disabled child.<sup>31</sup> Each child’s IEP must be reviewed at least once per year.<sup>32</sup>

In addition to the substantive requirements described above, the IDEA also requires states to maintain procedural safeguards to protect the rights of disabled students and their parents. Parents must be afforded “an opportunity to present complaints with respect to 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.”<sup>33</sup> Parents who file a complaint under § 1415(b)(6) have a right to an impartial due process hearing.<sup>34</sup> The hearing may be conducted either by a state agency or by a local education agency.<sup>35</sup> If a local agency conducts the initial due process hearing, then the party aggrieved by the agency’s decision may appeal to the state agency for review.<sup>36</sup> Any party aggrieved by the decision of the state education agency may bring a civil action in state or federal court.<sup>37</sup> The IDEA directs the court to review the administrative record and permits the court to

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25. H.R. REP. NO. 105-95, at 84 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 81.

26. 20 U.S.C. § 1411(a)(1).

27. *Id.* § 1412(a)(1)(A).

28. *Id.* § 1412(a)(4).

29. *Id.* § 1414(d)(1)(A).

30. *Id.*

31. *Id.* § 1414(d)(1)(B).

32. *Id.* § 1414(d)(4)(A)(i).

33. *Id.* § 1415(b)(6).

34. *Id.* § 1415(f)(1).

35. *Id.* The decision as to whether the initial due process hearing will be held at the local or state level may be determined either by state law or by the state department of education. *Id.*

36. *Id.* § 1415(g). In states that provide for due process hearings at both the local and state levels, the local agency hearing is called a “Level I hearing” and the state agency hearing is called a “Level II hearing.” See *McCartney C. v. Herrin Cmty. Unit Sch. Dist. No. 4*, 21 F.3d 173, 174 (7th Cir. 1994).

37. 20 U.S.C. § 1415(i)(2)(A).

hear additional evidence.<sup>38</sup> The court must make its decision based on the preponderance of the evidence.<sup>39</sup> The IDEA does not specify a statute of limitations for bringing a civil action in court.<sup>40</sup>

Although the EAHCA authorized parents to seek administrative and judicial review of certain decisions made by schools, the Supreme Court held in *Smith v. Robinson* that parents who prevailed in litigation with schools could not receive attorneys' fees.<sup>41</sup> Congress responded to *Smith* by enacting the Handicapped Children's Protection Act of 1986.<sup>42</sup> Congress was concerned that if parents were unable to receive attorneys' fees, many would be unable to vindicate the rights that the IDEA guaranteed to their children. Senator Weicker remarked:

What we do here today is to make the Education of Handicapped Act consistent with more than 130 other fee shifting statutes which provide for the award of attorneys' fees to parties who prevail in court to obtain what is guaranteed to them by law. Without this remedy, many of our civil rights would be hollow pronouncements available only to those who could afford to sue for enforcement of their rights.<sup>43</sup>

The current version of the attorneys' fees provision provides: "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party."<sup>44</sup> The reasonableness of attorneys' fees is determined by the prevailing rate in the community in which the action was brought for the type of services the attorney provided.<sup>45</sup> The court may reduce an award of attorneys' fees if the parents unreasonably protracted the dispute, or if the parents' attorney failed to provide all required information in the due process complaint.<sup>46</sup>

38. *Id.* § 1415(i)(2)(B)(ii).

39. *Id.* § 1415(i)(2)(B)(iii).

40. The IDEA also fails to provide a limitations period for seeking administrative review of a school's educational decisions. *See C.M. v. Bd. of Educ.*, 241 F.3d 374, 379 (4th Cir. 2001). The regulations implementing the IDEA do require that a state education agency convene a hearing within forty-five days of receiving a request for a hearing and that a state education agency complete a review of the hearing within thirty days of receiving a request for review. 34 C.F.R. § 300.511 (2003). Both the school district and the parents may request additional time to prepare for a hearing. *Id.*

41. 468 U.S. 992 (1984).

42. Pub. L. No. 99-372, 100 Stat. 796 (1986).

43. 132 CONG. REC. 16,823 (statement of Sen. Weicker); *see also Fontenot v. La. Bd. of Elementary & Secondary Educ.*, 805 F.2d 1222, 1223 (5th Cir. 1986) (characterizing Congress as acting "swiftly, decisively, and with uncharacteristic clarity to correct what it viewed as a judicial misinterpretation of its intent").

44. 20 U.S.C. § 1415(i)(3)(B).

45. *Id.* § 1415(i)(3)(C).

46. *Id.* § 1415(i)(3)(F). Section 1415(b)(7)(B) requires parents or their attorney to provide the child's school with the following information:

- (i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;
- (ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

Courts determine whether a parent is a "prevailing party" by applying the test the Supreme Court formulated in *Texas State Teachers Ass'n v. Garland Independent School District*.<sup>47</sup> In that case, the Court stated, "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit."<sup>48</sup>

Awards of attorneys' fees are not limited to cases resolved by judicial review.<sup>49</sup> Since § 1415(i)(3)(B) refers to "any action or proceeding brought under this section,"<sup>50</sup> courts have allowed parents to recover attorneys' fees incurred during administrative hearings.<sup>51</sup> Courts have also permitted parents to recover attorneys' fees incurred during negotiations with schools concerning their child's placement, even where those negotiations were successfully resolved prior to an administrative hearing.<sup>52</sup> Thus, parents may recover any attorneys' fees they incur while making a successful challenge to a school's educational program for their child.

Just as the IDEA does not contain a statute of limitations for actions to review the decisions of state education agencies, so too the IDEA does not contain a statute of limitations for attorneys' fees actions. Therefore, this Note next discusses how courts determine an appropriate limitations period when none is specified by statute.

## II. LIMITATIONS BORROWING WHERE FEDERAL STATUTES ARE SILENT

The problem of causes of action without express limitations periods is unique to federal law.<sup>53</sup> All states have enacted residual statutes of limitations that provide a limitations period for causes of action for which there is no express limitations period.<sup>54</sup> Although there is a residual federal statute of limitations,<sup>55</sup> it applies only

(iii) a proposed resolution of the problem to the extent known and available to the parents at the time . . . .

47. 489 U.S. 782, 789-90 (1989). For an application of the "prevailing party" test, see *J.H.R. v. Bd. of Educ.*, 705 A.2d 766, 773-74 (N.J. Super. Ct. App. Div. 1998).

48. *Texas State Teachers Ass'n*, 489 U.S. at 789 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The court in *Curtis K.* supported its validation of the *Texas State Teachers Ass'n* prevailing party test with the IDEA's legislative history. 895 F. Supp. at 1208 n.6. The Supreme Court adopted a test in *Texas State Teachers Ass'n* that it had developed in *Hensley*. A Senate report that discussed the attorneys' fee provision stated that "prevailing party" should be interpreted "consistent with the U.S. Supreme Court's decision in *Hensley v. Eckerhart* . . . ." S. REP. NO. 99-112, at 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1803.

49. See generally *Osbourne, Jr. & DiMattia, supra* note 14 (describing the history of the attorneys' fees provision and reviewing cases that define the scope of the provision).

50. 20 U.S.C. § 1415(i)(3)(B) (emphasis added).

51. *Moore v. District of Columbia*, 907 F.2d 165, 166 (D.C. Cir. 1990); *Duane M. v. Orleans Parish Sch. Bd.*, 861 F.2d 115, 120 (5th Cir. 1988); *Eggers v. Bullitt County Sch. Dist.*, 854 F.2d 892, 898 (6th Cir. 1988).

52. *Shelly C. v. Venus Indep. Sch. Dist.*, 878 F.2d 862, 864 (5th Cir. 1989).

53. See Note, *Limitation Borrowing in Federal Courts*, 77 MICH. L. REV. 1127 (1979).

54. *Id.*; e.g., IND. CODE § 34-11-1-2 (1998) (ten years); N.Y. C.P.L.R. 213 (McKinney 2003) (six years); TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1997) (four years).

55. 28 U.S.C.A. § 1658(a) (West Supp. 2003).

to statutes enacted after December 1, 1990.<sup>56</sup> Hence, there are still many federal causes of action without an express statute of limitations.

### *A. The Importance of Certainty in Limitations Periods*

Courts have recognized that certainty is especially important in determining statutes of limitations.<sup>57</sup> Since a statute of limitations period can bar a claim, even if valid, potential litigants need to know with certainty how long they have to press a claim or worry about defending against a claim. Uncertainty may cause a potential plaintiff to lose his claim by not pressing it in time.

Further, uncertainty concerning what limitations period applies to a cause of action may spawn substantial litigation over what limitations period should apply. That satellite litigation interferes with the goals of the substantive legislation. As the Supreme Court noted, "the legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters."<sup>58</sup>

Despite the need for definite limitations periods, many federal statutes fail to specify a statute of limitations for the causes of action they create.<sup>59</sup> Indeed, there are over two hundred express and implied causes of action created by federal statutes for which there are no limitations periods provided by statute.<sup>60</sup>

### *B. A Partial Residual Statute of Limitations*

In 1990 Congress enacted a residual statute of limitations for statutes passed after December 1, 1990.<sup>61</sup> That statute provides, "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."<sup>62</sup> Section 1658 does not, however, provide a statute of limitations for statutes enacted before December 1, 1990, and therefore does not apply to the IDEA.

Many commentators have criticized Congress for not making § 1658 retroactive.<sup>63</sup> A House report explained the reason for not making § 1658 retroactive as follows:

56. *Id.*

57. *See, e.g.,* *Wilson v. Garcia*, 471 U.S. 261, 266 (1985) (stating that "[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations" (quoting *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting))).

58. *Id.* at 275.

59. *Bd. of Regents v. Tomanio*, 446 U.S. 478, 483 (1980) (describing a lack of a statute of limitations as "a void which is commonplace in federal statutory law").

60. Abner J. Mikva & James E. Pfander, *On the Meaning of Congressional Silence: Using Federal Common Law to Fill the Gap in Congress's Residual Statute of Limitations*, 107 *YALE L.J.* 393, 395 (1997).

61. 28 U.S.C.A. § 1658(a).

62. *Id.*

63. *See, e.g.,* Kimberly Jade Norwood, 28 *U.S.C. § 1658: A Limitation Period with Real Limitations*, 69 *IND. L.J.* 477 (1994).

[W]ith respect to many statutes that have no explicit limitations provision, the relevant limitations period has long since been resolved by judicial decision, with the applicable period decided upon by the courts varying dramatically from statute to statute. Under these circumstances, retroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to a six month limitation period in one statute, and a ten year period in another, would threaten to disrupt the settled expectations of a great many parties. Given that settling the expectations of prospective parties is an essential purpose of statutes of limitation, the Committee was reluctant to apply this section retroactively without further study to ensure that the benefit of retroactive application would indeed outweigh the costs.<sup>64</sup>

Whatever the merits of the argument that making § 1658 retroactive would disrupt settled expectations for certain statutes, there could not have been any settled expectations with regard to the IDEA's attorneys' fee provision in 1990. In 1990, no United States court of appeals had considered the question of limitations periods for attorneys' fees actions, and only three district courts had considered the question.<sup>65</sup>

### C. A Judicial Solution to a Legislative Problem

Judges find it difficult to impose limitations periods where Congress has not because most judges believe that the creation of limitations periods is a legislative, rather than a judicial, function.<sup>66</sup> Most judges also believe, however, that allowing a cause of action to live on indefinitely is worse than judicially imposing a limitations period.<sup>67</sup> In a case from the early nineteenth century, Chief Justice Marshall stated that causes of action without limitations periods "would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain for ever [sic] liable to a pecuniary forfeiture."<sup>68</sup>

Judges typically impose statutes of limitations by adopting the statute of limitations from the cause of action under state law that is the most closely analogous to the federal cause of action.<sup>69</sup> So if a district court in the Northern District of Indiana wanted to know what statute of limitations should apply to attorneys' fees actions under the IDEA, the court would examine Indiana statutes,

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64. H.R. REP. NO. 101-734, at 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6870.

65. The first appellate court decision concerning limitations periods for attorneys' fees was *Dell v. Board of Education*, 32 F.3d 1053, 1064 (7th Cir. 1994) (adopting the Illinois School Code's 120-day limitations period for judicial review of administrative decisions). The three district court opinions to address the question before 1990 were *James v. Nashua School District*, 720 F. Supp. 1053, 1058 (D.N.H. 1989) (adopting New Hampshire's three-year limitations period for personal injury actions), *Michael M. v. Board of Education*, 686 F. Supp. 995, 1002 (E.D.N.Y. 1988) (adopting New York's three-year limitations period for "an action to recover upon a liability created or imposed by statute"), and *Robert D. v. Sobel*, 688 F. Supp. 861, 864 (S.D.N.Y. 1988) (adopting same limitations period as *Michael M.*).

66. *See Dell*, 32 F.3d at 1062; *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 84 (2d. Cir. 1961); Note, *supra* note 53, at 1131.

67. Note, *supra* note 53, at 1130.

68. *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

69. *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995).



find in those statutes the cause of action most analogous to the IDEA attorneys' fees action, and apply the limitations period from the state statute to the IDEA.<sup>70</sup>

A court first borrowed a state limitations period for a federal cause of action in 1895.<sup>71</sup> The Court in *Campbell* held that the Rules of Decision Act<sup>72</sup> required it to adopt a limitations period from state law.<sup>73</sup> The Court recognized two exceptions to the rule of state law borrowing, however. First, federal courts are not required to borrow state law where that law discriminates against federal rights by applying different limitations periods to similar state and federal causes of action.<sup>74</sup> Second, "statutes of limitations must give a party a reasonable time to sue."<sup>75</sup>

The Rules of Decision Act is not a compelling justification for borrowing state limitations periods. According to the Act, state laws must be used "in cases where they apply,"<sup>76</sup> but state law does not apply to causes of action created by federal statutes. Later courts recognized that difficulty and therefore rejected the Rules of Decision Act as a justification for borrowing state limitations periods.<sup>77</sup> Today, federal courts borrow state limitations periods "as a matter of interstitial fashioning of remedial details under the respective substantive federal statutes."<sup>78</sup> Thus, limitations borrowing is an example of courts making federal common law.<sup>79</sup> Courts find that they are justified in continuing to adopt state limitations periods because Congress has acquiesced in the limitations periods that the courts have imposed on some federal causes of action.<sup>80</sup>

Although borrowing from state law is the traditional solution for filling in limitations periods, courts should not borrow from state law where the analogous state limitations periods would frustrate the "purpose or operation" of the federal law.<sup>81</sup> In *DelCostello*, for example, the Supreme Court refused to apply a limitations period from state law to suits brought under the Labor Management Relations Act because all analogous state limitations periods were either too brief to vindicate the rights of employees or too long to promote the rapid resolution of disputes.<sup>82</sup> Instead, the Court adopted the National Labor Relation Act's six-month

70. The result of that exercise can be found in *Wagner v. Logansport Community School Corp.*, 990 F. Supp. 1099 (N.D. Ind. 1997) (adopting Indiana's thirty-day limitation period for appeals from administrative agency decisions).

71. *Campbell v. Haverhill*, 155 U.S. 610 (1895).

72. The Rules of Decision Act was originally enacted as § 34 of the Judiciary Act of 1789. Now codified at 28 U.S.C. § 1652 (2000), the Act provides: "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

73. *Campbell*, 155 U.S. at 615-16.

74. *Id.* at 615.

75. *Id.*

76. 28 U.S.C. § 1652.

77. *Holmberg v. Ambrecht*, 327 U.S. 392, 394-95 (1946); *see also DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 160 n.13 (1983) (stating that "[s]ince *Erie*, no decision of this Court has held or suggested that the Act requires borrowing state law to fill gaps in federal substantive statutes").

78. *DelCostello*, 462 U.S. at 160 n.13.

79. GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 7.07 (3d ed. 2002); Mikva & Pfander, *supra* note 60, at 396.

80. *See N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995).

81. *Id.*

82. *DelCostello*, 462 U.S. at 168.

limitations period for making charges of unfair labor practices.<sup>83</sup>

Although in *DelCostello* and other cases<sup>84</sup> courts have borrowed limitations periods from federal statutes, the Supreme Court recently stated that federal borrowing is the exception and not the rule for filling in statutes of limitations.<sup>85</sup> In *North Star Steel Co.* the Court stated:

But the reference to federal law is the exception, and we decline to follow a state limitations period "only 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'"<sup>86</sup>

Thus, when determining a proper limitations period for a federal cause of action, courts should first locate all analogous state causes of action. Courts should then determine which state cause of action is most analogous to the federal cause of action. If the limitations period for that state cause of action is consistent with the purposes and operation of the federal law, then that limitations period should apply. If the limitations period is inconsistent with the purposes and operation of the federal law, then courts must determine whether there are any analogous state causes of action whose limitations periods are consistent. If so, then that limitations period should apply.<sup>87</sup> Only if there is no analogous state cause of action that has a limitations period consistent with the federal law should a court borrow a limitations period from federal law.

### III. LIMITATIONS PERIODS ADOPTED FOR ADMINISTRATIVE REVIEW ACTIONS

Although a complete analysis of the appropriate limitations period for administrative review actions is beyond the scope of this Note,<sup>88</sup> a brief overview of the subject is necessary to understand the debate over what limitations period should apply to attorneys' fees actions. The judicial circuits are almost evenly split between those that favor a shorter limitations period for administrative review actions and those that favor a longer period.<sup>89</sup> The First, Second, Seventh, Ninth, Eleventh, and D.C. Circuits favor shorter limitations periods, ranging from thirty days to four months.<sup>90</sup> In contrast, the Third, Fourth, Fifth, Sixth, and Eighth

83. *Id.* at 169.

84. *See, e.g.,* *Lampf, Pleva, Lipking, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359 (1991); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987).

85. *N. Star Steel Co.*, 515 U.S. at 35.

86. *Id.* (quoting *Reed v. Transp. Union*, 488 U.S. 319, 324 (1989) (quoting *DelCostello*, 462 U.S. at 172)).

87. Although the Supreme Court does not explicitly state that all analogous state causes of action must be examined before a court may apply a federal limitations period, the reference in *North Star Steel Co.* to "available state statutes" implies that courts should look at all possible state causes of action.

88. For a thorough discussion and analysis, see Drew G. Peel, Comment, *Time to Learn: Borrowing a Limitations Period for Actions Arising Under Section 1415(e)(2) of the Education for All Handicapped Children Act of 1975*, 1991 U. CHI. LEGAL F. 315.

89. *See infra* notes 90-91.

90. *Cory D. v. Burke County Sch. Dist.*, 285 F.3d 1294, 1295 (11th Cir. 2002) (thirty days); *Providence Sch. Dep't v. Ana C.*, 108 F.3d 1, 5 (1st Cir. 1997) (thirty days);

Circuits favor longer limitations periods, ranging from one to six years.<sup>91</sup> Although there is no appellate court opinion in the Tenth Circuit, a district court in Utah adopted a thirty-day limitations period.<sup>92</sup>

All of the courts that favor a brief limitations period find that administrative review actions are most analogous to state actions that authorize appeals from administrative agency decisions.<sup>93</sup> Those state statutes usually have brief limitations periods.<sup>94</sup> Of the courts that favor longer limitations periods, some find that administrative review actions are most analogous to actions for personal injury.<sup>95</sup> Other courts find that there is no closely analogous state cause of action and therefore apply the state's residual statute of limitations.<sup>96</sup> Still other courts find that administrative review actions are most analogous to appeals from administrative agency decisions but refuse to apply the brief limitations periods permitted by those statutes because the courts find brief limitations periods inconsistent with the purposes of the IDEA.<sup>97</sup>

On the whole, the language, structure, and legislative history of the IDEA all favor adopting the brief limitations periods governing administrative appeals. Although § 1415(i)(2)(A) states that parents or schools have the right to bring a "civil action" rather than an "appeal,"<sup>98</sup> the civil action provides for judicial review of administrative proceedings.<sup>99</sup> Although courts are permitted to hear evidence not introduced at the administrative hearings<sup>100</sup> and are directed to base their decision "on the preponderance of the evidence,"<sup>101</sup> the Supreme Court has held that those provisions are "by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review."<sup>102</sup> Further, the Court stated that reviewing courts must give "due weight" to administrative proceedings.<sup>103</sup> Thus, the scope of review in civil actions authorized by § 1415(i)(2)(A) is similar to the scope of review for an appeal of an administrative agency decision.<sup>104</sup>

It is clear from the legislative history of the IDEA that a brief limitations period is consistent with the purposes of the statute. One of the sponsors of the

Livingston Sch. Dist. Nos. 4 & 1 v. Keenan, 82 F.3d 912, 914 (9th Cir. 1996) (thirty days); Dell v. Bd. of Educ., 32 F.3d 1053 (7th Cir. 1994) (120 days); Spiegler v. District of Columbia, 866 F.2d 461, 469 (D.C. Cir. 1989) (thirty days); Adler v. Educ. Dep't, 760 F.2d 454, 459-60 (2d Cir. 1985) (four months).

91. Birmingham v. Omaha Sch. Dist., 220 F.3d 850, 856 (8th Cir. 2000) (three years); Schimel v. Spillane, 819 F.2d 477, 480 (4th Cir. 1987) (one year); Janzen v. Knox County Bd. of Educ., 790 F.2d 484, 489 (6th Cir. 1986) (three years); Scokin v. Texas, 723 F.2d 432, 438 (5th Cir. 1984) (two years); Tokarcik v. Forest Hills Sch. Dist., 665 F.2d 443, 454 (3d Cir. 1981) (two or six years).

92. L.C. v. Utah State Bd. of Educ., 57 F. Supp. 2d 1214, 1218 (D. Utah 1999).

93. See *supra* note 90.

94. Peel, *supra* note 88, at 329.

95. Birmingham, 220 F.3d at 856.

96. Schimel, 819 F.2d at 480.

97. Scokin v. Texas, 723 F. 2d 432, 438 (5th Cir. 1984).

98. 20 U.S.C. § 1415(i)(2)(A) (2000).

99. *Id.*

100. *Id.* § 1415(i)(2)(B)(ii).

101. *Id.* § 1415(i)(2)(B)(iii).

102. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).

103. *Id.*

104. Peel, *supra* note 88, at 328-29.

EAHCA, the predecessor to the IDEA, stated, "in view of the urgent need for prompt resolution of questions involving the education of handicapped children it is expected that all hearings and reviews conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable consistent with fair consideration of the issues involved."<sup>105</sup>

Further, other provisions of the IDEA make a long limitations period unnecessary.<sup>106</sup> The IDEA requires that a student's IEP be reviewed at least once per year.<sup>107</sup> Therefore, even if a parent aggrieved by a school's decision does not receive relief at the administrative level and does not timely file for judicial review, the parent can still challenge the school's action at the next IEP conference. After that IEP conference, the full range of administrative and judicial remedies is again available to the parent.<sup>108</sup>

#### IV. THE APPROPRIATE LIMITATIONS PERIOD FOR ATTORNEYS' FEES ACTIONS

Although the judicial circuits disagree about the proper limitations period for administrative review actions, the approach each circuit follows is settled.<sup>109</sup> In contrast, there is much uncertainty, even within each circuit, concerning the proper limitations period for attorneys' fees actions. As noted in the Introduction, the only federal courts of appeals to address this issue are the Sixth, Seventh, and Eleventh Circuits.<sup>110</sup> Further, there are many states in which no court has considered the question of limitations periods for attorneys' fees actions.<sup>111</sup>

Several factors may explain why there are fewer attorneys' fees cases than administrative review cases. First, there are fewer potential plaintiffs in attorneys' fees actions. Both schools and parents can seek judicial review of agency decisions,<sup>112</sup> but only parents may bring an action for attorneys' fees.<sup>113</sup> Second, the right of parents to obtain attorneys' fees has existed only since Congress enacted the HCPA in 1986.<sup>114</sup> Third, and perhaps most important, attorneys have a strong incentive to seek attorneys' fees quickly regardless of what limitations period exists.<sup>115</sup>

105. 121 CONG. REC. 37,416 (1975) (statement of Sen. Williams). Senator Williams's statement is one of the most often cited justifications for applying a brief limitations period to § 1415(i)(2)(A) actions. See *Cory D. v. Burke County Sch. Dist.*, 285 F.3d 1294, 1299 (11th Cir. 2002); *Livingston Sch. Dist. Nos. 4 & 1 v. Keenan*, 82 F.3d 912, 916-17 (9th Cir. 1996); *Dell v. Bd. of Educ.*, 32 F.3d 1053, 1060 (7th Cir. 1994); *Spiegler v. District of Columbia*, 866 F.2d 461, 467 (D.C. Cir. 1989); *Adler v. Educ. Dep't*, 760 F.2d 454, 460 (2d Cir. 1985); *Peel*, *supra* note 88, at 319.

106. See *Peel*, *supra* note 88, at 330.

107. 20 U.S.C. § 1414(d)(4)(A)(i) (2000).

108. See *Adler*, 760 F.2d at 460; *Peel*, *supra* note 88, at 330.

109. The Tenth Circuit is the exception. See *supra* text accompanying note 92.

110. See *supra* note 10.

111. For a summary of the cases considering limitations periods, see *STUDENTS WITH DISABILITIES AND SPECIAL EDUCATION LAW 173-76*, *supra* note 8.

112. 20 U.S.C. § 1415(i)(2)(A) creates a right of action for "[a]ny party aggrieved by the findings and decision" of the state education agency.

113. 20 U.S.C. § 1415(i)(3)(B) ("In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." (emphasis added)).

114. Pub. L. No. 99-372, 100 Stat. 796 (1986).

115. See *Zipperer v. Sch. Bd.*, 111 F.3d 847, 851 (11th Cir. 1997).

Besides the paucity of reported cases, another source of uncertainty for litigants in attorneys' fees cases is that some courts adopt different limitations periods for attorneys' fees actions than for administrative review actions. In fact, of the three judicial circuits to consider limitations periods both for attorneys' fees and for administrative review actions, only the Seventh Circuit has adopted the same limitations period for both.<sup>116</sup> The Sixth Circuit has adopted a three-year limitations period for administrative review actions,<sup>117</sup> but a thirty-day limitations period for attorneys' fees actions.<sup>118</sup> The Eleventh Circuit followed the opposite course and adopted a thirty-day limitations period for administrative review actions<sup>119</sup> but a four-year limitations period for attorneys' fees actions.<sup>120</sup> For the reasons discussed below, courts should follow the lead of the Eleventh Circuit and adopt longer limitations periods for attorneys' fees actions than for administrative review actions.

### A. An Independent Cause of Action for Attorneys' Fees

The most important disagreement between courts that favor brief limitations periods and courts that favor longer limitations periods concerns whether attorneys' fees actions are independent or ancillary to administrative review actions. Courts that adopt brief limitations periods hold that actions for attorneys' fees are part of the judicial review of administrative decisions.<sup>121</sup> In contrast, courts favoring longer limitations periods characterize actions for attorneys' fees as independent actions.<sup>122</sup> The Seventh Circuit has neatly summarized the divide:

If seen as an independent cause of action, a claim for attorneys' fees under § 1415 is arguably analogous to a tort action seeking money damages, which usually carries a comparatively long statute of limitations. . . . If viewed as part of the administrative review of the underlying education dispute, however, the claim is more analogous to statutes dealing with judicial review of state agency decisions. The limitations period for such agency review is generally quite short.<sup>123</sup>

#### 1. Arguments That Attorneys' Fees Actions Are Ancillary to Administrative Review Actions

Both the Sixth and Seventh Circuits have concluded that a claim for attorneys' fees is part of the administrative review process.<sup>124</sup> The Seventh Circuit holds that

116. *Dell v. Bd. of Educ.*, 32 F.3d 1053 (7th Cir. 1994).

117. *Janzen v. Knox County Bd. of Educ.*, 790 F.2d 484, 489 (6th Cir. 1986).

118. *King v. Floyd County Bd. of Educ.*, 228 F.3d 622, 627 (6th Cir. 2000).

119. *Cory D. v. Burke County Sch. Dist.*, 285 F.3d 1294, 1300 (11th Cir. 2002).

120. *Zipperer*, 111 F.3d at 852.

121. *See, e.g., King*, 228 F.3d at 626; *Powers v. Ind. Dep't of Educ.*, 61 F.3d 552, 556 (7th Cir. 1995).

122. *See, e.g., Zipperer*, 111 F.3d at 851; *Shanahan v. Bd. of Educ.*, 953 F. Supp. 440, 443 n.5 (N.D.N.Y. 1997).

123. *Powers*, 61 F.3d at 555 (citations omitted).

124. *King*, 228 F.3d at 626; *Dell v. Bd. of Educ.*, 32 F.3d 1053, 1064 (7th Cir. 1994). At least one district court from the Fourth Circuit has agreed with the view that actions for attorneys' fees are part of administrative review. *See Mayo v. Booker*, 56 F. Supp. 2d 597, 598 (D. Md. 1999).

§ 1415(i)(2)(A) is the only part of § 1415 that confers a right to judicial review.<sup>125</sup> The court stated in *McCartney C.* that parents who prevail against a school in an administrative hearing may “bring an independent suit in federal court *under* 20 U.S.C. § 1415(e)(2) [now codified at § 1415(i)(2)] to obtain, *pursuant to* § 1415(e)(4)(B) [now codified at § 1415(i)(3)(B)], reimbursement of the attorney’s fees expended . . . .”<sup>126</sup> According to the Seventh Circuit, then, § 1415(i)(3)(B) does not create a cause of action separate from § 1415(i)(2)(A). Therefore, the statute of limitations that applies to administrative review actions must also apply to attorneys’ fees actions.<sup>127</sup>

The Sixth Circuit also held that attorneys’ fees actions are part of the judicial review of administrative proceedings.<sup>128</sup> The court stated in *King*:

[T]he 1986 fee award amendment to the IDEA had the effect of making a parent who prevailed in the administrative proceedings with the assistance of counsel an “aggrieved” party, for purposes of 20 U.S.C. § 1415(i)(2), insofar as there was no award of attorney fees. As an aggrieved party, the parent is authorized to go to court to seek reasonable attorney fees.<sup>129</sup>

On the Sixth Circuit’s view, parents can obtain attorneys’ fees only because they are “aggrieved parties” for purposes of § 1415(i)(2)(A). Since the court holds that the IDEA “seems to treat the award of attorney fees as another phase of the administrative proceeding,”<sup>130</sup> § 1415(i)(2)(A) provides both relief from administrative decisions and awards for attorneys’ fees. Therefore, the same statute of limitations must apply to both types of proceedings.

## 2. Arguments That Attorneys’ Fees Actions Are Independent Actions

The arguments advanced by the Sixth and Seventh Circuits are not compelling because § 1415(i)(3)(B) creates a cause of action not only where parents prevail in

125. See *McCartney C. v. Herrin Cmty. Unit Sch. Dist. No. 4*, 21 F.3d 173, 174 (7th Cir. 1994). In *McCartney C.* the court did not address the issue of how long the limitations period should be, but rather when the limitations period began to run. The parents of a disabled child had prevailed against the school district in a hearing before the state education agency, and the school did not seek judicial review of the agency’s decision. When the parents brought an action in federal court to recover the attorneys’ fees they incurred during the administrative proceedings, the school district argued that their action was time barred because the parents had not filed their claim within 120 days of the state education agency’s decision. The parents did not dispute that the proper limitations period was 120 days, but they argued that the limitations period did not begin to run until 120 days after the state agency’s decision. Only then, the parents argued, had they prevailed, because that was the point at which the school district could no longer seek judicial review of the agency’s decision. The Seventh Circuit agreed with the parents. Thus, where all education and placement issues are resolved at the administrative level, a claim for attorneys’ fees does not accrue until the time when the losing party may appeal has elapsed. *Id.* at 175.

126. *Id.* at 174 (emphases added).

127. See *Dell*, 32 F.3d at 1061 (stating that “[a]lthough Congress might have intended to ‘unbundle’ the placement and reimbursement issues, it did not do so”).

128. *King*, 228 F.3d at 626.

129. *Id.* at 625.

130. *Id.*

a judicial review, but also where parents prevail in administrative hearings<sup>131</sup> or negotiations.<sup>132</sup> Although § 1415(i)(3)(B) authorizes an award of attorneys' fees "[i]n any action or proceeding brought under this section,"<sup>133</sup> courts have not limited recovery of attorneys' fees to situations where parents prevail in court.<sup>134</sup> Since parents may bring attorneys' fees actions even where they do not bring an action under § 1415(i)(2)(A), there is no support for the position of the Sixth and Seventh Circuits that attorneys' fees actions are brought *under* § 1415(i)(2)(A).

Further, there are many differences between administrative review actions and attorneys' fees actions. First, the parties who are authorized to bring administrative review actions are different from the parties who are authorized to bring attorneys' fees actions.<sup>135</sup> Under § 1415(i)(2)(A), "[a]ny party aggrieved by the findings and decision" of the state education agency may bring a civil action in state or federal court.<sup>136</sup> Thus, both parents and schools may seek judicial review of the state agency's decision.<sup>137</sup> Section 1415(i)(3)(B), however, permits only parents, not schools, to bring an action for attorneys' fees.<sup>138</sup>

Second, appeals from state education agency decisions and actions for attorneys' fees differ in their scope of review. In administrative review actions, courts must show substantial deference to the determinations of the administrative agency.<sup>139</sup> By contrast, administrative agencies do not have authority to award attorneys' fees under the IDEA.<sup>140</sup> Thus, there can be no deference to the findings of an administrative agency in an action for attorneys' fees, because "[n]o aspect of [that] action is appellate in nature."<sup>141</sup>

Third, the facts and legal bases upon which courts make attorneys' fees decisions are different from the facts and legal bases upon which courts review state education agency decisions.<sup>142</sup> Although a reviewing court in an administrative review action must show deference to the findings of the state education agency, the court's review "is also intended to be a revisiting of the merits of the underlying litigation."<sup>143</sup> By contrast, the only questions in an attorneys' fees action are "who won?" and "what is a reasonable fee?" The court does not need to determine who should have won, but only who did win.<sup>144</sup>

131. *Moore v. District of Columbia*, 907 F.2d 165, 166 (D.C. Cir. 1990); *Duane M. v. Orleans Parish Sch. Bd.*, 861 F.2d 115, 120 (5th Cir. 1988); *Eggers v. Bullitt County Sch. Dist.*, 854 F.2d 892, 898 (6th Cir. 1988).

132. *Shelly C. v. Venus Indep. Sch. Dist.*, 878 F.2d 862, 864 (5th Cir. 1989).

133. 20 U.S.C. § 1415(i)(3)(B) (2000).

134. *See supra* notes 131-32.

135. *See Zipperer v. Sch. Bd.*, 111 F.3d 847, 851 n.2 (11th Cir. 1997).

136. 20 U.S.C. § 1415(i)(2)(A).

137. *Zipperer*, 111 F.3d at 851 n.2.

138. *See* 20 U.S.C. § 1415(i)(3)(B); *Zipperer*, 111 F.3d at 851 n.2; *see also* *Curtis K. v. Sioux City Cmty. Sch. Dist.*, 895 F. Supp. 1197, 1210 (N.D. Iowa 1995) (noting that § 1415(i)(3)(B) "provides for a cause of action for attorney fees, not by 'any aggrieved party,' but by a 'prevailing party'").

139. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982).

140. *Zipperer*, 111 F.3d at 851.

141. *Bow Sch. Dist. v. Quentin W.*, 750 F. Supp. 546, 549 (D.N.H. 1990); *see also* *Curtis K.*, 895 F. Supp. at 1211 (stating that "[t]here is no suggestion of deference to any prior decision in a fee-claim action").

142. *B.K. v. Toms River Bd. of Educ.*, 998 F. Supp. 462, 470 (D.N.J. 1998).

143. *Curtis K.*, 895 F. Supp. at 1209.

144. *Id.*

Finally, some courts hold that there is a jurisdictional difference between §§ 1415(i)(2)(A) and 1415(i)(3)(B).<sup>145</sup> According to those courts, state and federal courts have concurrent jurisdiction over administrative review actions, but federal courts have exclusive jurisdiction over attorneys' fees actions.<sup>146</sup> It is clear from the plain language of the statute that an administrative review action may be brought in either state or federal court.<sup>147</sup> Section 1415(i)(2)(A) provides that an aggrieved party may bring a civil action "in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy."<sup>148</sup> It is not clear, however, that an action for attorneys' fees can be brought only in federal court, and one state court has held that state courts have jurisdiction to award attorneys' fees.<sup>149</sup>

The jurisdiction controversy centers on the provision that immediately precedes the attorneys' fees provision. Section 1415(i)(3)(A) provides: "[t]he district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy."<sup>150</sup> While some courts hold that this provision deprives state courts of jurisdiction,<sup>151</sup> the court in *J.H.R.* held that the language merely extends jurisdiction to federal courts without taking it away from state courts.<sup>152</sup> The court reasoned that § 1415(i)(3)(A) was a part of the IDEA before it provided for attorneys' fees.<sup>153</sup> That section was added only to remove any limitation on the jurisdiction of federal courts based on the amount in controversy and therefore does not take away jurisdiction from state courts.<sup>154</sup> The historical argument in *J.H.R.* is strengthened by the practical argument that it would be a waste of judicial resources to permit parents to file for judicial review of educational decisions in state court but then require them to file for attorneys' fees in federal court.<sup>155</sup>

### *B. The Relevance of Federal Rule of Civil Procedure 54*

The Federal Rules of Civil Procedure provide that "[u]nless otherwise provided by statute or order of the court, the motion [for attorneys' fees] must be filed no later than 14 days after entry of judgment."<sup>156</sup> Courts are divided over whether Rule 54 provides a limitations period for some IDEA attorneys' fees actions.<sup>157</sup> It is clear that Rule 54 does not apply to actions to recover attorneys' fees incurred where the merits of the case were resolved during negotiations or at

145. *Zipperer*, 111 F.3d at 851; *Curtis K.*, 895 F. Supp. at 1210.

146. *Zipperer*, 111 F.3d at 851; *Curtis K.*, 895 F. Supp. at 1210.

147. 20 U.S.C. § 1415(i)(2)(A) (2000).

148. *Id.*

149. *J.H.R. v. Bd. of Educ.*, 705 A.2d 766, 773-74 (N.J. Super. Ct. App. Div. 1998).

150. 20 U.S.C. § 1415(i)(3)(A).

151. *Zipperer*, 111 F.3d at 851; *Curtis K.*, 895 F. Supp. at 1210.

152. *J.H.R.*, 705 A.2d at 776.

153. *Id.*

154. *Id.*

155. *See id.*

156. FED. R. CIV. P. 54(d)(2)(B).

157. *Compare Day v. Radnor Township Sch. Dist.*, No. CIV.A.92-3764, 1994 WL 683375, at \*1 (E.D. Pa. Nov. 29, 1994) (holding that Rule 54 applies), *with J.B. v. Essex-Caledonia Supervisory Union*, 943 F. Supp. 387, 390 (D. Vt. 1996) (holding that Rule 54 does not apply).



the administrative level.<sup>158</sup> Rule 54 limits how long a prevailing party has to move for fees after entry of a judgment.<sup>159</sup> Where parents and schools resolve their disputes through negotiation, there is no judgment entered. Further, since an order of a state education agency is not a judgment within the meaning of the Federal Rules of Civil Procedure, Rule 54 does not apply to actions to recover attorneys' fees incurred in administrative proceedings.<sup>160</sup>

Even where parents prevail at the level of judicial review, however, some courts still hold that Rule 54 does not apply. The court in *J.B.* reasoned as follows: "[U]nder Rule 54, the request for fees is presumed to be initiated by motion. The IDEA requires that all actions for attorneys' fees and costs be determined by actions in the district courts. Actions for legal fees cannot be initiated by motion. Rule 54 is therefore, inapplicable."<sup>161</sup>

Although several courts have held that Rule 54 does apply to IDEA attorneys' fees actions where a district court has entered a judgment on the merits,<sup>162</sup> the reasoning in *J.B.* is persuasive because § 1415(i)(3)(B) creates an independent cause of action for attorneys' fees.<sup>163</sup> Rule 54 "presupposes . . . that a post-judgment request for fees and costs is ancillary to that judgment and not a separate cause of action."<sup>164</sup> Thus, Rule 54 does not apply to attorneys' fees actions brought under the IDEA because § 1415(i)(3)(B) creates a separate cause of action for attorneys' fees.

### C. Consistency with Purposes and Operation of the IDEA

Courts that favor brief limitations periods and courts that favor longer limitations periods both hold that their preferred limitations period is consistent with the purposes and operation of the IDEA. This Part reviews the arguments of both camps and concludes that because longer limitations periods are consistent with the purposes and operation of the IDEA, limitations periods for actions founded on statutory liability should apply to attorneys' fees actions.

#### 1. Arguments That Brief Limitations Periods Are Consistent with the IDEA

Courts that have found the IDEA's attorneys' fees provision analogous to administrative appeals have also concluded that a brief limitations period is consistent with the purposes and operation of the IDEA. The Seventh Circuit stressed that delaying the adjudication of attorneys' fees could not serve a useful

158. *Ivanlee J., Jr. v. Wilson Area Sch. Dist.*, No. CIV.A.97-683, 1997 WL 164272, at \*1 n.2 (E.D. Pa. April 3, 1997) ("Of course, because no final judgment has been rendered in this action, Rule 54 does not apply." (emphasis in original)); *J.B.*, 943 F. Supp. at 390 ("[Rule 54] presupposes that a final judgment is entered by a court and that a post-judgment request for fees and costs is ancillary to that judgment and not a separate cause of action.").

159. FED. R. CIV. P. 54(d)(2)(B).

160. *J.B.*, 943 F. Supp. at 390; see also *King v. Floyd County Bd. of Educ.*, 228 F.3d 622, 627 (6th Cir. 2000); *Oberti v. Bd. of Educ.*, No. CIV.A.91-2818 (JEI), 1995 WL 428635, at \*2 (D.N.J. July 17, 1995).

161. *J.B.*, 943 F. Supp. at 390 (citations omitted).

162. See *King*, 228 F.3d at 627; *Oberti*, 1995 WL 428635, at \*2; *Day*, 1994 WL 683375, at \*1.

163. See *supra* text accompanying notes 131-34.

164. *J.B.*, 943 F. Supp. at 390.

purpose, because by the time a cause of action for attorneys' fees accrues, all parties should know the extent of the legal fees they have incurred.<sup>165</sup> While the court in *Dell* conceded that the need to resolve attorneys' fees disputes was less pressing than the need to resolve educational issues, the court nevertheless asserted that all parties to the litigation have an interest in the prompt resolution of all the issues.<sup>166</sup>

One court has stated that delaying resolution of attorneys' fees issues may actually harm some schools.<sup>167</sup> In *Oberti*, parents had prevailed against a school district in a judicial review of the state education agency's placement decision for their son.<sup>168</sup> More than two years after the district court entered judgment in favor of the parents, they brought suit seeking attorneys' fees.<sup>169</sup> The court in which the claim for attorneys' fees was filed found that the claim was untimely.<sup>170</sup> One of the reasons the court cited for finding that the claim was time barred was that "[i]n a climate of increasing demands on shrinking public education resources, we are not prepared to resuscitate the forgotten obligations of prior years and impose them on the school district's current budget."<sup>171</sup>

Parents who delay in bringing actions for attorneys' fees may burden courts as well as schools. Since the IDEA authorizes courts to award "reasonable attorneys' fees" to a parent who is a "prevailing party,"<sup>172</sup> courts must determine whether parents prevailed and whether the amount of attorneys' fees they requested is reasonable. Making those determinations often requires courts to review the records of the administrative proceedings and the judicial proceedings, if there are any records.<sup>173</sup> It may be more difficult to determine who prevailed and whether the amount of attorneys' fees expended was reasonable if a long time has elapsed since the proceedings on the merits.<sup>174</sup>

While delaying the adjudication of attorneys' fees may cause hardships for both schools and courts, it is less clear that forcing parents to bring their claims promptly will harm parents. In the context of placement decisions, some courts have decided not to adopt brief limitations periods because they believed that a brief period would prejudice the rights of parents who were not represented by attorneys and who might not be familiar with the legal system.<sup>175</sup> Parents who sue for attorneys' fees, however, are represented, or have been represented, by an attorney. Therefore, courts that adopt brief limitations periods for attorneys' fees

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165. *Dell v. Bd. of Educ.*, 32 F.3d 1053, 1063-64 (7th Cir. 1994).

166. *Id.* at 1063.

167. *Oberti*, 1995 WL 428635, at \*4.

168. *Id.* at \*1.

169. *Id.*

170. *Id.* at \*4.

171. *Id.*

172. 20 U.S.C. § 1415(i)(3)(B) (2000).

173. *Mayo v. Booker*, 56 F. Supp. 2d 597, 598 (D. Md. 1999).

174. *Id.*; see also *Dell v. Bd. of Educ.*, 32 F.3d 1053, 1063 (7th Cir. 1994) (arguing that because an award of attorneys' fees requires a court to review an administrative record that it did not create, delaying the adjudication of attorneys' fees wastes judicial resources).

175. See, e.g., *Schimmel v. Spillane*, 819 F.2d 477, 482 (4th Cir. 1987). Some courts seek to protect parents by requiring the school district to provide information about applicable statutes of limitations to parents and tolling the statute of limitations if schools fail to provide that information. See, e.g., *Spiegler v. District of Columbia*, 866 F.2d 461, 469 (D.C. Cir. 1989).

actions "do not run the risk of hurting vulnerable unrepresented parents."<sup>176</sup>

Another concern about brief limitations periods in the context of appeals of educational decisions is that brief limitations periods will force parents to seek out an attorney and thereby become less involved in their children's education.<sup>177</sup> That concern is, of course, irrelevant in suits for attorneys' fees.<sup>178</sup>

## 2. Arguments That Longer Limitations Periods Are Consistent with the IDEA

The longer limitations periods provided for actions founded on statutory liability are consistent with the purposes and operation of the IDEA. While the Eleventh Circuit found that the goals of the IDEA could not be achieved unless educational disputes were resolved quickly,<sup>179</sup> it also found that "the resolution of claims for attorneys' fees is less urgent."<sup>180</sup> Several district courts have also held that a longer limitations period for attorneys' fees actions will not disserve the IDEA.<sup>181</sup>

Those same courts also found that longer limitations periods will positively promote the goals of the IDEA. Longer limitations periods may encourage parents to vindicate the rights guaranteed to their children by the IDEA.<sup>182</sup> By vindicating the rights of their own children, parents advance the rights of all disabled children.<sup>183</sup>

The principal virtue of a longer limitations period is that it encourages settlement of attorneys' fees claims.<sup>184</sup> Courts are concerned that brief limitations periods will force parents into litigation because parents will not have enough time to negotiate for fees before the limitations period expires.<sup>185</sup> That concern was stated most forcefully in *Curtis K.*:

[T]he 30-day statute of limitations suggested by defendants provides no realistic opportunity for the negotiation and compromise of fee claims prior to the filing of an independent action for fees in federal court . . .

176. *Powers v. Ind. Dep't of Educ.*, 61 F.3d 552, 558 (7th Cir. 1995).

177. See *Janzen v. Knox County Bd. of Educ.*, 790 F.2d 484, 487 (6th Cir. 1986); *Scokin v. Texas*, 723 F.2d 432, 437 (5th Cir. 1984); *Tokarcik v. Forest Hills Sch. Dist.*, 665 F.2d 443, 452 (3d Cir. 1981). For a critique of the argument that brief limitations periods discourage parental involvement in education, see Peel, *supra* note 88, at 332.

178. *Powers*, 61 F.3d at 558.

179. *Cory D. v. Burke County Sch. Dist.*, 285 F.3d 1294, 1299 (11th Cir. 2002).

180. *Zipperer v. Sch. Bd.*, 111 F.3d 847, 851 (11th Cir. 1997).

181. *B.K. v. Toms River Bd. of Educ.*, 998 F. Supp. 462, 471 (D.N.J. 1998); *Curtis K v. Sioux City Cmty. Sch.*, 895 F. Supp. 1197, 1219 (N.D. Iowa 1995); *Michael M. v. Bd. of Educ.*, 686 F. Supp. 995, 1002 (E.D.N.Y. 1988).

182. See *Zipperer*, 111 F.3d at 851-52; see also *B.K.*, 998 F. Supp. at 473. In *B.K.* the parents' attorney failed to seek attorneys' fees despite the parents' requests that he do so. The parents were therefore obliged to hire a second attorney to pursue the attorneys' fees claim. The court stated, "In this context, preventing plaintiff from seeking reimbursement for counsel fees paid to her former attorney would only serve to discourage parents from advocating the rights of their children." *Id.*

183. See *Curtis K.*, 895 F. Supp. at 1219.

184. *B.K.*, 998 F. Supp. at 471 ("[A]llowing a longer statute of limitations for fee claims would allow enough time for the parties to attempt to agree on the issue of attorneys' fees.").

185. *Curtis K.*, 895 F. Supp. at 1219-20.

the court does not see how good faith negotiations can be carried on among the parties, some of whom are directed by boards, and some of whom may have to apportion a fee claim between them, within so short a time . . . The court desires that all such negotiations be conducted in good faith, and not with an eye to making a short fee-claim statute of limitations a trap for the unwary.<sup>186</sup>

Promoting settlement is especially important where the merits of the placement issues were resolved at an administrative hearing or in negotiations prior to a hearing, because there is no need for any judicial involvement in those cases.<sup>187</sup>

#### *D. Actions Founded on Statutory Liability: The Best Limitations Period*

In the absence of congressional action, the most appropriate limitations periods are those contained in general statutes of limitations that govern "action[s] founded on statutory liability."<sup>188</sup> Those statutes are more analogous to § 1415(i)(3)(B) than statutes providing for judicial review of administrative decisions, because an action for attorneys' fees is not a review or appeal, but rather an independent cause of action.<sup>189</sup> Longer limitations periods will not frustrate the purposes or operation of the IDEA. On the contrary, longer limitations periods will promote voluntary settlement of attorneys' fees claims between parents and schools, thereby reducing litigation and allowing schools to use more resources for education.<sup>190</sup> Parents and their attorneys will not rush to file suits to beat a brief limitations period, and schools will be motivated to resolve attorneys' fees issues promptly to avoid future litigation. Although some have argued that it is unfair to burden future years' school boards and administrators with past years' legal expenses,<sup>191</sup> the liability for attorneys' fees is created by the IDEA, and schools can avoid future liability by settling fee disputes promptly.

The argument that long limitations periods will burden courts<sup>192</sup> also has little merit. For proceedings resolved during negotiations or at an administrative hearing, the court awarding attorneys' fees will be unfamiliar with the case no matter how promptly or tardily parents bring a fee action. The mere passage of time does not make an administrative record or lawyer's time sheets more difficult to understand. For cases resolved upon judicial review, however, there would be a gain in judicial efficiency if fee disputes were resolved in the same proceeding with the educational issues involved in the case.

186. *Id.*

187. See *King v. Floyd County Bd. of Educ.*, 228 F.3d 622, 628 (6th Cir. 2000) (Engel, J., dissenting).

188. FLA. STAT. ch. 95.11(3)(f) (2002). The Eleventh Circuit adopted that statute of limitations in *Zipperer v. School Board*, 111 F.3d 847, 851 (11th Cir. 1997). A district court in New York adopted a similar New York statute in *Michael M. v. Board of Education*, 686 F. Supp. 995, 1002 (E.D.N.Y. 1988). The New York statute imposed a three year limitations period on "an action to recover a liability . . . created or imposed by statute." *Id.*

189. See *supra* text accompanying notes 147-48.

190. See *B.K. v. Toms River Bd. of Educ.*, 998 F. Supp. 462, 471 (D.N.J. 1998); *Curtis K.*, 895 F. Supp. at 1219-20.

191. *Oberti v. Bd. of Educ.*, No. CIV.A.91-2818 (JEI), 1995 WL 428635, at \*4 (D.N.J. July 17, 1995).

192. See *Dell v. Bd. of Educ.*, 113, 32 F.3d 1053, 1063 (7th Cir. 1994); *Mayo v. Booker*, 56 F. Supp. 2d 597, 598 (D. Md. 1999).

Even in those cases, the gain in efficiency is not great. The only questions a court must answer in an attorneys' fees action are whether the parents prevailed and whether the fees for the attorney's services were reasonable.<sup>193</sup> Whether the parents prevailed will usually be apparent from the order issued by the court. The court will either order the school to comply with some of the important requests made by the parents or it will deny the parents' requests. Parents do not have to obtain all the relief they requested to be considered prevailing parties. They need only "succeed on any significant issue which achieves some of the benefit [they] sought."<sup>194</sup>

The question of what is a reasonable fee is composed of two parts. First, a court must determine the prevailing rate in the community for services of the type and quality the lawyer performed.<sup>195</sup> Second, the court must determine whether the amount of time the lawyer worked on the case was reasonable.<sup>196</sup> Only the second part requires reviewing the record of the case, since the prevailing legal rates in the community do not depend upon the facts of a particular case. Even the question of whether the parents and their lawyer devoted a reasonable amount of time to the case does not require a searching review of the merits of the case.<sup>197</sup> Thus, little efficiency is gained by dealing with attorneys' fees and educational issues in a single proceeding.

#### CONCLUSION

The best possible solution to the problem of limitations periods for attorneys' fees actions is for Congress to amend the IDEA to provide a limitations period. Congressional action would resolve uncertainty and relieve the courts of litigation that distracts them from enforcing the substantive provisions of the IDEA. Congress also is in a better position than the courts to establish a fair limitations period. Congress is not bound by the jurisprudence of state law borrowing, and Congress can conduct investigations to determine an appropriate limitations period. Given Congress's long silence on limitations periods in the IDEA and other federal statutes, however, it is unlikely that a congressional solution will be forthcoming.

The structure and goals of the IDEA support adopting a longer limitations period for attorneys' fees actions. Although the four-year period adopted by the Eleventh Circuit may be longer than necessary to safeguard the rights of disabled children and their parents, the state law borrowing doctrine confines courts' choices of limitations periods.<sup>198</sup> Section 1415(i)(3)(B) creates a statutory liability. Courts should, therefore, borrow the limitations period from state law that governs actions for liability created by statute. Although the lengthy limitations periods may create

193. 20 U.S.C. at § 1415(i)(3)(B) (2000).

194. *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989). See *supra* text accompanying notes 47-48.

195. 20 U.S.C. § 1415(i)(3)(C).

196. 20 U.S.C. § 1415(i)(3)(F)(iii).

197. See *Curtis K. v. Sioux City Cmty. Sch.*, 895 F. Supp. 1197, 1209 (stating that "an action for attorney fees 'should not result in a second major litigation' revisiting the merits of the underlying action" (quoting *Commissioner v. Jean*, 496 U.S. 154, 163 (1990))).

198. In the context of borrowing a limitations period for administrative review actions, the D.C. Circuit described itself as "faced with the unenviable task of choosing between a 30-day limitations period and a 3-year limitations period." *Spiegler v. District of Columbia*, 866 F.2d 461, 469 (D.C. Cir. 1989).

some difficulties for courts and schools, the difficulties are not so great as to make the limitations periods inconsistent with the purposes and operation of the IDEA, especially since the purpose of the attorneys' fees provision is to ensure that parents are able to vindicate their children's rights. Until Congress acts to fill the statutory void, courts should follow the course of the Eleventh Circuit.