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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the unanimous conclusion of the hearing officer, administrative law judge, district court, and court of appeals panel that Elizabeth's placement at a residential school "was proper under the [Individuals with Disabilities Education] Act" (*Florence Cnty. Sch. Dist.* v. *Carter*, 510 U.S. 7, 15 (1993)) because "the placement * * * provided both specially designed instruction to meet Elizabeth's unique needs and services required for her to benefit from that instruction" (Pet. App. 24a-25a) is correct.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

This is a simple, straightforward case. Petitioner does not dispute that it failed to provide Elizabeth with the "free appropriate public education" required under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1412(a)(1)(A). Neither does petitioner dispute that it is obligated to reimburse Elizabeth's parents for the costs of placing her in a private school if that placement was "proper" under the statute. See *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 232-233 (2009).

The statute expressly recognizes that residential placements may be "proper" under the Act. The sole question in this case is whether Elizabeth's placement complied with that standard. Petitioner's attempt to conjure a conflict among the lower courts on the basis of that fact-bound determination is unavailing.

To begin with, both the district court and Judge Gorsuch in his concurring opinion demonstrated that Elizabeth's placement is "proper" under each of the varying formulations of the statutory standard applied by the courts of appeals. Even if these formulations were inconsistent with one another (as we explain, they in fact are not), this case would not present that conflict—or provide an appropriate vehicle for its resolution—because the decisions below already demonstrate that Elizabeth would prevail under any of the lower courts' legal formulations.

In addition, there is no conflict among the lower courts. Although the verbal formulations that they apply differ, the focus of the inquiry is identical:

whether the residential placement was needed to enable the child to receive the free appropriate education to which she is entitled under the IDEA or whether it aimed at other, noneducational goals. There simply is no conflict warranting this Court's attention.

Finally, petitioner and its *amici* distinguish between "educational residential placements" and "mental health residential placements," arguing that this case is an example of the latter and therefore an impermissible application of the IDEA. *E.g.*, *Amici Curiae* Brief of National School Boards *et al.* at 15 ("School Boards Am. Br.") (emphasis omitted).

But all of the decisionmakers below—the court of appeals majority, Judge Gorsuch in his concurring opinion, the district court, the administrative law judge, and the hearing officer—concluded, in the words of Judge Gorsuch, that Elizabeth's "private placement was essential to ensure she received a meaningful educational benefit, and the private placement was primarily oriented toward enabling her to obtain an education." Pet. App. 32a. That incontrovertible factual finding places this case firmly in the "educational residential placement" category and confirms that the arguments advanced by petitioner and its *amici* provide no grounds for review in this case.[1]

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[1] Petitioner several times references the cost of Elizabeth's residential placement. *E.g.*, Pet. 2-3, 13, 23-24. Petitioner's *amici* focus on that issue as well. School Boards Am. Br. 14-15. As Judge Gorsuch explained, however, petitioner did not "present any serious challenge to the *specific amounts* Elizabeth incurred in connection with her private placement (for her education or related services); instead, * * * the school

A. The Individuals With Disabilities Education Act.

Every year the federal government furnishes tens of billions of dollars to the States for elementary and secondary school education.[2] States that choose to receive federal funding must in turn agree to educate children with disabilities.

Specifically, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq*., "requires States receiving federal funding to make a 'free appropriate public education' (FAPE) available to all children with disabilities residing in the State." *Forest Grove*, 557 U.S. at 232. The purpose of the IDEA is "principally to provide [disabled] children with 'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.'" *Sch. Comm. of Burlington* v. *Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985) (quoting 20 U.S.C. § 1400(d)(1)(A)).

Prior to enactment of the IDEA, "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.'" *Schaffer* v. *Weast*, 546 U.S. 49, 52 (2005) (quoting H.R. Rep. No. 332, 94th Cong., 1st Sess. 2 (1975)). Congress's purpose in enacting the IDEA was to "reverse this history of neglect." *Ibid.*

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district effectively chose to confine its attack to the propriety of her placement in the first place." Pet. App. 32a.

[2] See, *e.g.*, U.S. Department of Education, *Digest of Education Statistics, 2012*, Table 202 (showing more than $75 billion of federal revenues for public elementary and secondary schools in 2009-10), http://tinyurl.com/q3zk3ga.

The IDEA defines a "free appropriate public education" to include two principal components: "special education" and "related services." 20 U.S.C. § 1401(9). The term "special education" includes "specially designed instruction" that "meet[s] the unique needs of a child with a disability," such as "instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings." *Id.* § 1401(29). The term "related services" includes "developmental, corrective, and other supportive services" that "may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26)(A).

Congress understood that local school districts would not always comply with their obligations to educate disabled children and that parents in turn would be forced to resort to private placements to meet their children's needs. Congress therefore authorized parents in such circumstances to seek reimbursement from their school district for the costs of a private placement:

> when a public school fails to provide a FAPE [free appropriate public education] and a child's parents place the child in an appropriate private school without the school district's consent, a court may require the district to reimburse the parents for the cost of the private education.

Forest Grove, 557 U.S. at 232 (citing *Burlington*, 471 U.S. at 370). See also 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); *Florence Cnty. Sch. Dist. Four* v. *Carter*, 510 U.S. 7 (1993) (reimbursement may be appropriate even when parents place a child in a private school that has not been approved by the State).

The statute also expressly recognizes that some children may require placement in residential facilities. See 20 U.S.C. § 1401(27) (defining "secondary school" to mean "a nonprofit institutional day *or residential* school * * * that provides secondary education" (emphasis added)); *id.* § 1401(29)(A) (defining "special education" to include "instruction conducted * * * in hospitals and institutions, and in other settings"); *id.* § 1401(26)(A) (defining "related services" expansively to include "transportation, and such developmental, corrective *and other supportive services* * * * as may be required to assist a child with a disability to benefit from special education," specifically exempting only medical services that are not performed "for diagnostic and evaluation purposes" (emphasis added)). See also 34 C.F.R. § 300.104 ("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 of a child.").

B. Factual Background.

Respondent Elizabeth E. was neglected by her birth parents before co-respondents Roxanne B. and David E. agreed to care for her as a foster child and then to adopt her when she was three years old. Pet. App. 5a. In her earliest years, Elizabeth had severe temper tantrums, accompanied by a precipitous drop in her IQ likely due to her psychiatric difficulties. *Id.* at 69a.

When Elizabeth was eight years old, the family moved to Colorado where she initially attended public school and was identified as eligible for special education under the IDEA. Pet. App. 39a. By that time Elizabeth had been diagnosed with oppositional

defiant disorder, posttraumatic stress disorder, reactive attachment disorder, and a bipolar disorder. *Ibid.*

As Elizabeth grew older, the public schools of petitioner Jefferson County School District could no longer meet her educational needs.[3] Accordingly, petitioner and Elizabeth's parents reached a mediated agreement under the IDEA to have Elizabeth placed for ninth and tenth grades at Humanex Academy, a private school in Colorado that specializes in education of children with significant learning disabilities and emotional and behavioral issues. Pet. App. 39a-40a.

Still, Elizabeth struggled. She declined academically, had anger outbursts, went through periods of alternative reality, and had problems staying in the classroom. Pet. App. 40a, 153a-154a. She was not prepared for advancement to the eleventh grade at Humanex, and as her behavior at home deteriorated over the summer of 2008 (including threats to kill her parents and a physical assault on her younger brother), Elizabeth's parents decided—with notice to petitioner—to place Elizabeth for psychiatric hospitalization at the Aspen Institute for Behavioral Assessment in Utah. *Id.* at 5a-6a, 72a.[4] Petitioner re-

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[3] Petitioner's website reflects that it is the largest school district in Colorado with almost 86,000 students enrolled across more than 150 schools. See www.jeffcopublicschools.org.

[4] Petitioner erroneously asserts (Pet. 6) that Elizabeth's parents did not inform it that they were considering placing her in an inpatient facility; the record makes clear that they did provide prior notice. Pet. App. 6a, 40a, 81a, 158a. In any event, Elizabeth's parents have never sought reimbursement for her hospitalization at Aspen. *Id.* at 58a.

sponded by unilaterally withdrawing Elizabeth from Humanex Academy and disavowing any ongoing obligation to her on the ground that she was no longer a student in petitioner's school district. *Id.* at 6a.[5]

The Aspen Institute diagnosed Elizabeth with a bipolar affective disorder, a nonverbal learning disorder, a history of reactive attachment disorder, a cognitive disorder, and borderline mental retardation. Pet. App. 166a. Elizabeth also exhibited early warning symptoms of a severe psychotic disorder or schizophrenia. *Ibid.* Aspen strongly recommended that Elizabeth immediately be placed in a residential treatment center with an academic environment that could redress her learning disability and emotional needs. *Id.* at 167a.

In November 2008, Elizabeth's parents advised petitioner that they intended to enroll Elizabeth at Innercept, a residential facility in Idaho. Pet. App.

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[5] Petitioner later abandoned this argument as grounds to deny Elizabeth her rights under the IDEA. Pet. App. 28a-29a, 178a-179a. See, *e.g.*, *Catlin* v. *Soble*, 93 F.3d 1112, 1122 (2d Cir. 1996) (responsibility under IDEA to make a free appropriate public education falls on school district where parents reside). The statement in the petition (at 7) that "[t]he [petitioner] District * * * stood ready, willing and able to provide Elizabeth" with the educational placement required by the IDEA misstates petitioner's position as determined by the district court. See Pet. App. 31a n.8.

Moreover, nothing in the record supports petitioner's assertion (Pet. 7) that Elizabeth's parents told petitioner that they "had no intention of returning Elizabeth to Colorado." No such communication took place and Elizabeth's parents never refused to return her to Colorado. Pet. App. 92a (ALJ's finding that "there is no evidence the Parents ever refused to return Elizabeth to Colorado for evaluation or that the District ever asked them to do so").

6a. Innercept includes a state-accredited educational facility (Innercept Academy) that is staffed by state-accredited teachers. *Id.* at 23a, 75a, 168a-169a. Elizabeth's daily schedule at Innercept included several hours of traditional classroom instruction as well as one to one-and-a-half hours of directed homework time. *Id.* at 23a, 55a, 170a.

Innercept also provided for one-on-one instruction for Elizabeth when she was unable to participate in the classroom. Pet. App. 23a, 55a. At Innercept, Elizabeth was enrolled in classes such as English, World History, Math Concepts, and Speech, and she was working toward her high school diploma. *Ibid.*

C. Administrative Proceedings.

Elizabeth's parents sought reimbursement from petitioner for the costs of Elizabeth's special education and related services at Innercept, but petitioner refused on the ground that Elizabeth was no longer residing in the school district. Elizabeth's parents responded by requesting an administrative due process hearing under the IDEA to require reimbursement by petitioner. Pet. App. 7a-8a. Following a five-day evidentiary hearing, a hearing officer concluded in relevant part that petitioner had failed to make a free appropriate public education available to Elizabeth prior to her enrollment at Innercept and that Innercept was an appropriate reimbursable placement under the IDEA. *Id.* at 149a-203a.[6]

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[6] The hearing officer heard extensive testimony from the principal and director of education at Innercept, the medical director and attending psychiatrist at Innercept, the director of psychology at the Aspen Institute, and an assistant principal and counselor at Humanex. Pet. App. 53a-55a.

The hearing officer observed that "[m]ental health and educational experts who have dealt with Elizabeth over the years have identified her as one of the most severely challenged children in terms of mental health of any they have dealt with." Pet. App. 150a n.1. The hearing officer further described the educational gains made by Elizabeth while at Innercept, *id.* at 170a, concluding in part that "Elizabeth's educational improvement while at Innercept could have not have occurred without the small size of the adolescent facility and the full-time structure." *Id.* at 172a. The hearing officer found that "Elizabeth required the 24 hour a day, 7 days a week care and the structure provided by [a residential treatment center] such as Innercept in order to function academically," and that, as of the time she began at Innercept, "Elizabeth could not have received educational benefit in a less restrictive environment than a residential facility." *Id.* at 173a. See also *id.* at 175a (concluding that Elizabeth "could not receive educational benefit" in a public school or day treatment/educational program).

An administrative law judge generally affirmed the hearing officer's decision. Pet. App. 67a-148a. The ALJ noted that Innercept was "a highly regarded therapeutic program specializing in treatment of adolescents with behavioral disorders" and that it "is educationally accredited by the state of Idaho, and was recommended to the Parents by their educational consultant who specializes in private placement of emotionally disturbed children." *Id.* at 95a. It further concluded that "residential treatment such as that supplied by Innercept is necessary for Elizabeth to make educational progress," and that "[e]very expert that testified at the hearing opined that the Parents'

decision to place Elizabeth at Innercept was reasonable and appropriate." *Ibid.*

The ALJ also emphasized the primarily educational nature of the services provided to Elizabeth at Innercept:

> Unlike Elizabeth's admission to Aspen, a primary purpose of her admission to Innercept was to receive education in a therapeutic environment. Unlike Aspen, Innercept has a significant educational function, with integrated clinical and academic care. Its on-campus school is academically accredited and its classroom teachers are licensed by Idaho. Innercept has other client/students whose tuition is paid by school districts. Much of Elizabeth's day is spent pursuing education, either inside or outside the classroom. Furthermore, the goal of Elizabeth's stay at Innercept is her successful graduation from high school and assimilation into the community, not just improvement of her psychiatric condition.

Pet. App. 101a.

D. The District Court's Ruling.

Petitioner sought review of the ALJ's decision in the district court, and the district court affirmed. Pet. App. 65a. After the federal courts of appeals' varying formulations of the standard that must be met for reimbursement under the IDEA, *id.* at 48a-52a, the district court applied each of these formulations to Elizabeth's case and then agreed with "the ALJ's conclusion that, no matter which test is employed, the Parents' placement of Elizabeth at

Innercept was an appropriate and reimbursable placement under the IDEA." *Id.* at 52a.

Specifically, the district court concluded that Elizabeth's placement met even the most ostensibly demanding of any potentially applicable standard, because "the services Innercept provided to Elizabeth were 'primarily oriented' toward providing Elizabeth an education," and "the placement [was] 'essential in order for the disabled child to receive a meaningful educational benefit.'" Pet. App. 54a-55a & n.1 (quoting *Richardson Indep. Sch. Dist.* v. *Michael Z.*, 580 F.3d 286, 299 (5th Cir. 2009)).

E. The Court Of Appeals' Ruling.

The court of appeals unanimously affirmed. At the outset it noted that petitioner did not challenge the hearing officer's conclusion that it had failed to provide a free appropriate education to Elizabeth. Pet. App. 8a. Petitioner instead argued that "Elizabeth's placement at Innercept is not reimbursable under the IDEA because it does not provide her with 'special education' and 'related services' as defined in the Act." *Ibid.*

The court of appeals acknowledged "different approaches" among the courts of appeals in how to determine whether a private residential placement is reimbursable under the IDEA, Pet. App. 10a, and it also noted that "the ALJ and district court concluded the placement at Innercept was reimbursable under the IDEA regardless of which approach was used to evaluate it." *Id.* at 14a. The court, however, declined to adopt any one approach advanced by its sister courts, concluding instead that "[t]his appeal can be

resolved by a straightforward application of the statutory text." *Id.* at 20a.[7]

Based on the "plain language of the Act," the court of appeals undertook a four-step inquiry "to determine whether a unilateral private school placement without the consent of or referral by the school district is reimbursable." Pet. App. 18a. First, a court or hearing officer should "[d]etermine whether the school district provided or made a [free appropriate public education] available to the disabled child in a timely manner." *Ibid.* It was not disputed that petitioner here refused to provide a free appropriate public education to Elizabeth. *Id.* at 23a.

Second, a court or hearing officer must determine that "the private placement is a state-accredited elementary or secondary school." Pet. App. 18a (citing 20 U.S.C. § 1412(a)(10)(C)(ii)). It was not disputed that Innercept met this requirement. *Id.* at 23a.

Third, a court or hearing officer must conclude that "the private placement provides special education, *i.e.*, 'specially designed instruction . . . to meet the unique needs of a child with a disability.'" Pet. App. 18a-19a (quoting 20 U.S.C. § 1401(29)(A)). The court of appeals noted "the unchallenged findings of the [hearing officer], ALJ, and district court" that "Elizabeth's time at Innercept included several hours per day of traditional classroom instruction and one

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[7] Indeed, the panel majority stated that it was *not* "propos[ing] a new test," and that "[t]he claims presented on appeal have merely been resolved by applying the plain text of the statute" (Pet. App. 20a n.5), specifically disagreeing with Judge Gorsuch's statement in his concurring opinion that it had formulated a standard different from the approach taken by other courts of appeals.

to one-and-a-half hours of directed homework," among other special education benefits. *Id.* at 23a.

Fourth and finally, if parents seek reimbursement for "services beyond specially designed instruction to meet the child's unique needs," then a court or hearing officer should determine "whether such additional services can be characterized as 'related services' under the Act." Pet. App. 19a (quoting 20 U.S.C. § 1401(26)). In this respect, the court of appeals noted that petitioner "has never challenged the reimbursability of any of the specific services provided at Innercept." *Id.* at 24a. Thus, the court of appeals concluded that "[b]ecause the placement at Innercept provided both specially designed instruction to meet Elizabeth's unique needs and services required for her to benefit from that instruction, the district court properly concluded it was reimbursable." *Id.* at 24a-25a.[8]

Judge Gorsuch concurred in the judgment. He concluded that the "[t]he court's judgment is undoubtedly right and easily arrived at." Pet. App. 32a. Acknowledging that the federal courts of appeals have adopted "somewhat different" but "somewhat overlapping" tests, he noted that "as the district court rightly recognized, there's no need to invite ourselves into their dispute," because "*all* of the available tests point to the same conclusion in this particular case: Elizabeth is entitled to a private placement." *Ibid.* He reiterated that "Elizabeth's private placement [was] appropriate under *any* plausible test—even under the test favored by the [peti-

[8] The court of appeals also addressed and rejected other objections to reimbursement by petitioner that petitioner did not raise in the certiorari petition.

tioner] school district and adopted by the Fifth Circuit." *Ibid.*

According to Judge Gorsuch, the panel majority had prescribed "a new (four step) test" to assess private placements under the IDEA, a test "that shares much in common with but also differs from the copious competing tests already circulating among circuit courts." Pet. App. 33a. (The majority disagreed that it had formulated a different standard. See page 12 n.7, *supra*.)

Judge Gorsuch emphasized that the panel's test was not necessary for resolution of Elizabeth's case:

> I do not for a moment question the value of my colleagues' enterprise: stirring the pot may help courts find just the right recipe in the end. In particular, my colleagues do well to remind us that deciding whether a private school placement is appropriate (step 3) is an analytically separate and distinct task from the job of ascertaining whether each related service provided by that school (step 4) is subject to reimbursement by a public school district. But it is equally clear that a new test isn't necessary to the disposition of this case: Elizabeth wins under any test.

Pet. App. 33a (citation omitted).

ARGUMENT

This Court has recognized that the IDEA authorizes a district court to order reimbursement of the costs of parents' unilateral placement of a student in a private facility if it concludes "both that the public placement violated IDEA and that the private school placement was proper under the Act." *Florence Cnty.*

Sch. Dist., 510 U.S. at 15. Whether a placement is "proper" is determined "in light of the purpose of the Act * * *, [which] is principally to provide handicapped children with a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." *Burlington*, 471 U.S. at 369 (quotation omitted).

Here, there is no dispute that petitioner failed to provide Elizabeth with a free appropriate public education. See Pet. App. 8a ("At no point before the ALJ, district court, or this court has the District challenged the [hearing officer's] conclusion that it failed to provide a FAPE to Elizabeth.").

Petitioner challenges the unanimous determination of each of the decisionmakers below—the hearing examiner, the administrative law judge, the district court, and the three members of the court of appeals panel—that Elizabeth's placement at Innercept is "proper" under the IDEA. That conclusion does not warrant this Court's review.

A. There Is No Substantive Disagreement Among The Courts Of Appeals Regarding The Governing Legal Standard.

The IDEA specifically contemplates that a child with disabilities may require residential services to provide him or her with the free appropriate public education guaranteed by the statute. See pages 3-5, *supra*; see also School Boards Am. Br. 14 (discussing school districts' voluntary placements of students in residential settings).

Petitioner is wrong in claiming that review by this Court is necessary because the courts of appeals have adopted different standards for determining whether a parent is entitled to reimbursement for

the costs of a unilateral residential placement. Although the lower courts may use different language, they all focus their analysis on the same basic point: whether the residential placement was needed to enable the child to receive the free appropriate education to which she is entitled under the IDEA or whether it aimed at other, noneducational goals.

Simply put, the courts of appeals undertake the same inquiry, but describe it in slightly different ways. These semantic differences provide no justification for this Court's intervention.

The leading case on this question is *Kruelle* v. *New Castle County School District*, 642 F.2d 687 (3d Cir. 1981). The court there stated that "[a]nalysis must focus * * * on 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." *Id.* at 693 (emphasis added).

Kruelle made clear that not every service that "can be construed as related to a child's ability to learn" is reimbursable. 642 F.2d at 694. See also *Clovis Unified Sch. Dist.* v. *Cal. Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990) (per curiam) (school district not required to provide kidney dialysis necessary to keep a child alive because "[a]ll medical services are arguably 'supportive' of a handicapped child's education," but "mere 'supportiveness' is too broad a criterion to be the test for whether a specific service is necessary under the Act to assist a child to benefit from special education"). Rather, "the relevant question * * * is whether residential placement is part and parcel of a specially designed instruction to meet the unique needs of a handicapped

child." *Kruelle*, 642 F.2d at 694 (quotations omitted). See also *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66, 79 (1999) ("It is undisputed that the services at issue must be provided if Garret is to remain in school.").[9]

The *Kruelle* formulation—that a private placement be "necessary for educational purposes"—has been adopted, either verbatim or in substance, by virtually all of the courts of appeals. See *Indep. Sch. Dist. No. 284* v. *A.C.*, 258 F.3d 769, 774 (8th Cir. 2001) (citing *Kruelle* and stating that "the IDEA requires that a state pay for a disabled student's residential placement if the student, because of his or her disability, cannot reasonably be anticipated to benefit from instruction without such a placement"); *Dale M.* v. *Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307*, 237 F.3d 813, 817 (7th Cir. 2001) (citing *Kruelle* for proposition that "placement [must be] necessary for educational reasons"); *Mrs. B.* v. *Milford Bd. of Educ.*, 103 F.3d 1114, 1122 (2d Cir. 1997) (citing *Kruelle* and stating that "[i]f institutionalization is required due to a child's emotional problems, and the child's emotional problems prevent the child from making meaningful educational progress, the Act requires the state to pay for the

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[9] Petitioner mischaracterizes *Kruelle* as "requir[ing] public school districts to fund a residential placement as long as the placement confers some educational benefits—regardless of the reason for the placement." Pet. 13-14. The very language of the opinion, quoted in the text above, demonstrates that petitioner is wrong. Indeed, the petition itself subsequently recognizes that the Third Circuit has applied *Kruelle* in a manner that does *not* apply such a broad standard. See Pet. 18-19 (citing *Mary T.* v. *School District of Phila.*, 575 F.3d 235 (3d Cir. 2009)).

costs of the placement"); *Tenn. Dep't of Mental Health & Mental Retardation* v. *Paul B.*, 88 F.3d 1466, 1471 (6th Cir. 1996) (citing *Kruelle* and stating that "a determination must be made whether full time residential placement is necessary for educational purposes as opposed to medical, social, or emotional problems that are separable from the learning process"); *Clovis*, 903 F.2d at 643 (citing *Kruelle* for necessity requirement); *Burke Cnty. Bd. of Educ.* v. *Denton*, 895 F.2d 973, 980 (4th Cir. 1990) (citing *Kruelle* for proposition that services must be "essential for the child to receive any educational benefit"); *Jefferson Cnty. Bd. of Educ.* v. *Breen*, 853 F.2d 853, 857 (11th Cir. 1988) (not citing *Kruelle* but affirming where record showed that "Alice needs a residential placement in a facility capable of providing an integrated program of educational and other supporting services"); *McKenzie* v. *Smith*, 771 F.2d 1527, 1534 (D.C. Cir. 1985) (citing and quoting *Kruelle* with approval); *Abrahamson* v. *Hershman*, 701 F.2d 223, 227-228 (1st Cir. 1983) (citing *Kruelle* and approving a residential placement found to be "essential in order for [the child] to make any educational progress whatever"). See also *Calumet Cnty. Dep't of Human Servs.* v. *Robert H.*, 653 N.W.2d 503, 508 (Wis. 2002) (citing *Kruelle* and noting that "[f]ederal courts deciding parental reimbursement cases under the IDEA have generally held that the test for whether a child's placement in a residential program is educational and therefore reimbursable under the IDEA focuses on whether the child's residential placement is 'necessary for educational purposes'").[10]

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[10] Petitioner is simply wrong in asserting that the Ninth Circuit in *Clovis* "'reject[ed] the line of reasoning' embraced by other circuits." Pet. 16. What *Clovis* "reject[ed]" was the

The Fifth Circuit stated that it disagreed with the *Kruelle* standard, but propounded a test that expressly reiterated the exact same requirement—that a residential placement must be necessary for educational purposes. See *Michael Z.*, 580 F.3d at 299 (requiring that the residential placement be "essential in order for the disabled child to receive a meaningful educational benefit" and "primarily oriented toward enabling the child to obtain an education"). Indeed, one of the members of the Fifth Circuit panel in *Michael Z.* remarked on the absence of any real distinction between the Fifth Circuit's test and the approach adopted in *Kruelle* and by other circuits. *Id.* at 303 (Prado, J., specially concurring) ("I write separately only to note that I do not interpret our two-part test for the propriety of a residential placement as departing from that of the other circuits that have addressed this issue" and that "[a]s I see it, then, today's opinion joins our fellow circuits in adopting the general *Kruelle* standard").

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wayward position of a single *district court* which concluded that "'states remain responsible'" for reimbursement merely if "'medical, social or emotional problems that require hospitalization create or are intertwined with the educational problem.'" *Clovis*, 903 F.3d at 643 (quoting *Vander Malle* v. *Ambach*, 667 F. Supp. 1015, 1039 (S.D.N.Y. 1987)). In rejecting that position, *Clovis* made clear—expressly relying on *Kruelle*—that "our analysis must focus on whether Michelle's placement may be considered necessary for educational purposes" rather than "a response to medical, social, or emotional problems that is necessary quite apart from the learning process." *Ibid.* (citing *Kruelle,* 642 F.2d at 693). See also *Taylor* v. *Honig*, 910 F.2d 627, 633 (9th Cir. 1990) (citing both *Clovis* and *Kruelle* for proposition that residential placement must be "necessary to meet [child's] educational as opposed to his medical needs").

The Tenth Circuit's approach here also turns on this criterion, because it requires that an educational placement either provide special education directly or provide related services in order to be reimbursable. See Pet. App. 18a-19a; 20 U.S.C. § 1401(26)(A) (related services are those that are "*required* to assist a child with a disability to benefit from special education") (emphasis added); 34 C.F.R. § 300.104 (only residential services "necessary to provide special education and related services" are to be at no cost to the parent).

Petitioner points out (Pet. 19-21) that some courts also inquire whether a placement or any related services provided by the residential placement are "primarily oriented toward enabling a disabled child to obtain an education." *Dale M.*, 237 F.3d at 817. See also *Michael Z.*, 580 F.3d at 299.

But what some of these courts describe as a second "step" is just another way of asking the very same question framed in *Kruelle*: whether "education required residential placement, which was therefore a 'necessary predicate *for learning'* as opposed to * * * a 'response to medical, social or emotional problems that are segregable from the learning process.'" *Dale M.*, 237 F.3d at 817-818 (quoting *Kruelle*, 642 F.2d at 693) (emphasis added).

The requirement that related services be "primarily oriented" toward educational activities will virtually always lead to the same answer as asking whether the residential placement is necessary for educational purposes. This approach is therefore wholly consistent with that employed by courts applying the *Kruelle* test. Accord *Michael Z.*, 580 F.3d at 303 (Prado, J., concurring) (this articulation "is also consistent with the approach of other circuits").

Indeed, the Third Circuit, when applying its *Kruelle* standard to the placement of an emotionally disturbed girl at a long-term residential psychiatric treatment center, has explained that "the relevant consideration is not the tool the institution uses, but rather the *substantive goal sought to be achieved* through the use of that tool." *Mary T.* v. *Sch. Dist. of Phila.*, 575 F.3d 235, 245 (3d Cir. 2009) (emphasis added). Where a residential placement is "'part and parcel of a specially designed *instruction* to meet the unique needs of a handicapped child,'" any related services will almost invariably be oriented toward that goal. *Id.* at 244 (quoting *Kruelle*, 642 F.2d at 694) (emphasis added).

The Fourth Circuit, also applying *Kruelle*, disallowed reimbursement where the residential placement was "'primarily to address the safety needs of the Student as a result of her mental health issues and not her educational needs.'" *Shaw* v. *Weast*, 364 F. App'x 47, 53 (4th Cir. 2010) (per curiam).

So too with the Tenth Circuit's approach in the decision below. Facilities with state educational accreditation will naturally provide specially designed instruction as well as related services that are oriented toward that end.

The absence of any substantive disagreement among the courts of appeals is confirmed by the strikingly consistent outcomes that courts have reached in private residential reimbursement cases.

For example, where a residential placement provides little or no educational services, courts virtually always deny reimbursement. See, *e.g.*, *Ashland Sch. Dist.* v. *E.H.*, 587 F.3d 1175, 1185 (9th Cir. 2009) (child did not receive education services for "at

least the first six months"); *Mary T.*, 575 F.3d at 239 (child did not receive educational services for "more than six months"); *Butler* v. *Evans*, 225 F.3d 887, 893 (7th Cir. 2000) ("There is scant evidence that the hospital provided or was equipped to provide anything more than meager educational services"); *Clovis*, 903 F.2d at 646 (medical facility "hardly provided [the child] with any educational services").

By contrast, where the educational services are extensive, courts almost always uphold the placement. See, *e.g.*, Pet. App. 55a n.16 (placement provided "between four and four-and-a-half hours per day" of education); *Mrs. B.*, 103 F.3d at 1118 (placement provided "six hours per day of traditional schooling"); *Babb* v. *Knox Cnty. Sch. Sys.*, 965 F.2d 104, 105 (6th Cir. 1992) (classes held three hours a day).

Similarly, residential facilities with educational accreditation usually qualify for reimbursement, while those without it do not. Compare Pet. App. 55a (accredited institution), and *Seattle Sch. Dist., No. 1* v. *B.S.*, 82 F.3d 1493, 1502 (9th Cir. 1996) (same), with *Mary T.*, 575 F.3d at 248 (non-accredited institution), *Butler*, 225 F.3d at 893 (same), and *Clovis*, 903 F.2d at 646 (same). These consistencies should not come as a surprise, given the substantive overlap between the circuits' various verbal formulations.

It is telling that petitioner points to only one specific case that, it asserts, confirms the alleged conflict among the lower courts. Petitioner claims that *Ashland School District* v. *E.H.*, 587 F.3d 1175 (9th Cir. 2009), involved "practically identical facts" to the present case, but reached a different conclusion. Pet. 17. That simply is not true.

The district court in *Ashland* made a finding of fact that the child "'was not transferred to a residential facility because of educational deficiencies but for medical reasons'" and that "'[d]uring at least the first six months [at the residential facility, the child] was in *no condition* to devote much time or effort to schoolwork.'" 587 F.3d at 1185 (quoting district court ruling; emphasis added). Here, by contrast, the district court made a factual finding "that a preponderance of the evidence shows that the services Innercept provided to Elizabeth were 'primarily oriented' toward providing Elizabeth an education," including that she "regularly spends between four and four-and-a-half hours per day on educational work." Pet. App. 54a-55a & n.16.

Ashland, in short, would have been decided the same way in the Tenth Circuit as it was in the Ninth Circuit—reimbursement denied—because the child's placement offered medical services, not instruction designed to meet the unique educational needs of the child. See Pet. App. 18a-19a. For that matter, *Ashland* would have come out the same under the Fifth Circuit's approach as well. See *Michael Z.*, 580 F.3d at 299 (requiring that services be primarily oriented toward educational, not medical, ends). And as the district court and court of appeals both observed, the outcome in Elizabeth's case would have been the same—reimbursement approved—under the Ninth and Fifth Circuit standards, as well. Pet. App. 16a, 53a.

Ashland and this case have different outcomes simply (and correctly) because the district courts made different factual determinations about the purpose to which the residential placement and related services was directed.

Furthermore, the district court in *Ashland* did not just deny reimbursement because of the medical nature of the services provided. It also based its decision on multiple other factors, including the high cost of residential facilities, the parents' failure to adhere to the IDEA's notice requirement, and the fact that the parents never complained to the school district about their child's individualized education plan prior to seeking reimbursement for an alternative placement. *Ashland,* 587 F.3d at 1181. Many of these factors are left to the discretion of the district judge under the IDEA. See 20 U.S.C. § 1412(a)(10)(C)(iii). Most of them are not present in Elizabeth's case. See Pet. App. 27a-29a (finding that Elizabeth's parents did not violate the IDEA's notice requirement). It is hardly surprising that the Ninth and Tenth Circuits would reach different conclusions on two very different sets of facts.

In sum, there simply is no substantive disagreement among the courts of appeals—simply a difference in semantic formulation. And the decision below is likely to help resolve those semantic differences by shifting the analytical emphasis away from judicial articulations and back toward the statutory text. *Cf.* Pet. App. 33a (Gorsuch, J., concurring) ("[S]tirring the pot may help courts find just the right recipe in the end.").[11]

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[11] Petitioner claims that the second step of the court of appeals' approach—asking whether the placement is with a state-accredited school—conflicts with this Court's decision in *Florence County School District* v. *Carter*, 510 U.S. 7 (1993). See Pet. 22. It is more than a little odd for petitioner, which seeks to overturn the court of appeals' decision upholding Elizabeth's placement at Innercept, to complain that the court of appeals' standard is too restrictive of parents'

B. Any Conflict Among The Courts Of Appeals Is Not Presented Here, Because This Case Would Have Been Decided The Same Way By The Other Circuits.

Even if there were a substantive conflict among the courts of appeals, this case would provide a particularly inappropriate vehicle for addressing that question. That is because Elizabeth's placement would be upheld under all of the various formulations. And this is not speculation—the district court and Judge Gorsuch demonstrated in their opinions that each of these standards is satisfied. As Judge Gorsuch explained, "all of the available tests point to the same conclusion in this particular case: Elizabeth is entitled to a private placement." Pet. App. 32a (emphasis omitted).

The district court and the ALJ arrived at precisely the same conclusion. "[N]o matter which test is employed," the district court determined, "the Parents' placement of Elizabeth at Innercept was an appropriate and reimbursable placement under the IDEA." Pet. App. 52a. The ALJ's opinion similarly states "that residential services at Innercept were 'related services' regardless of which federal circuit test is used." *Id*. at 141a.

Because the outcome of this case would remain the same under any of the formulations employed by the courts below—and petitioner has not even tried to advance a standard under which Elizabeth's

choices. In any event, petitioner's assertion rests on a misunderstanding of the court of appeals' standard: the Tenth Circuit stated only that the private facility must be *accredited*, not that it had to be approved for IDEA placements by the school district—and this Court in *Florence County* rejected only the latter requirement (see 510 U.S. at 14-15).

placement would be improper—review is plainly inappropriate. This Court's decision would have no impact on the outcome of this case and, more importantly, the facts of this case would not illustrate the different effects of different approaches to the question.

The analysis of the decisionmakers below is detailed and comprehensive.

Thus, with respect to *Kruelle*'s formulation of the standard, Judge Gorsuch, the district court, the ALJ, and the hearing officer all reached the same conclusion: "Elizabeth's placement at Innercept was 'necessary for educational purposes' and * * * her 'medical, social [and] emotional problems [were not] segregable from the learning process.'" Pet. App. 52a. See *id*. at 32a; *id*. at 100a ("Elizabeth's emotional problems are not segregable from her learning problems, and residential treatment is necessary for her to receive educational benefit."); *id*. at 198a. Petitioner acknowledged as much. *Id*. at 16a.

Elizabeth's placement at Innercept also satisfies the "primarily oriented" formulation employed by the Fifth and Seventh Circuits. *Michael Z.,* 580 F.3d at 299; *Dale M.*, 237 F.3d at 817. As Judge Gorsuch concluded, "Elizabeth's private placement [was] appropriate"—"even under the test favored by the school district and adopted by the Fifth Circuit." Pet. App. 32a; accord *id*. at 55a (district court opinion); *id*. at 101a (ALJ opinion).

Elizabeth's "private placement was essential to ensure she received a meaningful educational benefit." Pet. App. 32a (Gorsuch, J., concurring). Numerous experts in this case testified that Elizabeth could not make academic progress if she did not attend a

residential facility. See, *e.g.*, *id*. at 24a (noting the testimony of David Miller, Dr. Partha Gandhi, and Dr. George Ullrich). Elizabeth's psychological issues "are the major impediment to her ability to progress in the classroom and to benefit from her education." *Id*. at 198a. See also *id*. at 53a (citing Dr. Gandhi's testimony that it would be "impossible to address her educational needs without addressing her mental health needs"). In order for Elizabeth to function academically, her disabilities required that she receive 24-hour-a-day, 7-days-a-week care and structure, which could only be provided at a residential facility like Innercept. *Id*. at 173a.

Elizabeth's placement at Innercept was not only essential; it was also "primarily oriented toward enabling her to obtain an education." Pet. App. 32a (Gorsuch, J., concurring). See also *id*. at 54a-55a ("[T]he services Innercept provided to Elizabeth were 'primarily oriented' toward providing Elizabeth an education."); *id*. at 100a (finding that the placement met the Seventh Circuit's "primarily educational" test, as discussed in *Butler* and *Dale M*.).

In the Fifth and Seventh Circuits, courts have distinguished between related services that are "primarily oriented toward enabling a disabled child to obtain an education," and those that are "primarily aimed at treating a child's medical difficulties or enabling the child to participate in non-educational activities." *Michael Z.,* 580 F.3d at 299-300. See also *Dale M.*, 237 F.3d at 817 ("The essential distinction is between services primarily oriented toward enabling a disabled child to obtain an education and services oriented more toward enabling the child to engage in noneducational activities. The former are 're-

lated services' within the meaning of the statute, the latter not.").

In *Butler*, for example, the Seventh Circuit refused to order reimbursement for the plaintiff's psychiatric hospitalization, on the ground that her hospitalization was "exclusively for medical reasons, not for educational purposes, and [she] received almost exclusively medical services, not educational ones" while there. 225 F.3d at 893. Similarly, in *Dale M.*, the court denied reimbursement for the plaintiff's residential placement because the primary purpose of that placement was to provide "confinement," and to function as a "jail substitute." 237 F.3d at 817. The Seventh Circuit concluded that the placement was not a "'necessary predicate for learning,'" as the plaintiff "ha[d] the intelligence to perform well as a student and no cognitive defect or disorder such as dyslexia that prevent[ed] him from applying his intelligence to the acquisition of an education, without special assistance." *Id.* at 817-818.

By contrast, the "primary purpose of [Elizabeth's] admission to Innercept was to receive education in a therapeutic environment." Pet. App. 142a. Innercept is neither a hospital nor a jail substitute. As the district court found, "the goal of Elizabeth's stay at Innercept is her successful graduation from high school," in a setting that makes high school graduation possible for a student with her disabilities. *Ibid.* Innercept is an accredited school staffed by teachers, not a hospital staffed by doctors. The instruction and counseling at Innercept are provided by certified educators and therapists, not physicians, and most of Elizabeth's day was spent pursuing education. *Id.* at 101a.

Because Elizabeth's placement satisfied every formulation employed by the courts of appeals, her parents were properly awarded reimbursement, and this case therefore would be an especially poor vehicle for resolving any conflict among the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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