

IOWA DEPARTMENT OF EDUCATION

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| In re: Petition for Declaratory Order |) | |
| |) | Admin. Docket # 5109 |
| Keystone Area Education Agency, |) | |
| |) | DECLARATORY ORDER |
| Petitioner, |) | |
| |) | (Cite as 29 D.o.E. App. Dec 280) |
| Concerning Iowa Code chapters 299 and 299A |) | |
| & Iowa Administrative Code chapter 281-41. |) | |

On September 6, 2019, the Iowa Department of Education received a petition for a declaratory order from Keystone Area Education Agency (“Keystone”), pursuant to Iowa Code section 17A.9 (2019).

The petition posed five questions.

- A. Under Iowa Code chapter 299A, is a public agency required to excuse a student for therapy, with or without a physician’s excuse?
- B. 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?
- C. 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”)?
- D. 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?
- E. 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?

On September 18, 2019, the Department received an answer to Keystone’s petition and a petition in intervention, both filed by Hills & Dales Child Development Center (“Hills & Dales”), an Iowa non-profit corporation. On January 15, 2020, the Dubuque Community School District (“Dubuque”) joined Keystone’s petition. The

Department ordered mediation, which was unsuccessful. I heard oral argument on February 7, 2020, and held the record in this matter open until February 13, 2020, for further exhibits. This matter is fully submitted.

Findings of Fact

Hills & Dales is a health care provider that offers a variety of services to children and adults with intellectual disabilities, one of which is applied behavioral analysis (“ABA Treatment”) from Hills & Dales’ AutismHD Clinics. ABA Therapy includes services to address “receptive and expressive language,” improving behavior, and “play and social skills.” Hills & Dales holds licenses from, or is regulated by, the Iowa Department of Inspections and Appeals, Iowa Medicaid Enterprise, the Centers for Medicare and Medicaid Services, and the Commission on Accreditation of Rehabilitation Facilities. The ABA Treatment is prescribed by physicians and provided by Board Certified Behavioral Analysts (“BCBAs”). Hills & Dales asserts that the ABA Therapy it provides is a medical service.

This action concerns Hills & Dales clients who are also students of the Dubuque Community School District. Some of the students reside at Hills & Dales’ residential facility, and others reside with parents. Hills & Dales professionals have an obligation to provide services consistent with physician orders, such as orders for ABA Therapy. Hills & Dales has provided letters from several families who describe in glowing terms their children’s ABA Therapy.

Dubuque and Keystone are both school corporations under Iowa law, (Iowa Code chapters 274 and 273, respectively), and both are accredited by the Iowa State

Board of Education and under the general supervision of the Iowa Department of Education. Both have received physician orders or notes excusing Hills & Dales clients from school to receive ABA Therapy. For some students, no excuse is necessary because their ABA Therapy has been accommodated by scheduling, such as by arranging study halls or allowing a reduced number of courses for a student close to graduation. For other students, no excuse is necessary because their Individualized Education Program Team (“IEP Team”) has made the decision to shorten their school day. A small number of students who reside at Hills & Dales receive ABA Therapy during the school day, which results in missing instruction. Those range from 11.5 hours per week to 16.5 hours per week. A larger number of students who do not reside at Hills & Dales have elected CPI and have dual enrolled for only a portion of the school day. For some students, Dubuque and Keystone are unable to provide all of the services listed in these students Individualized Education Programs (“IEPs”) due to absences for ABA Therapy. Hills & Dales has expressed concern that, if the students do not receive some ABA Therapy during the school day, they will be required to provide it in the evening, with resulting fatigue or frustration to some students.

The office of the Dubuque County Attorney has written a letter indicating that the office would not prosecute parents for truancy for sending their children to ABA Therapy provided by Hills & Dales.

Conclusions of Law

Iowa Code section 299.1 empowers school districts to “adopt a policy or rules relating to the reasons considered to be valid or acceptable excuses for absence from

school.” The school is responsible for determining whether a particular absence is excused. *Howard-Winneshiek Cmty. Sch. Dist.*, 4 D.P.I. App. Dec. 118, 122 (1985) (parents do not “have the primary authority for determining whether an absence from school is justified”).

In developing and applying its attendance policies, schools have wide latitude and discretion; however, the State Board has recognized this discretion is susceptible to abuse. *Id.* at 122-23. An attendance policy that affords discretion to the district is preferable to “flat, unbending rules which fail to meet the needs of individuals, or a form of ‘Napoleonic Code’ which attempts to envision and rule on every conceivable reason under every conceivable circumstance.” *Id.* at 123.

The Individuals with Disabilities Education Act (“IDEA”) governs Dubuque and Keystone, *see* 34 C.F.R. § 300.2, and requires them to provide a FAPE to students with disabilities, *id.* § 300.101. FAPE is defined as

special education and related services that -

- (a) Are provided *at public expense, under public supervision and direction, and without charge;*
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

Id. § 300.17 (emphasis added). The Supreme Court defined the substantive standard for a FAPE in *Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 1000 (2017) (““reasonably calculated to enable a child to make progress appropriate in light of the

child's circumstances"). "The goals may differ, but every child should have the chance to meet challenging objectives." *Id.*

The IDEA provides that a school day for a child with a disability is the same school day for all individuals, unless a child's IEP Team determines that a shorter school day or a longer school day is required for a FAPE. Iowa Admin. Code r. 281-41.11(1).

The IDEA excludes medical services from the provision of FAPE, aside from medical services necessary as part of an evaluation. *See, e.g.,* 34 C.F.R. § 300.34(c)(5); *see also Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999). The Supreme Court has set a black-and-white rule for this medical-services exclusion: "the services of a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not." *Id.* at 72 (cleaned up).

It is thus settled that the phrase "medical services" in § 1401(a)(17) does not embrace all forms of care that might loosely be described as "medical" in other contexts, such as a claim for an income tax deduction. *See* 26 U.S.C. § 213(d)(1) (1994 ed. and Supp. II) (defining "medical care").

Id. at 74-75. Services performed by a physician (outside of an evaluation) are excluded; services prescribed by a physician are not. The medical-educational distinction is not as clear as posited by Hills & Dales. Just because a service is prescribed by a physician does not mean it automatically is outside of an IEP Team's authority or consideration. The IDEA's text on interagency agreements reinforces this conclusion. That rule provides that Medicaid financial responsibility "must precede" that of education

agencies. 34 C.F.R. § 300.154(a)(1). Continuing, the Medicaid agency must not “disqualify an eligible service for Medicaid reimbursement because that service is provided in a school context.” *Id.* § 300.154(b)(1)(ii).

Unlike dialysis or chemotherapy, two other reasons for which a child may miss school regularly, ABA Therapy is beyond any question an instructional service or support and related service that schools may be required to provide as a part of a FAPE. See, e.g., Claire Maher Choutka et al., *The “Discrete Trials” of Applied Behavior Analysis for Children with Autism: Outcome-Related Factors in the Case Law*, 38 J. Special Educ. 95 (2004) (gathering 68 special education cases decided prior to August 2001). If ABA Therapy is necessary for a FAPE, it is the obligation of the public agency to provide it, either directly or by contract. See, e.g., 34 C.F.R. § 300.17(a). In *Letter to Wymyslo*, 113 LRP 37279 (OSEP 2013), the United States Department of Education (“USDE”) took enforcement action against the state of Ohio for refusing to provide ABA Therapy to infants and toddlers with disabilities under Part C of the IDEA. The USDE stated that ABA Therapy could be a Part C service “if identified by the child’s Individualized Family Service Plan (IFSP) Team as necessary to meet the unique developmental needs of a particular infant or toddler.” *Id.*

In a *Dear Colleague Letter*, 66 IDELR 21 (OSEP 2015), the USDE recognized that ABA Therapy is an important methodology for educating students with autism spectrum disorder. However, the USDE cautioned against relying exclusively on ABA Therapy without including or considering other types of services “that might be appropriate for children with” autism spectrum disorders.

A recommendation from a physician is entitled to great weight, but is not binding on an IEP Team. For example, a physician's recommendation for physical restraint was not binding on an IEP Team, which had determined the seclusion was more appropriate for a child with challenging behaviors. *M.M. v. District 0001 Lancaster County Sch.*, 702 F.3d 479 (8th Cir. 2012).

An IEP Team must consider the results of outside therapy. In *Letter to Lillie & Felton*, 23 IDELR 714 (OSEP 1995), the USDE considered whether an evaluation team must consider the results of extra tutoring provided by parents to students with learning disabilities. The USDE's answer was "yes."

Generally, it would be appropriate for the evaluation team to consider information about outside or extra learning support provided to the child in developing the written report required at [citation], as such information may indicate that the child's current educational achievement reflects the service augmentation, not what the child's achievement would be without such help.

Id. The IEP Team must consider the results of outside therapy to determine if it is providing sufficient services to provide a FAPE.

If a service is required to provide a FAPE, the public agencies have discretion in selecting how that service is provided and who provides it. Public agencies are not bound by a parent's request for a particular staff member, or a parent's request or private provider's request that a particular private provider be used. *See, e.g., Bradley v. Arkansas Dep't of Educ.*, 443 F.3d 965 (8th Cir. 2006).

If a parent does not agree with a school's decision on whether to include ABA Therapy in an IEP, the parent has procedural safeguards under the IDEA. *Letter to*

Anonymous, 102 LRP 9238 (OSEP 2000). This would also include other decisions, including decisions on the length of school days. The parties may resolve any dispute through mediation and, if they agree, execute a legally binding agreement. 34 C.F.R. § 300.506.

Keystone and Dubuque are subject to monitoring by the Department for special education compliance and enforcement. 34 C.F.R. § 300.600. This includes compliance with the IDEA's program requirements. 34 C.F.R. § 300.600(b)(2). This monitoring is independent of any claims a parent may assert in a due process complaint, mediation request, or administrative complaint.

The IDEA does not directly regulate Hills & Dales. 34 C.F.R. § 300.2(c). Any relationship between Hills & Dales and the IDEA is indirect and based on a contract relationship with a public agency that is subject to the IDEA. *See generally id.*

Private instruction is one way to meet the law's requirement for compulsory attendance. Iowa Code ch. 299A. Special education is available to students with disabilities. *Id.* § 299A.9. Dual enrollment for special education services is also available. *Id.* § 299A.8(1) ("any academic activities in the district"). Chapter 299A places limits on who may provide private instruction when the instructor is not a licensed teacher. *See, e.g., id.* § 299A.3 ("parent, guardian, or legal custodian").

Discussion

Attendance policy. The law vests the Dubuque Community School District with broad discretion in determining whether an absence is excused or not excused. Iowa Code § 299.1. That discretion is subject to checks on its abuse. *Howard-Winneshiek Cmty.*

Sch. Dist., 4 D.P.I. App. Dec. at 122-23. Whether a district abuses its discretion is largely determined by the facts of each case.

It would be improper to cast the power provided to school districts in such a manner that it would be completely subject to a physician order or the charging decision of a county attorney. The fact that a physician might have provided a note, or the fact that a county attorney indicated no intent to prosecute truancy violations, is a factor for the district to consider and weigh in light of all other factors, including whether the frequent absences (excused or not) are depriving a child of a FAPE.

FAPE. The fact that Hills & Dales considers ABA Therapy to be a medical service provided according to a “medical model” is instructive, but not binding on Keystone, Dubuque, or the Department. ABA Therapy may also be required to provide a FAPE, and it is to be weighed in light of all other services required for a FAPE. Keystone and Dubuque are held to the obligations imposed by the IDEA and professional rules and norms, just as Hills & Dales is also held to the standards governing its practice.

The Department has no intent to “marginalize” (Tr. p. 21) the services provided by Hills & Dales or the opinions of the students’ physicians. Rather, the Department must give proper weight to all services, including educational services, during the school day. Adopting the position asserted by Hills & Dales, in contrast, would “marginalize” the proper role and public function of public education by making services provided by schools and AEAs always secondary to the ABA Therapy services provided by Hills & Dales or other private providers. The physicians and Hills & Dales providers are certainly experts; however, so are the professionals employed by

Dubuque and Keystone. The function of the IEP Team is to ensure that all areas of expertise are gathered together and given the proper weight in light of the IDEA's standards.

When considering the authorities cited above, IEP Teams must consider whether ABA Therapy services are required for a FAPE. This is clear in the present facts because the listed ABA Therapy goals ("receptive and expressive language," improving behavior, and "play and social skills") closely relate to matters of IDEA concern. *See, e.g.,* 34 C.F.R. § 300.304(c)(4) ("The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, *social and emotional status*, general intelligence, *academic performance*, *communicative status*, and motor abilities.") (emphasis added). To the extent that ABA Therapy services are required for a FAPE, the IEP Team determines the extent to which those services are to be provided by public agencies and the extent, if at all, those services are to be provided by a private provider. If those services are to be provided by a private provider, those services are subject to supervision by Keystone and Dubuque for IDEA compliance. Hills & Dales' argument, that its services are providing a FAPE, is based on a flawed premise. It would require ignoring operative language in the definition of FAPE. 34 C.F.R. § 300.17(a) (under public supervision and direction). The cases cited by Hills & Dales in its brief (pp. 3-4) all concern requests by parents for schools to fund ABA Therapy. They do not stand for the proposition that private-provided ABA Therapy is a FAPE.

If ABA Therapy services are not required for a FAPE, Keystone and Dubuque have no obligation to provide them. In any event, the parents would be entitled to a

prior written notice describing those decisions (34 C.F.R. § 300.503) and entitled to procedural safeguards, including mediation, due process complaints, and administrative complaints (*see id.* § 300.502). If ABA Therapy services are not required for a FAPE, then Keystone and Dubuque should exercise great caution before allowing the child to miss IDEA-required services for non-IDEA-required ABA Therapy.

An IEP Team may determine that a child requires a shortened school day, if necessary for a FAPE. Iowa Admin. Code r. 281-41.11(1). This could include shortening a school day if a particular child has specific needs or concerns, such as fatigue. This would not include shortening a school day to provide outside services that are not necessary for a FAPE, in lieu of school-provided services that would be required for a FAPE.

If a student has time in her or his schedule during the school day, such as a senior who is permitted to schedule a partial day based on credits earned or a student who has the ability to schedule study hall at a convenient time, allowing a student to do this would be permissible. This is a general education rule and flexibility available to all students, not a decision that must be made by the IEP Team.

If a student receiving ABA Therapy from Hills & Dales is required to miss school and Keystone and Dubuque, considering the facts of each case, determine that the absences are to be excused under section 299.1, the IEP Team may need to consider whether an extended school day, extended school week, or extended school year is appropriate.

Private Instruction. Parents have broad latitude and choice in providing home instruction to their children; however, that latitude and choice is not limitless. Section 299A.9 provides checks on competent private instruction for children with disabilities. Further, chapter 299A provides limits on providing competent private instruction by nonparents who do not have teaching licenses. Private instruction is a creature of statute, and any changes will require legislative action.

Conclusion

In light of the preceding findings of fact, conclusions of law, and discussion, I make the following declaratory rulings.

- A. 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.

- B. 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.

- C. 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 if the services required by a child's IEP are not provided because the child is being withheld from school for private therapy.

- D. For a parent who does not elect competent private instruction ("CPI"), what options are available to the student if their child does 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.

- E. 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

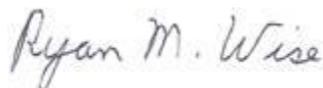
source of the parent's disagreement is with an IEP Team decision, the parent has procedural safeguards available under the IDEA.

Aside from these orders as stated above, the Department makes no further declaration, ruling, or order.

I would like to compliment the attorneys for their skill in presenting their respective positions, both in briefing and at oral argument.

This declaratory order has the same status and binding effect as a final order issued in a contested case proceeding.

Done on March 13, 2020, in Des Moines.



Ryan Wise
Director
Iowa Department of Education

Copies to Counsel