IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JENNIFER L. HIGGINS and BARBARA RIGGINS,	)	
Plaintiffs,	)	
vs.	)	Civil Action No.
MARGARET SPELLINGS, Secretary of the Department of Education,	)	07-0495-CV-W-SOW
Defendant.	)	

SUGGESTIONS IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Federally insured student loans have no statute of limitations. The Secretary of Education is authorized to collect student loans by means of extra-judicial wage garnishments, seizure of tax refunds, and the attachment of federal benefits such as Social Security benefits received by disabled and elderly citizens. It is unlikely that a student loan can be discharged in bankruptcy. If a person is disabled and unable to work they may be subjected to all of these collection tools, not to mention telephone calls and letters demanding repayment. A person may, however, request that her student loan be discharged by establishing a total and permanent

disability. Therefore, the decision concerning whether a loan can be discharged because of the disability is a critical decision for many individuals. If it is improperly denied, it can result in their meager Social Security disability or retirement benefits being subjected to garnishment for the rest of their lives. Plaintiffs contend they were denied due process by the procedures used to evaluate their disability discharge requests. The focus of this suit is to bring a few elements of simple fairness and accuracy to the process so that the Plaintiffs can more effectively make their claim for a disability discharge.

STATEMENT OF FACTS

Statement of Uncontroverted Material Facts

1. The United States Department of Education is an agency within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq.

2. Margaret Spellings, Secretary of the Department of Education, is responsible for the administration of the federally-guaranteed student loan program.

3. Plaintiff Higgins obtained a federally-guaranteed student loan and owes approximately $8181.26. (Higgins Tr. 21).

4. Plaintiff Higgins requested a discharge of her student loan by completing the Department of Education's form to request a disability discharge. Her physician completed the

"Physician's Certification of Borrower's Total and Permanent Disability." (Higgins Tr. 13 & 16).

5. Plaintiff Higgins received a notice from Direct Loans making a preliminary determination that she met the eligibility requirements for a discharge of her student loan. (Higgins Tr. 19-20).

6. The Department of Education received her request for a discharge on January 3, 2006. (Higgins Tr. 23).

7. The Department of Education faxed a med info sheet to Plaintiff Higgins' doctor on January 13, 2006. (Higgins Tr. 22).

8. The Department of Education's internal records indicate that the med info sheet was returned blank on April 11, 2006. (Higgins Tr. 21).

9. On April 12, 2006, Plaintiff Higgins' request for a discharge of her student loan was denied on the basis that the physician failed to respond to the fax request for additional information. (Higgins Tr. 21).

10. Plaintiff Higgins received a notice from the Department of Education that she did not meet the "definition of total and permanent disability for the following reason(s): Medical Review Failure." (Exhibit A).

11. Plaintiff Riggins obtained a federally-guaranteed student loan in the amount of $2500.00 to attend school in 1983. (Riggins Tr. 11-12).

12. Plaintiff Riggins completed the Department of Education's form to request a disability discharge, and her physician completed the "Physician's Certification of Borrower's Total and Permanent Disability." (Riggins Tr. 1-2).

13. An agent for Pioneer Credit Recovery spoke to Plaintiff Riggins' doctor, Alan Chan, on August 30, 2007. He stated that Plaintiff Riggins cannot work due to chronic fatigue, unable to handle stress in a working environment, and limited ability to focus or concentrate. (Riggins Tr. 3).

14. On August 30, 2007, Plaintiff Riggins submitted additional information regarding her receipt of Social Security benefits and her current financial status via facsimile to an individual named Connie. (Riggins Tr. 6-10).

15. The Department of Education sent Plaintiff Riggins' physician, Dr. Chan, a fax dated October 30, 2007, requesting additional information. The Defendant's notes state the fax was sent on November 8, 2007. (Riggins Tr. 5).

16. Plaintiff Riggins received a notice from the Department of Education that she did not meet the "definition of total and permanent disability for the following reason(s): Medical Review Failure." (Exhibit B).

Statutory and Regulatory Background

Students who receive federally insured student loans and later become disabled have the right to request that their loan be discharged if they become disabled. 20 U.S.C. § 1087 provides:

> (a) Repayment in full for death and disability
>
> If a student borrower who has received a loan described in subparagraph (A) or (B) of section 1078(a)(1) of this title dies or becomes permanently and totally disabled (as determined in accordance with regulations of the Secretary), then the Secretary shall discharge the borrower's liability on the loan by repaying the amount owed on the loan.

Obviously, the Secretary "shall" discharge the loan if the borrower has a permanent and total disability. It should be noted 20 U.S.C. § 1087(a) was amended August 14, 2008. H.R. 4137, Sec. 437. The amendment adds additional methods to establish "disability" including, for example, by establishing that the student is considered unemployable by the Veterans Administration. However, the amendment does not affect the procedural issues raised in this action. Furthermore, the amendment does not become effective until July 1, 2010. H.R. 4137, Sec. 437.

As the statute provides, the Secretary of Education has promulgated regulations describing the process for obtaining a disability discharge under the various student loan programs. Although the regulations vary slightly depending on the type of

loan, the definition of disability and the disability determination process is the same.

Even after an individual has been determined permanently and totally disabled, the loan is not immediately discharged. 34 C.F.R. § 682.402(c)(1)(i); 34 C.F.R. § 674.61(b); 34 C.F.R. § 685.213(d). After the initial determination that the individual is totally and permanently disabled, the individual's situation is monitored for three years. If, during that three year period the individual's annual earnings from employment exceed 100% of the poverty standard for a family of two, or the individual receives a new student loan, the initial determination of disability is rescinded.

"Totally and permanently disabled" is defined by the Secretary's regulations as "[T]he condition of an individual who is unable to work and earn money because of an injury or illness that is expected to continue indefinitely or result in death." 34 C.F.R. § 682.200(b); 34 C.F.R. § 674.51(s).

As defined by the Secretary's regulations, the disability process begins when a borrower claims to be totally and permanently disabled. 34 C.F.R. § 682.402(c)(2); 34 C.F.R. § 674.61(b)(3); 34 C.F.R. § 685.213(b). At this point the lender or other agency involved requests that the borrower submit "a form approved by the Secretary, a certification by a physician, who is a doctor of medicine or osteopathy and legally authorized

to practice in a state, that the borrower is totally and permanently disabled as defined in § 682.200(b)."

If the borrower submits a certification form and a lender makes a determination that the borrower meets the criteria for total and permanent disability, the claim is submitted to a guaranty agency. 34 C.F.R. § 682.402(c)(4). If a guaranty agency receives a completed form supporting the conclusion that the borrower is totally and permanently disabled, the guaranty agency must pay the lender. § 682.402(c)(6).

If the guaranty agency denies the claim, it must return the claim to the lender who is required to notify the borrower that the application for disability discharge has been denied. § 682.402(c)(7). If the guaranty agency pays the lender, then the guaranty agency assigns the loan to the Secretary who then reviews the claim.

The Secretary then reviews the borrower's claim for disability discharge and if the Secretary determines that the claim is approved, the borrower is notified that his or her loan has been conditionally discharged for a period of up to three years and if the conditions described above have been met, the discharge will become final. Id; § 682.402(c)(13); (15).

However, if the Secretary does not approve the request, § 682.402(c)(12) provides that the borrower is notified of the denial and that the loan is due and payable.

ARGUMENT

Jurisdiction. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The Supreme Court has held that the Administrative Procedure Act does not provide an independent basis for subject matter jurisdiction. Califano v. Sanders, 430 U.S. 99, 105 (1977). Instead, the Supreme Court has declared that § 1331 confers jurisdiction on federal courts to review agency action. Id.

The Administrative Procedure Act (APA) grants courts the statutory authority to review an agency's actions. Specifically, the APA states that "[A] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Only agency action that is final is reviewable. 5 U.S.C. § 704.

The APA grants a general waiver of sovereign immunity in cases involving agency action. 5 U.S.C. § 702. The courts have held that the APA's waiver of sovereign immunity is not limited to claims arising out of the APA. See Raz v. Lee, 343 F.3d 936 (8th Cir. 2003)(finding that the Plaintiff's suit arising out of allegations that the FBI's surveillance actions were violations of his civil rights was viable under the APA's waiver of sovereign immunity). In sum, the APA acts to waive sovereign

immunity in any claim against the federal government where agency action is alleged.

Standard of Review. Under the APA, the court must set aside agency action where the Secretary has acted arbitrarily or capriciously, abused her discretion, or otherwise has failed to act in accordance with the law. 5 U.S.C. § 706(2)(A). The Supreme Court has provided several definitions of arbitrary and capricious. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), the Court concluded that its review was limited to determining whether the agency considered the relevant factors and whether there was a clear error in judgment by the agency. The Court has also held that agency action is arbitrary and capricious where there is no rational connection between the facts the agency found and the decision it made. Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974)(internal citations omitted). Finally, in Motor Vehicle Mfrs. Ass'n of U.S., Inc., v. State Farm Mutual Auto. Ins., 463 U.S. 29, 43 (1983), the Court concluded that an agency decision is arbitrary and capricious where the agency's offered explanation for its decision runs counter to the evidence before the agency. See also, Friends of Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115, 1121 (8th Cir. 1999).

When reviewing the agency's decision, the court is to examine the whole administrative record. 5 U.S.C. § 706. The whole record refers to the record before the agency at the time of its decision. Overton Park, 401 U.S. at 420.

As discussed above, where the court is reviewing an agency's decision, the court utilizes the arbitrary and capricious standard. However, where claims arise out of violations of the Constitution, the court's review is *de novo*. See McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 493 (1991)(holding that the appropriate standard of review in evaluating the administrative adjudication of facts is whether the agency abused its discretion; the appropriate standard of review of constitutional or statutory claims is *de novo* review); Escudero-Corona v. I.N.S., 244 F.3d 608, 614 (8th Cir. 2001) (holding that plaintiff's due process and equal protection claims are afforded *de novo* review).

A summary judgment is appropriate where, after the submission of the pleadings, affidavits, answers to interrogatories, admissions, and depositions, no genuine issue to any material fact remains. Fed. R. Civ. P. 56(c). In other words, a judge must find for the moving party if, "under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

Due Process. The Due Process Clause of the Fifth Amendment to the United States Constitution requires that due process must be afforded to individuals affected by government action. Before determining whether the procedures utilized by an agency are adequate, it must first be determined whether an interest protected by the due process clause exists. Government agency actions affecting life, liberty or property fall within the interests protected by the Due Process Clause. The first question in this context is whether discharging a student loan because of a disability discharge is a protected property interest.

"Property interests" have been found in: public assistance benefits, Goldberg v. Kelly, 397 U.S. 254 (1970); Social Security disability benefits, Mathews v. Eldridge, 424 U.S. 319 (1976); public education, Goss v. Lopez, 419 U.S. 565 (1975); utility services, Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1 (1978); government employment, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); and driver's license suspensions, Bell v. Burson, 402 U.S. 535 (1971).

Although the underlying substantive property interest is created by an independent source, federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process

Clause. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593, 602 (1972).

In this case, the Plaintiffs have a legitimate claim of entitlement to a disability discharge. The statute in question states that if a student becomes "permanently and totally disabled (as determined in accordance with regulations of the Secretary), then the Secretary shall discharge the borrower's liability on the loan by repaying the amount owed on the loan." 20 U.S.C. § 1087(a). Although the Secretary is given authority to promulgate regulations defining permanent and total disability, once a student meets this definition the Secretary "shall discharge" the loan. Id. The mandatory language in the statute creates the property interests necessary for due process protection. Plaintiffs submitted evidence establishing their eligibility for discharge as set forth in the regulations and statute.

The courts have found a sufficient property interest in a wide variety of government services similar to this case. In Daniels v. Woodbury County, Iowa, 742 F.2d 1128 (8th Cir. 1984), the court was confronted with a local general relief program operated in Woodbury County, Iowa. After describing the general requirements for a property interest, the court concluded that the plaintiffs had a legitimate claim of entitlement to the local general relief payments. The court reviewed the

underlying Iowa statutes which provided that a county "shall" provide relief for poor persons. Id. at 1132. The court noted that once an applicant meets the established conditions, the county was required to deem the applicant eligible for relief and thus the property interest was created. The court concluded that the plaintiffs were entitled to due process protection in the processing of their requests for assistance and remanded the case to the District Court for determination of what process was due.

In a similar case involving county general relief assistance, the Ninth Circuit also concluded that there was a sufficient property interest to justify due process protection for applicants of those benefits. Griffeth v. Detrich, 603 F.2d 118 (9th Cir. 1979). In Kapps v. Wing, 404 F.3d 105 (2nd Cir. 2005), the court held that an energy assistance applicant had a property interest sufficient to implicate due process. The court reviewed the underlying program and observed that once an applicant had established that the eligibility requirements were met, the applicant was required to receive the energy assistance. In Wedges/Ledges of Cal., Inc. v. City of Phoenix, Ariz., 24 F.3d 56 (9th Cir. 1994), the court held that an applicant for an amusement game license had a protected property interest. The court noted that the city regulations governing

such devices created an "articulable standard" sufficient to give rise to a legitimate claim of entitlement. Id. at 64.

In Mallette v. County Employees' Ret. Sys. II, 91 F.3d 630 (4th Cir. 1996), an applicant for a city disability pension claimed a due process violation. The court held that the application for disability benefits did constitute a property interest for purposes of due process protection. The court stated that under the city retirement system regulations there was a legitimate expectation of receiving benefits once disability was established and thus the claimant had a right to be heard with due process protection. Id. at 640. See also, Resler v. Pierce, 692 F.2d 1212 (9th Cir. 1982)(applicants for Section 8 benefits had property interest).

Finally, in one of the early cases dealing with Social Security benefits, this Court held that an applicant for Social Security disability benefits had established a legitimate claim of entitlement so as to implicate a property interest and trigger due process restrictions on government action. Dealy v. Heckler, 616 F.Supp. 880 (W.D.Mo. 1984).

What Process is Due. Once a property interest has been established, the question becomes what process is due. In Mathews v. Eldridge, 424 U.S. 319 (1976), the Court defined the elements to be considered. The Court noted that the fundamental requirement of due process is that there be an opportunity to be

heard at a meaningful time and in a meaningful manner. In this context, the Court observed that due process is a flexible concept and procedural protections should be designed for the particular situation. The Court summarized the due process analysis:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e.g., Goldberg v. Kelly, supra, 397 U.S., at 263-271, 90 S.Ct., at 1018-1022.

Id. at 334-35.

The private interest affected by the denial of a disability discharge is significant. The unpaid student loan will remain in collection status. This means that the loan will continue to collect interest at the contract rate. If the discharge is not promptly granted, this could mean an addition of thousands, or tens of thousands, of dollars to a student loan over time. The disabled person will continue to receive letters demanding payment of the student loan, and in many cases receive frequent telephone calls from debt collectors dunning them for payments. If the individual is owed a tax refund from her prior work, this tax refund can be seized because of the outstanding federal

debt. 31 U.S.C § 3720A. The Department of Education, or one of its agents, may file suit to obtain judgment against the disabled student loan debtor, and with that judgment is able to attach the individual's automobiles, homes, or any other property not specifically exempt from garnishment and attachment.

Finally, the federal student loan debt may be the basis of offsetting any payments due to the individual from the federal government, such as the recent economic stimulus payments made to moderate and low income citizens. Many people requesting disability discharges will already be receiving Social Security disability benefits. Because they owe the student loan, these disability benefits can be attached to repay the delinquent student loan. 31 U.S.C. § 3716. Therefore, a disabled person can have up to fifteen percent of her monthly check seized to pay for the outstanding student loan. Since Congress eliminated the statute of limitations for the collection of delinquent student loans, this fifteen percent reduction in Social Security disability or retirement benefits can continue until death. Lockhart v. United States, 546 U.S. 142 (2005). In short, the failure to receive a prompt and accurate disability discharge determination can cost disabled individuals a significant monetary amount over their lifetime.

Right to Be Heard. Plaintiffs contend that the procedures utilized by Defendant do not give them an adequate opportunity to be "heard" with regard to their request for a disability discharge and secondly that the "decision" Defendant reached fails to apprise Plaintiffs of the true reason for the denial of their claim, and is therefore inadequate. Both of these deprive Plaintiffs of due process guaranteed by the Fifth Amendment to the United States Constitution.

Plaintiffs first contend that they were not given an opportunity to be heard on their claims for disability discharge. Plaintiffs are mindful that the statute in question does not authorize a trial-type hearing and therefore, the procedure specifications in 5 U.S.C. § 554 are not required. Since this is an information adjudication, 5 U.S.C. § 555 is applicable. Pension Benefits Guaranty Corp v. LTV Corp., 496 U.S. 633 (1990).

Nonetheless, the Due Process Clause requires an opportunity to be heard at a meaningful time and a meaningful manner, even though a trial-type hearing is not required. In this case, the Plaintiffs submitted a request for a disability discharge to the servicing agency of their loan. The servicing agency made a preliminary determination with regard to their total and permanent disability. Ms. Higgins was provided a notice (undated) stating that her total and permanent disability had

been preliminarily approved and that her case would be sent to the disability discharge loan servicing center. (Higgins Tr. 20). This notice does not provide any opportunity to submit additional evidence, present written or oral information, obtain copies of the information already in the file, learn what additional evidence may be needed, or obtain additional information concerning the standards to be applied. It simply states that her preliminary request will either be approved or denied, in which case her loan will be returned and collection will resume. At the end of the document, Ms. Higgins was informed that if she had questions about "the status of your loan discharge application" she could contact a toll free number. (Higgins Tr. 21). The next notice Ms. Higgins received was the notice reversing the preliminary determination and finding that she is not totally and permanently disabled. (Exhibit A). Apparently, behind the scenes, the agency sent a form to Plaintiff's doctor requesting additional information. (Higgins Tr. 16). This form was returned to the agency and it was noted to be "blank." (Higgins Tr. 22). It appears, however, that the physician did return the form with two boxes checked indicating that Ms. Higgins would not be able to engage in any form of employment. (Exhibit C). The agency apparently denied Ms. Higgins' claim because her physician allegedly failed to respond to a request for additional information. (Higgins Tr.

22). During the several months that the agency was holding Ms. Higgins' claim for discharge, she was not informed of what additional evidence was needed, much less given an opportunity to submit any additional evidence or arguments establishing her claim for a disability discharge.

The Administrative Record of Barbara Riggins' request is similar. She submitted a doctor's certification dated August 9, 2007, indicating she is unable to work in any capacity. (Riggins Tr. 1). The servicing agency apparently contacted Ms. Riggins' doctor on August 30, 2007, and the doctor provided some missing information concerning the license number. The agent wrote that the doctor once again confirmed that Ms. Riggins was unable to work. The record contains a physician fax form which was allegedly sent to the claimant's physician on November 8, 2007. In addition, the record contains some information which was apparently sent to the original servicer of the loan by Ms. Riggins on August 30, 2007. (Riggins Tr. 6-10). This was a letter from the Social Security Administration indicating she was entitled to Supplemental Security Income benefits and that she became disabled on September 14, 1999 (Riggins Tr. 7). Ms. Riggins also received a letter dated December 20, 2007, indicating that even though she was given a preliminary determination that she was totally and permanently disabled, her claim had been reviewed and it was determined that she did not

meet "FSA(s) definition of total and permanent disability for the following reason: medical review failure." (Exhibit B). Once again, Ms. Riggins was not advised of any activities of the disability discharge loan servicing center. She was not notified that additional information was needed or how to submit additional information.

The risk of an erroneous decision through the procedures currently used would seem to be extreme. In both cases, Plaintiffs were not given an opportunity to submit additional evidence or even know what evidence was being considered with regard to their claim. They were unaware of the standard to be utilized in deciding their case and had no opportunity to present evidence, even in written form, to satisfy that standard. Even if a trial-type hearing is not required, due process still requires a notice of the pending action and an opportunity to present evidence and objections. In Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1 (1978), the Court held that an individual was entitled to a pre-termination notice and opportunity to be heard before utility services were terminated. Although the utility company indicated that an opportunity to meet with management was available, the plaintiff was never provided information concerning what methods they might have to complain about the pending action. The Court held that even though the plaintiffs knew there was a threat of

termination of service, they were not notified of the availability of a procedure for protesting the termination and presenting evidence in support of their claim. Id. at 1563. The Court held that due process required that the plaintiffs be given an opportunity to meet with the utility and to present their claims and that such a procedure was not made available to the plaintiffs. Id. at 1564.

In Winegar v. Des Moines Indep. Com. School Dist., 20 F.3d 895 (8th Cir. 1994), the court held that the plaintiff was not given an adequate opportunity to be heard on his challenge to an employment decision. The court noted the plaintiff was given an opportunity to have "meetings" with school board officials, but was never given an opportunity to challenge the evidence against him. The plaintiff in that case was given an opportunity to submit written comments and meet with officials, but the court determined that this was more in the nature of an "investigation." The court held that "[N]o matter how elaborate, an investigation does not replace a hearing." Id. at 901.

In Grijalva v. Shalala, 152 F.3d 1115 (9th Cir. 1998), the court held that Medicare beneficiaries were denied due process when notices failed to provide an adequate explanation for denial of Medicare benefits. With regard to the risk of erroneous determinations, the court noted "[T]he appeal rights

and other procedural protections available to Medicare beneficiaries are meaningless if the beneficiaries are unaware of the reasons for service denial and therefore cannot argue against the denial." Id. at 1122.

In Gray Panthers v. Schweiker, 652 F.2d 146 (D.C. Cir. 1980), Congress had eliminated Medicare hearings for claims in dispute of less than $100.00. Congress allowed only paper hearings for those claim denials. In holding that a blanket preclusion of oral hearings constituted a denial of due process, the court noted:

> [I]t is universally agreed that adequate notice lies at the heart of due process. Unless a person is adequately informed of the reasons for the denial of a legal interest, a hearing serves no purpose and resembles more a scene from Kafka than a constitutional process. Without notice of the specific reasons for denial, a claimant is reduced to guessing what evidence can or should be submitted in response and driven to responding to every possible argument against denial at the risk of missing the critical one altogether.

Id. at 168-169. After a lengthy analysis the court concluded the process in question presented a significant possibility of an erroneous deprivation and failed to assure that adequate notice and a genuine opportunity to present the claimant's case was provided.

An applicant for a driver's license was denied without any statement of the reason. The applicant was apparently required to submit letters in support of his application since he had a

prior criminal conviction; however, the applicant was never notified of that. The court held that the license board's failure to publish existing policies and regulations was a denial of due process since applicants were not advised of the existing procedural or substantive criteria which would govern the board's decision. Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973).

In this case, neither Plaintiff was advised that additional evidence was needed to evaluate their claim of disability. They had been preliminarily approved as being totally and permanently disabled and they had submitted the appropriate documentation required by the Secretary's regulations. They had no reason to assume that additional evidence might be needed. Apparently the Secretary wrote to the claimants' physicians requesting additional information, but never notified Plaintiffs that their claim was in doubt. In essence, Defendant gave claimants no process and no "hearing" concerning their request for a disability discharge. The risk of an erroneous termination is obviously significant. The burden on the agency is minimal. Writing to the disabled student and advising her of the additional evidence needed, the standard she needed to prove, and the mechanism by which the student could submit additional evidence is diminimus, particularly when compared to the significant private interest of the disabled student.

Inadequate Notice. Plaintiffs were both sent similar notices that their request for a total and permanent disability discharge was denied. The notice states that they had received a preliminary determination that they were eligible, but on "further review of your discharge application and supporting documentation" the Plaintiffs did not meet the definition of "total and permanent disability for the following reason: medical review failure." The notice states that their loans will be returned to payment status and they will be contacted regarding repayment arrangements. (Exhibits A and B). The claims were denied for "medical review failure." This term is nowhere defined in the letter. We are left to speculate as to the real reason for the denials. Before requesting a protective order barring additional discovery, Defendant supplied the only clue we have as to the meaning of this term. In response to Plaintiffs' Interrogatories numbers 9 and 10, the Defendant responded that "a 'medical review failure' can have several meanings depending on the particular circumstances." (Exhibit D). They gave an example concerning Plaintiff Higgins' case indicating that they had sent a request for additional information to her doctor, but the doctor did not respond. (Exhibit D). So, we now know that the most likely meaning of "medical review failure" in this particular case means that the Plaintiff's physician did not provide requested information. We

know this only because of the limited discovery Plaintiffs were able to obtain prior to the protective order. Of course, the term "medical review failure" may have a different meaning depending on the context of the case. Although this may make perfect sense to agency bureaucrats, it is meaningless to disabled students who receive this form letter. No reasonable person would understand the true basis for the denial of their disability discharge based upon this notice. It provides a term without definition and undoubtedly leaves every recipient scratching their heads in confusion. These notices are hopelessly inadequate from a due process standpoint and confuse more than they educate. A person receiving a denial may choose to proceed with judicial review as Plaintiffs in this case have, or they may choose to submit a new application for a disability discharge following the denial. However, it is unlikely that an individual can make a reasoned decision concerning how to proceed based upon the notices received by Higgins and Riggins.

In Memphis Light, Gas and Water, the Court held a notice constitutionally deficient because it did not "provide notice reasonably calculated to apprise respondents of the availability of an administrative procedure to consider their complaint of erroneous billing. . . " Supra at 1567. As noted above in Grijalva v. Shalala, 152 F.3d 1115 (9th Cir. 1998), appeal and other procedural protections are "meaningless if the

beneficiaries are unaware of the reason for service denial and therefore cannot argue against the denial. 'Due process requires notice that gives an agency's reason for its action in sufficient detail that the affected party can prepare a responsive defense.'" Id. at 1122. The court held that such an inadequate notice constituted an unreasonable risk of erroneous deprivation.

In Bliek v. Palmer, 102 F.3d 1472 (8th Cir. 1997), a notice provided to individuals who had been overpaid food stamps failed to state that there was an additional option available to them. The letters did not state that in addition to repaying the benefits, they could attempt to settle the overpayment and compromise the claim with the state agency. The court held that failure to include that information constituted a due process violation. The court noted that there was a significant risk of erroneous deprivation in that case because the recipients would be ignorant of the options available to them. The burden to the administrative agency was negligible. Id. at 1477.

As noted above in Gray Panthers v. Schweiker, 652 F.2d 146, 168 (D.C. Cir. 1980), "[W]ithout notice of the specific reasons for denial, a claimant is reduced to guessing what evidence can or should be submitted in response . . ." And, the Court held in Dealy v. Heckler, 616 F. Supp. 880 (W.D. Mo. 1984), that a Social Security notice, which misled a claimant into believing

that she could reapply for benefits at any time, was constitutionally deficient. Id. at 887.

This case is also in marked contrast to Crum v. Missouri Director of Revenue, 455 F. Supp.2d 978 (W.D. Mo. 2006). In Crum the complaining physicians argued they did not receive adequate notice that their licenses would be terminated for failure to pay state taxes. The Court noted that the physicians had received multiple notices specifying which tax returns were not provided and offering them an opportunity to submit the necessary tax returns to avoid license suspension. Unlike the case at hand, there were state statutes and regulations defining the exact procedures required. Here, Plaintiffs have yet to learn exactly what procedural avenues are available to the Plaintiffs and any policies or procedures used to govern the disability determinations made by Defendant.

Plaintiffs submit that the risk of erroneous deprivation caused by this inadequate notice is severe. The administrative burden for the Defendant to provide the true explanation for the denial of benefits is minimal. Therefore, the notice provided to the Plaintiffs violates the Due Process Clause.

Indeed, the agency's notices do not even satisfy the minimal requirements of the Administrative Procedure Act, 5 U.S.C. § 555(e), which requires that "[P]rompt notice shall be given of the denial in whole or in part of a written

application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial." The agency decision in Plaintiffs' cases is meaningless and inadequate. See e.g., City of Gillette, Wyo. v. F.E.R.C., 737 F.2d 883 (10th Cir. 1984).

Arbitrary and Capricious. Plaintiffs contend that the decisions in both cases are arbitrary and capricious. Simply put, every piece of evidence in Plaintiffs' files supports the proposition that they are totally and permanently disabled. All doctors' opinions in their files support their assertions of total and permanent disability. All additional information in Plaintiffs' files supports their claim of disability. The decision of the Secretary in both cases must be arbitrary and capricious since there is no evidence supporting the decision. If specific information was needed to answer any question, the Secretary should have notified the Plaintiffs and notified them what specific information was needed in order to make a decision on their claims. The failure of the Secretary to do this is once again arbitrary and capricious.

CONCLUSION

Plaintiffs Higgins and Riggins were denied due process in the evaluation of their disability discharge adjudications.

They were given no meaningful opportunity to support their claims with additional evidence. They were not advised of what additional evidence was needed to establish their claim. They were summarily denied with a notice that failed to state the actual reason for the denial.

Plaintiffs request that this Court enter an order reversing the denials in Plaintiffs' cases and remanding the cases to the Defendant requiring Defendant to: re-adjudicate Plaintiffs' claims; apprise Plaintiffs of the standard for total and permanent disability they are required to establish; provide Plaintiffs a complete opportunity to submit additional evidence in support of their claim for total and permanent disability; and issue a decision on their claims and, if unfavorable, provide Plaintiffs with a decision stating the specific reasons why their claims were denied.

Respectfully submitted,

s/James M. Smith
JAMES MARSHAL SMITH #25688

s/Amber C. Henry
AMBER C. HENRY #58547

Legal Aid of Western Missouri
1125 Grand Blvd., Suite 1900
Kansas City, Missouri 64106
(816) 474-6750
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2008, the foregoing was filed electronically using the CM/ECF system and a copy of the electronic notification sent to:

Jeffrey P. Ray
Assistant United States Attorney
Charles Evans Whitaker Courthouse
400 East 9th Street, Room 5510
Kansas City, Missouri 64106

s/James M. Smith
Attorney for Plaintiffs