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SUPREME COURT OF IOWA

SUPREME COURT NO. 21-0095
DUBUQUE COUNTY CASE NO. CVCV110693

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.

ON APPEAL FROM
THE IOWA DISTRICT COURT IN AND FOR DUBUQUE COUNTY
HONORABLE JUDGE THOMAS A. BITTER
JUDGE OF THE FIRST JUDICIAL DISTRICT

PETITIONER-APPELLANT'S FINAL REPLY BRIEF

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Soo Line R.R. v. Iowa Dept. of Transp., 521 N.W.2d 685, 688-89 (Iowa 1994).

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE IDOE DID NOT EXCEED THE AUTHORITY CONFERRED UPON IT BY ANY PROVISION OF LAW.

With regard to the preservation of this issue, the Iowa Department of Education ("IDOE") argues that, because Hills & Dales Child Development Center

("Hills & Dales") did not raise this issue in the administrative proceedings before the IDOE, the issue has not been preserved. However, the District Court determined that it was appropriate to issue a ruling on this issue in the Judicial Review proceedings because "Chapter 17A of the Iowa Code requires reversal of agency action if that action is beyond the authority delegated to the agency by law." (App. p. 259). The Iowa Court of appeals has opined, "[i]n determining whether the district court erred in exercising its power of judicial review, we apply the standards of Iowa Code section 17A.19(10) to the agency action to determine whether our conclusions are the same as those of the district court." See, *Renewable Fuels, Inc. v. Iowa Insurance Commissioner*, 752 N.W.2d 441, 444 (Iowa Ct. App. 2008) (citing *Williamsson v. Wellman Fansteel*, 595 N.W.2d 803, 806 (Iowa 1999)). Therefore, it follows that it is appropriate for this Court to apply the standards of Iowa Code section 17A.19(10) to the agency action (i.e. the Declaratory Order) to determine whether its conclusions are the same as those of the District Court and, ultimately, to issue a ruling in that regard.

The District Court erred in holding that the IDOE did not exceed the authority conferred upon it by any provision of law. The IDOE argues that the District Court correctly held that "[t]he Director of the IDOE is given broad authority to interpret school laws and rules related to school laws" pursuant to Iowa Code § 256.9(16) and that "[w]hether the agency action has some consequence on how Hills & Dales meets

its obligations is not germane to the question of whether the IDOE acted within its authority." (App. p. 259). Hills & Dales disagrees with the District Court and the IDOE.

In the same manner as the District Court, the IDOE understates Hills & Dales' position by reducing Hills & Dales' argument on this issue to the notion that "the Declaratory Order is beyond the Department's statutory authority because it affects Hills & Dales, an entity that it does not regulate." See, Respondent-Appellee's Brief p. 25. Like the District Court, the IDOE ignores that it is the context of such interference that is the determinative factor and the crux of Hills & Dales' argument on this issue. In this case, the context is that the agency action adversely affects minor children receiving physician-prescribed ABA Treatment at one of the AutismHD Clinics from licensed, Board Certified Behavior Analyst (BCBA) professionals. It is interests of the minor children with autism diagnoses who are subject to Hills & Dales' care obtaining physician-prescribed ABA Treatment Hills & Dales aims, and frankly is required, to protect in these proceedings.

In support of its position, the IDOE relies on *Iowa Insurance Institute v. Core Group of Iowa Association for Justice*, 867 N.W.2d 58 (Iowa 2015), in which the Supreme Court of Iowa held that the declaratory order at issue can affect "nonparties [to the proceedings before the agency] as a precedent." See, *Iowa Insurance Institute* at 66. However, in that same case, the Supreme Court of Iowa also notes that "[a]n

agency shall not issue a declaratory order that would ***substantially prejudice*** the rights of a person who would be a necessary party and ***who does not consent in writing to the determination of the matter by a declaratory order*** proceeding." *Id.* at 63. (Emphasis added.)

Each of the foregoing factors establishing that a Declaratory Order should not have been issued are present in this case: (1) substantial rights of Hills & Dales and, more particularly, minor children with autism diagnoses for whom Hills & Dales is legally and ethically obligated to advocate are substantially prejudiced; and (2) Hills & Dales did not agree to be bound by the Declaratory Order. Specifically, Hills & Dales stated: "The intervenor, Hills & Dales, does not and cannot consent to be bound by the determination of the matters presented in the above-captioned declaratory order proceeding. Only the Iowa Department of Inspections and Appeals, the Iowa Department of Human Services, the Iowa Medicaid Enterprise, and the Centers for Medicare and Medicaid Services have binding authority over Hills & Dales' ICF/ID service requirement, including, but not limited to, physician-prescribed, medically necessary ABA Treatment." (App. p. 30).

Thus, contrary to what the District Court and the IDOE have asserted, given the substantial prejudice to Hills & Dales and, more particularly, minor children with autism diagnoses for whom Hills & Dales is legally and ethically obligated to advocate are substantially prejudiced, the effect of this Declaratory Order on how

Hills & Dales meets its obligations is, as a matter of fact, germane to the question of whether the IDOE acted within its authority.

Accordingly, because substantial rights of Hills & Dales and minor children with autism diagnoses have been prejudiced, Hills & Dales did not consent to be bound by the Declaratory Order, and the District Court did not give proper weight to the context of the interference caused by the agency action, the District Court's ruling in that regard should be reversed.

II. THE DISTRICT COURT ERRED IN HOLDING THAT ABA THERAPY IS A "RELATED SERVICE" AND NOT A "MEDICAL SERVICE."

The District Court erred in holding that "ABA therapy is a 'related service,' rather than a 'medical service.'" (App. p. 260). The IDOE first argues that "ABA Therapy fits neatly within the statutory definition of a related service" as that term is defined in the IDEA. See, Respondent-Appellee's Brief p. 28. Hills & Dales rejects this argument and notes that physician-prescribed ABA Treatment is not expressly included in the definition of "related service" found in 20 U.S.C. § 1401(26)(A). While the definition does include broad language describing therapies and services "to assist a child with a disability to benefit from special education," the physician-prescribed ABA Treatment at issue here does not fall precisely within this framework and, in making the determination of whether such ABA Treatment is a medical service or a related service, one must turn to case law for guidance.

In that regard, the IDOE argues that *Cedar Rapids Community School Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66 (1999) is controlling and, specifically, that the medical services exemption applies only to services performed by a physician. See, Respondent-Appellee's Brief p. 28.

The United States Court of Appeals for the Third Circuit has rejected the *Garret* case as a bright-line standard of whether the service is provided by a physician or not. See, *Mary T. v. School Dist. of Philadelphia*, 575 F.3d 235, 248 (Third Circuit 2009). Instead, the court held that the definition of medical services was "designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." *Id.* (citing *Irving Independent School Dist. v. Tatro*, 468 U.S. 883, 892 (1984)). Thus, the court has concluded that the determination of whether or not a service is a medical service in this context hinges on whether the services are within the traditional competence of a school, regardless of the actual provider. Hills & Dales has argued that the ABA Treatment provided by Hills & Dales is not within the traditional competence of a school and, therefore, is an excluded medical service under the IDEA, and not a "related service" as the District Court held.

The IDOE argues that Hills & Dales' argument based on *Mary T.* is not persuasive and that this Court should disregard the Third Circuit's analysis in *Mary T.* and affirm the IDOE's decision on this issue. See, Respondent-Appellee's Brief

pp. 30-31. In support of that argument, the IDOE posits that the Supreme Court of Iowa ruled in *State v. Sweet*, 879 N.W.2d 811, 832 (Iowa 2016) that United States Supreme Court decisions on federal law are binding on state high courts. However, what the Supreme Court of Iowa actually ruled is that United States Supreme Court cases are binding on state high courts as to their interpretation of the Federal Constitution. *Id.* at 832. Furthermore, it is noteworthy that the Court also provided that "[i]n the development of our own state constitutional analysis, we may look to decisions of the United States Supreme Court, cases from other states, and other persuasive authorities." *Id.* (citing *State v. Short,* 851 N.W.2d 474, 481 (Iowa 2014); *State v. Ochoa,* 792 N.W.2d 260, 267 (Iowa 2010)). Nothing in *State v. Sweet* requires that this Court disregard the Third Circuit's analysis in *Mary T.* out of hand, because an interpretation and/or analysis of the Federal Constitution is not sought. On the contrary, *State v. Sweet* supports the notion that Iowa's high state courts may look to decisions in other jurisdictions and other persuasive authority in formulating its own analysis.

Accordingly, this Court should find the guidance provided in *Mary T.* to be persuasive because, as Hills & Dales has argued, the ABA Treatment provided by Hills & Dales is not within the traditional competence of a school and, therefore, is an excluded medical service under the IDEA, and not a "related service" as the District Court held. Therefore, the District Court's ruling in that regard should be

reversed.

III. THE DISTRICT COURT ERRED IN HOLDING THAT THE IDOE DID NOT RELY ON KEYSTONE'S REPRESENTATIONS NOT SUPPORTED BY THE EVIDENCE REGARDING SCHOOL ATTENDANCE.

The District Court erred in holding that the IDOE did not rely on Keystone's representations not supported by the evidence regarding school attendance. In its brief, the IDOE asserts that Hills & Dales' arguments that (1) Keystone's misrepresented the magnitude of the attendance issues in this case, and (2) the IDOE's failed to consider that physician-prescribed ABA Treatment is impermanent and, ultimately, the student resumes his or her regular education or instruction schedule on a fulltime basis, and the student does so better suited to participate and reach his or her fullest potential in school, are unsuccessful because "[t]he 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." See, Respondent-Appellee's Brief p. 33.

Hills & Dales remains unconvinced that Keystone's misrepresentations regarding school attendance matters as well as the IDOE's failure to consider the temporary nature of ABA Treatment did not factor into the Declaratory Order, and Hills & Dales comprehensively addressed these arguments in the Petitioner-Appellant's Brief filed previously. In short, the prevalence of attendance discussion throughout all of the proceedings, including in the IDOE's Declaratory Order as well

as the District Court's Order affirming the agency action, makes clear that attendance concerns were a critical consideration.

If, however, we take the IDOE at its word that these attendance concerns did not factor into the agency action, and that indeed the IDOE's Declaratory Order "does not rely on a great many facts or pieces of evidence," then Hills & Dales finds that equally troubling.

It should be noted that the record consists almost entirely of facts in support of Hills & Dales' position. Thus, to take agency action without regard for the facts on the record amounts to the IDOE intentionally disregarding Hills & Dales' interest in the proceedings as a whole, and thus intentionally disregarding the aggrieved minor children with autism diagnoses who obtain physician-prescribed ABA Treatment. This admission by the IDOE that it acted without regard for the facts actually establishes that the IDOE acted arbitrarily, capriciously, and unreasonably. According to the Supreme Court of Iowa, "[a]n agency's action is 'arbitrary' or 'capricious' when it is taken without regard to the law or facts of the case." See, *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 355 (Iowa 1998) (citing *Soo Line R.R. v. Iowa Dept. of Transp.*, 521 N.W.2d 685, 688-89 (Iowa 1994)). Further, "[a]gency action is 'unreasonable when it is 'clearly against reason and evidence.'" *Id.* Thus, because the IDOE acted without regard to the facts of the case, the agency action is arbitrary, capricious and unreasonable as a matter of law.

Accordingly, the District Court's ruling in that regard should be reversed.

IV. THE DISTRICT COURT ERRED IN HOLDING THAT THE IDOE'S RULING WAS NOT BASED UPON AN UNJUSTIFIABLE OR ILLOGICAL INTERPRETATION OF LAW.

The District Court erred in holding that the IDOE's ruling was not based upon an unjustifiable or illogical interpretation of law. Hills & Dales' position with regard to the FAPE requirement is clear: the purpose of the IDEA is to protect the rights of individuals with disabilities and their parents. The IDEA guarantees the right to a free and appropriate public education (FAPE) for children with disabilities. Specifically, the IDEA provides that "[a] State is eligible for assistance" if, among other things, "[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." See, 20 U.S.C. § 1412(a)(1)(A). The IDEA further provides that, "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature and severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." See, 20 U.S.C. § 1412(a)(5). The crux of the IDEA's FAPE requirement, as it pertains to the present

matter, is that the IEP of each of the Treated Residents and Treated Students should be reasonably calculated to enable each Treated Resident and Treated Student to make appropriate progress in light of their autism diagnoses. What is "appropriate" in light of any given child's circumstances is based on the individual needs of the child. "Appropriate" for a Treated Resident or Treated Student obviously greatly differs from "appropriate" for another student attending school in the DCSD. In light of the foregoing, how can using the requirements of the IDEA as the basis for *denying* physician-prescribed ABA Treatment to autistic children be said to be anything other than illogical and unjustifiable?

The IDOE, however, poses a different question: "who has the legal responsibility to decide what services students receive: Hills & Dales, or a public agency? See, Respondent-Appellee's Brief p. 38. The IDOE argues that it correctly concluded that public agencies have the responsibility under IDEA to determine what services a child should receive (citing *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 1000 (2017) and *Bradley v. Arkansas Dept. of Educ.*, 443 F.3d 965, 975-76 (8th Circuit 2006)). This question posed by the IDOE amounts to a straw man. Of course, Hills & Dales does not take the position that it has the authority to make such decisions unilaterally, but nor should the public agencies have such discretion. Such decisions should be made collaboratively and, pursuant to the standard provided in *Endrew F.*, should be reasonably calculated to enable a

child to make progress in light of the child's circumstances. See, *Endrew F.* at 1000. Why, given this clearly defined standard, can the public agencies unilaterally "overrule" the parties actually acting in the best interests of the autistic students at issue (e.g., parents, physicians, and Hills & Dales)?

Furthermore, the IDOE effectively hides behind the procedural requirements regarding IEPs—"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 the 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." See, Respondent-Appellee's Brief p. 40. It is well documented why obtaining ABA Treatment outside of school hours is completely out of the question. In short, forcing the students to attend their ABA Treatment during hours before or after their long school days would result in fatigue that would no longer make attending ABA Treatment practicable. These are children who face unique challenges after all. To expect them to expand upon their already demanding schedules is plainly unreasonable. Illustrative of that point, one parent noted of their son: "His day starts by 6 a.m. and does not end until he is home from school at 4 p.m. He still has goals and programs to work on in the evening, as well, due to his level of care. It is not possible to assume he could tack on additional hours somewhere nor that we should have to make a choice of one treatment/support versus education. Our son deserves

the right to receive all supports and services that he qualifies for just as any other child deserves." (App. p. 64).

With regard to Hills & Dales' rights to protect its interests and, more specifically, the interests of minor children with autism diagnoses for whom Hills & Dales is legally and ethically obligated to advocate, the IDOE effectively is saying Hills & Dales has no opportunity to prevent the harmful effects that will result from this agency action in these proceedings or otherwise because Hills and Dales has "no appeal rights" in the only proffered route to a successful appeal (i.e. appealing an IEP through IDEA procedures). See, Respondent-Appellee's Brief p. 40. Hills & Dales does, however, agree with the IDOE that "[t]he Department's statement of the law is incorrect." *Id.*

Effectively, in light of the foregoing, instead of prioritizing the rights of the individual students with autism diagnoses and considering what is appropriate in light of each individual child's needs, the agency action offers broad discretion to Keystone and the DCSD to implement policies that interfere with a child's right to obtain his or her physician-prescribed ABA Treatment by BCBA Professionals at the AutismHD Clinic, and this is despite the fact that Hills & Dales must comply with the physician's order for ABA Treatment. Thus, the agency action is irrational, illogical and wholly unjustifiable in light of the adverse effects it may have on these children. Accordingly, the District Court's ruling in that regard should be reversed.

V. THE DISTRICT COURT ERRED IN HOLDING THAT THE IDOE'S RULING WAS NEITHER ARBITRARY NOR CAPRICIOUS.

The District Court erred in holding that the IDOE's ruling was neither arbitrary nor capricious. Like the District Court, the IDOE summarily rejects the notion that it did not give adequate consideration to the physicians' letter and Dubuque County Attorney's letter submitted with Hills & Dales brief before the agency. See, Respondent-Appellee's Brief p. 41. Specifically, the IDOE argues that "[t]he 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." See, Respondent-Appellee's Brief p. 42.

This begs the question: what "other evidence" did the IDOE find to be more persuasive? By its own admission, to reiterate a point previously made in this reply brief, "[t]he 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." See, Respondent-Appellee's Brief p. 33. Furthermore, the IDOE has admitted that the "Declaratory Order does not rely on a great many facts or pieces of evidence" and "does not address specific factual circumstances, but addresses the applicable law in general in an advisory manner." (App. p. 202). It should also be reiterated that the only facts in this case are for Hills & Dales' position. This admission of the IDOE's disregard for the facts in general is troubling and, in addition to establishing that the IDOE

failed to consider the record as a whole, actually proves the IDOE acted arbitrarily, capriciously, and unreasonably. According to the Supreme Court of Iowa, "[a]n agency's action is 'arbitrary' or 'capricious' when it is taken without regard to the law or facts of the case." See, *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 355 (Iowa 1998) (citing *Soo Line R.R. v. Iowa Dept. of Transp.*, 521 N.W.2d 685, 688-89 (Iowa 1994)). Further, "[a]gency action is 'unreasonable when it is 'clearly against reason and evidence.'" Thus, because the IDOE acted without regard to the facts of the case, the agency action is arbitrary, capricious and unreasonable as a matter of law. Accordingly, the District Court's ruling in that regard should be reversed.

CONCLUSION

The District Court's order entered December 23, 2020 should be reversed. Substantial rights of Hills & Dales as well as the Treated Residents and Treated Students, for whom Hills & Dales is legally and ethically obligated to advocate, have been prejudiced because such order affirms an agency action which is:

1. Beyond the authority delegated to the IDOE by any provision of law or in violation of any provision of law pursuant to Iowa Code § 17A.19(10)(b);

2. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the IDOE pursuant to Iowa Code § 17A.19(10)(c);

3. Based upon a determination of fact clearly vested by a provision of law in the discretion of the IDOE that is not supported by substantial evidence in the record when that record is viewed as a whole pursuant to Iowa Code § 17A.19(10)(f);

4. Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has been vested by a provision of law in the discretion of the IDOE pursuant to Iowa Code § 17A.19(10)(l); and,

5. Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion pursuant to Iowa Code § 17A.19(10)(n).

Respectfully submitted,

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ATTORNEYS' COST CERTIFICATE

We hereby certify that the cost of printing the foregoing Final Reply Brief for the Petitioner-Appellant was the sum of $0.

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/s/ Brian J. Kane June 16, 2021
Brian J. Kane