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 BRIEF

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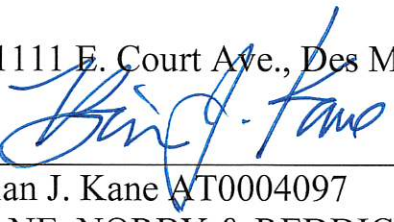
By: 

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Rules:

Statutes:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

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

Clark by Clark v. Iowa Dept. of Human Services, 555 N.W.2d 472, 474 (Iowa 1996).

Iowa Power & Light Co. v. Iowa State Commerce Comm'n, 410 N.W.2d 236, 240 (Iowa 1987).

McCracken v. Iowa Dept. of Human Services, 595 N.W.2d 779, 783 (Iowa 1999).

Northwestern Bell Telephone Co. v. Iowa Utilities Bd., 477 N.W.2d 678, 682 (Iowa 1991).

Iowa Admin. Code § 281-1.4

Iowa Code § 17A.19(8)

Iowa Code § 17A.20

Iowa Code § 256.9

Iowa R. App. P. 6.907

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

Cedar Rapids Community School Dist. v. Garret F. ex rel. Charlene F., 526 U.S. 66 (1999).

Clark by Clark v. Iowa Dept. of Human Services, 555 N.W.2d 472, 474 (Iowa 1996).

Irving Independent School Dist. v. Tatro, 468 U.S. 883, 893 (1984).

Mary T. v. School Dist. of Philadelphia, 575 F.3d 235, 248 (Third Circuit 2009).

The Sherwin-Williams Company v. Iowa Department of Revenue, 789 N.W.2d 417 (Iowa 2010).

Iowa Code § 17A.19(10)(l)

Iowa Code § 17A.20

Iowa R. App. P. 6.907

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

Clark by Clark v. Iowa Dept. of Human Services, 555 N.W.2d 472, 474 (Iowa 1996).

Iowa Code § 17A.20

Iowa R. App. P. 6.907

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

Clark by Clark v. Iowa Dept. of Human Services, 555 N.W.2d 472, 474 (Iowa 1996).

Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988, 1000 (2017).

20 U.S.C. § 1412(a)(1)(A) and (a)(5)

Iowa Code § 17A.19(10)(l)

Iowa Code § 17A.20

Iowa R. App. P. 6.907

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

Clark by Clark v. Iowa Dept. of Human Services, 555 N.W.2d 472, 474 (Iowa 1996).

Dico, Inc. v. Iowa Employment Appeal Bd., 576 N.W.2d 352, 355 (Iowa 1998).

Schoenfield v. FDL Foods, Inc., 560 N.W.2d 595, 598 (Iowa 1997).

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

Iowa Code § 17A.19(10)(n)

Iowa Code § 17A.20

Iowa Code § 299.8

Iowa R. App. P. 6.907

ROUTING STATEMENT

This case presents an application of existing legal principles and should be transferred to the Court of Appeals pursuant to Rules 6.1101(1) and 6.1101(3)(a) of the Iowa Rules of Appellate Procedure.

STATEMENT OF THE CASE

Keystone Area Education Agency (hereafter "Keystone") initiated these proceedings with the filing of a Petition for Declaratory Order with the Iowa Department of Education (hereafter the "IDOE") on September 9, 2019 (the

"Original Petition"). (App. pp. 12-14). Hills & Dales Child Development Center (hereafter "Hills & Dales") was named by Keystone as an interested party in the Original Petition. (App. p. 13). Hills & Dales filed an Answer to Keystone's Original Petition as well as its Petition for Intervention on September 17, 2019. (App. pp. 23-25, 28-30).

After an attempt to resolve this matter via mediation proved to be unsuccessful, a hearing for oral arguments before the IDOE, via teleconference, was scheduled for and held on February 7, 2020. A full transcript of that hearing is included in the Agency Record, commencing on page 93 thereof. (App. pp. 104-150).

The IDOE subsequently entered its Declaratory Order on March 13, 2020 (Admin. Docket #5109) (hereafter the "Declaratory Order" or the "agency action"), which adversely affected Hills & Dales. (App. pp. 80-93). Thereafter, Hills & Dales, having exhausted all administrative remedies and having been aggrieved by the final agency action, filed the following concurrently on April 8, 2020: (i) a Request for Stay Pending Judicial Review filed with the IDOE; and (ii) a Petition for Judicial Review in the District Court in and for Dubuque County. (App. pp. 94-95, 151-155).

The IDOE never issued a ruling on Hills & Dales' Request for Stay; however, notwithstanding that fact, the status quo was maintained during the pendency of the judicial review proceedings.

After all briefs were filed, oral argument was held on Hills & Dales' Petition for Judicial Review on December 8, 2020. Thereafter, the District Court entered an order affirming the agency action on December 23, 2020 (hereafter the "District Court Order"). (App. pp. 252-262).

Specifically, in the District Court Order, the District Court held as follows with respect to the issues subject to review:

1. "The IDOE did not exceed the authority conferred upon it by law." (App. p. 259).

2. "The IDOE did not err in concluding that ABA therapy is a 'related service,' rather than a 'medical service.'" (App. p. 260).

3. "It does not appear that the IDOE relied upon Keystone's representation in any way" with regard to school attendance, which representation Hills & Dales argues is not supported by the evidence. (App. p. 260).

4. "The IDOE hasn't discounted any student's need, or denied any student's right, for ABA therapy. Merely because the IDOE ruling may have an effect on some students does not mean that ruling was based upon an unjustifiable or illogical interpretation of law." (App. p. 261).

5. "The IDOE's decision was neither arbitrary nor capricious." (App. p. 261).

Pursuant to Iowa Code § 17A.20, "[a]n aggrieved or adversely affected party

to the judicial review proceeding may obtain a review of any final judgment of the district court under this chapter by appeal. The appeal shall be taken as in other civil cases, although the appeal may be taken regardless of the amount involved."

Hills & Dales is exercising its right to an appeal under Iowa Code § 17A.20 and timely filed a Notice of Appeal to that effect on January 19, 2021, wherein Hills & Dales appeals to the Supreme Court of Iowa from the District Court's December 23, 2020 order entered in this case and from all adverse rulings and orders inhering therein. (App. pp. 263-265).

STATEMENT OF THE FACTS

Petitioner-Appellant, Hills & Dales, is an Iowa non-profit corporation whose principal office is located in Dubuque, Iowa. Hills & Dales is an ICF/ID (intellectual disabilities) licensed facility in the State of Iowa under 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. By way of further explanation, Hills & Dales provides services and programs to children and adults with (or who are) intellectual disabilities, Autism Spectrum Disorders (ASD), medically fragile, physically challenged and with complex needs. (Non-disability services include Hills and Dales' Childcare Center and Preschool and Hills & Dales' Senior/Lifetime Center.) Disability services/programs occur in varied locations per Iowa (IAC) and federal (CFR) regulations. Agency services are licensed or certified

and compliant with the requirements of 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. As an ICF/ID licensed facility, Hills & Dales provides a 24-hour residential licensed healthcare facility. Hills & Dales also offers Home and Community Based Service (HCBS), 24-hour day programs and hourly services which are CARF Accredited. Hills & Dales also offers Applied Behavioral Analysis Treatment ("ABA Treatment") at its AutismHD Clinics, which are also CARF Accredited. (CARF Accreditation is an indication of an organization's dedication and commitment to improving the quality of the lives of the persons served.)

Several of the questions raised by Keystone in the Original Petition are related to minor children receiving physician-prescribed ABA Treatment at one of Hills & Dales' AutismHD Clinics (hereafter the "AutismHD Clinic") from licensed, Board Certified Behavior Analyst (BCBA) professionals. All of these affected children are students in the Dubuque Community School District (hereafter the "DCSD"). Some of these students treated by the AutismHD Clinic are residents of Hills & Dales (hereafter the "Treated Residents"). Others of these students treated by the AutismHD Clinic are not residents (hereafter the "Treated Students"). Both Treated Residents and Treated Students alike are receiving physician-prescribed ABA Treatment from Hills & Dales at the AutismHD Clinic for their autism diagnoses

and are, in some cases, pursuant to physician orders, removed from DCSD classes at certain times to receive their physician-prescribed treatment. There were, as of the date Hills & Dales filed its Petition for Intervention in this matter, eight (8) Treated Residents and fourteen (14) Treated Students. (App. p. 29). Presently, there are three (3) Treated Residents who are impacted by school attendance issues.

Hills & Dales, as an ICF/ID licensed facility, has a legal obligation, which it takes seriously, to provide the physician-prescribed treatment to the Treated Residents. The Treated Students' parents/guardians are responsible for determining and carrying out their child's medical treatment plan. The ABA Treatment so provided by Hills & Dales has been, by all accounts, successful in treating challenges and deficits of these Treated Residents and Treated Students associated with their autism diagnoses.

In that regard, by letter dated November 14, 2019, the pediatricians of Medical Associates provided that, in their expert opinions, "ABA therapy is the gold standard for children with autism spectrum disorder. It is a medical treatment which is prescribed by a physician for eligible patients. When such therapy is prescribed, an authorized caretaker is expected to follow the physician order with parental or guardian consent. ABA therapy should be provided by licensed, board certified behavior analyst professionals." (App. p. 46). Furthermore, these pediatricians asserted that "[a]utistic students who received ABA therapy are better suited to reach

their fullest potential both when attending school and in their general lives. ***ABA therapy's critical value to a child with autism would qualify the treatment as reason for an excused absence from school.***" (Emphasis added.) (App. p. 46).

Additionally, Dubuque County Attorney C.J. May, III provided his thoughts on this matter by letter dated December 2, 2019, to Attorney Brian J. Kane, counsel for Hills & Dales. (App. pp. 47-48). In his letter, the Dubuque County Attorney opined that "a reasonable person under most circumstances would consider physician-prescribed treatment as a reasonable excuse to be absent from a day of instruction." (App. p. 47). Furthermore, in his view, "for this health and welfare of our children, we must certainly rely upon those with expertise to guide us and assist us in caring for our children" and "we must, as reasonable individuals, accept those experts' opinions as reasonable and proper." (App. p. 47). Lastly, he indicates that "[a]s the prosecutor of those who may be in violation of Iowa's truancy laws in Dubuque County, I would say that ***physician-prescribed treatment which causes a Treated Resident and/or Treated Student's absence from a day of instruction to be a reasonable excuse for the absence.***" (Emphasis added). (App. p. 48).

Although the Original Petition filed by Keystone stemmed from Keystone's concerns regarding ABA Treatment leading to an increase in absences from regular classroom instruction, in reality, school attendance is only an issue for a small number of Treated Residents at any given time. A handful of Treated Residents must

necessarily miss portions of their classroom instructions because dual enrollment is not an option for them (because Hills & Dales does not provide educational services). However, these attendance issues are impermanent because once once a student (i.e. Treated Resident) completes his or her physician-prescribed ABA Treatment by BCBA Professionals at Hills & Dales' AutismHD Clinic, 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. Essentially, the amount of school time missed, for the few students who miss any time, reduces gradually over time as the ABA Treatment progresses.

It should also be noted that in its Petition for Intervention, 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).

ARGUMENT

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

Preservation of Error. Hills & Dales preserved this issue by timely filing its Notice of Appeal on January 19, 2021. Although this issue was not raised by Hills & Dales in the initial administrative proceedings before the Iowa Department of Education, 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).

Scope and Standard of Review. The scope of review is for correction of errors at law. See, Iowa R. App. P. 6.907. An appeal of a district court's exercise of its powers of judicial review is governed by Iowa Code § 17A.20, under which a district court's decision rendered in an appellate capacity is reviewed to decide whether the district court correctly applied the law. See, *Clark by Clark v. Iowa Dept. of Human Services*, 555 N.W.2d 472, 474 (Iowa 1996). To make that determination, the appellate court applies the standards of Iowa Code § 17A.19(8) to determine if its conclusions are the same as the district court's. *Id.* Iowa Code § 17A.19(8) provides that an agency decision may be reversed if substantial rights of an individual have been prejudiced and the action is unsupported by substantial evidence or affected by

errors of law. *Id*. Regarding the issue of whether an administrative agency has exceeded its statutory authority in particular, the appellate court decides whether its conclusions are the same as those of the district court. See, *McCracken v. Iowa Dept. of Human Services*, 595 N.W.2d 779, 783 (Iowa 1999). Like the district court, the appellate court accords limited deference to the agency's interpretation of law, including statutory interpretation. *Id*.

Argument. The District Court erred in holding that the IDOE did not exceed the authority conferred upon it by any provision of law. Specifically, the District Court 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's position.

According to the Supreme Court of Iowa, "[a]n administrative agency has only such jurisdiction and authority as expressly conferred by statute or necessarily inferred from the power expressly granted." See, *Northwestern Bell Telephone Co. v. Iowa Utilities Bd.*, 477 N.W.2d 678, 682 (Iowa 1991) (citing *Iowa Power & Light Co. v. Iowa State Commerce Comm'n*, 410 N.W.2d 236, 240 (Iowa 1987)). The Iowa Department of Education's authority is derived from Iowa Admin. Code § 281-1.4, which provides that "[t]he department of education is established by the General

Assembly to act in a policy-making and advisory capacity and to exercise general supervision over the state system of education including (1) public elementary and secondary schools, (2) community colleges, (3) area education agencies, (4) vocational rehabilitation, (5) educational supervision over the elementary and secondary schools under the control of the department of human services, and (6) nonpublic schools to the extent necessary for compliance with the Iowa school laws." Some specific duties of the Director of the Iowa Department of Education are set forth in Iowa Code § 256.9. However, Hills & Dales, as an ICF/ID licensed facility, has a legal obligation to provide the physician-prescribed treatment to the Treated Residents. (App. p. 29). The Treated Students' parents/guardians are responsible for determining and carrying out their child's medical treatment plan. (App. p. 29). Hills & Dales is regulated by the Iowa Department of Inspections and Appeals, the Iowa Department of Human Services, the Iowa Medicaid Enterprise, the Centers for Medicare and Medicaid Services, and the Commission on Accreditation of Rehabilitation Facilities, and ***only these agencies have binding authority over Hills & Dales***. (Emphasis added.) (App. p. 30).

Furthermore, the District Court understates Hills & Dales' position by opining that "Hills & Dales' argument seems to be based primarily on the contention that the agency action interferes with Hills & Dales' administration of necessary treatment and services." (App. p. 259). The context of such interference is the determinative

factor and the crux of Hills & Dales' argument. 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. Both Treated Residents and Treated Students alike are receiving physician-prescribed ABA Treatment from Hills & Dales' BCBA Professionals at the AutismHD Clinic for their autism diagnoses. (App. p. 29). Therefore, substantial rights of Hills & Dales as well as the Treated Residents and Treated Students, for whom it is legally and ethically obligated to advocate, have been prejudiced because the IDOE has acted beyond the authority delegated to it by any provision of law.

Not only did the District Court understate Hills & Dales' position, but it also failed to properly identify the interests Hills & Dales aims to protect in these proceedings. To the District Court, "[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' inability to meet its obligations is only a minor factor in these proceedings. The more crucial factor in Hills & Dales' opinion, which the District Court fails to consider here, is the Treated Residents' inability to obtain their physician-prescribed ABA Treatment which Hills & Dales is obligated to provide via its licensing stated above. The positive impact of ABA Treatment on these students is clear. Hills &

Dales submitted three excerpts of letters from parents of Treated Residents and/or Treated Students regarding the impact of ABA Treatment on their children by Second Supplement to Brief in Response to Keystone Area Education Agency's Petition for Declaratory Order and Brief in Support Thereof (hereafter "Second Supplement"). (App. pp. 63-66). One parent noted of their son: "This treatment has helped get him ready to learn in the public school environment, as well as, reduce some very significant challenging behaviors that have excluded him from participation in the school environment. The collaboration between his school, ICF, and ABA staff has provided for consistency and effectiveness across all environments, despite the unnecessary turmoil surrounding this issue." (App. p. 64). Another parent noted, of their son's "amazing" progress through ABA Treatment: "From things such as being potty trained, zippering his coat, sorting laundry, having interactions with people; all types of things that he would use every day. And most importantly they have helped him find his voice. He had 0 words when he initially started working with Hills and Dales. Today he is pushing around 170 words." (App. p. 64). A third parent offered a unique perspective as a teacher: "Three years ago, we didn't know if any of this was possible. We know it is because of the intense and constant data collection by the RBTs ["Registered Behavior Technicians"] and hours spent to utilize and engineer programs designed by the BCBAs ["Board Certified Behavior Analysts"] of private ABA Therapy. That hard work and dedication makes

every minute of her time in therapy impactful in multiple ways. I'm a teacher by trade, I love public schools and all it offers my children. I find it to be enough only when combined with a strong family unit (whatever that might look like) and additional necessary private programs where afforded. For our family and our daughter's needs, that means Private ABA Therapy." (App. p. 65). The IDOE is no longer just "interpreting school laws" when its agency action is so plainly interfering with the remarkable progress these children are making with their physician-prescribed ABA Treatment. This context cannot be ignored.

Accordingly, because substantial rights of Hills & Dales and minor children with autism diagnoses have been prejudiced 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."

Preservation of Error. Hills & Dales preserved this issue by timely filing its Notice of Appeal on January 19, 2021.

Scope and Standard of Review. The scope of review is for correction of errors at law. See, Iowa R. App. P. 6.907. An appeal of a district court's exercise of its powers of judicial review is governed by Iowa Code § 17A.20, under which a district court's decision rendered in an appellate capacity is reviewed to decide whether the

district court correctly applied the law. See, *Clark by Clark v. Iowa Dept. of Human Services*, 555 N.W.2d 472, 474 (Iowa 1996). To make that determination, the appellate court applies the standards of Iowa Code § 17A.19(8) to determine if its conclusions are the same as the district court's. *Id.* Iowa Code § 17A.19(8) provides that an agency decision may be reversed if substantial rights of an individual have been prejudiced and the action is unsupported by substantial evidence or affected by errors of law. *Id.*

Argument. The District Court erred in holding that "ABA therapy is a 'related service,' rather than a 'medical service.'" (App. p. 260). In reaching its conclusion, the District Court considered the following factors: (1) whether the service is a "supportive service" that is "required to assist a child with a disability to benefit from special education," and (2) whether the service is excluded from the definition of "related services" as a "medical service" that is not for diagnostic or evaluation purposes. (App. p. 260) (citing *Irving Independent School Dist. v. Tatro*, 468 U.S. 883, 893 (1984)). The District Court incorrectly concludes that, because Hills & Dales argues that the resulting fatigue of obtaining ABA Treatment before or after the long school day makes obtaining such ABA Treatment outside of school hours impracticable, Hills & Dales "acknowledges that ABA therapy is a 'supportive service' that helps those children to benefit from their education." (App. p. 260). Thus, the District Court concludes that ABA Treatment is a "supportive service" that

is not for diagnostic or evaluation purposes and, therefore, is a "related service" and not a "medical service." (App. p. 260). Hills & Dales disagrees with the District Court's position.

In *The Sherwin-Williams Company v. Iowa Department of Revenue*, 789 N.W.2d 417 (Iowa 2010), the Iowa Department of Revenue's interpretation of the term "manufacturer" for the purposes of a manufacturing exemption for use tax was subject to review to determine whether it was based on an erroneous interpretation of the term "manufacturer" in the discretion of the Iowa Department of Revenue, and, thus, a more deferential standard of review did not apply. Ultimately, the Supreme Court of Iowa held that "[b]ecause the legislature has not clearly vested the interpretation of the word "manufacturer" in the discretion of the agency, the deferential standard of review in Section 17A.19(10)(l) does not apply" and "we review the agency decision on this issue to determine whether it was 'based upon an erroneous interpretation of a provision of law.'" *Id.* at 424. The same standard should apply to the present case with respect to the IDOE's interpretation of the term "medical services."

Hills & Dales' position is that the ABA Treatment it provides to the Treated Residents and Treated Students is more closely aligned with medical services provided by physicians and not services that can be provided by a school nurse or other trained personnel like the services provided in *Cedar Rapids Community*

School Dist. v. Garret F. ex rel. Charlene F., 526 U.S. 66 (1999), because the ABA Treatment at issue is administered by licensed, Board Certified Behavior Analyst (BCBA) professionals. Whether or not a physician provides the ABA Treatment is not ultimately dispositive of the issue of whether certain services constitute medical services under the IDEA. The United States Court of Appeals for the Third Circuit agrees.

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. 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.

Accordingly, because substantial rights of Hills & Dales and minor children

with autism diagnoses have been prejudiced and the District Court's determination stems from a misapplication of case law authority regarding "related services" and "medical services," 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.

Preservation of Error. Hills & Dales preserved this issue by timely filing its Notice of Appeal on January 19, 2021.

Scope and Standard of Review. The scope of review is for correction of errors at law. See, Iowa R. App. P. 6.907. An appeal of a district court's exercise of its powers of judicial review is governed by Iowa Code § 17A.20, under which a district court's decision rendered in an appellate capacity is reviewed to decide whether the district court correctly applied the law. See, *Clark by Clark v. Iowa Dept. of Human Services*, 555 N.W.2d 472, 474 (Iowa 1996). To make that determination, the appellate court applies the standards of Iowa Code § 17A.19(8) to determine if its conclusions are the same as the district court's. *Id.* Iowa Code § 17A.19(8) provides that an agency decision may be reversed if substantial rights of an individual have been prejudiced and the action is unsupported by substantial evidence or affected by errors of law. *Id.*

Argument. 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 concluded that "[i]t does not appear that the IDOE relied upon Keystone's representation [regarding the effects of ABA Treatment on school attendance ("effectively removes a child from school for half of every day")] in any way." (App. p. 260). Notwithstanding the fact that, as the District Court notes, "the Declaratory Order noted that school attendance has not been an issue for most students who receive ABA therapy." (App. p. 260). Hills & Dales disagrees with the District Court's position that Keystone's attendance concerns were not a factor relied upon by the IDOE.

The IDOE also offers two specific arguments regarding its Declaratory Order not being supported by substantial evidence in the record when viewed as a whole: (1) the IDOE did not base is decision on Keystone's assertions about children missing school with which Hills & Dales disagrees; and (2) the IDOE concludes that the fact that ABA Treatment progresses and that the amount of school time missed, if any, reduces over time is not relevant to the IDOE's interpretation of school laws. (App. pp. 202-203). Hills & Dales' finds these arguments to be disingenuous at best as a great deal of the Declaratory Order discusses potential attendance-related issues. In particular, Hills & Dales notes the following excerpts from the "Findings of Fact" in the IDOE's Declaratory Order, all of which clearly stem from attendance concerns which were expressed by Keystone all throughout the proceedings:

- "A small number of students who reside at Hills & Dales receive ABA Therapy during the school day, which results in missing instruction…" (App. p. 82).
- "Iowa Code section 299.1 empowers school districts to 'adopt policies 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." (App. pp. 82-83).
- "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." (App. p. 83).
- "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 every conceivable circumstance.'" (App. p. 83).
- "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 FAPE." (App. p. 84).
- "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 part of a FAPE." (App. p. 85).

- "This would also include other decisions, including decisions on the length of school days." (App. p. 87).

Furthermore, in the "Discussion" portion of the IDOE's Declaratory Order, attendance policies are the first matter discussed. (App. p. 87-88). It is clear that attendance concerns were a critical part of these proceedings and one of the primary bases for Keystone's original Petition for Declaratory Order. For the IDOE to assert that the attendance matters are irrelevant is plainly false and a position not supported by the Declaratory Order, which discusses attendance in depth.

The prevalence of attendance discussion all throughout the proceedings shows that the agency action, in large part, does stem from concerns expressed by Keystone in its Petition for Declaratory Order, its Brief in support thereof and its subsequent Reply Brief in support thereof, that the Treated Residents and Treated Students would be absent from substantial periods of regular school instruction. According to Keystone's Reply Brief, "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." (App. p. 50). However, this is simply not supported by substantial evidence in the Record when the Record is viewed as a whole.

In fact, as the IDOE noted in its "Findings of Fact" in its Declaratory Order, 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. (App. p. 82). In many cases, Treated Students have elected CPI (home-schooling) and dual enrolled for only a portion of the day. (App. p. 82). Thus, only a small handful of the Treated Residents, for whom dual enrollment is not an option (because Hills & Dales does not provide educational services), are missing portions of their school instruction, as prescribed by their physicians—much less than "half of the school day, every day," as Keystone indicated. (App. p. 50). Illustrative of this point, Hills & Dales' Supplement to Brief in Response to Keystone Area Education Agency's Petition for Declaratory Order and Brief in Support Thereof details how six of the nine Treated Residents as of that date **do not miss any school time to attend ABA Treatment**. (Emphasis added.) (App. pp. 56-62).

On top of the fact that attendance is only an issue for a small amount of Treated Residents, the agency action seemingly ignores entirely the impermanence of physician-prescribed ABA Treatment. Once a student completes his or her physician-prescribed ABA Treatment by BCBA Professionals at Hills & Dales' AutismHD Clinic, 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. Essentially, the amount of school time missed, for the few students who miss any time, reduces gradually over time as the ABA Treatment progresses. (App. p. 138; Tr. p. 35, L. 1-17).

Accordingly, because substantial rights of Hills & Dales and minor children with autism diagnoses have been prejudiced and the District Court affirmed a ruling which was not supported by substantial evidence in the record before the court when that record is viewed as a whole, 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.

Preservation of Error. Hills & Dales preserved this issue by timely filing its Notice of Appeal on January 19, 2021.

Scope and Standard of Review. The scope of review is for correction of errors at law. See, Iowa R. App. P. 6.907. An appeal of a district court's exercise of its powers of judicial review is governed by Iowa Code § 17A.20, under which a district court's decision rendered in an appellate capacity is reviewed to decide whether the district court correctly applied the law. See, *Clark by Clark v. Iowa Dept. of Human Services*, 555 N.W.2d 472, 474 (Iowa 1996). To make that determination, the appellate court applies the standards of Iowa Code § 17A.19(8) to determine if its conclusions are the same as the district court's. *Id.* Iowa Code § 17A.19(8) provides

that an agency decision may be reversed if substantial rights of an individual have been prejudiced and the action is unsupported by substantial evidence or affected by errors of law. *Id.*

Argument. 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 concluded that "[t]he IDOE hasn't discounted any student's need, or denied any student's right, for ABA therapy. Merely because the IDOE ruling may have an effect on some students does not mean that ruling was based upon an unjustifiable or illogical interpretation of the law." (App. p. 261). Hills & Dales disagrees with the District Court's position.

Substantial rights of Hills & Dales as well as the Treated Residents and Treated Students, for whom it is legally and ethically obligated to advocate, have been prejudiced because the agency action is based upon an irrational, illogical, or wholly unjustifiable interpretation of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency. See, Iowa Code § 17A.19(10)(l). Specifically, the IDOE's action is based upon an irrational, illogical and wholly unjustifiable interpretation of the FAPE requirement under the Individuals with Disabilities Education Act (IDEA).

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 that regard, the IDOE concluded in the Declaratory Order that "[t]he Supreme Court defined the substantive standard

for a FAPE in *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 1000 (2017) ('reasonably calculated to enable a child to make progress in light of the child's circumstances'). 'The goals may differ, but every child should have the chance to meet challenging objectives.'" (App. pp. 83-84). Unfortunately, despite correctly identifying the general substantive standard for a FAPE, the IDOE has applied this standard irrationally and to the detriment of students with autism in general, and specifically to the detriment of the Treated Residents and Treated Students with autism.

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. Specifically, the IDOE held that "[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." (App. p. 92). In other words, the IDOE asserts that the IDEA, a piece of legislation specifically designed to ensure that students with disabilities are receiving an education that is specifically tailored to their individual needs, provides the basis for

interfering with the Treated Residents' and Treated Students' physician-prescribed ABA Treatment. If the goal of the IDOE is to ensure that all students are provided with equal educational opportunities, it would follow that these students with autism diagnoses should be allowed to complete their physician-prescribed ABA Treatment because, long term, these students would be better suited to participate to a greater extent in the DCSD's special education programs. (App. p. 44). The positive impact of ABA Treatment on these students is clear. Hills & Dales submitted three excerpts of letters from parents of Treated Residents and/or Treated Students regarding the impact of ABA Treatment on their children by Second Supplement to Brief in Response to Keystone Area Education Agency's Petition for Declaratory Order and Brief in Support Thereof. (App. pp. 63-66). These letters are described in greater detail on pages 21-22 herein.

Despite the phenomenal progress the ABA Treatment has enabled the Treated Residents and Treated Students to make, as illustrated by the excerpts of parent letters referenced in the preceding paragraph, the IDOE remains rigid, shortsighted, and misguided in its interpretation of the FAPE requirement under the IDEA. Rather than undertake a collaborative effort with all parties involved to accommodate this vital ABA Treatment, the IDOE has elected to make continuing to receive such ABA Treatment impracticable for certain students. Thus, the agency action is irrational, illogical and wholly unjustifiable in light of the adverse effects it may have on these

children.

Accordingly, because substantial rights of Hills & Dales and minor children with autism diagnoses have been prejudiced and the District Court affirmed a ruling which is irrational, illogical and wholly unjustifiable in light of the adverse effects it may have on these children, 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.

Preservation of Error. Hills & Dales preserved this issue by timely filing its Notice of Appeal on January 19, 2021.

Scope and Standard of Review. The scope of review is for correction of errors at law. See, Iowa R. App. P. 6.907. An appeal of a district court's exercise of its powers of judicial review is governed by Iowa Code § 17A.20, under which a district court's decision rendered in an appellate capacity is reviewed to decide whether the district court correctly applied the law. See, *Clark by Clark v. Iowa Dept. of Human Services*, 555 N.W.2d 472, 474 (Iowa 1996). To make that determination, the appellate court applies the standards of Iowa Code § 17A.19(8) to determine if its conclusions are the same as the district court's. *Id.* Iowa Code § 17A.19(8) provides that an agency decision may be reversed if substantial rights of an individual have been prejudiced and the action is unsupported by substantial evidence or affected by errors of law. *Id.*

Argument. The District Court erred in holding that the IDOE's ruling was neither arbitrary nor capricious. The District Court opines that adequate consideration was given to letters drafted by the pediatricians of Medical Associates and Dubuque County Attorney C.J. May, III, respectively. The District Court ultimately concluded that "the IDOE is not required to defer to those people, nor to give their statements greater weight than other evidence or the law." (App. p. 261). Hills & Dales disagrees with the District Court's position that the IDOE's decision was neither arbitrary nor capricious.

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.* An abuse of discretion occurs "when the agency action 'rests on grounds or reasons clearly untenable or unreasonable.'" *Id.* (citing *Schoenfield v. FDL Foods, Inc.*, 560 N.W.2d 595, 598 (Iowa 1997).

Substantial rights of Hills & Dales as well as the Treated Residents and Treated Students, for whom it is legally and ethically obligated to advocate, have been prejudiced because the agency action is otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. See, Iowa Code § 17A.19(10)(n). Specifically,

the IDOE arbitrarily and unreasonably fails to give proper weight to the physicians' letter and County Attorney's letter submitted with Hills & Dales' Brief in Response to Keystone Area Education Agency's Petition for Declaratory Order and Brief in Support Thereof. (App. pp. 46-48). Instead of deferring to these authorities on these matters, the IDOE notes only that a school district may consider these things among other factors. For example, see, App. p. 86. ("A recommendation from a physician is entitled to great weight, but is not binding on an IEP Team"). However, based on the conclusions drawn in its Declaratory Order, it appears the IDOE has, in actuality, given these letters virtually no weight.

By letter dated November 14, 2019, the pediatricians of Medical Associates provided that, in their expert opinions, "ABA therapy is the gold standard for children with autism spectrum disorder. It is a medical treatment which is prescribed by a physician for eligible patients. When such therapy is prescribed, an authorized caretaker is expected to follow the physician order with parental or guardian consent. ABA therapy should be provided by licensed, board certified behavior analyst professionals." (App. p. 46). Furthermore, these pediatricians asserted that "[a]utistic students who received ABA therapy are better suited to reach their fullest potential both when attending school and in their general lives. ***ABA therapy's critical value to a child with autism would qualify the treatment as reason for an excused absence from school.***" (Emphasis added.) (App. p. 46).

Additionally, Dubuque County Attorney C.J. May, III provided his thoughts on this matter by letter dated December 2, 2019, to Attorney Brian J. Kane, counsel for Hills & Dales. (App. pp. 47-48). In his letter, the Dubuque County Attorney opined that "a reasonable person under most circumstances would consider physician-prescribed treatment as a reasonable excuse to be absent from a day of instruction." (App. p. 47). Furthermore, in his view, "for this health and welfare of our children, we must certainly rely upon those with expertise to guide us and assist us in caring for our children" and "we must, as reasonable individuals, accept those experts' opinions as reasonable and proper." (App. p. 47). Lastly, he indicates that "[a]s the prosecutor of those who may be in violation of Iowa's truancy laws in Dubuque County, I would say that ***physician-prescribed treatment which causes a Treated Resident and/or Treated Student's absence from a day of instruction to be a reasonable excuse for the absence.***" (Emphasis added). (App. p. 48).

Thus, the IDOE has elected to ignore the recommendation of the physicians of Medical Associates of Dubuque that the Treated Residents and Treated Students be permitted to receive ABA Treatment provided by licensed, board certified behavior analyst professionals during the school day as needed. Additionally, the IDOE has chosen to disregard the Dubuque County Attorney's opinion with regard to such physician-prescribed treatment that, in his view, such physician-prescribed ABA Treatment constitutes a reasonable excuse for an absence from school, even

though the Dubuque County Attorney himself bears the responsibility of prosecuting those in violation of Iowa's truancy laws in Dubuque County, Iowa.

Clearly, neither the Treated Residents nor the Treated Students are "truants" within the meaning of Iowa Code § 299.8, which provides:

> "Any child of compulsory attendance age who fails to attend school as provided in this chapter, or as required by the school board's or school governing body's attendance policy, or who fails to attend competent private instruction or independent private instruction under chapter 299A, ***without reasonable excuse for the absence***, shall be deemed to be a truant." (Emphasis added.)

The above-cited provision of the Iowa Code plainly states that a student with a "reasonable excuse for the absence" does not constitute a truant. The Treated Residents and Treated Students are receiving physician-prescribed ABA Treatment for their ongoing health, safety and behavioral needs as it relates to their year-round life plan, which certainly meets any "reasonable excuse" standard imposed by the foregoing statute. Furthermore, the pediatricians of Medical Associates as well as the Dubuque County Attorney agree with Hills & Dales' position in this regard. Nevertheless, on the issue of whether the students must be excused to receive their physician-prescribed ABA Treatment, the IDOE concludes: "No. This decision is

committed by statute to the school district." (App. p. 91). This conclusion is arbitrary or capricious because it is made without regard to the law or facts of the case, and it is unreasonable because it is clearly against reason and evidence. See, *Dico, Inc.* at 355 (citing *Soo Line R.R. v. Iowa Dept. of Transp.*, 521 N.W.2d 685, 688-89 (Iowa 1994)). Therefore, this conclusion is an abuse of discretion because it rests on grounds or reasons clearly untenable or unreasonable. *Id.* (citing *Schoenfield v. FDL Foods, Inc.*, 560 N.W.2d 595, 598 (Iowa 1997). It is fatal to the IDOE position that it is the judge and jury on its decision to itself override the physicians' and county attorney's professional opinions.

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 be noted 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.

Lastly, the Treated Residents have been "targeted" by virtue of where they reside and by virtue of the fact that the Treated Residents cannot dual enroll for education purposes because of Hills & Dales' ICF/ID licensing, which does not allow the Treated Residents to dual enroll with the DCSD. (App. p. 44). Hills & Dales proposes that Keystone and the DCSD could allow an "exception to policy" as the Record shows they have in the past, which would alleviate this matter as to the Treated Residents. (App. p. 74). Despite the evidence reflecting that these exceptions to policy have existed, the IDOE opined unreasonably in its Declaratory Order:

> "An IEP Team may determine that a child requires a shortened school day, if necessary for 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 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." (App. p. 90).

It is ironic that the IDOE cites fatigue as a justification for an IEP Team

determining that a shortened day may be appropriate for a particular student while taking the position that the physician-prescribed ABA Treatment is not a justification for a shortened day, which would force the Treated Residents to attend their ABA Treatment during hours before or after their long school days and, ultimately, result in fatigue for the Treated Residents 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). Additionally, the Record includes several examples of exceptions and accommodations to full day class attendance for autistic and non-autistic Hills & Dales residents, showing that Hills & Dales and the DCSD have successfully collaborated on attendance issues in the past (e.g., "Resident # 1" was excused from attendance during an "illness season" and private instruction was provided by the school 2-3 times per week for 1 hour"). (App. p. 74).

In light of the foregoing, to not permit a shortened day for the Treated Residents is, therefore, a conclusion that is arbitrary or capricious because it is made without regard to the law or facts of the case, and it is unreasonable because it is clearly against reason and evidence, and contrary to what the IDOE has already conceded. See, *Dico, Inc.* at 355 (citing *Soo Line R.R. v. Iowa Dept. of Transp.*, 521 N.W.2d 685, 688-89 (Iowa 1994)).

Accordingly, because substantial rights of Hills & Dales and minor children with autism diagnoses have been prejudiced and the District Court affirmed a ruling which is arbitrary and capricious, 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).

REQUEST FOR ORAL ARGUMENT SUBMISSION

Petitioner-Appellant requests oral argument in this case.

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ATTORNEYS' COST CERTIFICATE

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

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