Before The
**State of Wisconsin**
**DIVISION OF HEARINGS AND APPEALS**

In the Matter of ####, Student

**AMENDED DECISION**

v.

DHA Case No. DPI-24-0040
DPI Case No. LEA-24-0039

#### [School District]

The Parties to this proceeding are:

#### Student, by

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#### [School District] by

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## PROCEDURAL HISTORY

On December 20, 2024, the Wisconsin Department of Public Instruction (DPI) received a request for a due process hearing under Wis. Stats. Chapter 115 and the federal Individuals with Disabilities Education Act (IDEA) from #### (Parents) on behalf of #### (Student) against the #### (District). DPI referred the matter to the Wisconsin Division of Hearings and Appeals, and Senior Administrative Law Judge (ALJ) Sally Pederson was duly appointed to conduct a hearing.

On March 3, 2025, a prehearing telephone conference was held with the parties, during which the hearing was scheduled for April 1, 2, 3, and 4, 2025, and, at the request of the Parents, the decision deadline was extended for cause to accommodate mediation.

The hearing was not completed on April 1, 2, 3, and 4, 2025, so additional hearing dates were scheduled and held on May 15, 16, 21, and 22, 2025. Consequently, at the request of the Parents, the decision deadline was further extended with cause to July 9, 2025.

On June 21 and 30, 2025, counsel for the Parents and Student, with no objection from the District, requested a one-week extension of the deadline for filing post-hearing briefs due to a death in the law firm, with comparable extension of the decision deadline. Accordingly, the deadlines for filing reply briefs and issuing the decision were extended with cause to June 30, 2025 and July 16, 2025, respectively.

## ISSUES

1. Did the District deny the Student a free, appropriate public education (FAPE) by:

    a. failing to have a safety or crisis plan in place for the Student in November 2024;

    b. failing to implement the Student's individualized education plan (IEP) and/or individualized health plan (IHP) with regard to the Kennedy Krieger Treatment Plan, toileting, the schedule for changing pull-ups, the plan for providing food and water, the use of safety mats; and,

    c. failing to train the bus drivers on the Student's seizures.

2. Did the District violate the Parents' procedural rights by not providing them with a copy of the Student's Behavioral Intervention Plan (BIP) and by not providing them with prior written notice before changing the Student's toileting plan on September 5, 2024 and their Treatment Plan on October 31, 2024?

3. Did the District fail to offer the Student an educational placement that provides them with FAPE?

## FINDINGS OF FACT

1. The Student is a 17-year-old (d.o.b. ####) child with a disability who resides in the District with their Parents. They receive special education services in the District based on their educational impairments in the areas of autism and other health impairment (OHI).

(District Exhibit 1,[1] p. 3) The Student attended school in the District from 2011 to 2021 and again during the 2024-2025 school year. (D. Ex. 1; D. Ex. 19, p. 270)

2. The Student's medical/treatment records indicate that they are "medically and psychologically complex" with a history of the following medical diagnoses: autism spectrum disorder, severe intellectual disability, attention deficit hyperactivity disorder (ADHD), obsessive-compulsive disorder, post-traumatic stress disorder, chronic constipation, developmental delay, eating disorder, encephalopathy, history of QTc prolongation, seizure disorder, sleep disorder, and speech delay. (St. Ex. 71; D. Ex. 77, pp. 601 and 604; St. Ex. 86, pp. 851-852)

3. The Student is primarily non-verbal with a functional level below that of a two-year-old. (St. Ex. 127) They has frequent incontinence, does not have the ability to independently use the toilet, and wears pull-up diapers that must be changed every couple of hours. (St. Ex. 128, pp. 2948-2949; Tr. pp. 1199-1200)

4. The Student often engages in aggressive and violent behavior, which has caused property damage and injuries to herself, their Parents, and District staff. (St. Ex. 60, p. 619; St. Ex. 86, p. 869; St. Ex. 123; St. Ex. 128, p. 2952; Tr. pp. 560-562, 1196, 1335, 1337, 1346) The Parents have called police for assistance on various occasions when the Student has acted aggressively at home. (D. Ex. 13, pp. 209-244; Tr. pp. 1196, 1337, 1341)

5. The Parents have taken the Student to Children's Wisconsin (CW) Hospital several times where they has been admitted "for extremely aggressive behavior [that resulted] in harm to themselves and their caregivers," including on August 22 to September 5, 2019, August 3 to August 6, 2020, April 9 to April 27, 2021, and May 31 to July 21, 2021. Following their last admission in 2021, two CW physicians, including the Chief and Medical Director of CW's Pediatric Hospital Medicine, wrote a letter recommending that the Student be admitted to the Kennedy Krieger Institute (KKI), stating that "despite our best efforts, both [the Student's] and their parents' safety are in jeopardy with them at home," noting that the "parents have utilized the maximum amount of in-home behavioral health resources provided by county services." KKI is a therapeutic hospital located in Baltimore, MD.
(St. Ex. 71)

6. Instead, in January 2022, the Student was placed at #### [residential treatment center] by the #### County Court system, with the agreement of the Parents and the Parents' private insurer. #### is a residential treatment center located in Wisconsin. (D. Ex. 77, pp. 601 and 604; Tr. p. 1074)

7. Beginning in the summer of 2023, #### County began planning the Student's discharge from #### [residential treatment center]. The Parents, the Student's private applied behavioral analyst #### and a physician from #### [residential treatment center]did not believe it was appropriate or safe

[1] Hereinafter, the District's exhibits will be referred to as "D. Ex." and the Student/Parents' exhibits will be referred to as "St. Ex." The transcript will be referred to as "Tr."

for the Student to return home, rather than to a residential facility upon their discharge from #### [residential treatment center], based upon the Student's ongoing aggressive and challenging behaviors. (D. Exs. 69, 70 at p. 571, and 77 at p. 601; Tr. pp. 1099, 1332)

8. On October 30, 2023, Dr. #### from #### [residential treatment center] wrote a letter in support of the Student being admitted to KKI's inpatient neurobehavioral unit, stating that it was "medically necessary for [the Student] to be admitted to an inpatient unit" and noting that "[the Student's] behaviors pose significant and imminent risk to themselves and others." (D. Ex. 77, p. 601)

9. On November 2, 2023, the Student was admitted to the inpatient neurobehavior unit at KKI for treatment of their "severe behavior disorder." (D. Ex. 77, p. 604; Tr. p. 1074)

10. When the Parents placed the Student at KKI, they were no longer an enrolled pupil in the District for whom the District was responsible to provide special education. Nevertheless, the District's Director of Pupil Services was frequently in touch with the Parents and KKI staff while the Student was at KKI. (Tr. pp. 2195, 2199-2201)

11. In anticipation of the Student being discharged from KKI in the summer of 2024, the District held an IEP team meeting on June 11, 2024 to develop an IEP and determine placement for the 2024-2025 school year. Both Parents participated in the IEP meeting, along with their family advocate and two attorneys. Eleven District staff members participated in the IEP meeting, along with the District's attorney. In addition, eight KKI staff members participated in the IEP meeting to provide information about KKI's treatment and behavior plan that might be incorporated into their IEP. With regard to information provided by KKI, the IEP noted that "KKI is not an educational placement, the following information is based on a therapeutic environment." (D. Ex. 1, pp. 1-37)

12. The Student's aggressive behaviors reduced while they were at KKI, yet they still engaged in 86 problem behaviors on average per day at the time of their discharge from KKI. (St. Ex. 102, p. 1850; D. Ex. 1, p. 18; Tr. p. 1348)

13. The Parents did not believe it would be safe for the Student to return home after being discharged from KKI. (St. Ex. 86, p. 2389; Tr. pp. 1196, 1332-1333)

14. KKI prepared a Behavior Plan for the Student which referenced the functional behavioral assessment (FBA) it had conducted upon their admission. The Behavior Plan contained recommendations for "reducing problem behavior and increasing socially acceptable behavior." The Behavior Plan stated that one staff member implemented the plan at KKI but sometimes additional people may be needed to help with physical management of the Student's behavioral outbursts. It further stated that "it would be ideal if this plan could be applied after discharge as described," but noted that "because different settings vary in terms of their purpose, resources, and regulations, it is sometimes not possible or appropriate for recommendations to be followed exactly as prescribed in this plan."

During the hearing, the KKI Behavior Plan was also referred to as the KKI Treatment Plan. (St. Ex. 81, pp. 813-814)

15. On August 29, 2024, KKI discharged the Student. The KKI physician who prepared the Student's Discharge Summary listed the Student's active diagnoses at the time of discharge as: ADHD-predominantly hyperactive type, autism spectrum disorder, constipation, developmental expressive language disorder, epistaxis, idiopathic generalized epilepsy, intellectual disability, abnormal gait, hallux valgus-acquired bilateral, monoallelic deletion of SCN5A gene, sleep disorder, stereotypic movement disorder with self-injurious behavior, and disruptive behavior-pediatric patient. The Student's prescribed medication regime included nine medications, plus a daily multivitamin and mineral oil supplement. (St. Ex. 86, pp. 851, 856)

16. The Student's neurobehavioral team at KKI prepared a "Letter of Support for Services" with their clinical recommendations for the Student, "based upon their behavioral and medical needs." They recommended that the Student "receive a level of care that would provide them with consistent supervision by trained professionals in both the treatment plan during all waking hours who may (1) remain in direct visual line of sight, (2) assist with implementing the developed treatment plan with fidelity, and (3) continue to provide them with daily behavioral treatment and support." (St. Ex. 102, pp. 2848, 2851)

17. The District implemented the Student's June 2024 IEP and placement at Indian Trail High School on September 4, 2024 when the Student returned to school in the District. The IEP required that the District provide the Student with specially designed, direct instruction in the special education setting in the areas of reading, math, physical education, and behavior regulation/coping. The IEP included the related services of special education busing, special health needs nursing services, speech and language therapy, occupational therapy, and assistive technology. The specially designed instruction and related services correspond to the four annual goals in the IEP related to reading, number sense, functional communication, and behavior regulation. The IEP also included several program modifications/supports and numerous supplementary aids and services. One supplementary service in the IEP was that the Student would have a separate setting for lunch, and another was that two staff members would assist/support them during toileting. The IEP did not include other provisions related to toileting, changing pull-ups, providing food and water, or the use of safety mats. (D. Ex. 1, pp. 1-37)

18. The IEP team did not review and revise or develop a new behavior intervention plan (BIP) for the Student when they returned to the District in September 2024, even though the last BIP the District had developed for the Student was in 2021. The District wanted to gather data about the Student in the school/educational setting before revising their BIP, since they had been in medical facilities for the prior two and a half years. In the meantime, the District incorporated behavioral strategies from the KKI Behavior Plan into the June 2024 IEP and subsequent IEPs to address the Student's behavior. (D. Ex. 1, pp. 19-24; Tr. pp. 226-230)

19. The District's special health needs nurse developed an individual health plan (IHP) for the Student, with input from the Parent(s). The IHP is not part of the Student's IEP. The June 4, 2024 IHP was revised on August 27 and September 18, 2024. With regard to toileting, the IHP states that the Student "wears a pull up and requires assistance but is able to help, they may need to be double diapered" and "may require assistance of 2 people during toileting, frequent opportunities to use restroom and a toileting schedule is helpful." With regard to eating and drinking, the IHP states:

    - No free milk but can eat things with milk as an ingredient, can drink soy milk.
    - Food should be finely chopped and soft. Will need assistance to poke and scoop the food. [The Student] eats with left hand. No raw vegetables.
    - [The Student] will take too much food at one time so that should be controlled on a plate for them.

    (D. Ex. 8, pp. 160-161; Tr. p. 2020)

20. At the beginning of the school year, staff members took the Student to a private bathroom for toileting. However, the Student sometimes became aggressive in the bathroom, and it was too small of a room for staff to be able to back up and give the Student space, which was a strategy recommended in the KKI Behavior Plan. The public restroom also was problematic because if the Student became aggressive, it could pose a safety risk to other students in the restroom. Therefore, the staff began using a changing room that had a hydraulic lift table that was also used for other special needs students to change pull-ups. (Tr. pp. 2020-2023)

21. On September 20, 2024, the Parents had the Student admitted to CW Hospital where they remained until discharged on November 4, 2024. The CW Discharge Summary lists "aggressive behavior" as the reason for hospitalization. (St. Ex. 60; Tr. pp. 1196; 1381-1382)

22. On October 4, 2024, the District held another IEP team meeting to review the IEP and two incidents of restraint used with the Student. At the meeting, the Parents indicated they wanted a bathroom goal added to the IEP. The IEP team discussed the problems presented by using the small private bathroom or public restroom to change pull-ups and discussed the need and goal of reducing the Student's aggressive behaviors during toileting, which interfered with using the small private bathroom. An annual goal addressing the Student's toileting behaviors was added to the IEP and discussed with the Parents, who agreed with it. The Parents also expressed other concerns related to the Student's iPad and TD Snap communication app, feeding, and bus transportation. (D. Ex. 2, pp. 38-76; Tr. 2024-2030)

23. Also on October 4, 2024, the Student's IHP was further revised at the Parents' request to include a toileting plan. The revised IHP includes a page of seven toileting suggestions and a 13-step toileting process that was provided by the Parents. (D. Ex. 9, pp. 168-176)

24. The Parents contacted several residential schools and facilities regarding admitting the Student into their programs. On October 8, 2024, Shrub Oaks International School (Shrub Oaks) sent the Parents an email offering to accept the Student into its residential program at an annual rate of $597,990. Shrub Oaks is a therapeutic school for students with "significant co-occurring conditions" and acute behaviors that is located in Mohegan Lake, NY. (D. Ex. 34, p. 428; St. Ex. 119, p. 2901; Tr. pp. 1739)

25. On October 9, 2024, the Parents sent the District toileting suggestions for the Student that differed from those they had submitted for the revised IHP on October 4, 2024. On October 29, 2024, the Parents asked for different changes to the changing of pull-ups procedure, which the District utilized when the Student returned to school after their discharge from CW on November 4, 2024. (D. Exs. 30, 31, 32, pp. 417-418, 421; Tr. pp. 2030-2031, 2047, 2051)

26. On November 7, 2024, at approximately 10:45 a.m., an incident occurred that resulted in law enforcement placing District schools on a secure hold for a period of time, which meant that classes went on as normal, but students and staff were not allowed to leave the school buildings, and people were not allowed to enter the buildings. The special education coordinator was aware that the Student had an outside occupational therapy evaluation that day, with the Parents scheduled to pick them up at school at 11:15 a.m. So the special education coordinator conferred with the school principal and the school resource officer (who was in contact with other law enforcement) and arranged that the Parent would be able to safely pick the Student up at a back entrance of the school, which they did. (Tr. pp. 2052-2055)

27. If an evacuation drill occurred at the Student's school, staff would take the Student out of the building in their wheelchair/stroller, along with the other students. School staff are provided training on school evacuations, and the District has a general protocol for dealing with a secure hold situation. (Tr. pp. 2056-2057)

28. On November 15, 2024, the Parents emailed the District expressing various concerns about the District's changing procedures, including that the District had changed from the KKI Treatment (Behavior) Plan related to toileting/bathroom procedures, as far back as September, without informing the Parents. However, the KKI Behavior Plan for toileting was not part of the Student's IEP, and the June IEP that was in effect in September did not contain a changing/toileting plan. (D. Ex. 35, p. 430)

29. On November 16, 2024, the Parents emailed the District asking for an IEP meeting to discuss residential placement of the Student and stating that the Student needed "emergency placement" at Shrub Oaks International School. (D. Ex. 34, p. 428)

30. On November 18, 2024, the Parents emailed the District about using a different procedure for changing the Student's pull-ups. (D. Ex. 38, p. 440)

31. On November 19, 2024, the District convened an IEP meeting to address Parent concerns. At the meeting, the Parents asked for changes to the Student's toileting/pull-ups procedures, stating that the school and home procedures were different and causing the Student to be aggressive at school. The IEP team and Parents agreed to suspend the annual goal related to toileting behavior and added bathroom procedures provided by the Parents as supplementary aids and services in the IEP. (D. Ex. 3, pp. 75-139)

32. On November 19, 2024, the toileting procedures in the IHP were also revised, per the Parents' suggestions. (D. Ex. 78)

33. On November 21, 2024, the Director of Pupil Services emailed the Parents and stated that the District would be scheduling an IEP meeting as soon as possible to review the Student's BIP. In their response, the Parents stated that they were looking into getting an advocate/legal representation to be present with them at an IEP meeting to review the BIP and that they would keep #### [Director of Pupil Services] informed. (D. Ex. 36, pp. 436-437)

34. On December 20, 2024, the Parents filed a due process hearing request with DPI against the District that initiated these proceedings.

35. On January 11, 2025, the Parents informed the District that they had retained legal representation, and they requested that an "emergency" IEP meeting be held on January 15, 2025. (D. Ex. 51, pp. 493-494)

36. The District agreed to convene an IEP meeting on January 15, 2025 and informed the Parents that the District wanted to review the FBA and BIP at the meeting because the IEP team had planned to do so at an IEP meeting scheduled for January 9, 2025 that was canceled because the Parents were not available. However, the Parents informed the District that they wanted to discuss their specific concerns at the January 15 IEP meeting, that the FBA could be discussed if there was time, and that the BIP could be discussed at an IEP meeting on January 27, 2025. However, the January 27, 2025 meeting got changed to a mediation meeting between the parties, rather than an IEP team meeting to review the BIP. (D. Ex. 51, p. 489; D. Ex. 53, p. 504; Tr. pp. 2068-2069, 2204-2206)

37. On January 15, 2025, the District held an IEP meeting to address the Parents' concerns and to review the BIP. The Parents expressed concerns about the Student not having access to and using their TD Snap communication device and about the bathroom routine for the Student. The IEP team informed them that the Student had access to their TD Snap all day at school and that the Student's pull ups were changed four times per day or more if she was wet or had a bowel movement. The IEP meeting ended before the BIP could be addressed by the team. (D. Ex. 4, pp. 113-150; Tr. pp. 2204-2205)

38. The Student's progress report dated January 24, 2025 shows that the Student made the following progress towards their annual IEP goals: reading – adequate progress; number sense – insufficient progress; functional communication – adequate progress; behavior regulation – insufficient progress. The occupational therapist noted in their January 2025

progress report that the Student had made progress. (D. Ex. 5, pp. 151-153; D. Ex. 6, pp. 154-157)

39. After mediation was unsuccessful, the District sent emails to the Parents in March 2025 to schedule an IEP meeting to review the Student's BIP and IEP, but the Parents did not agree to meet for an IEP meeting with the due process proceeding ongoing. (D. Ex. 62, pp. 538-542; Tr. pp. 2068-2069, 2208-2212)

40. District staff used restraint on the Student approximately 20 times during the 2024-2025 school year when they were unable to de-escalate the Student's aggressive behavior in another manner. District staff received training on the use of restraint, specifically the Crisis Prevention Institute's nonviolent crisis intervention training. The first de-escalation method used is to give the Student space and the next is to use protective mats as a barrier. The District completed notification reports that were provided to the Parents when restraint was used, as required by Wisconsin law. (D. Ex. 25, pp. 348-407; Tr. pp. 253, 579, 2073-2077, 2080-2083, 2093)

41. The Student was suspended from school for behavioral problems for a total of three and a half days during the 2024-2025 school year. (Tr. 212)

42. In April 2025, the District hired a registered behavior technician (RBT) who works solely with the Student at school. The RBT is supervised by a board-certified behavior analyst. (Tr. pp. 1946-1948)

43. The special health needs nurse provided information to the Student's two bus drivers and two bus monitors about the Student's seizure disorder and allergies, and she trained them on what to do if the Student had a seizure while on the bus. (Tr. pp. 761-762, 2185-2186) In addition, the District provided the bus company with a form about transporting the Student, which specifically states that the Student has a known seizure disorder, instructs to "pull over and call dispatch to call 911 and parent," and lists the special health needs nurse's name, title, and phone number. (D. Ex. 21, p. 310)

44. The District did not assign one staff person as the Student's one-on-one aide because that was not required by the Student's IEP(s), but the Student had two or three District staff persons with them at all times at school during the 2024-2025 school year. The District's special education coordinator believes the Student's IEP should be revised to accurately reflect the high level of constant adult support they have received. (Tr. pp. 84, 168, 1950-1952, 1954-1955, 2067)

45. The Student had access to their TD Snap communication device at school; the District did not deny them access to the device. The Student sometimes chose not to use their TD Snap communication device, but they communicated with staff through other methods, such as using visual supports, gestures, head movement, prolonged eye contact, pointing, leading staff, reaching, and making choices. (Tr. pp. 570, 647, 650-654, 1667-1668, 1672)

46. During the 2024-2025 school year, the Student received the specially designed direct instruction and related services set forth in their IEP(s). (Tr. pp. 1570, 1572, 1671, 1686-1687, 1918-1920, 1922-1925)

## DISCUSSION

### *Jurisdiction*

The undersigned ALJ has authority to preside over this due process proceeding pursuant to Wis. Stat. § 115.80(2).

### *Burden of Proof*

The U.S. Supreme Court has ruled that the burden of proof in an administrative hearing challenging an IEP is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). As the complainants in this matter, the burden of proof is on the Parents. The Parents must "cite credible evidence that the choice[s] the school district made cannot be justified." *Sch. Dist. v. Z.S.*, 184 F.Supp.2d 860, 884 (W.D. Wis. 2001), *aff'd* 295 F.3d 671 (7th Cir. 2002).

### *Free, appropriate public education*

The IDEA requires that all children with disabilities are offered a free, appropriate public education (FAPE) that meets their individual needs. 20 USC § 1400 (d); 34 CFR § 300.1. A FAPE refers to "special education and related services that are provided at public expense and under public supervision and direction … and are provided in conformity with an individualized education program." Wis. Stat. § 115.76(7).

In *Endrew F. v. Douglas Co. Sch. Dist. RE-1,* 137 S.Ct. 988 (2017), the U.S. Supreme Court ruled that the IDEA requires a school district to offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's unique circumstances, noting that a child should have the chance to meet challenging objectives. When a child is not able to achieve at grade level and is not fully educated in the regular education environment, the Supreme Court opined that the IEP should be "appropriately ambitious in light of [the child's] circumstances." *Id.* at 1000.

The IDEA does not address IHPs, nor does Wisconsin special education law. Therefore, the statutory requirements to provide and implement an IEP do not apply to IHPs. Districts are "responsible for providing services necessary to maintain the health and safety of a child while the child is in school, with breathing, nutrition, and other bodily functions (e.g., nursing services, suctioning a tracheotomy, urinary catheterization) if these services can be provided by someone who has been trained to provide the service and are not the type of services that can only be provided by a licensed physician." *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 29 IDELR 966 (U.S. 1999). However, such services are often provided as related services in an IEP, rather than in an IHP. Nevertheless, it is possible that failure to implement provisions of an IHP might result

in a denial if FAPE if the services were necessary for a Student to be able to access and receive special education services.

Here, the Parents alleged that the District denied the Student FAPE by not having a safety or crisis plan in place for them in November 2024 and not training the Student's bus drivers on their seizures, and by not implementing the Student's IEP and/or IHP with regard to the KKI Treatment Plan, toileting, the schedule for changing pull-ups, the plan for providing food and water, and the use of safety mats. As explained below, the evidence on the record does not support the Parents' contentions.

***Safety or Crisis Plan and Bus Driver Training on Seizures***

The Student's IEP did not contain a safety or crisis plan. However, there is no requirement in the IDEA or Wisconsin law that requires a school district to develop a safety or crisis plan for a student with disabilities. The District's special education coordinator credibly testified that the District has a protocol for dealing with lock down situations that would apply to all students, and that if a school evacuation occurred, staff would take the Student out of the school in their wheelchair or stroller and that school staff receive training on this type of crisis. (Tr. pp. 2056-2057) The Parents' concerns regarding this issue seem to have stemmed from a secure hold incident that occurred at the school in November 2024, but there is no evidence showing that the Student was in danger during the incident, that having an individual safety or crisis plan for the Student would have affected how the incident was handled, or that the incident and lack of a safety plan in any way denied the Student FAPE.

Similarly, the Parents failed to show by a preponderance of the evidence that the Student's bus drivers had not received instruction regarding the Student's seizures. On the contrary, the special needs health nurse and the director of pupil services credibly testified regarding the instruction, training, and forms that were provided to the bus company and bus drivers regarding the Student's seizures and how to respond if they had a seizure on the bus. (D. Ex. 21, p. 310; Tr. pp. 761-762, 2185-2186) Furthermore, there is no evidence on the record showing that any such training lapse resulted in a denial of FAPE to the Student.

***Implementation of the IEP and IHP***

The Parents failed to meet their burden of showing that the District failed to implement the Student's IEP and IHP. The Parents' witness ####, a board-certified behavior analyst in Maryland who was formerly employed at KKI and worked with the Student, testified that if the District did not incorporate the KKI Behavior Plan into the Student's IEP at the District, it could impact the Student's ability to receive FAPE. (Tr. p. 853) However, the KKI Behavior Plan was developed by KKI, a therapeutic hospital; it is not an IEP developed by a local educational agency under the IDEA. Moreover, the KKI Behavior Plan itself states that "it would be ideal if this plan could be applied after discharge as described," but noted that "because different settings vary in terms of their purpose, resources, and regulations, it is sometimes not possible or appropriate for recommendations to be followed exactly as prescribed in this plan." (St. Ex. 81, pp. 813-814) Accordingly, the District was not legally obligated to implement the

KKI Behavior Plan, except to the extent that specific provisions of the plan were included in the Student's IEP or possibly the IHP.

Certain behavioral strategies from KKI were included in the Student's IEP in lieu of the District revising the Student's BIP at the start of the school year, but there is no credible evidence on the record indicating that those IEP provisions were not implemented. Rather, the District presented credible testimony by the Student's special education teacher, the director of pupil services, the special education coordinator, and the school principal that the Student had adult support and supervision from two or three adults at all times in school, rather than a single one-on-one aide, and that behavioral strategies such as providing the Student with space and using mats as protective barriers were implemented. (Tr. pp. 84, 168, 1950-1952, 1954-1955, 2076-2077) The evidence does not establish that the District failed to implement the Student's IEP or IHP with regard to KKI Behavior/Treatment Plan.

In terms of toileting, the Student's IEP required that two staff members accompany them to the bathroom. (D. Ex. 1, p. 23) The evidence showed that two or three staff members were always with the Student during toileting. The toileting plan from the KKI Behavior Plan was not in the Student's IEP, so the District was not required to implement it as part of the Student's IEP. The toileting provisions in the IHP were revised more than once at the Parents' request. Notably, the toileting provisions added to the IHP in October were listed as "suggestions." Moreover, the toileting procedures that the Parents provided to the District in October and November 2024 differed from KKI's toileting plan. (St. Ex. 86; D. Ex. 30, p. 417; D. Ex. 41, p. 451) It is unclear what toileting provisions the Parents believe were not implemented. Moreover, even if the District did not implement some toileting provision(s) in the IHP or IEP, the Parents failed to show that it rose to the level of a denial of FAPE.

Further, the Parents presented little or no evidence that the District failed to implement the IEP or IHP related to changing the Student's pull-ups, feeding the Student, and using safety mats. Rather, District staff credibly testified that the District changed the Student's pull-ups every two hours or more frequently as needed, used protective mats as barriers when the Student acted aggressively, and cut the Student's food up in small pieces. (Tr. pp. 585-586, 588, 2076-2077). In their post-hearing brief by counsel, the Parents essentially conceded these points, stating that the District "may not" have followed plans for changing pull-ups, feeding, and using safety mats. The Parents did not meet the burden of proof.

### *Other Issues*

During the hearing, the Parents implied that the District did not provide the Student FAPE by other acts or failings that were not noticed in their due process hearing request. For example, the Parents appeared to claim that the Student did not receive FAPE because the Student did not use or have access to their TD Snap communication device every day, did not have one person serve as a one-on-one aide, was restrained in school and was suspended from school, and did not make progress towards or achieve all of their annual IEP goals.

Under Wisconsin law, a party filing a written request for a special education due process hearing may amend its request only if the other party consents in writing and is given the opportunity to resolve the issues presented by the request at a resolution meeting, or if the ALJ grants permission at least five days before the hearing is scheduled to occur. Wis. Stat. § 115.80(1)(g). *See also* 34 CFR § 300.511(d).

The Parents and Student did not ask to amend the hearing request to include additional issues. During the prehearing conference on March 3, 2025, the ALJ discussed the hearing issues in detail with the parties, and specifically invited the parties to contact them and the other party if they had any concerns or questions about the hearing issues as stated in the written Prehearing Conference Report, Scheduling Order, and Notice of Hearing that was provided to the parties after the prehearing conference. The District, by its attorney, did follow up with the ALJ and the other party to clarify one of the issues, but the Parents did not ask to amend or add issues. Therefore, the Parents and Student were not entitled to raise new issues at the hearing, and the ALJ is not obligated to address them in this decision.

Nevertheless, the evidence on the record does not show that the Student was denied FAPE based on issues and information raised by the Parents at the hearing that were not included in their hearing request. For example, the Student's special education teacher and the speech and language therapist credibly testified that the Student had access to their TD Snap communication device at school and that, while they sometimes chose not to use the device, they were able to communicate with staff through other methods. (Tr. pp. 570, 647, 650-654, 1667-1668, 1672) Similarly, the Student was not denied FAPE because the District provided them with adult support and supervision from two or three people at school, rather than a single one-on-one aide. The District did use restraint on the Student and did suspend the Student for three and a half days. However, there was no evidence showing that restraint was used improperly on the Student or that the use of restraint and suspension for three and a half days resulted in a denial of FAPE to the Student.

With regard to the Student's progress towards their annual goals in the IEP, the special education teacher testified at the hearing that the District provided the Student with the special education instruction and services set forth in their IEPs with fidelity throughout the 2024-2025 school year. (Tr. pp. 1918-1925) Further, the Student made progress towards some of their annual goals, according to the January 2025 progress reports, and the special education teacher credibly testified that, since January 2025, the Student began making progress towards the number sense (math) annual goal and began exhibiting aggressive behaviors less frequently. (D. Ex. 5, pp. 151-153; D. Ex. 6, pp. 154-157; Tr. p. 1942-1943)

The Student has complex disabilities and behavioral issues, is non-verbal, and functions at below a two-year-old level. They were also out of school for six weeks in the autumn of 2024 when their Parents took them to CW Hospital for admission only 13 days after they returned to school in the District. Despite these challenges, the Student was able to make progress towards some of their annual goals during the 2024-2025 school year. The evidence on the record shows that the IEP was appropriately ambitious in light of the Student's circumstances. Their failure to achieve progress towards all of their annual goals does not translate to a denial of FAPE.

### *Parents' Procedural Rights*

The IDEA affords certain procedural rights to the parents of a child with a disability. 20 USC § 1415 (a) & (b). One such requirement is that a school district must provide the parent of a child with a disability prior written notice whenever it proposes to initiate or change, or refuses to initiate or change, the identification, evaluation or educational placement of the child, or the provision of FAPE to the child. 20 USC 1415 (b)(3)(B); Wis. Stats. § 115.792 (1)(b).

The federal regulations implementing the IDEA mandate that, in a due process proceeding involving a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (1) impeded the child's right to a FAPE; or (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child; or (3) caused a deprivation of educational benefit. 34 CFR § 300.513 (a)(2).

The Parents allege that the District violated their procedural rights by not providing them with a copy of the Student's BIP and by not providing them with prior written notice before changing the Student's toileting plan in September 2024 and their Treatment Plan on October 31, 2024. Again, however, the record does not support these claims.

### *Failure to provide the BIP to Parents*

First, there is no credible evidence that the District did not provide the Parents with a copy of the Student's BIP. In fact, the District did not revise the Student's prior BIP, and did not develop a new one, so there was not a new BIP to provide to the Parents. The District chose to incorporate some behavioral strategies from KKI into the Student's IEP at the start of the school year, rather than develop a new BIP based on behavioral baseline information from #### [residential treatment center] and KKI, which are therapeutic facilities/hospitals, rather than school settings. The special education teacher was observing and gathering data about the Student for the IEP team's use, but the IEP team did not meet to revise or develop a BIP. (Tr. pp. 1948-1949)

The District wanted to review the BIP at IEP team meetings in January 2025, but the one meeting concluded after the Parents' agenda items were discussed and another meeting was switched to mediation. The District also attempted to convene an IEP team meeting in March 2025 to review and revise the Student's BIP, but the Parents would not agree to attend the IEP meeting. There is no legal requirement with regard to the timelines for reviewing and revising a BIP. While best practice would have been for the District to convene an IEP team meeting to review and revise the Student's BIP during the 2024-2025 school year (even if the Parents refused to attend), the evidence on the record does not prove that the District's failure to revise the BIP or provide a copy of a BIP to the Parents resulted in a denial of FAPE to the Student.

### *Prior Written Notice*

The Parents allege that the District unilaterally changed the Student's toileting plan in September 2024 without providing them with prior written notice. However, as explained above, the Student's IEP did not contain a toileting plan. The IEP required that two adults accompany the Student while toileting, and this occurred throughout the school year.

The IHP contained various toileting provisions, suggestions, and procedures throughout the year, based upon the Parents' ongoing requests. Again, however, there is no evidence that the District changed the IHP toileting provisions in September 2024 and failed to provide prior written notice of it to the Parents. Further, as also explained above, the IHP is not covered by the IDEA, and the procedural safeguards in the law do not apply to an IHP as they do to an IEP. The Parents failed to meet their burden here.

The Parents also contend that the District failed to provide them with prior written notice before changing their Treatment Plan on October 31, 2024. The Parents failed to present evidence proving this allegation, and it is not completely clear what this issue refers to. On October 31, 2024, the Parent met with District staff to discuss the method that CW Hospital was using to change the Student's pull-ups. The Parent subsequently sent an email indicating that they believed the District had changed "the treatment plan for [the Student] using the restroom" and they referred to the KKI plan for toileting/changing the Student's pull-ups. (D. Ex. 35, p. 430) If this concern is indeed what this hearing issue is referring to, the Parents did not meet their burden of showing that the District changed the Student's KKI Treatment plan on toileting without providing them written notice. As stated previously, the KKI Behavior/Treatment plan for toileting was not even included in the Student's IEP or the IHP. Therefore, this issue was not proven by a preponderance of the evidence.

### *Placement*

The Parents allege that placement in the District has not provided the Student with FAPE and that residential placement, such as at Shrub Oaks, is necessary for them to receive FAPE.

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child. 34 CFR § 300.104.

In considering the question of whether a child's placement at a residential facility was an educational placement under the IDEA that was required to be at no cost to the parents, the Wisconsin Supreme Court has ruled that the analysis should be on whether it is "necessary for educational purposes." *State ex rel. Support of Robert H.*, 2002 WI 126, ¶ 23, 257 Wis. 2d 57, 69, 653 N.W.2d 503, 508, citing *Butler v. Evans*, 225 F.3d 887, 893 (7th Cir. 2000). If a residential placement is "'a response to medical, social, or emotional problems that is necessary quite apart from the learning process,' then it is not an educational placement for purposes of the IDEA." *Id*., citing *Butler*, 225 F.3d at 893.

In this case, the evidence on the record does not show that placement in a residential program is necessary for the Student's educational purposes. Instead, the evidence suggests that the Parents are seeking a residential placement to address the Student's "medical, social or emotional disabilities apart from their special education needs." *Butler*, 225 F.3d at 894. *Id*.

The District provided the Student with meaningful access to public education and addressed their disability-related needs, such as their behavioral, toileting, and feeding needs, in a non-residential educational environment. Notably, the District's director of pupil services, the Student's special education teacher, the speech and language therapist, the assistive technology support teacher, the special education coordinator, and the school principal all credibly testified that they believe the Student received FAPE from the District during the 2024-2025 school year. (Tr. pp. 121-123, 127-128, 223-224, 558, 1608-1609, 1687) Their testimony was more convincing than the Parents' witnesses who had limited personal knowledge of how the Student's IEP and placement were actually implemented in the District during the 2024-2025 school year.

Simply put, the credible evidence on the record shows that the Student received FAPE in the District placement. The record does not establish that a residential placement is necessary to provide the student with "meaningful access to public education or to address their special educational needs within their regular school environment." *Butler*, 225 F.3d at 894. It is apparent that the Student's behaviors make virtually all aspects of their life difficult for themselves and those around them. That includes going to school and obtaining an education. However, the evidence on the record simply does not show that the Student requires placement in a residential program in order to receive special education and related services. The Parents failed to show that the Student did not receive FAPE during the 2024-2025 school year in the District.

All of the arguments presented by the parties were carefully considered by the undersigned ALJ. The courts have recognized that an administrative decision-maker "is not required to make findings that respond to every issue the [Complainants] raised in its request." *Peace Lutheran Church & Acad. v. Vill. of Sussex*, 2001 WI App 139, ¶ 33, 246 Wis. 2d 502, 631 N.W.2d 229. Thus, any arguments and evidence on the record that were not specifically mentioned were determined to not merit comment in the decision.

## CONCLUSIONS OF LAW

1. The District did not deny the Student a free, appropriate public education (FAPE) by:
    a. failing to have a safety or crisis plan in place for the Student in November 2024;

    b. failing to implement the Student's individualized education plan (IEP) and/or individualized health plan (IHP) with regard to the Kennedy Krieger Behavior/Treatment Plan, toileting, the schedule for changing

pull-ups, the plan for providing food and water, and the use safety mats; or by,

c. failing to train the bus drivers on the Student's seizures.

2. The District did not violate the Parents' procedural rights by not providing them with a copy of the Student's Behavioral Intervention Plan (BIP) or by not providing them with prior written notice before changing the Student's toileting plan on September 5, 2024 and their Treatment Plan on October 31, 2024.

3. The District offered the Student an educational placement that provided them with FAPE during the 2024-2025 school year. The Student does not require a residential placement in order to receive FAPE.

## ORDER

For the reasons set forth above, it is hereby ordered that the due process hearing request in this matter is dismissed.

Dated at Madison, Wisconsin on July 16, 2025.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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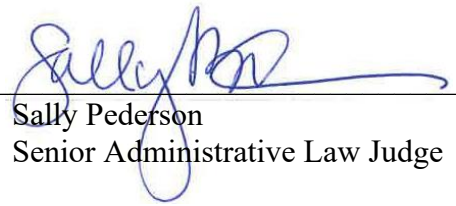
By: 

Sally Pederson
Senior Administrative Law Judge

APPEAL RIGHTS FOLLOW ON NEXT PAGE

## NOTICE OF APPEAL RIGHTS

Any party aggrieved by the attached decision of the administrative law judge may file a civil action in the circuit court for the county in which the child resides or in federal district court, pursuant to Wis. Stat. § 115.80(7), 20 USC § 1415, and 34 CFR § 300.512. The court action must be filed within 45 days after service of the decision by the Division of Hearings and Appeals.

It is the responsibility of the appealing party to send a copy of the appeal to the Director of Special Education, Special Education Team, Department of Public Instruction, 201 West Washington Avenue, Madison, WI 53703. The Department of Public Instruction will prepare and file the record with the court only upon receipt of a copy of the appeal. The record will be filed with the court within 40 days of the date that the Special Education Team at the Department of Public Instruction receives the appeal.