No. 11-1334

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JEFFERSON COUNTY SCHOOL DISTRICT R-1,

Plaintiff-Appellant

v.

ELIZABETH E., BY AND THROUGH HER PARENTS,
ROXANNE B. AND DAVID E.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE WILLIAM J. MARTÍNEZ

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*
SUPPORTING DEFENDANT-APPELLEE

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INTEREST OF THE UNITED STATES

This case raises important issues regarding the Individuals with Disabilities Education Act (the IDEA or the Act), 20 U.S.C. 1400 *et seq.*, a civil rights statute that authorizes federal grants to help fund special education and related services for children with disabilities.

The United States Department of Education administers and enforces the IDEA and is authorized to issue regulations, policy statements, and interpretive

letters implementing the Act. See 20 U.S.C. 1402, 1406, 1416; 34 C.F.R. 300.1 *et seq*. Upon referral from the Department of Education, the United States Department of Justice may bring actions in federal court to enforce the IDEA. 20 U.S.C. 1416(e)(2)-(3). The United States thus has a strong interest in the proper judicial interpretation of the Act.

STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether Jefferson County School District R-1 (JCSD), the party challenging the administrative decision, bears the burden of proof.

2. Whether, under the IDEA, a school district must pay for some or all of the costs of a residential placement when the child's disability is intertwined with his or her ability to benefit from educational services.

STATEMENT OF THE CASE

1. The IDEA

"Congress first passed [the] IDEA as part of the Education of the Handicapped Act in 1970, 84 Stat. 175, and amended it substantially in the Education for All Handicapped Children Act of 1975, 89 Stat. 773." *Schaffer* v. *Weast*, 546 U.S. 49, 51-52 (2005). When the IDEA first became law "the majority of disabled children in America were 'either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to

"drop out."''" *Id.* at 52 (quoting H.R. Rep. No. 332, 94th Cong., 1st Sess. 2 (1975)); see also *Honig* v. *Doe*, 484 U.S. 305, 309 (1988). With the Act, Congress sought to "reverse this history of neglect." *Schaffer*, 546 U.S. at 52.

The IDEA authorizes federal grants to States to help provide special education and related services to children with disabilities. 20 U.S.C. 1411(a)(1). In order to receive federal funds, States must ensure that every child with a disability residing in the State has available to the child a "free appropriate public education" (FAPE) – that is, the school must make available special education and related services designed to meet the child's unique needs. 20 U.S.C. 1412(a)(1) and (5). States must ensure that each local school district develops an "individualized education program" (IEP) for each eligible child with disabilities. 20 U.S.C. 1412(a)(4). The IEP must contain, among other things, a statement of the special education and related services that the child is to receive. 20 U.S.C. 1414(d)(1)(A)(i)(IV).

"Special education," as defined by the IDEA, "means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability," including instruction conducted in "hospitals," "institutions," and "other settings." 20 U.S.C. 1401(29). Under the Act, "related services" broadly encompass all supportive services that may be "required to assist a child with a disability to benefit from special education," including "psychological services,"

"social work services," "counseling services," and "medical services, except that such medical services shall be for diagnostic and evaluation purposes only." 20 U.S.C. 1401(26)(A). Medical services that *must* be provided by a licensed physician are not considered required "related services." *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66, 73-76 (1999), *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 892-894 (1984). "If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents." 34 C.F.R. 300.104. The Act also provides that parents may secure reimbursement from the school district after placing the child in a private school or private setting if (a) the school district did not provide the child with a FAPE, (b) the private placement did provide the child a FAPE, and (c) the parents provided the school district timely notification that they were rejecting the proposed IEP and placing the child in a private placement. 20 U.S.C. 1412(a)(10)(C)(ii); *School Comm. of the Town of Burlington* v. *Department of Educ.*, 471 U.S. 359 (1985) (*Burlington*).

2. Background

A. Plaintiff Elizabeth E. (Elizabeth) is a child with very serious mental and emotional disorders. App.219.[1] In fact, some medical and education experts who dealt with her described her as "one of the most severely challenged children in terms of mental health of any they have dealt with." App.219 n.1.

In 2000, Elizabeth and her family moved to Jefferson County, Colorado, where JCSD found that Elizabeth was eligible for IDEA-related services because of her serious emotional disturbance and her learning disability. App.219, 371, 386, 393-394. As JCSD has acknowledged, Elizabeth's special education plan must, among other things, address her mental health needs. App.2290-2291.

Elizabeth's parents and JCSD agreed that Elizabeth would attend a private school for children with significant learning disabilities and emotional and behavioral issues for her first two years of high school. App.191, 220-221. While she began each of these years well and achieved many of her social, emotional, and academic goals, at the end of each year Elizabeth would "become over-stimulated" and would have anger outbursts, disassociate, go into alternate realities for long periods of time, and was removed from the classroom. App.220-221.

Early in her third year at the private high school, the school staff was concerned that they could no longer meet Elizabeth's serious needs, and discussed

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[1] Citations to "App.__" refer to pages in the Appellant's Appendix filed in this appeal.

the possibility of residential treatment. App.221. Elizabeth's behavior at home also deteriorated and became threatening and violent, which her parents viewed as an escalation of her previous behavior. App.221-222, 224.

B. Elizabeth's parents then admitted her into the Aspen Institute for Behavior Assessment (Aspen) in Utah, "an acute inpatient psychiatric hospital designed for adolescents who are psychologically or neurologically compromised." App.226. The Aspen staff found Elizabeth to be very seriously "psychologically and neurologically compromised" (App.227) and found that she "exhibited early warning symptoms * * * [of] a severe psychotic disorder or schizophrenia" (App.228). Aspen concluded that "Elizabeth's emotional stability and behavior impact her ability to learn in the classroom, and that it is impossible to address her educational needs without addressing her mental health needs." App.204. Aspen strongly recommended that Elizabeth be placed directly into a small residential program with "strong clinical support by licensed therapists, medication management by a psychiatrist, and an academic environment that could cater to her learning disability and emotional needs." App.228. Elizabeth's parents notified JCSD of Elizabeth's hospitalization, and continued to update JCSD on her progress. App.224. JCSD informed Elizabeth's parents that it had unenrolled Elizabeth from the private high school and, a few weeks later, asserted that it had

no responsibility to Elizabeth under the IDEA because her parents had unilaterally admitted Elizabeth into an out-of-state hospital. App.193, 224.

Two days after she was discharged, Elizabeth's parents enrolled her at Innercept , LLC (Innercept) in Idaho, a residential facility that offers "integrated psychiatric, behavioral and academic care." App.231; see App.228-230. Innercept has an on-campus accredited high school staffed by state-accredited teachers that has the same educational content and diploma as any other high school in Idaho. App.229. Elizabeth's parents notified JCSD that they would enroll Elizabeth at Innercept and seek reimbursement from JCSD. App.232. JCSD three times told Elizabeth's parents that JCSD had no responsibility to Elizabeth under the IDEA because she had been hospitalized out-of-state. App.193-194, 232. Elizabeth was a legal resident of Jefferson County at all times. App.235.

C. Elizabeth's parents requested a due process hearing, as required under the IDEA, to review JCSD's rejection of their reimbursement request. App.218. The hearing officer held that JCSD violated the IDEA when (a) it failed to provide adequate notice before unenrolling Elizabeth from school, and (b) it refused to provide Elizabeth with IDEA-required services once she enrolled at Innercept. App.234-238. The hearing officer found that "Elizabeth's emotional and psychological problems affect her ability to function in the classroom" and "[h]er educational needs can not be addressed * * * without addressing her mental health

needs." App.233. The hearing officer ordered JCSD to reimburse Elizabeth's parents for the cost of Innercept, less the cost of any strictly medical services. App.248. JCSD appealed to a second level administrative law judge, who generally affirmed the hearing officer's decision, holding that reimbursement was appropriate. App.292.

D. JCSD filed suit in federal court, naming Elizabeth's parents as defendants. The district court generally affirmed the administrative decisions, holding, in relevant part, (a) that JCSD had the burden of proof (App.196-197) and (b) that Innercept was a reimbursable IDEA placement (App.202-207). The court ordered JCSD to reimburse Elizabeth's parents for all services provided at Innercept, except those provided by a licensed physician. App.214-215.

SUMMARY OF THE ARGUMENT

This Court should uphold the district court's common-sense ruling that a plaintiff seeking to overturn an administrative decision issued under the IDEA bears the burden of proof in federal court. A holding that, in a federal court action initiated by a school district, parents must shoulder the burden of proof after winning at the administrative level and being named as the defendant would conflict with Supreme Court precedent, the traditional burden of proof rule, and provisions of the IDEA.

This Court should join the majority of circuit courts of appeals and adopt a test that a school district is liable under the IDEA for the cost of a residential placement, less the cost of medical treatment that can be provided *only* by a licensed physician, if the child's mental health needs are so significantly intertwined with his or her educational needs that educational services cannot be provided without some mental health treatment. Under this test, the evidence would show that the child cannot meaningfully benefit from educational services without the educational *and* mental health services that the residential placement provides.

While residential placements can be costly, the very small number of children for whom residential placement is the least restrictive environment are among the most vulnerable and historically underserved children in need of IDEA services. The test the school district proposes here would exempt school districts from paying for IDEA-related services merely because they are intertwined with residential services. As a result, the most vulnerable children will effectively be denied critical special education and related services the IDEA guarantees them. This scenario is clearly contrary to the IDEA, which was enacted to ensure that *all* children with disabilities have a free and appropriate public education.

ARGUMENT

I

THE PLAINTIFF CHALLENGING THE ADMINISTRATIVE DECISION IN FEDERAL COURT BEARS THE BURDEN OF PROOF

The district court properly held that JCSD bears the burden of proof in federal court because it is the plaintiff seeking to overturn the administrative decisions. App.196. The majority of circuit courts of appeals assign the burden to the party challenging an administrative decision. *Marshall Joint Sch. Dist. No. 2* v. *C.D.*, 616 F.3d 632, 636 (7th Cir. 2010); *District of Columbia* v. *Doe*, 611 F.3d 888, 897 (D.C. Cir. 2010); *School Union No. 37* v. *Ms. C.*, 518 F.3d 31, 35 (1st Cir. 2008); *Hood* v. *Encinitas Union Sch. Dist.*, 486 F.3d 1099, 1103 (9th Cir. 2007); but see *Lathrop R-II Sch. Dist.* v. *Gray*, 611 F.3d 419, 423 (8th Cir. 2010), cert. denied, 131 S. Ct. 1017 (2011); *Richardson Indep. Sch. Dist.* v. *Michael Z*, 580 F.3d 286, 292 n.4 (5th Cir. 2009) (*Richardson*). This Court has not explicitly addressed the issue of burden of proof in federal court when the school district challenges an administrative decision in which the parents prevailed. See *Thompson R2-J Sch. Dist.* v. *Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008), cert. denied, 129 S. Ct. 1356 (2009); *L.C.* v. *Utah State Bd. of Educ.*, 125 F. App'x 252, 255 (10th Cir. 2005).

Supreme Court precedent, the traditional default rule, and the operation of the IDEA during an appeal in federal court all demonstrate that the party

challenging the administrative decision has the burden of proof in federal court. In *Schaffer*, the Supreme Court held that the party challenging the child's IEP bears the burden of proof at the *administrative level*. 546 U.S. 49. In so holding, the Court affirmatively fixed the outer boundary of its decision, stating "[w]e hold no more than we must to resolve the case at hand: The burden of proof in an administrative hearing challenging an IEP is *properly placed upon the party seeking relief*." *Id.* at 62 (emphasis added). *Schaffer* does not stand for the proposition that the parents challenging the school district's proposed IEP bear the burden *at all times*; indeed, *Schaffer* suggests precisely the opposite. The Court's decision was premised upon the fundamental principle of procedure that the burden of proof lies with the party seeking relief. 546 U.S. at 55, 57-58.

Nothing in *Schaffer*, or anywhere else, calls for a different result in this procedural posture. Elizabeth and her parents carried the burden of proof when they challenged the school district's actions and sought reimbursement at the administrative level. After they prevailed, JCSD was the challenger, attacking the administrative decisions. JCSD has sought "to change the present state of affairs and * * * naturally should be expected to bear the risk of failure of proof or persuasion." 546 U.S. at 56. There is nothing in the IDEA, or anywhere else, that would alter this basic principle of civil procedure.

In fact, assigning the burden to JCSD is fully consistent with the IDEA and its implementing regulations. First, under the IDEA, a federal court "must give 'due weight' to the hearing officer's findings of fact, which are considered *prima facie* correct." *L.B.* v. *Nebo Sch. Dist.*, 379 F.3d 966, 974 (10th Cir. 2004). It is hardly reasonable for a party to have the burden of proof to sustain administrative findings that are presumed to be correct. Second, the IDEA's "stay-put" provision and implementing regulations preserve a hearing officer's decision in favor of the parents during the pendency of any litigation in federal court. Once a hearing officer holds in favor of the parents, the placement or services the hearing officer finds proper under the IDEA must be implemented while any subsequent federal court review is underway. 20 U.S.C. 1415(j); 34 C.F.R. 300.518(d). It would be inconsistent with this standard of review and the statutory "stay-put" provision to require parents who prevailed at the administrative level to prove their case anew in federal court.

II

THIS COURT SHOULD ADOPT A REIMBURSEMENT TEST THAT REQUIRES REIMBURSEMENT FOR SPECIAL EDUCATION AND RELATED SERVICES WHEN THE CHILD'S EDUCATIONAL AND MENTAL HEALTH NEEDS ARE SIGNIFICANTLY INTERTWINED

The IDEA is premised on the fact that each child with a disability requires special education and related services that are specially tailored to her unique needs, and these often include a broad array of related and supportive services to

enable the child to meaningfully benefit from her education. See, *e.g.*, 20 U.S.C. 1400(d)(1)(A); *Burlington*, 471 U.S. at 367-368. Therefore, as the majority of circuits have held, the appropriate inquiry when defining a school district's IDEA obligations to a particular student is the degree to which the child's educational and other needs are related.

1. Congress enacted the IDEA to reverse a history of neglect. 20 U.S.C. 1400(c)(2); *Schaffer*, 546 U.S. at 52; *Honig*, 484 U.S. at 309; *Board of Educ.* v. *Rowley*, 458 U.S. 176, 179 (1982). When Congress first enacted the IDEA, "[a]mong the most poorly served of disabled students were emotionally disturbed children: Congressional statistics revealed that for the school year immediately preceding passage of the Act, the educational needs of 82 percent of all children with emotional disabilities went unmet." *Honig*, 484 U.S. at 309; *A.E.* v. *Independent Sch. Dist. No. 25*, 936 F.2d 472, 475 (10th Cir. 1991).

Nearly twenty years after the initial legislation, it was still "clear that students with serious emotional disturbances remain[ed] significantly underserved or unserved by the special education system." S. Rep. No. 204, 101st Cong., 1st Sess. 6 (1989); see also H.R. Rep. No. 544, 101st Cong., 2d Sess. 39 (1990) ("It is generally agreed that children with serious emotional disturbance remain the most underserved population of students with disabilities."). For example, during the 1986-1987 school year, only about 19% of children with serious emotional

disturbances received a free appropriate public education, and these children had the highest drop-out rate of all special education students. *Id.* at 10, 39. Ten years later, in 1997, Congress found that "the promise of the [IDEA] law has not been fulfilled for too many children with disabilities. Too many students with disabilities are failing courses and dropping out of school. Almost twice as many students with disabilities drop out as compared to students without disabilities." S. Rep. No. 17, 105th Cong., 1st Sess. 5 (1997).

To address this pernicious failure to educate children with disabilities, particularly those children with significant mental health issues, Congress has repeatedly authorized federal grants to help school districts provide educational programs tailored to the unique educational needs of children with disabilities. 20 U.S.C. 1401(9), 1411(a)(1). The IDEA, however, is more than a funding statute. *Honig*, 484 U.S. at 310. The Act "confers upon disabled students an enforceable substantive right to public education in participating States and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." *Ibid.* (internal citation and footnote omitted).

The IDEA's overarching substantive goal is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. 1400(d)(1)(A); *Burlington*, 471 U.S. at 369. Congress intended

that "the term 'unique educational needs' be broadly construed to include the * * * academic, social, health[,] emotional, communicative, physical and vocational needs" of a child with disabilities. H.R. Rep. No. 410, 98th Cong., 1st Sess. 19 (1983). Thus, the IDEA requires broadly defined resources for children with disabilities based upon Congress's recognition, decade after decade, that without such resources many children are unable to benefit from the special education States must provide. See 20 U.S.C. 1401(26)(A); *Garret F.*, 526 U.S. at 73, 79; *Tatro*, 468 U.S. at 889-891.

Clearly, residential placements are – and should be – rare. Under the Act, a residential placement is only appropriate when a child's very severe mental health, behavioral, or other needs cannot be met in a less restrictive environment. Under those very limited circumstances, school districts are obligated to pay for some portion of the residential placement, including the educational and mental health services provided in the residential setting that the student needs to meaningfully benefit from her educational instruction. See, *e.g.*, *Independent Sch. Dist. No. 284* v. *A.C.*, 258 F.3d 769 (8th Cir. 2001) (*Independent*); *Mrs. B.* v. *Milford Bd. of Educ.*, 103 F.3d 1114 (2d Cir. 1997); *Seattle Sch. Dist., No. 1* v. *B.S.*, 82 F.3d 1493 (9th Cir. 1996) (*Seattle*); *Babb* v. *Knox Cnty. Sch. Sys.*, 965 F.2d 104 (6th Cir. 1992); *Jefferson Cnty. Bd. of Educ.* v. *Breen*, 853 F.2d 853 (11th Cir. 1988) (*Jefferson Cnty.*); *McKenzie* v. *Smith*, 771 F.2d 1527 (D.C. Cir. 1985);

Abrahamson v. *Hershman*, 701 F.2d 223 (1st Cir. 1983); *Kruelle* v. *New Castle Cnty. Sch. Dist.*, 642 F.2d 687 (3d Cir. 1981).

2. To determine when residential placement is reimbursable under the IDEA, the majority of circuits examine the relationship between the child's educational and other disability-related needs that affect the child's ability to learn. In 1981, the Third Circuit held that the relevant inquiry regarding a school district's residential cost obligations is "whether full-time placement may be considered *necessary for educational purposes*, or whether the residential placement is a response to medical, social or emotional problems that are *segregable from the learning process*." *Kruelle*, 642 F.2d at 693 (emphasis added). Where a child's other needs are not severable from her educational needs, the related services aimed at addressing those needs are "an essential prerequisite for learning" and must be provided by the school district for the child to receive the free appropriate public education to which she is entitled under the IDEA. *Id.* at 694.

The majority of circuits have adopted the Third Circuit's analysis. Although the circuits use slightly differently language, the essence of the inquiry is the same where, as here, the parties agree that a residential placement was medically necessary for the child: if the child's educational and other needs are significantly intertwined, so that educational services must be accompanied by other medically-

related, psychiatric, or psychological services to provide the child any *educational* benefit, the school district must pay for some or all of the residential placement and for the educational and related services, except medical services that can be provided *only* by a licensed physician. See *Garret F.*, 526 U.S. at 73-76; *Tatro*, 468 U.S. at 892-894; *Independent*, 258 F.3d at 774 (citing *Mrs. B.*, 103 F.3d at 1122; *McKenzie*, 771 F.2d at 1534; *Kruelle*, 642 F.2d at 693); *Mrs. B.*, 103 F.3d at 1122 (citing *Abrahamson*, 701 F.2d at 227-228; *McKenzie*, 771 F.2d at 1534); *Tennessee Dep't of Mental Health & Mental Retardation* v. *Paul B.*, 88 F.3d 1466, 1471 (6th Cir. 1996) (*Tennessee*) (citing *McKenzie*, 771 F.2d at 1534; *Kruelle*, 642 F.2d at 693); *Clovis Unified Sch. Dist.* v. *California Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990) (*Clovis*) (citing *Kruelle*, 642 F.2d at 693); *Burke Cnty. Bd. of Educ.* v. *Denton*, 895 F.2d 973, 980 (4th Cir. 1990) (*Burke Cnty.*) (citing *McKenzie*, 771 F.2d at 1534; *Abrahamson*, 701 F.2d at 227; *Kruelle*, 642 F.2d at 693-694); *McKenzie*, 771 F.2d at 1534 (quoting *Kruelle*, 642 F.2d at 693); *Abrahamson,* 701 F.2d at 227-228.

The First, Second, Third, Fourth, Sixth, Eighth, Ninth, Eleventh, and District of Columbia Circuits all examine the degree to which the child's educational and other needs are related. If the child's disabilities interfere with her learning – where the child's educational and other disability-related needs are "intertwined" or "unseverable," see *Mrs. B.*, 103 F.3d at 1122; *Burke Cnty.*, 895 F.2d at 980;

Jefferson Cnty., 853 F.2d at 855 – the IDEA requires reimbursement for a residential placement that is designed to address the child's educational and other needs; such a placement is "required," "necessary for," or "essential to" the child's educational progress, *Independent*, 258 F.3d at 774; *Mrs. B.*, 103 F.3d at 1122; *Tennessee*, 88 F.3d at 1471; *Burke Cnty.*, 895 F.2d at 980; *Jefferson Cnty.*, 853 F.2d at 857; *McKenzie*, 771 F.2d at 1534; *Abrahamson,* 701 F.2d at 227-228; *Kruelle*, 642 F.2d at 693. Stated differently, reimbursement under the IDEA is not appropriate where the child's other needs are "segregable," "separable," or "quite apart" from her educational needs. *Tennessee*, 88 F.3d at 1471; *Clovis*, 903 F.2d at 643; *McKenzie*, 771 F.2d at 1534; *Kruelle*, 642 F.2d at 693. At bottom, regardless of the phrasing used, under all of these tests a school district must pay for some portion of a residential placement the child requires if the child's educational and other needs are so closely related that the child's other needs must be addressed for her to benefit from the educational services she is provided in the residential placement.

This analysis of the relationship between the child's educational and other disability-related needs is consistent with the Department of Education's interpretation of the IDEA. The Act's implementing regulations provide that when a child requires a residential placement, the school district must pay for the cost of the program, including special education, related services, and room and board.

See 34 C.F.R. 300.104. Only medical services that *must* be provided by a licensed physician are excluded from reimbursement. See 20 U.S.C. 1401(26); 34 C.F.R. 300.104; *Garret F.*, 526 U.S. at 73-76; *Tatro*, 468 U.S. at 892-894. The Department of Education interprets this regulation to require reimbursement for a residential placement "where a child's educational needs are *inseparable* from the child's emotional needs." 71 Fed. Reg. 46,581 (emphasis added). In such a case, when "an individual determination is made that the child requires the therapeutic and habilitation services of a residential program in order to 'benefit from special education,' * * * the [school district] is responsible for ensuring that the entire cost of that child's placement, *including the therapeutic care* as well as room and board, is without cost to the parents." *Ibid.* (emphasis added). Thus, the agency charged with administering and enforcing the IDEA also considers the relationship between the child's educational and other disability-related needs to determine when reimbursement is appropriate under the Act.

3. In this case, JCSD and the National School Boards Association and various State school board associations (collectively, NSBA) would have the Court apply a test that would make it unreasonably difficult for parents to receive reimbursement for a necessary residential placement for a child with severe emotional, medical, or mental health disabilities. In an attempt to discount the Third and Ninth Circuit tests, JCSD and NSBA appear to have mischaracterized

those Circuits' holdings. JCSD and NSBA claim that the Third Circuit has abandoned its relationship test and that the Ninth Circuit examines only the purpose for the residential placement. JCSD even goes so far as to assert that the Ninth Circuit interprets the IDEA to require reimbursement only when the child's educational needs are the "but for" cause of the residential placement. This analysis does not hold up upon closer examination of the decisions.

The Third Circuit has not rejected, modified, or departed from the residential placement reimbursement test it announced in *Kruelle*. In the very case JCSD cites, *Mary T.* v. *School District of Philadelphia*, 575 F.3d 235 (3d Cir. 2009), the Third Circuit expressly relied upon the *Kruelle* test, although the facts called for a different outcome. The child in *Mary T.* was placed into a "long-term psychiatric residential treatment center" that did not have "any educational accreditation[,] * * * on-site school, special education teachers, or school affiliation" or "any appreciable academic component." *Id.* at 239, 241. Assessing "the link between the supportive service or educational placement and the child's learning needs," *id.* at 244 (quoting *Kruelle*, 642 F.2d at 694), the court in *Mary T.* held that the child's medical and educational needs were severable, *id.* at 246. The court emphasized that because the psychiatric hospital had no educational accreditation or services, the child's hospitalization was not reimbursable under the IDEA. *Id*. at 245, 248-249. Thus, the difference between *Kruelle* and *Mary T.* lies in facts underlying the

decisions, not the test employed to determine whether reimbursement was appropriate. The *Kruelle* test is still the test used in the Third Circuit.

Contrary to the assertions of JCSD and NSBA, the Ninth Circuit employs this same relationship test. The Third Circuit asks whether the residential placement is "necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process." *Kruelle*, 642 F.2d at 693. The Ninth Circuit asks whether residential placement is "necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process." *Clovis*, 903 F.2d at 643 (citing *Kruelle*, 642 F.2d at 693). Although the *Clovis* court said that it rejected the "intertwined" analysis employed by a lower court, *Vander Malle* v. *Ambach*, 667 F. Supp. 1015, 1039 (S.D.N.Y. 1987), it expressly relied on *Kruelle* and adopted nearly identical language. 903 F.2d at 643; see also *Richardson*, 580 F.3d at 298 n.8 (noting that the Ninth Circuit fully adopted the Third Circuit's "inextricably intertwined" test).

As the Third Circuit explained in *Mary T.*, the court must "look to whether the 'social, emotional, medical and educational problems . . . [are] so intertwined that realistically it is not possible for the court to perform the Solomon-like task of separating them.'" 575 F.3d at 244 (quoting *Kruelle*, 642 F.2d at 694) (alteration

in original). Thus, the Third and Ninth Circuits examine two sides of the same coin: whether the child's educational and other needs are intertwined, or whether they are "segregable" or "quite apart." In both instances, the court must "assess the link between the supportive service or educational placement and the child's learning needs." *Ibid.* (quoting *Kruelle*, 642 F.2d at 694). Any difference between the Third and Ninth Circuit tests is merely semantic.

The facts underlying *Clovis* illuminate the relationship test the Ninth Circuit adopted. The parties agreed that, in order to receive an appropriate education, the child, who had been diagnosed with a serious emotional disturbance, needed a residential placement that provided intensive psychological services. *Clovis*, 903 F.2d at 641. Thus, the need for a residential placement was not in dispute; the only issue in the case was whether the placement was appropriate for purposes of the IDEA. *Id.* at 641-642. The Ninth Circuit held that because the psychiatric hospital where the child had been placed following an acute psychiatric crisis did not provide educational services, the costs of the residential placement were not reimbursable under the IDEA. *Id.* at 645-647. In so holding, the Ninth Circuit distinguished residential placements that offered "an integrated program of educational and other supporting services" and that "could meet the child's educational and related needs" from the non-educational psychiatric hospital into which the child had been placed. *Id.* at 646-647. Thus, the dispositive issue in

Clovis was not the severability of the child's psychological and educational needs, but rather the nature of the services offered by the specific placement.

The Ninth Circuit applied the "intertwined" relationship test in several subsequent decisions. In *Taylor* v. *Honig*, 910 F.2d 627, 628 (9th Cir. 1990), the court affirmed a preliminary injunction ordering that a child diagnosed with a severe emotional disturbance be placed into "a residential facility * * * operating under appropriate state authorization in a dual capacity as a school and as a psychiatric hospital." See also *Clevenger* v. *Oak Ridge Sch. Bd.*, 744 F.2d 514, 516-517 (6th Cir. 1984). The Ninth Circuit's affirmance was based, in part, on the findings that the child required a highly structured environment to address his educational and other needs and, unlike in *Clovis*, the facility operated a full-time school. *Taylor*, 910 F.2d at 632-633. Thus, the child's educational and other needs were sufficiently related, and the residential placement provided educational services, so reimbursement was required. In *Seattle School District* v. *B.S.*, 82 F.3d 1493 (1996), the Ninth Circuit held that a school district was required to pay for a residential placement that addressed the child's intertwined educational, emotional, and behavioral needs. The court held that the residential placement was appropriate and reimbursable because it "addresse[d] these disorders in an attempt to ensure that [the child] [wa]s able to benefit from her education." *Id.* at 1502.

Most recently, the Ninth Circuit again stated that the IDEA requires a school district to address the child's "academic, social, health, emotional, communicative, physical and vocational needs." *Ashland Sch. Dist.* v. *Parents of Student E.H.*, 587 F.3d 1175, 1185 (9th Cir. 2009) (*Ashland*) (quoting *Seattle*, 82 F.3d at 1500). The court held that the residential placement in that case was to treat the child's psychological and medical, not educational problems, which were segregable. *Ibid.*[2]

4. The only two circuits that require that a residential placement serve a "primarily educational" purpose, regardless of the child's other needs and the relationship between those needs and the child's ability to benefit from educational services, are the Fifth and Seventh Circuits. In 1985, the Seventh Circuit held that the State had violated the IDEA by requiring a class of parents to pay some living expenses for their children with developmental disabilities who were in residential facilities. *Parks* v. *Pavkovic*, 753 F.2d 1397 (7th Cir. 1985). In so holding, Judge Posner, relying on *Kruelle*, 642 F.2d 687, 693-696, noted that a State cannot "avoid its obligations under the Act by showing that the child would have had to be institutionalized quite apart from educational needs that also required institutionalization." *Id.* at 1405-1406. The court observed that the distinction

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[2] In addition, in *Ashland*, the child's parents neither objected to their child's IEP nor provided required notice to the school district, 587 F.3d at 1185-1186, both of which are grounds to reduce or deny reimbursement under the Act, 20 U.S.C. 1412(a)(10)(C)(iii).

between "cases where the child is placed in a residential facility 'because' he is developmentally disabled, rather than 'because' he is handicapped and needs special education * * * is purely verbal." *Id.* at 1406.

Some sixteen years later, writing for a divided panel, Judge Posner held that the critical inquiry governing reimbursement is whether the residential placement services are "primarily oriented toward enabling a disabled child to obtain an education * * * [or] oriented more toward enabling the child to engage in noneducational activities." *Dale M.* v. *Board of Educ.*, 237 F.3d 813, 817 (7th Cir. 2001); see also *Butler* v. *Evans*, 225 F.3d 887 (7th Cir. 2000). In *Dale M.*, the court held that although the child had "psychological problems that interfered with his obtaining an education," the residential placement did not address the child's psychological needs and provided only confinement. 237 F.3d at 816-817. In the court's view, the child's problems were "not primarily educational" and therefore, reimbursement was not warranted under the IDEA. *Id.* at 817. The dissenting judge noted that "every circuit that has addressed the question has held that the Congressional mandate requires the provision of a support service that is 'a necessary predicate for learning,' and not 'segregable from the learning process.'" *Id.* at 818 (Ripple, J., dissenting) (quoting *Kruelle*, 642 F.2d at 693, and citing *Tennessee*, 88 F.3d at 1471; *Burke Cnty.*, 895 F.2d at 980; *McKenzie*, 771 F.2d at 1533) (internal citations omitted).

Noting the split between the Seventh Circuit and all other circuits, the Fifth Circuit recently adopted a test under which a residential placement is reimbursable if it is "1) essential in order for the disabled child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education." *Richardson*, 580 F.3d at 299. This more restrictive "primarily oriented" test undermines the IDEA's broad concept of education and emphasis on providing the related services that children with disabilities require to benefit from special education. See 20 U.S.C. 1400(d)(1)(A); *Honig*, 484 U.S. at 309. In adopting such a test, the Fifth Circuit has fundamentally misunderstood the purpose and scope of related services under the Act.

Under the IDEA, related services are not a superfluous add-on; they are a fundamental component of the education that, in exchange for federal funds, school districts must provide to children with disabilities. The substantive goal of the IDEA is to ensure that school districts provide children with disabilities with the resources they need to receive an education with meaningful benefits. A child's medical, psychological, emotional, or other disability that interferes with the educational process is precisely what the special education and related services must be tailored to address. It is true that school districts are not required to "treat" or "cure" a child's disability or "foot the bill" for medical care of children with disabilities. School districts must, however, provide an educational program

designed to address the child's disability, and also must provide "supportive services (including * * * psychological services, * * * social work services, * * * counseling services * * *) as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. 1401(26)(A).

In *Richardson*, the Fifth Circuit raised the oft-repeated argument of school districts that, in the rare instance when residential placement is at issue, any related services necessarily are primarily medical and therefore outside the scope of the Act. 580 F.3d at 300. This argument is without merit. In some cases, a child's residential placement may be due to medical or psychological needs, such as an acute psychiatric crisis. See, *e.g.*, *Mary T.*, 575 F.3d 235; *Butler*, 225 F.3d 887; *Clovis*, 903 F.2d 635. This does not mean, however, that residential placements for *all* children with mental illness are to address purely medical needs. The IDEA specifically contemplates that some children's special education and related services will include educational and mental health services provided in hospitals, institutions, and other settings. See 20 U.S.C. 1401(26)(A) and (29)(A); 34 C.F.R. 300.34(a), 300.39(a)(1)(i), 300.104. Several circuits have, therefore, dismissed school districts' arguments that mental health services are medical services and always fall outside the ambit of the IDEA. See, *e.g.*, *Babb*, 965 F.2d at 109; *Taylor*, 910 F.2d at 631-632; see also *Tilton* v. *Jefferson Cnty. Bd. of Educ.*, 705 F.2d 800, 803 (6th Cir. 1983).

The Supreme Court has rejected similar arguments that school districts are not responsible to provide "medical" related services when those services do not require the services of a licensed physician. The Court has required school districts to pay for medical services that are necessary for a child to benefit from her education. Just three years after the Third Circuit held that a school district had to provide "clean intermittent catheterization" to a child with disabilities, *Tokarcik* v. *Forest Hills Sch. Dist.*, 665 F.2d 443 (3d Cir. 1981), the Supreme Court came to precisely the same conclusion, holding that catheterization was a "related service" that the school district must provide so that the child with disabilities could benefit from special education. *Tatro*, 468 U.S. at 891 n.8, 892. Recognizing that related services broadly encompass all supportive services necessary to allow children with disabilities to benefit from their education, the Court later held that the school must provide continuous one-on-one nursing services to a child with disabilities. *Garrett F.*, 526 U.S. at 73, 79.

In both of these decisions, the Court examined the relationship between the children's educational and medical needs and held that the children could not have meaningful access to their education without their medical needs being met. *Garrett F.*, 526 U.S. at 79; *Tatro*, 468 U.S. at 890. In so holding, the Supreme Court dismissed the school districts' argument, similar to those raised by JCSD and NSBA here, that such services fell outside the scope of the IDEA because they

could be described as purely medical in nature. See *id.* at 893-894; see also *Garret F.*, 526 U.S. at 76 ("Continuous [nursing] services may be more costly and may require additional school personnel, but they are not thereby more 'medical.'"). Therefore, the appropriate inquiry is not the nature of the child's non-educational needs, but whether those needs are sufficiently related to the child's educational needs to fall within "related services" under the IDEA and can be provided by someone other than a licensed physician. *Id.* at 74-76; *Tatro*, 468 U.S. at 892-894.

5. JCSD and NSBA argue that this Court should adopt the Fifth Circuit's very limited test. Followed to its logical extension, under that test, a child like Elizabeth with serious disabilities for whom addressing her mental health needs is critical to her ability to learn, and whose placement in a residential facility has not been challenged by the school system as unnecessary or gratuitous, would not receive any educational services from her home district. This is precisely what Congress sought to avoid when it enacted the IDEA.

Both JCSD and NSBA repeatedly raise the specter of overwhelming financial burden on school districts of private residential placements, which they interpret as requiring school districts to "treat" or "cure" mental illness. In fact, residential placements reimbursable under the IDEA are few. The IDEA requires that educational services be provided in the "least restrictive environment" in which the child can receive an appropriate education. See 20 U.S.C. 1412(a)(5).

Thus, for a residential placement to be considered reimbursable under the IDEA, parents must demonstrate that the residential placement is not just advisable, but necessary for the child to receive an appropriate education. See *Kruelle*, 642 F.2d at 695 ("[O]nce a court concludes that residential placement is the *only* realistic option for learning improvement, the question of 'least restrictive' environment is also resolved.") (emphasis added). In those admittedly rare instances in which a residential placement is legitimate and supported – that is, when special education and related services reasonably calculated to result in meaningful educational benefit cannot be provided elsewhere – the IDEA requires that school districts provide such educational and related services to the child with disabilities.

Although residential placements can be costly, the law is clear that acceptance of federal funds imposes a corresponding obligation upon school districts to provide children with disabilities with a *free* and appropriate education. 20 U.S.C. 1400(d)(1)(A); *Florence Cnty. Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 15 (1993); *Burlington*, 471 U.S. at 370-371. "[P]ublic educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims." *Carter*, 510 U.S. at 15; see also *Burlington*, 471

U.S. at 370-371 ("Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP.").

Once Elizabeth left the Aspen hospital and was placed in Innercept (the parents, correctly in our view, are not seeking reimbursement for Elizabeth's hospitalization at Aspen), the relevant inquiry under the IDEA to determine whether the costs of that placement are reimbursable is the relationship test employed by the majority of circuit courts of appeals.

CONCLUSION

This Court should (1) affirm the district court holding that JCSD has the burden of proof and (2) adopt the majority's "intertwined" relationship test set out above for determining when the IDEA requires reimbursement for the costs of a residential placement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief for the United States as *Amicus Curiae* Supporting Defendant-Appellee:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 6,997 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ Erin Aslan
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Dated: November 23, 2011

CERTIFICATE OF DIGITAL SUBMISSIONS

I certify that the electronic version of the foregoing Brief for the United States as *Amicus Curiae* Supporting Defendant-Appellee, prepared for submission via ECF, complies with all required privacy redactions per Tenth Circuit Rule 25.5, is an exact copy of the paper copies submitted to the Tenth Circuit Court of Appeals, and has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/ Erin Aslan
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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2011, I electronically filed the foregoing Brief for the United States as *Amicus Curiae* Supporting Defendant-Appellee with the Clerk of the Court for the Tenth Circuit Court of Appeals via the CM/ECF system. I further certify that all participants are ECF-registered, and service will be achieved through the CM/ECF system.

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