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BRIGHT “IDEA” OR MISSING THE MARK?: THE THIRD CIRCUIT
RESTRICTS REIMBURSEMENT FOR RESIDENTIAL
PLACEMENT UNDER THE INDIVIDUALS WITH
DISABILITIES EDUCATION ACT

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“There is no doubt that many children benefit from placements at exclusive residential facilities At the same time, many of those placements . . . cost more than \$100,000 per student per year. Given the stakes, few educational decisions are as significant as whether a public school district must pay for a private residential placement.”¹

I. INTRODUCTION: COUNTING THE COSTS OF A FREE EDUCATION

The Individuals with Disabilities Education Act (IDEA) has a clear goal: to provide handicapped students with the right to an education catered to their particular needs and disabilities.² While the goal of the IDEA is clear, disagreement between parents and school districts over appropriate education services demonstrates the practical complications the IDEA creates.³ Specific difficulties arise when parents unilaterally pursue

* J.D. Candidate, 2015, Villanova University School of Law. This Casebrief would not exist without the unwavering support of my amazing parents and family. I would also like to thank the *Villanova Law Review*, especially Megan Pownall, Tommy Reilly, Kelsey Hughes-Blaum, Samantha Peruto, and Nick Carroll, for your invaluable feedback and constant encouragement. I also extend my sincerest appreciation to Marion Walsh, whose professional feedback made this work possible. This Casebrief is dedicated to the loving memory of my grandfather, Jack Hellmann, who believed in my academic career enough to inspire it in the first place. Thanks to you, Pop-pop, I did this one my way.

1. Mark Walsh, *Supreme Court Declines Appeal on IDEA Residential Placements*, EDUC. WEEK (June 24, 2013, 9:33 AM), http://blogs.edweek.org/edweek/school_law/2013/06/supreme_court_acts_on_appeal_o.html (quoting appellate brief filed by former United States Solicitor General Neal K. Katyal). Katyal filed a petition with the United States Supreme Court seeking review of a Tenth Circuit decision granting reimbursement for unilateral residential placement. *See* Petition for a Writ of Certiorari at 1, *Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227 (10th Cir. 2012) (No. 12-1175), 2013 WL 1247971 [hereinafter *Petition for a Writ of Certiorari*], *cert. denied*, 133 S. Ct. 2857 (2013).

2. *See* Ann K. Wooster, Annotation, *What Constitutes Services That Must Be Provided by Federally Assisted Schools Under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C.A. §§ 1400 et seq.)*, 161 A.L.R. FED. 1, § 2[a] (2000) (“The initial purpose of IDEA, as interpreted by the courts, was to remedy the condition of the more than half of all handicapped children in the United States who were not receiving an education appropriate to their needs.”).

3. *See* Thomas A. Mayes & Perry A. Zirkel, *State Educational Agencies and Special Education: Obligations and Liabilities*, 10 B.U. PUB. INT. L.J. 62, 62 (2000) (“Disputes between parents of children with disabilities and school officials regarding the spe-

residential placement to ensure an adequate education for their child.⁴ Such challenges surface not only due to the financial hardship that residential tuition places on school districts, but also due to the complexity of students' disabilities.⁵

Despite multiple references to difficulties interpreting the IDEA and its practical ramifications, the Third Circuit has been credited with defining and clarifying proper remedies under the IDEA.⁶ Notably, the Third Circuit has developed the oldest and most popularly adopted test for evaluating the appropriateness of reimbursement for residential placements.⁷ Yet, over time, the Third Circuit has reformed its analysis of unilateral residential placements when identifying which placements are entitled to reimbursement.⁸ Recently, the Third Circuit narrowed its once permissive approach to residential placement reimbursement in *Munir v. Pottsville Area School District*,⁹ where the court denied reimbursement for the placement of an emotionally disturbed student in a residential facility. The notable decision in *Munir* is representative of an overarching transformation from the Third Circuit's once broad treatment of qualifying residential

cial education of children with disabilities are reaching courts with greater frequency.”).

4. See Ralph D. Mawdsley, *Applying the Forest Grove Balancing Test to Parent Reimbursement for Placement in Residential Medical Facilities*, 253 EDUC. L. REP. 521, 527 (2010) (“[W]hen parents choose to place their children in residential facilities, the issue of school district reimbursement involves a more complex analysis of educational benefits and medical services under the IDEA.”).

5. See LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* § 2:27 (4th ed. 2013) (“Providing educational services to a student in a residential facility by the public school agency can be logistically problematic.”). Students who require residential placement due to the compilation of educational, physical, and mental disabilities create tremendous difficulties for courts in their efforts to evaluate reimbursement for such placements under the IDEA. See Dixie Snow Huefner, *Special Education Residential Placements for Students with Severe Emotional Disturbances: The Implications of Recent Ninth Circuit Cases*, 67 EDUC. L. REP. 397, 398 (1991) (designating cases “in which the student is severely emotionally disturbed and placed . . . in a psychiatric treatment center that offers both extensive medical and special education services,” as “[a]mong the most difficult cases” under IDEA).

6. See Perry A. Zirkel, *Compensatory Education Under the Individuals with Disabilities Education Act: The Third Circuit's Partially Mis-Leading Position*, 110 PENN ST. L. REV. 879, 881 (2006) (identifying Third Circuit as leader “in filling in the wide gap in the IDEA as to appropriate remedies”).

7. See Mawdsley, *supra* note 4, at 527 (describing Third Circuit's test as “oldest” test); see also *Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1233–34 (10th Cir. 2012) (“The Third Circuit approach has been followed, to varying degrees, by the First, Second, Fourth, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits.” (footnote omitted)), *cert. denied*, 133 S. Ct. 2857 (2013).

8. See Appellant's Reply Brief at 5–6, *Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227 (10th Cir. 2012) (No. 11-1334), 2012 WL 115482 [hereinafter Appellant's Reply Brief] (commenting on changes in Third Circuit's interpretation of appropriate residential placements).

9. 723 F.3d 423 (3d Cir. 2013).

placements to a more restrictive view of which services qualify for reimbursement.¹⁰

This Casebrief discusses the Third Circuit's preferred analysis of reimbursement requests for residential placements and serves as a guide to practitioners litigating reimbursement disputes.¹¹ Part II of this Casebrief traces the history of the IDEA, from the recognition of educational inequalities requiring legislative action to the present understanding of proper residential placements.¹² Part III discusses the Third Circuit's recent decision in *Munir*, focusing on the juxtaposition of the Circuit's broad interpretation of reimbursement entitlement in early cases and the comparatively narrow approach the court employed in *Munir*.¹³ Part IV considers implications of the Third Circuit's departure from its once inclusive methodology, taking into account the goals of the IDEA.¹⁴ Finally, Part V provides recommendations for practitioners in light of the court's decision in *Munir*.¹⁵ Ultimately, this Casebrief highlights the Third Circuit's abandonment of its original analysis of residential placements in exchange for an alternatively strict standard controlling reimbursement.¹⁶ Despite the Third Circuit's insistence that its holding in *Munir* is merely a continuation of the court's usual reimbursement analysis, this Casebrief recognizes the transformation in the Third Circuit's standard and seeks to

10. See Appellant's Opening Brief at 30, *Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227 (10th Cir. 2012) (No. 11-1334), 2011 WL 4438392 (describing "unmistakable trend among the federal circuits [moving] away from the 'inextricably intertwined' test toward the principle that when mental illness . . . requires treatment in and of itself, parents must look to resources other than educators and educational funding"); *id.* at 33 (referring to *Mary T.* as evidence that "the Third Circuit itself" has departed from understanding of inextricably intertwined explained in *Kruelle* (citing *Mary T. v. Sch. Dist. of Phila.*, 575 F.3d 235, 244-46 (3d Cir. 2009))).

11. For a discussion of the Third Circuit's considerations, see *infra* notes 100-10 and accompanying text.

12. For a discussion of background on the IDEA and judicial interpretations of reimbursement, see *infra* notes 18-81 and accompanying text.

13. For a discussion of the evolution of the Third Circuit's treatment of unilateral residential placements for reimbursement purposes, see *infra* notes 100-10 and accompanying text.

14. For a discussion of the potential consequences of the Third Circuit's transformative analysis of residential placement services, see *infra* notes 111-53 and accompanying text.

15. For a discussion of practitioner suggestions, see *infra* notes 154-76 and accompanying text. For closing comments, see *infra* notes 177-82 and accompanying text.

16. See Anna Kessler, Recent Case, *FAPE Not So Free: Parents Denied Tuition Reimbursement in Munir v. Pottsville Area School District*, TEMP. L. REV. 3D CIR. BLOG (Jan. 2014), <https://sites.temple.edu/templelawreviewblog/2014/01/25/kessler-note/> ("The *Munir* court set a stricter precedent for parents seeking compensation for special educational services for their disabled children." (referring to *Munir v. Pottsville Area Sch. Dist.*, 723 F.3d 423 (3d Cir. 2013))).

guide practitioners in response to the court's new reimbursement assessment methodology.¹⁷

II. BACKGROUND: A HISTORY LESSON ON THE IDEA AND CIRCUIT COURT ASSESSMENTS

The high stakes in residential placement reimbursement disputes demonstrate the IDEA's significance in the area of special education law.¹⁸ Yet, circuit courts' inconsistent interpretations of appropriate residential placements under the IDEA force parents to navigate a complicated system when requesting reimbursement.¹⁹ This section provides a brief overview of the influences that prompted the IDEA's creation and traces efforts by circuit courts to incorporate Congress's goals into varying tests to analyze reimbursement claims.²⁰ In the absence of congruency in the interpretation of services provided under the IDEA, this section also discusses motive for placement, which many courts have incorporated into their reimbursement analyses.²¹

A. Congress's Not-So-New "IDEA"

Congress developed the IDEA in 1990, serving as a milestone in efforts to transform educational opportunities for handicapped students.²² The IDEA expresses Congress's intention "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their

17. For a discussion of the changes in the Third Circuit's reimbursement analysis and implications of such changes, see *infra* notes 111–53 and accompanying text.

18. See Walsh, *supra* note 1 (referring to importance of reimbursement disputes).

19. See Petition for a Writ of Certiorari, *supra* note 1, at 2–3 (commenting on varying court views on entitlement to reimbursement under IDEA).

20. For a discussion of the tests developed by the Third, Seventh, Fifth, and Tenth Circuits, see *infra* notes 31–62 and accompanying text.

21. For a discussion of cases considering motive for placement, see *infra* notes 63–81 and accompanying text.

22. See LaDonna L. Boeckman, *Bestowing the Key to Public Education: The Effects of Judicial Determinations of the Individuals with Disabilities Education Act on Disabled and Nondisabled Students*, 46 DRAKE L. REV. 855, 865 (1998) (tracing history of IDEA's development). In 1965, Congress enacted the Elementary and Secondary Education Act (ESEA), requiring public school districts to "meet the educational needs of educationally deprived children in economically disadvantaged locations." See Wooster, *supra* note 2, § 2[a]. While intended as a response to disabled students' "total exclusion from the classroom," the ESEA failed to provide sufficient educational opportunities to disabled children and was subsequently replaced by the Education of the Handicapped Act (EHA) in 1970. See *id.* As part of amendments to the EHA in 1990, Congress renamed EHA the IDEA and "re-vamped" the educational program. See *id.*

unique needs”²³ The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to qualifying children with disabilities.²⁴ To provide a FAPE, school districts must develop an “individualized education program” (IEP) for qualifying students that outlines individualized goals and current academic achievement levels.²⁵ School districts satisfy FAPE obligations by designing an IEP “reasonably calculated” to allow the particular student to receive “meaningful educational benefits in light of the student’s intellectual potential.”²⁶

Under the IDEA, parents who believe that a public school district is not providing a FAPE for their qualifying child may unilaterally place that child in an alternative private school and then seek reimbursement from the school district for the tuition costs.²⁷ Parents are entitled to reim-

23. 20 U.S.C. § 1400(d)(1)(A) (2012) (quoting purpose listed for IDEA). Congress’s findings revealed the importance of “[i]mproving educational results for children with disabilities” *Id.* § 1400(c)(1).

24. *See id.* § 1412(a)(1) (containing FAPE requirement).

25. *See id.* § 1414(d) (describing school district obligations).

26. *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 729–30 (3d Cir. 2009) (quoting *Shore Reg’l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004)) (internal quotation marks omitted); *see also Mary T. v. Sch. Dist. of Phila.*, 575 F.3d 235, 240 (3d Cir. 2009) (describing school districts’ FAPE obligations). As the creation of a proper IEP satisfies the FAPE requirement under the IDEA, school districts are not required to “maximize the potential” of each handicapped student. *See T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 197 n.21 (1982)) (internal quotation marks omitted). Alternatively, the FAPE guaranteed in the statute seeks to provide “a basic floor of opportunity” for all handicapped students. *See Rowley*, 458 U.S. at 200.

27. *See* 20 U.S.C. § 1412(a)(10)(C) (regulating payment following unilateral private placement); David S. Doty, *A Desperate Grab for Free Rehab: Unilateral Placements Under IDEA for Students with Drug and Alcohol Addictions*, 2004 *BYU EDUC. & L.J.* 249, 253 (2004) (describing development of “basic principles governing tuition reimbursement under IDEA” (citing *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993); *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 370 (1985))). Doty credits the U.S. Supreme Court’s decision in *Burlington* with recognizing reimbursement as a possible remedy and formulating the corresponding test for reimbursement entitlement. *See id.* at 253; *see also Burlington*, 471 U.S. at 370 (recognizing validity of reimbursement remedies under IDEA: “[W]e are confident that by empowering the court to grant ‘appropriate’ relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.”).

The IDEA’s “broad purpose of providing children with disabilities a FAPE,” combined with the potential lack of adequate public education programs to address a disabled student’s particular needs, have been credited as the reasons behind permitting disabled students to receive a proper private education at the school district’s expense. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 238 (2009); *see also Carter*, 510 U.S. at 12 (noting IDEA enables courts “to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.” (quoting *Burlington*, 471 U.S. at 369) (internal quotation marks omitted)). Nonetheless, while the IDEA provides par-

bursement for such alternative private placements only if the student's public school district failed to provide the child with a FAPE and the new placement is deemed appropriate.²⁸ In certain instances, parents consider alternative placement in a private residential facility as necessary for their child to obtain educational benefits not otherwise available through public school.²⁹ Should a court determine that residential placement is necessary to provide a child with an appropriate education, the school district must pay all placement costs, including non-medical care and room and board.³⁰

B. *Setting the Curve: Competing Circuit Tests to Determine "Appropriate" Residential Placement*

While parents are reimbursed for a child's enrollment in an appropriate alternative placement, complications arise when a residential facility combines both educational and mental health services.³¹ Placement in residential facilities is to be at no cost to parents only "[i]f placement in a public or private residential program is necessary to provide special educa-

ate with the right to enroll their children in private schools without the consent of state or local officials, parents exercise this right "at their own financial risk." *Burlington*, 471 U.S. at 373-74.

28. See *Mary T.*, 575 F.3d at 242 ("A court may grant tuition reimbursement if the School District failed to provide the required FAPE and the parents sought an appropriate private placement."); see also *Carter*, 510 U.S. at 15 (noting parents "are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act"). In *Carter*, the Supreme Court additionally confirmed that courts are entitled to incorporate equitable considerations into their reimbursement examinations. See *id.* at 16 ("Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required.").

29. See, e.g., *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 694 (3d Cir. 1981) (referring to "consistency of programming and environment" offered at residential placement as "critical" to handicapped child's "ability to learn" due to complexity of disabilities).

30. See *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 638 (9th Cir. 1990) (recognizing school districts are required to provide residential placements when necessary). The *Clovis* court referred to inclusion of "residential schools" in the EHA's definition of elementary and secondary schools as evidence of school district responsibility for residential placements. See *id.* (citing 20 U.S.C. § 1401(a)(9)-(10)). The *Clovis* court also referred to Congress's explanation in "pertinent regulations." See *id.* ("[I]f placement in a public or private residential program is necessary to provide special education and related services to a [child with a disability], the program, including non-medical care and room and board, must be at no cost to the parents of the child." (quoting 34 C.F.R. § 300.302 (2006)) (internal quotation marks omitted)).

31. See *Petition for a Writ of Certiorari*, *supra* note 1, at 2-3 ("The circuits have struggled for years to delineate the boundaries of school districts' obligation to provide their students with a free appropriate public education in cases where the child's mental health needs require the child to be placed at a residential facility.").

tion and related services”³² Still, federal courts of appeals are split regarding the proper test to determine whether a child’s placement is appropriate for reimbursement purposes.³³ As the IDEA explicitly exempts school districts from paying for medical expenses,³⁴ the proper test used to evaluate residential placements should differentiate between placements that qualify as “special education” or “related service” as opposed to a “medical service.”³⁵

The Third Circuit developed the “inextricably intertwined test” in *Kruelle v. New Castle County School District*.³⁶ In *Kruelle*, the court adopted the view that residential placement may be necessary for educational purposes when the placement is part of a “specially designed instruction to meet the unique needs of a handicapped child.”³⁷ In holding that a severely handicapped child was entitled to residential placement, the Third Circuit referred to the student’s medical, emotional, and educational needs as inextricably intertwined.³⁸

32. 34 C.F.R. § 300.104 (2006) (listing requirements for reimbursement for residential placement); *see also* 20 U.S.C. § 1412(10). “Related services” referred to in the IDEA have a broad definition, including “‘medical services’ to the extent that they are ‘for diagnostic and evaluation purposes only.’” Mawdsley, *supra* note 4, at 524 (quoting 20 U.S.C. § 1401(26)(A)).

33. *See* Mawdsley, *supra* note 4, at 527 (“Federal courts of appeal, in the absence of direction from the Supreme Court, have designed three separate tests to use in assessing whether parent residential placements can be considered to be appropriate for purposes of reimbursement.”).

34. For a discussion of the categories of services that the IDEA allows reimbursement for, *see infra* note 35.

35. *See, e.g., Clovis*, 903 F.2d at 638 (noting need to determine whether student’s placement was “related service” or “medical service” in order to establish whether reimbursement is owed). The IDEA’s definition of “related services” provides an exemption for “medical services,” rendering them not entitled to reimbursement under the IDEA. *See* 20 U.S.C. § 1401(a)(17). Still, the IDEA also provides no definition of medical services or guidance on how courts should differentiate such medical services from related services. *See Clovis*, 903 F.2d at 638.

36. 642 F.2d 687 (3d Cir. 1981); *see also* Huefner, *supra* note 5, at 398 (discussing “inseparability test” developed in *Kruelle*).

37. *See Kruelle*, 642 F.2d at 694 (quoting 20 U.S.C. § 1401(6)) (internal quotation marks omitted) (describing court’s central inquiry).

38. *See id.* at 687; *see also* Huefner, *supra* note 5, at 398 (describing inextricably intertwined test). Huefner points to the court’s opinion in *Kruelle* as an instance where the court invoked “the unseverability of medical, emotional, and educational needs” in order to justify free residential placement for a student with severe disabilities. *See id.*

The court’s reimbursement analysis in *Kruelle* focused only on whether the services the child was receiving in the residential facility satisfied the IDEA’s definition of “special education” services. *See* Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E. *ex rel.* Roxanne B., 702 F.3d 1227, 1237 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 2857 (2013). The court did not alternatively analyze whether the services would fit under the category of “related services,” for which the IDEA also entitles reimbursement. *See id.* (addressing *Kruelle* court’s silence “as to the scope of the term ‘related services’”). Nevertheless, in subsequent cases considering whether to adopt the test developed in *Kruelle*, courts often “conflate the two statutory provisions.” *See id.* (citing Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 298

In *Kruelle*, the court considered the appropriateness of residential placement for Paul Kruelle, a thirteen-year-old suffering from cerebral palsy and extreme physical, mental, and emotional afflictions.³⁹ While the school district alleged that Paul's residential placement was necessary "for reasons of medical and domiciliary care, not for educational purposes," the court recognized that the reach of educational instruction is "necessarily broad" to effectively address the specialized needs of severely handicapped children like Paul.⁴⁰ Therefore, when a student's medical and educational needs cannot be segregated, residential placement is appropriate, even when non-academic services are necessary.⁴¹

(5th Cir. 2009); *Dale M. ex rel. Alice M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307*, 237 F.3d 813, 817–18 (7th Cir. 2001); *Clovis*, 903 F.2d at 643–44).

39. See *Kruelle*, 642 F.2d at 688–89 (describing Paul's emotional and physical problems). The court described Paul as "profoundly retarded" with "the social skills of a six month old child" and an I.Q. "well below thirty." *Id.* at 688. Paul is unable to walk, dress, or eat without the assistance of an aid, is not toilet trained, does not speak, and has an "extremely low" "receptive communication" level. See *id.* at 688–89. Further, Paul has a "history of emotional problems" which lead to "choking and self-induced vomiting when experiencing stress." *Id.* at 689 (internal quotation marks omitted).

40. See *id.* at 693; see also *Vander Malle v. Ambach*, 667 F. Supp. 1015, 1038 (S.D.N.Y. 1987) ("Because Congress intended to provide education for all children 'regardless of the severity of their handicaps,' education within the meaning of the Act must necessarily be broadly interpreted." (citation omitted) (quoting 20 U.S.C. § 1412(2)(C))). The Third Circuit based its creation of the inextricably intertwined test on its understanding of Congress's intentions when passing the IDEA. See *Kruelle*, 642 F.2d at 690–91 (discussing reasons behind IDEA's passage). Specifically, the court noted that Congress recognized the "broad range of special needs presented by [children with disabilities], the lack of agreement within the medical and educational professions on what constitutes an appropriate education, and the tradition of state and local control over educational matters . . ." *Id.* at 691.

41. See Huefner, *supra* note 5, at 398 (commenting on court's interpretation in *Kruelle*). Huefner explained the court's understanding that "[f]or some, the need for extensive special education and related services is inextricably intertwined with their physical and mental health needs, with the latter needs contributing heavily to the educational needs." *Id.* The court's holding suggested a distinction between cases where a student's special education and health needs are inextricably intertwined, versus those cases where medical issues are severable from educational needs. See *Kruelle*, 642 F.2d at 693. In the former case, the provision of mental or physical health treatment is necessary for particular students to experience any educational benefit. See, e.g., *Jefferson Cnty. Bd. of Educ. v. Breen*, 853 F.2d 853 (11th Cir. 1988) (ordering reimbursement for placement in residential facility that provided both psychiatric and educational services); *Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514 (6th Cir. 1984) (same); *B.G. ex rel. F.G. v. Cranford Bd. of Educ.*, 702 F. Supp. 1140 (D.N.J. 1988), *supplemented*, 702 F. Supp. 1158 (D.N.J. 1988) (same); *Papacoda v. Connecticut*, 528 F. Supp. 68 (D. Conn. 1981) (same). Alternatively, in "severable" cases, the disabled students at hand are capable of receiving special educational benefits through the provision of academic services in a non-residential setting. See Huefner, *supra* note 5, at 398. While the student's particular disabilities may also require separate medical residential treatment for emotional, behavioral, mental, or physical problems, such issues are considered secondary to educational needs. See, e.g., *Burke Cnty. Bd. of Educ. v. Denton ex rel. Denton*, 895 F.2d 973 (4th Cir. 1990) (denying reimburse-

Ultimately, the *Kruelle* court found Paul's "social, emotional, medical and educational problems to be so intertwined 'that realistically it is not possible for the court to perform the Solomon-like task of separating them.'"⁴² Thus, Paul's combination of emotional, mental, educational, and physical issues manifested the need for a residential setting to provide the consistency and structure necessary for any level of learning.⁴³ Although Paul's residential services would include non-educational treatment in light of his medical needs, the court held that such services are still covered under the IDEA, noting "[w]here basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point."⁴⁴

In *Dale M. ex rel. Alice M v. Board of Education of Bradley-Bourbonnais High School District No. 307*,⁴⁵ the Seventh Circuit rejected the Third Circuit's inextricably intertwined test, instead choosing to evaluate the appropriateness of residential placements based on the primary purpose of the placement.⁴⁶ Concerned that the inextricably intertwined test would lead to overly inclusive coverage under the IDEA, the majority in *Dale M.* instead held that a residential facility is appropriate for placement only when it is considered "primarily educational."⁴⁷ Unlike the Third Circuit's broad definition of "support services," the Seventh Circuit's "prima-

ment for residential placement due to severability of emotional and educational needs); *Cain v. Yukon Pub. Schs.*, Dist. I-27, 775 F.2d 15 (10th Cir. 1985) (same); *Matthews ex rel. Matthews v. Davis*, 742 F.2d 825 (4th Cir. 1984) (same); *Hall ex rel. Allread v. Freeman*, 700 F. Supp. 1106 (N.D. Ga. 1987) (same); *Garrick B. ex rel. Gary B. v. Curwensville Area Sch. Dist.*, 669 F. Supp. 705 (M.D. Pa. 1987) (same); *Ahern v. Keene*, 593 F. Supp. 902 (D. Del. 1984) (same).

42. *Kruelle*, 642 F.2d at 694 (quoting *North v. D.C. Bd. of Educ.*, 471 F. Supp. 136, 141 (D.D.C. 1979)). The *Kruelle* court drew from past cases that "actually collapsed the distinction by declaring the impossibility of separating emotional and educational needs in complex cases," and applied similar logic to the case at hand. *See id.* at 693 (citing *North*, 471 F. Supp. at 141); *see also* Huefner, *supra* note 5, at 398 (describing "the now well accepted view" developed in *North* and *Kruelle* that emotional and behavioral goals must sometimes accompany academic goals in effort to achieve overarching educational progress).

43. *See Kruelle*, 642 F.2d at 694 ("[H]ere, consistency of programming and environment is critical to Paul's ability to learn, for the absence of a structured environment contributes to Paul's choking and vomiting which, in turn, interferes fundamentally with his ability to learn.").

44. *See id.* at 693 (quoting *Battle v. Pennsylvania*, 629 F.2d 269, 275 (3d Cir. 1980)) (internal quotation marks omitted).

45. 237 F.3d 813 (7th Cir. 2001).

46. *See* ABA, *Case Law Development*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 207, 211 (2001) (discussing Seventh Circuit's substitution of *Kruelle* test for "very different formulation" which denies reimbursement if "the support services are not aimed at a problem that is 'primarily educational'").

47. *See Dale M.*, 237 F.3d at 817; *see also* Mawdsley, *supra* note 4, at 529 ("[W]here a student's problems are not primarily educational so that they can be said to interfere with the acquisition of an education, a school district has no obligation to provide, and thus no obligation to reimburse parents for, a placement whose sole function is to keep a student out of jail."). The Seventh Circuit's test provides that reimbursement for placement in a residential setting merely for

rily oriented” test significantly restricts the reach of reimbursement for “related services” under the IDEA.⁴⁸ While the Third Circuit’s inextricably intertwined test enables courts to consider how the combination of all services in a residential facility will impact a child’s overall ability to learn, the Seventh Circuit’s primarily oriented test alternatively restricts courts’ focus to only those services directly educational in nature.⁴⁹

In *Richardson Independent School District v. Michael Z.*,⁵⁰ the Fifth Circuit also rejected the Third Circuit’s inextricably intertwined test and developed an alternative test to assess residential placement for reimbursement purposes.⁵¹ The test consists of two parts: 1) the placement must be “essential in order for the disabled child to receive a meaningful educational benefit”; and 2) the placement must be “primarily oriented toward ena-

“confinement,” and not in response to educational needs, “stretches the statute too far.” See *Dale M.*, 237 F.3d at 817.

In *Dale M.*, the court examined whether the placement of Dale, who suffered from severe behavioral issues, depression, and substance abuse problems, entitled his mother to reimbursement for tuition costs. See *id.* at 814–15. While Dale was enrolled in a “therapeutic day school” for “disruptive and truant students,” where he was placed by the school district, he barely attended school and was subsequently hospitalized for depression, arrested for burglary and theft, and diagnosed with a conduct disorder. See *id.* at 814. Against the recommendation of the school district to re-enroll Dale in the therapeutic day school, Dale’s mother instead enrolled Dale in The Elan School. See *id.* The majority commented that “Dale’s problems are not primarily educational.” *Id.* at 817. Drawing on Dale’s lack of cognitive issues and his general intelligence, the court held that “proper socialization” was actually the problem that Dale’s placement was used to address. See *id.*

48. See *Dale M.*, 237 F.3d at 817 (elaborating on primarily oriented test). The majority described a distinction “between services primarily oriented toward enabling a disabled child to obtain an education and services oriented more toward enabling the child to engage in noneducational activities.” *Id.* Only the former category qualifies as “related services” deserving of reimbursement. See *id.* (describing school districts’ limited liability under IDEA). In his dissent, Circuit Court Judge Ripple criticized the majority in *Dale M.* for rejecting the interpretation of appropriate residential placement developed in *Kruelle* and adopted by a majority of courts. See *id.* at 818 (Ripple, J., dissenting) (“[T]he majority not only dooms Dale M.’s case but also sets this circuit on a course different from that of all the courts that have interpreted this provision.”). Judge Ripple explained that the majority’s new test failed to recognize Congress’s intention to provide for the varied, and sometimes broad, nature of services relating to education. See *id.* (“[E]very circuit that has addressed the question has held that the Congressional mandate requires the provision of a support service that is ‘a necessary predicate for learning,’ and not ‘segregable from the learning process.’” (citations omitted) (quoting *Kruelle*, 642 F.2d at 693)).

49. See Mawdsley, *supra* note 4, at 534 (“While the *Kruelle* test permits a court to consider all of the services in a residential medical facility in their total connection with a disabled student’s education, *Dale M.* limits the balancing test only to those services that directly affect educational benefits.”); see also *Dale M.*, 237 F.3d at 818 (Ripple, J., dissenting) (“That the difference between the panel majority’s formulation and that of our sister circuits is not just one of semantics but a chasm of substance is made starkly clear by the analysis of the Third Circuit in *Kruelle*.”).

50. 580 F.3d 286 (5th Cir. 2009).

51. See *id.* at 299 (describing Fifth Circuit’s formulation of new alternative test).

bling the child to obtain an education.”⁵² This test, incorporating “amalgamated elements of *Kruelle* and *Dale M.*” is a “very restrictive test” for analyzing residential placements.⁵³ When practically applied, the test reduces parents’ opportunities to obtain reimbursement for unilateral residential placements.⁵⁴ Similar to the Seventh Circuit’s treatment of the *Kruelle* test in *Dale M.*, the Fifth Circuit in *Michael Z.* rejected the inextricably intertwined standard based on concerns regarding its overly inclusive results.⁵⁵

52. *See id.* (enumerating Fifth Circuit’s test for reimbursement). The court differentiated its test from the Third Circuit’s test. *See id.* at 300 (“Unlike *Kruelle*, this test does not make the reimbursement determination contingent on a court’s ability to conduct the arguably impossible task of segregating a child’s medical, social, emotional, and educational problems.”). The first prong of the test eliminates a school district’s duty to pay for residential placement if the student in question would be able “to receive an educational benefit without the residential placement.” *See id.* The second prong incorporates the test articulated by the Seventh Circuit in *Dale M.*, “asking whether the particular treatments that the private facility provided were primarily oriented towards enabling the child to receive a meaningful educational benefit.” *Id.*

53. Mawdsley, *supra* note 4, at 527; *see also id.* at 527–31 (comparing tests developed by Third, Seventh, and Fifth Circuits).

54. *See* Ralph D. Mawdsley, *Post-Forest Grove Parental Reimbursement for Private School Placements: What About Parents Who Cannot Afford the Cost of Such Placements?*, 292 EDUC. L. REP. 1, 13 (2013) (“In effect, at least in the Fifth Circuit, it is not sufficient for parents seeking reimbursement to prove that their child needed residential placement; the parents must produce evidence that their child’s treatment at their placement choice ‘was primarily oriented toward . . . enabling her to receive a meaningful educational benefit.’” (quoting *Michael Z.*, 580 F.3d at 301)); *see also* Jose L. Martín, *Modern Issues in Cases of Reimbursement for Unilateral Private Placements Under the IDEA*, Presentation at the 2011 Tri-State Regional Special Education Law Conference 7 (Nov. 3, 2011), available at <http://www.ksde.org/Portals/0/SES/legal/conf11/02b-Martin-UnilateralPlacements.pdf> (“[T]his opinion significantly reduces the potential reimbursement parents can recover in most residential placement situations involving students with psychiatric needs.” (referring to *Michael Z.*, 580 F.3d 286)).

55. *See Michael Z.*, 580 F.3d at 299–300 (rejecting application of inextricably intertwined test). The Fifth Circuit ultimately reversed the lower court’s reimbursement award of \$56,000 to the parents for the tuition costs of placing their daughter, Leah Z., in a residential facility. *See id.* at 291, 301. While the district court originally applied the inextricably intertwined test and found the placement appropriate under the IDEA, on appeal, the Fifth Circuit Court of Appeals criticized the Third Circuit’s test as overreaching. *See id.* at 299 (noting *Kruelle* expands school district liability beyond that required by IDEA). The Fifth Circuit found that any services that affect a student’s ability to “physically or psychologically receive an education” are potentially encompassed under the “broad language” of *Kruelle*. *See id.* (“Undoubtedly, it is difficult to conceive of a disabled child, particularly a child with mental disabilities, whose medical, social, or emotional problems would have no effect on the child’s ability to learn and would therefore be segregable from the learning process.”). The Fifth Circuit’s alternative test attempted to limit the reach of reimbursement entitlement available under *Kruelle* through a standard that more accurately reflects the intention of the IDEA drafters. *See id.* at 303 (Prado, J., concurring) (“This is a necessary limitation on *Kruelle*’s potentially expansive scope, as *Kruelle* asks only whether the placement is necessary.”).

In *Jefferson County School District R-1 v. Elizabeth E. ex rel. Roxanne B.*,⁵⁶ the Tenth Circuit rejected all of the aforementioned tests, alternatively developing its own four-point statutory test based on the plain language of the IDEA.⁵⁷ The creation of yet another test to analyze the appropriateness of unilateral placements expanded the disparities in federal circuit courts' responses to reimbursement claims.⁵⁸ The Tenth Circuit claimed that its "straightforward application of the Act's text," escapes the shortcomings of the inextricably intertwined test and the Seventh and Fifth Circuits' primarily oriented standards.⁵⁹ While recognizing that the creation of the tests formulated by the Seventh and Fifth Circuits sought to prevent the expansion of school district liability beyond the parameters of the IDEA, the *Elizabeth E.* court recognized risks that arise following the Fifth and Seventh Circuits' dispositive consideration of whether placements are primarily oriented towards education.⁶⁰ Specifically, the Tenth Circuit noted that there is not a clear indication that only those placements with services primarily addressing academic issues will best serve a child's educational needs.⁶¹ Rather, the court anticipated the possibility of residen-

56. 702 F.3d 1227 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 2857 (2013).

57. *See id.* at 1236–37 (describing alternative test through which to examine residential placements). The Tenth Circuit's test considers: (1) "whether the school district provided or made a FAPE available to the disabled child in a timely manner," (2) "whether the private placement is a state-accredited elementary or secondary school," (3) "whether the private placement provides . . . specially designed instruction . . . to meet the unique needs of a child with a disability," and (4) whether any additional services the private placement provides beyond instruction can be characterized as "related services" under the Act. *Id.* (second alteration in original) (citations omitted) (internal quotation marks omitted).

In *Elizabeth E.*, the court evaluated the unilateral placement of student, Elizabeth E., in Innercept, a residential facility. *See id.* at 1231. Although the Tenth Circuit acknowledged that Elizabeth's placement satisfied the requirements for reimbursement under the Third Circuit, the Seventh Circuit, and the Fifth Circuit tests, the court did not adopt any of these evaluation approaches. *See id.* at 1236. Instead, the Tenth Circuit created its own test. *See id.* at 1236–37.

58. *See Split Widened: Test for Reimbursement of Residential Placement Under IDEA*, APPELLATE REV. (Jan. 3, 2013, 11:23 PM), <http://coareview.blogspot.com/2013/01/split-widened-test-for-reimbursement-of.html?m=1> (crediting Tenth Circuit's new test with widening "an extant circuit split").

59. *See Elizabeth E.*, 702 F.3d at 1237–38 (comparing Tenth Circuit's test with Third, Seventh, and Fifth Circuits' tests). Specifically, the Tenth Circuit noted that its plain language test "dispenses with the need to fully dissect the amorphous, judicially crafted 'primarily oriented' standard of the Fifth and Seventh Circuits." *Id.* at 1238.

60. *See id.* ("Unquestionably, the genesis of the 'primarily oriented' test is a concern with expanding school district liability beyond the requirements of the IDEA."). While the Tenth Circuit acknowledged the purpose of the Fifth and Seventh Circuits' rejection of the inextricably intertwined test, the court also designated "the 'primarily oriented' requirement" that the two circuits embraced as simultaneously "over-inclusive and under-inclusive." *See id.*

61. *See id.* ("[I]t is not at all clear that determining whether a placement is 'primarily oriented toward enabling a child to obtain an education' sheds any light on the question of whether a placement provides specially designed instruction to meet a child's unique needs . . .").

tial placement services that enabled “a child to receive a meaningful education” while not generally being “‘primarily oriented’ toward educational goals.”⁶²

C. *Beyond the Final Exam: Motive as an Additional Consideration When Evaluating Residential Placement*

In addition to the use of varying circuit court tests, some courts consider motive for placement when determining whether residential placement is eligible for reimbursement.⁶³ While the Third Circuit did not explicitly discuss motive for placement in *Kruelle*, even courts in circuits that have adopted the inextricably intertwined test nonetheless consider motive in their reimbursement analyses.⁶⁴ Courts’ incorporation of motive into reimbursement evaluations has resulted in a series of reimbursement denials when an event “unrelated to education” prompts a child’s placement.⁶⁵

In *Clovis Unified School District v. California Office of Administrative Hearings*,⁶⁶ the Ninth Circuit’s consideration of motive for placement further limited the potential for reimbursement permitted under the *Kruelle* test.⁶⁷ The *Clovis* court ultimately held that the parents of Michelle Sorey, a handicapped student, were not entitled to reimbursement for Michelle’s hospital stay following “an ‘acute’ psychiatric crisis.”⁶⁸ While the majority

62. See *id.* (expanding on Tenth Circuit’s criticism of primarily oriented requirements adopted by Fifth and Seventh Circuits).

63. See Doty, *supra* note 27, at 263 (“Closely connected with the issue of eligibility is the issue of motive for the private placement.”); see also Huefner, *supra* note 5, at 399 n.13 (describing cases where courts “ruled that hospitalization for psychiatric reasons was essentially a medical placement and not an educational placement, even when special education services were provided on site” (citing *Tice ex rel. Tice v. Botetourt Cnty. Sch. Bd.*, 908 F.2d 1200, 1209 (4th Cir. 1990); *McKenzie v. Jefferson*, 566 F. Supp. 404, 412 (D.D.C. 1983))).

64. For a discussion of the consideration of motive in a Third Circuit case and a Ninth Circuit case, see *infra* notes 66–81 and accompanying text.

65. See Doty, *supra* note 27, at 264 (“[N]umerous courts and hearing officers have denied reimbursement where the placement was made for reasons unrelated to education.”).

66. 903 F.2d 635 (9th Cir. 1990).

67. See *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 299 (5th Cir. 2009) (“Some courts applying the *Kruelle* test appear to have recognized the breadth of the ‘inextricably intertwined’ inquiry and have attempted to limit its application.” (citing *Clovis*, 903 F.2d at 643)); see also *Clovis*, 903 F.2d at 645 (reversing district court’s determination that hospitalization entitled parents to reimbursement because child “was hospitalized primarily for medical, i.e. psychiatric, reasons”); David C. Donohue, Note, *Clovis Unified School District v. California Office of Administrative Hearings: Restricting Related Services Under the Individuals with Disabilities Education Act*, 8 J. CONTEMP. HEALTH L. & POL’Y 407, 420–21 (1992) (describing *Clovis* court’s holding as having “formulated a new test which considerably restricts the related services that a school district must supply for a student with a disability”).

68. See *Clovis*, 903 F.2d at 645 (noting reason for Michelle’s placement). Although the court acknowledged that Michelle’s need for some form of residential

explicitly conditioned its holding on the conclusion that Michelle's placement was motivated by medical needs, the court cited *Kruelle* when describing its analysis.⁶⁹

In reaching its holding, the court rejected the parents' theory that placements such as Michelle's, which provide services "supportive" of special education, escape exclusion from reimbursement as medical services.⁷⁰ Instead, the majority pointed to various factors indicating the treatment provided was not primarily used to aid Michelle in benefiting from special education.⁷¹ Such factors included the psychiatric motivation for hospitalization, the "intensity" of the psychotherapy services provided, the high cost of the placement, the "characterization" of the facility, and the lack of educational services built in to the placement.⁷² The court

placement was undisputed, the court denied reimbursement for Michelle's hospitalization. *See id.*

69. *See id.* at 638 ("Because we find that Michelle was hospitalized for medical, rather than educational purposes, we reverse the orders of the District Court."). The court articulated the focus of its evaluation as deciding whether Michelle's placement was "necessary for educational purposes, or . . . a response to medical, social, or emotional problems that is necessary quite apart from the learning process." *Id.* at 643 (citing *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 693 (3d Cir. 1981)).

While the *Clovis* court cited *Kruelle* when describing the analysis used to determine the appropriateness of placement, the *Clovis* court unequivocally rejected consideration of the intertwinement of medical and educational issues as referred to in *Vander Malle*. *See id.* at 643 (rejecting "line of reasoning" that requires state responsibility for all placement costs when child's "medical, social or emotional problems that require hospitalization create or are intertwined with the educational problem" (quoting *Vander Malle v. Ambach*, 667 F. Supp. 1015, 1039 (S.D.N.Y. 1987)) (internal quotation marks omitted)). Despite the *Clovis* court's differentiation between *Kruelle* and *Vander Malle*, the court in *Vander Malle* both cited *Kruelle* and adopted the *Kruelle* court's analysis when evaluating school districts' responsibility for reimbursement. *See Vander Malle*, 667 F. Supp. at 1039 (citing *Kruelle*, 642 F.2d at 693).

70. *See Clovis*, 903 F.2d at 643 (rejecting parents' argument that relevant question to determine reimbursement is "whether the placement is *supportive* of a handicapped child's education"). The court noted that "mere 'supportiveness' is too broad a criterion" to establish services as necessary and therefore entitled to reimbursement. *See id.* As "[a]ll medical services are arguably 'supportive' of a handicapped child's education," the court identified "supportiveness" as an overly inclusive standard contravening the IDEA's "explicit exclusion of medical services." *See id.*

71. *See* Donohue, *supra* note 67, at 424 ("The court's test necessitates that the placement be primarily for special education reasons."). For a discussion of the factors assessed by the court, see *infra* note 72 and accompanying text.

72. *See Clovis*, 903 F.2d at 645 (enumerating factors in favor of denying reimbursement for Michelle's placement). The court noted that Michelle's daily receipt of "intensive psychotherapy" demonstrated that services provided "appear 'medical' in that they address a medical crisis." *Id.* The opinion also pointed to "the high cost of her placement" due to the facility's status as a "medical facility, requiring a staff of licensed physicians, a high staff to patient ratio, and other services which would not be available or required at a placement in an educational institution." *Id.* The court additionally reiterated the need for "educational programs for handicapped children" to "meet education standards of the State educa-

held that the aforementioned factors were evidence that Michelle's placement was primarily motivated by health purposes rather than education purposes.⁷³

The Third Circuit also incorporated motive as a determinative factor in its reimbursement evaluation in 2009, when it decided *Mary T. v. School District of Philadelphia*.⁷⁴ In *Mary T.*, parents sought reimbursement for the residential placement of their daughter Courtney, a special education student who suffered from various mental and emotional disorders.⁷⁵ Courtney's parents placed her in Supervised LifeStyles (SLS), a residential psychiatric facility, following the "deteriorat[ion]" of her mental state.⁷⁶

While the court relied heavily on the facts and holding of *Kruelle* when determining the appropriateness of Courtney's placement in SLS, much of the court's analysis focused on factors not addressed in *Kruelle*.⁷⁷ The

tional agency" in order to qualify for reimbursement under the IDEA. *Id.* at 646 (quoting 20 U.S.C. § 1412(6)) (internal quotation marks omitted). Yet, due to the absence of teachers employed by the facility, the school district had to provide teachers who visited the facility to instruct Michelle and other patients. *See id.* The *Clovis* court's factor-based analysis has received criticism from commentators who view this more restrictive approach as "inconsistent with the purposes and findings of Congress in enacting the IDEA." *See, e.g.,* Donohue, *supra* note 67, at 424–25 (arguing that analysis employed by court in *Clovis* "contravenes the IDEA's goal of treating all children with disabilities equally").

73. *See Clovis*, 903 F.2d at 645 (pointing to medical reasons as underlying cause of Michelle's placement).

74. 575 F.3d 235, 245 (3d Cir. 2009) (noting minor Courtney's placement in residential facility "was necessitated, not by a need for special education, but by a need to address Courtney's acute medical condition").

75. *See id.* at 238–39 (describing Courtney's learning disabilities and mental disabilities).

76. *See id.* at 246 (pointing to Courtney's "deteriorat[ing]" condition as evidence that her placement was in response to her need for "emergency intervention and stabilization"). Once enrolled in SLS, Courtney participated in various programs and therapy sessions, prompting her parents to request reimbursement from Courtney's school district for placement costs. *See id.* at 244–45. Her parents argued that Courtney's participation in SLS's "token economy program," which enables students to "earn 'dollars' for good behavior to be spent for various rewards" was cognizant of the nature of services "offered in public schools." *See id.* at 244. Courtney's parents also pointed to the facility's provision of "group therapies," "Life Skills Training," and "psychoeducational skills groups" as further evidence of the educational services Courtney received from residential placement in light of her "limited" capacity. *See id.* at 244–45.

Further, the parents pointed to Courtney's unique disabilities as evidence that she was "not capable of receiving traditional academic instruction." *See id.* at 243. The services that SLS provided to Courtney in her placement therefore necessarily "focused on behavior modification and her emotional wellness" in order to enable Courtney to receive the educational benefits that the IDEA guarantees her. *See id.* Framing their argument in harmony with the inextricably intertwined test, Courtney's parents argued that "her medical and educational needs were not severable under . . . *Kruelle* . . . thereby requiring the School District to reimburse Plaintiffs for Courtney's tuition at SLS." *Id.*

77. *See* Caryl Andrea Oberman, *Autism Trends and Cases, 2009–2010*, THE LAW OFFICES OF CARYL ANDREA OBERMAN LLC, <http://www.caryloberman.com/articles/autism-trends-and-cases-2009-2010/> (last visited Aug. 31, 2014) (crediting Third

Third Circuit focused particularly on services SLS provided to Courtney, such as a mood disorders group, anxiety disorders group, psychological skills group, life skills training group, and medication group, claiming such services were primarily “designed to make her aware of her medical condition and how to respond to it.”⁷⁸

Further, the *Mary T.* court noted SLS’s accreditation by the New York State Office of Mental Health as evidence of the program’s predominate purpose of “address[ing] medical, rather than educational, conditions.”⁷⁹ Ultimately, the holding revealed that Courtney’s medical and educational needs were severable, distinguishing the case from *Kruelle*.⁸⁰ Therefore, the court denied reimbursement to Courtney’s parents, demonstrating one of the first signs of the Third Circuit’s shift toward restrictive treatment of reimbursement requests.⁸¹

III. FLUNKING ITS OWN TEST OR KEEPING UP WITH THE CLASS? THE THIRD CIRCUIT’S DECISION IN *MUNIR*

In *Munir*, the Third Circuit again addressed the boundaries of reimbursement entitlement under the IDEA.⁸² The court considered whether a student’s placement in a residential facility that provided psychological treatment and education services qualified for reimbursement.⁸³ Though the court compared the placement to those in previous Third Circuit cases and a Ninth Circuit case, the court integrated the medically-induced motive for placement into its analysis and subsequently denied reimbursement.⁸⁴ This holding not only mirrors the alternative evaluations embraced by other circuit courts, but it is also representative of the Third Circuit’s general transition toward restrictive treatment of reimbursement claims.⁸⁵

Circuit in *Mary T.* as having “effectively reversed, while purporting to distinguish, decades of analysis under the principles of [*Kruelle*]”. *Compare Mary T.*, 575 F.3d at 245 (identifying medical cause for Courtney’s placement), with Brief for Appellant at 55–56, *Munir v. Pottsville Area Sch. Dist.*, 723 F.3d 423 (3d Cir. 2013) (No. 12-3008), 2012 WL 6813033 [hereinafter Brief for Appellant] (noting insignificance of reason for placement under *Kruelle*).

78. *See Mary T.*, 575 F.3d at 245 (pointing to medical nature of treatment).

79. *See id.* (noting medical accreditation of residential facility).

80. *See id.* at 246 (“The present case is clearly distinguishable from *Kruelle*.”).

81. *See id.* at 248–49 (denying parents’ request for reimbursement).

82. *See Munir v. Pottsville Area Sch. Dist.*, 723 F.3d 423, 425–26 (3d Cir. 2013) (framing case as inquiry regarding coverage for services under IDEA).

83. *See id.* at 426 (describing *Munir*’s efforts to obtain reimbursement for son’s placement).

84. *See id.* at 431–32 (differentiating minor O.M.’s placement from Paul’s placement in *Kruelle*); *see also id.* at 429 (crediting medical emergency as prompting O.M.’s residential placement). The *Munir* court specifically compared the facts at hand with the cases of *Mary T.* and *Clovis*, even though *Clovis* is a Ninth Circuit case. *See id.* at 432–34.

85. *Compare Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 300 (5th Cir. 2009) (explaining treatment at residential facility must be “primarily oriented

A. *The Road to Residential Placement: Facts and Background of Munir*

Munir stems from a parent's challenge to the Pottsville Area School District's denial of reimbursement for a student's residential placement.⁸⁶ Parent and appellant, Muhammad Munir (Munir), unilaterally placed his minor son, O.M., in two private facilities following O.M.'s multiple suicide attempts.⁸⁷ The school district previously evaluated O.M. for a learning disability but determined O.M. was not eligible for learning disability services or emotional disturbance services.⁸⁸ Although O.M. passed his public school classes, he continued to display suicidal behavior, requiring multiple hospitalizations and warranting requests for district involvement.⁸⁹

Following one of O.M.'s hospital stays in November 2008, the school district created a "Rehabilitation Act § 504 plan" for O.M.⁹⁰ However, the school district did not create an IEP for O.M.⁹¹ After another suicide threat and subsequent hospitalization in January 2009, O.M.'s parents enrolled him at Wediko Children's Services (Wediko), without formal approval from O.M.'s school district.⁹² While enrolled in Wediko, O.M.

towards educational improvement" in order to be eligible for reimbursement), and Dale M. *ex rel.* Alice M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 237 F.3d 813, 817 (7th Cir. 2001) (denying reimbursement due to placement's primary purpose of confinement), with *Munir*, 723 F.3d at 431-32 (commenting on facility's primary focus on mental health treatment).

86. See *Munir*, 723 F.3d at 426 (providing procedural history of case).

87. See *id.* at 426-28 (enumerating O.M.'s seven separate hospitalizations between 2005 and 2009 for suicide threats and attempts).

88. See *id.* at 426-27 (describing school district's previous testing of O.M.). Responding to O.M.'s pattern of suicidal threats and gestures and resulting hospital treatment, the Pottsville Area School District first conducted a psycho-educational evaluation of O.M. in 2005. See *id.* at 427. The school district's evaluation included testing O.M. for a learning disability to determine whether he qualified for IDEA services while he was enrolled in a Pottsville public middle school. See *id.* Although the school district's evaluation did not lead to the development of a learning disability prognosis or development of an IEP, O.M.'s suicidal behavior continued. See *id.* at 427-28 (describing O.M.'s subsequent hospital visits for suicidal behavior in April 2008, summer 2008, September 2008, November 2008, and January 2009).

89. See *id.* at 427 ("O.M. returned to Pottsville in the fall of 2005 and performed well academically for three years."). But see *id.* ("He initially decided to take honors math classes, but began struggling academically and dropped them."). The court referred to O.M.'s average academic performance to dispel assertions that "O.M.'s condition was affecting his ability to learn at that time." See *id.* at 429. Nevertheless, O.M.'s suicidal tendencies continued, and following O.M.'s hospitalization in early September 2008, O.M.'s parents requested an IEP for their son. See *id.* at 427.

90. See *id.* (describing school district's response).

91. See *id.* (noting school district's failure to create IEP). For a discussion of school districts' obligation to create appropriate IEPs in order to satisfy FAPE obligations under the IDEA, see *supra* notes 24-26 and accompanying text.

92. See *Munir*, 723 F.3d at 428 (describing O.M.'s placement). Wediko Children's Services, where O.M. remained for the rest of the school year, is a private therapeutic residential treatment center in New Hampshire. See *id.*

received daily individual and group therapies, which included training in social skills, emotional regulation, stress management, and conflict resolution.⁹³ Wediko also offered a full school day with a curriculum that met New Hampshire's educational standards.⁹⁴ After two to three weeks at Wediko, O.M. was able to attend small educational classes and "debriefing periods" that the facility offered.⁹⁵

Following Wediko's involvement, O.M.'s original school district re-evaluated O.M.'s need for an IEP and offered new services in response to his educational needs.⁹⁶ O.M.'s parents nevertheless rejected the school district's proposed IEP because it did not provide O.M. with small classes or the same types of counseling services he was receiving at Wediko.⁹⁷ Alternatively, O.M.'s parents decided to have their son complete the 2008–2009 school year at Wediko and then enrolled O.M. in The Phelps School (Phelps) for the following school year.⁹⁸ In August 2009, Munir initiated efforts to obtain school district financial support for O.M.'s placements in Wediko and Phelps, ultimately leading to a court of appeals challenge for tuition reimbursement totaling \$68,752.61.⁹⁹

B. *The Third Circuit's Analysis on Who Should Foot the Bill for O.M.'s "Free" Education*

The Third Circuit held Munir was not entitled to reimbursement for O.M.'s placements in either facility, because both placements failed to

93. *See id.* (describing O.M.'s treatment while enrolled at Wediko).

94. *See id.* (expanding on Wediko's offerings).

95. *See id.* (reporting O.M.'s participation in classes at Wediko). The classes were graded on a pass-fail basis, and there were three debriefing periods included in every school day used to assess how well O.M. was maintaining control of his thoughts, mood, and anxiety. *See id.*

96. *See id.* (discussing school district's response to O.M.'s placement at Wediko). While O.M. was enrolled in Wediko, the facility conducted a series of cognitive and academic achievement tests on him in February 2009, to evaluate his "social-emotional functioning." *See id.* Wediko then contacted O.M.'s original school district to recommend an IEP for him and provided the school district with its findings and recommendations. *See id.* In May 2009, the school district finally offered an IEP for O.M., and in September 2009, it added a cognitive-behavioral curriculum for students experiencing anxiety and depression, which included psychological services and increased social work services. *See id.*

97. *See id.* (explaining Munir's rejection of proposed IEP).

98. *See id.* (describing O.M.'s subsequent placement in The Phelps School). The Phelps School is a residential school licensed by the Pennsylvania Department of Education. *See id.* O.M.'s parents transferred him to the new facility because they believed that O.M.'s suicide risk level "had decreased to the point where he could function in a less intensive environment." *See id.* Further, O.M.'s parents liked that the school was closer to home and offered small classes and a supportive environment. *See id.* Following O.M.'s time at The Phelps School, he soon transitioned to a regular special education program and was eventually placed back in his "peer age group" before graduating. *See* Brief for Appellant, *supra* note 77, at 55.

99. *See Munir*, 723 F.3d at 428–29, 431 (tracing efforts to obtain reimbursement for O.M.'s placements).

meet the IDEA's reimbursement requirements.¹⁰⁰ To qualify for reimbursement, Munir was required to establish that: (1) the school district failed to provide O.M. with a FAPE, and (2) O.M.'s new placements were appropriate.¹⁰¹ The first prong of the test was not satisfied for O.M.'s placement in Phelps, because O.M.'s school district had created a proper IEP before he was transferred to the private facility.¹⁰² Additionally, although O.M.'s transfer to Wediko satisfied the first prong of the reimbursement test, the court determined that Wediko was not an "appropriate" placement, thereby failing the second prong.¹⁰³

The court of appeals affirmed the district court's holding that Wediko did not constitute an appropriate placement, as the "primary purpose" of O.M.'s enrollment at the facility was the treatment of his mental health issues, as opposed to educational needs.¹⁰⁴ The Third Circuit referred to the mental health motive for O.M.'s placement as evidence contradicting the educational claim for reimbursement.¹⁰⁵ Additionally, the court viewed the involvement of a clinical psychologist in formulating O.M.'s

100. *See id.* at 430–31, 434 (upholding district court's reimbursement denials for both of O.M.'s residential placements). In evaluating Munir's request for reimbursement, the Third Circuit considered the two-prong test prescribed by the IDEA. *See id.* at 430 ("To be entitled to reimbursement, Munir must show that the School District failed to provide O.M. with a FAPE and that the alternative private placement was appropriate.").

101. *See* *Mary T. v. Sch. Dist. of Phila.*, 575 F.3d 235, 242 (3d Cir. 2009) (noting reimbursement requirements for unilateral private placements under IDEA).

102. *See* *Munir*, 723 F.3d at 430 (rejecting reimbursement request for O.M.'s enrollment at Phelps). The court held that the school district created an IEP for O.M. that was reasonably calculated to meet his educational needs and thus proper for FAPE purposes. *See id.* at 430–31; *see also id.* at 434 ("In designing O.M.'s IEPs, the School District took into account Wediko's evaluation of O.M. and 'incorporated virtually all of the Wediko recommendations.'" (quoting *Munir v. Pottsville Area Sch. Dist.*, No. 3:10-cv-0855, 2012 WL 2194543, at *9 (M.D. Pa. June 14, 2012))). As the IEP was in place before O.M. was enrolled at Phelps, and as the administration of such an IEP fulfilled the school district's duty to provide a FAPE under the IDEA, Munir was not entitled to reimbursement for the Phelps placement because the school district did not fail to provide a FAPE. *See id.*

In considering reimbursement for O.M.'s placement in Wediko, the court acknowledged that the absence of an IEP at the time of O.M.'s enrollment satisfied the first prong of the reimbursement requirements under the IDEA. *See id.* at 430. Thus, while the school district had provided O.M. with a FAPE before he had enrolled at Phelps, the district had not similarly provided the requisite education before O.M. enrolled in Wediko. *See id.*

103. *See id.* at 430–31 (detailing court's analysis of O.M.'s placement at Wediko).

104. *See id.* at 429 (weighing evidence suggesting that "the primary purpose of that placement was the provision of mental health treatment rather than provision of special education," in finding against Munir).

105. *See id.* (reiterating comments made by O.M.'s hearing officer that his placement was result of "a medical/mental health crisis that required immediate treatment"). The court further pointed to testimony from O.M.'s father and witnesses from Wediko to support reimbursement denial due to O.M.'s health-based motives for placement. *See id.* ("This finding was supported by the testimony of O.M.'s father and witnesses from Wediko, who 'emphasized that Student needed

treatment plan as indicative that Wediko's services "were not focused primarily on education."¹⁰⁶ Rather, the court identified the educational benefits that O.M. undisputedly received during his time at Wediko as merely "incidental," thereby rendering reimbursement improper.¹⁰⁷

In its analysis, the Third Circuit cited *Kruelle*, acknowledging that a school district may be responsible for a residential placement when a child with disabilities requires a highly structured environment to obtain any level of educational benefits.¹⁰⁸ Nevertheless, the Third Circuit distinguished O.M.'s placement from Paul Kruelle's, because O.M.'s placement provided only an "incidental educational benefit" arising from "twenty-four-hour supervision for medical, social, or emotional reasons."¹⁰⁹ The court noted that O.M.'s needs did not parallel Paul Kruelle's needs for a highly structured environment to obtain any level of educational benefits; alternatively, O.M.'s need for a private environment stemmed from medical reasons only.¹¹⁰

IV. TAKING A PEEK AT THE ANSWER KEY: DISCUSSING IMPLICATIONS OF THE THIRD CIRCUIT'S NEW REIMBURSEMENT ANALYSIS

The Third Circuit's analysis in *Munir* is a departure from its once broad interpretation of reimbursement entitlement and is instead in line with an overarching trend in favor of restricting school district financial responsibility for unilateral placements.¹¹¹ The specific focus on motive in the Third Circuit's new reimbursement standard threatens results that contradict the purpose of the IDEA and ignore the nature of complex physical, mental, and emotional disabilities.¹¹² Furthermore, the Third Circuit's failure to clarify its shift away from the inextricably intertwined

to attend Wediko in order to keep him safe from the effects of his depression, which led to suicide threats and gestures when he was living at home.'").

106. *See id.* (supporting determination that placement's primary purpose was medical in nature).

107. *See id.* at 430 (adopting lower court's observation).

108. *See id.* at 431 (citing *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 693 (3d Cir. 1981)). The court questioned whether the particular placement was "necessary to provide special education and related services." *See id.* (quoting 34 C.F.R. § 300.104 (2006)) (internal quotation marks omitted).

109. *See id.* at 432 (distinguishing residential placement qualifying for reimbursement from placement that alternatively provides mostly medical treatment).

110. *See id.* (classifying O.M.'s educational benefits as "incidental" to his overall medical treatment).

111. *See* Alefia Mithaiwala, *An Update on Private School Reimbursement Under the IDEA: Some Good News for School Districts*, MICKES GOLDMAN O'TOOLE, LLC (Jan. 1, 2010), <http://www.mickesgoldman.com/mgo/articles/an-update-on-private-school-reimbursement-under-the-idea-some-good-news-for-school-districts-by-alefia-mithaiwala/> (referring to "growing trend" suggesting "courts are becoming impatient with parents who seek reimbursement and expenditure of public school funds to deal with students' medical and delinquent behavioral issues").

112. For a discussion of the potential consequences of the Third Circuit's incorporation of motive into its reimbursement analysis, see *infra* notes 121–24, 144–46, 150–53 and accompanying text.

test it established in *Kruelle* threatens to create confusion for practitioners seeking to present cases in line with the court's preferences.¹¹³

This section first addresses how the *Munir* court's reimbursement evaluation incorporated factors and concerns not present in the Third Circuit's original development of the *Kruelle* inextricably intertwined test.¹¹⁴ Next, this section addresses the Third Circuit's failure to distinguish *Munir* from cases like *Mary T.* and *Clovis*, further revealing the court's abandonment of the inextricably intertwined test in exchange for a new standard that incorporates the reimbursement tests of other circuits.¹¹⁵ Finally, this section addresses the consequences of the Third Circuit's new reimbursement standard in light of the court's failure to expressly recognize its departure from the original inextricably intertwined test.¹¹⁶

A. *New Test, New Focus*

The Third Circuit's holding in *Munir* exemplified the court's incorporation of new priorities and factors into its reimbursement analysis.¹¹⁷ The court's evaluation notably rejected indications that O.M.'s emotional and learning disabilities were intertwined and ignored the simultaneous academic and psychological treatment that O.M. received at Wediko.¹¹⁸ Rather, the opinion extensively focused on the medically-induced motive for O.M.'s placement, contradicting other courts' descriptions of the Third Circuit's overly inclusive construal of proper residential placements.¹¹⁹

Overlooking the indisputable academic offerings Wediko provided, the Third Circuit's determination turned on the reasoning that Wediko's offerings "were directed primarily at the child's medical or emotional

113. For a discussion of the difficulties for practitioners created by the Third Circuit's failure to expressly clarify its new reimbursement standard, see *infra* notes 141–43, 147–49 and accompanying text.

114. For a discussion of the evolution of the Third Circuit's reimbursement standard exemplified by *Munir*, see *infra* notes 117–32 and accompanying text.

115. For a discussion of the Third Circuit's missed opportunity to distinguish *Munir* from *Mary T.* and *Clovis*, see *infra* notes 133–46 and accompanying text.

116. For a discussion of the consequences of the Third Circuit's new reimbursement standard, see *infra* notes 147–53 and accompanying text.

117. For a discussion of the changes in the Third Circuit's priorities in *Munir*, see *infra* notes 118–32 and accompanying text.

118. See *Munir v. Pottsville Area Sch. Dist.*, 723 F.3d 423, 433 (3d Cir. 2013) ("Unlike the students in *Mary T.* and *Clovis*, O.M. was placed at a facility that did offer an educational component."). *But see id.* ("O.M.'s participation in some educational programs at Wediko does not conclusively establish that the purpose of his placement there was educational.").

119. *Compare id.* at 434 ("Because O.M.'s parents have not shown that they placed O.M. at Wediko in order to meet his specialized educational needs, the District Court correctly determined that they are not entitled to reimbursement."), *with* *Petition for a Writ of Certiorari*, *supra* note 1, at 13 (describing "extraordinarily broad test for residential placements" utilized by courts adopting standard developed in *Kruelle*).

needs”¹²⁰ Thus, while the Third Circuit’s opinion resolves concerns for over-inclusivity of eligible services under the IDEA, it also eliminated any redress for Munir despite the school district’s complete lack of an IEP for O.M.¹²¹ Such a result fails to satisfy the IDEA’s “broad purpose” of providing a FAPE to qualifying children.¹²² Alternatively, the court’s denial of reimbursement, despite the district’s failure to create an appropriate IEP, exemplifies a handicapped student’s exclusion from the public education system: the same outcome Congress intended to avoid with the passage of the IDEA.¹²³ Ultimately, the narrow definition of “appropriate” placement the court employed effectively required Munir to pay for the district’s abandonment of its IDEA obligations.¹²⁴

Furthermore, the *Munir* opinion stressed O.M.’s satisfactory grades in public school as evidence that his educational needs were already adequately addressed without residential placement.¹²⁵ Yet, the Third Circuit failed to reflect on the amount of school that O.M. missed due to hospitalizations following his suicide threats and attempts.¹²⁶ Had the court acknowledged that O.M.’s placement sought to resolve emotional disabilities that directly prevented educational progress in light of forced absences, Munir’s request for reimbursement would have been grounded in a clear educational purpose for his son’s residential placement.¹²⁷

Moreover, the court overlooked O.M.’s overall success and improvement while partaking in Wediko’s programming.¹²⁸ The services that

120. See *Munir*, 723 F.3d at 432 (drawing on references to primary purpose of placement from *Mary T.* and *Clovis*).

121. See Kessler, *supra* note 16 (“The court’s opinion treats the district’s obligations under IDEA leniently by failing to address the lack of a proposed IEP between 2005 and 2009.”).

122. See *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 238 (2009) (describing IDEA’s “broad purpose”).

123. See *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 691 (3d Cir. 1981) (describing IDEA’s goal to establish “the personal independence and enhance the productive capacities of handicapped citizens”).

124. See *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 370 (1985) (“If that were the case, the child’s right to a *free* appropriate public education, the parents’ right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete.”).

125. See *Munir*, 723 F.3d at 433–34 (“O.M. was an above-average student at Pottsville, who had no serious problem with attendance and socialized well with other students.”).

126. See Brief for Appellant, *supra* note 77, at 45, 54 (pointing to O.M.’s hospital stays that “caused him to miss school” and “[h]is daily trips to the guidance office, and leaving early from school several times” as evidence that O.M.’s emotional issues adversely affected his attendance and education).

127. See *id.* at 54 (describing Munir’s attempt to show educational purpose for placement, as facility could remedy attendance problems stemming from O.M.’s emotional issues).

128. See *id.* at 52 (“The record suggests that it is residing at the private school that is the key to the absence of suicide threats, gestures and attempts since January 2009” (alteration in original) (quoting Hearing Officer Opinion) (internal quotation marks omitted)).

O.M. received at Wediko enabled his transfer to a less-intensive environment and eventual placement back into classes with his peer age group.¹²⁹ Thus, Wediko's dual mental health and academic program conveyed a "meaningful benefit" to O.M. in the form of control over his suicidal thoughts and tendencies.¹³⁰ O.M.'s increased control following his enrollment in Wediko enabled him to miss less school, which translated to an undoubtedly meaningful benefit for his education.¹³¹ Yet, the Third Circuit's analysis focused on the medical emergency that induced O.M.'s placement rather than the educational services he received at Wediko or his resulting academic success from the placement.¹³²

B. *Dodging the Opportunity to Distinguish*

The Third Circuit's decision in *Munir* also restricted entitlement to reimbursement by rejecting the opportunity to distinguish the case from *Mary T.* and *Clovis*.¹³³ Instead, the Third Circuit pointed to both cases as evidence that *Munir* was not entitled to reimbursement for his unilateral placement of O.M.¹³⁴ While the *Munir* court drew on similarities between *Mary T.* and *Clovis* with the case at hand, a number of factual distinctions afforded the Third Circuit the ability to distinguish *Munir* from the cases where courts denied requests for reimbursement.¹³⁵

First, both residential facilities at issue in *Mary T.* and *Clovis* were psychiatric facilities without educational affiliation.¹³⁶ The minor educational services offered at the respective facilities do not compare to Wediko's extensive educational programming.¹³⁷ Wediko's provision of

129. *See id.* at 55 (describing O.M.'s progress at Wediko).

130. *See id.* (highlighting O.M.'s mental health milestones that led to academic success).

131. *See id.* (commenting on end of O.M.'s suicide attempts following his enrollment at Wediko).

132. *See Munir v. Pottsville Area Sch. Dist.*, 723 F.3d 423, 429 (3d Cir. 2013) (highlighting O.M.'s medically-induced placement).

133. *See id.* at 433 (noting Wediko provides an "educational component" unlike programs in *Mary T.* and *Clovis* where facilities did not have school affiliation or educational accreditation). *But see id.* (explaining that while facilities' failure to offer educational programs "may be strong evidence that the child was placed there to meet his medical or emotional needs," existence of educational program alone is not conclusive evidence that placement in such facility is for educational purposes).

134. *See id.* at 432–34 (comparing facts of *Munir* to facts in *Mary T.* and *Clovis*).

135. For a discussion of the distinctions between *Munir* and *Mary T.* and *Clovis*, see *infra* notes 136–43 and accompanying text.

136. *See* Brief for Appellant, *supra* note 77, at 52 (noting that Courtney's placement in *Mary T.* "was not at a school; she was in a mental health rehabilitation facility").

137. *Compare* *Mary T. v. Sch. Dist. of Phila.*, 575 F.3d 235, 244–45 (3d Cir. 2009) (describing limited academic offerings), *and* *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 646 (9th Cir. 1990) (same), *with* *Munir*, 723 F.3d at 428 (describing Wediko's extensive educational components).

debriefing sessions between classes provided O.M. with the opportunity to discuss his progress controlling his anxieties and thoughts during his instruction and classes.¹³⁸ These sessions exhibited a program that quite literally intertwined O.M.'s emotional treatment with academic resources.¹³⁹ Such programming suggests the educational services O.M. received at Wediko were not merely "incidental" benefits, but rather, part of an intentional plan to address his overlapping academic and psychological challenges.¹⁴⁰

Instead of distinguishing O.M.'s placement in Wediko from the residential placements in *Mary T.* and *Clovis*, the Third Circuit incorporated those courts' consideration of motive for placement into its analysis in *Munir*.¹⁴¹ The *Munir* court's repeated references to the medically-oriented primary purposes of Wediko also echo components of the primarily oriented tests that other circuits created in place of the inextricably intertwined test.¹⁴² Thus, the Third Circuit's reference to reimbursement as contingent on a facility's primary focus on education blurs the line between the inextricably intertwined test and the Fifth and Seventh Circuits' primarily oriented tests. This opinion not only demonstrates the Third Circuit's transition from its original reimbursement standard, but also re-

138. See *Munir*, 723 F.3d at 428 (explaining O.M.'s debriefing sessions).

139. See *id.* (describing Wediko's combination of classes and debriefing sessions).

140. See Brief for Appellant, *supra* note 77, at 53 (arguing O.M.'s educational and psychological treatments were combined because emotional disturbance and academic issues "were not severable").

141. See *supra* notes 69, 76–81, 119–20 and accompanying text (discussing focus on motive for placement in *Clovis*, *Mary T.*, and *Munir* respectively).

142. For a discussion of courts' attention to the primary orientation of treatment in residential placements in *Munir*, *Dale M.*, and *Michael Z.*, see *supra* note 85 and accompanying text.

In *Kruelle*, the Third Circuit demonstrated an understanding of the "necessarily broad" reach of proper educational services anticipated in the IDEA, which often made it impossible to distinguish treatment as either health-based or education-based. See *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 693 (3d Cir. 1981) ("Where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point." (quoting *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980)) (internal quotation marks omitted)). The Fifth and Seventh Circuits alternatively envisioned a dichotomy of "appropriate" and excludable treatment and conditioned reimbursement on services' appearance as "primarily oriented" towards education. See, e.g., *Dale M. ex rel. Alice M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307*, 237 F.3d 813, 817 (7th Cir. 2001) (drawing distinction "between services primarily oriented toward enabling a disabled child to obtain an education and services oriented more toward enabling the child to engage in noneducational activities"). But, as the Tenth Circuit observed when it refused to adopt a primarily oriented standard, limiting reimbursement to those programs with a strict focus on education overlooks the potential of residential placements that enable a student "to receive a meaningful education" while not generally being "primarily oriented toward educational goals." See *Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1238 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 2857 (2013).

flects the resulting lack of clarity for practitioners attempting to adhere to the circuit's new methodology.¹⁴³

The Third Circuit's departure from the *Kruelle* test, as exemplified by *Munir*, suggests that simply demonstrating a child's inextricably intertwined health-based and learning disabilities is no longer adequate to obtain reimbursement for residential placement.¹⁴⁴ *Munir* instead establishes an education-based primary purpose of placement as an additional requirement that parents seeking reimbursement must meet.¹⁴⁵ Thus, the Third Circuit's holding requires an evolution of practitioners' approach to reimbursement cases.¹⁴⁶

C. *Consequences of the Third Circuit's New Normal in Reimbursement Cases*

Despite the absence of motive as a relevant factor when the Third Circuit developed the *Kruelle* test, in *Munir*, the court consistently emphasized that O.M.'s placement was triggered by the onset of a mental health emergency.¹⁴⁷ While the court's decision to adapt its initial *Kruelle* standard is not problematic in and of itself, the court's failure to clarify its departure from its original analysis threatens significant confusion for practitioners.¹⁴⁸ Without express recognition of the transition away from the inextricably intertwined test, practitioners lack sufficient guidance on

143. See Martín, *supra* note 54, at 7–8 (noting similarities between Third Circuit and Fifth Circuit consideration of primary purpose of residential placements). In summarizing the Third Circuit's evaluation of the appropriateness of residential placement in *Mary T.*, Martín commented on the court's consideration of Courtney's placement in a "medically-oriented" facility. See *id.* at 7. Martín compared the court's acknowledgement that Courtney's placement was "not primarily oriented at enabling the child to receive an education" to the Fifth Circuit's use of the "primarily oriented" test. See *id.* Martín explained, "[t]hus, one could argue that the Third and Fifth Circuit are not that far off in their respective analyses, although they certainly use different wording and structure their 'tests' in different ways." *Id.* at 8.

144. For a discussion of changes in the Third Circuit's analysis in *Munir*, when compared with its analysis in *Kruelle*, see *infra* note 147 and accompanying text.

145. See *Munir v. Pottsville Area Sch. Dist.*, 723 F.3d 423, 429 (3d Cir. 2013) (denying reimbursement because O.M.'s placement was result of "medical/mental health crisis that required immediate treatment" (internal quotation marks omitted)).

146. For practitioner tips in response to the Third Circuits' new reimbursement standard, see *infra* notes 154–76 and accompanying text.

147. See *Munir*, 723 F.3d at 432 (exemplifying Third Circuit's emphasis on motive for placement). But see Petition for a Writ of Certiorari, *supra* note 1, at 13–14 (describing inextricably intertwined test as mandating "public school districts to fund a residential placement as long as the placement confers some educational benefits—regardless of the reason for the placement").

148. See *Munir*, 723 F.3d at 431–32 (referring to court's analysis in its *Kruelle* decision). Despite the *Munir* court's references to the Third Circuit's definition of appropriate residential services developed in *Kruelle*, the *Munir* court also referred to the health emergency that prompted O.M.'s placement, although no such consideration for motive was originally provided in *Kruelle*. See *id.* at 433.

the proper arguments that should be made in accordance with the Third Circuit's new reimbursement analysis.¹⁴⁹

Additionally, the incorporation of motive into the Third Circuit's reimbursement analysis following *Munir* effectively prevents reimbursement for all future Third Circuit residential placements that follow a health-based emergency.¹⁵⁰ The *Munir* holding disregards the interconnectivity between a child's disability and ability to achieve educational goals by stipulating that all treatment initiated by a health emergency is not appropriate for reimbursement purposes.¹⁵¹ Therefore, the Third Circuit's dispositive consideration of motive for placement ignores overlapping disabilities that require treatment even in the immediate aftermath of a health emergency.¹⁵² Despite the possibility of a coincidental medical emergency spurring residential placement for a student that already required such placement, the dispositive treatment of motive for placement would automatically render the placement inappropriate for reimbursement purposes.¹⁵³

V. HOW TO SCORE EXTRA CREDIT IN THIRD CIRCUIT REIMBURSEMENT CASES: RECOMMENDATIONS FOR PRACTITIONERS

Reimbursement debates impose significant costs on all parties involved.¹⁵⁴ Therefore, counsel for school districts and parents alike can benefit from adjusting their litigation strategies in light of the holdings of recent reimbursement cases.¹⁵⁵ Further, recognizing the time, energy, and resources expended on reimbursement legal battles, attorneys should

149. See *id.* at 431–32 (referencing *Kruelle*, but providing no description of factors incorporated into Third Circuit's current reimbursement analysis that were not similarly included in *Kruelle*). For a discussion of changes in *Munir* when compared with the Third Circuit's analysis in *Kruelle*, see *supra* note 147 and accompanying text.

150. See Doty, *supra* note 27, at 263 (noting connection between “motive for the private placement” and eligibility for reimbursement). Doty refers to a number of cases where reimbursement was denied because placement was a result of “medical or psychiatric” reasons, “family conflict, drug abuse, or delinquent behavior.” See *id.* at 264.

151. See *Munir*, 723 F.3d at 433 (denying reimbursement for O.M.'s placement at Wediko because his placement “was prompted by a medical emergency”).

152. See *id.* (holding placement at Wediko was inappropriate under IDEA despite district court's recognition that O.M. “undoubtedly benefitted” from facility's educational program).

153. For a discussion of the ramifications of the Third Circuit's dispositive consideration of motive, see *supra* notes 150–52 and accompanying text.

154. See Mayes & Zirkel, *supra* note 3, at 62 (“The stakes in such lawsuits are extraordinarily high, with effects that reach beyond the immediate parties.”).

155. Telephone Interview with Marion M. Walsh, Attorney, Littman Krooks LLP (Feb. 17, 2014) (advocating for increased negotiations between all parties in reimbursement disputes to reduce significant litigation costs).

recommend negotiations between parents and the school district before final placement decisions are made.¹⁵⁶

A. *Tips for Parents on Acing the Race to Reimbursement*

When fighting for unilateral residential placement reimbursement, parents have a difficult task in convincing courts that the placement is “appropriate” under the IDEA.¹⁵⁷ Showing academic progress and psychological growth is important to demonstrate the success of residential treatment, but as *Munir* indicated, progress alone will not always lead to reimbursement.¹⁵⁸ One special education attorney suggests presenting testimony to portray that the particular placement is “individually tailored for the student’s specific needs.”¹⁵⁹ Features such as licensed teacher-employees, strong monitoring, use of proven methodologies, counseling specific to academic challenges, educational accreditation, and solid educational programming are also all ideal factors to highlight in any residential placement.¹⁶⁰

Frustration often accompanies representing parents in reimbursement disputes based on school districts’ tendencies to mislabel disabilities as medical in nature when unfamiliar with the complexities of emotional disturbances.¹⁶¹ One special education attorney explains that parents of students with passing grades and high cognitive levels often face an uphill battle, even when initially requesting IDEA services, due to misconceptions regarding the manifestation of learning disabilities.¹⁶² Furthermore, school districts sometimes fail to comprehend that even those disabilities that appear medical in nature are potentially covered under the IDEA due

156. *See id.* (describing “success stories” where parties reached settlement, allocated funds to education rather than litigation).

157. *See id.* (noting burden is on parents to convince courts that placement is appropriate).

158. *Compare* Brief for Appellant, *supra* note 77, at 55 (“The obvious answer to the question of whether O.M.’s emotional disturbance was severable from his academic needs is that once O.M. was at Wediko, his emotional state immediately improved.”), *and* Telephone Interview with Marion M. Walsh, *supra* note 155 (pointing to progress as important factor when fighting for reimbursement), *with* *Munir v. Pottsville Area Sch. Dist.*, 723 F.3d 423, 433 (3d Cir. 2013) (“[A]ny educational benefit he received from the Wediko placement was incidental.”).

159. Telephone Interview with Marion M. Walsh, *supra* note 155 (explaining that relating methods treatment facility provides to particularities of students’ emotional issues helps demonstrate that placement was strategically selected to address child’s needs).

160. *See id.* (providing suggestions for parents bringing reimbursement suits).

161. *See id.* (tracing challenges of reimbursement claims). Walsh pointed to anorexia as a disorder that school districts often do not know how to address. *See id.* She explained that districts will automatically label anorexia as a medical disorder, overlooking the impact it may have by preventing students from attending class. *See id.*

162. *See id.* (commenting on school districts’ limited understanding regarding reality of intertwined medical and educational disabilities).

to the adverse impact on attendance that such issues create for students.¹⁶³

In light of the misunderstandings surrounding the existence of learning disabilities, settlement negotiations before unilateral placement offer parents' attorneys the opportunity to clarify the realities of students' learning needs and capabilities.¹⁶⁴ Such negotiations may enable parents to reach an agreement through which their child's school district agrees to provide the student with additional services, potentially preventing the need for residential placement altogether.¹⁶⁵ Even if negotiations cannot avoid the need for residential placement, parents' efforts to work with their child's school district before a medical emergency occurs avoid labeling the placement as medically motivated if necessary after a health-based occurrence.¹⁶⁶ Pre-placement negotiations also save parents litigation costs and redirect school district funding to be used on better means, such as training school personnel to identify disabilities earlier.¹⁶⁷

B. *Instructions on an A+ Defense for School Districts*

Counsel for school districts should attempt to establish a "bright line" division between medical treatment and academic services provided in residential facilities.¹⁶⁸ Even if a residential facility is accredited by an educational agency, school districts can highlight involvement of medical staff in creating and executing the program as evidence that a program is primarily medical in scope.¹⁶⁹ Further, school districts' counsel should emphasize any disparities in psychological versus educational services offered and attempt to isolate psychological breakdowns as out-of-school occurrences, thereby rendering them unconnected to academic progress.¹⁷⁰

Reimbursement cases under the IDEA pose financial strains on school districts, even if the court does not ultimately order reimburse-

163. *See id.* (elaborating on school districts' incomplete understanding of all disabilities that potentially qualify for services under IDEA).

164. *See id.* (pointing to settlements as best option for parents).

165. *See id.* (explaining benefits of early negotiations with school districts to avoid need for unilateral placement).

166. For a discussion of the court's focus on medically-induced placement in *Munir* and the ramifications of the Third Circuit's dispositive consideration of such medically-based motives for placement, see *supra* notes 117, 150-53 and accompanying text.

167. *See* Telephone Interview with Marion M. Walsh, *supra* note 155 (describing "getting the school district on board" as key to progress in treating student's emotional disabilities).

168. *See supra* note 32 (describing treatment encompassed by IDEA's definition of "related services").

169. *See, e.g.,* *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 645 (9th Cir. 1990) (pointing to facility's use of medical staff in providing Michelle's treatment).

170. *See* Telephone Interview with Marion M. Walsh, *supra* note 155 (describing strategies used by school districts in defending reimbursement actions).

ment.¹⁷¹ Therefore, attorneys representing school districts should instruct their clients to take proactive measures prior to having to defend reimbursement claims.¹⁷² Efforts to address parents' claims of public education shortcomings may help to mitigate the potential for lofty reimbursement awards.¹⁷³ One commentator suggests that school districts propose IEP reevaluation immediately upon notice of parent interest in unilateral placement.¹⁷⁴ Incorporating objective consultants into efforts to evaluate the success of current IEPs or special education services allows school districts to demonstrate their efforts to fulfill FAPE requirements.¹⁷⁵ Further, if parents continue to seek unilateral placement after reevaluation attempts, school districts have a basis for arguing that parents failed to cooperate in the "collaborative, interactive approach envisioned by the IDEA."¹⁷⁶

VI. THE THIRD CIRCUIT'S GRADUATION TO A NEW REIMBURSEMENT ANALYSIS

Commenters once credited the Third Circuit with leading the charge in developing a reimbursement standard cognizant of the complicated reality for students with severe disabilities and intertwined academic challenges.¹⁷⁷ Yet, opinions such as *Munir* reveal the court's imposition of additional barriers that parents must now overcome to qualify for reimbursement for residential placements.¹⁷⁸ Critics will disagree on whether the Third Circuit's transition to a narrow interpretation of proper placement represents a necessary response to an overly burdensome test or an ill-advised shift requiring parents to shoulder the costs regularly reserved for school districts.¹⁷⁹

171. See Doty, *supra* note 27, at 250 (describing "demands for private residential care" as "disastrous regardless of the outcome" due to "time, money, and human capital" schools must dispose of when fighting requests).

172. See Martin, *supra* note 54, at 23 (warning against school district inaction following private placement).

173. See *id.* (identifying correlation between school districts' "fail[ure] to respond proportionately to the challenges presented by the student's needs" and reimbursement awards for unilateral placement).

174. See *id.* (encouraging school districts to duplicate "program strengths" of residential placements parents are interested in and to "incorporate similar services or interventions into the student's IEP").

175. See *id.* (enumerating steps that both help to avoid unilateral placement and also defend school districts should reimbursement case arise).

176. See *id.* (recommending school districts "document any instances of lack of cooperation on the part of parents in the IEP development and revision process").

177. See Zirkel, *supra* note 6, at 881 (describing Third Circuit's positive reputation for IDEA interpretation).

178. See Kessler, *supra* note 16 (identifying new standard to qualify for reimbursement under *Munir*).

179. Compare *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 299 (5th Cir. 2009) (disapproving of inextricably intertwined test as overly broad), with Kessler, *supra* note 16 (criticizing narrow interpretation adopted in *Munir*).

Regardless, the court's opinion in *Munir* has made it clear that the Third Circuit's analysis of residential placements has transformed from its initial creation of the inextricably intertwined test in *Kruelle*.¹⁸⁰ The Third Circuit's notable incorporation of motive into its reimbursement analysis demonstrates the need for attorneys to recognize the dispositive outcome that results when a unilateral placement follows a medical emergency.¹⁸¹ While the new reimbursement standard raises challenges for practitioners in light of the Third Circuit's failure to admit to the significant transformation of its original reimbursement analysis, recognizing the clear departure from *Kruelle* will better enable attorneys to advise clients and prepare for trial.¹⁸²

180. See Appellant's Reply Brief, *supra* note 8, at 5 (arguing that "the test applied by the Third Circuit, as it revisited *Kruelle*" in subsequent cases, no longer requires school districts to shoulder the costs "where mental illness affects education").

181. For a discussion of the Third Circuit's incorporation of motive for placement as a dispositive factor in its reimbursement analysis, see *supra* notes 150–53 and accompanying text.

182. For a discussion of litigation recommendations, see *supra* notes 154–76 and accompanying text.