
LEGAL UPDATE

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IOWA SUPREME COURT DECISION — AUTHORITY TO EXCUSE A STUDENT FROM SCHOOL FOR PRIVATE THERAPY

Purpose. *Legal updates are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update is intended to provide legislators, legislative staff, and other persons interested in legislative matters with summaries of recent meetings, court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although an update may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

Hills & Dales Child Development Center v. Iowa Department of Education

Filed December 30, 2021, as amended March 8, 2022

No. 21-0095

www.iowacourts.gov/courtcases/13855/embed/SupremeCourtOpinion

Factual and Procedural Background. Keystone Area Education Agency (Keystone) is an area education agency under Iowa Code section 273.2. Keystone is responsible for identifying and serving children requiring special education in northeast Iowa. Hills & Dales Child Development Center (HD) is a nonprofit service provider for individuals with disabilities. HD provides children with applied behavioral analysis (ABA) therapy, among other services. Dubuque Community School District (DCSD) is a school district located in the geographic area of Keystone and HD.

Keystone filed a petition for a declaratory order with the Iowa Department of Education. DCSD and HD intervened in the declaratory proceeding. Keystone's petition for a declaratory order contained five questions. After briefing and a hearing, the department issued a declaratory order. Below are Keystone's questions and the department's answers:

1. Under Iowa Code chapter 299A, is a public agency required to excuse a student for therapy, with or without a physician's excuse?

Answer: No. This decision is committed by statute to the school district.

2. If a public agency is not required to excuse a student for therapy, when can a public agency be found to have abused its discretion?

Answer: Whether a public agency abuses its discretion will be determined by the facts of each case, including the public agency's obligation to comply with applicable law.

3. If a public agency does excuse a student for therapy pursuant to a physician's order, can the public agency be found to have denied that student a Free Appropriate Public Education (FAPE)?

Answer: A public agency that excuses a child for therapy may violate the IDEA [Individuals with Disabilities Education Act] if the services required by a child's IEP [Individualized Education Program] are not provided because the child is being withheld from school for private therapy.

4. For a parent who does not elect competent private instruction (CPI), what options are available to the student if [the parents do] not want their student enrolled full time with the public agency?

Answer: The student, if compulsory attendance age, is subject to Iowa Code chapter 299. If a parent does not elect CPI and does not otherwise comply with compulsory attendance law, the school may take any available action, including but not limited to action under Iowa Code chapter 299 or action available under its district attendance policies. If the source of the parent's disagreement is with an IEP Team decision, the parent has procedural safeguards available under the IDEA.

5. For a student who does not qualify for CPI, which may include students residentially placed in a medical facility, what options are available to the student if the parents do not want their student enrolled full time in the public agency?

Answer: The student, if compulsory attendance age, is subject to Iowa Code chapter 299. If a parent is not able to elect CPI and does not otherwise comply with compulsory attendance law, the school may take any available action, including but not limited to action under Iowa Code chapter 299 or action available under its district attendance policies. If the source of the parent's disagreement is with an IEP Team decision, the parent has procedural safeguards available under the IDEA.

HD appealed the department's declaratory order to the district court. The district court affirmed the department's declaratory order. HD appealed the district court's decision to the Iowa Supreme Court (Court).

Issues.

1. Whether the department had the authority to issue the declaratory order.
2. Whether ABA therapy is a "related service" or a "medical service" under the IDEA.
3. Whether the department's declaratory order was supported by substantial evidence regarding the impact of ABA therapy on school attendance.
4. Whether the department's declaratory order constitutes an unjustifiable and illogical interpretation of the IDEA.
5. Whether the department's declaratory order should be considered arbitrary and capricious as a result of the consideration the department gave to letters from a physician and a county attorney.

Holding. The Court held that the department had the authority to issue the declaratory order, ABA therapy is a "related service" under the IDEA, the department's declaratory order was supported by substantial evidence regarding the impact of ABA therapy on school attendance, the department's declaratory order did not constitute an unjustifiable or illogical interpretation of the IDEA, and the department's declaratory order should not be considered arbitrary or capricious as a result of the consideration the department gave to letters from a physician and a county attorney.

Analysis. The Court began its opinion by explaining the statutory framework at the state and federal levels that governs these issues. Pursuant to Iowa Code section 256.1, the department is required to "act in a policymaking and advisory capacity and to exercise general supervision over the state system of education including . . . [p]ublic elementary and secondary schools." Meanwhile, Iowa Code section 299.1(2) empowers school districts to "adopt a policy or rules relating to the reasons considered to be valid or acceptable excuses for absence from school." At the federal level, the IDEA requires that states and schools provide children with disabilities with FAPE. FAPE means special education and "related services," including transportation and developmental, corrective, and other supportive services that are designed to enable a child with a disability to remain in school during the day. However, related services do not include medical services outside of diagnostic or evaluation purposes. The IDEA requires public agencies to work with parents, teachers, and experts to develop an IEP. An IEP describes the FAPE that is required to meet the individual needs of each child with a disability.

Authority of the Department to Issue a Declaratory Order. In holding that the department had the authority to issue the declaratory order, the Court explained that Iowa Code section 256.9(16) authorizes the department to interpret school laws and related rules. Keystone requested that the department interpret Iowa Code chapter 299 (compulsory education requirements) and "clarify its duty under the IDEA to provide FAPE" — legal questions regarding education provided in this state. The department was acting within its authority in issuing the declaratory order regardless of whether the order impacted third parties who were not involved in the proceeding.

ABA Therapy. The Court described ABA therapy as a type of therapy that includes "therapy in receptive and expressive language, play and social skills, functional routines, and cognitive skills development." The Court stated those treatments fit within the definition of "related services" under FAPE. The Court then cited a United States

Supreme Court decision, *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 73 (1999), which held that “medical services” under the IDEA are services that can only be provided by a physician. HD conceded that ABA therapy is performed by certified practitioners, not physicians. Accordingly, the Court concluded ABA therapy is a related service under the IDEA.

Challenge to Sufficiency of the Evidence. HD argued the declaratory order was not supported by substantial evidence regarding the impact of ABA therapy on school attendance. The department responded, and the Court agreed, that the declaratory order addresses questions of law, not facts. The Court rejected HD’s argument because the declaratory order “merely states that the discretion of determining good cause for nonattendance lies with the school authorities on a case-by-case basis.”

Challenge to the Department’s Interpretation of the IDEA. HD argued the department’s declaratory order violates the spirit of the IDEA by giving a public agency discretion to excuse an absence and determining that a public agency can violate the IDEA in allowing an absence for therapy in noncompliance with an IEP. The department argued that “the real question is not whether ABA therapy is beneficial or effective, but instead is who has the legal responsibility to decide when to excuse an absence for private ABA therapy.” The Court stated that Iowa Code section 299.1(2) provides schools with the discretion to decide attendance policies. The Court explained that a student may seek to have ABA therapy on school time included in the student’s IEP as part of the student’s FAPE. The Court concluded it is the school and the public agency that make the decision regarding absences, not physicians.

Failure to Consider Letters from Physicians and a County Attorney. HD argued that the department’s declaratory order should be considered arbitrary and capricious because the department failed to give proper consideration to two letters in the record — one from physicians and one from a county attorney. The Court explained that HD did not provide a good legal argument as to why the department, which is required by Iowa Code section 256.9(16) to interpret school law and supervise the state system of public education, should defer to the interpretation of these physicians and a county attorney.

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