SPECIAL EDUCATION LEGAL ALERT

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This month's update identifies two court decisions that address current issues, including the provision of ABA services and specialized reading methodologies. For various related articles, special supplements, and earlier monthly updates, see **perryzirkel.com**.

On December 30, 2021 in *Hills & Dales Child Development Center v. Iowa Department of Education*, Iowa's supreme court addressed the issue of whether school districts (and intermediate units) must release students with disabilities during the school day to receive privately provide applied behavior analysis (ABA) therapy upon a physician's order. The Iowa Department of Education interpreted the state's compulsory education law and the IDEA to leave this matter to school district discretion, and a private, nonprofit provider of such services challenged this interpretation, insisting instead that school districts must honor a physician's release order for this purpose. A lower court agreed with the Department's interpretation, and the private provider took an appeal to the state's highest court under the state administrative procedures act.	
Is ABA therapy a related service under the IDEA, thus subject to determination of the child's IEP team, or—as the private provider contends—is it instead a medical service, thus excluded from the purview of the IEP team?	Citing the Supreme Court decision in *Cedar Rapids Cmty. Sch. Dist. v. Garret F*. (1999), which interpreted the IDEA exclusion for medical services to be limited to services that can only be provided by a physician, the court concluded that ABA therapy is a related service. It can be provided and, in this case, is provided by a certified practitioner, not a physician.
The private provider further argues that ABA therapy is effective and, thus, a district may be liable for denial of FAPE under the IDEA for failing to release the child for this purpose.	The court disagreed, clarifying that the issue was not whether ABA therapy is effective but instead is "who has the authority to decide if a student can miss school for private therapy: … [the school district] or physicians associated with [the private provider]."
The school district counter-argued that releasing a student with an IEP from school for such services could result in the district's liability for denial of FAPE.	The court conditionally agreed: "If a student misses school time to an extent that it prevents the student from receiving the educational benefits outlined in the student's IEP, a public agency could be held liable under the IDEA."
The private provider's final argument is that physician "orders" should be controlling for IEP teams and for good-cause excusals from attendance.	The court characterized such physician determinations as entitled to weighty consideration, not controlling authority, for IEP teams' FAPE decisions and school administrators' attendance decisions.
The bottom line is to continue to make individualized FAPE determinations under the IDEA, including whether the child needs ABA therapy and, if so, the location, frequency, and duration, subject to the parents' right to a due process hearing (or state complaint procedures). Physicians, private providers, and other third parties all play a supporting role, but the district and the parents are the leads in meeting and exceeding the requirements of FAPE for the individual IDEA-eligible child.	

In its December 31, 2021 decision in *Albuquerque Public Schools Board of Education v. Armstrong*, a federal district court in New Mexico addressed various FAPE issues for the IEPs in grades 4 and 5 for a child whom the district first evaluated in grade 2 with "characteristics of dyslexia" and eligible under the IDEA. Based on what his parents perceived as a lack of progress during this period, including but not limited to continuing struggles in reading, his parents filed for a due process hearing when the student was in grade 6. The hearing officer ruled in their favor for approximately 10 of the 16 issues in their complaint. The resulting remedies included, among various other items, one hour per day of compensatory education in 1:1 dyslexia-specific reading instruction and orders for the IEP team to include writing goals and inclusion support in math. The district filed for appeal, focusing on selected aspects of the hearing officer's decision.	
The district contended that the SPIRE reading program that it provided to the student was appropriate to meet the student's needs, per the Supreme Court's substantive standard for FAPE under *Endrew F*.	The FAPE denial, the court explained, was not whether SPIRE could be an effective methodology but rather (1) the unreliable and inconsistent measures that amounted to lack of meaningful progress, and (2) the district's failure to implement SPIRE with fidelity.
The court also agreed with the hearing officer that the district failed to comply with the New Mexico law for teacher training in "evidence-based reading interventions" for students identified with dyslexia and as IDEA-eligible.	For example, the evidence in the record was that the student's fourth-grade and fifth-grade special education teachers and his SPIRE teacher had "received no specialized training regarding dyslexia whatsoever." Thus, they did not have the capacity to provide the needed instruction.
The district argued that the student's inconsistent progress was attributable to the parents' arrangement for two private tutors who provided reading programs different from each other and from SPIRE.	The court rejected this argument as only theoretical rather than specifically applicable for this student, explaining that "the fact that multiple reading programs 'could' impact a child's learning does not demonstrate that they did in this case."
The district also attributed the student's limited progress to his sporadic attendance record, which extended to the shift to remote learning during the 2–3 pandemic months at the end of the student's fifth-grade year.	Pointing out that such behavior may be related to the child's disability, the court declined to regard it as absolving the district from its FAPE obligation and, as for the last few months, "the pandemic itself and the switch to online learning led to difficulties in recording attendance."
The district also called into question the hearing officer's adverse ruling regarding assistive technology (AT) and her broad-based remedial orders that included training for teachers and increased services for the student in AT.	The court found that the evidence supported the hearing officer's ruling with regard to failure to implement the IEP provisions for AT, especially Bookshare access before and during the pandemic period of grade 5, and rather cursorily affirmed the remedial orders.
This case primarily serves as another reminder, in addition to the federal district court decisions in the June 2020 and November 2021 legal alerts, of the need to keep track of the recent case law that is counter to the tradition of judicial deference to school authorities in methodology cases. These cases are attributable in part to the increasing advocacy specific to students with dyslexia. Secondarily, the case shows the relatively limited role thus far of the pandemic in FAPE litigation, although the courts are slow to reach these issues.	