

## Trending Case Law Impacting Special Education in Arkansas



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1

## Trending Special Education Case Law

- **FACT STATEMENTS**
  - A majority of students with disabilities (SWD) are educated most of their instructional day in general education classrooms.
  - A growing number of SWD receive some, if not all, special education services in general education settings. That number is increasing due to more inclusive practices.
  - General education classroom dynamics are changing, in part due to inclusive practices and the shortage of qualified general and special education teachers.
  - The lines are blurring between general education and special education instruction for SWD due to these changes.

2

## Trending Special Education Case Law

- What will Free Appropriate Public Education (FAPE) look like for SWD in this evolving dynamic?
- Are the federal courts helping to clarify the FAPE issues under the Individuals with Disabilities Education Act (IDEA) or are they further “muddying” the water?
- What will be/is the impact of recent federal court decisions on special education in Arkansas public schools?

3

## Trending Special Education Case Law

- NOTE: Federal courts rarely overturn IDEA due process administrative law judges (ALJ)/hearing officers (HO) decisions. That is why the outcome of a Special Education due process hearing (DPH) is so important.
- During a DPH, it is important to sufficiently “establish and build the record,” so that if an appeal of a ALJ’s/HO’s decision is made to federal court, then the exhibits and transcript(s) of witness testimony provide ample evidence to support the district’s position and argument.

4



## Trending Special Education Case Law

As we attempt to answer these questions, for our purposes today, the focus is on some decisions that directly affect Arkansas school districts as rendered by:

- The Supreme Court of the United States (SCOTUS),
- The United States Court of Appeals for the Eighth Circuit [the Eighth (8<sup>th</sup>) Circuit],
- The United States District Courts of Arkansas, and
- Arkansas State Education Agency Due Process Hearing Decisions.

5

## Supreme Court of the United States (SCOTUS)



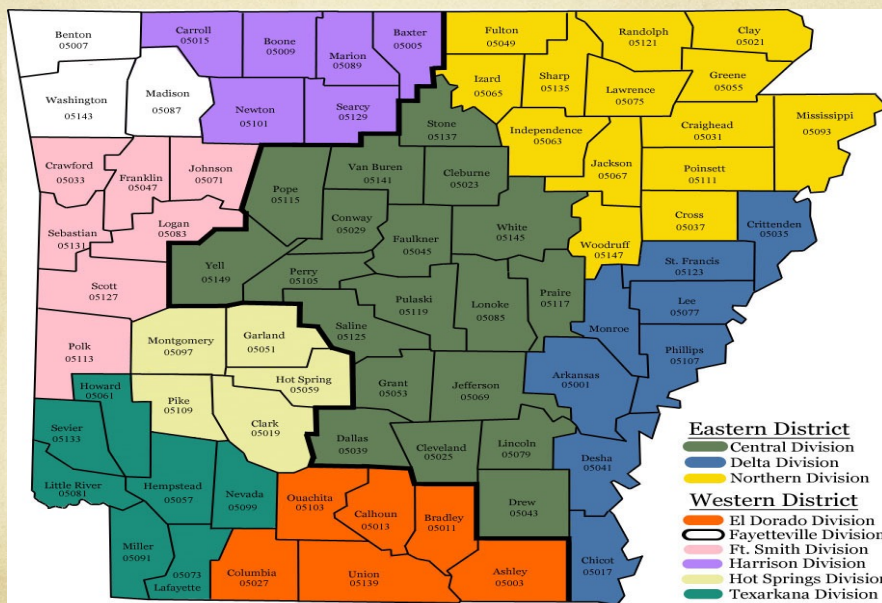
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### United States Circuit Courts of Appeal [Eighth (8<sup>th</sup>) Circuit Court]



7

### United States District Courts of Arkansas



8

## Trending Special Education Case Law

- IDEA's "Exhaustion of Remedies" Requirements (*SCOTUS Perez* case impact)
- FAPE: Adequacy and Appropriateness (*SCOTUS Endrew* case impact)
- Child Find & Referral under the IDEA
- Evaluation & Eligibility Determination under IDEA
  - NEED for Specially Designed Instruction (Special Education)
- Twice-Exceptional Students (Giftedness and Disability)
- Use of Seclusion and Restraint: School Staff Liability (i.e., teachers)
- Mental/Behavioral Health, Functional Behavior Assessment (FBA), and Behavior Intervention or Support Plans (BIP/BSP)
- Services to students with Autism Spectrum Disorder (ASD)

9

## Recent *SCOTUS* Decisions

10



## Recent SCOTUS Decisions

- *MIGUEL LUNA PEREZ v. STURGIS PUBLIC SCHOOLS, ET AL.*
  - Certiorari to the U.S. Ct. of Appeals for the Sixth Circuit
  - No. 21-887. Argued January 18, 2023 – Decided March 21, 2023
- **BACKGROUND**
  - Miguel, who is deaf, attended schools in Michigan’s Sturgis Public School District from ages 9-20, when it was announced that he would not graduate. He and his family filed an administrative complaint alleging (among other things) that the district failed to provide him a FAPE because they provided unqualified interpreters and misrepresented his educational progress over the years.

11

## Recent SCOTUS Decisions

- Although a settlement was reached, Mr. Perez then sued in federal district court under the American’s with Disabilities Act (ADA) seeking compensatory damages for emotional distress suffered due to the District failing to meet his educational needs in 2021.
- The district moved to dismiss, stating that IDEA barred him from bringing his ADA claim because IDEA requires a plaintiff “seeking relief that is also available under” IDEA to first exhaust IDEA’s administrative procedures.
- The federal district court agreed with the school district and dismissed the suit.
- The Sixth Circuit affirmed.

12

### Recent SCOTUS Decisions

- **SCOTUS Held:** IDEA's exhaustion requirement does not preclude Mr. Perez's ADA lawsuit because the relief he seeks (i.e., compensatory monetary damages) is not something IDEA can provide.
- The issue at the heart of this case is one of "exhaustion," which refers to the general requirement that one must complete the IDEA administrative adjudication stage (DPH) before proceeding to court.
- However, IDEA, §1415 (l), first clause, focuses on "remedies" and sets forth this general rule: "Nothing [in IDEA] shall be construed to restrict" the ability to seek "remedies" under "other Federal laws protecting the rights of children with disabilities."

13

### Recent SCOTUS Decisions

- The second clause carves out an exception: Before filing a civil action under other federal laws "seeking relief that is also available" under IDEA, "the procedures under [§1415](f) and (g) shall be exhausted." (The right to a "due process hearing")
- Because IDEA does not provide compensatory (monetary) damages, Mr. Perez could pursue his ADA claim.
- **The opinion of the Supreme Court was unanimous. The court reversed and remanded the case.**

14



### Recent SCOTUS Decisions

- *ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. ET AL. v. DOUGLAS COUNTY SCHOOL DISTRICT RE-1*
  - Certiorari to the U.S. Ct. of Appeals for the Tenth Circuit
  - No. 15-827. Argued January 11, 2017 – Decided March 22, 2017
- **BACKGROUND:** Endrew F, a child with autism, received annual IEPs in the District from PreK-4<sup>th</sup> grade. By 4<sup>th</sup> grade, his parents felt his academic and functional progress had stalled. When the IEP proposed for the 5<sup>th</sup> grade resembled those from past years, his parents removed him from public school and enrolled him in a specialized private school where he made significant progress. They sought reimbursement for his private placement by filing a complaint under the IDEA.
- Their claim was denied and a federal District Court affirmed that decision.
- The 10<sup>th</sup> Circuit Court of Appeals affirmed.

15

### Recent SCOTUS Decisions

- The 10<sup>th</sup> Circuit Court interpreted *Rowley* to establish a rule that a child’s IEP is adequate as long as it is calculated to confer an “educational benefit [that is] merely . . . more than de minimis.”
- The court concluded that Endrew’s IEP had been “reasonably calculated to enable [him] to make *some* progress.” The court then held that Endrew had received a FAPE.

16



### Recent SCOTUS Decisions

- **SCOTUS Held:** “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”
  - The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.
  - The absence of a “bright-line rule” should not be mistaken for “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.” (Rowley 458 U.S. at 206)

17

### Recent SCOTUS Decisions

- As Chief Justice Roberts wrote in the Opinion of the Court, “When all is said and done, a student offered an educational program providing ‘merely more than ‘*de minimis*’ progress from year to year can hardly be said to have been offered an education at all.”
- He goes on to say, “For children with disabilities, receiving instruction that aims so low would be tantamount to ‘sitting idly ... awaiting the time when they were old enough to drop out.’” (Rowley 458 U.S., at 179.) “The IDEA demands more.”

18

### Recent SCOTUS Decisions

- This would apply, Roberts wrote, even to kids like Drew who are not integrated into general education classrooms:
  - “If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.”

19

### Recent SCOTUS Decisions

- He acknowledged that this was a “general standard, not a formula.” “A lot will depend,” he wrote, “on each child’s unique needs:
  - We will not attempt to elaborate on what “appropriate” progress will look like from case to case. It is in the nature of the [special education law] and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.”

20



## Recent Eighth Circuit Court of Appeals Decisions

21

### Eighth Circuit Court of Appeals

- *Independent Sch. Dist. No. 283 v. E.M.D.H., (8th Cir. 2020), cert. denied, 142 S. Ct. 67 (2021).*
- Because a high schooler's anxiety and depression prevented her from accessing the general education curriculum, a Minnesota district erred in finding the teen ineligible for IDEA services based on her above-average academic performance.
- The 8th Circuit upheld a District Court ruling that the student's disability-related absences impeded her access to the general education curriculum and entitled her to specialized instruction, finding that the district denied the student FAPE. It reinstated a HO's order that required the district to pay for private tutoring.

22

### Eighth Circuit Court of Appeals

- **BACKGROUND:** The student had exhibited various identified psychological disorders (severe recurrent major depressive disorder, generalized anxiety disorder (GAD), ADHD, panic disorder with associated agoraphobia, (OCD traits) since early in her life and had been in therapy since 2<sup>nd</sup> grade. However, she progressed and even excelled in elementary school.
- She started having increased school absenteeism and mental health hospitalizations for treatment as she moved through the grades.

23

### Eighth Circuit Court of Appeals

- Diagnoses included major depressive disorder, autism spectrum disorder (ASD), ADHD, GAD with panic and OCD features, and symptoms of borderline-personality disorder. The evaluator concluded that the array of mental illnesses had “resulted in an inability to attend school, increasing social isolation, and continued need for intensive therapeutic treatment.”

24



### Eighth Circuit Court of Appeals

- The district addressed the Student's eligibility for special education in November of 2017 and determined that she didn't qualify. The parents obtained an Independent Educational Evaluation (IEE) that confirmed her previous diagnoses. The district disagreed with the recommendation that she receive special education services. The parents then filed for a DPH.

25

### Eighth Circuit Court of Appeals

- The parents prevailed, as the ALJ found that the district acted unlawfully when it failed to:
  - identify the student as a SWD,
  - conduct an appropriate special education evaluation,
  - find the Student qualified for special education services, and
  - provide the Student a FAPE.
- The district appealed the decision to federal district court, which affirmed the ALJ's decision, except for the order to pay for future private-tutoring services, which the district court reversed. The parties then cross-appealed that decision.

26

### Eighth Circuit Court of Appeals

- **8<sup>th</sup> Circuit HELD:** Because the high school Student's disabilities prevented her from accessing her education, the district erred in finding her ineligible for IDEA services based on her above-average academic performance. She was a "twice-exceptional" student, both gifted and disabled.
- The court affirmed the lower court's decision that the district denied the student FAPE. It also reinstated the ALJ's order that required the district to pay for private tutoring.

27

### Eighth Circuit Court of Appeals

- *Jacquie Albright, As parent and Next Best Friend of Child Doe v. Mountain Home School District; Debbie Atkinson, Director of Special Education, Susanne Belk, BCBA Consultant*
  - Appeal from U.S. District Court for the Western District of Arkansas - Harrison
  - Submitted: December 13, 2018
  - Filed: June 12, 2019

28



### Eighth Circuit Court of Appeals

- **BACKGROUND:** Parent alleged that her daughter, a student initially categorized with a significant Intellectual Disability and later reclassified as having severe Autism, wasn't provided a FAPE by the district. It was difficult for the parent and the other IEP team members to agree on many aspects of the Student's IEP, since a highly contentious relationship existed between the parent and the district, complicated further by the parent's employment with the district. The parent had filed four due process complaints against the district challenging the Student's education up to this point in time.

29

### Eighth Circuit Court of Appeals

- When the parent's administrative challenge failed, she appealed that decision in federal district court and brought additional claims for constitutional violations under 42 U.S.C. §1983, disability discrimination and retaliation under §504, disability discrimination under Title II of the ADA and violations of Arkansas law.
- The Court found that the parent was not entitled to relief, even if the district violated the IDEA by arranging for a functional behavioral assessment of the elementary school student with disabilities despite the parent's refusal to consent and without pursuing the IDEA's consent override procedures.

30

### Eighth Circuit Court of Appeals

- The district court held that any procedural violation was harmless in light of the district's need for information about the student's behaviors. There was no substantive issue or harm.
- The district court affirmed the administrative decision, granted summary judgment to the district on the remaining federal claims, and then declined to exercise supplemental jurisdiction over Albright's state law claims.
- The parent thereafter filed the appeal with the 8<sup>th</sup> Circuit Court.

31

### Eighth Circuit Court of Appeals

- **8th Circuit HELD:** In sum, the court found "a profoundly toxic lack of trust" between Albright [parent] and the district has rendered it nearly impossible for the parties to agree on an education program best suited for Child Doe's needs, despite both parties' seemingly earnest desire to provide just that."
- "Nonetheless, having found no clear error in the district court's factual findings and having given due weight to the hearing officer's credibility determinations, we conclude that Child Doe was not denied a FAPE."

32



### Eighth Circuit Court of Appeals

- The Court further found that the district court didn't abuse its discretions in denying Albright's motions for extensions of time and to accept her summary judgment response out of time. The Court concluded that Albright's late filing was not excusable, notwithstanding the relative insubstantiality of the delay and the danger of prejudice to the district.
- Further, because of the Court's decision that the district didn't violate the IDEA, "a retaliation suit under §504 based on IDEA violations is precluded." The district was thus entitled to summary judgment on Albright's retaliation claims.
- The judgment of the district court is affirmed.

33

### Eighth Circuit Court of Appeals

- *I.Z.M. v. Rosemount-Apple Valley-Eagan Public Schools, 8<sup>th</sup> Circuit, 2017.*
- A Minnesota district didn't violate the IDEA by not providing Braille instructional materials to a ninth-grader with a visual impairment "for all classroom assignments and instruction" as his IEP required. The 8<sup>th</sup> Circuit held that the district's occasional implementation failures did not result in a denial of FAPE.

34

### Eighth Circuit Court of Appeals

- *Osseo Area Schools v. M.N.B., 8<sup>th</sup> Circuit, 2020.*
- In a case involving Minnesota's school choice law, a district's acceptance of a fifth-grader's open enrollment application did not require it to provide the home-to-school transportation set forth in her IEP.

35

### Eighth Circuit Court of Appeals

- *Doe v. Aberdeen School District, 8<sup>th</sup> Circuit, 2022.*
- A former special education teacher will have to defend allegations that she violated the constitutional rights of three elementary school students with disabilities by using seclusion and restraint to address minor rule-breaking and noncompliance.
- Holding that the teacher "substantially departed from acceptable standards," the 8<sup>th</sup> Circuit allowed the parents to proceed with their Fourth Amendment claims against the South Dakota teacher.

36



### Eighth Circuit Court of Appeals

- *C.N. v. Willmar Public Schools, 8<sup>th</sup> Circuit, 2010.*
- A special education teacher didn't violate a third-grader's Fourth Amendment rights when she used seclusion and restraint to manage the child's behaviors. Noting that the child's behavioral intervention plan (BIP) allowed the teacher to use such techniques, the 8<sup>th</sup> Circuit affirmed the District Court's dismissal of the parent's constitutional claim.

37

### Eighth Circuit Court of Appeals

- *Steckelberg v. Chamberlain School District, 8<sup>th</sup> Circuit, 2023*
- The 8<sup>th</sup> Circuit awarded the parents of a teen with an Other Health Impairment, severe neuropsychiatric disorders, OCD, Tourette syndrome, and a Specific Learning Disability tuition and costs associated with their unilateral private placement, including travel expenses. Because the South Dakota school district didn't develop appropriate programming to meet the student's behavioral needs or have alternative placement options available, it must reimburse the parents \$90,000.

38

### Eighth Circuit Court of Appeals

- *D.L. v. St. Louis City School District, 8<sup>th</sup> Circuit, 2020.*
- A Missouri district erred when it recommended placing an elementary school student with PTSD, Autism and other disabilities in a behavior-centered school that didn't offer a sensory room or other critical supports.
- Additionally, the court pointed out that the principal testified that the school served children who made "poor choices" and needed discipline. The court found that the district violated the IDEA not only by failing to offer the needed sensory support, but also by offering a placement in a school not appropriate for this student.

39

### Eighth Circuit Court of Appeals

- *Hansen v. Republic R-III School District, 8<sup>th</sup> Circuit, 2011.*
- A ninth-grader with bipolar disorder who had multiple disciplinary referrals over a four-year span for threatening students and teachers, fighting, and disrespecting teachers and peers, and who performed poorly in class and on standardized tests wasn't merely socially maladjusted.
- The 8<sup>th</sup> Circuit held that the Missouri student was eligible under the IDEA category of ED based on an inability to build or maintain satisfactory interpersonal relationships.

40



### Eighth Circuit Court of Appeals

- *Minnetonka Public Schools, Independent School District No. 276 v M.L.K., 8<sup>th</sup> Circuit, 2022*
- Noting that an elementary school student with Autism made appropriate progress in reading during his second- and third-grade years, the 8<sup>th</sup> Circuit held that a Minnesota district's failure to classify him as a child with dyslexia didn't result in a denial of FAPE.
- The district identified and addressed the student's difficulties with reading and attention. The court reversed a District Court ruling that required the district to provide compensatory education.

41

### Eighth Circuit Court of Appeals

- *Estate of Barnwell v. Watson, 8<sup>th</sup> Circuit, 2018.*
- A mother's reports of generalized concerns, without more, were not enough to alert the Arkansas school district to the student's bullying by his peers. The mother of a teenager with Asperger syndrome told the IEP team she was worried about bullying because of the student's past difficulties with peers. She didn't, however, describe any incidents of harassment or identify any students who were causing problems currently for her son.

42

## U.S. DISTRICT COURTS OF ARKANSAS

43

### Eastern District of Arkansas

- *Jacksonville N. Pulaski School District v. D.M. and K.M., Eastern District, AR, 2021.*
- **Ruling:** The fact that a kindergartner with ADHD, Autism, and a sensory processing disorder performed well academically didn't justify an Arkansas school district's refusal to evaluate the child's need for IDEA services. Citing the child's repeated suspensions for aggressive behavior, the District Court held that the school district violated its Child Find obligation.

44



### Eastern District of Arkansas

- *DOE, C.P., Individually and as Parent and Next Friend of J.P., PLAINTIFF v. Johnny KEY, in his Official Capacity as Commissioner of Education and Secretary of the Arkansas Department of Education and CABOT SCHOOL DISTRICT, DEFENDANTS, U.S. District Court, Eastern District of Arkansas, March 31, 2023*
- **Ruling:** An Arkansas district won't have to defend allegations that it denied a 5th grader FAPE by failing to identify and address her specific learning disabilities. The Court held that the student's unilateral parental placement in an out-of-district private school ended the parent's right to seek relief for the alleged IDEA violations.

45

### Eastern District of Arkansas

- **Meaning:** A student's withdrawal from a district bars any subsequent due process complaint. (*Thompson v. Board of Education of Special School District No. 1, 8<sup>th</sup> Circuit 1998*). Although OSERS has criticized this decision, the rule remains in effect. This district argued that the parent could not seek reimbursement for a private school placement that predated the parent's filing of a due process complaint. The parent's refusal to identify the date of the student's enrollment in the out-of-district school strengthened the district's request for a dismissal.

46

### Eastern District of Arkansas

- *BEEBE SCHOOL DISTRICT, Plaintiff/Counter-Defendant v. DOES J.H. and R.H., Individually and as Parents and Next Friend of G.H., Defendants/ Counter-Claimants*, U.S. District Court, Eastern District of Arkansas, March 30, 2022.
- **Ruling:** An Arkansas school district didn't deny FAPE to a 3<sup>rd</sup> grader with dyslexia when it used hard-copy work packets to provide instruction at the start of the COVID-19 pandemic. The Court reversed an administrative decision that required the district to reimburse the parents for the student's unilateral placement in a private special education school.

47

### Eastern District of Arkansas

- **Meaning:** A district will have a much stronger defense against pandemic-related FAPE claims if it can show it offered multiple instructional options during extended school closures.
- Also, documentation of attempts to communicate with parents and modify the student's biweekly work packets is critical. In this case, the availability of other options (video lessons or real-time online instruction), along with repeated attempts to contact the parents to discuss student progress, established the district's effort to meet the student's needs during the distance learning.

48



### Eastern District of Arkansas

- *RUSSELLVILLE SCHOOL DISTRICT, Plaintiff v. T.R., Parent and Next Friend of K.R., a Minor, Defendant*, U.S. District Court, Eastern District of Arkansas, September 22, 2021.
- **Ruling:** The Court gave parents permission to file a reply brief but denied their motion to dismiss a district's amended complaint in a case arising from the district's appeal of a due process decision.
- **Meaning:** Courts hesitate to dismiss a case that still presents questionable issues, is capable of repetition, or is being actively litigated. This district conducted an ordered BCBA evaluation while it appealed an IHO's decision, but still hadn't fully implemented all of the terms of the order. Because its implementation efforts were ongoing, and it pointed out that there were pending due process claims, appeals, a civil suit, and unresolved claims for fees, costs, and compensatory damages, the district established that there was an ongoing controversy and the case was not moot.

49

### ARKANSAS DEPARTMENT OF EDUCATION

#### DUE PROCESS HEARINGS

50

### Arkansas Due Process Hearings (DPH) 2023-2024

- *Malvern School District, Arkansas State Educational Agency, H-24-23, June 2, 2024, HO: Dana McClain*
- **Issue:** Whether the district denied the Student a FAPE between February 28, 2023, and November 17, 2023.
- **Ruling:** “Having considered Parent’s argument that the district failed to implement Student’s IEP between October 17, 2023, and November 17, 2023, and in light of the findings and conclusions supra, it is the conclusion of this HO that the district’s failure to implement Student’s IEP between October 18, 2023 and November 17, 2023 denied Student a FAPE and substantively violated the requirements of IDEA.”

51

### Arkansas Due Process Hearings (DPH) 2023-2024

- **Private School Placement:** Parent argued in her post hearing brief that because of the denial of a FAPE, Student is entitled to private school placement. Parent failed to provide any evidence of a private school placement for the Student to attend. Further, there was no evidence provided that any private placement was appropriate for Student and could meet her unique needs. As such, Parent failed to provide sufficient evidence for an award of private school placement.
- “The results of the testimony and evidence warrant a finding for the Parent relative to denial of FAPE. Specifically, Parent introduced sufficient evidence in the record to establish by a preponderance of the evidence that the district denied Student a FAPE between October 18, 2023 and November 17, 2023.”

52



### Arkansas Due Process Hearings (DPH) 2023-2024

- **Order:** District must take the following actions regarding Student:
  - Conduct an IEP meeting and revise Student's IEP within 15 days of the decision.
  - Provide Student with compensatory services as follows: 4 hours in physical therapy; 6 hours in speech therapy; 6 hours in occupational therapy.
  - Provide Student with 40 hours of compensatory services in Applied Behavioral Analysis (ABA) therapy services to be spread over time taking into account Student's ability to tolerate additional instruction. These services will be carried forward in Student's IEP until completed.

53

### Arkansas Due Process Hearings (DPH) 2023-2024

- Within 30 days the district must conduct a Functional Behavioral Assessment (FBA) to determine the function of the Student's maladaptive behaviors and recommend appropriate programming to address those behaviors. The FBA shall be conducted by a Board Certified Behavioral Analyst (BCBA) not employed by the district.
- Within 15 days after completing the FBA and any written reports regarding the FBA, the district shall hold an IEP meeting to discuss and determine a plan to address Student's maladaptive behaviors. At a minimum, the IEP Team shall consider the FBA and any other data or information. BCBA participation to discuss findings and help develop appropriate behavior intervention plan to address the behaviors.

54

### Arkansas Due Process Hearings (DPH) 2023-2024

- *Quitman School District, Arkansas State Educational Agency, H-24-29, May 24, 2024; HO: Cheryl L. Reinhart*
- **Issues:** District denial of parent request for Student's paraprofessional to attend IEP meetings, failure to ensure parent the right to examine Student's records, failure to provide staff with training needed to implement the IEP and BIP, failure to have IEP goals for written expression, and failure to provide all minutes of related services provided for in Student's IEP.
- **Ruling:** District denied FAPE to a 2<sup>nd</sup> grader with autism-related behavioral problems when it repeatedly denied his parents' requests to invite his one-to-one paraprofessional to his IEP meetings. As a remedy for the procedural violation, a HO ordered the district to include the paraprofessional on the student's IEP team any time the parents sought her input.

55

### Arkansas Due Process Hearings (DPH) 2023-2024

- **Ruled** that there wasn't a material IEP implementation failure for not having Written Expression goals in the IEP for about 14 weeks of school, and thus, not a substantive violation of the IDEA, since the Student was not deprived of educational benefit.
- **Ruled** that the district didn't fail to provide related services called for in the IEP.
- **Ruled** that the Student was entitled to an FBA, if one has not already been conducted; and a review of the Student's BIP implementation by a BCBA, to determine its effectiveness and whether it needs to be amended, and for coordination among parents and district staff on implementation strategies.

56



### Arkansas Due Process Hearings (DPH) 2023-2024

- **Order:** Denied parents' request for an order that:
  - District stop retaliation against Parents;
  - District contract with a provider to evaluate Student regarding his need for Applied Behavioral Analysis (ABA) therapy;
  - District provide compensatory education;
  - Future IEP meetings be held at a location off of the school campus; and
  - The principal be excluded from future IEP meetings for Student.

57

### Arkansas Due Process Hearings (DPH) 2023-2024

- **Ordered District to:**
  - pay for a functional behavioral analysis (FBA), if one hasn't already been conducted, by a BCBA of parents' choice, to be completed within the first 60 days of the start of the 2024-2025 school year;
  - include the Student's one-on-one paraprofessional on Student's IEP team as long as Parents' request the parapro's inclusion under federal regulation Sec. 300.321(a) & (c);

58

### Arkansas Due Process Hearings (DPH) 2023-2024

- include in Student's IEP a requirement that all documentation of Student's behavior, and any educational records requested by Parents, will be provided to Parents at least monthly.
- provide Parents copies of any documentation that will be reviewed at an IEP meeting at or before the IEP meeting. District will obtain and maintain a record of Parents' acknowledgement of receipt of such documentation and educational records. Parents and District shall agree on the method of delivery of documents and educational records.

59

### Arkansas Due Process Hearings (DPH) 2023-2024

- **NOTE:** A district can't bar paraprofessionals from participating in students' IEP meetings as a matter of policy. If the parents believe the paraprofessional has knowledge or special expertise regarding the child, they may invite her to the meeting regardless of any reservations the district might have.
- The district maintained that it wanted to protect its paraprofessionals from any bullying or intimidation they might encounter at IEP meetings. However, by excluding the paraprofessional, despite her willingness to participate and her extensive firsthand knowledge of the student's behaviors, the district deprived the parents and other team members of vital information.

60



### Arkansas Due Process Hearings (DPH) 2023-2024

- *Scholarmade Achievement Charter School, Arkansas State Educational Agency; H-24-34, May 15, 2024; HO: Dana McClain*
- **Issues:** Denial of FAPE between August 20, 2023, and February 9, 2024, by failing to:
  - allow parent to inspect and review records;
  - develop and implement an appropriate behavior plan using positive behavior interventions;
  - use peer reviewed research to determine supplementary aids and services;
  - use appropriate assessment tools and strategies to provide relevant information to the IEP team;
  - ensure Parent is a member of any group that makes decisions regarding Student's educational placement;
  - timely implement IEP for transfer student with IEP in place;
  - properly train teachers, and
  - conduct an appropriate manifestation determination for Student.

61

### Arkansas Due Process Hearings (DPH) 2023-2024

- **Ruling:** District denied FAPE to student with ADHD when it failed to allow the parent an opportunity to inspect and review the student's education records and to participate in the Student's IEP development. The HO ordered the district to:
  - conduct staff training regarding parental access to records, and
  - hold a facilitated IEP meeting with the parent in attendance.
- **Meaning:** Districts may charge for copies of records "if the fee does not effectively prevent the parents from exercising their right to inspect and retrieve those records. A district that requires a hefty payment before it will produce records is likely interfering with the parent's inspection rights." This district informed the parent that staff spent five days compiling and duplicating 162 pages of records at a cost of \$800 per day. A better approach would have been to charge a reasonable rate and provide the records before or simultaneous with sending the letter citing its costs.

62

### Arkansas Due Process Hearings (DPH) 2023-2024

- Ruled that the Parent didn't present sufficient evidence that the district failed to conduct an appropriate manifestation determination for the Student.
- Found numerous procedural violations by the district in reference to the alleged failures of the district and therefore ordered the district to take a number of actions within specified timelines.

63

### Arkansas Due Process Hearings (DPH) 2023-2024

- *Springdale School District, Arkansas State Educational Agency, H-24-32, May 12, 2024, HO: Dana McClain*
- **Issues:** Whether the district denied FAPE between November 16, 2023, and January 26, 2024, by failing to:
  - hold the IEP meeting at a time convenient for the parents and their advocate;
  - discuss any of the parents' listed agenda items;
  - include information the parents' wanted contained in the IEP;
  - give notice that the IEP team was going to discuss lessening the Student's school day; and,
  - that the IEP developed on January 26, 2024 contained defamatory statements.

64



### Arkansas Due Process Hearings (DPH) 2023-2024

- **Ruling:** The HO found for the District, concluding that it didn't violate the IDEA or deny a 9-year-old with OHI a FAPE by failing to schedule an IEP meeting at a time convenient to the parents.
- Further, the results of testimony and evidence on other issues warranted a finding in favor of the district. Also, the allegation regarding defamatory statements on the IEP is not an action under IDEA and, therefore, the Parents' claim was dismissed.
- **Meaning:** Although it's critical that parents be involved in the IEP process and have meaningful participation, there are instances when a district is justified in proceeding without the parents. The district made its case for developing the child's IEP absent his parents by pointing to its documented efforts to obtain the parents attendance and participation, including rescheduling the annual review and offering an additional IEP meeting at mutually agreed on times and dates.

65

### Arkansas Due Process Hearings (DPH) 2023-2024

- *Little Rock School District, Arkansas State Educational Agency; H-23-29, H-24-04, April 14, 2024; HO: Cheryl L. Reinhart*
- **Issues:**
  - Whether the District failed to follow due process procedures relating to the referral, evaluation and identification of the Student as a child with a disability in need of special education services in the 2021-2022 school year (Child Find);
  - Whether that failure was a denial of FAPE under the IDEA;
  - Whether the District denied the Student a FAPE during the 2022-2023 school year when it failed to develop an appropriate IEP and failed to provide services in conformity with the IEP.

66

### Arkansas Due Process Hearings (DPH) 2023-2024

- **Ruling:** The District's procedural violation denied FAPE to a teen with multiple disabilities in violation of the IDEA, and thus, the HO ordered it to provide 1,320 minutes of speech therapy compensatory education. The district also failed to appropriately develop and implement the teen's IEP, denying her FAPE.
- **Meaning:** When a district has reason to suspect disability, it must make reasonable efforts to obtain informed consent to conduct an initial special education evaluation. The district instead steered the grandparent to a 504 plan. It shouldn't have assumed that the grandparent's desire not to pull the teen from class was the same as rejecting a referral. Ensure that parents/guardians are provided a hard copy of parental rights and procedural safeguards.

67

### Arkansas Due Process Hearings (DPH) 2023-2024

- *Springdale School District, Arkansas State Educational Agency; H-24-21, March 29, 2024; HO: Cheryl L. Reinhart*
- **Issues:** Whether District denied Student a FAPE in violation of IDEA from November 9, 2021, through November 9, 2023, by failing to develop and implement appropriate IEPs for Student for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> grades;
- Whether District denied FAPE when it placed Student in a self-contained classroom without making an appropriate determination of least restrictive environment (LRE); and
- Whether District should pay for Student to attend a private school.

68



### Arkansas Due Process Hearings (DPH) 2023-2024

- **Ruling:** Found District failed to develop and implement appropriate IEPs for Student's 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> grade years, as well as violated the IDEA's requirement for placing the Student in the LRE, also a denial of FAPE.
- **Order:** Relief granted to Parents -
  - District paid for independent comprehensive evaluation within 45 days, to include evaluation for Autism, by a qualified evaluator of parents' choice;

69

### Arkansas Due Process Hearings (DPH) 2023-2024

- District paid for FBA conducted by a BCBA of parents' choice to address trauma-induced behavior and inform the development of a BIP and a plan for transitioning Student back to school, (which may include a trauma-trained Registered Behavior Technician (RBT) to work with Student in the educational setting under BCBA's supervision); and
- development of an appropriate IEP, to include assignment to a different school.

Denied parents' request for district to pay for enrolling Student in a private school and transportation to and from the private school.

70

### Arkansas Due Process Hearings (DPH) 2023-2024

- *Fort Smith School District, Arkansas State Educational Agency, EH-24-33, March 13, 2024; HO: Dana McClain*
- **Issue:** Whether the district erred at the MDR held on February 1, 2024, in concluding that Student's conduct exhibited on January 25, 2024, was not related to Student's disability.
- **Ruling:** The HO found that the district's MDR conclusion under the IDEA was incorrect and directed the district to change the decision within 15 days. Also, within 30 days, the district must conduct a FBA and, within 15 days, develop a BIP for the 11-year-old with Disruptive Mood Dysregulation disorder, severe ADHD, sleep problems, Tourette disorder, autism and SLD.

71

### Arkansas Due Process Hearings (DPH) 2023-2024

- **Meaning:** Before taking disciplinary action for misconduct of a student with a disability that would result in a change of placement of the student, the district must determine whether the misconduct was a manifestation of the disability or the result of an IEP implementation failure.
- This case highlights the importance of carefully reviewing doctors' reports, diagnoses, the IEP, teacher observations, and all relevant information in a student's records during the MDR.
- In this case, if the MDR team had reviewed, considered, and discussed a doctor's letter from 2021 on file, the team would have better understood how symptoms of his disabilities matched his behaviors.

72



### Arkansas Due Process Hearings (DPH) 2023-2024

- *Pulaski County Special School District, Arkansas State Educational Agency, H-24-02, January 22, 2024; HO: Danna J. Young*
- **Issues:** Whether the district denied a FAPE between October 19, 2022 and July 13, 2023, in violation of IDEA by failing to:
  - provide IEPs that were reasonably calculated to enable Student to make progress appropriate in light of her circumstances;
  - include special education services in IEPs to address Student's dyslexia; and
  - provide ESY services to Student during Summer 2023.

73

### Arkansas Due Process Hearings (DPH) 2023-2024

- **Ruling:** Found for the Parents.
  - Student was denied FAPE between October 19, 2022 and the end of the school year on account of receiving services pursuant to an inappropriate IEP.
  - Student was denied FAPE when her IEP team determined on May 30, 2023 that ESY services weren't warranted.
- **Order:**
  - Compensatory education in the form of an agreed upon reading tutor/coach at district's expense for 1 hour weekly beginning February 5, 2024 through the end of July 2024.
  - If found eligible for ESY services by the IEP team at the Annual Review conference at the end of the school year, ESY services will be provided above and beyond the comp ed required.

74

## Trending Case Law Impacting Special Education in Arkansas

### ○ References

- Individuals with Disabilities Education Law Reporter (IDELR)
- Justia, Eighth Circuit US Court of Appeals Case Law
- LRP Publications, Inc.
- LRP Media Group
- Perry A. Zirkel Legal Updates
- Special Ed Connection, LRP