

Before the
Administrative Hearing Commission
State of Missouri



, in the interest of ,)	
)	
Petitioner,)	
)	
vs.)	Case No.20-1763
)	
AURORA R-VIII SCHOOL DISTRICT,)	
)	
Respondent.)	

DECISION

(Parent) filed a due process complaint on behalf of her son,. (Student) against the Aurora R-VIII School District (District), alleging that the District improperly decided that Student’s conduct was not a manifestation of his disability. We find that the determination was appropriate.

Procedure

On April 28, 2020, Parent filed an expedited due process complaint against the District on behalf of Student. On April 28, 2020, we sent the parties a notice of pre-hearing conference and notice of hearing, which we scheduled for May 12, 2020, and June 1- 2, 2020, respectively. On May 11, 2020, the District filed its answer to the due process complaint. Pursuant to Executive Order 2 (March 13, 2020), the Governor declared a state of emergency and pursuant to the “Stay at Home” order issued April 3, 2020, all schools were closed through the remainder of the school year.

On May 7, 2020, Parent filed her pre-hearing conference statement. On May 6, 2020, the District filed its pre-hearing conference statement. On May 12, 2020, we held a pre-hearing conference.

On June 1-2, 2020, we held a hearing in this matter. Parent appeared in person and by attorney Daniel J. Rhoads. Shellie L. Guin and Brodie W. Herman, with Guin Mundorf, LLC, appeared on behalf of the District. At the time of the hearing, the District planned to offer summer school for all students from June 15-July 17, 2020.¹ Therefore, we calculated our decision due date to be June 26, 2020. Both parties agreed at the hearing that this date was correct. Both parties filed simultaneous proposed findings of fact, conclusions of law, and legal briefs on June 15, 2020, and this case was fully submitted.

Findings of Fact

1. At all relevant times, Student attended Aurora Junior High School, which is in the District. At the time of the hearing, he was years old. He has attended school in the District since kindergarten.
2. At age five, Student was diagnosed with autism spectrum disorder.
3. Student lives with Parent, who also has an intellectual disability. As such, Student's aunt assisted Parent with issues related to Student's education.
4. lives in another part of Missouri, approximately three hours from Student and Parent, and visits them every month. Until 2008, worked as a special education teacher. She holds a Master's degree in special education administration from Missouri State University.
5. In January 2020, the District suspended Student for 155 days. Student's suspension resulted in this due process complaint.

¹ These would be the first school days since March 13, 2020.

Grounds for Suspension

6. The District suspended Student for inappropriate sexual conduct with a six-year-old girl (Victim) on the school bus over a period of weeks in November and December of 2019.

7. The District became aware of the behavior in late December 2019 after Victim told her parents about the ongoing abuse. Victim's mother recorded her description of the abuse. Victim's parents immediately contacted the District. The District reported the abuse to the Missouri Children's Division and began conducting its own investigation of the abuse.

8. Victim told her mother that Student would sit next to her on the bus and touch her underneath her pants and smell his fingers after touching her. This occurred on every ride Victim had with Student at the end of the fall semester.

9. Victim told her mother that she did not let Student touch her. In victim's words, "I don't [let him]. And one time I didn't because I kept kicking his hand away."²

10. The District reviewed video footage from the school bus Student and Victim rode. Because the camera records over previous footage daily, only video footage of the ride of December 20, 2019 was available.

11. On December 20, 2019, Student began riding the bus in his own seat away from Victim. The bus contains two rows of seats divided by a center aisle. Each seat has space for two students.

12. Victim began the bus ride sitting by the window next to another, older student in the second to last seat on the left. Victim cannot be seen because her head sits below the top of her seatback. The bus ride began with most seats occupied. Student sat in a seat by himself three rows up and across the aisle from Victim.

² Ex. B at 5.

13. As the ride progressed and the bus made stops, students got up from their seats to leave the bus. Throughout these initial stops, Student can be seen looking around the bus towards the front and the back. During one of the stops, Student got up from his seat and walked toward the front of the bus. At the front of the bus, Student inspected the seats to see who was there, then stood next to an empty seat and scanned the bus.

14. When the student sitting next to Victim left, Student immediately went to sit next to her. At this point, the seats behind them and to the right were occupied. Student continued looking around the bus and leaning out into the aisle to see the front. After sitting for about two minutes, Student stood up slightly to look back at the students sitting behind him.

15. Next, the student sitting next to Student and Victim got up and moved to a seat further up and shortly thereafter, the students in the seat behind them left. After the nearby students left, Student placed his backpack on the newly unoccupied seat to his left.

16. When the bus returned to motion, Student turned his attention to Victim. When the bus stopped next, another student went back and sat in the seat one up and across the aisle from Student. Student immediately redirected his focus toward the front of the bus. When this student left, Student returned his attention toward Victim.

17. At this point, Student lifted his hand into the camera's visibility and leaned toward Victim. While doing this, Student leaned his head against the seat in front of him in a manner that shielded him from visibility from the front of the bus. At the next stop, Student lifted his head back up and looked toward the front of the bus. When the bus began moving again, Student returned to his previous position with his attention toward Victim. Student exited the bus at the next stop.

18. After reviewing the video footage to confirm Victim's account of the abuse, the District arranged a meeting with Student and District Superintendent Billy Redus. Brenda Lakin,

the District's Director of Special Services, took notes during the meeting. Parent and Student's grandmother also attended the meeting.

19. Student initially declined to answer questions about what happened on the bus, but then stated he did not sit with smaller children and only talks to his friends on the bus. Student told Redus he knew he was not supposed to touch other people. When asked if he had been told not to touch other people by teachers, Student agreed, but stated he did not really ever touch people.

20. During his meeting with Redus, Student also expressed that he knew to always tell the truth and usually did so at school. Student told Redus he understood the difference between a "good" touch and a "bad" touch and that he had never touched another student in a bad way.

21. After concluding its investigation, the school administration suspended Student for ten days and referred him for possible long-term suspension.

Student's Educational Needs and IEP

22. The District first evaluated Student for special education eligibility on January 19, 2013, while Student was in first grade. The District determined Student met the criteria for an educational diagnosis of autism.

23. In reaching its determination of Student's eligibility, the District noted in Student's Individualized Education Plan (IEP) that he exhibited "off-task behaviors and is highly distractible."³ Student exhibited a "floppy" physical demeanor and would fall out of his chair and lie on people or his teacher. In addition to his compromised motor skills, Student exhibited difficulties with speech and language. Student also showed an aversion to eye contact and abnormal breathing patterns.

³ Ex. I at 8.

24. The District administered the Wechsler Intelligence Scale for Children-Fourth Edition intelligence quotient (IQ) test. Student had a full scale IQ of 80, placing him at the low average range of cognitive ability. The test illustrated a significant weakness in the area of perceptual reasoning and a relative strength in verbal comprehension.

25. The District administered the Adaptive Behavior Assessment System-II test. The test indicated strengths in leisure and community use and weakness in communication, self-direction, and self-care.

26. As documented in his IEP, Student's disability adversely affects his educational performance as follows:

[Student] struggles to function successfully in the regular classroom on a level equal to his age peers. Without specialized accommodations and instruction, [Student] has difficulty expressing what he has learned both orally and in writing. [Student] needs special education services to benefit fully from the regular education environment[.4]

27. While Student's IEP detailed Student's difficulty with attention, communication, and motor skills, it did not describe any issues with inappropriate touching and explicitly noted that Student did not exhibit behaviors that impede the learning of others.

28. Based on Student's relatively high cognitive abilities, the District chose to place Student in primarily regular education settings. His IEP directs that Student should receive at least 80% of his education in a regular class setting.

29. By eighth grade, Student took mostly regular education classes with the exception of one study strategies class.

⁴ Ex. M at 4.

30. Even though Student takes regular education classes, he does receive special assistance. His IEP calls for the use of Text-to-Speech, preferential seating, and extended time for writing assignments.

31. Student's IEP contains progress goals in the areas of speech fluency, oral expression, written expression, and reading comprehension. His most recent IEPs reflect that he is making progress towards these goals. Student has no behavior related goals.

Student's Classroom Performance and Behavior

32. By all accounts, Student performs well in class. With the exception of a C grade in science, Student received As and Bs in seventh and eighth grades. Student's regular education classes included science, social studies, mathematics, English language arts, physical education, and percussion.

33. Student has never had any significant disciplinary issues in school.

34. Student interacts well with his classmates and has friendships in school. No teacher or faculty member has ever observed Student engage in any inappropriate physical interactions with others.

35. Student does not have many friends outside of school. He does, however, have at least some friends he interacts with outside of school. He has visited a friend's home to play video games and played basketball at the YMCA.

The Manifestation Determination Review

36. On January 31, 2019, the District conducted a manifestation determination meeting with Student's IEP team. The participants in the meeting included Parent, Student's grandmother, Lakin, Principal Brad Boettler, three of Student's teachers, and Student's case manager, Ms. Cline.

37. The purpose of the meeting was to determine whether Student's behavior on the bus was a manifestation of his disability. To that end, the meeting consisted of three specific areas of discussion: the incidents on the bus, observations of Student from the meeting participants, and Student's IEP, including the behavior goals and issues identified therein.

38. The IEP team concluded that Student's behavior was not a manifestation of his disability. In reaching this decision, the team contrasted its understanding of Student's unique problems stemming from his autism spectrum and the nature of the behavior on the bus. All of the school staff agreed that Student's behavior shown on video illustrated a sophistication of thought and planning. The team members cited Student's pattern of inspecting the bus to find the Victim, blocking access to the seat next to them, and persistent examination of the circumstances around him as an illustration that Student understood the wrongness of his actions and correspondingly sought to conceal them.

39. The IEP team contrasted this incident with other known incidents of misbehavior in school and especially unstructured school activities. Student's teachers universally agreed that they had never seen anything like this from Student, and Student's record contained no incidents of any behavioral issues. The team noted that Student had never had any other incidents remotely similar to this while attending school in the District. The team understood this absence of behaviors as evidence that Student's autism spectrum disorder did not compel Student to engage in any touching behaviors.

40. Having determined that Student's behaviors on the bus were not a manifestation of his disability, the District suspended Student for 155 school days, during which he would receive homebound instruction. The level of discipline was selected based on the severity of the behavior as well as the desire to have Student return to school at the beginning of a full semester following suspension in January 2021.

41. Student's family disagreed with the outcome of the manifestation determination meeting. During the meeting, the family asserted that the District did not have sufficient expertise to reach the determination it did and that they wanted a medical professional to assess Student.

42. District and Student's family agreed that Student would receive an evaluation from a professional selected by the family and that the team would reconvene following the evaluation to reassess the IEP team's determination.

Outside Evaluation and Services

43. Prior to the manifestation determination meeting, Student began receiving counseling at the Clark Community Health Center. Student received an initial evaluation from the Clark Center on January 15, 2020. Student began receiving therapy sessions for the purpose of learning how to express emotions and developing a treatment plan related to the sexual allegations against him. Through at least March 12, 2020, Student adamantly denied abusing Victim to his counselor.

44. contracted with Dr. Stephanie Campbell to evaluate Student. The purpose of the evaluation was to establish his current level of intellectual and social functioning in light of his recent behaviors and suspension.

45. Campbell holds a Ph.D. in educational psychology from Mississippi State University. Her doctoral program focused on school related issues like testing, assessments, and behavior and analytic training. She operates a private practice as a licensed clinical psychologist and behavior analyst. Additionally, she teaches at Missouri State University.

46. During this period, Parent caught Student viewing pornography on his home computer. Student closed his computer immediately in an attempt to conceal the content he was viewing.

47. Prior to evaluating Student, Campbell maintained a dialogue with and Parent by text message. On March 12, 2020, Campbell sent Parent a text message that stated, “I need more information from the school district. I understand you signed a release yesterday for me to talk with the school. It will be very important for me to speak to them. I am trying to do that, but sometimes schools are less motivated to talk to me than I am to them.”⁵

48. On March 17, 2020, Dr. Campbell received an e-mail from Lakin inviting her to speak about Student. Lakin wrote, “I thought I would reach out to open the lines of communication. I understand you have some questions. Feel free to call me at [number redacted] if you would like to talk.”⁶

49. On March 23, 2020, Campbell performed an evaluation of Student.

50. As part of her assessment, Campbell performed clinical interviews of Student, Parent, , and a psychiatrist and counselor who had worked with Student at the Clark Center. Campbell did not accept Lakin’s offer to talk about Student, nor did she seek interviews with any District staff or review video of the incident. Additionally, Campbell reviewed Student’s records from the District, performed a “mental status examination,” tested Student, and performed a social and sexual skills exercise.

51. Campbell administered the Stanford-Binet – Fifth Edition standardized intelligence test for Student. Student scored a composite of 80 – the same as he had tested for the District. Average scores range between 85 and 115. Student’s subscores indicated he possessed relative strength in fluid reasoning, but a relative weakness in quantitative reasoning. These strengths and weakness suggest that Student reasons well when faced with concrete, discernible problems, but struggles when situations become more dynamic and ambiguous.

⁵ Ex. HH at 11-12.

⁶ Ex. P at 6.

52. Campbell performed exercises with Student to evaluate his capacity to understand other individuals' feelings or reactions to behaviors. Campbell determined that Student struggled with predicting how someone else might think. Campbell noted that Student continued to lie about what happened on the bus, even when the lies were easily disprovable. Campbell took these blatant lies as a sign that Student lacked a full understanding of how others' thought processes work.

53. Campbell does not have expertise with sexual paraphilia. To better understand these issues, she turned to peer reviewed journal articles. Specifically, Campbell reviewed *A Systemic Review of Interventions for Inappropriate Sexual Behavior of Children and Adolescents with Developmental Disabilities* published in 2015 and *Sexuality in Autism: Hypersexual and Paraphilic Behavior in Women and Men with High-Functioning Autism Spectrum Disorder* published in 2017 (hereinafter the "2015 article" and "2017 article").

54. The 2015 article noted that children with autism have been frequently reported to engage in undesirable sexual behaviors. The article stated three "plausible reasons" for this frequency. First, students with autism generally do not have access to sex education. Second, students with autism often present a predisposition for self-stimulatory behavior that may translate into sexual activities. Third, because autistic students often require unique and intensive instructional practices in order to acquire understanding of social and behavioral skills, they may have difficulty differentiating between private and public settings as well as social boundaries, particularly when they may be excluded from social groups that could help teach these boundaries.

55. The 2017 article also noted that lack of sexual education, sensory behaviors, and deficits in social and communication skills may contribute to the incidence of sexual behaviors in autistic students. The article also elaborates that non-sexual repetitive interests may evolve

into sexual behaviors at the onset of puberty. With respect to paraphilic behavior, the article notes that “very few studies” have addressed such behaviors in individuals with autism. In an effort to correct this deficiency, the 2017 article authors aimed to investigate hypersexual and paraphilic behaviors in a large sample of individuals with high-functioning autism or Asperger syndrome; the study participants were mostly adults. In its review of its statistical findings, the 2017 article notes that lower cognitive abilities seem to be an important factor in paraphilic behavior and it can be hypothesized a lack of awareness of social norms and behavioral self-control would explain higher rates of paraphilic behaviors. Furthermore, although many of the individuals in the study had paraphilic fantasies, significantly fewer actually engaged in paraphilic behavior and “high-function [autism-spectrum disorder] individuals could have higher self-control abilities than [autistic] patients with cognitive impairments.”⁷

56. At one point in her observation of Student, Campbell instructed him to sit back on the couch and relax while she asked him questions. Student reclined away from her and Campbell could tell he placed his hands near his crotch. Campbell could not see his hands directly, but she suspected Student may have been engaging in self-stimulating behavior. Beyond this, Campbell did not notice significant signs of abnormal sensory focus except that Student put his hands to his mouth to bite his fingernails. Nonetheless, Campbell postulated that Student’s practice of smelling his hand after touching Victim might be a sensory component of his disability.

57. Campbell believes Student’s actions on the bus are substantially related to his disability. Campbell believes this to be the case because “there are other places that he’s exhibiting these kinds of inappropriate or sexually action out types of behaviors ... and I believe

⁷ Ex. 6 at 11.

the setting in which it occurred is a setting that is – does not play to [Student’s] strengths. It’s a dynamic social, very ambiguous, low-structured place where he may struggle more.”⁸

58. Campbell philosophically opposes the use of suspensions to address children’s behaviors. In her expert opinion, undesirable behaviors are best addressed through direct instruction and replacement behaviors. After completing her evaluation of Student, she e-mailed Lakin and stated, “I am keeping my fingers crossed that when we all put our heads together we can come up with a response that really addresses the issue the most effective way possible.”⁹

April Meeting

59. On April 20, 2020, the IEP team reconvened with Campbell remotely through an online meeting service to discuss her evaluation report as well as new information related to Student’s viewing of pornography.

60. Campbell’s report and assessment of Student did not sway the IEP team to believe Student’s behaviors were a manifestation of his disability.

61. The IEP team initially planned to conduct the meeting in the same format as the original manifestation determination meeting. However, at Parent’s behest, the team focused primarily on discussion of Campbell’s evaluation.

62. The team noted that Campbell had not spoken with any teachers or reviewed the incident.

63. The team could only identify one incident of Student’s misbehavior. While suspended and working on his homebound instruction, Student began playing music with explicit lyrics in the public library. Student played the music openly with no concern for being caught. When staff addressed the problem with him, he understood and stopped immediately.

⁸ Tr. at 90-91.

⁹ Ex. P at 6.

The team understood this incident as evidence that Student understood right from wrong and would not seek to conceal a behavior he did not know was inappropriate. The team noted that Student had never had any other incidents remotely similar to this while attending school in the District. Again, the team understood this absence of behaviors as evidence that Student's autism spectrum disorder did not compel Student to engage in any touching behaviors.

64. All parties, including Campbell, agreed that Student had the ability to control his behavior generally. However, she relayed to the team her concerns with autism related sexual behaviors. Specifically, she stated to the team that Student needs sex education and that he lacks sufficient social relationships to fill gaps in his sexual understanding.

65. While Campbell adamantly argued that the punitive measures did not serve Student's best interests, she failed to convince the team that his behaviors were a manifestation of his disability.

In School Observations of Student

66. In the original manifestation determination meeting and second meeting in April, the predominant factual underpinnings for the District's determination were the direct observations of Student in the classroom. Three teachers attended the meetings and shared their experiences with Student. The same three teachers testified about their observations at the hearing.

67. Robert Ball taught Student eighth grade civics and summer school genetics. He has worked as a teacher for the District for 24 years and has taught many children with autism in his regular education classes. Ball holds a Master's degree in secondary education and a Bachelor of Science degree in social science from Missouri State University.

68. In Ball's observation, Student has always participated successfully in his classes. Until seeing Student's IEP during the 2019 regular school year, Ball did not know Student had a disability.

69. In civics class, Student receives extra time on written assignments and had some difficulties speaking in class. Although he needed extra time, he performed well on these writing assignments and all other aspects in his regular education class.

70. Ball observed that Student understood social cues from other students and very rarely needed redirection to go along with the rest of the class. Student had no difficulties working with other students on group assignments.

71. Student exhibited good behavior in Ball's class. Ball uses a disciplinary system in which students receive three documented warnings before punishment. Student has not received any warnings from Ball, and he never observed any sexual behavior or inappropriate touching.

72. Tyler Hamilton works at the District as a music teacher and band director. He teaches Student in his percussion class and directs Student in the school band, where he is also a percussionist. Hamilton has held his position for two years. He graduated from Missouri State University with a Bachelor's degree in music education. He holds a certificate from DESE in K-12 instrumental music education.

73. In contrast to classes like civics, the District's music program involves both structured and unstructured environments. The marching band particularly involves significant periods of down time. The band meets for practices in the mornings and afternoons after school. The band performs at football games and weekend competitions. Student plays as one of the marching band's six percussionists. While members of the marching band are not performing, they sit and watch the other students. They take the bus to games and competitions.

74. Hamilton considers Student an average student in his percussion band. In the marching band, Student played both stationary and mobile instruments. He marched with a bass drum. Student mostly receives regular instruction from Hamilton, but sometimes requires additional specific instruction.

75. Hamilton has observed that Student has friends in his classes. He noted that Student belonged to a group of four students he described as “inseparable” during marching band.¹⁰ Of these four students, only Student had an IEP. Student makes jokes and goofs around with other students. Hamilton has observed that Student utilizes social cues from other students in class to ascertain what he should be doing in class.

76. Hamilton has never seen Student engage in any sexual behaviors or inappropriate touching. He is excitable like his peers, but Hamilton does not observe any atypical behavioral problems with Student. Correspondently, Student’s behavior on the bus shocked Hamilton. Hamilton viewed video footage from the bus and noted that Student’s behavior did not resemble his behaviors in percussion class or band. Hamilton often observes Student looking around at people to discern social cues, but he has never seen Student focus on any one student like he did with Victim.

77. Curtis Bishop works for the District as a junior high physical education and health teacher. He has held his position for 21 years, during which time he has taught many students with autism. He holds a Bachelor of Science degree in education and a DESE certificate in K-12 physical education and health. He taught Student in both seventh and eighth grade.

78. Student likes sports and does well in Bishop’s class. If not for his IEP, Bishop would not have identified Student as having a disability. Student seemed to Hamilton to get along with other students and fit in. Hamilton has never observed any sexual behavior or inappropriate touching by Student. Furthermore, Hamilton has not received any complaints about Student’s behavior in the locker room, where students are not directly supervised.

79. Sex education is a component of health class for eighth grade students. Student received sex education in November 2019. The second lesson of this component centers on

¹⁰ Tr. at 157.

consent and respecting others. Course materials for sex education explicitly address inappropriate touching.

80. In addition to these three teachers, District administration and staff participated in the manifestation determination meeting. These individuals also testified at hearing regarding their observations of Student.

81. Brad Boettler is the principal of Aurora Junior High School. 2019-2020 was Boettler's first year as Principal. Prior to that, he worked as the District's transportation and alternative schools director. In this position, Boettler held responsibility for bus routing and discipline related issues on the bus.

82. Boettler had never previously observed or received a report of any misbehavior from Student in unstructured environments like the bus, hallways, or cafeteria.

83. In addition to his administrative duties, Boettler drives the bus for students who participate in the District's "Sporting Chance" program – an extracurricular option for students who wish to play sports. Student participates in Sporting Chance, and Boettler has never observed any misbehavior issues with Student on these bus rides.

84. Brenda Lakin serves as the special services director for the District. In this position, She oversees the District's special education program. She has held this position since 2006. Lakin holds a Bachelor's degree in education from Evangel University, a Master's degree in education administration from Missouri State University, a specialist's degree in educational administration from Missouri State, and a doctoral degree in education administration from Lindenwood University. Additionally, Lakin holds certificates in early childhood and elementary special education from DESE and a certificate from Penn State University in applied behavior analysis.

85. Prior to her current position, Lakin worked as a special education teacher and kindergarten teacher in the Willard School District and as a special education process coordinator and autism consultant in the Springfield R-12 School District. In the latter position, Lakin developed programs for and evaluated autistic students. She continues to provide autism consultation in her position with the District.

86. Lakin has completed several training programs in autism through the state's Project ACCESS. These trainings include basic training on working with autistic students, functional behavior assessments, communication training, and picture exchange communication systems for non-verbal students.

87. In Lakin's experience with autistic students, they do not take meticulous steps to hide impulsive or stimulatory behaviors. In Lakin's understanding of Student's particular experience of autism spectrum disorder, Student does not exhibit any significant sensory issues related to autism.

Conclusions of Law

This Commission has jurisdiction over this case. Section 162.961.¹¹ The burden of proof is on the party seeking relief, in this case the Parent. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Parent must prove her case by a preponderance of the evidence. *Tate v. Dept. of Social Servs.*, 18 S.W.3d 3, 8 (Mo. App. E.D. 2000).

We must judge the credibility of witnesses, as well as the weight and value of the evidence. *Faenger v. Petty*, 441 S.W.3d 199, 204 (Mo. App. W.D. 2014). We have the discretion to believe all, part, or none of the testimony of any witness. *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D. 2001). When there is a

¹¹ Statutory references, unless otherwise noted, are to the 2016 RSMo.

direct conflict in the testimony, we must make a choice between the conflicting testimony.

Harrington v. Smarr, 844 S.W.2d 16, 19 (Mo. App. W.D. 1992).

Objections Taken With the Case

At hearing, both parties objected to certain testimony and documentary evidence on the grounds of relevance. We took these objections with the case. Particularly, Parent objected to the evidence related to a prior due process complaint related to Student's suspension and redlined version of a second evaluation performed by Campbell in April 2020 with the specific purpose of confirming his autism diagnosis. The District also objected to a line of testimony related to Campbell's attempts to secure Medicaid funding for her treatment of Student.

The test for legal relevance "weighs the evidence's probative value against unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." *Barkley v. McKeever Enterprises, Inc.*, 456 S.W.3d 829, 843 (Mo. banc 2015). We find no risk of any unfair prejudice from admitting these records and testimony. Correspondently, we overrule all relevance objections and admit the evidence subject to their weight as reflected in our findings of facts.

Manifestation Determination

Parent challenges the District's decision to suspend Student for 155 days. If a child's special education program or placement, as defined in the child's IEP, is disputed by the child's parents, the IDEA provides for a review procedure. 20 U.S.C. § 1415(a), (b), (d); 34 C.F.R. §§ 300.500–.580. These changes of placement include disciplinary suspensions of greater than ten school days. Local enforcement agencies may only suspend students with IEPs for more than ten school days if the behavior underlying the disciplinary action is not a manifestation of the student's disability. 20 U.S.C. § 1415(c). A student's bad decision unrelated to his disability is

not a manifestation of a disability. See *Fitzgerald v. Fairfax City Sch. Bd.*, 556 F. Supp.2d 543 (E.D. Va. 2008) (student's anxiety and ADHD issues were unrelated to his decision to conduct a weekend paintball raid on his high school). The IDEA describes two circumstances where behaviors constitute 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 local educational agency's failure to implement the IEP.

20 U.S.C. § 1415(k)(1)(E).

Parent attacks the IEP team's finding that Student's conduct was not a manifestation of his disability, and the resulting change of placement in the IEP to homebound education with services. Parent does not argue that Student's behavior resulted from a failure to implement his IEP. Therefore, the sole issue before this Commission is whether Student's actions were caused by, or had a direct and substantial relationship to, Student's autism spectrum disorder.

Missouri's State Plan for Special Education (State Plan) describes autism as:

a developmental disability significantly affecting verbal or nonverbal communication and social interaction, generally evident before age three (3) that adversely affects a student'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.

State Plan, Title III, § B, p. 24.

As evidenced by this broad definition, people with autism experience it differently and to varying degrees. As is the case with Student, individuals with autism can thrive in spite of the challenges their condition may present. An educational diagnosis of autism under the State Plan only requires an adverse impact in the areas of communication and social interaction. The State Plan elaborates:

A student displays autism when:

(1) Through evaluation that includes a review of medical records, observation of the child's behavior across multiple environments, and an in-depth social history, the following behaviors are documented:

a. Disturbances of speech, language-cognitive, and nonverbal communication: The student displays abnormalities that extend beyond speech to many aspects of the communication process. Communicative language may be absent or, if present, language may lack communicative intent. Characteristics may involve both deviance and delay. There is a deficit in the capacity to use language for social communication, both receptively and expressively.

b. Disturbance of the capacity to relate appropriately to people, events, or objects: The student displays abnormalities in relating to people, objects, and events. There is a deficit in the capacity to form relationships with people. The capacity to use objects in an age appropriate or functional manner may be absent, arrested, or delayed. The student may seek consistency in environmental events to the point of exhibiting rigidity in routines.

* * *

Other Behaviors Which the Student May Exhibit Include:

(1) Disturbance of developmental rates and sequences: The student may also exhibit delays, arrests, or regressions in physical, social, or learning skills. Areas of precocious skill development may also be present, while other skills may develop at normal or extremely depressed rates. The order of skill acquisition frequently does not follow normal developmental patterns.

(2) Disturbances of responses to sensory stimuli: The student's behavior may also range from being hyperactive to being unresponsive to people and objects in their environment and can alternate between these two (2) states over periods ranging from hours to months. Disturbances may be apparent in auditory, visual, olfactory, gustatory, tactile, and kinesthetic responses. The student may respond to stimulation inappropriately and in repetitive or nonmeaningful ways.

State Plan, Title III, § B, p. 24-25.

Student's IEP extensively documents his difficulties with speech, language-cognitive, and non-verbal communication. With respect to the social types of behaviors, the IEP describes comparatively fewer details. Student has documented difficulties with motor skills and general body control. Specifically, at the time of his educational diagnosis, Student had a "floppy" demeanor and struggled to perform physical activities. As far as relation to other people, Student's autism led him to sometimes "flop" onto teachers or other students and displayed an aversion to eye contact. His IEP contained no further references to suggest significant interferences in interpersonal activities and no suggestion that Student presented rigidity of routine or sensory issues. In short, the IEP suggests that Student's autism primarily affects his communication and has minimal impact on his social judgment and behavior.

Student's behaviors as observed by his teachers and school staff corroborate this assessment of Student's disability. Student has demonstrated his capacity to understand major issues of right and wrong through his years of excellent behavior and his own attestations. Every teacher and staff member who interacted with Student testified to Student's good behavior and had never seen him inappropriately touch another student, sexually or otherwise. When questioned by District staff, Student indicated that he understood the difference between right and wrong, truth and lies, and "good" and "bad" touches. The IEP team, including Campbell, agreed that Student can control his actions, at least generally. All this is not to say that a generally well-behaved student could not demonstrate undesirable behaviors as a result of their disability. However, we find that unlikely to be the case with Student, particularly since the suggested relationship between his behavior on the bus and his disability do not appear to reflect Student's unique situation.

Parent relies heavily on the findings of Campbell to support her position that Student's autism caused, or was substantially related to, the incidents on the school bus. Campbell, in turn,

bases her conclusions on published journal articles that discuss the relation of autism and undesirable sexual behaviors. These articles note several factors that predispose autistic individuals to such behaviors, but none correspond to facts of Student's life or his particular experience of autism. As such, autism does not *cause* sexual misbehavior in itself, but certain components of it may relate to these behaviors.

Both articles relied on by Campbell cite three factors that predispose autistic people to undesirable sexual behavior: (1) lack of sexual education, (2) a drive for sensory stimulation, and (3) deficits in social and communication skills that create difficulty differentiating between private and public settings or recognizing social boundaries. None of these three factors apply to Student.

Student received sex education in health class in November 2019 – precisely the same time that he began abusing Victim. The second lesson of this component centers on consent and respecting others. Course materials for sex education explicitly address inappropriate touching.

Student has never presented any significant self-stimulating behaviors aside from biting his fingernails, nor does the record contain any evidence to suggest he may have sought olfactory stimulation in any other circumstances. Student's behavior was not indiscriminate; he appeared to seek out a particular student. He did not exhibit this behavior in other circumstances. The most concerning evidence of this type of behavior is Campbell's suggestion that Student may have stimulated his genitals in her office. However, Campbell could not say with certainty that Student was actually touching himself, and this alleged behavior differs significantly from touching another person. As noted in the 2017 article, sexual stimulatory behaviors arise as a transition from other stimulatory needs during puberty. Therefore, the absence of prior stimulatory behaviors suggests that Student did not touch Victim for these purposes.

Finally, the facts do not indicate that Student's deficits in social and communication skills have affected him to such a degree that he would fail to recognize the inappropriateness of touching a six-year-old girl. Student struggles with verbal and written communication and motor skills, but functions well with his peers. Although he has few friends outside of school, he does have some, and in school he has close friends and fits in well as reflected by his teachers' observations. He recognizes social cues and does not try to conceal behaviors he does not recognize as wrong. He usually stops misbehaviors when corrected, but he persisted with his behavior on the bus after Victim tried to stop him by kicking his hand away. His IEP notes that he does not present any obstacle to other students' learning, and his years of good behavior corroborate that fact. He has never inappropriately touched another student and stated he knew the difference between good and bad touches.

We find Campbell sincere in her belief that Student should not have been suspended, both out of pragmatic concern for behavior modification and because of her belief that Student's behaviors related to his autism. However, we find it concerning that she reached this conclusion without considering significant information that, as previously discussed, directly relates to the factors that contribute to sexual misbehavior in autistic people. As Campbell stated herself, it was "very important" to speak to school staff about Student. Despite overtures to do so from Lakin, Campbell continued in her evaluation and report without any input from Student's teachers or other District staff and without reviewing video of the incident.

With all these facts in mind, we do not find evidence sufficient to support the idea that Student's autism spectrum disorder caused or substantially related to his behaviors on the bus. We agree with the IEP team's determination that Student's conduct was not caused by or directly and substantially related to his disability.

Summary

We find that the manifestation determination was appropriate, and the District did not violate 20 U.S.C. § 1415 in suspending Student for more than ten school days.

SO ORDERED on June 26, 2020.

AUDREY HANSON MCINTOSH
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
 - (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.