IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 21-0095

HILLS & DALES CHILD DEVELOPMENT CENTER,

Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF EDUCATION,

Respondent-Appellee,

and

KEYSTONE AREA EDUCATION AGENCY and
DUBUQUE COMMUNITY SCHOOL DISTRICT,

Intervenors.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE THOMAS A. BITTER, JUDGE

RESPONDENT-APPELLEE'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases: **Page(s)**

Rules:

Statutes:

Other:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DEPARTMENT HAD AUTHORITY TO ISSUE THE DECLARATORY ORDER.

Authorities

Ahrendsen ex rel. Ahrendsen v. Iowa Dep't of Human Servs., 613 N.W.2d 674 (Iowa 2000)

Iowa Code 17A.19(10)(b)

Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Just., 867 N.W.2d 58 (Iowa 2015)

Iowa Code § 256.9(16)

Iowa Code § 17A.9(1)

Iowa Code § 17A.9(1)(*a*)

281 Iowa Admin. Code r. 3.1

Iowa Code § 256.1

Iowa Ass'n of Sch. Boards v. Iowa Dep't of Educ., 739 N.W.2d 303 (Iowa 2007)

Iowa Code chapter 299

Iowa Code chapter 299A

II. WHETHER THE DEPARTMENT'S INTERPRETATION OF THE TERM "MEDICAL SERVICES" IN THE IDEA IS CORRECT.

Authorities

Irving Indep. Sch. Dist. v. Tatro, 486 U.S. 883 (1984)

34 C.F.R. § 300.34(c)

Cedar Rapids Cmty Sch. Dist. v. Garret F., 526 U.S. 6 (1999)

20 U.S.C. § 1401(26)(A)

John T. v. Marion Independent School Dist., 173 F.3d 684, n.1 (8th Cir. 1999)

Mary T. v. School Dist. of Philadelphia, 575 F.3d 235 (3rd Cir. 2009)

State v. Sweet, 879 N.W.2d 811 (Iowa 2016)

III. WHETHER THE DECLARATORY ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Authorities

Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493 (Iowa 2003)

Peoples Mem'l Hosp. v. Iowa C.R. Comm'n, 322 N.W.2d 87 (Iowa 1982)

IV. WHETHER THE DEPARTMENT CORRECTLY INTERPRETED THE IDEA.

Authorities

Endrew F. v. Douglas County School Dist. RE-1, 137 S. Ct. 994 (2017)

Bradley v. Arkansas Dept. of Educ., 443 F.3d 965 (8th Cir. 2006)

20 U.S.C. § 1400(d)

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176 (1982)

34 C.F.R. § 300.17(a)

20 U.S.C. § 1414

20 U.S.C. § 1401(29)

20 U.S.C. § 1415 *et seq.*

Dear Colleague Letter, 66 IDELR 21 (OSEP 2015)

V. WHETHER THE DEPARTMENT GAVE PROPER CONSIDERATION TO THE LETTERS FROM THE COUNTY ATTORNEY AND LOCAL PHYSICIANS AND WHETHER THE DECLARATORY ORDER IS ARBITRARY OR CAPRICIOUS.

Authorities

Endrew F. v. Douglas County School Dist. RE-1, 137 S. Ct. 994 (2017)

Iowa Code § 299.1

M.M. v. District 001 Lancaster Cnty. Sch., 702 F.3d 479 (8th Cir. 2012)

ROUTING STATEMENT

Because this case involves the application of existing legal principles, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(*a*).

STATEMENT OF THE CASE

Iowa's obligation to educate children with disabilities is established and governed by the federal Individuals with Disabilities in Education Act, or IDEA. The IDEA represents "an ambitious federal effort to promote the education of handicapped children" and it requires that to the maximum extent possible, children with disabilities should be educated with children who are not disabled. 20 U.S.C. § 1412(a)(5); *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 179 (1982). Among other things, the IDEA supplies the states with federal funding for specialized education services to assist eligible disabled children. Iowa administers those funds through the Iowa Department of Education ("Department"), area education agencies, and local school districts. *See* Iowa Code chapters 256B, 273; 281 Iowa Admin. Code ch. 41. Keystone Area Education Agency ("Keystone") is the state agency responsible for identifying and serving children who require special education in northeast Iowa, including in the Dubuque Community School District.

Keystone sought guidance from the Department regarding some of its obligations to children eligible for special education and options available to families. Therefore, Keystone submitted a request for Declaratory Order to the Department. After receiving briefing and argument, the Department declared the following: that it is the responsibility of a public agency to determine what is a Free and Appropriate Public Education ("FAPE"), which the IDEA requires a public school to provide to all students with disabilities; that a public agency has discretion in whether to excuse a student for a medical appointment; and that if a public agency excuses a student for therapy, it may violate federal law if the student then misses services required for a FAPE. The Department answered Keystone's questions of law. It did not make any declaration regarding whether particular students may be absent from school or what services they should receive.

Hills & Dales Child Development Center ("Hills & Dales"), a nonprofit service provider for individuals with disabilities, intervened in the matter before the agency and sought judicial review of the Department's Declaratory Order. Hills & Dales is concerned about the effect of the Department's Declaratory Order on children with autism that it treats and challenges the Department's interpretation of the law.

The District Court ruled that the Declaratory Order was a correct statement of the law, was supported by substantial evidence, and was not arbitrary or capricious. Hills & Dales appeals from the District Court's ruling dismissing its petition for judicial review.

STATEMENT OF FACTS

Keystone sought a declaratory order because of its concern that students eligible for special education were missing time in school to attend private therapy at Hills & Dales. (CR at 1-3; App. 12-14.) Keystone requested guidance from the Department on whether a doctor's note excused its obligation under federal and state law to provide special education services to school-age children. The core of this dispute is that although Hills & Dales provides therapy for students with disabilities, it is not a school, and cannot provide the education that Iowa children are entitled to and required to attend. 20 U.S.C. § 1400 *et seq.* (IDEA); Iowa Code ch. 299 (compulsory education). Iowa schools and AEAs provide that education. Under the law, the AEA and local district, not any private provider, are responsible for determining whether a child is eligible for special education and what services eligible children should receive. 20 U.S.C. § 1414; 281 Iowa Admin. Code ch. 41.

A. Hills & Dales.

Hills & Dales is a private, nonprofit health care agency that provides services to children and adults with intellectual disabilities, including autism. One of the services Hills & Dales provides is applied behavior analysis, or ABA Therapy. (CR at 13; App. 24.) ABA Therapy helps children with autism improve behavior, receptive and expressive language, play and social skills. ABA Therapy can be prescribed by a physician or identified by a school team as a needed service as part of an IEP. It is provided by trained behavior analysis, not physicians. (CR at 13; App. 24.) Parents whose children have received ABA Therapy provided written testimony that was introduced into the record. (CR at 53-54; App. 64-65.) They report that ABA Therapy has helped their autistic children to participate in school and family life. *Id.*

Hills & Dales treats some children with ABA Therapy who are able to live at home with their families. In the Certified Record, Hills & Dales called these children the "Treated Students"; at the time the Department issued its Declaratory Order there were fourteen (14) Treated Students. (CR at 30; App. 41.) In addition, some children reside full time at Hills & Dales and receive ABA Therapy. (CR at 29; App. 40.) These children are called the "Treated Residents"; at the time of the Declaratory Order there were

eight (8) Treated Residents. *Id.* Hills & Dales disputes how much school time the Treated Students and Treated Residents miss, but it is clear that some have missed some time in school, and this problem will likely recur. *See* (Appellant's Brief, p. 14.) Hills & Dales asserts that the Treated and Resident Students must receive ABA therapy during the school day. (Pet'r's Reply Brief, App. 236.)

Hills & Dales is not an accredited nonpublic school. (Pet'r's Brief, p. 11; Hills & Dales does not provide educational services), (CR at 33, App. 44), (Hills & Dales' licensing does not allow treated residents to choose competent private instruction and dual enroll). It cannot provide school or special education services for its child residents, and so both resident and nonresident students have to choose some other option to comply with Iowa's compulsory education statutes and to access the special education services provided in public school. The IDEA does not regulate Hills & Dales. 34 C.F.R. § 300.2(c).

B. Compulsory Education in Iowa.

The state may set minimum educational standards for all its children and has a corresponding responsibility to see that those standards are honored. *Johnson v. Charles City Cmty. Sch. Bd. of Educ.*, 368 N.W.2d 74, 79 (Iowa 1985). Under Iowa law, children between the ages of six and

sixteen must attend school. Iowa Code § 299.1. Iowa's compulsory education statute, Chapter 299, provides that each district may adopt a policy or rules relating to the reasons considered to be valid or acceptable excuses for absence from school. *Id.* A student who fails to attend school is deemed truant. Iowa Code § 299.8.

Under Chapter 299, a student of mandatory attendance age in Iowa must attend public school, an accredited private school, or choose one of the private instruction options. Private instruction (or "homeschooling") is one way to satisfy Chapter 299. Iowa Code § 299A. Parents who wish to educate their school-age children outside of their local public school or an accredited private school have three options. First, they may choose competent private instruction under the supervision of a licensed teacher. Iowa Code § 299A.2. Second, they may choose competent private instruction under the supervision of someone who is not a licensed teacher, but who is a parent, guardian, or legal custodian. Iowa Code § 299A.3. Third, they may choose independent private instruction that is exempt from most school statutes and rules and may be taught by any person. Iowa Code § 299A.1(2)(b).

Parents choosing competent private instruction, whether with a licensed teacher or a parent/guardian, can dual enroll their student in their

local public school for services or extracurricular activities, including special education services, and spend part of the day at public school. Iowa Code § 299A.8. Parents who choose independent private instruction, however, cannot dual enroll in public school. *Id.* Therefore, parents of children who need to dual enroll to receive special education services can only homeschool their child if a licensed teacher or a parent/guardian can teach them. Treated Residents at Hills & Dales cannot dual enroll in the Dubuque Community School District unless a parent or guardian provides instruction, because Hills & Dales is not a school and employs no licensed teachers.

C. The Individuals With Disabilities in Education Act (IDEA).

The purpose of the IDEA is "to ensure that all children with disabilities have available to them appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d). The IDEA requires states and schools to provide disabled children with a "free and appropriate public education" (FAPE) and "related services." *Cedar Rapids Cmty. Sch. Dist. v. Garrett F.*, 526 U.S. 66, 68 (1999); 34 C.F.R. § 300.2. FAPE is defined as a course of study "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," that is provided at public expense, under public supervision and direction. *Endrew F. v. Douglas County School*

Dist. RE-1, 137 S. Ct. 988, 1000 (2017); 34 C.F.R. § 300.17. FAPE includes both specially designed instruction to meet the unique needs of the child and related services, including transportation and developmental, corrective, and other supportive services as may be required to assist a child with a disability to benefit from special education. 20 U.S.C. §§ 1401(9),(26), and (29); 281 Iowa Admin. Code r. 41.17. The IDEA does not require a school to provide "medical services," which is defined as services that must be performed by a physician and cannot be performed by other trained personnel in schools. *Cedar Rapids*, 526 U.S. at 73-74.

The core of the IDEA is "the cooperative process that it establishes between parents and schools." *Schaffer v. Weast*, 546 U.S. 49 (2005). A public agency must develop an Individualized Education Program, or "IEP," which means a written statement for each child with a disability. 20 U.S.C. § 1401. The IEP is the means by which special education and related services are tailored to the unique needs of a particular child under the IDEA. *Endrew F.*, 137 S. Ct. at 988. The function of the IEP Team within a public school is to ensure that all areas of expertise are gathered together and given the proper weight in light of the IDEA's standards. (CR at 78; App. 89).

If parents are unsatisfied with the decisions made by their child's

school and IEP Team, there are procedural safeguards in IDEA to protect them and their child. State law governs an administrative appeal process for challenging a child's IEP. After exhausting these remedies, an aggrieved parent may seek judicial review in state or federal court. 20 U.S.C. § 1415; 281 Iowa Admin. Code r. 41.516. In conducting that review, the court "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2); *Indep. Sch. Dist. No. 283 v. S.D. by J.D.*, 88 F.3d 556, 560 (8th Cir. 1996). If, therefore, a child's physician recommended a service and the school did not include it in the child's IEP, the parents of the child have the opportunity to challenge the school's decision.

IDEA imposes significant obligations and responsibilities on Area Education Agencies and school districts. They are subject to monitoring by the Department for special education compliance and enforcement. 34 C.F.R. § 300.600. If the AEA or school elects to have any services for students provided by a private agency, the public agencies must supervise that private provider. Enforcement can include the withholding of funds, or a corrective action or improvement plan. 34 C.F.R. § 300.600(a).

D. The Department's Declaratory Order.

On September 9, 2019, the Department received a Petition for a Declaratory Order from Keystone, pursuant to Iowa Code section 17A.9. (CR at 1-3; App. 12-14.) The Petition posed five questions:

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

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?

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 and Appropriate Public Education (FAPE)?

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?

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?

On September 18, 2019, the Department received an Answer to Keystone's Petition and a Petition in Intervention, filed by Hills & Dales. (CR at 12-14; 17-19; App. 23-25, 28-30.) On January 15, 2020, the Dubuque Community School District joined Keystone's petition. The parties filed briefs. (CR at 29-37, App. 40-48; Hills & Dales Brief); (CR at 4-11, App. 15-26; Keystone Brief); (CR 38-43, App 49-54; Keystone Reply Brief). Hills & Dales also submitted Supplemental Exhibits. (CR at 45-68;

App. 56-79.) The Director of the Department heard oral argument on February 7, 2020 and held the record open for additional documents until February 13, 2020. (CR at 69-70; App. 80-81.) The Director issued the Declaratory Order answering Keystone's questions on March 13, 2020. (CR 69-82, App. 80-93; Declaratory Order.)

In its Declaratory Order, the Department analyzed the applicable law. It then answered Keystone's questions as follows:

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

   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?

   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 and Appropriate Public Education (FAPE)?

   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.

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?

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?

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.

(CR at 80-82; App. 91-93.)

ARGUMENT

The Department had the authority to issue the Declaratory Order in response to Keystone's request. The order is a correct statement of the applicable law. To the extent that it includes any facts, it is supported by substantial evidence. It is not arbitrary or capricious. The Court should affirm the Declaratory Order and the District Court's dismissal of Hills & Dales' petition for judicial review.

I. THE DEPARTMENT HAD AUTHORITY TO ISSUE THE DECLARATORY ORDER.

A. Preservation of Error and Standard of Review.

Hills & Dales has not preserved this issue, since it raised it for the first time in its Petition for Judicial Review and did not raise it before the agency. This Court's review is limited to questions considered by the agency. *Ahrendsen ex rel. Ahrendsen v. Iowa Dep't of Human Servs.*, 613 N.W.2d 674, 676 (Iowa 2000). The Court's review on petitioner's claim that agency action is beyond the agency's statutory authority under Iowa Code 17A.19(10)(b) is for errors at law. *Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Just.*, 867 N.W.2d 58, 64 (Iowa 2015).

B. Argument.

The District Court correctly held that the Department had the authority to issue the declaratory order, because the director of the Department is given broad authority in Iowa law to interpret school laws and the agency action clearly involved the interpretation of school laws. Iowa Code § 256.9(16); Iowa Code § 17A.9(1) (Any person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency). Hills & Dales argues that the Department did not have the authority to issue this Declaratory Order because it affects Hills & Dales and

the students it treats, and the Department does not regulate Hills & Dales. (Appellant's Brief, p. 19.) The District Court correctly held that any effect on Hills & Dales' operations is not germane to the question of whether the Department acted within its authority. (App. 252-262.)

Under the Iowa Administrative Procedure Act (IAPA), "Any person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency." Iowa Code § 17A.9(1)(*a*). The Department of Education has adopted a corresponding rule allowing any person to petition the Department for a declaratory order. *See Iowa Ins. Inst.*, 867 N.W.2d at 61; 281 Iowa Admin. Code r. 3.1.

The Director of the Department has been granted authority in the Iowa Code to interpret school laws and rules related to the school laws. Iowa Code § 256.9(16). The Department was created to exercise general supervision over the Iowa state system of public education. Iowa Code § 256.1. The Supreme Court has held that "it is undeniable that this statute clearly vests the director with discretion to interpret "school laws." *Iowa Ass'n of Sch. Boards v. Iowa Dep't of Educ.*, 739 N.W.2d 303, 307 (Iowa 2007). The Declaratory Order clearly interprets Iowa school law, including Chapters 299 and 299A, and the IDEA. It gives direction only to Keystone

and the Dubuque Community School District, which the Code allows the Department to supervise.

Hills & Dales argues that the Declaratory Order is beyond the Department's statutory authority because it affects Hills & Dales, an entity that it does not regulate. (Appellant's Brief, p. 18-19.) The District Court properly rejected this argument. (App. 259.) In the *Iowa Insurance Institute* case, this Court recognized that agency declaratory orders can affect nonparties to the proceeding before the agency, and that they are not rendered invalid or ineffective if they do. "Practically speaking, the commissioner's declaratory order—especially once reviewed by this court—can affect nonparties as a precedent. But, of course, that is true of any declaratory order, and any contested case proceeding as well." *See Iowa Ins. Inst.*, 867 N.W.2d at 66-67; 281 Iowa Admin. Code r. 3.12 ("A declaratory order has the same status and binding effect as a final order issued in a contested case proceeding."). Businesses that might employ public school students are also affected by Iowa's compulsory education laws, for example. That does not mean that the Department is improperly regulating local business when it requires potential employees to be in school during the day instead of working. Likewise, the Department did not exceed its authority when it issued an order that affects Hills & Dales.

Hills & Dales also argues that the Department exceeded its authority because it injures the Treated and Resident Students and prevents them from obtaining ABA Therapy. (Appellant's Brief, pp. 20-22.) This argument is both factually incorrect and unrelated to the issues at hand. It is factually incorrect because Dubuque Community School District staff can provide ABA Therapy during school hours if a student's IEP Team decides that the student's IEP should include it. (CR at 5; App. 16.) If the IEP Team determines that ABA Therapy is not part of a student's IEP, the Declaratory Order still does not mean that students cannot receive ABA Therapy. In such a case, it means that a student cannot receive ABA Therapy during school hours. A student may receive ABA Treatment outside of school hours, even if ABA Therapy is not part of a student's IEP.

Hills & Dales' argument that students will be denied therapy is also immaterial to the question of the Department's authority. The Department did not decide whether ABA Therapy is beneficial or not. The Department's decision indicated that IEP teams determine what services are necessary for FAPE, and that if students miss services necessary for FAPE to attend outside therapy, the public agencies could violate the IDEA. These are issues that the Department was within its statutory authority to address. *Iowa Ass'n of Sch. Boards*, 739 N.W.2d at 307.

II. THE DEPARTMENT'S INTERPRETATION OF THE TERM "MEDICAL SERVICES" IN THE IDEA IS CORRECT.

A. Preservation of Error and Standard of Review.

The Department agrees with Hills & Dales' statements on scope of review and standard of review and agrees that Hills & Dales properly preserved its arguments below.

B. Argument.

The Department determined that ABA Therapy is "beyond any question an instructional service or support and related service that schools may be required to provide as part of FAPE." (CR at 74; App. 85.) The District Court affirmed the Department's conclusion, and this Court should also.

Under IDEA, schools are responsible for providing eligible children not just with classroom instruction, but also with "related services" that enable those children to have meaningful access to education. *Irving Indep. Sch. Dist. v. Tatro*, 486 U.S. 883, 891 (1984). Schools are not, however, responsible for providing "medical services" which are beyond their competence. 34 C.F.R. § 300.34(c); *Cedar Rapids Cmty Sch. Dist. v. Garret F.*, 526 U.S. 6 (1999). Hills & Dales argues that the Department erroneously determined that ABA Therapy is a related service, not a medical service. Hills & Dales argues that ABA Therapy is a "medical service," and is not

part of FAPE, and that the Department erroneously concluded that it is part of the school's obligation to decide if a student requires it and to provide it. (CR at 74; App. 85.)

The Department was correct in its interpretation of the term "medical services" because (1) the text of the IDEA supports the proposition that ABA Treatment is a related service and (2) the United States Supreme Court holding in *Cedar Rapids v. Garret F.* is controlling, binding authority and declares that the "medical services" exemption refers to those services that must be performed by a physician.

First, ABA Therapy fits neatly within the statutory definition of a related service. A "related service" is defined in IDEA as:

> The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, *psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services*, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, *counseling services, including rehabilitation counseling, orientation and mobility services*, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required *to assist a child with a disability to benefit from special education*, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(26)(A) (emphasis added).

ABA Therapy is a related service that may be required to assist a child with a disability to benefit from special education, fitting the definition in the IDEA. It could be described as physical therapy (helping with bathroom skills, buttons, and dressing); as counseling (helping with challenging behaviors); or as psychological services (helping with interactions with people and being prepared to learn in school). (CR 53-54; App. 64-65.) The treatment helps children with autism learn skills they need to be able to go to school and to learn there, including speech, self-care, and self-control skills. (CR at 46-50; App. 57-61.) The pediatricians cited by Hills & Dales describe the treatment as helping students "reach their fullest potential" at school. (CR at 35; App. 46.) A parent noted "This treatment has helped get him [her child] ready to learn in the public school environment, as well as, reduce some very challenging behaviors that have excluded him from participating in the school environment." (CR at 53; App. 64.) ABA Therapy clearly fits within this statutory definition of a related service.

Second, the United States Supreme Court has provided clear and settled guidance that a "medical service" is a service that can only be provided by a physician. *Cedar Rapids*, 526 U.S. at 73-74; (CR at 73; App. 84); see also *John T. v. Marion Independent School Dist.*, 173 F.3d 684, 687 n.1 (8th Cir. 1999). Contrary to Hills & Dales' assertion, the fact that ABA

Therapy is not provided by a physician is dispositive of the issue. (Appellant's Brief, p. 25.) In *Cedar Rapids*, a case arising out of an Iowa school district, the Supreme Court held that operating a student's ventilator was a related service because non-physicians could be trained to do the task. *Cedar Rapids*, 526 U.S. at 77-79. The Court expressly rejected the multi-factor approach offered here by Hills & Dales, and neither cost nor the importance of the service matter to the determination of whether the service is a "medical service." *Id*. at 75. ABA Therapy is not provided by a physician and so is not a "medical service" under the binding precedent in *Cedar Rapids*. *Id.*

Hills & Dales argues that ABA Therapy can be considered a medical service even though it concedes that it is not provided by a physician. It points to a case from the Third Circuit which, it argues, calls into question the Supreme Court's bright line rule that if a service is not provided by a physician, it is not a medical service under IDEA. *Mary T. v. School Dist. of Philadelphia*, 575 F.3d 235, 248 (3rd Cir. 2009); (Appellant's Brief, p. 25.) It appears that in *Mary T.*, the Third Circuit departed from the clear guidance the Supreme Court provided in *Cedar Rapids* and considered the costs of the services at issue, perhaps because of the unusual facts of the case. *Id*. at 248. However, Hills & Dales' argument based on *Mary T.* is not persuasive

because the case is not controlling precedent in Iowa and is distinguishable on its particular facts.

In *Mary T.*, the court decided that a student's six-month inpatient stay at a psychiatric hospital in another state was not a related service for which her home school district would be responsible, even though not every service at that hospital was provided by a physician. *Mary T.*, 575 F.3d at 248. The Third Circuit considered the costs of the service and the fact that the student's medical needs were far beyond the range of competence of any public school district in determining that the services were "medical services." *Id*.

The Third Circuit's analysis in *Mary T.* is inconsistent with the U.S. Supreme Court's clear holding that an excluded "medical service" is one that only a physician can provide. *Id*.; *Cf. Cedar Rapids*, 526 U.S. at 73-74. However, it is the United States Supreme Court's holding, and not the Third Circuit's, which is binding precedent in this Court. *State v. Sweet*, 879 N.W.2d 811, 832 (Iowa 2016) (United States Supreme Court decisions on federal law is binding on state high courts). The Department's analysis is correct under *Cedar Rapids*, and for this reason alone the Court should disregard the *Mary T.* case and affirm the Department's decision on this issue.

In addition, the Third Circuit's decision in *Mary T.* rests on unusual facts that are not present here. The student in *Mary T.* was admitted to the acute-care ward of a psychiatric treatment facility and her treatment plan did not contain any academic goals. *Id*. at 241. Even with several weeks of extensive support and services, the student was not stable enough to undergo evaluation or receive educational services. *Id.* As such, the Third Circuit noted that the services being provided were likely not even "supportive services" since her medical needs and academic needs were separated and she was not receiving any academic services.

The issue of whether a school should be responsible for a child's extended in-patient hospital stay where no educational services were possible is very different from the circumstances here. ABA Therapy is designed to address student's behaviors and can be provided by public agencies if the student's IEP team determines such services are necessary to provide FAPE. In sum, ABA Therapy is neither "unduly expensive" nor "beyond the range of [the] competence" of the school and is a covered related service that can be part of FAPE. *Id*. at 247. The District Court correctly affirmed the Department on this issue.

III. THE DECLARATORY ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Preservation of Error and Standard of Review.

The Department agrees with Hills & Dales' statements on scope of review and standard of review and agrees that Hills & Dales properly preserved its arguments below.

B. Argument.

Hills & Dales makes two arguments to support its claim that the Department's Declaratory Order is not based on substantial evidence. First, it argues that Keystone misrepresented the number of students who miss school time to receive ABA Therapy and that the Department relied on Keystone's statement. Second, it argues that the Department failed to consider the evidence that ABA Therapy decreases in duration over time. (Appellant's Brief, p. 27-28.) For the reasons explained below, neither of Hills & Dales' arguments succeed and the District Court was correct to reject them.

The Department's Declaratory Order does not rely on a great many facts or pieces of evidence. In the main, it is a statement of the law. It considers the fact that ABA Therapy is a service prescribed by a physician, but performed by a non-physician. (CR at 73-74, App. 84-85) ("just because

a service is prescribed by a physician does not mean it automatically is outside of an IEP Team's authority or consideration.") It considers the fact that Hills & Dales nevertheless believes ABA Therapy is a medical service. (CR at 77, App. 88.) Otherwise, the Declaratory Order does not address specific factual circumstances, but advises readers on the applicable law.

Hills & Dales first complains about a statement Keystone made in its briefing to the agency: "the outside therapy effectively removes a child from school for half of the school day, every day, which results in the student being deprived of a substantial portion of their education." (CR at 39; App. 50; Appellant's Brief, p. 30.) Hills & Dales views this statement as exaggerated and points out that in fact, only "a handful" of the Treated Residents miss school time for ABA Therapy. (CR at 45-51, App. 56-62; Hills & Dales list of treated residents). But Keystone's statement about children missing half the school day does not appear anywhere in the Declaratory Order. In fact, as Hills & Dales admits, the Declaratory Order noted that for most of the affected students, attendance has not been an issue because their ABA Treatment has either been accommodated by general scheduling (e.g., arranging study halls) or their IEP Team has instituted a shortened school day. (Appellant's Brief, p. 30.) The District Court correctly found that one party submitting evidence or argument that the

agency did not in fact rely on is not a basis for a substantial evidence challenge. (App. 260.)

Hills & Dales' second argument is that the Department put inadequate weight on the fact that ABA Therapy decreases in duration over time. This argument also provides no basis to reverse the Declaratory Order. The only page in the record Hills & Dales cites to, page 127, is a transcript of an argument by Hills & Dales' attorney, which is not evidence. (CR at 127, App. 138.) However, even if the Department concedes that ABA Therapy decreases over time, the Department's Declaratory Order is still accurate and supported by substantial evidence. In answering the questions presented by Keystone, it was not relevant to the Department's interpretation of state and federal school laws whether or not ABA Therapy is constant or decreasing in duration. Or, to put it another way, whether or not ABA Therapy decreases in duration over time, the Department's interpretation of school laws would be the same. The fact that the Declaratory Order does not discuss that fact specifically does not make it invalid.

Hills & Dales misrepresents the Department's position, by claiming that the Department viewed "attendance matters" as "irrelevant," which is "plainly false." (Appellant's Brief, p. 29.) The Department did not argue to the District Court that "attendance" was irrelevant. The questions that

Keystone posed to the Department concerned the general issue of "attendance," and when the law requires it. (CR at 1-3; App. 12-14.) Rather, the Department viewed the specific factual assertion made by Hills & Dales about the duration of ABA Therapy to be irrelevant to the questions of law posed by Keystone. In addition, Hills & Dales presents a list of facts related to "attendance" which the Department included in the Declaratory Order. (Appellant's Brief, pp. 28-29.) The Department will agree these facts (or conclusions) relate to attendance. The entire Declaratory Order relates to attendance. These attendance-related facts in the Declaratory Order are accurate and do not provide a basis to reverse the Order.

The two factual issues that Hills & Dales raises here to show that the Declaratory Order is not supported by substantial evidence do not provide a basis to reverse the Declaratory Order. The Department did not rely on the statement by Keystone about how much time the Treated Residents miss. And the question of whose authority and responsibility it is to order ABA Therapy is independent of whether ABA Therapy is permanent or temporary.

The Court's task on judicial review is to "broadly and liberally apply [the agency's] findings to uphold rather than to defeat the agency's decision." *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 501 (Iowa

2003). The question is not whether there is sufficient evidence to warrant a decision the agency did not make, but rather whether there is substantial evidence to warrant the decision it did make. *Peoples Mem'l Hosp. v. Iowa C.R. Comm'n*, 322 N.W.2d 87, 91 (Iowa 1982). The two factual issues that Hills & Dales raises here to show that the Declaratory Order is not supported by substantial evidence do not provide a basis to reverse the Declaratory Order. The Department did not rely on the statement by Keystone about how much time the Treated Residents miss. And the question of whose authority and responsibility it is to order ABA Therapy is independent of whether ABA Therapy is permanent or temporary.

IV. THE DEPARTMENT CORRECTLY INTERPRETED THE IDEA.

A. Preservation of Error and Standard of Review.

The Department agrees with Hills & Dales' statements on scope of review and standard of review and agrees that Hills & Dales properly preserved its arguments below.

B. Argument.

Hills & Dales argues that the Declaratory Order is based on an irrational and wholly unjustifiable interpretation of FAPE under the IDEA. (Appellant's Brief, p. 33.) Specifically, Hills & Dales argues that the Declaratory Order reached an erroneous conclusion when it declared that the

school district could violate the IDEA if it excuses a child for ABA Therapy at Hills & Dales and that child then misses services called for in his or her IEP. *Id.* at 35; (Dec. Order, CR at 81, App. 92.) Because the IDEA is designed to assist eligible students and ABA Therapy is effective, Hills & Dales argues, the Department should allow the Treated Students to be excused for ABA Therapy during the school day even when they miss required services at school. (Appellant's Brief, pp. 34-35.)

Hills & Dales centers its argument on whether ABA Therapy is helpful to the Treated Students, but the Declaratory Order answered a different question: who has the legal responsibility to decide what services students receive: Hills & Dales, or a public agency? The Department correctly concluded that public agencies have the responsibility under IDEA to determine what services a child should receive. *Endrew F.*, 137 S. Ct. at 994; *Bradley v. Arkansas Dept. of Educ.*, 443 F.3d 965, 975-76 (8th Cir. 2006). The Declaratory Order is a correct statement of the law and should be affirmed.

The purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate *public* education…designed to meet their unique needs." 20 U.S.C. § 1400(d) (emphasis added). To accomplish this goal, the IDEA provides federal

money to assist state and local agencies in educating handicapped children. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 179 (1982). The operative language in the IDEA is that FAPE is provided by public schools under public supervision and direction. 34 C.F.R. § 300.17(a). The IDEA assigns to schools the responsibility to determine what services are part of FAPE for each eligible child through the IEP process. 20 U.S.C. § 1414. Although schools can provide FAPE through private providers or in different settings, *see* 20 U.S.C. § 1401(29), schools are not required to accept recommendations from outside parties in the IEP process. *Bradley*, 443 F.3d at 975-76. It was not an erroneous or illogical interpretation of the IDEA to conclude that public agencies must decide what services are part of a student's IEP and how it should be provided. It was a straightforwardly correct reading of the law.

In addition, contrary to Hills & Dales arguments, the Declaratory Order does not say that students should not receive ABA Therapy or that ABA Therapy isn't effective.[1] Indeed, the Order states that ABA Therapy is a "related service" that may be required as part of a FAPE. (CR at 74; App.

[1] The U.S. Department of Education has cautioned that ABA Therapy, while effective, should not be relied on exclusively and IEP Teams should consider other types of services that might be appropriate for students with autism spectrum disorders. *Dear Colleague Letter*, 66 IDELR 21 (OSEP 2015).

85.) But it correctly holds that under the IDEA, the *public agency*, not any outside provider, decides whether and when ABA Therapy is part of a FAPE. *See Endrew F.*, 137 S. Ct. at 994 (An IEP is developed by IEP team including teachers, school officials, and the child's parents, in compliance with IDEA procedures). The public agency has discretion in deciding whether outside therapy should be part of an IEP and who provides it. (CR at 75, App. 86.) If parents disagree with the public agency's assessment, they have appeal rights under IDEA. 20 U.S.C. § 1415 *et seq.*

The Declaratory Order may have effects on Hills & Dales, and on the Treated Students. It may have effects that Hills & Dales is concerned about or finds to be harmful. If a student's IEP Team does not include ABA Therapy as part of an IEP, that student's parents may have to choose between appealing the IEP through IDEA's procedures or seeking private therapy outside of school hours. Hills & Dales, however, is not a party to the IEP process, and has no appeal rights. The Department's statement of the law is incorrect.

V. THE DEPARTMENT GAVE PROPER CONSIDERATION TO THE LETTERS FROM THE COUNTY ATTORNEY AND LOCAL PHYSICIANS AND THE DECLARATORY ORDER IS NOT ARBITRARY OR CAPRICIOUS.

A. Preservation of Error and Standard of Review.

The Department agrees with Hills & Dales' statements on scope of review and standard of review and agrees that Hills & Dales properly preserved its arguments below.

B. Argument.

Hills & Dales argues that the Department's Declaratory Order is arbitrary or capricious because it unreasonably fails to give proper weight to the physicians' letter and the Dubuque County Attorney's letter submitted with Hills & Dales Brief before the agency. (Appellant's Brief, p. 38.) Hills & Dales argues that the Department, the state agency charged by federal and state law with interpreting school law and supervising the Iowa state system of public education, should "defer to these authorities" instead of interpreting the law. *Id.* The District Court rejected this argument and held that the Department did consider the information from the County Attorney and the physicians, and that the Department's action was not arbitrary or capricious. This Court should affirm the District Court's decision.

First, the Department did consider the physicians' letter and the County Attorney's letter. The Declaratory Order discussed them both and explicitly rejected Hills & Dales' position that the public agency is required to defer to either physicians or the county attorney. (CR at 77, App. 88.) Rather, it is the public agency's duty under the law to determine what excuses are reasonable and to provide eligible students with a FAPE. *See Endrew F.*, 137 S. Ct. at 994; Iowa Code § 299.1. The Department noted that a physician's opinion is entitled to great weight, but is not binding on an IEP Team. (CR at 75; App. 86); *M.M. v. District 001 Lancaster Cnty. Sch.*, 702 F.3d 479 (8th Cir. 2012). The County Attorney does not supervise Keystone and Dubuque, and they will not decide if the public agencies have complied with their duty to provide FAPE to all eligible children as required by the IDEA.

Hills & Dales provides no support for its claim that the Department or the public schools should instead defer to outside individuals. The District Court correctly held that the Department was not required to give the County Attorney's or physicians' statements greater weight than other evidence that it found persuasive, or greater weight than the law. (App. 261.) The Declaratory Order and the District Court should be affirmed.

CONCLUSION

Hills & Dales has no role in the process by which the IDEA guarantees eligible disabled Iowa students a free appropriate public education. Rather, as the Department correctly explained in the Declaratory Order, the IDEA assigns that responsibility and duty to public agencies like Keystone and the Dubuque Community School District. These agencies have the responsibility to determine what services will be part of FAPE for each eligible student, and to decide when to excuse students from school hours that should be spent receiving those services. Hills & Dales would like the public agencies to defer this responsibility to itself or to other professionals, but the law does not allow or require that deference.

For all the reasons stated above, the Department respectfully requests that this Court affirm the District Court's decision and the Declaratory Order.

REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests, pursuant to Iowa Rules of Appellate Procedure 6.908, to be heard in oral argument on all issues raised in its appeal brief.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains 7,429 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Date: June 17, 2021

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PROOF OF SERVICE

I, Jordan Esbrook, hereby certify that on the 17th day of June, 2021, I or a person acting on my behalf did serve Appellee's Final Brief and Request for Oral Argument on all other parties to this appeal by EDMS to the respective counsel for said parties:

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CERTIFICATE OF FILING

I, Jordan Esbrook, hereby certify that on the 17th day of June, 2021, I or a person acting on my behalf filed Appellee's Final Brief and Request for Oral Argument with the Clerk of the Iowa Supreme Court by EDMS.

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