

Before the  
Administrative Hearing Commission  
State of Missouri



, in the	)	
interest of ,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 19-0691
	)	
MILLER R-II SCHOOL DISTRICT,	)	
	)	
Respondent.	)	

**DECISION**

(Parents – separately Father and Mother) filed a due process complaint against the Miller R-II School District (District) challenging the District’s determination that (Student) conduct was not a manifestation of his disability. We affirm the District’s determination.

**Procedure**

On May 15, 2019, Parents filed an expedited due process complaint against the District. On May 22, 2019, the District filed a response. On June 11, 2019, we held a hearing. Elizabeth A. Helfrich and Joshua E. Douglas, with Mickes O’Toole, LLC, represented the District. Parents appeared *pro se*. This case became ready for decision on June 18, 2019, when the final written arguments were filed.

## **Findings of Fact**

1. Student is    years old and attends Miller High School (High School) in the District. During the 2018/2019 school year,<sup>1</sup> Student was a tenth grade student.

2. Student is a child with a disability. Student meets the eligibility criteria for educational diagnoses in the area of autism. He attends some regular education classes and receives specialized instruction.

3. Father is an employee of the District.

### Relevant Witnesses

#### *District*

4. Dunstan Storm is the District superintendent. He has a Bachelor's degree from Pittsburgh State University and a Doctorate in education leadership from St. Louis University. He has been in education for 22 years, including 18 years as an administrator. Student had not been referred to him for long-term suspension before the incident at issue.

5. Dennis Kimzey is the principal at the High School. He has been in education for 12 years. He has known Student for two years and sees him on a daily basis in the morning when Student comes to school.

6. Ron Weldy has been the assistant principal at the High School for two years. He was a teacher before taking this position. Weldy has known Student for two years and has provided a "time out" for Student approximately two times in the fall semester by walking with him to the field house.

7. Jania Whittaker is one of Student's regular education teachers. She has been a teacher for 19 years and has a Bachelor's degree in education from Missouri State University. She teaches 7<sup>th</sup> through 12<sup>th</sup> grade family and consumer science and is a Parents As Teachers

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<sup>1</sup> All of the witnesses' testimony concerns this school year.

educator. She has known Student since his birth. Student attends Whittaker's class in first period.

8. Courtney Poirot is the High School counselor for 7<sup>th</sup> – 12<sup>th</sup> grade students. She has a Bachelor's degree in agriculture education and a Master's degree in school counseling. This is her first year as a school counselor. Poirot started seeing Student at the end of the fall semester on an as-needed basis, sometimes a couple of times a week and sometimes a couple of days a month.

9. Special Services Coordinator Tamara Landers currently teaches Student, had Student in her class when he was in the 7<sup>th</sup> grade, and has worked with him since he was in elementary school.

#### *Parents*

10. Parents testified and presented two witnesses.

11. Pat Moots is a case manager at the Clark Mental Health Center. She has a Bachelor's degree in human service management. Moots worked nine years as a paraprofessional in special education and assisted in formulating individualized education programs (IEPs). She attended several IEP meetings and the manifestation determination meeting as a parent advocate for Parents. She has no professional training in autism. Moots worked with Student for approximately one year and three months.

12. Rebecca Clifton Hopkins has a Master's degree in psychology. She has 12 years of experience, is certified as a mediator and high conflict coach, and is certified in trauma-informed care and mental health first aid. She worked for nine months for Missouri Parents Act as an advocate. Hopkins is currently an Independent Living Specialist/Autism Specialist and advocate for Empower Abilities. She does not have any teaching or behavioral analysis certifications. Hopkins attended several of Student's IEP meetings, the manifestation determination meeting, and the school board appeal hearing as an advocate for Parents.

### Function Behavior Assessment (FBA)

13. The report of a school board meeting on April 12, 2018, appealing a prior manifestation determination for Student, mentions an FBA as an option.

### Student's IEP/Evaluation

14. On August 14, 2018, an IEP team meeting was held. Parents did not request an FBA.

15. On December 18, 2018, Mother sent Landers an e-mail requesting a re-evaluation of Student in the areas of academic, psychological, IQ, or social/emotional and functional needs.

16. The District sent a notice to Parents scheduling a review of existing data (RED) meeting. This meeting was held on January 16, 2019. Parents did not request an FBA. Moots attended this meeting.

17. At the RED meeting, a Parents' advocate requested that the District test in the area of language. The District added the areas of expressive and receptive language evaluation to the RED document.

18. Parents also requested training regarding autism for the District's employees. The District sent an elementary teacher and a high school teacher to autism training.

19. The District sent a notice of reevaluation to Parents and completed an evaluation report for Student on March 5, 2019. The report was reviewed with Parents. The team concluded Student continued to be a student with an educational diagnosis of autism.

### Student's Conduct

20. During the first part of his sophomore year, Student was doing very well in school.

21. On March 8, 2019, Student would not comply with Whittaker's rule prohibiting food in the classroom. She attempted to give him alternatives, but he screamed at her. Principal Kimzey cleared the classroom. Student refused alternatives that were offered to calm him down. Student was suspended for the rest of the day (0.75 day).

22. On April 15, 2019, Student appeared to be having a normal day. He was a little agitated because there was going to be a staffing change.

23. Student stayed with Landers until he went to his physical education class for 3<sup>rd</sup> hour. During this time, he talked with Landers and did school work.

24. After lunch, Student returned to Landers' room for 6<sup>th</sup> hour. His backpack was at his feet.

25. At around noon on April 15, 2019, Student sent an e-mail to another student and to Poirot stating: "Im going to plung this knife deep down into my stomach and im going to die [sic.]"<sup>2</sup> Student had attempted to retract the e-mail, but Poirot was able to read it. Student had never sent Poirot an e-mail before. Poirot was surprised because Student had never discussed weapons or suicide to her in the past.

26. Poirot told Kimzey about the e-mail. He retrieved Student from Landers' classroom, and they went to Poirot's office. Poirot spoke with Student about the e-mail and began the District's suicide protocol. Kimzey contacted Weldy to come to Poirot's office. After speaking with Student, Poirot determined he did not intend to harm himself, but he admitted to her that there was a knife in his backpack.

27. Poirot informed Kimzey that Student had admitted that there was a knife in his backpack. Weldy got the backpack from Landers' classroom. Weldy and Kimzey searched Student's backpack and found what looked like a steak knife. The knife blade was five inches long,<sup>3</sup> and it was wedged in a zippered compartment of the backpack.

28. Poirot asked Student if he knew he should not have brought the knife to school and knew that he would get in trouble for doing so. He answered "yes" to both questions.

29. Parents took Student out of school to seek help for him.

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<sup>2</sup> Resp. Ex. 1.

<sup>3</sup> Resp. Ex. 3.

## Discipline/Manifestation Determination

30. Kimzey determined that discipline was warranted for bringing the knife to school, not for the threat of self-harm.

31. Kimzey gave Student a ten-day, out-of-school suspension and referred the disciplinary action to Storm for a long-term suspension. He informed Parents that he had done so.

32. Storm later further disciplined Student for bringing a knife to school in violation of the District's policy/regulation 2620:<sup>4</sup>

### **STUDENTS**

#### **Discipline**

##### **Firearms and Weapons in School**

The District recognizes firearm and weapon possession as a potential threat to the health, safety and security of students, employees, and other persons. The district will not tolerate the presence of firearms or weapons on the premises of our schools. This prohibition includes possession of firearms and weapons on school playgrounds, school parking lots, school buses, and at school activities, whether on or off school property. The District complies with the provisions of the Improving America's Schools Act of 1994 and other applicable federal and state law.

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Students who violate this policy will be suspended for no less and one (1) year and are subject to permanent expulsion. However, the Superintendent may recommend to the Board a modification of the suspension on a case-by-case basis. Students with disabilities under the Individuals with Disabilities Act and/or Section 504 of the Rehabilitation Act are entitled to the protections of those laws.

33. Thus, the minimum discipline for such a violation is a one-year suspension, and the violation could lead to expulsion. Under the same District policy/regulation, a knife is considered a weapon. The policy/regulation references § 571.010(12), which defines a knife as:

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<sup>4</sup> Resp. Ex. 27. See also § 160.261. Statutory references are to RSMo 2016.

Any dagger, dirk, stiletto, or bladed hand instrument that is readily capable of inflicting serious physical injury or death by cutting or stabbing a person. For purposes of this chapter, “knife” does not include any ordinary pocketknife with no blade more than four inches in length[.]

34. On April 29, 2019, Storm sent a long-term suspension letter to Parents informing them that he was suspending Student for 170 additional school days and advising them of their right to request a hearing with the school board.

35. On May 10, 2019, the District held a manifestation determination meeting. The following individuals were present at the meeting: Parents, Kimzey, Weldy, Poirot, Whittaker, Landers, Hopkins, Debbie Fort (a parent advocate), and Moots.

36. Landers directed the meeting. Everyone at the meeting had an opportunity to participate. The meeting lasted about two hours and was very intense.

37. The team reviewed Student’s IEP, his recent evaluation, his discipline reports, and Whittaker’s observations in the classroom. The District’s employees all voted that Student’s conduct was not a manifestation of his disability. Moots abstained from the vote. Parents disagreed.

38. Parents met with the school board on May 16, 2019. The Board voted unanimously to uphold the long-term suspension. Storm provided Parents with notice of this meeting and informed Parents of the Board’s decision.

#### District’s Actions After the Suspension

39. After the suspension, Landers arranged for Student to continue in the two online classes he was taking and added two other online courses. When Mother contacted the District with information that Student was not doing the work, the District arranged a teacher to meet with him at the library, a neutral site.

40. On April 30, 2019, the IEP team amended Student's IEP and sent Parents a Notice of Action.

41. The District intends to continue educating Student.

### **Conclusions of Law**

This Commission has jurisdiction over this case.<sup>5</sup> The burden of proof is on the party seeking relief, in this case, Parents.<sup>6</sup> Parents must prove their case by a preponderance of the evidence.<sup>7</sup> A preponderance of the evidence is "evidence which as a whole shows the fact to be proved [is] more probable than not."<sup>8</sup>

We must judge the credibility of witnesses, as well as the weight and value of the evidence.<sup>9</sup> We have the discretion to believe all, part, or none of the testimony of any witness.<sup>10</sup> Our findings of fact reflect our determinations of credibility.

### FAPE Generally

Under the IDEA, all children with recognized disabilities are entitled to FAPE designed to meet their unique needs.<sup>11</sup> Missouri's State Plan for Special Education (2017) (State Plan) generally defines FAPE as regular and specialized special education and related services provided at public expense, under public supervision and direction without charge to the parents that meet the educational standards of the state educational agency and are provided in conformity with the Student's IEP.<sup>12</sup> The IDEA does not prescribe any substantive standard regarding the level of education a disabled child should be accorded.<sup>13</sup> It does require the school

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<sup>5</sup> Section 162.961.

<sup>6</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

<sup>7</sup> *Tate v. Dep't of Social Services*, 18 S.W.3d 3, 8 (Mo. App. E.D. 2000).

<sup>8</sup> *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000).

<sup>9</sup> *Faenger v. Petty*, 441 S.W.3d 199, 204 (Mo. App. W.D., 2014).

<sup>10</sup> *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D., 2001).

<sup>11</sup> 20 U.S.C. §1400(d)(1)(A) and 34 C.F.R. §300.1(a).

<sup>12</sup> State Plan, Regulation IV, page 42.

<sup>13</sup> *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982).



district to “provide a disabled child with such special education and related services ‘in conformity with the [child’s] individual education program.’”<sup>14</sup>

“To meet its substantive obligations under the IDEA” an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>15</sup> This is not a bright-line rule and it “requires a prospective judgment by school officials” that is a “fact-intensive exercise” incorporating information from both school officials and the child’s parents.<sup>16</sup>

The only allegation that the District violated Student’s right to FAPE is Parents’ assertion that they requested an FBA and the District never acted on that request. The District’s witnesses testified that Parents did not request the FBA, and the Parents and their witnesses testified that they did. We do not make a determination that witnesses were not credible, but we determine that Parents failed to prove that the District was aware of the request.<sup>17</sup> As evidence of this we look to the IEP resulting from the August meeting.<sup>18</sup> There is no mention of an FBA request. We compare this failure to act to the District’s proper action when a reevaluation was requested. Landers testified that, if Parents had requested an FBA at the IEP meeting or the RED meeting, the District would have granted that request.<sup>19</sup>

We find no violation of FAPE for failing to perform an FBA for Student.

### Manifestation Determination

Parents argue that Student’s conduct of taking a knife to school in his backpack is a manifestation of his disability.

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<sup>14</sup> *Andrew F. v. Douglas County School District RE-I*, 137 S. Ct. 988, 994 (2017).

<sup>15</sup> *Id.* at 999.

<sup>16</sup> *Id.*, citing *Rowley*, 458 U.S. at 207.

<sup>17</sup> We note that the report of a board meeting on April 12, 2018, appealing a prior manifestation determination for Student, mentions an FBA as an option. Pet. Ex G at 17. But there is no proof that this was requested. The District’s witnesses testified that they were unaware of such a request.

<sup>18</sup> Resp. Ex. 15.

<sup>19</sup> Tr. at 67-70.

A “child with a disability” is defined as follows:

(a) *General* (1) *Child with a disability* means a child evaluated in accordance with §§ 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, another health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

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(c) *Definitions of disability terms.* The terms used in this definition of a child with a disability are defined as follows:

(1) Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.<sup>[20]</sup>

As defined in 34 CFR §300.530(e), the conduct is a manifestation of a disability:

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or

(ii) If the conduct in question was the direct result of the LEA’s failure to implement the IEP.

Parents present several arguments that Student’s conduct should be considered a manifestation of his disability. Moots testified that Student suffers from impulse control. Parents argue that they requested an FBA, as we addressed above, and one was not provided, as a reason that the manifest determination was incorrectly decided, and that the District’s lack of support for Student is one of the reasons for Student’s conduct. Parents failed to prove this.

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<sup>20</sup> 34 CFR § 300.8(a)(1).

Parents argue that Student has exhibited similar behavior before in that he has engaged in verbal threats in the past.<sup>21</sup> The District counters these arguments as described below.

The District's witnesses testified that they did not consider the conduct to be a manifestation of Student's disability. Whittaker testified that Student's behavior related to his autism prior to this incident had been a quick escalation when he was irritated. This incident was planned, and Student attempted to delete the e-mail – an indication that he knew that his conduct was wrong. Whittaker also described Student's behavior related to his autism as a preference for seclusion and "repetitive behavior of like picking at his hands and movement and those type of things."<sup>22</sup>

Kimzey testified that although Student had been disciplined for using words in a threatening manner, his conduct in bringing a knife to school was "completely out of character."<sup>23</sup> Landers testified, as other District employees testified, that Student is a "great kid."<sup>24</sup> She described how his autism has manifested at school in the past:

At the end of the day, when the day is over, he's in my room at the end of the day, he will kind of spin around the room or kind of dance around, maybe, and then, usually, he'll sit back down, and then but his – the part of his autism that interferes a little bit is when he gets upset. I mean, you know, mainly it's if you want him to do something or a compliance thing or something that somebody says upsets him, he will just yell an outburst. He'll yell. He might scream at the person or just, you know, just yell in general or he may leave the room.<sup>[25]</sup>

Poirot testified that Student had never mentioned bringing a weapon to school. Weldy testified as to why he decided that the conduct was not a manifestation of Student's disability:

Q: Okay. Ultimately, did you express an opinion at the meeting as to whether you thought [Student's] behavior was related to his autism?

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<sup>21</sup> In *Regional Sch. Unit #72*, 114 LRP 13097 (SEA ME 9/19/13), the parent argued that her child's multiple instances of stealing shoes was related to speech-language impairment. But she did not provide evidence to counter the school district's evidence that it was not, and the hearing officer found for the district.

<sup>22</sup> Tr. at 37.

<sup>23</sup> *Id.* at 31.

<sup>24</sup> *Id.* at 65.

<sup>25</sup> *Id.*

A: Yes.

Q: Okay. And what was your decision?

A: I did not feel that the case had to do with the – with his autism.  
Can I explain why?

Q: Yeah, please.

A: I think, you know, that there – there was some great thought that I felt like there was great thought put into this process. Like I said, the knife didn't just drop into the bag. It kind of had to be placed in there because I had to kind of pull it out. . . .<sup>[26]</sup>

Many of the District's witnesses testified that their reaction upon learning that Student brought a knife to school was that they were shocked or did not believe it. All of the District's witnesses stressed that the facts indicated that Student had planned the conduct.

Cases have found that a student's planning and purposeful conduct could be considered as a reason that the conduct was not a manifestation of a disability such as Attention Deficit Hyperactivity Disorder (ADHD) and Specific Learning Disability in Written Expression. In *J.H. by and through L.H v. Rose Tree Media School District*,<sup>27</sup> the court upheld the hearing officer's decision that the school district was correct in determining that the student's planned conduct was not a manifestation of his disability. The court stated:

It is unapparent to the Court how J.H.'s disability or its impulsive effects and associated stressors, caused or directly and substantially related to a planned assault on another student.<sup>[28]</sup>

In *M.V. v. Conroe Independent School District*,<sup>29</sup> the court affirmed the district's decision that the student's conduct was not a manifestation of the impulsivity that was the key characteristic of his ADHD. The conduct of bringing stun guns and Adderall to school was premeditated and not impulsive.

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<sup>26</sup> Tr. at 114-15.

<sup>27</sup> 2018 WL 4405890 (E.D. Penn. September 17, 2018).

<sup>28</sup> *Id.* at 4.

<sup>29</sup> 2019 WL 193923 (S.D. Tx. January 15, 2019).

In the case before us, the District counters Parents' argument that the conduct was a manifestation of Student's disability with a similar argument – that the conduct was planned. Student placed the knife in a zippered compartment of his backpack, carried the knife in his backpack for most of the day, sent, and then attempted to delete, an e-mail threatening to harm himself with the knife. He admitted to knowing that this conduct was wrong and that he would get in trouble for it.

We determine that Student's purposeful conduct in bringing a knife to school is not a manifestation of his autism disorder.<sup>30</sup>

### **Summary**

We affirm the determination that Student's conduct was not a manifestation of his disability. The District did not violate Student's FAPE by failing to conduct an FBA.

SO ORDERED on June 24, 2019.

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SREENIVASA RAO DANDAMUDI  
Commissioner

### **Appeal Procedure**

Please take notice that this is a final decision of the Administrative Hearing Commission and you have a right to request review of this decision. Per § 162.962, when a review of this decision is sought, either party may appeal as follows:

- (1) The court shall hear the case without a jury and shall:
  - (a) Receive the records of the administrative proceedings;
  - (b) Hear additional evidence at the request of a party; and

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<sup>30</sup> See *High Tech Middle North County*, 114 LRP 53411 (SEA CA 10/9/14) (bringing a knife to school was a conscious choice, not a memory lapse that might be related to his diagnosis of ADHD-inattentive type).

- (c) Grant the relief that the court determines to be appropriate, basing its decision on the preponderance of the evidence;
- (2) Appeals may be taken from the judgment of the court as in other civil cases;
- (3) Judicial review of the administrative hearing commission's decision may be instituted by filing a petition in a state or federal court of competent jurisdiction. Appeals to state court shall be filed within forty-five days after the receipt of the notice of the agency's final decision;
- (4) Except when provided otherwise within this chapter or Part 300 of Title 34 of the Code of Federal Regulations, the provisions of chapter 536 are applicable to special education due process hearings and appeal of same;
- (5) When a commissioner renders a final decision, such decision shall not be amended or modified by the commissioner or administrative hearing commission.

The right to appeal is also addressed in 34 C.F.R. § 300.516.