



**APPLICATION OF CHANTEL L. ALBERHASKY
FOR CIRCUIT OR ASSOCIATE CIRCUIT JUDGE
31st CIRCUIT JUDICIAL COMMISSION
GREENE COUNTY, MISSOURI (as adopted June 8, 2009)**

RESPONSES TO THESE QUESTIONS WILL BE MADE PUBLIC IF THE APPLICANT IS NOMINATED.

NOTE – Please submit seven (7) paper copies with attachments.

1. Present principal occupation or title:
Shareholder, The Alberhasky Law Firm, P.C.
2. What is your age?
48 years old.
3. (a) How many years have you been a citizen of the United States?
48 years

(b) How long have you been a Greene County resident?
47 years

(c) How many consecutive years immediately preceding your application have you been a qualified voter of Missouri?
30 years
4. State the date you were admitted to The Missouri Bar and whether your license is in good standing. If not, explain in detail.
October 1998. My license is in good standing.
5. List any other states, courts or agencies in which you are licensed as an attorney.
U.S. District Court, Western District of Missouri
Eighth Circuit Court of Appeals
I am currently admitted *pro hac vice* to the U.S. District Court of Utah.
6. (a) State the name and address of all colleges and universities attended, other than law school, together with the dates and degrees received.

**Southwest Missouri State University (NKA Missouri State University)
901 South National
Springfield, MO 65807
Attended 1981; 1983; 1988-1991 (part-time); 1991-1995 (full-time)
Bachelor of Arts, cum laude**

**Graff Area Vo-Tech (NKA Ozark Technical College)
1001 E Chestnut
Springfield, MO 65802
Attended 1984-1985
Surgical Technician Certificate**

(b) List/describe any college or university activities, scholastic achievements and other awards or honors you think are relevant to the commission's decision.

Dean's List: Fall 1991; Spring and Fall 1992; Spring and Fall 1993; and Fall 1994.

Phi Alpha Theta National History Honor Society, President, 1996 – 1997

Extemporaneous Speaking Contest, Second place, Fall 1991

(c) Attach a certified copy of college, university and law school transcripts here, or have the institutions send transcripts direct to the contact person.

See attached.

7. (a) State the name and address of all law schools attended together with the dates and degrees received.

**University of Missouri-Columbia School of Law
125 Jesse Hall
Columbia, MO 65211
Attended 1995-1998
Juris Doctorate**

(b) List/describe any law school activities, scholastic achievements and other awards or honors you think are relevant to the commission's decision.

I was in the top third of my law school class. I was the recipient of the Sidney Faber Award in Criminal Law for receiving the highest grade in my Criminal Law class. I participated in Moot Court Competition, won the ABA Client Counseling Competition and was selected to compete at the Regional ABA Client Counseling competition in Kansas. I was also the recipient of a partial scholarship awarded to a single working parent attending law school. During law school I was a single parent of an elementary age child who was active in extracurricular activities. I did not have the benefit of family living within close proximity to provide assistance. Balancing the duties and responsibilities of being a single parent and a law student presented its own unique set of challenges requiring perseverance and tenacity.

8. State, in chronological order (starting with the earliest employment) (a) significant non-law-related employment prior to or since law school and (b) all employment from the beginning of law school to the present. To the extent reasonably available to you, include the name and address of each employer and the dates of employment, and for legal employment, describe the positions you have held, e.g., associate, partner, law clerk, general counsel.

**Cox Hospital
1425 N Jefferson
Springfield, MO 65802**

I worked as a surgical technician from 1985 to 1995. I voluntarily left this position to attend law school.

**Missouri Attorney General's Office – Criminal Appeal Division
207 W. High St.
Jefferson City, MO 65102**

I worked as a summer clerk in 1997. I voluntarily left this position to return to law school.

**Law Offices of Robert Palmer, PC
205 Park Central East
Suite 511
Springfield, MO 65806**

I was an associate with the firm from 1998 to 2003. I voluntarily left this position to open a law firm with my husband, Randy Alberhasky.

**The Alberhasky Law Firm, P.C.
419 Boonville Avenue
Springfield, MO 65806
Shareholder, 2003 - present**

**City of Springfield – Municipal Court
625 N. Benton
Springfield, MO 65806
Provisional Municipal Judge, January 2009 –present**

9. If you were a student at any school from which you were suspended, placed on probation, or expelled by school authorities, for any reason, describe the circumstances.

I took a college course at Missouri State University during my senior year of high school for which I received a D and was placed on academic probation. I repeated the course. I made the Dean's List and graduated cum laude from MSU.

10. Describe the nature of your experience in trial and appellate courts and explain how they demonstrate the quality of your legal work. *(You either may take as much space as you need here or attach your response on separate sheets).*

During the course of my practice, I have gained a wide breadth of knowledge and experience having practiced in both state and federal court. I began my legal career as an associate with The Law Offices of Robert MN Palmer, P.C. representing clients in complex product liability cases in federal and state courts throughout the nation. I assisted Mr. Palmer in preparing for litigation in crashworthiness cases filed in Missouri, Texas, Illinois, Kansas and Hawaii. I was responsible for researching and ensuring the firm was in compliance with the rules of civil procedure for various jurisdictions. I also represented my own clients in personal injury, civil rights and property cases.

In 2003, my husband and I opened our firm and I have litigated numerous personal injury and administrative law cases. I have represented clients in a variety of matters including civil rights, special education, property, criminal, and traffic. I have also developed an expertise in the area of special education law representing families of children with disabilities under the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973. Special education law is a complex and constantly changing area of law. There are few attorneys who practice special education law and I am the only one in Southwest Missouri who represents children.

Since 2009, while continuing my practice, I have served as a provisional municipal judge for the city of Springfield. I fill-in when one of the full-time judges is not available to serve. I am on the bench approximately two to four days a month.

I have an inquisitive interest in the law that has been the impetus for my diverse practice. The broad range of cases I have litigated have required me to extensively use my research, analytical and writing skills. The level of success I have achieved for my clients is evidence of the quality of my advocacy skills and written work product. I believe my diverse practice, dedication to research, and my judicial experience give me the perspective and background necessary to serve as Associate Circuit Judge.

Include in your response:

- a. **Appellate Experience:** Please include a representative list of cases you have briefed and/or argued (if you are a judge, include representative cases from your practice prior to your judicial appointment). To the extent reasonably available to you, the style, date, court and, if published, the citation; identify the client(s) you represented and opposing counsel; give a one-paragraph description of the case and your role.
- ***M.S., by and through her parent, J.S. v. Utah School for the Deaf and the Blind*, U.S. District Court of Utah, 2:13-cv-420, 2013:**

I am admitted *pro hac vice* in the U.S. District Court of Utah to represent M.S. in this pending appeal arising from a special education due process hearing held in April 2013. The defendant has filed a cross-claim on the issues it lost at hearing. This case is discussed more thoroughly below in the

Trial-Level Experience section. The case is before Judge Dean Benson. Opposing counsel is Kristina Kindl and Kevin Olsen.

- ***Hansen Ex Rel. J.H. v. Republic R-III School District*, 632 F.3d 1024 [265 Ed. Law Rep. 9] (8th Cir. 2011):**

I was sole counsel on behalf of a 13-year-old boy who suffers from Bipolar Disorder, Conduct Disorder, and Attention-Deficient Hyperactive Disorder. I alleged on behalf of my client, the school district violated the Individuals with Disabilities Education Act by failing to find my client eligible for special education services. After receiving an unfavorable decision from the Hearing Panel, I filed an appeal to the United States District Court for the Western District of Missouri. The District Court overturned the Hearing Panel's decision and found my client eligible for special education services. The school district appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit affirmed the District Court's decision. I also obtained a favorable ruling for my client for attorney fees and expenses for the full amount sought. There are few cases in the Eighth Circuit favorable to parents so the Eighth Circuit's ruling was not only important to my clients but for other families seeking special education services for their disabled children. Opposing counsel was Ernest Trakas, Celyndra Brasher and Alefia Mithaiwala.

- ***State ex re. Phillips v. Lepage*, 67 S.W.3d 690 (Mo. App. S.D. 2002):**

This case arose out of an automobile accident in McDonald County. I was lead counsel on behalf of Curtis Dyer who alleged Alice Doyle was negligent in crossing the center line of the road and striking his vehicle head on. Mr. Dyer suffered injuries and his wife, his two children, and his step-son were killed. Relator was the father of Mr. Dyer's step-son. Alice Doyle's insurance company, Allstate, agreed to pay policy limits and brought an action in interpleader because it was facing competing claims for the insurance funds. Judge John LePage denied relator's demand for jury trial on relator's wrongful death claim within an interpleader action. Relator filed a writ of prohibition and mandamus. I authored the respondent's brief and gave oral argument before the Court of Appeals. The preliminary prohibition order was quashed and the relator's petition was denied by the appellant court. Opposing counsel was Glenn Gulick.

- ***Deever v. Karsch Sons Inc.*, 144 S.W.2d 370 (Mo. App. S.D. 2004):**

Our firm represented the claimant in a workers' compensation claim. The ALJ found in favor of the claimant and the award was upheld by the Labor and Industrial Relations Commission. The employer appealed. I assisted in the research and drafting of the motion to dismiss, arguing that the notice of appeal was not effective because of the employer's failure to pay the full amount of the docket fee within the thirty days of the final award.

The employer paid the docket fee of \$50 as required by Rule 81.04(c) but failed to pay the additional \$20 required by statute within 30 days of the final award. Our motion to dismiss was granted. Opposing counsel was Jason D. Knight.

- b. **Trial-Level Experience:** Please include a representative list of cases and/or administrative hearings you have handled (if you are a judge, include representative cases from your practice prior to your judicial appointment). To the extent reasonably available to you, the style, date and court; identify who you represented and opposing counsel; state whether the case was disposed of following a jury trial, bench trial or at what other stage; and give a one-paragraph description of the case and your role.

- ***M.S., by and through her parent, J.S. v. Utah School for the Deaf and the Blind, Special Education Due Process Hearing, April 2013:***

I was admitted *pro hac vice* in Utah to represent M.S. in a special education case. M.S. is a 15-year-old residential student at the Utah School for the Deaf and the Blind (USDB). M.S. has multiple disabilities including blindness, hearing impairment, cognitive deficits and is non-verbal. USDB failed to teach M.S. a means to communicate. USDB was facing budget cuts and made the decision to send students, including M.S., back to their local school districts due to the high cost of educating said students. I filed for due process on behalf of M.S. alleging USDB failed to provide M.S. with a free and appropriate public education (FAPE), it failed to provide M.S. with extended school year services, and that the local school district was not the appropriate placement for M.S. I also sought private placement at the Perkins School for the Blind in Massachusetts. A five-day hearing was held in Salt Lake City in which 30 witnesses testified including experts. The hearing officer found USDB violated the Individuals with Disabilities Education Act when it failed to provide extended school year services for M.S. and when it tried to place M.S. back into her local school district. The Hearing Officer ordered USDB to keep M.S. in its residential program. The hearing officer ruled against us on the issue of a denial of a FAPE and on the issue of private placement. I filed an appeal on those issues which is pending in the United States District Court of Utah. The hearing officer was Wallace Calder. Opposing counsel was Kristina Kindl and Kevin Olsen.

- ***Camdenton R-III School District v. L.F., Special Education Due Process Hearing, April 2012:***

I was sole counsel for the L.F. family and their minor child, L.F. The parents of L.F. disagreed with the educational evaluation conducted by the Camdenton school district and requested the school district provide L.F. with an independent educational evaluation (IEE) at public expense.

Camdenton initiated due process proceedings against the parents of L.F. requesting a hearing panel determine its evaluations were appropriate. The parents withdrew their request for an IEE but Camdenton refused to withdraw its request for a due process hearing. I agreed to represent the family pro bono. I entered my appearance in the case and filed a motion to dismiss. Shortly after my entry of appearance, Camdenton backed down and withdrew its request for a hearing. Ransom Ellis, III was the Hearing Chairperson. Opposing counsel was Teri Goldman.

- ***Wentzville R-IV School District v. G.A.*, Special Education Due Process Hearing, November 2012:**

The Wentzville School District evaluated G.A. for eligibility for special education services and determined G.A. did not meet the eligibility criteria for special education services under the IDEA. The parents withdrew G.A. from Wentzville school district and subsequently filed a complaint with the Office of Civil Rights against the school district. In retaliation, Wentzville initiated special education due process proceeding against the parents of G.A. I was retained by G.A.'s parents for the limited purpose of having the matter dismissed or transferred to the Missouri Administrative Hearing Commission. Although the Hearing Chair denied my motion to dismiss, or, in the alternative transfer venue, I was successful in quashing a significant portion of the school district's subpoena duces tecum thereby protecting my client from oppressive and harassing discovery. The Hearing Chair was Pamela Wright. Opposing counsel was Ernest Trakas.

- ***H.F. a minor et al. v. Forsyth R-III School District et al.*, United States District Court for the Western District of Missouri, 09-3349-CV-S-RED, 2011:**

I was sole counsel on behalf of Bruce Forrest and his minor child, H.F. Mr. Forrest was an employee of the school district and his minor child was a student enrolled in the school district. H.F. qualified as a student with a disability under Section 504 of the Rehabilitation Act of 1973. I filed on behalf of my clients, a complaint with the Office of Civil Rights alleging discrimination by the school district against H.F. Shortly thereafter, Mr. Forrest was demoted. I withdrew the OCR complaint and filed a complaint in District Court alleging the school district discriminated against H.F. and retaliated against Mr. Forrest for advocating for his child under Section 504. At the close of discovery, the school district requested and paid for mediation. The matter was settled for a confidential amount. A hearing was held before Judge Richard Dorr to approve the minor's settlement. Opposing counsel was Ernest Trakas and Elizabeth Helfrich.

- ***Laura Brown et al. v. Forsyth R-III School District et al.*, United States**

District Court for the Western District of Missouri, Case No. 10-3013-CV-S-RED, 2011:

I was sole counsel on behalf of Laura Brown and her minor child A.B. who alleged his civil rights were violated when employees of the school district struck him with a wooden paddle leaving bruises and contusions on his buttocks and thigh area. Judge Richard Dorr granted summary judgment. This case was instrumental in causing the school district to ban spanking and reverse its long-standing policy allowing corporal punishment. Opposing counsel was Todd M. Johnson, Brandon Cori and Robert Numrich.

- ***Elizabeth Lewis v. Travis Graves*, Associate Circuit Court of Greene County, Missouri, Case No. 1131-CV00492, 2011:**

I represented Travis Graves in a full order of protection case. Ms. Lewis and Mr. Graves were embroiled in a bitter child custody battle when Ms. Lewis filed for a full protective order against Mr. Graves. Judge Mark Powell presided over the hearing. I was able to demonstrate Ms. Lewis sought the protective order for the sole purpose of using the order to prevent Mr. Graves from having access to his minor child. Judge Powell found no credibility to Ms. Lewis' claims and denied Ms. Lewis a full order of protection.

- ***Johns v. Covington et al. v. Botts Enterprises*, Circuit Court of Lawrence County, Case No. 08LW-CC00039, 2009:**

I was sole counsel in this property case on behalf of Bobbie Johns who alleged trespass upon her property. She claimed the defendants erected a building, a driveway, and a fence on her property as well as removed several trees that defendants sold for compensation. The defendants filed a third-party complaint. This was a bench trial in front of Judge Robert Wiley who ruled in favor of my client and awarded her damages and ordered defendants to remove the building, driveway and fence at their own expense. Opposing counsel was J. Craig Peterson and the third-party defendant's counsel was Steven Snead.

- ***Kristi Murphy et al. v. David Murphy et al.*, Circuit Court of Greene County, Missouri, Case No. 104CC4881, 2006:**

I was sole counsel in this personal injury case on behalf of Kristi and David Murphy who alleged the defendants were negligent by failing to safely evaluate whether Kristi could manage the horse provided by defendant. Kristi was thrown from the horse and suffered a fractured ankle. After three-day trial, presided over by Judge Daniel Conklin, the jury returned a verdict for the defendant. Opposing counsel was Bradley Sylwester.

- ***City of Springfield v. Barbara Evans*, City of Springfield, Missouri, Case No. 070674891, 2008:**

I was sole counsel in this criminal matter on behalf of Barbara Evans. Ms. Evans was charged with driving while intoxicated. I negotiated a plea agreement in which Ms. Evans received a suspended execution of sentence. The plea agreement was approved by Judge Denise Budd.

- ***Wanda Holloway v. Joe L. Farley*, Circuit Court of Stone County, Missouri, Case No. CV503-324CC, 2005:**

Our firm represented Wanda Holloway in a personal injury case. Ms. Holloway alleged the defendant was negligent in crossing the middle of the road striking her vehicle and causing her injury. I drafted and argued motions at trial and prepared the jury instructions. The jury returned a verdict for the defendant. Opposing counsel was Steven Snead and Warford Johnson III.

- ***State of Missouri v. Travis Graves*, Circuit Court of Greene County, Missouri, Case Nos. 31303CF8941 and 31303CF6596, 2004:**

I was sole counsel in this criminal matter on behalf of Travis Graves. He was charged with felony stealing and felony possession of a controlled substance. I negotiated a plea agreement reducing the felony stealing charge to a misdemeanor with time served. Judge Calvin Holden approved the plea agreement. I further negotiated a plea agreement for my client to receive a suspended imposition of sentence on the possession of a controlled substance charge and for my client to participate in drug court. Judge Don Burrell approved the plea agreement.

- ***Allstate v. Curtis Dyer, et al.*, Circuit Court of McDonald County, Missouri, Case No. Unknown, 2002:**

I was lead counsel on behalf of Curtis Dyer who alleged Alice Doyle was negligent in crossing the center line of the road and striking his vehicle head on. Mr. Dyer suffered injuries and his wife, his two children, and his step-son were killed. Alice Doyle's insurance company, Allstate, agreed to pay policy limits and brought an action in interpleader because it was facing competing claims for the insurance funds. A hearing on the apportionment of the insurance funds was held before Judge John LePage. Opposing counsel was Glenn Gulick.

- ***Erica Gould v. Tavis Stanley*, Circuit Court of Lawrence County, Case No. CV101-523CC, 2002:**

I was sole counsel in this personal injury case on behalf of Erica Gould who alleged defendant was negligent by driving his vehicle at an excessive speed

causing the vehicle to go off the road and crash. Ms. Gould was a passenger in the car and suffered lacerations to her face with permanent scarring to her forehead. The case was settled the day before trial. Opposing counsel was William Lasley.

- ***Jonathan Beck v. Wal-Mart Stores, Inc.*, Circuit Court of Greene County, Missouri, Case No. 199 CC 0713, 2001:**

I worked with William Petrus representing Jonathan Beck in this personal injury case. Mr. Beck alleged the defendant was negligent in not properly tightening the lug nuts on his tires, resulting in a lug nut falling off and locking up the tire, causing the vehicle to crash. I presented witnesses for direct examination and I assisted in preparing the jury instructions. After a two day trial presided over by Judge Henry Westbrooke, the jury returned a verdict for plaintiff in the amount of \$30,000. Defendants filed a motion for judgment notwithstanding the verdict, or in the alternative, a motion for new trial. I presented oral argument for plaintiff at hearing and Judge Westbrooke denied defendant's motion. Opposing counsel was James T. Seigfried.

- ***Kathleen N. Mills v. Steven Turner*, Circuit Court of Taney County, Missouri, Case No. CV798-0435CC, 2001:**

I worked with William Petrus representing Kathleen Mills in this personal injury case involving an automobile accident wherein Kathleen Mills suffered injuries. I presented witnesses for direct examination. The jury returned a verdict for defendant. Judge Jame Eiffert presided over the trial. Opposing counsel was Sean McGinnis.

- ***Eulis Kemble v. Wal-Mart Stores, Inc.*, United States District Court for the Western District of Missouri, 99-3003CVS-RGC-ECF, 2000:**

I was lead counsel on an employment discrimination case on behalf of Eulis Kembel who alleged he was demoted because of his disability and because of the perception he was disabled. At the close of discovery, Wal-Mart filed for summary judgment. I drafted the opposing brief. The majority of employee claims under the Americans with Disabilities Act are lost at summary judgment. Judge Russell Clark denied Wal-Mart's motion. A few weeks before trial, Wal-Mart initiated settlement negotiations and the matter was settled for a confidential amount. Opposing counsel was David Sullivan and Pamela Connolly.

I assisted Robert Palmer with complex product liability cases while an associate at his firm. My responsibilities included drafting complaints, drafting and managing discovery, drafting and arguing motions, deposing expert witnesses, and researching and ensuring compliance with the rules of

civil procedure for various jurisdictions. The following is a representative list of those cases:

- ***Angela Beanland et al. v. Ford Motor Company*, Circuit Court of Laclede County, Missouri, Case No. CV300-390CC, 2002:**

The firm represented Angela Beanland in this products liability case. Ms. Beanland alleged the defendant was negligent in the design of the front passenger seat bottom and the seat belt restraints which enhanced her injuries above what she would have received in the collision. Angela suffered a L1 burst fracture with neurological impairment. The case settled for a confidential amount. Opposing counsel was Robert T. Adams and Douglas W. Robinson.

- ***Courtney Palka v. General Motors Corporation, et al.*, Circuit Court of Cook County, Illinois County Department, Law Division, 2001:**

The firm represented Courtney Palka in this products liability case. Courtney Palka alleged defendant was negligent in the design and manufacturer of the rear end of 1996 Chevrolet Beretta. Courtney was a two-year-old child who was properly belted in a child seat in the rear of the Beretta when the vehicle was rear ended by another driver. The survival space in the rear of the Beretta was reduced by over 60% where Courtney was seated. Courtney suffered significant brain damage rendering her blind and quadriplegic. The case settled for a confidential amount. Opposing counsel was Philip L. Harris, James K. Toohey and Jennifer Johnson.

- ***Mohamed v. Mazda Motor Corporation*, United States District Court for the Eastern District of Texas, Marshall Division, 2001:**

The firm represented Dr. Khadijah Abdul Ali Mohamed's family in this product liability case. The Mohammed family alleged the defendant was negligent in the design and manufacture of the Mazda Protege and failed in its duty to exercise ordinary care in the design of the passive restraint in the Protege. Dr. Mohammed was restrained only by the passive shoulder belt when her vehicle was struck by a pick-up truck. Dr. Mohammed suffered fatal injuries. The case settled for a confidential amount. Opposing counsel was Lewin Plunkett.

- ***Chad Cloud v. DaimlerChrysler*, Circuit Court of Jackson County, Missouri, 2000:**

The firm represented Chad Cloud in this product liability case. Chad Cloud alleged defendant was negligent in the design and manufacturer of the Chrysler by providing a lap-only belt system in the back seat. Chad, a minor, was a passenger in the back driver-side seat wearing the lap-only

belt system when his mother's car crossed the center line and collided with another vehicle. Chad jackknifed over the lap belt causing injury to his thoracic spine rendering him paraplegic. The case settled for a confidential amount. Opposing counsel was Gary R. Cunningham and Robert Haddad.

- ***Erving Domingo, et al. v. Ford Motor Company*, Circuit Court of the Second Circuit Court of the State of Hawai'i, Civil No. 97-0286, 1999:**

The firm represented Erving Domingo and his children in this product liability case. Erving Domingo alleged the defendant was negligent in the design and manufacture of the Mercury Tracer and failed in its duty to exercise ordinary care in the design of the passive restraint in the Tracer. Rhonda Domingo was restrained only by the passive shoulder belt in the front passenger seat when her vehicle was struck by a Blazer. She suffered fatal injuries to her aorta and liver. The matter was settled for a confidential amount. Opposing counsel was Donald Dawson and Kenneth Fukunaga.

- c. **Judicial Experience:** If you are a judge, commissioner, or are serving or have served in another judicial capacity, please describe the nature and extent of your judicial responsibilities, including the dates you have served at each level, the types of dockets you have handled, and any special expertise you have developed that you believe is relevant to your qualifications for the position for which you are applying.

Since January 2009, I have served as a provisional municipal judge for the City of Springfield. During my tenure as a provisional municipal judge, I have presided over 30 bench trials for a variety of cases including stealing, possession of narcotic paraphernalia, driving while intoxicated, common assault, marijuana possession, and traffic violations. I have heard and ruled on various motions, including motions to suppress, motions to dismiss and motions to withdraw. I have also presided over contempt hearings, probation revocation hearings, bond forfeiture hearings, and pre-trial conferences. My other responsibilities include taking pleas, imposing fines, setting bonds, and imposing jail sentences.

Serving as a provisional municipal judge has provided me with significant experience and knowledge of how to manage a courtroom and move a high volume docket in an efficient but courteous and patient manner.

11. (a) Describe any additional legal experience that you believe may be relevant to the commission's decision, including clients by category that you have represented.

In 2010, I was appointed as special prosecutor by the City of Bolivar to investigate a case of stealing. After a thorough investigation, I deferred prosecution.

While in law school, I clerked at the Missouri Attorney General's Office in the Criminal Appeals Division and drafted respondent's briefs on behalf of the State of

Missouri. I was the only law clerk in the criminal division, during my tenure, to have been given the honor of presenting an oral argument. I argued before the Missouri Court of Appeals, Western District. The State won the appeal.

Also during law school, I participated in the Domestic Violence Clinic. As a third year Rule 13 certified law student, I represented petitioners in multiple rural counties in obtaining orders of protection for themselves and their children. I also served as guardian ad litem for minor children and participated in child custody hearings.

(b) Describe any non-legal experience that you believe may be relevant to the commission's decision.

I bring a unique perspective to the bench. My life experience and my legal practice are not typical. I grew up in a lower-income neighborhood in Northwest Springfield. Neither of my parents graduated from high school. My parents owned a shoe repair shop and worked six days a week to support our family. So for our family, getting a high school diploma was the goal. After high school, I followed in the footsteps of my older sister, and those with whom I grew up with, and obtained vocational training, got a job and raised a family. Later in life I made the decision to earn a college degree. I took college courses at MSU while I continued to work at Cox Hospital as a surgical technician and raise my son. I then moved to Columbia, Missouri with my young son to attend law school at MU. By the time I began practicing law I had real life experiences to draw upon. It is that background and those experiences that have shaped my practice and influenced the choices I have made in my legal career. I am confident my personal and professional background would add to the tapestry of experience on the 31st Circuit Court.

12. List all bar associations and other professional societies of which you are a member, with any offices held and dates.

Missouri Bar Association, 1998 - present

Springfield Metropolitan Bar Association, 1998 - present

Missouri Association of Trial Attorneys, 1998 - present

Missouri Municipal and Associate Circuit Judges Association, 2009 - present

Council of Parent Attorneys and Advocates, Inc., 2008 - present

13. (a) List any professional articles or books authored by you that have been published or any special recognition or award of a professional nature you have received.

Not applicable.

(b) List any other articles, reports, letters to the editor, editorial pieces, or other material authored by you that have been published within the last five (5) years.

“Future Reflections” Volume 31, Number 4 – A 2012 speech I gave at the National Federation of the Blind’s annual convention regarding my experience establishing the Parents of Blind Children chapter of Missouri was published in this magazine for parents and teachers of blind children.

14. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations in which you have significantly participated. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences or publications.

Over my professional career, I have been involved in numerous community activities and charitable organizations.

SMBA Law Day Committee

The purpose of the committee is to promote and organize events for the annual celebration of Law Day.

Missouri Parents of Blind Children

I was instrumental in starting the Missouri chapter of the National Organization of Parents of Blind Children. I served as President from 2012-2013. MPOBC is an organization that promotes blindness skills and provides support to families with blind children.

MATA Certified Emergency Response Team Volunteer

In June 2011, I volunteered in Joplin after the devastating tornado to provide free legal advice on issues confronting disaster victims.

Rivendale Learning Institute

Rivendale is a private school for children with learning disabilities and autism. My husband and I supported and sponsored the 2009 and 2010 “Leather and Lace” fundraiser to raise money to help ensure children with autism and learning disabilities receive the education and services they need to reach their full potential.

Rountree Elementary, PTA

I served as President in 2011-2012. During my time as president, the PTA organized the most successful fundraiser in recent history. The success of the event allowed the PTA to purchase a large piece of playground equipment for the school. I also served as the Chairperson for the Holiday Basket program in 2008 -2010 and 2012, by organizing and coordinating the collection and delivery of food, clothes and toys for less fortunate Rountree families.

Love Without Boundaries

In 2004, I volunteered my time and skills as a surgical technician on a surgical-mission trip to China to repair cleft lips and palates of orphans. That same year I organized a blanket drive and coordinated with UPS to ship over 1200 blankets to orphanages in Inner Mongolia.

I am an avid runner. I have run in many charity races to raise money for various organizations. My first marathon was in Memphis, Tennessee sponsored by St. Jude Children's Research Hospital. The funds raised from the marathon goes to research to save children from cancer and other deadly diseases. I am currently training to run the St. Jude marathon again this December.

15. Do you now hold or have you ever held an elective or an appointive public office or position? If yes, provide details.

Yes. I was appointed to my current position of provisional municipal judge for the City of Springfield in January 2009. The provisional municipal judge position is a one-year appointment. The City of Springfield has re-appointed me every year since 2009. I was most recently re-appointed in June, 2013.

I was also appointed special prosecutor for the City of Bolivar in 2010.

16. Please list any client(s) or organization(s) for which you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organization(s).

Not applicable.

17. Provide the branches and dates of (a) military service or (b) other public service not otherwise disclosed in this application. If discharged from the military, state whether the discharge was other than honorable.

Not applicable.

18. State whether you are able, with or without a reasonable accommodation, to perform the essential functions of being a trial judge.

I am able to perform the essential functions without accommodations.

19. Were you ever refused admission to the bar of Missouri or the bar of another state or the federal courts? If yes, provide details.

No.

20. Have you ever been disciplined, admonished or cited for breach of ethics or professional conduct by the Supreme Court of Missouri or by any court or bar association or committee thereof? If yes, provide details.

No.

21. If you are or were a member of the judiciary of the state of Missouri, please state:

- a. Whether an order of discipline ever has been entered against you by the Supreme Court of Missouri for breach of the Code of Judicial Conduct or the Canons of Judicial Conduct. If yes, provide details.

No.

- b. Whether a reprimand or admonition ever has been entered against you by the Commission on Retirement, Removal and Discipline for any of the causes specified in Supreme Court Rule 12.07. If yes, provide details.

No.

22. Have you have ever been held in contempt of court? If yes, provide details.

No.

23. Have you ever been sued by a client or been a party to any other litigation, other than as guardian ad litem, plaintiff ad litem or defendant ad litem? **Yes.**

If your answer is yes, state the style of the case, where it was filed and explain in detail. If you are a judge and you have been sued in your judicial capacity, list only those cases where you are or were other than a nominal party.

Chantel Kelly v. Mark W. Kelly, Action for dissolution of marriage. Filed in Greene County, Missouri, March 1995. Judgment entered and matter concluded June 1995.

24. Have you ever been convicted or received a suspended imposition of sentence for a felony or misdemeanor in state, federal or military court? (*Note that this question does not require that traffic offenses or other infractions be listed.*)

No.

If your answer is yes, state the style of the case, where it was filed and explain in detail.

25. Are you delinquent in the payment of any federal, state, county or city taxes?
No. If yes, provide details.

26. You must attach to this application at least one writing sample of your choice. The only rule, limitation or instruction is that you must indicate whether it was edited by anyone else, and if so, to what degree

Attached is a brief I wrote for a case on appeal to the Eighth Circuit Court. I am the sole author and it represents 100% of my own work.

27. List/describe any additional honors or awards you have received, activities you have performed, or any other information not set out above that demonstrates the quality of your work as an attorney or that you otherwise believe is relevant to the commission's decision.

I have had the honor of being asked to be a speaker by various organizations as follows:

**Juvenile Law Committee - SMBA
"Special Education – IEPs"
July 2013, Springfield, Missouri**

**SMBA CLE – Hour by Hour
"School Law Review and Update"
June 2013, Springfield, Missouri**

**Guardian Ad Litem Training – CLE
"Working with IEPs and the School System"
June 2013, Springfield, Missouri**

**NALS of Missouri
"Litigating Special Education Cases"
February 2013, Springfield, Missouri**

**Springfield Area Legal Support Professionals
"Litigating Special Education Cases"
October 2012, Springfield, Missouri**

**Missouri State University Blindness Skills Specialist Project,
"Know the Law, Know Your Rights"
September 2012, Springfield, Missouri**

**National Organization of Parents of Blind Children
"Do's and Don'ts of an IEP Meeting"
July 2012, Dallas, Texas**

**National Federation of the Blind of Missouri Convention
IEP Workshop
March 2012, Kansas City, Missouri**

**National Organization of Albinism and Hypopigmentation
IEP Workshop
2009, Kansas City, Missouri**

Please list the names of *five* persons whom you will ask to provide letters of reference for you with respect to your judicial qualifications. Do **not** list as a reference a judge of the court involved. As to each of the five references, **please provide name, title, mailing address, telephone and e-mail address. Please note that it is your responsibility to contact your references** and to see that they send the requested letters in a timely manner with the a Guidelines for References..

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The Honorable Todd Thornhill
Presiding Judge
Springfield Municipal Court
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Springfield, MO 65806
(417) 864-1890
tthornhi@springfieldmo.gov

Official Transcript

Name: Kelly, Chantel Lorraine
 Student ID: 08271305
 Date of Birth: 11/28/XXXX
 Soc. Sec. Number: XXX-XX-9868

This transcript has been produced for:

CHANTEL ALBERHASKY
 419 BOONVILLE AVENUE
 SPRINGFIELD, MO 65806

Course Number	Course Title	Grade	Hours	Remarks
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Degrees Awarded

University of Missouri - Columbia	Law-JD	05-10-1998
Southwest Missouri State Univ	BA	05-1995

FALL 1995	Univ of MO-Col	Law	Law_Jd		
Law	101L	Contracts 1	85	3.0	
Law	103L	Torts 1	88	3.0	
Law	105L	Civil Procedure 1	83	3.0 *	
Law	107L	Property 1	76	3.0	
Law	116L	Legal Research & Writing	87	2.0	
LAW Term:		GPA	Hrs Att	Hrs Em	Qual Pt
LAW CUM:		14.0	14.0	14.0	1170.00
					83.571

WINT 1996	Univ of MO-Col	Law	Law_Jd		
Law	102L	Contracts 2	83	3.0	
Law	104L	Torts 2	83	3.0	
Law	106L	Civil Procedure 2	80	3.0	
Law	108L	Property 2	74	3.0	
Law	115L	Criminal Law	100	3.0	
Law	117L	Advocacy & Research	73	1.0	
LAW Term:		GPA	Hrs Att	Hrs Em	Qual Pt
LAW CUM:		16.0	16.0	16.0	1333.00
					83.313
LAW CUM:		30.0	30.0	30.0	2503.00
					83.433

SUM 1996	Univ of MO-Col	Law	Law_Jd		
Law	111L	Criminal Procedure	85	3.0	
LAW Term:		GPA	Hrs Att	Hrs Em	Qual Pt
LAW CUM:		3.0	3.0	3.0	255.00
					85.000
LAW CUM:		33.0	33.0	33.0	2758.00
					83.576

FALL 1996	Univ of MO-Col	Law	Law_Jd		
Law	221L	Evidence	84	4.0	
Law	227L	Basic Federal Income Tax	75	4.0	
Law	228L	Estates & Trusts 1	79	4.0	
Law	335L	Family Law	84	3.0	

LAW Term:		GPA	Hrs Att	Hrs Em	Qual Pt
LAW CUM:		15.0	15.0	15.0	1204.00
					80.267
LAW CUM:		48.0	48.0	48.0	3962.00
					82.542

WINT 1997	Univ of MO-Col	Law	Law_Jd		
Law	220L	Constitutional Law	77	4.0	
Law	225L	Business Organizations	83	4.0	
Law	320L	Conflict of Laws	83	3.0	
Law	372L	Professional Responsibility	94	2.0	

LAW Term:		GPA	Hrs Att	Hrs Em	Qual Pt
LAW CUM:		13.0	13.0	13.0	1077.00
					82.846
LAW CUM:		61.0	61.0	61.0	5039.00
					82.607

SUM 1997	Univ of MO-Col	Law	Law_Jd		
Law	384L	Trial Practice	86	3.0	

LAW Term:		GPA	Hrs Att	Hrs Em	Qual Pt
LAW CUM:		3.0	3.0	3.0	258.00
					86.000
LAW CUM:		64.0	64.0	64.0	5297.00
					82.766

FALL 1997	Univ of MO-Col	Law	Law_Jd		
Law	530L	Administrative Law	77	3.0	
Law	536L	Appellate Advocacy	S	2.0	
Law	571L	Employment Discriminatn	77	3.0	
Law	581L	Family Violence Clinic	S	3.0	
Law	651L	Tpc: Family Violenc3	84	2.0	

LAW Term:		GPA	Hrs Att	Hrs Em	Qual Pt
LAW CUM:		8.0	13.0	13.0	630.00
					78.750
LAW CUM:		72.0	77.0	77.0	5927.00
					82.319

WINT 1998	Univ of MO-Col	Law	Law_Jd		
Law	524L	Legislation	76	3.0	
Law	584L	Freedom of Speech & Assc	85	3.0	
Law	634L	Pretrial Litigation	79	3.0 *	
Law	666L	White Collar Crimes	86	3.0	

LAW Term:		GPA	Hrs Att	Hrs Em	Qual Pt
LAW CUM:		12.0	12.0	12.0	978.00
					81.500
LAW CUM:		84.0	89.0	89.0	6905.00
					82.202

Debra V. Helmer



Name: Chantel L Kelly
 Day/Month of Birth: 28-NOV

Student No: XXX-XX-9868
 Course Level: Undergraduate

Page: 1

Comments:

Degree: Bachelor Of Arts
 Date: May 19, 1998
 Major: History
 Minor: Political Science
 Honors: Cum Laude

SUBJ NO.	COURSE TITLE	CRSD GRD	PTS R
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INSTITUTION CREDIT:

Fall 1981	PSY 121	INTRO PSYCHOLOGY	3.00 D	0.00 E
Hrs: 0.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00				

Academic Probation:

Spring 1983	ENG 7	DEV WRT/WR STU TC	1.00 A	4.00 I
	ENG 113	COMPOSITION	3.00 B	9.08 I
	FSB 135	INTRO TO BUSINESS	3.00 C	6.00 I
	ORE 180	INTRO TYPING/WRITING	3.00 B	9.00 I
	PSY 121	INTRO PSYCHOLOGY	3.00 C	6.00 I
Hrs: 13.00 GPA-Hrs: 13.00 QPts: 34.00 GPA: 2.62				

Good Standing

Fall 1983	ARE 100	TWO DIMENS DESIGN	3.00 C	6.00 I
	ECO 155	PRINC ECONOMIC I	3.00 F	0.00 E
	HST 121	HIST OF US TO 1877	3.00 D	0.00 E
	RED 120	BEGIN GYMNASTICS	1.00 D	1.00
	SOC 150	PRINC OF SOCIOLOGY	3.00 B	9.00 I
Hrs: 7.00 GPA-Hrs: 7.00 QPts: 16.00 GPA: 2.29				

Good Standing

Fall 1988	PSY 304	ABNORMAL PSYCH	3.00 B	9.00 I
Hrs: 3.00 GPA-Hrs: 3.00 QPts: 9.00 GPA: 3.00				

Good Standing

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SUBJ NO.	COURSE TITLE	CRSD GRD	PTS R
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Institution Information continued:

Spring 1989	HST 122	HIST OF US 1877-PR	3.00 B	9.00 I
Hrs: 3.00 GPA-Hrs: 3.00 QPts: 9.00 GPA: 3.00				

Good Standing

Fall 1989	ECO 155	PRINC MACROECONOMIC	3.00 B	9.08 I
Hrs: 3.00 GPA-Hrs: 3.00 QPts: 9.00 GPA: 3.00				

Good Standing

Fall 1990	PHI 110	INTRO TO PHILOSOPHY	3.00 A	12.00 I
Hrs: 3.00 GPA-Hrs: 3.00 QPts: 12.00 GPA: 4.00				

Good Standing

Spring 1991	PSY 331	PSY OF CHILDHOOD	3.00 B	9.00 I
Hrs: 3.00 GPA-Hrs: 3.00 QPts: 9.00 GPA: 3.00				

Good Standing

Fall 1991	COM 115	FUND/PUBLIC SPEAKING	3.00 A	12.00 I
	GEN 040	SENATE BILL #4 NET	0.00 F	0.00 I
	HST 101	WESTERN CIVILIZ I	3.00 A	12.00 I
	PLS 101	AM GOV I/ORG/FUNC	3.00 A	12.00 I
Hrs: 9.00 GPA-Hrs: 9.00 QPts: 36.00 GPA: 4.00				

Good Standing

Spring 1992	HST 102	WESTERN CIVILIZ II	3.00 A	12.00 I
	HST 121	HIST OF US TO 1877	3.00 A	12.00 I
	PLS 102	AM GOV II/PUB POL	3.00 A	12.00 I

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Summer 1992

MTH 1 INTRO TO ALGEBRA 3.00 B 9.00 I

Hrs: 3.00 GPA-Hrs: 3.00 QPts: 9.00 GPA: 3.00

Good Standing

Fall 1992

ENG 120 COMPOSITION 3.00 A 12.00 I

HST 321 WOMEN/WESTERN CIVI 3.00 A 12.00 I

MTH 3 INTERM ALGEBRA 3.00 A 12.00 I

SPN 101 ELEM SPANISH I 3.00 A 12.00 I

Hrs: 12.00 GPA-Hrs: 12.00 QPts: 48.00 GPA: 4.00

Good Standing

Spring 1993

HST 517 LEG/CONST HST U.S. 3.00 A 12.00 I

MTH 145 CONTEMPORARY MATH 3.00 A 12.00 I

PHI 105 LOGIC, LANG & ARGMT 3.00 B 9.00 I

SPN 192 ELEM SPANISH II 3.00 A 12.00 I

Hrs: 12.00 GPA-Hrs: 12.00 QPts: 45.00 GPA: 3.75

Good Standing

Summer 1993

HST 390 INTRO HISTORIOGRAPHY 3.00 A 12.00 I

PHI 196 ELEMENTS SYMB LOGIC 3.00 A 12.00 I

PLS 397 LSAT PREPARATION 1.00 A 4.00 I

Hrs: 7.00 GPA-Hrs: 7.00 QPts: 28.00 GPA: 4.00

Good Standing

Fall 1993

ENG 380 INTRO WOMEN'S LIT 3.00 A 12.00 I

HST 506 THE HOLOCAUST 3.00 A 12.00 I

PLS 515 AMER CONSTIT LAW 3.00 A 12.00 I

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SUBJ NO. COURSE TITLE CRED GRD PTS R

Institution Information continued:

SPN 201 INTER SPANISH III 3.00 A 12.00 I

Hrs: 12.00 GPA-Hrs: 12.00 QPts: 48.00 GPA: 4.00

Good Standing

Spring 1994

HST 350 LATIN AMERICAN CIV 3.00 A 12.00 I

PED 118 BOWLING 1.00 A 4.00 I

PLS 419 JUDICIAL PROCESS 3.00 A 12.00 I

PLS 451 CRIMINAL LAW/ENFOR 3.00 A 12.00 I

SPN 202 INTER SPANISH IV 3.00 A 12.00 I

Hrs: 13.00 GPA-Hrs: 13.00 QPts: 52.00 GPA: 4.00

Good Standing

Summer 1994

BIO 101 BIOLOGICAL CONCEPTS 3.00 A 12.00 I

Hrs: 3.00 GPA-Hrs: 3.00 QPts: 12.00 GPA: 4.00

Good Standing

Fall 1994

HST 381 EAST ASIAN CIV II 3.00 A 12.00 I

HST 521 EARLY AMER REPUBLIC 3.00 A 12.00 I

LLT 121 CLASSICAL MYTHOLOGY 3.00 A 12.00 I

Hrs: 9.00 GPA-Hrs: 9.00 QPts: 36.00 GPA: 4.00

Good Standing

Spring 1995

GRY 135 ATMOSPHERIC SCIENC 5.00 C 10.00 I

PED 100 FITNESS FOR LIVING 2.00 A 8.00 I

PLS 517 CIV RIGHTS LIB/CRST 3.00 B 9.00 I

Hrs: 10.00 GPA-Hrs: 10.00 QPts: 27.00 GPA: 2.70

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Day/Month of Birth: 28-NOV

Student No: XXX-XX-9868
Course Level: Undergraduate

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Date issued: 29-JUL-2013
Transcript prepared for:

No. 10-1514

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

REPUBLIC R-III SCHOOL DISTRICT,
Defendant-Appellant,

v.

J.H., a minor, by and through his parent, LARRY HANSEN,
Plaintiff-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
THE HONORABLE RICHARD E. DORR

BRIEF OF APPELLEE

THE ALBERHASKY LAW FIRM, P.C.
Chantel L. Alberhasky, MO. Bar No. 47696
419 Boonville Ave.
Springfield, MO 65806
Telephone: (417) 865-4444

Attorney for Appellee

**RESPONSE TO APPELLANT'S SUMMARY OF THE CASE AND
REQUEST FOR ORAL ARGUMENT**

On April 10, 2009, after exhausting his administrative remedy, JH, a minor, by and through his parent, Larry Hansen (Hansen) filed his Complaint in the district court seeking to have JH found to be a student with a disability under the IDEA. The district court properly granted Hansen's Motion for Judgment on the Record and denied Republic R-III School District (Republic's) Motion for Judgment on the Record by making an independent finding that the administrative record shows by a preponderance of the evidence that JH meets the criteria of "serious emotional disturbance" and "other health impairment" under the Individual with Disabilities Education Act (IDEA).

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STATEMENT OF THE ISSUES

I. STANDARD OF REVIEW

E.S. v. Indep. Sch. Dist., No. 196, 135 F.3d 566 (8th Cir.1998)

Missouri Dept of Elementary and Secondary Ed. v. Springfield R-12 School Dist., 358 F.3d 992 (8th Cir. 2004)

II. REPUBLIC WAIVED THE ISSUES OF REMANDING THE MATTER TO THE PANEL FOR FINDING OF FACTS OR CONTINUATION OF THE DUE PROCESS HEARING BECAUSE REPUBLIC FAILED TO RAISE THESE ISSUES IN THE DISTRICT COURT SO THIS COURT NEED NOT CONSIDER REPUBLIC'S ARGUMENTS.

Ryder v. Morris, 752 F.2d 327 (8th Cir. 1985)

Misner v. Charter, 79 F.3d 745 (8th Cir. 1996)

Jenkins v. Winter, 540 F.3d 742 (8th Cir. 2008)

Novotny v. Chater, 72 F.3d 669 (8th Cir.1995)

III. THE DISTRICT COURT DID NOT ERR WHEN IT DID NOT REMAND THE MATTER TO THE PANEL FOR MORE THOROUGH FINDINGS OF FACT BECAUSE THE DISTRICT COURT WAS NOT REVIEWING THE PANEL'S DECISION FOR ERROR.

Cf. Patsy v. Board of Regents, 457 U.S. 496 (1982)

Tokarick v. Forest Hills Sch. Dist., 665 F.2d 443 (3d Cir. 1981)

Honig v. Doe, 484 U.S. 305 (1988)

Indep. Sch. Dist. No. 283 v. S.D. by J.D., 88 F.3d 556 (8th Cir. 1998)

IV. THE DISTRICT COURT DID NOT ERR WHEN IT DID NOT REMAND THE MATTER FOR A CONTINUATION OF HEARING BECAUSE THE IDEA EXPLICITLY AUTHORIZES DISTRICT COURTS TO ISSUE ITS OWN INDEPENDENT DECISION AND GRANT THE REMEDY THE COURT DEEMS APPROPRIATE.

Birmingham v. Omaha School Dist., 220 F.3d 850 (8th Cir. 2000)

Board of Educ. v. Rowley, 458 U.S. 176 (1982)

Kirkpatrick v. Lenoir County Board of Education, 216 F.3d 380 (4th Cir. 2000)

Indep. Sch. Dist. No. 283 v. S.D. by J.D., 88 F.3d 556 (8th Cir. 1998)

V. THE DISTRICT DID NOT ERR WHEN IT DETERMINED JH IS A STUDENT WITH A DISABILITY UNDER THE IDEA BECAUSE THE DISTRICT COURT GAVE DUE WEIGHT TO THE PANEL'S DECISION BEFORE ISSUING ITS INDEPENDENT DECISION BASED UPON THE PREPONDERANCE OF THE EVIDENCE.

Walczak v. Florida Union Free School Dist., 142 F. 3d 119 (2nd Cir. 1998)

Indep. Sch. Dist. No. 283 v. S.D. by J.D., 88 F.3d 556 (8th Cir. 1998)

A. JH's Impairments Adversely Affected His Educational Performance

Eschenasy v. New York City Department of Education, 604 F.Supp.2d 639 (S.D. N.Y. 2009)

B. JH Suffers From An "Emotional Disturbance"

Springer v. Fairfax County School Board, 134 F.3d 659 (4th Cir. 1998)

C. JH Meets The Eligibility Criteria for Other Health Impairment

School District of Springfield, R-12, 49 IDELR 177 (SEA MO 2007)

RESPONSE TO REPUBLIC'S STATEMENT OF THE CASE

In its February 5, 2010 decision, the district court granted Hansen's Motion for Judgment on the Record and found JH to be a student with a disability under the IDEA. On appeal, Republic challenges the district court's jurisdiction to issue its own findings and for the first time on appeal argues that the district court should have remanded the matter to the Hearing Panel (Panel) for thorough findings of facts or, in the alternative, for a "continuation" of the due process hearing so Republic can proffer its evidence.

STATEMENT OF FACTS

Republic's "Statement of Facts" contains misleading and inaccurate statements of the evidence. Hansen addresses these at the conclusion of its own Statement of Facts.

In November 2006, after gaining custody of his child, JH, Larry Hansen (Hansen) enrolled JH into fifth grade at Republic. (Tr. 314). From the date of enrollment through April 18, 2007, JH received six (6) disciplinary referrals for fighting with classmates and disrespectful behavior toward staff. (Tr. 16). During his fifth grade year, JH struggled academically to the point Republic devised an advancement plan that would require JH to successfully complete summer school, be tutored separately in math and reading and to pass a placement test before Republic would promote JH to sixth grade. (Tr. 178).

In May 2007, Hansen requested Republic evaluate JH for eligibility under the Individuals with Disabilities Education Act ("IDEA").

JH did not complete summer school because Republic kicked him out due to JH's behavior. (Tr. 316). Hansen hired a tutor at his own expense to teach JH for the remaining summer and Republic evaluated JH for eligibility under the Individuals with Disability Education Act ("IDEA"). (Tr. 213-214).

On August 28, 2007, Republic's staffing team determined that although JH was struggling they found there was no evidence to suggest JH had a disability so

Republic declined to evaluate JH for special education services. (Tr. 223).

During his sixth grade year, in the month of September 2007 alone, JH received five (5) disciplinary referrals that resulted in 13 days of out of school suspension. (Tr. 183-183). Republic disciplined JH for being disruptive in class, general misconduct, calling another child a “Jew,” and threatening staff. (Tr. 181-183). That same month Republic’s staff hotlined JH after he made suicidal statements. (Tr. 182).

By February 7, 2008 Republic had suspended JH approximately 20 days for disrespectful behavior and for making threats. (Tr. 183-184). At that time Republic placed JH on homebound status due to his behavior. (Tr. 190). JH received homebound instruction from Renee Doubleday, a substitute teacher for Republic. (Tr. 149-150).

Ms. Doubleday kept a journal of her tutoring sessions with JH which she provided to Republic. (Tr. 150). Ms. Doubleday observed that JH has difficulty focusing, has frequent outbursts and has a short attention span. (Tr. 152). Ms. Doubleday found that the medication prescribed by JH’s treating psychiatrist, Dr. Colby Wang, made a big difference in JH's mood, effort and ability to focus. (Tr. 152).

At the end of the 2007-2008 school year, JH was given the NWEA test – a general test given to students to ensure they are ready for promotion to the next

grade level – and JH failed the test. (Tr. 153, 167). Republic’s staff believed the medication prescribed by Dr. Wang would help JH score higher on the NWEA test so Republic gave the test to JH a second time even though Republic does not allow its students to re-take the NWEA test. (Tr. 168, 152). JH's score was higher post-medication and Republic promoted JH to seventh grade. (Tr. 167).

In February 2008, Hansen again requested JH be evaluated for eligibility under the IDEA and Republic agreed to the evaluation. (Tr. 231). As part of its evaluation, Republic sent JH to be evaluated by Dr. Brian Petrovich, a psychologist Republic routinely uses for its evaluations of its students. (Tr. 277-278). Prior to Dr. Petrovich evaluating JH, Dr. Anna Hertel, a licensed psychologist, performed an outside, independent psychological evaluation of JH at Mr. Hansen’s request. (Tr. 109). Dr. Petrovich did not conduct a full assessment of JH but instead chose to use the testing and the evaluation report of Dr. Hertel to form the basis of his diagnostic impressions. (Tr. 109).

Dr. Hertel diagnosed JH with Bipolar Disorder not otherwise specified, Conduct Disorder, and she gave a rule out diagnosis of Attention Deficit Hyperactive Disorder (ADHD). (Tr. 77, 78, 82). Dr. Petrovich gave a diagnosis of Conduct Disorder and a rule out diagnosis of ADHD and a rule out diagnosis of Bipolar Disorder. (Tr. 250). A rule out diagnosis does not mean the person does

not have the disorder, it means there's a very good likelihood the person has the disorder. (Tr. 83).

Republic's school-based mental health clinician, Peggy Defazio, also evaluated JH to assess his eligibility under the IDEA. (Tr. 196). As part of the assessment, Ms. Defazio reviewed the scores of the BASC-2 – a behavior rating scale filled out by Mr. Hansen and two of JH's teachers. (Tr. 99-101). Ms. Defazio reported that "the responses of all raters are reflective of significant problems with hyperactive/impulsive and inattentive symptoms consistent with a diagnosis of attention deficit hyperactive disorder, combined type." (Tr. 197, 198). Ms. Defazio also found that JH "struggles more with hyperactive/impulsive symptoms than inattentive symptoms, but the responses indicate that [JH] struggles with both types to a degree that they very likely interfere with his ability to maintain the behaviors that are expected of him at school." (Tr. 198). Ms. Defazio concluded that JH's behavior was consistent with a diagnosis of ADHD and that his most severe difficulties in the school environment were due to behaviors consistent with ADHD and ODD. (Tr. 199).

Republic denied JH eligibility for services by concluding that JH was socially maladjusted, and, thus didn't qualify under the category of "emotional disturbance." (Tr. 200). Mr. Hansen requested and obtained an independent education evaluation (IEE) at Republic's expense from psychiatrist, Dr. Colby

Wang, M.D. (Tr. 325). Dr. Wang diagnosed JH with Bipolar Disorder, ADHD, Conduct Disorder and gave a rule out diagnosis of post-traumatic stress disorder. (Tr. 24). Following the initial evaluation, Dr. Wang became JH's treating psychiatrist and met with JH several times a month. Dr. Wang prescribed medication to JH for his Bipolar Disorder and for ADHD. (Tr. 31). The eligibility team again met to reconsider JH's eligibility based upon Dr. Wang's findings. Republic again declined to find JH eligible under the IDEA based on the team's conclusion that JH's behavior is a result of him being socially maladjusted. (Tr. 203).

For the 2008-2009 school year, JH's seventh grade year, Republic returned JH to the regular classroom. In August 2008, Mr. Hansen requested Republic implement the written plan created by Republic's Student Intervention Team (SIT). Republic refused Mr. Hansen's request. (Tr. 285).

From August 2008 to December 2008 JH received approximately 25 disciplinary referrals. During that same period, JH expressed suicidal thoughts to Republic's guidance counselor. (Tr. 204). For the Fall 2008 semester JH failed all of his classes except for a math class for which he received a D-. (Tr. 205-206).

In September 2008, Mr. Hansen filed a due process complaint alleging that JH is a student with a disability under the IDEA, claiming Republic had violated the Child Find requirement of the IDEA and that Republic was denying JH a free and

appropriate public education (FAPE). (App. Appendix 1-8). The due process hearing occurred on February 23 and 24, 2009 at the beginning of the second semester of JH's seventh grade year.

Dr. Wang testified in person to explain his findings and diagnosis. (Tr. 10-37) . Dr. Wang testified that "the main point of bipolar disorder is that you have a larger-than-normal fluctuation of mood which is not under your control." (Tr. 26). Dr. Wang also testified that JH's conduct disorder "was mild, so he barely met that disorder, but fulfilled the criteria in terms of his threatening behavior and some physical violence." (Tr. 24). Dr. Wang also explained that that the main characteristics of ADHD are "inattentiveness, impulsivity, hyperactivity, lack of attention." (Tr. 28).

Dr. Hertel also testified in person and explained that Bipolar Disorder not otherwise specified "is a severe mood disorder where the individual's mood ranges from depressed to hypomanic to manic and even mixed-mood episodes." (Tr. 78). Dr. Hertel testified that JH "displayed a number of criteria for ADHD, such as hyperactivity, impulsivity, difficulty concentrating." (Tr. 83). Dr. Hertel further explained that she "attributed those symptoms to his mood disorder and gave the ADHD as a rule-out." (Tr. 83).

JH's teachers observed that JH has quick mood changes, goes from happy-go-lucky to very angry and described him as antsy and fidgety. (Tr. 135, 151).

Dr. Wang testified that ADHD causes JH to be intrusive when others are talking, to be fidgety and to answer questions much too quickly. (Tr. 29). Dr. Wang also testified that JH has an almost painfully difficult time staying in his seat. (Tr. 30). Mr. White admitted that JH's behavior affected his education. (Tr. 206).

At the close of Hansen's evidence, counsel for Republic made an oral motion for "summary judgment" based upon the Chairperson's prehearing order "in terms of the Petitioner's responsibility to show that [Republic] failed to timely evaluate the student." (Tr. 381). The Panel granted Republic's motion and dismissed Hansen's case on the grounds that he had "failed to meet the burden of proof that the student qualified for IDEA services." (Appellant App. 12).

In April 2009, after exhausting his state administrative remedy, Hansen filed a Complaint with the district court. (Appellant App. 13-22). Hansen filed a Motion for Judgment on the Record seeking to have JH found to be a student with a disability under the IDEA under the criteria of "emotional disturbance" arguing that JH meets the definition of emotional disturbance because is unable to build or maintain relationships with his peers and teachers and because he has inappropriate types of behavior or feelings under normal circumstances. (App. 21-37). Hansen also argued that JH met eligibility under the criteria of "Other Health Impairment" ("OHI") because he suffers from ADHD which adversely affects his educational

performance. Hansen also claimed Republic violated the "Child Find" section of the IDEA. (App. 21-37).

Republic also filed a Motion for Judgment on the Record seeking to have the district court find JH was not eligible under the IDEA, for attorney fees and for further relief the Court "finds just and proper under the circumstances." (Appellant App. 29).

The district court granted part of Hansen's Motion finding that JH is eligible under the IDEA because he meets the criteria of OHI. The district court also found JH meets the criteria of emotional disturbance because he is unable to build or maintain relationships with peers and teachers but held JH did not have inappropriate types of behavior or feelings under normal circumstances. The district court also held that Republic did not violate the Child Find section of the IDEA. The district court denied Republic's Motion.

Republic appeals.

A. Republic's Misleading and Inaccurate Statement of Facts

- Appellant's Brief p. 9 "The SIT continued to work to determine and address J.H.'s educational needs."

Republic's SIT attempted to provide assistance to JH via Ms. Defazio but

after failing in her efforts Republic did not offer further assistance to JH. In fact Republic refused to implement the SIT's written plan for JH despite Mr. Hansen's request Republic do so. (Tr. 285).

- Appellant's Brief p. 10, "As a result, and in lieu of a long term suspension, the District, at Mr. Hansen's request, placed JH on homebound."

Republic takes testimony out of context to support its statement that Mr. Hansen requested homebound for JH. In fact, Mr. Hansen testified that he *thought* he had requested homebound but then went on to testify that he never suggested homebound to Republic but that it was in fact Matt White, director of special services, who suggested placing JH on homebound status. (Tr. 319). Moreover, there is no testimony from Mr. White that Mr. Hansen requested JH be placed on homebound status.

- Appellant Brief, p. 11, "it would have been inappropriate for Dr. Petrovich to re-administer any of the tests that Dr. Hertel had already administered to JH."

Republic's statement is misleading in that Dr. Petrovich was in fact free to administer alternative tests to support his opinion. Thus, Dr. Petrovich's decision to rely upon Dr. Hertel's data for the basis of his opinion was from his own choosing and not born out of necessity as Republic's statement would imply. (Tr. 109-110).

- Appellant Brief, p. 13, “Hansen did not make Dr. Wang, or the complete, unredacted records available to the eligibility team....”

On numerous occasions Hansen offered to make Dr. Wang available to Republic – including a face-to-face meeting – so it could converse with Dr. Wang regarding his findings. However, Republic declined Hansen’s repeated offers because it objected to Mr. Hansen being present during its discussions with Dr. Wang. In addition, Hansen made repeated offers to supply Dr. Wang’s file to Republic with personal information redacted and again Republic refused said offers. (Tr. 274-275).

SUMMARY OF THE ARGUMENT

Republic waived its argument that the district court should have remanded the matter to the Panel for findings of fact, or for a continuation of the due process hearing, because Republic failed to raise its argument in the district court.

Republic also failed to demonstrate that a manifest injustice will result if this Court does not consider it. Even if this Court decides to consider Republic's argument, Republic's argument fails on the merit.

The lack of a thorough findings of fact from the Panel did not preclude the district court from hearing Hansen's Complaint because the district court was not sitting as an appellate court in that it was not reviewing the Panel's decision for error. The district court gives due weight to the Panel's decision but issues an independent decision based upon the preponderance of the evidence.

The district court had jurisdiction to review the administrative record, *hear additional evidence at the request of a party*, to issue an independent decision based on the preponderance of the evidence, and grant relief the court deemed appropriate. If Republic wanted to put forth its evidence it should have requested the district court consider it. If the district court refused to do so, Republic could have appealed the decision to this Court seeking to have the matter remanded back to the district court with instructions for the district court to hear said evidence.

Instead Republic made a legal strategic decision not to request the district

court hear additional evidence. Republic now seeks to fault the district court by claiming the district court should have remanded the matter back to the Panel, *sua sponte*, for consideration of additional evidence. Republic made a decision not to proffer its evidence to the district court based upon litigation strategy and now it must learn to live with that decision.

The district court not only had jurisdiction to issue a independent decision it made the correct decision when it held that the administrative record shows by a preponderance of the evidence that JH is a student with disability under the IDEA because he fits the criteria of "emotional disturbance" and OHI.

ARGUMENT

I. STANDARD OF REVIEW

In any action brought under this paragraph, the district court –

- (i) shall receive the records of the administrative proceedings;
- (ii) shall hear additional evidence at the request of a party; and
- (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(i)(2)(C).

When "reviewing a final determination of a state administrative panel's resolution of an IDEA claim," district courts give "due weight to the state proceedings." *Strawn v. Mo. State Bd. of Educ.*, 210 F.3d 954, 958 (8th Cir. 2000). Giving "due weight" is necessary "because the administrative panel had the opportunity to observe the demeanor of the witnesses and because the court should not substitute its own notions of sound educational policy for those of the school authorities that they review." *Id.* A district court's findings of fact are reviewed for clear error. Matters of law are reviewed *de novo*. See *Missouri Dept. of Elementary and Secondary Ed. v. Springfield R-12 School Dist.*, 358 F.3d 992, 998 (8th Cir. 2004). See also *E.S. v. Indep. Sch. Dist., No. 196*, 135 F.3d 566, 569 (8th Cir. 1998).

II. REPUBLIC WAIVED THE ISSUE OF REMANDING THE MATTER TO THE PANEL FOR FINDING OF FACTS OR CONTINUATION OF THE DUE PROCESS HEARING BECAUSE REPUBLIC FAILED

**TO RAISE THE ISSUE IN THE DISTRICT COURT SO THIS COURT
NEED NOT CONSIDER REPUBLIC'S ARGUMENTS.**

For the first time on appeal Republic raises the issue that the district court should have remanded this matter to the Panel for a "continued" due process hearing. Also for the first time on appeal, Republic argues that since the Panel failed to include findings of facts in its decision the district court was precluded from reviewing the Panel's decision.

Unless a party can show manifest injustice will result "a federal appellant court does not consider issues not raised below...". *Ryder v. Morris*, 752 F.2d 327, 332 (8th Cir. 1985). *See Misner v. Charter*, 79 F.3d 745, 746 (8th Cir. 1996) ("we need not address the two new arguments Walton raises on appeal because they were not raised in the district court."); *Jenkins v. Winter*, 540 F.3d 742, 751 (8th Cir. 2008); *Novotny v. Chater*, 72 F.3d 669, 670 (8th Cir.1995); *Ownbey v. Shalala*, 5 F.3d 342, 345 (8th Cir.1993).

Republic concedes that it did not challenge the Panel's findings at the district court because the findings were in its favor. (App. Br. p. 22). Republic filed with the district court its own Motion for Judgment on the Record based on the Panel's Opinion which Republic now claims is too deficient to review. Since the district court did not rule in Republic's favor, Republic is now crying foul.

Republic attempts to rely upon *Complete Auto Body & Repair, Inc. v. St.*

Louis County, 232 S.W.3d 722 (App. E.D. 2007), a Missouri state case, to support its argument that its failure does not preclude it from raising the issue for the first time on appeal. The case is inapposite. It is a state case dealing with state administrative review under RSMo. § 536.140.

Complete Auto Body simply reiterates well-established state case law that in state administrative review matters “[w]ithout findings of fact and conclusions of law, the court has no basis for reviewing the agency’s decisions on the record to determine *whether it violated any of the provisions of § 536.140.2*, which sets out the scope of review in contested cases.” (emphasis added). See *Missouri Veterans Home v. Bohrer*, 849 S.W.2d 77, 80 (Mo.App. 1993) (findings must be sufficiently specific that the court can review the decision intelligently without resorting to the evidence). *Weber v. Firemen’s Retirement System*, 872 S.W.2d 477, 480 (Mo. En Banc 1994).

Under RSMo. § 536.140.2 (Missouri Administrative Procedures Act “MAPA”), the review process is limited, because the scope of the review is narrow. Under MAPA the reviewing court is limited to determining whether the agency’s action was in violation of law, exceeded agency statutory authority, “unsupported by competent and substantial evidence,” “unauthorized by the law,” was “arbitrary, capricious or unreasonable,” or is an “abuse of discretion.” RSMo. § 536.140.

In contrast, under the IDEA the court “shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and base its decision on the preponderance of the evidence, and shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(B). The structural differences between judicial review of state agency adjudications and adjudications under the IDEA are quite clear in the scope of the judicial proceedings and the standards of deviation.

In light of the fact that Republic failed to raise the aforementioned issues in the district court and it further failed to argue in its brief that a manifest injustice will result if its arguments are not considered, so this Court need not consider Republic arguments.¹

If this Court does decide to consider Republic’s new arguments, Republic’s arguments fail on the merits.

**III. THE DISTRICT COURT DID NOT ERR WHEN IT DID NOT
REMAND THE MATTER TO THE PANEL FOR MORE THOROUGH
FINDINGS OF FACT BECAUSE THE DISTRICT COURT WAS NOT
REVIEWING THE PANEL'S DECISION FOR ERROR.**

Republic argues that MAPA is controlling over due process hearings and

¹ Absent some justification, arguments raised for the first time in a reply brief will not be considered. *United States v. Brown*, 108 F.3d 863, 867 (8th Cir. 1997).

therefore the hearing panel was required under state law to provide findings of facts. Republic further argues that the district court should have “recognize[d] the insufficiency of the panel’s findings” since the Panel’s decision does not contain a “single finding of fact or credibility determination.” Republic then makes the erroneous leap that the “paucity of the Panel’s decision should have precluded judicial review.” (App. Brief p. 22, 24).

Republic’s argument is without merit because the district court was not acting as an appellate court in that it was not reviewing the Panel’s decision for error.

Republic provides a plethora of Missouri state cases discussing state administrative review limitations based upon RSMo. § 536.140 to support its position but Republic fails to cite any federal cases. This is because Republic’s argument again fails to account for the fundamental differences between judicial review of state agency adjudications and federal actions that require exhaustion of state administrative remedies.²

MAPA provides for a typical system of judicial review of agency adjudications in that the reviewing court is reviewing for error. The reviewing

² A plaintiff may, in some circumstances, bring an IDEA claim directly to federal court when exhaustion would be futile. See *Honig, v. Doe*, 484 U.S. 305, 326-27 (1988).

state court considers the agency's action and either affirms, reverses or modifies the decision. See RSMo. § 536.140.

In contrast, the IDEA provides for a traditional civil action to enforce statutory rights but requires that a plaintiff first exhaust state administrative remedies before proceeding to federal court. Under the IDEA's exhaustion requirement, federal courts simply delay hearing the claim until the state process is complete; they do not review the state decision. Cf. *Patsy v. Board of Regents*, 457 U.S. 496, 511 (1982). That is, in ruling on an IDEA complaint, the federal court does not “affirm” or “reverse” the administrative decision. Compare 20 U.S.C. § 1415(e)(2) with 20 U.S.C. § 1416(b)(3); see also *Tokarick v. Forest Hills Sch. Dist.*, 665 F.2d 443, 451 (3d Cir. 1981).

“Under IDEA, state law governs the administrative hearing process for challenging a child's IEP. But after exhausting these remedies, an aggrieved party may seek judicial review in federal court. In conducting that review, the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.” *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 560 (8th Cir. 1996).

The Panel's concise written decision did not preclude the district court from reviewing the administrative record, hearing additional evidence at the request of

parties and it did not preclude the district court from giving due weight to the Panel's decision and basing its decision on the preponderance of the evidence. In light of the above, Republic's argument must fail.

IV. THE DISTRICT COURT DID NOT ERR WHEN IT DID NOT REMAND THE MATTER FOR A CONTINUATION OF HEARING BECAUSE THE IDEA EXPLICITLY AUTHORIZES FEDERAL COURTS TO HEAR ADDITIONAL EVIDENCE, ISSUE ITS OWN INDEPENDENT DECISION AND GRANT THE REMEDY THE COURT DEEMS APPROPRIATE.

Republic claims that the district court's jurisdiction was limited to the question of whether the Panel's decision to grant's Republic's motion for directed verdict was proper and the district court's "duty was simply to consider the evidence in the light most favorable to the Hansens and determine whether there was a legally sufficient evidentiary basis for the Panel to require the [School] District to put on its case." Republic goes on to claim that the district court acted as a "roving commission" when it entered "its own findings." (App. Brief p. 29, 30).

Republic's claim is without merit since actions under the IDEA are procedurally unique in that a federal court issues a judgment on the merits of the plaintiff's IDEA claim and directly orders the school to provide an appropriate

remedy. “Under the IDEA, the district court ‘makes an independent decision of the issues based upon the preponderance of the evidence....’” *Birmingham v. Omaha School Dist.*, 220 F.3d 850, 854 (8th Cir. 2000) quoting *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997). See also 20 U.S.C. §1415(e)(2). Under the IDEA, the court “shall grant such relief as the court determines is appropriate.” See 20 U.S.C. § 1415(j)(2)(B)(iii). Furthermore, in enacting the IDEA, Congress specifically rejected statutory language that would have mirrored the deferential and limited standard of review applied under the federal Administrative Procedures Act. See *Board of Educ. v. Rowley*, 458 U.S. 176, 205 (1982).

Other circuits have characterized IDEA actions as “original civil actions” and not an “appeal.” “[W]hile a federal district court may review a state review officer’s decision and even defer to that decision, the federal district court does not sit as an appellate court. Federal district courts are courts of limited, original jurisdiction with no power to sit as appellate tribunals over state court or administrative proceedings. Federal district courts cannot directly supervise and supplant state administrative action by affirming, reversing, or modifying decision.” *Kirkpatrick v. Lenoir County Board of Education*, 216 F.3d 380, (4th Cir. 2000). “In providing for independent court review, Congress apparently intended to create an external check to guard against possible procedural deficiencies or institutional pressures inherent in the educational administrative

system. Rather than affirming, reversing or remanding an agency decision, courts are required to decide upon an educational placement which conforms to their understanding of the aims and terms of the Education Act.” *Tokarick*, 665 F.2d at 451. See *Shamrock Motors, Inc. v. Ford Motor Co.*, 120 F.3d 196, 200 (9th Cir. 1997) (“[t]he prospect of a federal court sitting as an appellate court over state administrative proceedings is rather jarring and should not be quickly embraced as a matter of policy.”); *Hameetman v. City of Chicago*, 776 F.2d 636, 640 (7th Cir. 1985) (“Federal courts have no general appellate authority over state courts or state agencies.”).

Republic faults the district court because it did not, *sua sponte*, remand the case back to the Panel so Republic could proffer its contra evidence. The IDEA does not authorize federal courts to remand cases to a state agency to conduct further evidentiary hearings or other proceedings. Compare 20 U.S.C. § 1415(e)(2) with 20 U.S.C. § 1416(b)(3); see also *Tokarick*, 665 F.2d at 451.

The IDEA authorizes the district court to “hear additional evidence at the request of a party....” 20 U.S.C. 1415(e)(2). In an IDEA case, the record is but one piece of evidence the district court considers. See 20 U.S.C. § 1415(h). “[The] [d]ecision on the record compiled before the administrative agency is the norm ... so a party that wants the judge to take evidence rather than decide the case on the record compiled before the hearing officers had better *tell* him.” *Indep. Sch. Dist.*,

88 F.3d at 560 (citing *Hunger v. Leininger*, 15 F.3d 664, 670 (7th Cir.), *cert. denied*, 513 U.S. 839, 115 S.Ct. 123, 130 L.Ed.2d 67 (1994)). (emphasis added).

Republic made the decision not to “tell” the district court it wanted the court to hear additional evidence. Now Republic is seeking another bite at the apple by arguing the district court should have remanded the matter for a “continuation” of the due process hearing so Republic can put forth evidence it failed to request the district court to consider. In fact Republic's argument ensures that there is never finality to the matter since the losing party could have a second, third, fourth bite at the apple by having the matter remanded to the hearing panel to proffer additional evidence each time the district court rules against them. Republic's argument is incongruent with 20 U.S.C. § 1415(e)(2).

Hansen initiated his civil action by filing a complaint and Republic responded by filing an answer. Both parties filed Motions for Judgment on the Record. The district court did not reverse the Panel's decision but issued its independent decision based on the preponderance of the evidence as authorized by the IDEA and did not consider additional evidence since Republic failed to request the district court do so. In light of the foregoing, Republic's argument must fail.

V. THE DISTRICT DID NOT ERR WHEN IT DETERMINED JH IS A STUDENT WITH A DISABILITY UNDER THE IDEA BECAUSE THE DISTRICT COURT GAVE DUE WEIGHT TO THE PANEL'S

**DECISION BEFORE ISSUING ITS INDEPENDENT DECISION
BASED UPON THE PREPONDERANCE OF THE EVIDENCE**

Republic claims the district court failed to give "due weight" to the Panel's decision. Republic would have this Court take the erroneous position that if a district court does reach the same decision as the Panel's the district court has de facto failed to give due weight to the Panel's decision. (App. Brief p. 35).

"[F]ederal courts do not simply rubber stamp administrative decisions...."
Walczak v. Florida Union Free School Dist., 142 F. 3d 119, 129 (2nd Cir. 1998).
"Preponderance of the evidence standard" for reviewing administrative record in Individuals with Disabilities Education Act (IDEA) is less deferential standard of review than substantial evidence test common to federal administrative law. *Indep. Sch. Dist.*, 88 F.3d at 560.

Republic attempts to support its argument by relying upon *Strawn v. Missouri State Board of Education*, 210 F.3d 954 (8th Cir. 2000). (App. Br. p. 35). *Strawn* is distinguishable from the case at bar because the district court in *Strawn* failed to acknowledge the "due weight" standard in its opinion. *Id.* at 958. In the case at bar, the district court acknowledged and referenced the "due weight" standard of review in its opinion. The district court also provides a thorough findings of fact to explain its decision making process.

A. JH's Impairments Adversely Affected His Educational Performance.

The disability of a student must "adversely affect" the student's "educational performance" for the student to be eligible for special education and related services. 34 C.F.R. 300.7(c). It is quite clear that JH's impairments adversely affect his educational performance. In fact Republic's director of special services, Matt White, admitted that JH's behavior adversely affects his education. (Tr. 206).

Moreover, the district court found that evidence in the administrative record - JH's failing grades, repeated suspensions for fighting with classmates and disrespectful behavior toward staff, being placed on homebound status with a tutor and the need for summer school - supported the finding that JH's impairments adversely affected his educational performance.

The district court in *Eschenasy v. New York City Department of Education*, 604 F.Supp.2d 639 (S.D. N.Y. 2009), came to the same conclusion based upon a student's "failing grades, repeated expulsions, suspensions, need for tutors and need for summer school." *Id.* at 647.

B. JH Suffers From An "Emotional Disturbance"

Republic claims that JH is socially maladjusted and therefore is not a student with a disability under the IDEA.

IDEA recognizes thirteen different categories of eligibility. One of those categories is “emotional disturbance.” 434 C.F.R. § 300.8(c)(4)(i) defines emotional disturbance as follows:

The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance –

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
- (B) **An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.**
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression; or
- (E) A tendency to develop physical symptoms or fear-associated with personal or school problems.

The term includes schizophrenia, but does not apply to children who are socially maladjusted *unless it is determined they have an emotional disturbance.* (Emphasis added.)

Republic relies upon *Springer v. Fairfax County School Board*, 134 F.3d 659 (4th Cir. 1998) to support its argument that JH does not suffer from an emotional disturbance. (App. Br. 37-38). *Springer* is distinguishable from the case at bar in many different respects.

In *Springer*, three psychologists evaluated the student and failed to contribute his behaviors to any emotional disturbance and instead found him to be socially maladjusted. *Id.* at 665. In contrast, JH’s treating psychiatrist and a psychologist

diagnosed JH with Bipolar Disorder.³ (Tr. 24). Republic's own psychologist gave JH a rule out diagnosis of bipolar disorder. (Tr. 250). Dr. Wang also testified that JH's conduct disorder was "mild, so [JH] barely met the criteria." (Tr. 24).

In *Springer*, the student's grades were consistently average to above average. *Id.* at 666. In contrast, JH suffered academically since he was first enrolled in Republic. JH had failing grades and was required by Republic to attend summer school in order to advance to the next grade.

In *Springer*, teachers, students, the student's father and the student himself stated that the student could build and maintain close personal relationships. *Id.* at 665. In contrast, the only person to opine that JH can build and maintain personal relationships was Mr. White, Republic's director of special services. (Tr. 299). Mr. White also opined that JH is socially maladjusted and that his behaviors are "by design." (Tr. 297). Mr. White admitted at the hearing he has no first hand knowledge of JH's behaviors and relied upon behavior reports to form his opinions. (Tr. 297).

³ Republic argues the "Panel found the Hansens' witnesses less than credible..." (App. Brief p. 34). Republic admitted in its brief that the Panel's written decision did not contain a "credibility determination." (App. Brief p. 22). Furthermore, the Panel did not make *any* statements – explicit or implicit – regarding the credibility of witnesses when it granted Republic's oral motion for directed verdict. Accordingly, Republic's argument is without bases, is purely speculative, and should be dismissed as such.

Republic would have this Court believe that JH is a respectful student who gets along with his "some" of his peers and "some" of his teachers based upon the sole testimony of Mr. White who has no personal knowledge of JH's behavior. Mr. White's opinion has no bases since he has never observed JH's behaviors, has never been JH's teacher and he has never personally conducted an evaluation of JH.

Furthermore, the testimony of JH's tutor, Ms. Doubleday, and the report of Republic's school-based mental health clinician, Ms. Defazio, stand in stark contrast to Mr. White's opinion. Ms. Doubleday testified that she became so upset during one particular tutoring session that she gave JH "a taste of the same disrespect and disdain he continued to display towards me." (Tr. 155). Ms. Defazio found that JH's "hyperactivity, impulsivity, inattention, defiant behaviors and limited social skills" has severely interfered with JH's ability to succeed socially and academically. (Tr. 199).

Republic erroneously claims that the district court's reliance upon Ms. Defazio's report is "double hearsay" since Ms. Defazio did not testify at the hearing. The report was read into the record without objection from Republic.⁴ Accordingly, Republic has waived its objection.

⁴ (Tr. 188-189) At the hearing Republic's Counsel objected to the reading into evidence, educational records provided to Hansen by Republic, but then withdrew his objection, never raised it again and therefore waived it.

In its brief, Republic also attempts to improperly introduce new documents into evidence which were not before the district judge. Republic attempts to use the new documents to support its claim that JH does not suffer from a "serious emotional disturbance." (Republic's Appendix p. 46, 47 & 54; App. Brief p. 39-40). Republic's new evidence should be stricken from the record as improper since the record on appeal consists solely of the original papers and exhibits presented to the district court, the transcript of the proceedings and a certified copy of the docket entries prepared by the district clerk. Federal Rule of Appellate Procedure 10(a).

Should this Court choose to consider this new evidence, Hansen respectfully requests he be allowed to present his contrary evidence based upon Republic's newly introduced documents. The new evidence Republic seeks to have this Court consider in fact undermines Republic's argument that JH does not suffer from an emotional disturbance. For the Fall 2009 semester JH received failing grades in all of his classes. During that same time period JH was suspended for disruptive conduct, threatening another student, and disrespectful behavior. In February 2010, Republic once again placed JH on homebound status with a tutor because of his behavior. (Appellant App. 54, 55).

Despite Republic's claim to the contrary, one disciplinary referral for

possession of marijuana does not negate the fact that JH has bipolar disorder and ADHD which are impairments that adversely impact his educational performance.

In any event, the administrative record as a whole shows that JH's impairments adversely affect his educational performance and that he meets the criteria of "emotional disturbance" in that he is unable to build or maintain personal relationships with peers and teachers. In light of the above, Republic's argument must fail.

C. JH Meets The Eligibility Criteria For Other Health Impairment.

Republic claims the district court "appears takes the position that J.H.'s medical diagnosis of ADHD automatically qualified him as a student with OHI." (Brief p. 46-47). In its argument before the district court, Republic took the position that the record does not support the conclusion that JH has the impairment of ADHD. (App. at 10-11). The district court disagreed and found JH suffers from the impairment of ADHD and provided its findings of fact to explain its decision. (Appellant App. 39-41). The district court also provided the bases for its decision that JH's impairments adversely affects his educational performance. (Appellant App. 35-36).

Republic clings to various due process hearing decisions to support its argument that JH does not meet the criteria of OHI despite the fact that hearing decisions are only binding on the parties involved. (App. Brief at 48).

In any event, Republic's reliance upon *School District of Springfield, R-12*, 49 IDELR 177 (SEA MO 2007) decision is unfounded. Two members of the Panel in *Springfield, R-12* – one member dissented - found that the student's impairments did not adversely affect his educational performance because in fifth grade the student only had five (5) disciplinary referrals and he had no disciplinary referrals in the sixth grade. In contrast, JH received five (5) disciplinary referrals in one month alone during his sixth grade year. (Tr. 183-184). During the Fall semester of his seventh grade year JH received 25 disciplinary referrals. At one point Republic placed JH on homebound status due to his disciplinary referrals. (Tr. 190).

In *Springfield, R-12* the two Panel members also found that the student's passing grades during fifth grade and for the first semester of his sixth grade year was proof that his impairments did not adversely affect his education. In contrast, JH has struggled academically since being enrolled in Republic. Republic required JH to attend summer school and to pass a promotion test before it would promote him to sixth grade due to his grades. (Tr. 178). During the Fall semester of his seventh grade year JH received failing grades, except for a D-, in all of his classes. (Tr. 205-206).

Republic's own school-based mental health clinician, Ms. Defazio, found that JH's severe difficulties in the school environment are to due to his behaviors

consistent with a diagnosis of ADHD. (Tr. 199). It is Dr. Wang and Dr. Hertel's expert opinions that JH demonstrated inattentiveness, impulsivity, hyperactivity and lack of attention. (Tr. 28, 83). Dr. Wang diagnosed JH with ADHD both inattentive and hyperactive and Dr. Hertel gave a rule out diagnosis of the same. (Tr. 24, 82). Consistent with Dr. Wang and Dr. Hertel's opinions, Ms. Defazio also reported that JH struggles with both hyperactive/impulsive symptoms and inattentive symptoms which interfere with JH's ability to maintain behaviors expected of him at school. (Tr. 198).

Moreover, JH's tutor described JH has antsy and fidgety and opined he has a short attention span. (Tr. 151-152). She testified that JH's behavior and ability to focus improved after he began taking medication prescribed by Dr. Wang. (Tr. 152). Republic had JH re-take a promotion test he originally failed because Republic believed the medication prescribed by Dr. Wang would help JH to score higher on the test. (Tr. 168). JH's test score did improve post-medication and Republic promoted JH to the seventh grade. (Tr. 167).

In light of the above, Republic's argument JH's education performance is not adversely affected by his ADH is without merit and must fail.

CONCLUSION

WHEREFORE, for the foregoing reasons, Hansen respectfully requests this Court deny Republic's request to have the matter remanded to the district court with instructions for the district court to remand to the hearing panel for additional findings of fact, or a "continuation" of the hearing, because Republic waived its argument when it did not raise it in the district court and because the relief sought is not proper under the IDEA. Hansen also respectfully requests this Court to affirm the district court's Order granting Hansen's Motion for Judgment on the Record.

Respectfully submitted,

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