No. 12-1175

IN THE
Supreme Court of the United States

JEFFERSON COUNTY SCHOOL DISTRICT R-1,
Petitioner,

v.

ELIZABETH E., by and through her parents,
ROXANNE B. and DAVID E.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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As the Tenth Circuit explained in the decision below, the courts of appeals "have taken different approaches in determining whether a private residential placement is reimbursable under the IDEA." Pet. App. 10a. The circuits are now split four different ways on that question. And that question is deeply important—with billions of dollars being spent on private placements each year. *See* Pet. 23-24; NSBA Br. 14-15; Jay G. Chambers et al., *What are We Spending on Special Education Services in the United States, 1999-2000?* Special Education Expenditure Project 10 (2004).

One group of circuits focuses on whether the child's mental health needs are "inextricably intertwined" with her educational needs. Another group of circuits asks whether the residential placement is

"primarily oriented" toward serving the child's educational needs. A third group of circuits focuses on whether the residential placement would have been "necessary quite apart from" the child's educational needs. And now, instead of picking among these three competing tests, the Tenth Circuit has concocted yet another test that hinges on whether the residential facility offers state-accredited special education. *See* Pet. 21-23. This intractable split casts a fog of uncertainty over the entire field of special education and undermines the cooperative process between parents and school districts. *See* NSBA Br. 7-9.

Respondent does not deny that the circuits have formulated divergent standards. She nevertheless argues that the differences among those formulations are supposedly superficial—that the circuits are using different language to ask the same basic question. Not so. The tests applied in the Third, Fifth, Seventh, and Ninth Circuits (as well as the Wisconsin Supreme Court) fundamentally differ from the test applied in the Second, Sixth, Eighth, and D.C. Circuits. Even the most liberal of those tests is far more exacting than the Tenth Circuit's newly invented—and wildly expansive—test. Those differences are genuine, and they lead to different outcomes on materially identical facts.

Indeed, application of the more stringent tests would have led to a different outcomes *in this very case*. There was no dispute below that Elizabeth's placement at Innercept was precipitated by her mental health needs rather than her educational needs. As the district court acknowledged, "Elizabeth's psychiatric conditions played a prominent role in her initial placement at Innercept." Pet. App. 56a.

That fact would have *foreclosed* reimbursement in the Third, Fifth, Seventh, or Ninth Circuits. But the district court brushed all of that aside and focused instead on whether Innercept provided special education. That analysis—now endorsed by the Tenth Circuit—is inconsistent with other circuits' analysis and led to an entirely different result in this case. Certiorari is warranted to bring uniformity to this important area of law.

I. THE CIRCUIT SPLIT IS GENUINE AND DEEP

As the opinions below explain, the question presented has fractured the circuits. There are now at least four different tests for determining whether and when a private residential placement is reimbursable under the IDEA. *See* Pet. 13-22. This stark division among the lower courts brings this case within the heartland of this Court's certiorari jurisdiction. *See* S. Ct. R. 10(a).

Although Respondent does not dispute that the circuits have taken divergent approaches to the question presented, she attempts to minimize the significance of the disagreement. She concedes (as she must) that the circuits use different "verbal formulations" to determine whether a private residential placement is reimbursable under the IDEA. Opp. 1. But she claims all the courts of appeals "undertake the same inquiry"; they simply "describe it in slightly different ways." Opp. 16.

Her characterization would come as a surprise to the courts of appeals, which certainly do not believe the differences between their tests are insignificant. They have devoted substantial attention to the perceived strengths and weaknesses of each test, *see, e.g.*, Pet. App. 20a-22a (explaining the supposed advantages of the Tenth Circuit's new test), and have

gone out of their way to distance their preferred test from those of other circuits, *see, e.g.*, *Richardson Indep. Sch. Dist.* v. *Michael Z.*, 580 F.3d 286, 299 (5th Cir. 2009) (rejecting Third Circuit's test); *Independent Sch. Dist. No. 284* v. *A.C.*, 258 F.3d 769, 777 (8th Cir. 2001) (rejecting Seventh Circuit's test). If the tests were identical, then these careful assessments of the competing proposals would be a waste of time.

Of course, the courts of appeals have not been engaged in a pointless debating exercise. There are critical substantive differences between the various tests they have adopted. Reimbursement in the Second, Sixth, Eighth, and D.C. Circuits hinges on whether "the child requires the residential program to receive educational benefit." *Mrs. B.* v. *Milford Bd. of Educ.*, 103 F.3d 1114, 1122 (2nd Cir. 1997); *see* Pet. 13-16. That inquiry imposes a very broad obligation on public education. Many children's problems—from drug use to truancy to violent behavior—interfere with learning. If a structured residential environment mitigates those problems generally, then it must be funded by the school district—even if those problems would have to be addressed regardless of education. *See, e.g.*, *Independent Sch. Dist. No. 284*, 258 F.3d at 777 (school district must pay for residential placement necessitated by the child's drug use, truancy, and suicide attempts); *Clevenger* v. *Oak Ridge Sch. Bd.*, 744 F.2d 514, 516 (6th Cir. 1984) (school district must pay for residential placement necessitated by the child's "*inability to cooperate* with authority").

The Tenth Circuit now has adopted an even broader test: Under the test minted below, a court need not even ask whether a residential placement is

necessary to meet the child's educational needs. *Any* residential placement, regardless of the reason for the placement, must be publicly funded as long as it is state-accredited and offers special education. *See* Pet. App. 18a-19a. Judge Gorsuch correctly observed that the majority did not even "expressly condition private placement on a showing that it is essential to provide a meaningful educational benefit to the child." Pet. App. 33a. On its face, then, the Tenth Circuit's test is even more expansive than the Second, Sixth, Eighth, and D.C. Circuits' already-expansive test—and will create major uncertainty for school districts. *See* NSBA Br. 6-7.

By contrast, other courts ask a fundamentally different question. As Respondent is forced to concede (at 20), the Fifth Circuit, Seventh Circuit, and Wisconsin Supreme Court have added a second "step" to the basic necessity inquiry: they will deny reimbursement for a residential placement unless it is "*primarily oriented toward* enabling the child to obtain an education." *Richardson Indep. Sch. Dist.*, 580 F.3d at 299 (emphasis added); *accord Dale M.* v. *Bd. of Educ.*, 237 F.3d 813, 817 (7th Cir. 2001); *Calumet Cnty. Dep't of Human Servs.* v. *Randall H.*, 653 N.W.2d 503, 509-10 (Wis. 2002). A residential placement, however, is not primarily oriented toward education simply because the child is a student. Courts applying that standard look at factors such as "whether the child was placed at the facility for educational reasons and whether the child's progress at the facility is primarily judged by educational achievement." *Richardson Indep. Sch. Dist.*, 580 F.3d at 301. Those factors are not relevant in the more permissive circuits. *See, e.g.*, *Independent Sch. Dist. No. 284*, 258 F.3d at 777 ("What should

control our decision is not whether the problem itself is 'educational' or 'non-educational,' but whether it needs to be addressed in order for the child to learn.").

The Third and Ninth Circuits take yet another approach. Those circuits deny reimbursement for a residential placement if it is a "response to medical, social, or emotional problems" and is "necessary quite apart from the learning process." *Clovis Unified Sch. Dist.* v. *Cal. Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990) (per curiam). Thus, a child whose "wild and destructive rages rendered her not only unable to benefit from education" but also "generally uncontrollable" was not entitled to reimbursement for a residential placement, even though there was no dispute that a highly structured environment was "needed for [her] to benefit from any educational program." *Id.* at 641-42, 645. In other words, school districts do not need to fund residential placements that are necessary to treat a child's mental health issues simply because the treatment also enables the child to learn.

Respondent unintentionally highlights this fundamental cleavage among the circuits when she strives to muster a common thread that unites the competing tests. She argues that all the circuits "focus their analysis on the same basic point: whether the residential placement was needed to enable the child to receive the free appropriate public education to which she is entitled under the IDEA, or whether it [was] aimed at other, noneducational goals." Opp. 16. But that supposedly unitary standard has two distinct elements—one focusing on the child's educational "need" for a residential placement

and the other focusing on the overall "aim" of the placement.

Sometimes the two elements will coincide, but often they will not. Kidney dialysis, for example, may very well be "needed" for a child to stay healthy enough to receive a free appropriate public education. *See Clovis Unified Sch. Dist.*, 903 F.2d at 643. But that does not mean that dialysis, a treatment for kidney disease, is "aimed at" educational goals. On the contrary, the child's dialysis would be "necessary quite apart from the learning process." *Id.* Likewise, a disabled child "who is struck by an automobile or who suffers a severe fall, or who suffers a heart seizure or stroke, may require medical treatment before he can benefit from a special education course." *McKenzie* v. *Jefferson*, 566 F. Supp. 404, 413 (D.D.C. 1983). But such treatments would *incidentally* facilitate education; they would not be "aimed at" educational goals, and thus would not have to be publicly funded. *See id.*

In the end, the circuit courts are deeply divided. Their competing tests reflect that division and the debate among those circuits has fully ventilated the advantages and disadvantages of each approach. This case presents a perfect vehicle to resolve that disagreement.

II. THE QUESTION PRESENTED IS OUTCOME-DETERMINATIVE

Respondent's claim that the test used by the Tenth Circuit is not outcome-determinative is incorrect. It is undisputed that she was placed at Innercept to treat her mental health issues, and that she was not placed there primarily for educational reasons. *See* Pet. 7-8. As the hearing officer noted: "The opinion of the experts at Aspen was that if Elizabeth re-

turned to an unstructured environment such as her home she would lose the benefit of the progress made at Aspen and would be at risk for a psychotic break." Pet App. 167a. The inevitable consequence of that fact is that her claim would have been denied in the Third, Fifth, Seventh, and Ninth Circuits, even though it was accepted by the Tenth Circuit here (and likely would have been accepted had her claim been brought in the Second, Sixth, Eighth, and D.C. Circuits). Reimbursement under a uniform federal statute, such as the IDEA, cannot turn on the happenstance of geography.

The district court's opinion demonstrates the hollowness of Respondent's contention that she would have prevailed under any test.[1] As explained in the petition, Respondent's placement at Innercept was "necessary quite apart from" her educational needs because her severe psychological condition required her to live day-to-day in a highly structured environment. Reimbursement would thus have been denied in the Ninth Circuit. The district court did not seriously grapple with that precedent. Rather, it simply noted testimony that Respondent's mental health is "intertwined" with her educational success, and that "when she is doing better with her mental

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[1] Judge Gorsuch also thought Respondent would prevail under any test, but he relied solely on the district court's analysis for that conclusion. *See* Pet. App. 32a. Respondent's attempt to paint the circuits' tests as all the same undoubtedly impacted the way the district court viewed this case, and the district court's skewed analysis, in turn, dictated Judge Gorsuch's view. Had the district court gone through the proper analysis, it would have been clear that Respondent is *not* entitled to reimbursement for her placement at Innercept.

health, she starts to function better in the classroom." Pet. App. 53a. And then it concluded in one brief sentence: "the treatment of [Respondent's] psychiatric condition at Innercept was not 'quite apart from' her educational needs." Pet. App. 54a.

But that phrasing distorts the Ninth Circuit's test. The question is not whether a child's mental health needs are separate from her educational needs. That inquiry would require courts to undertake an impossible "Solomonic task"—and would lead to reimbursement in almost every case. *Richardson Indep. Sch. Dist.*, 580 F.3d at 299. The question, rather, is whether the child would have needed a residential placement *notwithstanding* her educational needs. *See Clovis Unified Sch. Dist.*, 903 F.2d at 643. And it is clear that the answer here is yes. The district court was able to brush aside that inconvenient fact only because it misunderstood the Ninth Circuit's test. Had it correctly applied the test, it would have ruled against Respondent because her residential placement was necessary to avoid a psychotic break and to stabilize her medical condition—regardless of the need for education. Indeed, it is telling that Respondent simply ignored altogether the Ninth Circuit's test in her Opposition. *See* Opp. 25-29.

The district court devoted somewhat more attention to the Fifth and Seventh Circuits' test, but it seriously misconstrued that test as well. Courts applying the "primarily oriented" test focus on factors such as "whether the child was placed at the facility for educational reasons and whether the child's progress at the facility is primarily judged by educational achievement." *Richardson Indep. Sch. Dist.*, 580 F.3d at 301. In this case, both of those factors tremendously favor the District. Yet the

district court believed that it did not need to consider them at all. It "disagree[d]" with the courts (like the Fifth Circuit) that place emphasis on "the purpose of the *initial* placement." Pet. App. 56a n.17. "The crucial issue," it held, "is not the initial motivation behind the placement, but instead 'whether the education provided by the private school is reasonably calculated to enable the child to receive educational benefits.' " Pet. App. 56a (quoting *Thompson R2-J Sch. Dist.* v. *Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008)). Courts should "be focused on the actual services provided by the residential treatment facility to the child throughout the child's stay at the facility." *Id.*

The district court and Tenth Circuit's intense focus on whether a residential facility provides educational services thus breaks with the Fifth and Seventh Circuits. In those circuits, the reasons for the child's placement are critical. *See Richardson Indep. Sch. Dist.*, 580 F.3d at 301. The fact that a residential placement offers educational services is not sufficient by itself to make it a proper placement. *See, e.g.*, *Dale M.*, 237 F.3d at 819 (Ripple, J., dissenting) (noting that non-reimbursable residential program taught life skills and class work). The district court concluded that Respondent's placement met the Fifth and Seventh Circuits' test only because it distorted that test beyond recognition, as it did with the Ninth Circuit's test. Had it applied the proper test, it would have been compelled to conclude that Respondent's placement at Innercept was primarily oriented toward the treatment of her mental health issues—just as her own psychiatrists testified. *See* Pet. 7-8.

Respondent's effort (at 22-24) to distinguish *Ashland School District* v. *E.H.*, 587 F.3d 1175 (9th Cir. 2009), exemplifies this muddling of the circuits' different tests. She asks the Court to believe that the divergent outcomes between this case and *Ashland* are due to factual differences between the two cases. That is simply not true; the facts in the two cases are materially identical:

- In *Ashland*, as here, the child's mental health providers recommended residential treatment to address the child's persistent emotional and medical problems. 587 F.3d at 1179.
- In *Ashland*, as here, the parents transferred the student to an out-of-state private residential facility without notice or any indication that they were dissatisfied with the school district's services. *Id.* at 1179-80.
- In *Ashland*, as here, the facility had an educational program. *Id.*
- And in *Ashland*, as here, the child "was in no condition to devote much time or effort to schoolwork" during the first six months at the facility. *Id.* at 1185; *compare* Pet. App. 170a-171a.

Yet despite strikingly similar facts, reimbursement was denied in *Ashland* and was required by the Tenth Circuit here. The difference, of course, is that the court below minted its own test, and it led to a different outcome. That is precisely why this Court's intervention is needed.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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