

## Care and Treatment

### A Fact Sheet from the Minnesota Disability Law Center

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Minnesota's statutes and rules concerning children placed for care and treatment, like some other areas of special education law, are complicated and convoluted. Some confusion was caused by statutory changes in 2002. The changes, found in Minn. Stat §125A.515, included new definitions of which facilities were called care and treatment and resulted in some alterations in procedures. The confusion exists because the existing care and treatment rule, Minn. R. 3525.2325, which has different definitions and procedures was not repealed.

Generally, statutes prevail over, or preempt, rules when they conflict. But, where the statute is silent, the rules are intended to fill in the gaps. Until statutory or rule changes (or courts, the MDE or hearing officers) clarify where the real lines are between the statute, Minn. Stat §125A.515, and the rule, Minn. R. 3525.2325, there is much room to argue and there is a lack of certainty for administrators trying to comply with the various provisions. This article will provide some clarity on this topic, indicate where there are some potential conflicts and will provide an overview of where districts have been found in violation with regard to care and treatment.

The basics:

#### Who Provides?

If a student is placed in a care and treatment facility, the district in which the facility is located must provide educational services, both regular and special education. Minn. Stat. §125A.515, subd. 3(a). The district responsible to provide services is called, surprise, the providing district. (The term resident district is the district in which the parents reside). For students placed in a Department of Corrections facility, the DOC is the district responsible to provide services. Minn. Stat. §125A.515, subd. 3(b). The resident district remains financially responsible for these students.

#### What are care and treatment facilities?

This is the first main area of confusion. The statute, Minn. Stat. §125A.515, defines *students placed for care and treatment* as students who were placed in 1. group foster

homes, 2. secure juvenile detention facilities, 3. juvenile residential facilities, 4. temporary holdover - eight day, 5. group homes, 6. residential academies, 7. transitional programs, 8. shelter care, 9. shelter for homeless, 10. adult facilities that admit persons under the age of 22; and 11. residential treatment programs, all of which must be approved by the MDE. Minn. Stat. §125A.515, subds. 1 and 2.

The care and treatment rule, Minn. R. 3525.2325, however, was not repealed and contains a different definition of care and treatment facilities;<sup>1</sup> most notably, the rule *includes* students at home due to illness or accident and students in hospitals and day treatment centers while the statute does not. The statute does state that students who are not in school or predicted to be absent from school for 15 consecutive or intermittent days and who are at home or in certain facilities (such as hospitals or medical facilities or a day treatment centers) are NOT students placed for care and treatment. (These students must receive services through their district of residence. Minn. Stat. §125A.515, subd. 10.). But, importantly, the statute says nothing about students who are at home, in day treatment, or in a hospital for *more than* 15 consecutive or intermittent days.

*So, what laws apply to students who are at home, in day treatment, or in a hospital for more than 15 consecutive or intermittent days?*

This is the second area of confusion. Since the statute preempts the rule where the two conflict, only the statutory definition appears to apply. This, however, would result in students who are at home, in day treatment, or in a hospital for more than 15 consecutive or intermittent days not being covered at all. MDE has issued a complaint decision that suggests the rule will be used. In 2003, where a doctor placed a student at home because of her medical condition for over one school year and there was a dispute over the amount of services the student was entitled to, MDE applied the rule and ordered the district to provide a minimum level of services listed in the rule.<sup>2</sup>

Back to some more areas of agreement.

#### When Must Services Begin?

Educational services must begin within 3 business days after a student goes into care and treatment, but the first 4 days of when the student is present may be used for educational and safety screening. Minn. Stat. §125A.515, subd. 4(a). The rule says this must occur “immediately,” but following the timeline in statute would almost certainly be sufficient.

#### What Must Happen When a Student Enters Care and Treatment?

If the care and treatment facility has an on-site educational program, districts must determine whether a student in care and treatment is already eligible for special education services by contacting the resident district within one day to request verification of special education status and obtain the student’s transcript. Minn. Stat. §125A.515, subd. 5(a). There are different procedures for special education and regular education and it should be noted that placement in a care and treatment facility does not automatically qualify a student for special education services. Minn. Stat. §125A.515, subd. 3(c). Each student must meet special education eligibility criteria

*If the student is eligible for special education services*

If the student is eligible, the district must also obtain the IEP. Minn. Stat. §125A.515, subd. 5(a). Further, the district must hold an IEP meeting to review the IEP and provide notice or make a documented phone call to 1. the person or agency placing the student; 2. the resident district; 3. appropriate teachers and related services staff from the providing district; 4. appropriate staff from the care and treatment facility; 5. parents; and 6. the student if appropriate. Minn. Stat. §125A.515, subd. 5 (b). In general, MDE will apply state and federal due process protections to special education students in care and treatment facilities.<sup>3</sup>

Other due process requirements include: placement in the LRE when allowed by the student's treatment and educational needs, determination of placement by an IEP team (for students with disabilities) or by parents and staff (for regular education students); and compliance with the Pupil Fair Dismissal Act and other laws in discipline. Minn. Stat. §125A.515, subd. 8. The due process protections provided in the statute appear to preempt similar protections in the rule. The rule creates a distinction between short and long term placements and provides different due process protections.

*If the student is not eligible for special education services at time of placement*

If the student is not eligible, the district must screen the student to determine potential eligibility. Minn. Stat. §125A.515, subd. 5(c). The screening must occur once the parents and treatment conditions allow.<sup>4</sup> Students who are not eligible for special education services must be provided with regular education services. Minn. Stat. §125A.515, subd. 4.

The statute does not state what must happen if the screening suggests a need for a special education evaluation. Under the rule (which may be preempted) if the placement was over 30 days, the providing district must conduct the special education evaluation if needed, and develop an IEP if the student is eligible.

How much services are students entitled to? Are there any minimum services levels?

The statute also defines what education services are required. At a minimum, the district must provide the "education necessary" for students not at grade level as suggested by the education record or IEP **and** must provide a school day of the same length as regular school programs, unless a change is needed because of concerns noted in the IEP or made by treatment providers. Minn. Stat. §125A.515, subd. 7.

Since the statute excludes doctors and other medical professionals from the definition of care and treatment, the statute does not appear to contemplate what should happen for students placed at home or in a hospital (or in a day treatment program) by a physician. The care and treatment rule, discussed below, does account for this type of situation.

*Another Potentially Applicable Standard in Rule*

Even though the statute would appear to preempt the rule (because the statute addressed minimum standards), the rule addresses specific situations that the statute does not (e.g. placement at home by a doctor) and may still be valid as MDE has once applied the rule's

provisions after the statute was enacted.<sup>5</sup> The rule's minimum standards are differentiated between expected placements of more or less than 170 school days.

For students who are expected to be in a care and treatment facility for more than 170 days (exclusive of the summer), there are four options: A. the necessary instruction corresponding to the student's grade level; B. "preferably" a normal school day in accordance with the IEP; C. an average of two hours per day of one to one instruction; or D. individualized instruction for half the normal day in accordance with the IEP or education plan.

For students who are expected to be in a care and treatment facility for less than 170 days (exclusive of the summer), there are two options, either small group instruction for half the normal day or an average of one hour of one to one instruction.

#### *Another possible area of confusion*

With regard to what due process procedures apply, the rule has a distinction between short term (31 days or less) and long term (more than 30 day) placements. Since the distinction in rule implicates due process procedures, it appears that the statute would preempt the rule's provisions for special education due process steps. If no preemption is found, here's what the rule says about short and long term placements.

For short term placements of special education students, the providing district would, for special education students in a short term placement, have to begin instruction immediately, contact the prior district for the IEP, contact the parent to secure an agreement about services, and if there is a disagreement with the parent, hold a meeting and provide notice along with documentation (the modified IEP, parent rights, and a response form).

For long term placements the providing district must contact the parents for an agreement (if there is no agreement, a meeting must be held) and must determine whether the IEP can be fully implemented or if more evaluation is needed. If the IEP cannot be implemented or if more evaluation is needed, the parents must be contacted for an interim agreement or an IEP meeting must be held to develop an interim IEP. The resulting IEP must follow all IEP content requirements and must discuss how treatment and education services will be coordinated. Additionally, there are special provisions for providing education in a regular class and for residential facilities.

#### What Happens When a Student Leaves Care and Treatment?

If the student is in a care and treatment facility for more than 15 days, the district must provide an exit report that contains a summary of "regular education, special education, evaluation, educational progress, and service information" and send it to the resident district, the next providing district if different, the parents, and any appropriate social service agency. The report must include an IEP if the student is eligible for special education. Minn. Stat. §125A.515, subd. 6.

#### Who pays?

For a district placement, the resident district pays for education and care and treatment costs directly or through a tuition agreement. Minn. R. 3525.0800, subd. 7.

For a non-district placement, the resident district pays for education costs only, when it is notified. Minn. R. 3525.0800, subd. 7.

For a, non-resident district, agency placement in a day treatment program, the resident district determines the location of special education services and provides or pays for them. Minn. R. 3525.0800, subd. 7.

For a temporary day treatment placement in another district and the child lives within the resident district, the resident district provides transportation (during regular hours) and pays tuition to the providing district (unless the resident district can provide education at home or within the district). Minn. Stat. §125A.15, Minn. Stat. §125A.51

For temporary care and treatment placement, the non-resident/providing district provides education and transportation for the education program and bills the resident district. If there is a placement by Human Services or Corrections, neither the resident district or providing district is responsible for the costs of board, lodging and treatment. Minn. Stat. §125A.15

For placement in a privately owned and operated residential facility, a district may enter into a contract to pay for special education services through a joint powers entity. Minn. Stat. §125A.15

#### What's reimbursable through special education funds?

The statute, Minn. Stat. §125A.515, subd. 9, states that regular education services, including screening, are not reimbursable. However, for students who demonstrated learning or behavioral problems in a screening, indirect or consultative services provided in conjunction with regular education pre-referral interventions and assessment are reimbursable. Minn. Stat.. Otherwise, reimbursement is determined through special education laws.

#### What are the potential trouble-spots?

Over the past 3 or 4 years there have been 14 complaints and no due process hearings directly involving care and treatment issues. These complaints fall into three main categories.

#### *Provision and Supervision of Services at Non-Resident District Sites*

If a resident student is in a non-resident facility, MDE has stated that even though the providing district must deliver the education program to the student, the resident district must exercise its supervisory responsibility to ensure the providing district is offering FAPE. A failure to do so can mean that the resident district (and the providing district) will be responsible for any special education violations.<sup>6</sup> The same supervisory responsibility holds true for private facilities with whom a district contracts to provide FAPE.<sup>7</sup>

Students who are educated in care and treatment facilities run and licensed by the Department of Corrections must be provided with FAPE, to the extent allowable by penological considerations. The providing district's duty is to work within the constraints of the facility's requirements. For example, where two students were placed in handcuffs and ankle mechanical restraints because of their behavior, the district needed use licensed teachers to provide FAPE while they were restrained. MDE also showed deference to corrections' officials in determining when and where restraints were necessary.<sup>8</sup>

#### *Other special education due process protections*

In general, MDE will apply applicable due process protections to special education students in care and treatment facilities.<sup>9</sup> More specifically, where a student was placed at home by a doctor and the district began to provide services, MDE found a violation when the district stopped providing services to verify the doctor's placement. MDE concluded the student was entitled to notice and a review and revision of IEP because of the placement.<sup>10</sup> Similarly, in a different situation, a district was found in violation of providing IEP services prior to finishing the initial evaluation and obtaining consent.<sup>11</sup> Unilateral changes and failure to ensure parental participation have also resulted in violations.<sup>12</sup>

#### *Immediacy of Services*

MDE has also found violations where a district has not acted promptly to ensure the provision of special education services. In the metropolitan area, the district failed to find and establish tutoring services at the student's home for over a month. MDE determined that one week may be a reasonable day, but more than a month was not.<sup>13</sup> In a more complicated situation, MDE found a delay of services for over 40 days was similarly problematic, especially where parental notice and assessment was not completed.<sup>14</sup> Districts must also act promptly to determine if a student placed in a care and treatment facility is eligible for special education. A delay in finding out for over a month is not acceptable.<sup>15</sup> Furthermore, if there is a new care and treatment placement, the IEP must be reviewed and revised immediately to ensure the student receives FAPE.<sup>16</sup>

Additionally, following a care and treatment placement the district must seek the student's records as soon as possible.<sup>17</sup> And, the district cannot wait to conduct a screening on a student placed in homebound, even if there is a pending outside evaluation.<sup>18</sup>

#### Summary, or What should I do now?

Overall, there are two important points that remain unclear in care and treatment. First, the statute and the rule have different definitions of care and treatment. This would ordinarily preempt the rule, but so doing would remove protections for students placed at home, in the hospital or in day treatment facilities. MDE has issued a decision where it applied the rule in this situation. Second, the statute does not clearly discuss what minimum services are required. The rule does more specifically.

Since the MDE enforced the rule, compliance with the existing rule is one avenue of compliance. Districts working with special education students may also follow the statute and try to follow all state and federal special education due process protections to extent in the care and treatment or home/hospital/day treatment setting. The bottom line still is FAPE. For students without disabilities in care and treatment settings, districts must ensure screening is completed and then take appropriate steps when it is completed. If students without disabilities are placed at home/hospital/day treatment setting, this may trigger a district's child find responsibilities, so the district may want to determine whether an initial evaluation should be proposed.

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<sup>1</sup> Minn. R. 3525.2325, subd. 2 includes the following as care and treatment facilities: 1. chemical dependency and other substance abuse treatment centers; 2. shelter care facilities; 3. home, due to accident or illness; 4. hospitals; 5. day treatment centers; 6. correctional facilities; 7. residential treatment centers; and 8. mental health programs.

<sup>2</sup> MDE Complaint decision #1908

<sup>3</sup> See Complaint decisions #1878, #1845, #1846

<sup>4</sup> MDE Complaint decision #1846

<sup>5</sup> MDE Complaint decision #1908

<sup>6</sup> MDE Complaint Decision #1625, #1559

<sup>7</sup> MDE Complaint decision #1612

<sup>8</sup> MDE Complaint decision #2148

<sup>9</sup> MDE Complaint decision #1878, 1845, 1846, 1625

<sup>10</sup> MDE Complaint decision #1845

<sup>11</sup> MDE Complaint decision #1846

<sup>12</sup> MDE Complaint decision #1825

<sup>13</sup> MDE Complaint decision #1640

<sup>14</sup> MDE Complaint decision #1714

<sup>15</sup> MDE Complaint decision #1649

<sup>16</sup> MDE Complaint decision #1878

<sup>17</sup> MDE Complaint decision #1746, 1649

<sup>18</sup> MDE Complaint decision #1685