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Judicial Approaches to Special Education: Residential Placements for Children with Mental Illness Under IDEA

Ben Conway

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Judicial Approaches to Special Education: Residential Placements for Children with Mental Illness Under IDEA

Ben Conway*

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INTRODUCTION

Children with disabilities are entitled to a free, appropriate public education (FAPE), including placement at residential programs when necessary.¹ In some cases, school districts offer such placements. In other cases, parents are forced to turn to the courts. Families of sufficient means also have the additional option of funding the placement on their own and seeking reimbursement. When are youth with mental illness entitled to residential placement through the education system?

Under the Individuals with Disabilities Education Act (IDEA),² all children are entitled to a FAPE in a placement that is the least restrictive environment (LRE).³ This placement is determined through an individualized educational program (IEP).⁴ If a child has a disability that prevents him or her from access to education, then a FAPE consists of the support and services necessary to assist the child in accessing education along with appropriate placement.⁵ In cases where a child's mental health condition impedes his or her access to education, a FAPE includes the mental health services the student requires to access education.⁶

Children with mental illness can present a variety of internalizing or externalizing behaviors that impact their education.⁷ Like all other related support and services in special education, schools must provide mental health services in a placement that is the LRE.⁸ "To the maximum extent appropriate," children with disabilities should be educated in regular classes with their nondisabled peers in a

1. 20 U.S.C. § 1412(a)(1)(A) (2012).

2. *Id.* § 1400.

3. *Id.* § 1412(a)(5).

4. *Id.* § 1412(a)(5)(B)(i).

5. *Id.* §§ 1401(9), (26), (29), 1412(a)(1)(A).

6. IDEA and its implementing regulations do not use the term mental health services. Nonetheless, many related services are mental health services. *E.g.*, 34 C.F.R. §§ 300.34(a) (2014) (related services include psychological services, counseling services, and rehabilitation counseling); *id.* § 300.34(c)(2) (counseling services); *id.* § 300.34(c)(8) (parent counseling and training); *id.* § 300.34(c)(10) (psychological services); *id.* § 300.34(c)(14) (social work services); *id.* § 300.104 (residential placement).

7. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 13 (5th ed. 2013) (clustering disorders based on internalizing and externalizing factors).

8. 20 U.S.C. § 1412(a)(5)(A).

comprehensive school.⁹ Some children's behavioral challenges are severe enough that they must attend intensive day treatment programs while continuing to live at home.¹⁰ But the only way to enable a child with severe mental health challenges to access his or her education is through an educational placement at a residential program.¹¹

Broadly speaking, a residential program is a placement at which a child is placed away from his or her home—whether it is an educational placement is the core question in most cases.¹² In some cases, the student may need to leave his or her home state to attend school at a residential program,¹³ while in others the student is able to—or even entitled to—placement closer to his or her home.¹⁴ Every residential program is different,¹⁵ and a particular residential program may not be appropriate for a particular child.¹⁶

School districts often resist placing youth at residential programs.¹⁷ Residential placements are costly compared to even the most expensive nonpublic day schools and are among the most restrictive educational placements available.¹⁸

9. *Id.*

10. *E.g.*, Tracy N. *ex rel.* Nickalas N. v. Dep't of Educ., Haw., 715 F. Supp. 2d 1093, 1114–15 (D. Haw. 2010) (finding a day treatment program appropriate for a large youth with frequent behavioral outbursts).

11. *E.g.*, Seattle Sch. Dist., No. 1 v. B.S. *ex rel.* A.S., 82 F.3d 1493, 1497–98, 1502–03 (9th Cir. 1996) (finding that where the child's assaultive behavior problems had escalated to the point of the child's requiring restraints, a period of hospitalization, and ultimately expulsion from the school's day program, such that no educational services were provided for six months, the hearing officer and district court properly ordered residential placement through an IEP).

12. *E.g.*, *id.* at 1501 (noting that the child required “intensive, round-the-clock care, in order to address [a student's] behavioral disabilities and enable her to benefit from her education”). While IDEA's implementing regulations require that parents not be assigned the nonmedical costs, including room and board, of a residential program when such placement is necessary, 34 C.F.R. § 300.104 (2014), neither IDEA nor its implementing regulations define what a residential program actually is.

13. *E.g.*, Seattle Sch. Dist., No. 1, 82 F.3d at 1496–98 (Washington student parentally placed in a residential program in Montana).

14. *E.g.*, Todd D. *ex rel.* Robert D. v. Andrews, 933 F.2d 1576, 1578–79, 1581–82 (11th Cir. 1991) (holding the district court was incorrect in ordering a Georgia youth to attend a residential program in Texas when his IEP goals required placement closer to home).

15. *E.g.*, Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings, 903 F.2d 635, 639 (9th Cir. 1990) (while there was “no dispute that Michelle require[d] a residential placement in order to receive an appropriate education,” the parents and school district were unable to identify a mutually agreeable residential program); Clevenger *ex rel.* Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514, 515–16 (6th Cir. 1984) (comparing two residential programs to determine which was appropriate).

16. *E.g.*, Eschenasy *ex rel.* Eschenasy v. N.Y.C. Dep't of Educ., 604 F. Supp. 2d 639, 651–52 (S.D.N.Y. 2009) (holding that a particular residential program was not appropriate where the child did not make progress academically and was asked to leave because of behavioral challenges).

17. IDEA refers to local educational agencies. 20 U.S.C. § 1401(19)(A) (2012). Local educational agencies can include, *inter alia*, school districts, county offices of education, and independently operated charter schools. *Id.* This Article refers to local educational agencies collectively as school districts throughout.

18. *E.g.*, Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Cir. 1993) (explaining that the objective LRE's preference for mainstreaming precludes placement in a residential educational program if the student could access an education in a day program); *Clovis Unified Sch. Dist.*, 903 F.2d

When the student who needs residential placement is in the foster care or youth probation system, this resistance is often augmented by questions—feigned or real—of residence and responsibility.¹⁹

This Article explores the landscape of cases regarding residential programs.²⁰ It is intended to serve as a practitioner's guide to understanding application of IDEA and the right of children with disabilities to a FAPE. First, it briefly discusses what it means to guarantee a FAPE in the LRE under the requirements of IDEA, before turning to who is responsible for providing it. Next, it reviews what IDEA means by "educational benefit,"²¹ previewing how courts' frequent disregard of the statute's text has led to much of the confusion in the current state of the law. The Article then explores several key areas of confusion within the law, with a particular focus on the statute's "medical exception," before setting out the core tests utilized by the various circuit courts of appeals to determine whether placement at a residential program is appropriate. After this, the Article briefly discusses unilateral placements by parents and their attempts to seek reimbursement from the appropriate educational agency.

When read closely, case law regarding residential programs is riddled with inconsistencies, conflation, and contradictions.²² But when read as a whole, the body of law is similar if not uniform across circuits so long as appropriate attention is paid to the semantics of each circuit's wording of the inquiry—with the notable exception of the Tenth Circuit. For the most part, cases requesting residential placement for a FAPE are reliable in unilateral placement cases and vice versa.

I. TOMMY

Tommy²³ struggled all his life in school despite being in special education since first grade. He has depression and severe, school-based anxiety, the latter of which may stem from his intellectual disability that went unidentified until he was seventeen.²⁴ For a decade, California schools passed Tommy from grade to grade

at 635, 639 (the placement sought by parents in 1985 was \$150,000 per year); *Residential Treatment Centers*, MD. COAL. FAMILIES FOR CHILDREN'S MENTAL HEALTH, www.mdcoalition.org/resources/childrens-mental-health/155-residential-treatment-centers (last visited Aug. 25, 2014). In the author's experience, yearly costs at various residential programs between 2007 and 2014 have ranged from \$120,000 to \$150,000.

19. *E.g.*, *Orange Cnty. Dep't of Educ. v. Cal. Dep't of Educ.*, 668 F.3d 1052, 1053–55 (9th Cir. 2011) (five years of litigation to determine what agencies were responsible for the educational placement of a foster youth in a residential program).

20. As originally conceived, this Article focused particularly on residential placements for court-involved youth.

21. *See infra* Part III.

22. *See infra* Part V.

23. "Tommy's" story is based on a former client of the author. Some facts were changed to maintain confidentiality.

24. Until recently, intellectual disabilities were called "mental retardation." *Compare* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000) (mental retardation), *with* AM. PSYCHIATRIC ASS'N, *supra* note 7, at 33 (intellectual disability). In

and failed to identify his mild-bordering-on-moderate intellectual disability. As he grew older, he began presenting behavioral challenges as a result of his disabilities. In sixth grade, he started acting out in class. In seventh grade, he was regularly being suspended. And in eighth grade, he was expelled from school for a fight. Tommy did not succeed in comprehensive public schools. His school district offered placement in a private school that serves only children with disabilities through his IEP.

But Tommy's behaviors worsened in severity and frequency over the course of the first semester. He was increasingly sullen and would rarely speak either at home or at school. He made no friends and developed no meaningful relationships with any school staff. Some weeks he sat quietly in the back of the room doing nothing, while other weeks he swore at teachers and threatened his classmates. By the spring, he could rarely sleep through an entire night due to night terrors and experienced anxiety attacks during the school day. He began skipping school altogether. His private school documented all of these issues and discussed them with the school district at multiple IEP team meetings, but neither proposed any services or accommodations to address Tommy's deteriorating mental health and its impact on his education. His mother repeatedly asked for help and finally a mental health evaluation confirmed his severe depression and anxiety and recommended educational placement in a residential program. The school district did not act on this recommendation for over four months.

While the school district did nothing, Tommy's behaviors continued to escalate. An off-campus altercation led to Tommy's arrest and detention in a juvenile hall. A school psychologist at the juvenile hall evaluated Tommy and identified his intellectual disability and behaviors consistent with diagnoses of bipolar disorder and anxiety disorder. She confirmed that he needed placement in a residential program in order to access his education. The county agency operating the juvenile hall's school adopted that recommendation at an IEP team meeting. The director of special education from his home district participated in that meeting and did not dispute the IEP placement.

The residential placement was made four years after Tommy's mental health began to impede his access to an education and nearly a year after a school-based mental health evaluation recommended residential placement.

Tommy thrived at his residential program. His behaviors first stabilized with continual prompting. Then he began acquiring positive replacement behaviors and relied decreasingly on adult prompts. He made academic progress for the first time since elementary school. But it was several thousand miles from home. The school district refused to convene IEP team meetings and the county only funded one trip for his mother to visit him and participate in in-person family counseling

anticipation of this change, Congress accordingly amended IDEA in 2010 to refer to intellectual disabilities. Rosa's Law, Pub. L. No. 111-256, § 2(b)(2), 124 Stat. 2643, 2643 (2010) (codified as amended at 20 U.S.C. 1400 (2012)).

to help her understand his IEP and his developmental and mental health needs. Although his emotional functioning improved, due to his cognitive deficits he did not understand why he was in a locked placement so far from home.

About nine months into placement, his behavior began to deteriorate. Placement staff suggested that Tommy was ready to step down to a less restrictive setting closer to home, but that he still would need a residential program to access an education. His school district now claimed that the juvenile court had placed Tommy there outside the IEP process, even though their director of special education had attended the underlying IEP. They disavowed all responsibility and cynically offered to convene an IEP team meeting to offer him placement as soon as he returned home but not before. The juvenile court still maintained jurisdiction and indicated that he would likely be redetained if he returned home before an appropriate placement was arranged.

Informal attempts to resolve the dispute and bring Tommy home failed. Counsel filed an administrative due process complaint,²⁵ engaged in extensive motion practice, and the case finally settled before hearing. The district agreed to transition Tommy to an unlocked residential program less than twenty miles from his mother's home. He completed high school there and enrolled in a vocational program to build further independence skills.

Tommy is like the dozens of children for whom the author has obtained residential placement, whose emotional and behavioral needs are ignored until the only recourse is among the most restrictive and expensive. This Article does not address the myriad school-based services that should be provided to address a child's mental health and behavioral needs prior to reaching the point Tommy did. Instead, it focuses on the law once a child's disabling condition reaches that point of extraordinary impact.

II. IDEA GUARANTEES A FAPE IN THE LRE FOR ALL CHILDREN WITH DISABILITIES

The core guarantee of the IDEA is the right to a free, appropriate public education in the least restrictive environment—a FAPE in the LRE—through an individualized educational program (IEP).²⁶ The term “IEP” generally appears in four different contexts in special education. An IEP can refer to a written description of a disabled child's unique program of special education and related services.²⁷ The IEP is also the specific program that (should) enable the child to

25. IDEA requires states to afford an “impartial due process hearing” process to resolve disputes between parents and school districts. 20 U.S.C. § 1415(f)(1). In the author's experience, this is generally referred to as a “due process” hearing or an “administrative due process hearing.” The hearing process includes the right to counsel, the right to present evidence, and the right to present, confront, and compel the attendance of witnesses. *Id.* § 1415(h). Such a hearing is the primary method for exhausting administrative remedies prior to filing in state or federal court. *Id.* § 1415(i)(2).

26. *Id.* § 1401(9).

27. *Id.* § 1414(d)(1)(A).

access an education. An “IEP team” is a group of stakeholders—parents, teachers, service providers—who meet to review and modify the IEP as necessary.²⁸ The “IEP meeting,” or “IEP team meeting,” is the meeting at which the IEP is developed or modified.²⁹ In most cases, to establish the appropriateness of a residential program a child must first be evaluated by a school district, found eligible for special education, and be offered an IEP.

A. Eligibility for Special Education

To determine whether a child is eligible for special education, educational agencies must identify children who may have disabilities.³⁰ After this, educational agencies must evaluate such children in all areas of known and suspected disability.³¹ Evaluations must then be administered by staff who are both trained and knowledgeable in evaluating children with disabilities and also capable of obtaining, integrating, and interpreting existing data.³² IEP teams must then consider relevant assessment data to create an IEP that meets the full extent of the student’s academic, developmental, and functional needs.³³

Most students who are placed at residential programs are eligible for special education when they suffer from a “serious emotional disturbance.”³⁴ But there is no requirement for a particular classification in order to access a residential program.³⁵ Eligibility for emotional disturbance is based on long-term functioning³⁶: a single episode does not establish eligibility nor does a brief remission obviate eligibility.

28. *Id.* § 1414(d)(1)(B).

29. *E.g., id.* § 1414(d)(3)(A), (E).

30. *Id.* § 1412(a)(3). In the author’s experience, though IDEA places the child-find duty on the state educational agency, in most instances that duty is delegated to the local educational agency.

31. *Id.* § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4) (2014).

32. 20 U.S.C. § 1414(b)(3); 34 C.F.R. §§ 300.34(c)(10), 304(b)(1), (c)(1)(iv), (c)(6).

33. 20 U.S.C. § 1414(c)(1), (d)(3); 34 C.F.R. § 300.324(a)(1)(ii)–(iv).

34. *E.g., Muller ex rel. Muller v. Comm. on Special Educ. of the E. Islip Union Free Sch. Dist.*, 145 F.3d 95, 102–03 (2d Cir. 1998); *N. v. D.C. Bd. of Educ.*, 471 F. Supp. 136, 138 (D.D.C. 1979). A serious emotional disturbance is a condition that occurs over a long period, to a marked degree, and that adversely affects the child’s educational performance. 34 C.F.R. § 300.8(c)(4)(i). In addition to those three criteria, a child must exhibit at least one of the following:

- An inability to learn that cannot be explained by intellectual, sensory, or health factors;
- An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- Inappropriate types of behavior or feelings under normal circumstances;
- A general pervasive mood of unhappiness or depression; or
- A tendency to develop physical symptoms or fears associated with personal or school problems.

Id. § 300.8(c)(4)(i)(A)–(E). A child does not have an emotional disturbance if he or she is “socially maladjusted” unless it is determined that he or she nonetheless has an emotional disturbance. *Id.* at (c)(4)(ii).

35. *See* 20 U.S.C. § 1412(a)(3)(B) (clarifying that the child-find duty does not require classification by disability so long as every child with a disability is offered the special education and related services he or she needs to access his or her education).

36. 34 C.F.R. § 300.8(c)(4)(i).

A district cannot deny eligibility for special education by focusing only on a youth's high functioning at a residential program.³⁷ In a case from the Second Circuit, Treena Muller was adopted from an orphanage and began exhibiting behavioral and emotional problems early in life.³⁸ After the third psychiatric hospitalization in two months, she was discharged to a residential program where she "responded well, both emotionally and academically."³⁹ Treena's school district evaluated her for the first time three months into this residential placement.⁴⁰ The district dismissed Treena's long history of behavioral and emotional problems as a mere "tendency for depression."⁴¹ Instead, it focused solely on her high level of functioning within the residential program and found her ineligible for special education altogether.⁴² The Second Circuit found that Treena's long history of behavioral and emotional problems "amounted to more than a mere conduct disorder."⁴³

A district also cannot deny eligibility by viewing behaviors in isolation. Treena's behaviors included "suicide attempts, . . . arson attempts, . . . lies, cutting classes, failure to complete homework, stealing things, quitting the basketball team, . . . defiance, poor grades and academic performance."⁴⁴ Many of these behaviors "are not unusual or 'inappropriate' by themselves," but in combination they established that she exhibited inappropriate behaviors under normal circumstances.⁴⁵

B. *Determining the Procedural and Substantive Adequacy of an IEP Under Rowley*

Courts still apply the following two-pronged test from *Rowley* to determine whether school districts provide a FAPE under IDEA⁴⁶: (1) whether the respondents complied with the procedures set forth in IDEA, and (2) whether the

37. *Muller*, 145 F.3d at 103–04.

38. *Id.* at 98.

39. *Id.* at 99.

40. *Id.* at 98–99.

41. *Id.* at 99.

42. *Id.* at 99–100.

43. *Id.* at 103–04.

44. *Id.* at 104 (quoting the underlying district court decision).

45. *Id.*

46. Section 504 of the Rehabilitation Act of 1973 prohibits federally funded programs from discriminating on the basis of disability. 29 U.S.C. § 794(a) (2012). Public schools comply with section 504 by providing a FAPE through reasonable accommodations to their educational programming. *E.g.*, Lauren G. *ex rel.* Scott G. v. W. Chester Area Sch. Dist., 906 F. Supp. 2d 375, 387–88 (E.D. Pa. 2012). Generally, courts have found "few differences" between IDEA's affirmative duty to provide a FAPE and section 504's prohibition against discrimination. *Id.* (quoting and discussing Third Circuit precedent on the relationship between IDEA and section 504). In the author's experience, because IDEA's procedures are voluminously set out in statute and regulation, many education advocates exclusively prosecute claims through IDEA. This Article only addresses IDEA, but note that in some cases, the lack of procedures in section 504 results in *greater* protection to children with disabilities than IDEA. *Id.* at 392–94 (holding that for parents' failures to comply with procedures, student was denied a FAPE for one month under IDEA and entitled to no relief, but was denied a FAPE for five months and entitled to some relief under section 504 for the same conduct).

IEP was uniquely tailored and reasonably calculated to provide the child with some educational benefit.⁴⁷ These prongs are usually referred to as procedural FAPE and substantive FAPE, respectively.⁴⁸

Amy Rowley was a Deaf elementary student who had above average cognitive ability.⁴⁹ Amy's parents wanted her school district to provide a sign language interpreter, but the district instead provided only an FM transmitter linked to a hearing aid.⁵⁰ While Amy passed easily from grade to grade and was an above-average student, she had the potential to do much better.⁵¹ Justice Rehnquist, writing for a divided court, held that IDEA does not require IEPs to maximize the potential of children with disabilities commensurate with the opportunities afforded to their non-disabled peers, "[r]ather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education."⁵²

A procedural error only results in a denial of a FAPE if it: (1) impedes the right to a FAPE; (2) significantly impedes parental participation; or (3) causes a deprivation of educational benefit.⁵³ For example, failure to have a formal written offer of a FAPE at the beginning of the school year is a procedural violation of IDEA, but it does not cause a denial of a FAPE if it does not cause harm because the parents know what the offer is, had already decided to reject it, and received the written offer just a few days later.⁵⁴ But a FAPE has been denied when there was a failure to disclose testing results indicating a diagnosis of autism, because without knowledge of those results, the child's parents could not meaningfully participate in the IEP process.⁵⁵

In assessing whether an IEP provides a substantive a FAPE, courts engage in a fact-intensive inquiry, including academic progress, progress toward annual

47. Bd. of Educ. v. Rowley *ex rel.* Rowley, 458 U.S. 176, 206–07 (1982).

48. *E.g.*, Sch. Comm. v. Dep't of Educ. of Mass., 471 U.S. 359, 368 (1985) (holding that, to comply with IDEA, local educational agencies "implement the substantive and procedural requirements of the Act" (citation omitted)).

49. *Rowley*, 458 U.S. at 184.

50. *Id.* at 184–85.

51. *Id.* at 185–86.

52. *Id.* at 200.

53. 20 U.S.C. § 1415(f)(3)(E)(ii) (2012). Congress codified the Second Circuit's three-prong harmless-error approach when it reauthorized IDEA in 2004. *Id.* In the immediate wake of *Rowley*, Circuits diverged in their interpretation of whether to evaluate procedural FAPE under a strict liability theory—that a procedural violation alone established a denial of a FAPE—or a harmless-error test. Compare *Hall ex rel. Hall v. Vance Cnty. Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985) (strict liability for procedural violations), with *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994–95 (1st Cir. 1990) (applying a three-prong harmless-error test), and *W.G. ex rel. R.G. v. Bd of Tr.*, 960 F.2d 1479, 1484 (9th Cir. 1992) (applying a two prong harmless error test), *superseded by statute*, 20 U.S.C. § 1414(d)(1)(B), *as recognized in Anchorage Sch. Dist. v. M.P. ex rel. M.P.*, 689 F.3d 1047, 1055 (9th Cir. 2012). Though it has been a decade since Congress codified the harmless-error test, in the author's experience, some attorneys still occasionally plead procedural violations on a strict-liability theory. And their clients lose on those claims every time.

54. *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 459–61 (9th Cir. 2010).

55. *Amanda J. ex rel. Annette J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 891 (9th Cir. 2001).

goals, and access to the general curriculum.⁵⁶ Schools are not required to maximize educational benefit, but only to offer a “basic floor” of educational opportunity.⁵⁷

As described below in Section II.B, courts analyzing residential placements do not usually engage in this standard FAPE analysis. In unilateral placement cases, courts often use this analysis in the first prong, evaluating the district’s offer of a FAPE, but they do not strictly apply it in the second prong analyzing the appropriateness of the parents’ placement.

C. *The Least Restrictive Environment—the Objective and the Subjective*

Least restrictive environment (LRE) has two meanings in IDEA. Though neither the statute nor case law refer to the distinction in this way, the two meanings are best understood as the objective LRE and the subjective LRE.

The objective LRE refers to the continuum of placements, starting with full-time placement in a general education program with nondisabled peers—literally the least restrictive environment—and continuing up to the most restrictive environments, namely hospitals and institutions.⁵⁸ Residential programs are not expressly described on the federal continuum, but are instead separately defined in the regulations.⁵⁹ Residential programs fall near or at the most restrictive end of the LRE continuum.⁶⁰

The subjective LRE refers to IDEA’s core mandate that children with disabilities be removed from the general population “only when the nature or severity of the disability” is such that the child cannot access an education.⁶¹ Circuits use one of three tests to determine the subjective LRE. The Fifth Circuit developed the two-prong *Daniel R.R.* test,⁶² which the Second, Third, Tenth, and Eleventh Circuits also use.⁶³ The Sixth Circuit developed the three-prong *Roncker*

56. *Rowley*, 458 U.S. at 200–01.

57. *Id.* at 215.

58. 34 C.F.R. § 300.115 (2014).

59. *Id.* § 300.104.

60. *See, e.g.*, *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993) (explaining that the objective LRE’s preference for mainstreaming precludes placement in a residential educational program if the student could access an education in a day program).

61. 20 U.S.C. § 1412(a)(5) (2012).

62. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

63. *P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 119–20 (2d Cir. 2008) (adopting the *Daniel R.R.*, 847 F.2d at 1046, test, but incorrectly identifying the Ninth Circuit as following that test); *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004); *Oberti ex rel. Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1215 (3d Cir. 1993); *Greer ex rel. Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 696 (11th Cir. 1991), *opinion withdrawn*, 956 F.2d 1025 (11th Cir. 1992).

test,⁶⁴ which the Fourth and Eighth Circuits also use.⁶⁵ The Ninth Circuit alone uses its four-prong *Rachel H.* test.⁶⁶

This Article does not further discuss the different LRE tests. While residential placement cases often mention LRE,⁶⁷ courts do not usually apply an LRE analysis to determine whether residential placement is appropriate.

D. Related Services

An appropriate education must include mental health services when those services are necessary for a student to benefit from his or her education.⁶⁸ Federally mandated educationally related mental-health services, among other things, include: counseling services by social workers, psychologists, counselors, and other qualified personnel; medical services for assessment and evaluation; parent counseling and training; psychological services; planning and case management; and rehabilitation counseling.⁶⁹ However, IDEA and its implementing regulations “clearly convey[] that the list of services in § 300.34 is not exhaustive.”⁷⁰

E. Non-Medical Residential Programs

Since its enactment in 1975 as the Education for All Handicapped Children Act, IDEA and its implementing regulations have always required that educational agencies place children in residential programs when that is required to provide educational benefit⁷¹: if placement in a public or private residential program is necessary to provide special education and related services to a handicapped child,

64. *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

65. *DeVries ex rel. DeBlaay v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876, 878–79 (4th Cir. 1989); *A.W. ex rel. N.W. v. Nw. R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1987).

66. *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. ex rel. Holland*, 14 F.3d 1398, 1400–01, 1404 (9th Cir. 1994).

67. *E.g.*, *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993); *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 695 (3d Cir. 1981).

68. 20 U.S.C. § 1401(26)(A) (2012).

69. 34 C.F.R. § 300.34(c)(2) (2014) (counseling services); *id.* § 300.34(c)(5) (medical services for assessment and evaluation); *id.* § 300.34(c)(8) (parent counseling and training); *id.* § 300.34(c)(10)(i–ii) (psychological services); *id.* § 300.34(c)(10)(v) (planning and case management); *id.* § 300.34(c)(12) (rehabilitation counseling).

70. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,569 (Aug. 14, 2006) (to be codified at 34 C.F.R. pts. 300–01) [hereinafter Assistance to States] (responding to comments requesting a clear statement that the list of related services is not exhaustive).

71. Different authorities cite different starting points for IDEA. For example, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009), looks to the Education of the Handicapped Act of 1970. From 1965 to 1975, Congress engaged in a series of legislative attempts to address educational access for children with disabilities culminating in the Education for All Handicapped Children Act of 1975. *Bd. of Educ. v. Rowley ex rel. Rowley*, 458 U.S. 176, 179–80 (1982) (discussing the early history of federal special education litigation and legislation). The author follows a majority in pointing to the Education for All Handicapped Children Act of 1975 as the genesis of IDEA. 20 U.S.C. § 1405–06, 1415–20. That was the first codification that substantially resembles IDEA as it exists today.

the program, including non-medical care and room and board, must be at no cost to the parents of the child.⁷²

The only change to that mandate is to place greater emphasis on the person by updating the reference from “handicapped child” to “child with a disability.”⁷³ But as discussed more in Section VI below, the real question is when residential placement is necessary to enable a child to access his or her education.

III. COURTS’ APPROACHES TO ACADEMIC AND FUNCTIONAL NEEDS

The core guarantee of IDEA is a FAPE—free, appropriate public education. But what is an education? Is it just instruction in academic areas like reading, writing, and arithmetic? The plain language of IDEA is clear: measurement of educational benefit includes both academic and functional performance. In developing an IEP, the IEP team “shall consider . . . the academic, developmental, and functional needs of the child.”⁷⁴

Following the text of IDEA, special education evaluations must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information.”⁷⁵ Evaluation materials must be provided and administered in the way “most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally.”⁷⁶ Reevaluation is warranted whenever “the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation.”⁷⁷ Prior to exiting a child from special education, the local educational agency must provide the child a summary of his or her “academic achievement and functional performance.”⁷⁸ Assistive technology is equipment “used to increase, maintain, or improve functional capabilities of a child with a disability.”⁷⁹ An IEP document must include, among other things: a statement of “present levels of academic achievement and functional performance”;⁸⁰ a statement of annual goals “including academic and functional goals”;⁸¹ and a description of the accommodations needed to “measure the academic achievement and functional performance.”⁸²

Where Congress intended to limit educational benefit to academic achievement, it did so specifically. IDEA does not limit educational benefit to

72. *Kruielle*, 642 F.2d at 692 (quoting 45 C.F.R. § 121a.302 (1979)).

73. 45 C.F.R. § 300.104.

74. 20 U.S.C. § 1414(d)(3)(A) (2012).

75. *Id.* § 1414(b)(2)(A).

76. *Id.* § 1414(b)(3)(A)(ii).

77. *Id.* § 1414(a)(2)(A)(i).

78. *Id.* § 1414(c)(5)(B)(ii).

79. *Id.* § 1401(1).

80. *Id.* § 1414(d)(1)(A)(i)(I).

81. *Id.* § 1414(d)(1)(A)(i)(II).

82. *Id.* § 1414(d)(1)(A)(i)(VI)(aa).

academic achievement.⁸³ Yet courts regularly disregard the plain language of IDEA, so the definition of educational benefit varies from circuit to circuit (and sometimes from case to case).⁸⁴ For example, in the Ninth Circuit, educational benefit can include academic, social, and behavioral needs among others—academic achievement tests are “not the sine qua non of ‘educational benefit.’”⁸⁵ But, when determining whether a residential placement is educational in nature, “educational” no longer includes “medical, social, or emotional problems . . . quite apart from the learning process.”⁸⁶

A. Standards for Reviewing Residential Placements

The most difficult task in carefully parsing cases on residential programs is that courts conflate several distinctions in their analysis. These distinctions are not always vital, but courts’ lack of specificity does little to help clarify an already imprecise inquiry.

Most importantly, courts often interchangeably apply cases involving disputes over whether a residential placement is necessary for a FAPE with unilateral placement cases.⁸⁷ As used in this Article, a FAPE case is one in which the parent is advocating for the school district to place the child in a residential program through his or her IEP. The child is not yet in the desired placement and the core dispute is what educational program is necessary to provide a FAPE. A unilateral placement case is one in which a parent has withdrawn his or her child from public programs, placed the child at the parent’s own expense, and then seeks reimbursement from the educational agency. The child is already in the desired placement and, while what is necessary for FAPE is at issue, the core dispute is who will pay.

This cross-referencing is further complicated, as described below in Section VI, by the Seventh and Fifth Circuits’ articulation of analyses that are nominally different from the majority approach but do not seem to be substantively much different than one another. Though placement and related services are two different things, many courts conflate them when discussing residential

83. Though perhaps one could read the requirement for states to monitor “educational results and functional outcomes” as such a separation? *See id.* § 1416(a)(2)(A).

84. *See Deal ex rel. Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 855, 861–62, 864 (6th Cir. 2004); *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119 (2nd Cir. 1998); *Polk ex rel. Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 179 (2nd Cir. 1988).

85. *Seattle Sch. Dist., No.1 v. B.S. ex rel. A.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996).

86. *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990).

87. *Compare e.g., Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175, 1185 (9th Cir. 2009) (quoting *Clovis Unified Sch. Dist.*, 903 F.2d at 643—a FAPE case—in deciding a unilateral placement case), *with Taylor ex rel. Taylor v. Honig*, 910 F.2d 627, 628 (9th Cir. 1990) (citing *In re Drew P. v. Clarke Cnty. Sch. Dist.*, 877 F.2d 927 (11th Cir. 1989)—a unilateral placement case—in deciding a FAPE case).

programs.⁸⁸ This leads to a second confusion when courts apply “the medical exception” as if it were a single doctrine as described below in Section IV.

Courts next waver in the target of the medical exception analysis: some courts look to the purpose⁸⁹ (i.e., what motivated the placement), where other courts look into the nature of the service and placement (i.e., what is being provided and by whom).⁹⁰ As described below in Section VII, in unilateral cases courts may look to both. The standard of review at the district and appellate court levels is another moving target. This Article does not discuss it, but it is a vital consideration in determining whether to appeal an administrative decision.

These challenges are all layered on IDEA’s necessarily subjective standard requiring that a child be afforded a FAPE in the LRE. This shifting landscape does not lend itself to clean categories and tests, regardless of what any given case professes. The root of these confluences and confusions seems to be a departure from the statutory text and purpose of IDEA, as described below in Sections V, VI, and VII. Nonetheless, this nuance also leaves room creatively for the zealous advocate who understands where there is firm ground in the law and where there is mush.

IV. THE MEDICAL SERVICES EXEMPTIONS

IDEA provides two similar but distinct relevant medical exceptions.⁹¹ The first medical exception is that “related services” include the medical services of a physician only for diagnostic and evaluation purposes.⁹² Any medical services for any reason other than diagnostic and evaluation purposes are not related services, and therefore not the responsibility of the school district.⁹³ If a service is medical (and not for diagnosis or evaluation), the school is completely exempted from providing it.⁹⁴

The second medical exception is that educational agencies are responsible for all “non-medical” costs of residential program placements.⁹⁵ In comments to the 2006 regulations, the Department of Education’s Office of Special Education and Related Services explained that this means that “visits to a doctor for

88. See *Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1237 (10th Cir. 2012) (“[B]oth courts which purport to adopt and courts which purport to break from the Third Circuit approach frequently conflate the two statutory provisions.” (citations omitted)). *Elizabeth E.* is discussed in detail below.

89. *E.g.*, *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 694 (3d Cir. 1981).

90. *E.g.*, *Darlene L. v. Ill. State Bd. of Educ.*, 568 F. Supp. 1340, 1344 (N.D. Ill. 1983).

91. Additionally, related services do not include provision of surgically implanted devices. 34 C.F.R. § 300.5 (2014).

92. 20 U.S.C. § 1401(26) (2012); 34 C.F.R. § 300.34(c)(5).

93. *Irving Indep. Sch. Dist. v. Tatro ex rel. Tatro*, 468 U.S. 883, 890 (1984) (noting the second issue was whether catheterization “is excluded from this definition [of related services] as a ‘medical servic[e]’ serving purposes other than diagnosis or evaluation” (second alteration in original) (quoting 20 U.S.C. § 1401(26))).

94. See 20 U.S.C. § 1401(26).

95. 34 C.F.R. § 300.104.

treatment of medical conditions are not covered services under Part B of the Act and parents may be responsible for the cost of the medical care.⁹⁶ It was not written as a complete bar to such placements, but rather as a limitation of certain services.⁹⁷

The seminal Supreme Court case on the related services medical exception determined that catheterization was a related service where it could be performed by a lay person with minimal training and was necessary to enable the youth to attend school.⁹⁸ Amber Tatro was born with spina bifida that, among other challenges, made her unable to void her bladder without catheterization every three to four hours.⁹⁹ “The procedure is a simple one that may be performed in a few minutes by a layperson with less than an hour’s training. . . . [A]nd Amber [who was eight at the time of the decision] soon will be able to perform this procedure herself.”¹⁰⁰ In preschool, her school district offered her an IEP but refused to offer catheterization.¹⁰¹ The Supreme Court set out a twofold inquiry: (1) Was the service a supportive service? (2) Was the service a medical service for purposes other than diagnosis and evaluation?¹⁰²

In finding that catheterization was a supportive service, the Court focused on IDEA’s purpose of making public schools available to children with disabilities.¹⁰³ The Court reasoned that services “that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school.”¹⁰⁴

In finding that catheterization was not a medical service, the Court made three key determinations.¹⁰⁵ The Court first determined that the regulatory definition of medical services as those provided by a physician was reasonable¹⁰⁶ and clarified that this clause exempted only services that must be provided by a physician.¹⁰⁷ Catheterization was comparable to the nursing services provided to nondisabled students, such as on-site administration of medication.¹⁰⁸ The Court next clarified that the school would not be required to provide a service that could be performed outside the school day while still enabling the child to attend

96. *Id.* § 300.104; Assistance to States, *supra* note 70, at 46,581.

97. *See* 34 C.F.R. § 300.104.

98. *Tatro*, 468 U.S. at 885, 894.

99. *Id.* at 885.

100. *Id.*

101. *Id.* at 885–86.

102. *Id.* at 890.

103. *Id.* at 891.

104. *Id.*

105. *Id.* at 892–93.

106. *Id.*

107. *Id.* at 894.

108. *Id.* at 893–94.

school.¹⁰⁹ Finally, the Court noted that the family had sought no equipment from the school, only the services of qualified personnel.¹¹⁰

A year before *Tatro*, an Illinois district court upheld a denial authorization for a facility on the grounds that the proposed placement was “a psychiatric hospital providing psychiatric services.”¹¹¹ The plaintiffs urged that psychiatric services should be considered psychological services, and therefore “related services” under IDEA.¹¹² But “[p]sychiatrists, in contradistinction to psychologists . . . are licensed physicians whose services are appropriately designated as medical treatment.”¹¹³ Psychiatric services (as opposed to psychological services) are still generally considered medical services that are exempted from IDEA.

A month after *Tatro*, another Illinois district court allowed reimbursement for psychological services provided by a psychiatrist.¹¹⁴ That court focused on *Tatro*'s analysis of whether the service *must* be provided by a physician—including a psychiatrist.¹¹⁵ Because the therapy at issue was recommended (but not provided) by the school and *could* have been provided by a nonphysician, the therapy was a related service despite being provided by a psychiatrist, but reimbursement would be capped at the rate a non-psychiatrist would have charged.¹¹⁶

Tatro and its early progeny focused on the nature of the service itself. If the service was not a supportive service—not required to enable the child to attend school—or needed to be provided by a physician, then it was an excluded medical service. The service's purpose was never considered.

V. THE RESPONSIBILITY OF STATE EDUCATION AGENCIES

State educational agencies are ultimately responsible for ensuring that every child with a disability has access to a FAPE.¹¹⁷ Generally states ensure availability of a FAPE by clearly delegating responsibility to local school districts and enabling those districts to provide a FAPE. But as described below, in limited circumstances state educational agencies are directly responsible for educating youth.

A. Consolidating Responsibility

The purpose of including responsibility for residential placements in IDEA and its implementing regulations was “to assure a single line of responsibility with

109. *Id.* at 894.

110. *Id.* at 895.

111. *Darlene L. v. Ill. State Bd. of Educ.*, 568 F. Supp. 1340, 1342 (N.D. Ill. 1983).

112. *Id.* at 1344.

113. *Id.*

114. *Max M. v. Thompson*, 592 F. Supp. 1437, 1444 (N.D. Ill. 1984).

115. *Id.*

116. *Id.* at 1445 (ordering reimbursement reduced commensurate with rate that would be charged by a non-psychiatrist mental health professional).

117. 20 U.S.C. § 1412(a)(12) (2012).

regard to the education” of children with disabilities, and to ensure that “the State educational agency shall be the responsible agency” at the end of that line.¹¹⁸

When it enacted IDEA, Congress was concerned that “in many States, responsibility [for services] is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered.”¹¹⁹ Congress created this single line of authority through state departments of education in an effort to prevent interagency disputes over services:

Without this requirement, there is an abdication of responsibility for the education of handicapped children. . . . While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.¹²⁰

Further,

[a] cost-benefit philosophy supported these interlocking goals [of providing federal support for the education of children with disabilities]. Instead of saddling public agencies and taxpayers with the enormous expenditures necessary to maintain the handicapped as lifelong dependents in a minimally acceptable institutionalized existence, Congress reasoned that the early injection of federal money and provision of educational services would remove this burden by creating productive citizens.¹²¹

For example, the Orange County Department of Education followed both the letter and the intent of IDEA in *Orange County*—discussed below in Section V.B—by placing the student in a residential facility and maintaining that placement while disputing responsibility.¹²² But in the author’s experience, it is rare for a school district to make such a placement if they have a remotely plausible argument against responsibility.¹²³ The state education agency is ultimately responsible for ensuring that a FAPE—including placement at a residential program when necessary—is available to every child.

118. *North v. D.C. Bd. of Educ.*, 471 F. Supp. 136, 139 (D.D.C. 1979) (quoting a comment to the original regulations to IDEA’s predecessor the EAHCA).

119. S. REP. NO. 94-168, at 24 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1448. *See generally* *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 691–93 (3d Cir. 1981) (for history cites).

120. S. REP. NO. 94-168, at 24.

121. *Kruelle*, 642 F.2d at 691 (citing S. REP. NO. 94-168).

122. *Orange Cnty. Dep’t of Educ. v. Cal. Dep’t of Educ.*, 668 F.3d 1052, 1054 (9th Cir. 2011).

123. Perhaps one reason for this is that California law prohibits school districts from filing for due process against one another. *See* CAL. GOV’T CODE § 7586 (West 2008). The district in this position can file against the student disclaiming responsibility. 20 U.S.C. § 1415(b)(6) (2012); 34 C.F.R. § 300.507 (2014). But if it has already placed the youth, it must maintain the placement through the pendency of the proceedings—stay put. 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a). The author is aware of no case awarding a district reimbursement for maintaining stay put, even if the district is ultimately successful on the merits.

B. *Direct Responsibility of the State Educational Agency*

The state educational agency becomes directly responsible to provide a FAPE to a particular child when it either expressly assumes direct responsibility or fails to ensure that a FAPE is available to all children. States expressly assume direct responsibility for providing a FAPE in limited circumstances. For example, the California Department of Education directly operates California Schools for the Deaf.¹²⁴ Hawaii, an anomaly, places responsibility for providing a FAPE directly on the state department of education which acts as both the state educational agency and the statewide-local educational agency for all students.¹²⁵ When a state expressly assumes direct responsibility for providing a FAPE, it is in fact responsible.¹²⁶

Absent express responsibility, state educational agencies can become directly responsible for providing a FAPE by their action or inaction. When states fail to ensure that a FAPE is available to all children, they trigger direct state responsibility for a FAPE. This broadly occurs in two scenarios: when they do not clearly delegate responsibility,¹²⁷ and when a local school district is unable or unwilling to serve a child with a disability,¹²⁸ particularly when the state's actions or inaction impedes the student's right to a FAPE.¹²⁹

Sometimes states fail to clearly delegate responsibility to school districts and thus become directly responsible for providing a FAPE. For a number of years, California law did not establish what school district was responsible for foster youth placed through an IEP at a residential program.¹³⁰ The student in *Orange County, A.S.*, is a crossover youth—a foster youth who “crossed over” to the juvenile delinquency system—whose biological parents' educational decision-making rights had been terminated by a juvenile court.¹³¹ He had a foster parent who continued to hold educational rights even after he stopped living with her in 2004.¹³² When his 2006 IEP team determined that he required a residential

124. CAL. EDUC. CODE § 59002 (West 2003).

125. Michael P. *ex rel.* Courtney G. v. Dep't of Educ., 656 F.3d 1057, 1067–68 (9th Cir. 2011).

126. *E.g.*, Parent *ex rel.* Student v. Cal. Dep't of Educ., Case No. OAH-2012030888, slip op. at 11, ¶ 10 (Cal. Office of Admin. Hearings Apr. 25, 2013), available at www.documents.dgs.ca.gov/oah/scho_decisions/2012030888.pdf (finding the California Department of Education “is the responsible public agency in a due process hearing involving a student attending” a school described in California Education Code section 59002).

127. Doe *ex rel.* Gonzalez v. Maher, 793 F.2d 1470, 1491–93 (9th Cir. 1986) (holding that a court may order a state to provide services directly to a disabled child where a local education agency has failed to do so), *aff'd*, Honig v. Doe, 484 U.S. 305, 329 (1988); *Orange Cnty. Dep't of Educ.*, 668 F.3d at 1063 (finding the state responsible for providing a FAPE when California law did not clearly delineate what district was responsible for a child).

128. 34 C.F.R. § 300.227(a).

129. Todd D. *ex rel.* Robert D. v. Andrews, 933 F.2d 1576, 1578 (11th Cir. 1991) (holding that where Georgia law and policy barred the school district from offering an appropriate educational placement, the state was directly responsible).

130. *Orange Cnty. Dep't of Educ.*, 668 F.3d at 1055, 1057.

131. *Id.* at 1054.

132. *Id.*

placement, the county office of education agreed to fund the placement but disputed responsibility, forcing A.S. to file for due process against that office, the state, and two other school districts.¹³³ California law did not clarify what agency was responsible for A.S. until a 2007 amendment to the California Education Code—nearly a year and a half after his placement.¹³⁴ Because California law failed to delegate responsibility for such students, the California Department of Education was directly responsible for providing A.S. a FAPE during that time.¹³⁵

States also become directly responsible for providing a FAPE when a local school district is unable or unwilling to serve a child with a disability. In the early 1990s, Georgia law and policy effectively barred school districts from offering placement at in-state residential programs.¹³⁶ Todd D. was an eighteen-year-old Georgia youth with schizophrenia and borderline intellectual disability whose parents declined a proposed placement in Texas, arguing in part that he should be closer to home to work on his transition goals.¹³⁷ The district court ruled against the parents based on the convenience for the state of maintaining its existing policies.¹³⁸ The Eleventh Circuit rejected this approach that ignored Todd's unique needs.¹³⁹ The state would be directly responsible to provide Todd a FAPE if his parents could prove on remand that state policy in fact prevented the district from serving Todd in a local program.¹⁴⁰

Similarly, an Illinois family recently survived a state education agency's Rule 12(b) motion to dismiss where they had alleged that the state's refusal to approve the only placement appropriate for their child denied their child a FAPE.¹⁴¹ The plaintiffs credibly alleged that (1) but for the state's failure to approve the only appropriate placement, the school district would have placed the child at that placement; and (2) there was no appropriate placement other than the one sought in the complaint.¹⁴² The court considered this a jurisdictional issue and couched its order in the language of traceability—whether the plaintiff could establish a causal link between the state's action and the alleged harm.¹⁴³

But families are not always successful linking state action to denials of a

133. *Id.* at 1054–55.

134. *Id.* at 1060–63.

135. *Id.* at 1063 (citing *Gadsby ex rel. Gadsby v. Grasmick*, 109 F.3d 940, 953 (4th Cir.1997)) (holding that for the time period during which “California law failed to make any school district responsible for [the student’s] education . . . CDE [was] the agency responsible” for providing a FAPE).

136. *Todd D. ex rel. Robert D. v. Andrews*, 933 F.2d 1576, 1578–79 (11th Cir. 1991).

137. *Id.*

138. *Id.* at 1581–82.

139. *Id.*

140. *Id.* at 1583.

141. *B.J. ex rel. B.J. v. Homewood Flossmoor CHSD #233*, 999 F. Supp. 2d 1093, 1095 (N.D. Ill. 2013).

142. *Id.* at 1097–98.

143. *Id.* at 1095–96.

FAPE.¹⁴⁴ At the administrative level, some hearing officers in cases basing a denial of a FAPE on the state's failure to approve a program have found that a particular placement is inappropriate in part because it is not state approved.¹⁴⁵ On appeal, courts then rule that the parent lacks standing to challenge the state's withholding of approval because the denial of a FAPE is caused by the hearing officer's decision.¹⁴⁶ So the parent in this situation cannot win at the hearing because the hearing officer cannot award the relief they seek. But neither can the parent seek relief against the state because the denial is nominally caused by the hearing officer's decision. This could be an instance in which a direct filing in state or federal court is appropriate on the grounds that exhaustion of administrative remedies would be futile.¹⁴⁷

The state educational agency may fail to ensure availability of a FAPE when it fails to resolve interagency disputes.¹⁴⁸ Yet generally, states comply with IDEA by clearly delegating responsibility for providing a FAPE to local educational agencies—primarily school districts.¹⁴⁹

C. Responsibility Based on Students' Residency Versus Parents' Residency

Responsibility for providing a FAPE to California students with disabilities usually follows the student. For students in traditional families, the school district

144. *E.g.*, *M.M. ex rel. J.M. v. Bd. of Educ. of Waterville Cent. Sch. Dist.*, 963 F. Supp. 185, 189 (N.D.N.Y. 1997).

145. As discussed below, state accreditation is not necessary to determine that a program is appropriate, but it is often a factor in such determinations.

146. In some jurisdictions, a hearing officer's decision that a placement was inappropriate prevents plaintiffs from establishing a causal link with the state department of education. *M.M.*, 963 F. Supp. at 189; *Yamen ex rel. Yamen v. Bd. of Educ. of Arlington Sch. Dist.*, 909 F. Supp. 207, 209–20 (S.D.N.Y. 1996).

147. There is growing consensus among the circuits that exhaustion is an affirmative defense in special education cases, not a jurisdictional bar. *See Payne ex rel. D.P. v. Peninsula Sch. Dist.*, 653 F.3d 863, 870 (9th Cir. 2011) (holding that “the exhaustion requirement in [20 U.S.C.] § 1415(j) [(2012)] is not jurisdictional”), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (holding that when exhaustion is raised as an affirmative defense, it should be decided on a motion for summary judgment, not on an unenumerated Rule 12(b) motion); *McQueen ex rel. McQueen v. Colo. Springs Sch. Dist. No. 11*, 488 F.3d 868, 873 (10th Cir. 2007) (noting that *Jones v. Bock*, 549 U.S. 199 (2007), “casts doubt” on any characterization of exhaustion as jurisdictional); *Mosley v. Bd. of Educ. of City of Chi.*, 434 F.3d 527, 532–33 (7th Cir. 2006) (finding the exhaustion requirement in IDEA is a claims-processing rule).

These cases are based on a recent series of Supreme Court decisions holding that where, as in IDEA, a federal statute is silent as to whether exhaustion must be pleaded as an element of a claim, failure to exhaust is not a jurisdictional bar but rather an affirmative defense that must be raised and proved by the defendant. *Jones*, 549 U.S. at 212–13 (holding that because Prison Litigation Reform Act is silent, the usual federal practice of regarding exhaustion as an affirmative defense to be pleaded and demonstrated must be followed); *Eberhart v. United States*, 546 U.S. 12, 16 (2005) (reaffirming the holding of *Kontrick v. Ryan*, 540 U.S. 443 (2004), in which the Court admonished lower courts to carefully distinguish between jurisdictional and claims-processing rules).

148. *See Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 696–98 (3d Cir. 1981) (discussing the importance of a single line of responsibility to prevent such disputes from causing denials of service).

149. *Id.* at 696.

in which a child resides with his or her parent(s) is responsible for that child's education.¹⁵⁰ When a youth is detained at a juvenile detention center, the county office of education in which the detention center is located is responsible regardless of where the youth came from.¹⁵¹ When a court places a foster youth in a group home or foster family home, the school district in which that home is located is responsible for educating the youth.¹⁵² If a noneducational public agency, including a juvenile court, makes a residential placement by itself outside the IEP process, then that noneducational public agency "shall be responsible for the residential costs and the cost of noneducation services of the individual,"¹⁵³ and if that residential placement is located within California, then the school district in which the placement is located becomes responsible for the child's education.¹⁵⁴ When a youth is placed in a hospital—including a psychiatric hospital—the school district in which the hospital is located is responsible.¹⁵⁵

There are several key exceptions to this general rule that responsibility follows the youth. First, California foster youth have the right to remain in their school of origin when a court-ordered (noneducational) placement would otherwise force them to change schools;¹⁵⁶ the school district of the school of origin remains responsible for educating that foster youth.¹⁵⁷

Second, when a student requires an educational placement in an out-of-state state residential program, responsibility stays with the district in which the youth's parent lives, regardless of the youth's location.¹⁵⁸ This responsibility continues even after the student turns eighteen.¹⁵⁹ But a "parent" for special education purposes includes a court-appointed education rights holder, such as a court-appointed special advocate.¹⁶⁰ The result is that a school district that has never seen a child can be responsible for offering and funding a residential placement simply because some good Samaritan volunteered to help a child in need.

Third, when a youth transfers from one California school district to another,

150. CAL. EDUC. CODE § 48200 (West 2006 & Supp. 2014); *id.* § 56028 (West 2003 & Supp. 2014); *Katz v. Los Gatos-Saratoga Joint Union High Sch. Dist.*, 11 Cal. Rptr. 3d 546, 553 (Ct. App. 2004) (holding that Education Code "[s]ection 48200 embodies the general rule that parental residence dictates a pupil's proper school district").

151. EDUC. § 48645.2 (West 2006).

152. *Id.* § 48204 (West 2006 & Supp. 2014).

153. *Id.* § 56159 (West 2003).

154. *Id.* § 48204(a)(1) (West 2006 & Supp. 2014).

155. *Id.* § 56167 (West 2003 & Supp. 2014).

156. *Id.* § 48853.5(e) (West 2006 & Supp. 2014).

157. *Id.*

158. *Orange Cnty. Dep't of Educ. v. Cal. Dep't of Educ.*, 668 F.3d 1052, 1053 (9th Cir. 2011) ("We hold as a matter of California law that the California agency responsible for funding a special education student's education at an out-of-state residential program is the school district in which the student's parent, as defined by California Education Code section 56028, resides.").

159. EDUC. § 56041 (West 2003) (stating that responsibility stays with the district of the parent for non-conserved youth and with the district of the conservator for conserved youth); *Orange Cnty. Dep't of Educ.*, 668 F.3d at 1058–59 (explaining the application of section 56041).

160. EDUC. § 56028(b) (West 2003 & Supp. 2014).

during an academic year, while the youth is residentially placed through an IEP, *and* the new district does not have a contract with the residential facility, *then* the originating special education local plan area is responsible for maintaining the placement for the remainder of the academic year.¹⁶¹ Generally, when a youth transfers from one California district to another, the receiving district must offer comparable services for thirty days and then either adopt the previous IEP or develop, adopt, and implement a new IEP.¹⁶²

Fourth, if a noneducational public agency places a child in an *out of state* residential facility “without the involvement of the school district . . . in which the parent or guardian resides,” then that noneducational public agency is fully responsible for the costs of that placement, *including* the cost of any special education.¹⁶³

The availability of reimbursement for court placements as de facto unilateral placements is discussed below in Section VII. It is unclear whether these provisions would be a bar from seeking reimbursement from a school district if the placement was educationally necessary but made without the involvement of the district due to the district’s refusal to participate.

D. Interdistrict Transfers

How does a youth transfer districts while physically remaining in a residential program? Under California law, a youth does not legally “reside” at a residential program.¹⁶⁴ So when the parent(s) move to the jurisdiction of another school district while the youth is still in placement, the youth has also changed legal residence, and thus transfers districts. Understanding transfer provisions is particularly important when representing court-involved youth in residential placements.

First, when a detained California youth’s IEP team places the youth in a residential program, the youth likely immediately becomes a transfer student—by leaving the juvenile detention facility, the youth disenrolls from the juvenile court school.¹⁶⁵ Children with disabilities in the juvenile-delinquency system retain their right to a FAPE.¹⁶⁶ Because the youth never “resided” in the detention facility (for

161. *Id.* § 56325(c). California local plans are created by special education local plan areas (SELPAAs), which can be large districts or consortia of smaller districts. *See id.* § 56195.1.

162. *Id.* § 56325(a).

163. CAL. GOV’T. CODE § 7579(d) (West 2008).

164. A California minor’s residence is determined by the parent with whom he or she maintains his or her abode. *Id.* § 244(d) (West 2012). The residence of an unmarried minor with a living parent cannot be changed by that minor’s own act. *Id.* § 244(e). An adult in California can only have one residence at a time, and one residence cannot be lost until another is gained. *Id.* § 244(b)–(c). Thus, a minor retains his or her parent’s residence because the minor does not maintain an abode in a residential program and cannot lose his or her parent’s residence absent an affirmative act by the parent.

165. EDUC. § 48645.1 (West 2008).

166. *See* 34 C.F.R. § 300.102(a)(2) (2014) (limited exception to a FAPE for youth aged 18–21 in *adult* correctional facilities). Youth in adult correctional facilities who were found eligible for special

the same reasons they do not reside at the residential program), the youth transfers from the county office of education back to the district in which the “parent” resides. The county office of education is responsible for maintaining the placement through the end of the academic year plus extended school year, and then the home district will be responsible for offering a FAPE.¹⁶⁷ It is not clear how the interplay of the thirty-day transfer provisions and the requirement to have an IEP in effect at the beginning of a school year affects students in this situation.

Second, whenever a student’s parent changes, then the youth will have transferred if the new parent lives in a different school district.¹⁶⁸ While most students do not experience changes of parents, it is common for court-involved youth, particularly foster youth, to experience such changes of legal parent (for example, if the natural parents’ rights are terminated or a court-appointed special advocate resigns).¹⁶⁹

In sum, it is undisputed that educational agencies are responsible for residential placement when it is educationally necessary. And since the inception of IDEA, courts have struggled to determine when residential placement is educationally necessary.

VI. JUDICIAL APPROACHES TO DETERMINING WHETHER A RESIDENTIAL PLACEMENT IS NECESSARY

Courts apply one of four tests to determine whether a residential placement is educationally necessary. A majority of circuits inquire whether the placement is “primarily educationally-based,” looking to whether the child’s educational needs are severable from his or her social, emotional, and medical needs.¹⁷⁰ Nearly two decades of relatively consistent law among the courts of appeals later, the Seventh Circuit departed from this approach and instead chose to look to whether the services are “primarily oriented” toward academics, with what appears to be a narrow exception allowing functional skills to be considered for children with moderate to severe developmental disabilities.¹⁷¹ Another decade later, the Fifth Circuit created a test requiring courts to look at every element of a placement and “weed out” any unnecessary elements.¹⁷² After at least thirty-three years of litigation on residential placements, the Tenth Circuit took IDEA out of context

education prior to their adult incarceration are entitled to special education and related services, but do not enjoy the full rights of other youth with disabilities. *L.A. Unified Sch. Dist. v. Garcia*, 741 F.3d 922, 922–23 (9th Cir. 2014) (under California law, the school district in which the youth legally resides is responsible for serving youth in adult correctional facilities).

167. EDUC. § 56325(c) (West 2003 & Supp. 2014).

168. GOV’T § 244(d).

169. *E.g.*, *Orange Cnty. Dep’t of Educ. v. Cal. Dep’t of Educ.*, 668 F.3d 1052, 1054 (9th Cir. 2011) (holding that plaintiff’s biological parents’ rights were terminated and assigned to his foster parent).

170. *See infra* Part VII.B.

171. *See infra* Part VI.

172. *See id.*

in purporting to take a pure textualist approach.¹⁷³ As described below, this approach likely runs afoul of the text of IDEA and its implementing regulations.

Despite inconsistencies, there still exists a large amount of consensus regarding approaches to residential program and unilateral placement cases. Residential program cases generally fall into one (or both) of two categories: either the family is seeking an offer of a FAPE at a residential program, or the family has unilaterally placed the child and is seeking reimbursement. Unilateral placement cases are discussed in detail in Section VII below, but briefly, courts apply a progressive three-prong approach to unilateral placement cases, determining: (1) whether the educational agency offered a FAPE; (2) if not, whether the parents' placement was appropriate or proper; and (3) if so, whether equity warrants full, partial, or no reimbursement.¹⁷⁴

The analysis of whether a residential placement is educationally necessary for the purpose of determining a FAPE is almost identical to the analysis of whether a unilateral placement is appropriate (prong two). Cases about unilateral placement cite FAPE cases and FAPE cases cite unilateral placement cases.¹⁷⁵ The only difference in most circuits—discussed in more detail below—is that in a unilateral placement cases, the placement does not need to comply perfectly with state educational standards.¹⁷⁶ The author has not identified any decision noting that these are in fact separate types of cases nor one stating that courts nonetheless generally use the same analysis.

The Fifth, Seventh, and Tenth Circuits have recently created tests that are ostensibly for unilateral placements. It is unclear how a residential placement FAPE case would be analyzed in those circuits, but given the similarity to the majority approach, it seems likely that the Fifth and Seventh Circuits would apply their unilateral test to a FAPE case, but the Tenth Circuit's trajectory is less clear.

A. *Kruelle: The Majority Test*

The First, Second, Fourth, Sixth, Eighth, Ninth, Eleventh, and District of Columbia Circuits have all adopted the Third Circuit's *Kruelle* test, which was based in part on *North*, a 1979 District of Columbia district court case.

Ty North was educationally placed in a residential program following an administrative hearing, but was discharged "because the school could no longer deal with his emotional and other problems."¹⁷⁷ His parents—who could not control his behaviors—requested another residential placement, but the school

173. See *infra* Part VII.B.2.

174. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247–48 (2009).

175. Compare e.g., *Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175, 1185 (9th Cir. 2009) (quoting *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990)—a FAPE case—in deciding a unilateral placement case), with *Taylor v. Honig*, 910 F.2d 627, 628 (9th Cir. 1990) (citing *In re Drew P. v. Clarke Cnty. Sch. Dist.*, 877 F.2d 927 (11th Cir. 1989)—a unilateral placement case—in deciding a FAPE case).

176. See *infra* Part VIII.

177. *North v. D.C. Bd. of Educ.*, 471 F. Supp. 136, 138 (D.D.C. 1979).

district did nothing.¹⁷⁸ When his parents refused to accept him, the residential placement staff transferred him to the custody of children's services, which placed him in a mental health unit at a local hospital, and his parents filed against the district.¹⁷⁹ The school district "vigorously argue[d] that plaintiff's problems [were] emotional, social, and otherwise non-educational, and that they should not be saddled with the responsibility of providing him with living arrangements not strictly of an educational nature."¹⁸⁰ After hearing testimony, the court found that Ty's "needs are so intimately intertwined that realistically it is not possible for the Court to perform the Solomon-like task of separating them" and awarded a preliminary injunction ordering the school district to fund residential placement.¹⁸¹

Two years later, the Third Circuit applied similar analysis to determine that Paul Kruelle was entitled to a residential program in 1981.¹⁸² Paul had a profound intellectual disability with global developmental deficits; for example, he was unable to feed himself.¹⁸³ At age ten, Paul was educationally placed in a residential program, but when his family moved to Delaware his new school district put him in a day program similar to an environment in which had previously failed him.¹⁸⁴ The Third Circuit focused on whether the 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."¹⁸⁵ The "inextricability of medical and educational grounds for certain services," its unseverability, "is the very basis for holding that the services are an essential prerequisite for learning."¹⁸⁶

A decade later, the Ninth Circuit in *Clovis* adopted *Kruelle* and looked to whether a youth's "placement may be considered necessary for educational purposes, or whether the placement [in a psychiatric facility] is a response to medical, social, or emotional problems that is necessary quite apart from the learning process."¹⁸⁷ Everyone agreed that placement at a residential program was educationally necessary for Michelle, and she was placed in a residential program.¹⁸⁸ Her behaviors deteriorated while she was in a residential program to the point that she was transferred to a psychiatric hospital.¹⁸⁹ Michelle's program was primarily implemented by hospital staff who determined what, if any,

178. *Id.*

179. *Id.*

180. *Id.* at 140.

181. *Id.* at 141.

182. *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 693–94 (3d. Cir. 1981).

183. *Id.* at 688.

184. *Id.* at 689.

185. *Id.* at 693.

186. *Id.* at 694.

187. *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990).

188. *Id.* at 639.

189. *Id.*

educational programming she would receive on a given day.¹⁹⁰ The educational services she received were not provided by the hospital, but by the local school district, which sent its own teachers in.¹⁹¹ The hospital was under the supervision of the California Department of Health Services, not the Department of Education.¹⁹² Applying *Kruelle*, it determined that Michelle's hospitalization was a medical placement to address an "acute" psychiatric crisis" rather than an educational placement.¹⁹³

While the exact language varies, a majority of circuits use the Third Circuit's *Kruelle* segregability test.¹⁹⁴ Unlike the *Tatro* test for related services focusing on the nature of the service, the key to the *Kruelle* inquiry is the purpose of the placement (though the nature of the placement is a part of that analysis as evidenced by *Clavis*). The Fifth, Seventh, and Tenth Circuits diverge.

B. *The Seventh Circuit*

The Seventh Circuit analyzes whether the "primary orientation" of services is educational or not.¹⁹⁵ Dale M. transferred into his school district at age fourteen, and "became a serious disciplinary problem."¹⁹⁶ The following year, he was placed in a therapeutic day school where he only attended twenty days in his first semester, though he did well when he was present.¹⁹⁷ After his arrest and psychiatric hospitalization, Dale's mother unilaterally placed him in a residential program.¹⁹⁸

The majority decision found that the residential placement was for the sole

190. *Id.* at 645.

191. *Id.* at 646.

192. *Id.*

193. *Id.* at 645.

194. *E.g.*, *Indep. Sch. Dist. No. 284 v. A.C. ex rel. C.C.*, 258 F.3d 769, 774 (8th Cir. 2001) ("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." (citations omitted)); *Mrs. B. ex rel. M.M. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1122 (2d Cir. 1997) ("The fact that a residential placement may be required to alter a child's regressive behavior at home as well as within the classroom, or is required due primarily to emotional problems, does not relieve the state of its obligation to pay for the program under federal law so long as it is necessary to insure that the child can be properly educated."); *Doe ex rel. Doe v. Ala. State Dep't of Educ.*, 915 F.2d 651, 665 (11th Cir. 1990) ("[T]he state must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." (citations omitted)); *Burke Cnty. Bd. of Educ. v. Denton ex rel. Denton*, 895 F.2d 973, 980 (4th Cir. 1990) (finding the child's emotional challenges were "segregable" from his educational challenges where he performed well when he attended school); *McKenzie v. Smith*, 771 F.2d 1527, 1534 (D.C. Cir. 1985) (quoting *Kruelle*, 642 F.2d at 693); *Clevenger ex rel. Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514, 516 (6th Cir. 1984) ("Richard's main learning problem is his *inability to cooperate* with authority."); *Abrahamson v. Hershman*, 701 F.2d 223, 227 (1st Cir. 1983) ("[R]esidential placement was essential if Daniel was to receive the round-the-clock training he needed in order to make *any* educational progress.").

195. *Dale M. ex rel. Alice M. v. Bd. of Educ.*, 237 F.3d 813, 817 (7th Cir. 2001).

196. *Id.* at 814.

197. *Id.*

198. *Id.*

purpose of “confinement” to “keep Dale out of jail” after having determined that the residential placement did not provide “psychological services” to Dale.¹⁹⁹ On the one hand Dale clearly had “psychological problems that interfered with his obtaining an education,” but because he had “the intelligence to perform” and “no cognitive defect or disorder such as dyslexia” his problems were “not primarily educational.”²⁰⁰

A vigorous dissent criticized Judge Posner for mischaracterizing the facts on record: “the program at Elan involves three separate components, life skills, counseling and class work. . . . [N]one of us who wear black robes are in an institutional position to second guess the Illinois Department of Education that approved the program as a permissible [educational] placement for Illinois school children.”²⁰¹ Until residential placement was at issue, the school district agreed that Dale’s problems were related to his educational progress.²⁰²

Thus, *Dale M.* ignored IDEA and proposed a very narrow view of educational benefit. If followed faithfully, the Seventh Circuit would likely only consider *academic* benefit—progress in reading, writing, math, and other core academic content—for all children except those with severe to profound developmental disabilities.²⁰³ Despite Judge Posner’s purported departure from longstanding precedent in other circuits, district courts in the Seventh Circuit continue to essentially apply the *Kruelle* standard.²⁰⁴

C. The Fifth Circuit

The leading Fifth Circuit case, *Michael Z.*, was a unilateral placement case and the Fifth Circuit took care to describe the test it articulated as applying specifically

199. *Id.* at 817 (“[T]he Elan School does not provide psychological services, at least to Dale. For him all it provides is confinement. . . . Elan is a jail substitute.”).

200. *Id.*

201. *Id.* at 819.

202. *Id.*

203. *See id.*

204. *E.g.*, Memorandum Opinion & Order at 8, *Bd. of Educ. v. Ill. State Bd. of Educ.*, No. 13-02782, 2013 U.S. Dist. LEXIS 142134, at *13–14 (N.D. Ill. Oct. 1, 2013) (upholding reimbursement where “drug treatment services they provided W.E. were incidental to, and enabled him to benefit from, their academic programs”); Report & Recommendation Motions for Summary Judgment & Sanctions at 14, *Mount Vernon Sch. Corp. v. A.M. ex rel. Maier*, No. 11-00637, 2012 U.S. Dist. LEXIS 122918, at *23, *32–33 (S.D. Ind. Jul. 10, 2012) (magistrate judge quoting discussion of *Kruelle*, 642 F.2d 687, in *Dale M.*, 237 F.3d at 817, 818, and applying the “segregable” standard in recommending upholding an administrative placement at a residential program), *adopted by* Entry on Objections to Magistrate Judge’s Report & Entry on Case Management, *Mount Vernon Sch. Corp. v. A.M.*, No. 11-00637, 2012 U.S. Dist. LEXIS 122915 (S.D. Ind. Aug. 29, 2012); Memorandum Opinion & Order at 10, *Aaron M. ex rel. Glen M. v. Yomtoob*, No. 00-07732, 2003 U.S. Dist. LEXIS 21252, at *18 (N.D. Ill. Nov. 25, 2003) (explaining that *Dale M.*, 237 F.3d at 813, “merely confirms” that parents who unilaterally place their children bear the financial risk of that placement in denying a school district’s request to be reimbursed for expenses that were overturned on appeal). *But see* Decision & Order, *Hjortness ex rel. Hjortness v. Neenah Joint Sch. Dist.*, Nos. 05-00648, 05-00656, 2006 U.S. Dist. LEXIS 43642 (E.D. Wis. Jun. 27, 2006) (denying reimbursement where procedural errors did not significantly impede the parents’ participation in the IEP process).

to unilateral placements.²⁰⁵ In *Michael Z.*, the Fifth Circuit rejected the *Kruelle* approach, contending—without referring to IDEA’s extensive provisions regarding functional needs—that *Kruelle* “expands school district liability beyond that required by IDEA.”²⁰⁶ Instead, the Fifth Circuit in *Michael Z.* set forth a two-prong test asking whether (1) the residential placement was essential in order for the disabled child to receive a meaningful educational benefit, and (2) it was primarily oriented toward enabling the child to obtain an education.²⁰⁷

A concurring opinion questioned whether this new test was in fact distinct from *Kruelle*.²⁰⁸ “Though linguistically obtuse, *Kruelle* essentially asks a straightforward question: Does the child, because of her disability, require a residential placement to obtain the meaningful benefit to which she is entitled?”²⁰⁹ This test is discussed in detail below in Section VII.B.1. It is unclear whether the Fifth Circuit would analyze a FAPE residential placement case under its usual four-prong *Michael F.* test for FAPE²¹⁰ or whether it would use the first prong of its new *Michael Z.* test. Based on the similarities noted by the concurrence, there should not be a significant difference in the Fifth Circuit from the majority approach, but at least one district court has interpreted *Michael Z.* to impose a very strict definition of education as academic.²¹¹

D. The Tenth Circuit

The Tenth Circuit reviewed the approaches discussed above and rejected them.²¹² Its analysis focused heavily on the unilateral placement aspect of that case.²¹³ But because it clearly and forcefully rejected *Kruelle*’s segregability test, it is unclear how the Tenth Circuit would now analyze a residential-placement FAPE case. Of the circuits, the Tenth Circuit is the furthest from the majority. The case is discussed in detail below.

VII. UNILATERAL PLACEMENT CASES: REQUESTS FOR REIMBURSEMENT

In unilateral placement cases, parents place their child in a private program without the consent of or referral by their school district and then seek reimbursement from the district.

205. *Richardson Indep. Sch. Dist. v. Michael Z. ex rel. Leah Z.*, 580 F.3d 286, 298 (5th Cir. 2009).

206. *Id.* at 299.

207. *Id.*

208. *Id.* at 303.

209. *Id.* at 303 (Prado, J., concurring).

210. *Id.* at 293–94 (discussing *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 247 (5th Cir. 1997)).

211. *R.C. ex rel. S.K. v. Keller Indep. Sch. Dist.*, 958 F. Supp. 2d 718 (N.D. Tex. 2013), discussed in Part VII.B.1, *infra*.

212. *See Jefferson Cnty. Sch. Dist. v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1232–37 (10th Cir. 2012).

213. *Id.* at 1235–39.

Both conceptually and functionally, courts apply the three-prong approach recently reiterated by the Supreme Court in *Forest Grove* to unilateral placement cases, determining: (1) whether the educational agency offered a FAPE; (2) if not, whether the parents' placement was appropriate or proper; and (3) if so, whether equity warrants full, partial, or no reimbursement.²¹⁴ But in name, courts call this a two-prong test (whether the district failed to offer a FAPE and whether the placement is appropriate), after which the equities are balanced.²¹⁵ Regardless, this test is consecutive and dispositive. If the educational agency offered a FAPE, the parent's claim fails and the inquiry ends.

The right to reimbursement for unilateral placements was initially created by courts interpreting their statutory authority to "grant such relief as [it] determines is appropriate" in resolving special education disputes.²¹⁶ Congress subsequently created rules relating to the right to reimbursement for unilateral placements, tacitly endorsing *Burlington* and its progeny.²¹⁷

As with residential program law generally, unilateral placement decisions are not always clear in their analysis. Many cases conflate the first two prongs, discussing denial of FAPE hand-in-hand with the appropriateness of the parent's placement.²¹⁸ Other cases barely articulate any overall test and instead review specific elements.²¹⁹ But these are often important cases, so the author has put them where they fit best.

Very few families can afford the cost of placement at a residential program, so unilateral placement as it is most commonly executed—the parent paying out of pocket—is available only to a narrow portion of the population. But unilateral placement law is important for all practitioners regardless of the socioeconomic status of one's clients because in some cases an agency may seek reimbursement for a noneducational residential placement from the caregiver of a family. In such

214. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009).

215. *See, e.g., R.L. ex rel. O.L. v. Miami-Dade Cnty. Sch. Bd.*, No 12-14880, 2014 WL 3031231, at *5 (11th Cir. July 2, 2014) (articulating the relevant test in a unilateral placement case as a two-step analysis followed by an equitable determination of appropriate relief).

216. *Sch. Comm. v. Dep't. of Educ.*, 471 U.S. 359, 369–70 (1985) (quoting then-section 1415(e)(2) of the Education for All Handicapped Children Act of 1975); *see also* *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 12–14, (1993) (clarifying that *School Committee*, 471 U.S. at 359, does not require parents to follow all of IDEA's procedures).

217. *Forest Grove Sch. Dist.*, 557 U.S. at 239–45, 247 (discussing IDEA's 1997 amendments and their tacit endorsement of *School Committee*, 471 U.S. at 370, and *Carter*, 510 U.S. at 7); *see also* Ralph D. Mawdsley, *Diminished Rights of Parents to Seek Reimbursement Under IDEA for Unilateral Placement of Their Children in Private Schools*, 2012 BYU EDUC. & L.J. 303, 305–11 (2012) (discussing the development of unilateral placement law).

218. *See, e.g., Seattle Sch. Dist., No 1 v. B.S. ex rel. A.S.*, 82 F.3d 1493, 1500–02 (9th Cir. 1996).

219. *See, e.g., Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175, 1183–86 (9th Cir. 2009).

a case, the family may be able to shift liability to the school district, as the following families did.²²⁰

M.M. was a young woman whose anxiety was so severe that she “would become overwhelmed by her surroundings, leading to regressive behavior and an inability ‘to problem solve effectively or to think clearly and logically.’”²²¹ Her clinical social worker recommended a residential placement, but her school district refused to offer a residential placement.²²² Instead, the district advised M.M.’s mother to turn her over to the foster-care system.²²³ While the placement was pending, M.M.’s father died.²²⁴ With no alternative, Mrs. B. gave M.M. over to the foster-care system to achieve residential placement, but then that system took the proceeds from the father’s life insurance policy from this new widow to pay for the placement.²²⁵ The Second Circuit affirmed a district court order finding that M.M.’s placement should have been funded by her school district.²²⁶

This is not the only case in which a school district has forced parents to relinquish their children to foster care because the district refused to pay for a residential program. In *Christopher T.*, San Francisco Unified School District forced at least two families to do exactly this.²²⁷ Citing *Krulle*, the Northern District of California not only ordered prospective placement for both youth, but it also ordered the district to reimburse both the parents and the foster care system for the costs it incurred implementing the placement that should have been provided by the district.²²⁸

*A. If the Educational Agency Offered a FAPE, then
Reimbursement is Not Available*

Educational agencies enjoy a “safe harbor” from reimbursement claims if they make “a FAPE available by correctly identifying a child as having a disability and proposing an IEP adequate to meet the child’s needs.”²²⁹ However, “IDEA does not require [a student] to spend years in an educational environment likely to be inadequate and to impede her progress simply to permit the School District to try every option short of residential placement.”²³⁰ This prong of analysis

220. *E.g.*, *E.M. v. N.Y. City Dep’t of Educ.*, 758 F.3d 442, 461 (2d Cir. 2014) (concluding that a parent who has not yet paid for the unilateral placement has standing because of a contractual obligation to pay tuition).

221. *Mrs. B. ex rel. M.M. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1117 (2d Cir. 1997).

222. *Id.*

223. *Id.*

224. *Id.* at 1117–18.

225. *Id.* at 1118.

226. *Id.* at 1122.

227. *Christopher T. ex rel. Brogna v. S.F. Unified Sch. Dist.*, 553 F. Supp. 1107, 1109 (N.D. Cal. 1982).

228. *Id.* at 1120–21.

229. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 241 (2009).

230. *Seattle Sch. Dist., No. 1 v. B.S. ex rel. A.S.*, 82 F.3d 1493, 1501 (9th Cir. 1996) (citations omitted).

essentially applies *Ronley's* examination of substantive and procedural compliance to the district's offer of a FAPE.

First, an educational agency must meet its child-find duty to identify, locate, and evaluate the child for special education regardless of whether the child has previously attended public schools.²³¹ Merely having child-find procedures in place is not sufficient when a local educational agency “unreasonably fail[s] to identify a child with disabilities” because Congress placed “paramount importance [on] properly identifying each child eligible for services.”²³²

Next, an educational agency must timely complete its evaluations.²³³ The school district in *Tice* conceded that it failed to timely assess Matthew and the Fourth Circuit found that the “six-month delay directly resulted in there being *no* IEP in place at the time of” the unilateral placement.²³⁴ If the educational agency is prevented from completing evaluations, however, relief may be denied under the equities analysis discussed below.²³⁵

The educational agency must find the child eligible for special education.²³⁶ But if a child is not in fact eligible for special education, then an educational agency's failure to find, identify, and evaluate the child does not deny that child a FAPE and the inquiry ends.²³⁷

After evaluating and determining eligibility, the educational agency then must make an offer of a FAPE.²³⁸ This offer must be procedurally correct.²³⁹ In refusing to consider a school district's “post hoc rationalization,” the Fourth Circuit in *Tice* declared that where no IEP was offered, “*no* professional decision had been made to which deference was due.”²⁴⁰ Without clearly discussing the

231. *Forest Grove Sch. Dist.*, 557 U.S. at 245; *see also* 20 U.S.C. § 1412(a)(3)(A) (2012) (stating that the child-find requirement extends to “[a]ll children with disabilities residing in the State, including children with disabilities . . . attending private schools”).

232. *Forest Grove Sch. Dist.*, 557 U.S. at 245.

233. *See Tice ex rel. Tice v. Botetourt Cnty. Sch. Bd.*, 908 F.2d 1200, 1206–07 (4th Cir. 1990).

234. *Id.* While the express holding of *Tice*, applying a strict liability standard to a procedural error, has been superseded by statute, *Tice* remains reliable because the Fourth Circuit discussed how the delay in assessment resulted in the child not being served, which is similar to the “impede the right to a FAPE” prong of the current harmless error test.

235. *See, e.g., Patricia P. ex rel. Jacob P. v. Bd. of Educ.*, 203 F.3d 462, 469 (7th Cir. 2000) (“[P]arents who . . . do not allow a school district a reasonable opportunity to evaluate their disabled child, forfeit their claim for reimbursement . . .” (citations omitted)).

236. *See Muller ex rel. Muller v. Comm. on Special Educ.*, 145 F.3d 95, 102 (2d Cir. 1998) (explaining that whether a student is disabled such that he or she is eligible for special education under IDEA is “determined by the individual school district in accordance with state law”).

237. *See Maus ex rel. K.M. v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282, 294–98 (S.D.N.Y. 2010) (finding that a student with social disabilities that did not impair her educational performance was not eligible for special education services under IDEA and thus procedural violations by the district's committee on special education did not deny her a FAPE).

238. *See Tice*, 908 F.2d at 1208 (finding that a school district's failure to provide timely evaluations of a child identified as disabled was a procedural error that amounted to a failure to provide the child a FAPE as required by IDEA).

239. *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994) (“The Supreme Court has explained the great importance of . . . procedural components of IDEA.”).

240. *Tice*, 908 F.2d at 1208.

underlying facts, the Ninth Circuit in *Union* similarly emphasized the importance of the written offer because the purpose of prior written notice requirement is “to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional” services were offered.²⁴¹ Failure to make a written offer prevents the parents from being able to make a decision whether to accept or oppose the offer.²⁴² In sum, “a school district’s failure to propose an IEP of any kind is at least as serious” a failure to offer an appropriate IEP.²⁴³

The purported offer of a FAPE must address the known needs of a child.²⁴⁴ In *Seattle*, the Ninth Circuit considered a former foster youth with a long history of emotional and behavior challenges, including diagnosed attachment disorder and a personality disorder.²⁴⁵ Though she was “exceptionally bright,” she was “deteriorating” academically “unable to make productive use of what she learned.”²⁴⁶ The school district evaluated her when she was eight, but found her ineligible for special education.²⁴⁷ She was so disruptive to her peers that “the School District had even expelled her” when she was just ten.²⁴⁸ The district reevaluated her five months after expelling her and found her eligible, but recommended a school-based program despite a number of clinicians recommending residential placement.²⁴⁹ The Ninth Circuit ordered the school to fund a residential program, holding that the educational agency was not allowed to keep her in an inadequate environment simply “to try every option short of residential placement.”²⁵⁰

Similarly in *Mrs. B.*, the child had anxiety such that she “would become overwhelmed by her surroundings, leading to regressive behavior and an inability ‘to problem solve effectively or to think clearly and logically.’”²⁵¹ Even her teachers remarked that the child was “not producing or learning in our program.”²⁵² She failed to meet “nearly all” of her IEP objectives and “over the course of three years, despite being of average to slightly below-average

241. *Union Sch. Dist.*, 15 F.3d at 1526.

242. *Id.* The *Union School District* case, like the Fourth Circuit’s 1990 decision in *Tice*, appears at a glance to provide a strict error analysis to procedural FAPE claims, even though the Ninth Circuit had two years earlier shifted toward a harmless error test in *W.G. ex rel. R.G. v. Board of Trustees*, 960 F.2d 1479 (9th Cir. 1992). Nonetheless, *Union School District* is likely reliable on this point because although it does not expressly articulate harm, it discusses how the failure to make a formal written offer prevents the parents from participating in the IEP process. *Union Sch. Dist.*, 15 F.3d at 1526.

243. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 238–39 (2009).

244. *Mrs. B. ex rel. M.M. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1115–16 (2d Cir. 1997).

245. *Seattle Sch. Dist., No. 1 v. B.S. ex rel. A.S.*, 82 F.3d 1493, 1497–98 (9th Cir. 1996).

246. *Id.* at 1500–01.

247. *Id.* at 1497.

248. *Id.* at 1500.

249. *Id.* at 1497–98.

250. *Id.* at 1501.

251. *Mrs. B.*, 103 F.3d at 1117 (quoting the child’s psychological report from the Yale Child Study Center).

252. *Id.* at 1117.

intelligence, [she] did not advance more than one grade level in any subject.”²⁵³ The school district denied her a FAPE when it knew her emotional and behavioral challenges were impeding her ability to access an education, but “offered no plan to deal with her worsening behavior.”²⁵⁴

When a child has already attended the school’s placement or a similar placement, the court should look to actual progress in that environment.²⁵⁵ The court should examine both the academic and nonacademic educational benefit—or lack thereof—from the proposed placement.²⁵⁶ This FAPE analysis of actual progress accords with common substantive FAPE analysis in which courts sometimes limit their inquiry about the offer to what was known at the time of the IEP team meeting.²⁵⁷ If the educational agency failed to offer a FAPE, the court moves on to consider the appropriateness of the parent’s unilateral placement.

B. *Appropriateness of the Placement*

As discussed above, the analysis of whether a residential placement is educationally necessary for the purpose of determining a FAPE is the same in most circuits as the analysis of whether a parent’s unilateral placement is appropriate (prong two).²⁵⁸ The key difference is that a unilateral placement does not have to comport with all of the requirements of IDEA.²⁵⁹ In *Carter*, the Supreme Court expressly stated that a unilateral placement does not have to be certified by the state educational agency.²⁶⁰ “IDEA was intended to ensure that children with disabilities receive an education that is both appropriate and free”; to deny children a free appropriate education because their parents did not follow the same procedures prescribed for school districts “would defeat this statutory purpose.”²⁶¹ State educational agency certification is regularly a factor considered in determining appropriateness.²⁶²

253. *Id.* at 1121.

254. *Id.*

255. *Id.* at 1120–21; *Seattle Sch. Dist.*, 82 F.3d at 1500 (applying Sacramento City Unified Sch. Dist. v. Rachel H. *ex rel.* Holland, 14 F.3d 1398 (9th Cir. 1994)).

256. *Seattle Sch. Dist.*, 82 F.3d at 1500.

257. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (“[A]n IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” (quoting *Fuhrmann ex rel. Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993))).

258. *Compare Taylor ex rel. Taylor v. Honig*, 910 F.2d 627, 628 (9th Cir. 1990) (citing a unilateral placement case to decide a FAPE case), *with Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175, 1185 (9th Cir. 2009) (citing a FAPE case to decide a unilateral placement case); *compare Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 697 (3d Cir. 1981) (non-unilateral), *with Mary T. v. Sch. Dist.*, 575 F.3d 235, 246–48 (3d Cir. 2009) (citing *Kruelle*, 642 F.2d at 690–92, in a unilateral placement case).

259. *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 14 (1993).

260. *Id.*

261. *Id.* at 13.

262. *See, e.g., Manchester-Essex Reg’l Sch. Comm. v. Bureau of Special Educ. Appeals of Mass. Dep’t of Educ.*, 490 F. Supp. 2d 49, 54 (D. Mass. 2007).

Both the Second and Ninth Circuits have recently confirmed that for reimbursement “parents need not show that a private placement furnishes every special service necessary to maximize their child’s potential.”²⁶³ But the Tenth Circuit ignores the Supreme Court on this point and requires that the placement be state certified as described below.²⁶⁴ If the educational agency failed to offer a FAPE and the parent’s unilateral placement is appropriate, then most circuits move on to consider the equities. The Fifth and Tenth Circuits are exceptions.

1. *The Fifth Circuit*

The Fifth Circuit ostensibly departs from *Kruelle*, though it is not yet clear to what extent that departure is meaningful. Shortly after *Forest Grove*, the Fifth Circuit set forth a two-prong test to determine whether a unilateral residential placement is appropriate, asking whether (1) the residential placement was essential in order for the disabled child to receive a meaningful educational benefit, and (2) it was primarily oriented toward enabling the child to obtain an education.²⁶⁵ Even if the parent survives this inquiry, the court is then to “weed out inappropriate treatments from the appropriate (and therefore reimburseable) ones.”²⁶⁶

Leah Z. was a young woman with multiple mental and developmental disabilities whose chief behavior problem in high school was frequently leaving class during which time she would engage in a variety of maladaptive behaviors.²⁶⁷ In the middle of ninth grade, her school district transferred her to another school, but the teacher assigned to that class was on parenting leave and the district hired an uncertified teacher to staff the class who they failed to inform of Leah’s primary issue of fleeing class.²⁶⁸ After just two weeks in this classroom, she became so violent at home that her psychiatrist recommended admission to a residential program and the parents promptly placed her in it.²⁶⁹ Two months into this placement, the school district held an IEP team meeting at which it refused to offer residential placement and instead offered essentially the same program that had already failed Leah.²⁷⁰

In examining *Kruelle* and its progeny, the Fifth Circuit expressed concern—echoing *North* from thirty years prior—that “[b]y requiring courts to undertake the Solomonic task of determining when a child’s medical, social, and emotional

263. C.B. *ex rel.* Baquerizo v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1159 (9th Cir. 2011) (quoting Frank G. *ex rel.* Anthony G. v. Bd. of Educ., 459 F.3d 356, 356 (2d Cir. 2006)); Frank G., 459 F.3d at 365 (citing M.S. *ex rel.* S.S. v. Bd. of Educ., 231 F.3d 96 (2d Cir. 2000)).

264. Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E. *ex rel.* Roxanne B., 702 F.3d 1227, 1238–39 (10th Cir. 2012).

265. Richardson Indep. Sch. Dist. v. Michael Z. *ex rel.* Leah Z., 580 F.3d 286, 300 (2009).

266. *Id.* at 301.

267. *Id.* at 289–90.

268. *Id.* at 290.

269. *Id.*

270. *Id.* at 291.

problems are segregable from education, *Kruelle* expands school district liability beyond that required by IDEA.²⁷¹ The Fifth Circuit found that the IEP was clearly inappropriate.²⁷² Applying its new test, the district court's findings below established that residential placement was essential for Leah to receive educational benefit but the Fifth Circuit remanded for findings on whether the placement was primarily educationally oriented.²⁷³ In a concurring opinion, Judge Edward Prado did "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."²⁷⁴ He noted that while the Fifth Circuit's second prong is not expressly in the *Kruelle* test, courts applying *Kruelle* "have instead gone on to determine whether the *particular* placement for which the parents are asking to be reimbursed is itself proper."²⁷⁵

At least one district court in the Fifth Circuit has followed *Michael Z.*'s dicta regarding the limiting liability of districts for only academic services.²⁷⁶ R.C. was a high school student with varying diagnoses, including bipolar disorder, anxiety disorder, ADHD, and Asperger's syndrome.²⁷⁷ R.C. was absent for much of the second semester of eleventh grade due to school-based anxiety causing him to fail several classes.²⁷⁸ He was placed in a residential program for approximately four months, returned home briefly, and then was unilaterally placed at a second residential program after which his parents requested reimbursement.²⁷⁹ A district court judge felt that R.C.'s parents' representation that he had failed eleventh grade was "misleading" because of R.C.'s "excessive absence" from school that year.²⁸⁰ While the court was "concerned about plaintiff's having to be admitted to residential facilities and psychiatric programs, . . . the core of the IDEA is to provide access to educational opportunities."²⁸¹ Because R.C. was successful when he was able to attend school, the court disregarded his allegation that he was unable to attend school for significant periods of time due to his disability.²⁸² The court ignored the core argument that R.C.'s anxiety prevented him from accessing educational opportunities.

After conducting an "analysis of the services as a whole," but before balancing the equities, courts "must then examine each constituent part of the placement to weed out inappropriate treatments from the appropriate (and

271. *Id.* at 299.

272. *Id.* at 295.

273. *Id.* at 301.

274. *Id.* at 302.

275. *Id.* at 303.

276. *R.C. ex rel. S.K. & D.H. v. Keller Indep. Sch. Dist.*, 958 F. Supp. 2d 718 (N.D. Tex. 2013).

277. *Id.* at 723–24.

278. *Id.* at 736.

279. *Id.* at 728–29.

280. *Id.* at 736.

281. *Id.*

282. *Id.*

therefore reimburseable) ones.”²⁸³ Because *Michael Z.* was remanded and no published opinion has applied this aspect of the test, it is unclear how this weeding out would be applied and how it interacts with the Fifth Circuit’s concern over the difficulty of the “Solomonic task” of disaggregating services that are essential for education from those that are not. It may operate similar to *Tatro*—looking to the nature of the services themselves (whereas the focus of the first part of the *Michael Z.* analysis is the purpose of the placement).

2. *The Tenth Circuit*

The Tenth Circuit in *Jefferson* recently reviewed the varying approaches to appropriateness described in Section VI and invented its own test.²⁸⁴ Applying a selective reading of IDEA, the Tenth Circuit analyzes whether (1) the school district provided a FAPE, (2) the residential placement is accredited in its state, (3) the residential placement provided specially designed instruction to meet the unique needs of the child, and (4) any additional services are related services intended to support education.²⁸⁵ This *Jefferson* four-prong test takes the place of the first and second prongs of the *Burlington-Forest Grove* test to determine the appropriateness of a parent’s choice of residential placement in unilateral placement cases.²⁸⁶

Elizabeth E. was attending a private day school for children with disabilities pursuant to a settlement agreement when she was psychiatrically hospitalized for assessment purposes.²⁸⁷ The school district had a separate agreement with the private school that the school would refund the school district for days Elizabeth did not attend.²⁸⁸ But the district withdrew Elizabeth from the private school because she was in the hospital.²⁸⁹ The school district then asserted that Elizabeth was no longer even a student of the school district—allegedly mooting the settlement agreement.²⁹⁰ The parents informed the school district that they were transitioning Elizabeth to a residential program out of state and requested an IEP team meeting to discuss the change.²⁹¹ The school district refused to engage in any meaningful discussion.²⁹² The parents filed for due process, requesting that the school district fund a residential program for Elizabeth and at every level—

283. *Richardson Indep. Sch. Dist. v. Michael Z. ex rel. Leah Z.*, 580 F.3d 286, 301 (5th Cir. 2009).

284. *Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1236–38 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 2857 (2013). In its unsuccessful petition for certiorari, Jefferson County School District argued that this test was actually more favorable for parents. Petition for a Writ of Certiorari, 2012 U.S. Briefs 1175, at 11 (U.S. Mar. 26, 2013), 2013 WL 1247971, at *11.

285. *Elizabeth E.*, 702 F.3d at 1236–37.

286. *Id.* at 1232–33.

287. *Id.* at 1230.

288. *Id.*

289. *Id.*

290. *Id.* at 1230–31.

291. *Id.* at 1231.

292. *See id.*

administrative, district court, and court of appeals—the school district only challenged the appropriateness of Elizabeth’s placement, conceding its denial of a FAPE.²⁹³

While it appears to have achieved the correct result for Elizabeth E., the Tenth Circuit’s new approach is problematic on at least two levels. First, *Jefferson*’s second prong goes against two decades of precedent that parents need not meet IDEA’s procedural requirements such as accreditation,²⁹⁴ despite the Supreme Court’s recent affirmation that *Carter* is still good law,²⁹⁵ and current regulations confirming that.²⁹⁶ Second, *Jefferson*’s fourth prong may also go awry of *Carter* inasmuch as it requires parents to exercise a level of expertise in determining what services are educationally necessary. That expertise is supposed to be provided by the school district in the first instance: “[t]his is IDEA’s mandate, and school officials who conform to it need not worry about reimbursement claims.”²⁹⁷ When their child is denied a FAPE and parents place him or her in a substantively appropriate placement at their own expense, “it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials.”²⁹⁸

Jefferson has not yet been applied within the Tenth Circuit, so it remains to be seen what actual impact this will have on families.²⁹⁹

C. Balancing the Equities

An undercurrent of equity flows through the entire body of reimbursement cases. In 1985, *Burlington* started from the question of whether parents should be reimbursed when they avoided the IEP process.³⁰⁰ In 1993, *Carter* laid this out even more clearly, noting that under IDEA “[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required.”³⁰¹

Then in its 1997 reauthorization of IDEA, when Congress codified the authority for reimbursement, it also included equitable considerations.³⁰² First,

293. *Id.* at 1231–32.

294. Compare *id.* at 1237, with *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 14 (1993) (“Parents’ failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement.”).

295. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009).

296. 34 C.F.R. § 300.148(c) (2014).

297. *Carter*, 510 U.S. at 14.

298. *Sch. Comm. v. Dep’t. of Educ.*, 471 U.S. 359, 369–70 (1985).

299. Only one case to date cites *Jefferson Cnty. Sch. Dist. R-1* for a general proposition. *M.S. ex rel. J.S. v. Utah Sch. for the Deaf & Blind*, No. 2:13-cv-420 TS, 2014 U.S. Dist. LEXIS 118942, at *8, n.9 (D. Utah Aug. 25, 2014) (quoting *Jefferson Cnty. Sch. Dist. R-1*, 702 F.3d at 1229) (“IDEA provides federal funding to states to assist with the education of disabled children on the condition that states comply with the Act’s ‘extensive goals and procedures.’”).

300. *Sch. Comm.*, 471 U.S. at 372.

301. *Carter*, 510 U.S. at 16.

302. 20 U.S.C. § 1412(a)(10)(C)(ii–iv) (2012).

Congress allowed reduction or denial of reimbursement when a parent either (1) failed to state their concerns that the IEP team meeting prior to removal or (2) failed to provide written notice ten business days in advance.³⁰³ In 2009, *Forest Grove* reiterated that courts may broadly exercise “discretion to reduce the amount of a reimbursement award if the equities so warrant.”³⁰⁴ Courts exercise this “broad discretion” to achieve different results under similar circumstances.³⁰⁵

Failure to present a child for evaluation will generally bar reimbursement.³⁰⁶ Patricia P. placed her son in a parochial school for his first year of high school.³⁰⁷ When he was not allowed to return she nominally enrolled him in her local school but within two weeks unilaterally placed him in an out-of-state residential program with no notice.³⁰⁸ She filed for administrative due process, seeking reimbursement less than six weeks later.³⁰⁹ Over the next three years, her “sole action evidencing a willingness to avail her son for evaluation . . . was her offering to allow School District staff to travel [from Illinois] to Maine to evaluate” him at the residential program.³¹⁰ The Seventh Circuit denied reimbursement on the equities because Patricia P. failed to make a “genuine” effort to give the district a “reasonable opportunity” to evaluate her son.³¹¹ But it cautioned that school districts would be held to the same standard: “this Court will look harshly upon any party’s failure to reasonably cooperate with another’s diligent” attempts to comply with IDEA.³¹²

But a New York district court found “no showing that [the parents] acted unreasonably” in a similar case where the parents did not bring their residentially placed child back in state to proffer him for evaluation.³¹³ The Eschenasys first requested a special education evaluation in the spring of their son’s eleventh grade year, but then unilaterally placed him in a residential program before the district could complete its evaluation.³¹⁴ For over three months, the school district requested the parents either to present their son for evaluation or at least provide copies of the evaluations conducted at the residential program;³¹⁵ the parents did not.³¹⁶ After finding that he was substantively denied a FAPE³¹⁷ and that one of

303. *Id.* § 1412(a)(10)(C)(iii).

304. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009).

305. *See id.* at 238.

306. *Patricia P. ex rel. Jacob P. v. Bd. of Educ.*, 203 F.3d 462, 469 (7th Cir. 2000).

307. *Id.* at 465.

308. *Id.*

309. *Id.*

310. *Id.* at 469.

311. *Id.*

312. *Id.*

313. *Eschenasy ex rel. Eschenasy v. N.Y.C. Dep’t of Educ.*, 604 F. Supp. 2d 639, 644–45, 653 (S.D.N.Y. 2009).

314. *Id.* at 645.

315. *Id.* at 644–45.

316. *Id.* at 645.

317. The Court did find that the parents’ conduct barred their procedural claim: the school did not procedurally deny a FAPE for its failure to assess because the parents neither consented to the evaluation nor presented the child for evaluation. *Id.*

the unilateral placements was appropriate, the court found “no showing [that the parents] acted unreasonably under the circumstances” and awarded full reimbursement for the appropriate placement.³¹⁸

Still there are some general guidelines for evaluating equities beyond the importance of presenting the child for evaluation. Though not required, parents should provide written notice or state their concerns at an IEP team meeting prior to unilaterally placing their child per the plain language of IDEA.³¹⁹ When filling out application papers to a placement, they should carefully, clearly, and voluminously express their *educational* concerns.³²⁰ Parents should act before sex and drugs become a concern—in an appeal of the remand from *Forest Grove*, the Ninth Circuit used such evidence in the equities phase to deny reimbursement even though the child was denied a FAPE and the placement was appropriate.³²¹

Parents should be prepared to prove that school district officials have acted unreasonably to overcome the presumption in some circuits that school officials “are properly performing their obligations under IDEA.”³²² On the other hand, parents must be mindful of their own subjective reasons for requesting residential placement: in a subsequent appeal in *Forest Grove*, the Ninth Circuit rejected the “contention that, as a matter of law, his parents’ subjective reasons for private school enrollment cannot be a valid equitable consideration.”³²³

Further, if a district has provided English-speaking, literate parents with a generic statement of parental rights that contains notice of their right to seek reimbursement, the parents cannot rely on the district’s failure to specifically notify them of this right.³²⁴

Essentially, if the district is perceived as trying at all to work with the parents, the parents must prove their own good-faith attempt to cooperate.³²⁵ While the overwhelming majority of cases seriously considering the equities go at least in part against the parents, courts do occasionally find against a school district, even where the parent is arguably partially to blame.³²⁶

VIII. COMMONALITIES AMONG THE CIRCUIT TESTS

Of course, whenever possible, advocacy for youth with mental illness should start well before the child needs a residential program. In most of the residential

318. *Id.* at 652–53.

319. 20 U.S.C. § 1412(a)(10)(C) (2012).

320. *Forest Grove Sch. Dist. v. T.A.*, 638 F.3d 1234 (9th Cir. 2012).

321. *See id.* at 1241.

322. *See, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2008).

323. *Forest Grove Sch. Dist.*, 638 F.3d at 1238.

324. 20 U.S.C. § 1412(a)(10)(C)(iv); *Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175, 1184–85 (9th Cir. 2009).

325. *Patricia P. ex rel. Jacob P. v. Bd. of Educ.*, 203 F.3d 462, 469 (7th Cir. 2000); *see also Asbland*, 587 F.3d at 1186.

326. *E.g.*, *Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1242 (10th Cir. 2012) (holding the school district’s failure to notify parents of its intent to evaluate excused the parents’ failure to present the child for evaluation).

placement cases in which parents won, the child's mental illness had been unaddressed or underaddressed for years. The author's own experience is that early and intensive interventions can often prevent the need for residential placement. But attorneys do not always meet our clients in time to engage in early advocacy.

When read as a whole, the circuits—except the Tenth Circuit—apply similar analyses to residential placement cases. Though the wording changes, the majority look to whether the purpose of the placement is educational—necessary, primarily educational, inseparably educational, essential for educational purposes, primarily oriented toward enabling education. The careful attorney will be mindful, however, to articulate the nuanced differences when citing cross circuit authority to link facts to their home circuit's test.

For the most part cases requesting residential placement for a FAPE are reliable in unilateral placement cases and vice versa. In all but the Tenth Circuit, the analysis for appropriateness in FAPE cases is identical to the analysis of appropriateness for unilateral placement cases under the second prong of *Forest Grove*.

The key challenge in residential placement cases is establishing the ongoing link between a child's mental illness and the child's inability to access an education, especially when the symptoms prevent them from consistently attending school. IDEA was established to give all children with disabilities access to an education. Congress sought to ensure access to those children whose disabilities were so severe that they were unable or not allowed to attend school.

In most circuits, children with developmental disabilities *should* still have access to residential placements when necessary. But as the circuits move further away from IDEA's combined focus on academic and functional performance and increasingly impose their own ideas of what education is, it has become more difficult to obtain residential placement for youth with mental illness.