16-56472

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

M. S., A MINOR, by and through her guardian ad litem R.H.,

Plaintiff-Appellee,

—v.—

LOS ANGELES UNIFIED SCHOOL DISTRICT, a Public Entity,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR CENTRAL CALIFORNIA

BRIEF FOR *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. AND CALIFORNIA ASSOCIATION FOR PARENT-CHILD ADVOCACY IN SUPPORT OF PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of these entities:

Council of Parent Attorneys and Advocates

California Association for Parent-Child Advocacy

1. No amicus is a publicly held corporation or other publicly held entity;

2. No amicus has parent corporations; and

3. No amicus has 10% or more of stock owned by a corporation.

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STATEMENT OF INTEREST OF AMICI

Council of Parent Attorneys and Advocates (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties.

COPPA's attorney members represent children in special education and other civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in seeking to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. (ADA).

COPAA's primary goal is to secure appropriate educational services for children with disabilities in accordance with national policy.[1] COPAA provides resources, training, and information for parents, advocates, and attorneys to assist them in obtaining the free appropriate public education (FAPE) such children are

[1] "Improving educational results for children with disabilities is an essential element of [the U.S.] national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1).

entitled to under the Individuals with Disabilities Education Act (IDEA or Act), 20 U.S.C. § 1400 *et seq*.[2]

COPAA brings to the Court the unique perspective of parents, advocates, and attorneys for children with disabilities. Many children with disabilities experience significant challenges. Whether these children eventually gain employment, live independently, and become productive citizens depends in large measure on whether they secure their right to the free appropriate public education guaranteed under IDEA and other educational policies. Indeed, the core of IDEA is its codified goal that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living . . . ." 20 U.S.C. § 1400(d)(1)(A).

The California Association for Parent-Child Advocacy (CAPCA) is a volunteer-based organization engaging in legislative and policy advocacy on matters of concern to students with disabilities in California. Members of CAPCA

[2] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, Amicus states that: (A) there is no party, or counsel for a party in the pending appeal who authored the amicus brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than Amicus and its members.

participate as professionals and/or as family members of students with disabilities, in Individualized Education Program (IEP) meetings, resolution sessions, mediations, due process hearings and appeals throughout California. CAPCA was founded in 2003 when parents and advocates came together to resist proposals in the California legislature to drastically shorten the statute of limitations in special education cases and to impose other restrictions on the exercise of parental and student rights.

In this appeal, *Amici* are interested in ensuring that children in foster care, and otherwise receiving state support, receive the FAPE that IDEA guarantees to all children. For children who require a residential placement or educationally related mental health services to benefit from their education, school districts are responsible for ensuring those residential and/or mental health services. Those same children continue to enjoy all procedural rights provided by IDEA. *Amici* are deeply concerned that Appellant's position would deprive students who are dependents of the court to their rights under IDEA and deny them a FAPE.

All parties to this litigation have consented to the proposed *Amici* filing of this brief.

Amici adopt the Statement of Facts contained in Appellee's Brief at 11-18

Amici adopt the Statement of the Issue contained in Appellee's Brief at 3.

SUMMARY OF ARGUMENT

IDEA and state law require that local education agencies (LEAs) identify appropriate placements and programming to address an eligible student's unique and individual educationally-related needs. In situations where a student has mental health needs that impact his or her ability to access an educational environment and/or that require twenty-four-hour residential school placements, IDEA provides that LEAs can (and must) make such placements. IDEA also provides that the LEA must provide all students, including those in twenty-four-hour residential school placements, with ongoing progress monitoring, present-level assessment, and educationally-related (including transition) planning.

In the non-educational context, states may also develop policies and programs that provide children with emotional disabilities (who also happen to be students) with residential placements to address their mental health needs. This case thus asks whether state statutes addressing the *non-educational mental health needs* of a particularly vulnerable student population relieves LEAs of their obligations under IDEA to consider educationally-related mental health services (including residential placements) to meet a student's educational needs.

A review of IDEA's procedure-based planning approach and its broad remedial purpose makes clear that other state statutes do not (and cannot) encroach on, or be used to deny, a student his or her IDEA rights. When agencies other than

the LEA make residential placements for children (who happen to be students), this non-educational placement does not relieve the LEA of *its own* obligation to determine whether a student needs a residential placement for educational reasons, or to provide the ongoing procedures to which any IDEA-eligible student is entitled. Accordingly, the District Court correctly held that a school district has a distinct and independent legal responsibility to determine whether placement in a residential treatment center is necessary *for educational reasons*, and this Court should affirm the District Court's Order.

ARGUMENT

The question this Court is presented is whether a student with a disability as defined under IDEA is entitled to have his or her LEA make an appropriate offer of educational placement and programming despite the fact that he or she is *also* concurrently eligible for non-educationally-related placement and programming through another agency. *See M.S. v. L.A. Unified Sch. Dist.*, No. 2:15-cv-05819-CAS-MRW, 2016 U.S. Dist. LEXIS 125149, at *18 (C.D. Cal. Sept. 12, 2016). The answer to this question is yes, both because (despite Appellee's assertions to the contrary) (1) neither state nor federal law excuse LEAs from their ongoing procedural and substantive obligations because an eligible student also happens to be eligible for other non-educationally-related supports and services; and (2) public

policy and the underlying purpose of the IDEA support rejecting the Appellee's proposed excusal from educational planning obligations.

Consideration of a child's educational need for residential placement, notwithstanding decisions by non-educational agencies for mental health reasons, is part of an LEA's affirmative obligation under IDEA when crafting an IEP, an obligation which is not limited by California Education Code sections addressing responsibility for funding placements by non-educational agencies. Nevertheless, in an effort to excuse its procedural failures in this instance, Appellant focuses only on select statutory provisions of the California Education Code, and not the purpose of the scheme as a whole, to urge an interpretation to the contrary. Appellant's interpretation creates gaps in the educational programing of children who need IEPs as required by IDEA because it creates an educational placement scheme whereby students who, by virtue of their need for non-educationally-related mental health supports, lose fundamental federal procedural protections under IDEA.

As set forth in case law interpreting these types of statutory schemes, interpretation of California's Education Code sections must be with an eye toward what benefits the child, and not what benefits the school district. *Katz v. Los Gatos-Saratoga Joint Union High Sch. Dist.*, 117 Cal. App. 4th 47, 63 (2004) ("Although the Education Code does not explicitly set forth its overall purpose, the code's primary aim is to benefit students, and in interpreting legislation dealing with our

educational systems, it must be remembered that the fundamental purpose of such legislation is the welfare of the children."). Additionally, statutory language such as that contained in the California Education Code, must be considered "in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." *L.A. Unified Sch. Dist. v. Garcia*, 58 Cal. 4th 175, 186 (2013); *see also King v. Burwell* 135 S. Ct. 2480, 2489 (2014) ("we must read the words [of a statute] 'in their context and with a view to their place in the overall statutory scheme'"). Furthermore, the court has a continuing obligation to ensure that the state standards themselves, and as applied, are not below the federal minimums as set forth in IDEA which persist despite any state administrative rulings on federal law. *E.g.*, *E.M. v. Pajaro Valley Unified Sch. Dist*. 652 F.3d 999, 1005 (9th Cir. 2011); *see also* Cal. Educ. Code § 56000(e). Accordingly, Appellant's urged interpretation of select statutory provisions contained within California's Education Code is erroneous as it is not only inconsistent with the primary aim of California's statutory scheme as a whole, but it is incongruous with the express provisions of the federal rights mandated to these children under IDEA.

I. THERE IS NO LEGAL BASIS TO DENY STUDENTS WITH DISABILITIES ACCESS TO THE ROBUST PROCEDURAL FRAMEWORK PROVIDED UNDER IDEA BECAUSE OF ELIGIBLITY FOR ADDITIONAL SOCIAL SERVICES UNDER STATE LAW

Reversing the District Court's decision will be interpreted by LEAs to mean that when another agency (such as DCFS, in this case) has placed a student in a twenty-four-hour residential school for non-educationally related reasons, the LEA need not engage in the IEP planning process to determine whether a similar (or different) educational placement is merited for educationally-related reasons. This position is at odds with the plain language of state and federal laws and with the intended roles of LEAs for students with educationally-related mental health needs as outlined in the California government and education code legislative history.

A. Appellant's Sought-After Outcome Would Deny Students their Robust Procedural Rights

In 1975 Congress enacted IDEA[3] in light of "ample evidence" of the need to ensure that all children with disabilities "have available to them . . . a free appropriate public education . . . and to assure that the rights of" children with disabilities "and their parents or guardians are protected." *Honig v. Doe*, 484 U.S. 305, 309 (1988). IDEA confers upon students with disabilities "an enforceable substantive right to public education," as well as an entitlement to a series of detailed procedures (dealing with identification, assessment, planning, and ongoing monitoring) that, if

[3] The statute's first name was the Education for All Handicapped Children Act of 1975, Pub. L. 142, 89 Stat. 773 (Nov. 29, 1975) (EAHCA OR EHA). But "for simplicity's sake – and to avoid 'acronym overload,'" this brief uses IDEA throughout to refer to EAHCA, EHA and IDEA. *See Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 n.1 (2017)

followed, are presumed to guide a student's IEP team to offer him or her a substantively appropriate education. *Id.* at 310. The IEP is considered the "centerpiece of the statute's educational delivery system," *Honig*, 484 U.S. at 311, and includes detailed requirements about what an IEP team must consider and document when planning for a student.

The Appellant asks this Court to relieve it from having to go through the detailed procedural requirements under IDEA (and state law) and instead find that when a student is placed in a twenty-four-hour residential school for non-educational purposes *by another agency* the LEA should *not have to make an educational placement* recommendation as required under 20 U.S.C. § 1414(d)(1)(A)(i)(IV) and Cal. Educ. Code § 56342. This fanciful request is not supported by state or federal law. In fact, to read that because of a student's placement in a twenty-four hour residential setting by a non-LEA he or she is no longer entitled to a complete IEP document, is specifically at odds with Cal. Educ.Code § 56500(e), which states: "It is the further intent of the Legislature that this part does not abrogate any rights provided to individuals with exceptional needs and their parents or guardians under the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.)."

Moreover, Appellant's sought-after relief misrepresents the IEP process and would upset the overall framework intended to protect the procedural and

substantive rights of students with disabilities. By way of example, at all times in which a student is found to be eligible under IDEA, IEP teams must review existing evaluation data, including, but not limited to, evaluations, current classroom-based, local, or state assessments, and observational data from teachers and related service providers. 20 U.S.C. § 1414(c)(1)(A). This ongoing process of review and monitoring forms the basis of the student's IEP document, which includes present levels of academic achievement and developmental needs for a child, whether the child needs special education and related services, and whether modification to placement and services is necessary to enable the child to meet the measurable goals set out in the IEP. *Id.* § 1414(c)(1)(B). IDEA also places an affirmative obligation upon LEAs to review and revise a student's IEP at least annually, but more frequently in certain circumstances, including when there is a "lack of expected progress toward the annual goals and in the general education curriculum, where appropriate." *Id.* § 1414(d)(4)(A)(ii).

The educational planning process is a dynamic, ongoing, and data-driven program that Congress intended to be able to constantly provide for a student's unique and individual educationally-related needs. Based upon the comprehensive assessment, reassessment, and review system outlined in the IDEA, 20 U.S.C. § 1414(a-c), LEAs are tasked with developing an IEP document that reports assessment data, present levels of performance, expected progress towards general

education curriculum, new annual goals, 20 U.S.C. § 1414(d)(1)(A)(i)(I-III). And based upon the areas of need identified therein, the IEP team is supposed to include in the IEP document a "statement of the special education and related services and supplementary aids and services . . . to be provided to the child," 20 U.S.C. § 1414(d)(1)(A)(i)(IV), and various other additional programming elements, 20 U.S.C. § 1414(d)(1)(A)(i)(V-VIII).

If LEAs are permitted to not make educational placement offers to students who qualify for non-educational placements, how many of the above steps will also not be provided to the child? And if an LEA does not make an offer of placement based upon the student's then-present levels of performance, how will the team evaluate if the non-educational placement is educationally appropriate?

Lastly, students who receive IEP placement offers are granted additional procedural protections beyond the IEP process in the event that there are disagreements over a student's programming. IDEA provides that during the pendency of due process hearings and subsequent appellate review, "the child shall remain in the then-current educational placement . . . until such proceedings have been completed." 20 U.S.C. § 1415(j). Similarly, California law requires that "during the pendency of the hearing proceedings, including the actual state level hearing, or judicial proceeding regarding a due process hearing, the pupil shall remain in his or her present placement . . . unless the public agency and the parent

agree otherwise." Cal. Educ. Code § 56505(d). This requirement is commonly referred to as "stay put."

Congress developed stay put to maintain a student in an appropriate educational placement because of its "sense that there is a heightened risk of irreparable harm inherent in the premature removal of a disabled child to a potentially inappropriate educational setting." *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1040 (9th Cir. 2009). "In light of this risk, [Congress intended] the stay put provision [to] act[] as a powerful protective measure to prevent disruption of the child's education throughout the dispute process." *Id.* Indeed, once it is invoked, a request for stay put "functions as an automatic preliminary injunction" requiring that the school district–or in this case the charter school–maintain the last agreed to and (therefore assumed to be) appropriate educational program. *Id.* at 1037. In fact, stay put "substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the [traditional injunction standards}." *D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1992).

Allowing Appellant to not make a current educationally related placement for students who are then placed into twenty-four-hour residential schools for mental health needs through a non-LEA, would cause students with disabilities to lose their most protected right of consistency via IDEA's stay put provision. It may be the case that for some students, the twenty-four-hour placement is *entirely non-*

educationally-related, in which case an offer of a non-residential-placement would be appropriate. But for a number of students, if a twenty-four-hour placement is necessary for non-educational *and for educationally-related reasons*, that is the placement that Congress intended to have implemented as part of an IEP, and which would be the stay-put placement under IDEA. Consequently, if this Court were to allow the LEA to step back and not make an educationally appropriate placement offer for the time period a student is in a twenty-four-hour placement through another agency, this Court would essentially be creating a gap in the educational placement history that would fundamentally disrupt not only a student's educational progress, but also their procedural stay put rights. Beyond no legal basis existing for Appellant's requested temporary relief from educational planning, as is discussed below, there are no policy reasons to deny an already vulnerable set of students the consistency Congress felt *all* students with disabilities were entitled to receive.

B. State and Federal Law Require LEAs to Make Residential School Placements Whenever Necessary for a Student to Access Learning

Although Appellant asserts that schools "lack the competency or capacity to treat and fund a student's mental health treatment or medical care," this is only *partially* true with regard to medical care. In fact, it is undisputable that state and federal law provide for the placement of students with educationally-related mental health needs into twenty-four-hour residential treatment schools. *See* 34 C.F.R. § 300.104 (listing "placement in a public or private residential program," in the event

such a program "is necessary to provide special education and related services to a child with a disability.") and Cal. Educ. Code § 56361(i) ("instruction . . . in other institutions to the extent required by federal law or regulation."); *see also* https://www.cde.ca.gov/sp/se/ac/rescare.asp and https://achieve.lausd.net/cms/lib08/CA01000043/Centricity/domain/168/e-library/bulletins%20%20organized%20by%20date%20%20newest%20to%20oldest/BUL-5757.3%20.pdf (outlining Appellant's procedures for making a residential placement). When a child with disabilities requires a highly structured environment to achieve educational benefit, IDEA mandates a residential placement be provided. 34 C.F.R. § 300.104. This is also true for situations where a student concurrently requires a twenty-four-hour placement for non-educational reasons. *See* Cal. Educ. Code § 56167.5 (Distinguishing placement in a hospital or health facility as distinct from "a necessary residential placement . . . for which the local educational agency would be responsible as an educational program option."), and Appellant points to no law that can excuse them from this responsibility.

C. Allowing LEAs to not Make Residential School Placements Because of "Potential Conflicts" is not Supported by Law

Though the Appellant asserts that requiring LEAs to continue to meet their IDEA obligations to develop complete IEP offers will "lead to conflict on the issue of funding," App. Brief at 31-33, such potential conflicts are illusory and not justification for relieving LEAs from their obligations.

First, though the earlier tests this Court identified for apportionment of funding between LEAs and sister agencies were created in the context of "AB3632 placements" (*see infra*, fn. 5), it is obvious that the issue of funding responsibilities can be easily addressed when necessary. *See Clovis Unified Sch. Dist. v. Calif. Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990) (identifying tests for determining which agency is financially responsibility for residential placements as: "(1) where the placement is "supportive" of the pupil's education; (2) where medical, social or emotional problems that require residential placement are intertwined with educational problems; and (3) when the placement is primarily to aid the student to benefit from special education.").

More importantly, though, Appellant's efforts to raise cost considerations as justification for creating a rule that LEAs are relieved of the obligations to make placement offers under IDEA to students receiving placement and/or services from non-educational agencies is a dangerous precedent with no basis in IDEA's statutory text. In fact, questions of cost are specifically *excluded* from the educational planning context because IDEA is intended to provide a substantively appropriate education *to all* disabled students *in spite of the fact* that some of those programs will cause high costs for an LEA. *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1101 (9th Cir. 2013) ("The IDEA does not provide schools with any analog to Title II's fundamental alteration and undue burden defenses."). Indeed, as the First Circuit

held in 1989:

> The language of the Act could not be more unequivocal. The statute is permeated with the words "*all* handicapped children" whenever it refers to the target population. It never speaks of any exceptions for severely handicapped children. Indeed, as indicated *supra*, the Act gives priority to the most severely handicapped. Nor is there any language whatsoever which requires as a prerequisite to being covered by the Act, that a handicapped child must demonstrate that he or she will "benefit" from the educational program. Rather, the Act speaks of the *state's* responsibility to design a special education and related services program that will meet the unique "needs" of all handicapped children. The language of the Act in its entirety makes clear that a "zero-reject" policy is at the core of the Act, and that no child, regardless of the severity of his or her handicap, is to ever again be subjected to the deplorable state of affairs which existed at the time of the Act's passage, in which millions of handicapped children received inadequate education or none at all."

Timothy W. v. Rochester Sch. Dist., 875 F.2d 954, 960–61 (1st Cir. 1989).

A student with a disability is entitled to FAPE regardless of the severity of his or her disabilities, *See Endrew F.*, 137 S. Ct. at 999 (IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."), or of the level of achievement that he or she might attain, *Endrew F.*, 137 S. Ct. at 999 F.2d at 961, or of the fact that a particular program might be more costly. *See Cedar Rapids Cmty. Sch. Dist. v. Garret F. by Charlene F.*, 526 U.S. 66, 77-79, 119 S. Ct. 992, 999 (1999). Additionally, Appellant's request to be relieved of having to plan and provide placement to students when they have received placement from non-educational agencies on a "conflict of funding" pretense, is specifically barred by California law. Cal. Gov't Code § 7572(c) ("In

no case shall the inclusion of necessary related services in a pupil's individualized education plan be contingent upon identifying the funding source.").

Even for students whose mental health needs require placement in a twenty-four-hour residential school for mental health needs, LEAs are absolutely required to develop IEPs to address their full range of educational needs, regardless of the severity of the student's presentation or the potential cost of the program. LEAs are certainly not allowed to opt out of making a placement offer because doing so might expose them to additional financial obligations for students who may very well require intensive programming. *See Timothy W.*, 875 F.2d at 960–61.

D. Legislature Returned Full Responsibility to Assess and Treat Educationally-Related Mental Health Needs (Including with Placement) to Schools in 2011

That the Appellant seeks relief from educationally-related mental health planning for students is perplexing in light of California's legislative history relating to the provision of educationally-related mental health services that has increasingly tasked LEAs with such responsibilities.

Prior to July 1, 2011, LEAs and county mental health offices worked collaboratively in determining educationally-related mental health supports for students with disabilities. Cal. Gov. Code § 7570 ("Ensuring maximum utilization of all state and federal resources available to provide a child with a disability, as defined in Section 1401(3) of Title 20 of the United States Code, with a free

appropriate public education, the provision of related services, as defined in Section 1401(26) of Title 20 of the United States Code, and designated instruction and services, as defined in Section 56363 of the Education Code, to a child with a disability, shall be the joint responsibility of the Superintendent of Public Instruction and the Secretary of the Health and Human Services Agency."). Under the earlier system, once a student was determined by assessment to be seriously emotionally disturbed,[4] the IEP team would be expanded to include representatives from the county mental health department, and the expanded team would determine whether:

> (1) The child's needs can reasonably be met through any combination of nonresidential services, preventing the need for out-of-home care.
> (2) Residential care is necessary for the child to benefit from educational services.
> (3) Residential services are available that address the needs identified in the assessment and that will ameliorate the conditions leading to the seriously emotionally disturbed designation.

Cal. Gov. Code 7572.5 (repealed July 1, 2011).

In the event that the expanded IEP team determined that a residential placement was necessary, the LEA and county mental health would divide financial responsibility for the program as outlined in the statute. *Id*. Similarly, if the student was capable of accessing a less restrictive educational environment, a student was still entitled to the mental health services specified in his or her IEP. Cal. Gov. Code

[4] This referral process and any subsequent placement or services were commonly referred to as "AB3632" assessments, placements, or services.

§ 7576 (repealed July 1, 2011).

After then-Governor Arnold Schwarzenegger withdrew funding for the AB3632 mandates, the California Legislature repealed the statutes effective July 1, 2011 with AB114. *Id.* This repeal was accompanied by additional funding to LEAs to cover the costs of educationally-related mental health assessments, services, and placements that had previously been covered by county mental health offices, but which now were to be funded exclusively by the planning agency—the LEA.

But it is undeniable that since July 1, 2011, LEAs have been *solely responsible* for assessing and planning for a student's overall educationally-related mental health needs, including the need for twenty-four-hour residential placement schools, counseling, or other supports and services pursuant necessary for the provision of FAPE. *See also* Janelle E. Lawson, & Jennifer L. Cmar, *Implications of State Policy Changes on Mental Health Service Models for Students with Disabilities*, The Journal of Special Education Apprenticeship, Vol. 5(1) June 2016 (representatives from three schools interviewed "reported that it was difficult to respond to the change in policy and restructure their mental health service models so that SWDs did not lose access to services they depended upon to be successful in school."). Questions about placement in a twenty-four-hour residential school must be made *"by [the] student's IEP Team*." *See* Cal. Dep't Ed., Mental Health Services FAQ No. 8, Monday June 5, 2017 *available at*

https://www.cde.ca.gov/sp/Se/ac/mhsfaq.asp (last visited July 25, 2018) (emphasis added).

Clearly, there is no provision under federal law that a student's concurrent eligibility for additional services through a non-educational agency would relieve the LEA of these obligations. Indeed, California's own state law appears to specifically uphold the requirement of LEAs to continue their assessment, planning, and programming responsibilities for students with disabilities regardless of whether a student *also* receives non-educationally related mental health therapies through insurance, or other social service agencies. *See* Cal. Educ. Code § 56159 (suggesting that educationally-related services are entirely within the responsibility of the LEA). Moreover, if LEAs were not required to conduct educationally-related mental health assessments, or to develop complete IEP offers that address educationally-related mental health needs, then such planning *will not happen*, and students will suffer. Accordingly, this Court should not adopt the legally unfounded theories of the Appellant which would of course come at the expense of vulnerable students with disabilities.

II. CHILDREN IN FOSTER CARE ARE PARTICULARLY LIKELY TO NEED INTENSIVE SPECIAL EDUCATION PROGRAMS PROVIDED THROUGH RESIDENTIAL PROGRAMS

Contrary to the plain direction of the statute to provide a FAPE for *all* children with disabilities, S*ee Timothy W.*, 875 F.2d at 960–61, Appellant seeks to carve an

exception for students who are dependents of the court and receiving residential placements from a non-educational state agency for mental health purposes. Such a ruling would be very harmful for foster children and other children who have been placed in residential programs by other non-educational state agencies because it would not only deprive them of their rights under IDEA, but it would cause further upset in what is already a typically traumatic developmental stage for these students.

Unfortunately, "[i]t is well documented in the literature that the difficulties students in foster care span domains of social-emotional, behavioral, and academic functioning." Laure E. Palmieri and Tamika P. LaSalle, *Supporting Students in Foster Care*, 54(2) Psychology in the Schools 117, 117 (2017). And because social-emotional needs[5] form the foundation for a student's well-being, they have a significant impact on academic, as well as behavioral, outcomes. *Id.* These needs are *not* non-educational issues, of which a school district is absolved of responsibility. In fact, "[w]hen compared to non-maltreated peers, children with histories of maltreatment showed significantly greater maladaptive functioning, and these social and emotional problems ***are likely to permeate into all domains of***

[5] Children with disabilities are more likely to be abused and neglected than nondisabled children. Thus, a Minnesota study found that that, in cases where abuse and neglect were substantiated, more than one quarter (27.9%) of children over five had disabilities. Elizabeth Lightfood, Katherine Hill & Traci LaLiberte, *Prevalence of children with disabilities in the child welfare system*, 33(11) Children & Youth Serv. Rev. 2069 (2011).

school functioning, including behavioral and academic skills." *Id.* at 118 (emphasis supplied).

For this very reason, in 2013 the state of California took groundbreaking steps to supplement educational funding to LEAs to account for the heightened educationally-related needs for these students. *See* LCFF Frequently Asked Questions: Foster Youth Under the LCFF, *available at* https://www.cde.ca.gov/fg/aa/lc/lcfffaq.asp (last visited July 25, 2018). In order to access the Local Control Funding Formula (LCFF) monies, LEAs are required to develop a Local Control and Accountability Plan (LCAP) that includes goals, actions, and funding for foster youth and other disadvantaged children (including children with disabilities). *Id.*; *see also* Sample Foster Youth LCAP Goals, Outcomes, Actions, and Services, *available at* https://kids-alliance.org/wp-content/uploads/2018/04/Sample-DistrictLCAP-for-Foster-Youth.pdf (last visited July 25, 2018). Under the new LCFF and accountability systems, however, LEAs must also track educational data to demonstrate the effectiveness of programing provided to these more vulnerable student populations. Given this concurrently implemented policy, to disrupt the educational planning process for students who are dually eligible for LCFF (as a student with a disability and as students in the foster care system) would be particularly problematic.

Social and emotional behaviors and functioning "play a critical role in the way

that students perform academically." Palmieri, *supra*, at 120. For this, and other reasons, students involved with child welfare and foster care systems have high rates of special education services. Studies have found that while 13% of the general child population receive special education, somewhere between 25% to 52% of children in foster care receive special education services. Madelyn Y. Lee & Melissa Jonson-Reid, *Needs and outcomes for low income youth in special education: Variations by emotional disturbance diagnosis and child welfare contact,* 31(7) Child Youth Serv. Rev. 722, 722 (2009); *see also* Heather C. Forkey, *Children Exposed to Abuse and Neglect: The Effects of Trauma on the Body and Brain*, 30 J. Am. Acad. Matrim. Law. 307, 319 (2018) ("Of children in foster care, nearly 60% of children younger than five years have delays in communication, problem solving, social skills, and more than 40% of school-age children are in special education for cognitive and/or emotional issues"); Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out-of-Home Care Are Denied Equality in Education*, 19 Yale L. & Pol'y Rev. 81, 99 (2000) (children in foster care referred to special education over three times more than children not in foster care). Studies have also found higher rates of emotional disability eligibility among maltreated children than other children. *Id.* Lee, *supra*, 31(7) Child Youth Serv. Rev. at 722. Thus, these students routinely experience traumas that render them needing intervention that is both educationally-related and non-educationally-related. *See* Fostering Success in

Education: National Factsheet on the Educational Outcomes of Children in Foster care, January 2014, at 5, *available at* https://bettercarenetwork.org/sites/default/files/Fostering%20Success%20in%20Education%20-20National%20Factsheet%20on%20the%20Educational%20Outcomes%20of%20Children%20in%20Foster%20Care.pdf. (last visited July 25, 2018).

A. Stay Put Rights are Particularly Important for Children in Foster Care

As discussed above, students with disability are provided with powerful stay put protections to ensure that they receive continuity of educational supports. "The stay-put provisions strive to ensure the child is not treated as a ping-pong ball, ricocheting between placements with each new ruling in the dispute between parents and school." *Ashland Sch. Dist. v. V.M.*, 494 F. Supp. 2d 1180, 1182 (D. Or. 2007).

Maintenance of placement is of paramount importance for foster youth, because a significant contributing factor to behavioral difficulties for students in foster care is increased level of school mobility. Palmieri, *supra*, at 119. "Behavioral difficulties in school create significant barriers to academic success for students." *Id.* "Students in foster care have higher discipline rates than their peers, with 24% of foster youth facing at least one suspension or expulsion, while the national rate is 7%. Furthermore, students in foster care are three times more likely than their peers to be expelled from school." *Id.* School mobility leads to behavioral difficulties and

behavioral difficulties lead to lack of access to education, and the frequent school changes can cause trauma that causes negative impacts on education as well. Andrea G. Zetlin, Lois A. Weinberg, & Nancy M. Shea, *Caregivers, school liaisons, and agency advocates speak out about the educational needs of children and youths in foster care,* 55(3) Social Work, 245-255 (2010). Caregivers, school liaisons, and agency advocates speak out about the educational needs of children and youths in foster care. Social Work, 55(3), 245-255.

In addition, academic deficits are also linked to school mobility, because every time a student switches schools, she loses "4-6 months of progress due to acclimation to the new environment, delays in transfer of records, and assessment for special services." Palmieri, *supra*, at 119-20. In fact, with each change in school, a child falls further behind. David Kerbow, *Patterns of urban school mobility and local school reform. 1 J. Educ. for Students Placed At-Risk,*147-169 (1996). Patterns of urban school mobility and local school reform (finding educational performance drops with each school change even after family socioeconomic and other demographic factors were accounted for).

In light of the heightened risk of harm that students in foster care face on top of those that students with disabilities already confront, there is no question that stay put rights are particularly important for this population. Given this, it is important

that these students maintain their rights to stay put in the presumed appropriate educational setting in the event of subsequent disagreements.

The system proposed by Appellant whereby there is no current educational placement offered if the student is already placed in a twenty-four-hour placement for non-educational reasons would create placement lags and unnecessary changes in placement for students in state care. When students are placed in residential treatment facilities by DCFS for mental health treatment, DCFS may terminate the residential placement and discharge students to a lower level of care, without regard to the need for continued residential placement for educationally-related needs, needs which are beyond the scope of their mental health focus. Thus, without an IEP calling for residential placement for educational needs, parents will be deprived of their child's right to stay put under IDEA even if that placement is also necessary for educationally-related reasons. However, if the child's IEP also identified the residential program as the appropriate placement, then the school district would be required to continue funding the placement pending the legal challenge for the change in placement. Notably, Appellant and its supporting Amicus do not make any mention of a student's right to stay put under 20 U.S.C. § 1415(j) in their briefs, yet the loss of this statutory right to stay put is a serious deprivation of a crucial procedural right which would occur if Appellant's argument were upheld.

B. Specification of Residential Placement in IEPs when Necessary for Educational Reasons Protects Children with Disabilities from

Incurring Dangerous Gaps and Delays in their Schooling

It is well documented that students in foster care experience frequent changes in residency, which impacts their ability to access consistency in their educational programming. *See* Zetlin, *supra* at 245. For this reason, students in foster care are particularly likely to need to rely on Congress' efforts to create consistency in educational programming across school districts as outlined in 20 U.S.C. §1414(d)(2)(C)(i)(I) (student who transfers mid-year must receive services from the receiving school that are "comparable to those described in the previously held IEP [] until a new IEP is adopted."). The placement-relief scheme proposed by Appellant whereby LEAs can rely on residential placements by non-educational agencies to excuse the LEA from considering residential placement solely for educationally-related needs leaves dangerous gaps in programing for some of the most vulnerable students, runs afoul of this notion of consistent programming under IDEA, and is contrary to both IDEA and California law.

Under Appellant's urged construction, when a child is released from residential treatment by a non-educational agency because the residential treatment is no longer needed for mental health reasons, a receiving school district will not have an IEP offer that addressed the student's educationally-related placement needs for that period of time. However, for a good number of students placed residentially by a non-educational agency, the same (or a similar) residential placement will be

educationally appropriate and necessary to ensure the child receives FAPE, and therefore should be documented in the most recent IEP as the programming needed to provide that student with a FAPE. Yet if under Appellant's urged interpretation, there is no need for an LEA to develop an educational placement offer by virtue of the student's simultaneous need for a residential placement for non-educational placements, that particular student then has a gap in his or her educational program that will disrupt the student's access to programming.

Relying on the mental health need of a student placed by a non-educational agency as an excuse for not also considering the child's educationally-related need as part of the child's IEP could create long-lasting impacts to the child's educational programming. For example, if the student's residency changes by virtue of his or her foster care situation, his or her LEA may change, but because of the previous LEA's failure to make an educational offer the receiving school district, through no fault of its own, the receiving LEA can be left unaware of the educational need for residential placement because the prior district did not put place that needed placement into the child's IEP. Thus, not only is the student in this situation not able to access his or her stay put right if he or she were to stay in the same LEA before, during, and after his or her placement in a residential setting through a non-educational agency, but the student would *also* be denied the right to a "comparable"

IEP as provided for under 20 U.S.C §1414(d)(2)(C)(i)(I) and Cal. Educ. Code § 56325(a)(1-3).

Appellant's construction also conflicts with state law obligations imposed upon schools receiving the child upon discharge from a residential placement. Under California Government Code section 7579.1, the school district receiving the student in question must be given 10-days' notice before discharge and must be provided with the child's IEP so that the receiving school can ensure appropriate educational placement for the child will be made upon discharge without further delay. Even in instances in which the receiving LEA is the same one that was involved in educational planning prior to the residential placement by a non-educational agency, the Appellant's scheme will cause unnecessary delays. But when the receiving school district is an entirely different LEA responsible for providing "comparable" programming, there will considerable delay and disruption to the child's educational programming. This disruption will occur because as a result of the last LEA's failure to consider or address the child's educational need for residential placement, there is no way to ensure that an appropriate offer can be made as there is not a prior IEP to consider and "compare" to. Consequently, Appellant's urged construction results in a scheme that risks significant gaps in programing these children during transitions and leaves a most vulnerable population of students without continuity in educational programming.

CONCLUSION

The issues in this case directly implicate the IDEA's primary purpose, which is to ensure that school districts accepting federal funds meet all the educational needs of students with disabilities. For the foregoing reasons, the judgment below should be affirmed.

Dated July 25, 2018

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C)

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 6,869 words.

Dated: July 25, 2018

/s/ Selene Almazan-Altobelli

CERTIFICATE OF SERVICE

I certify that on July 25, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF as they are registered users.

/s/ Selene Almazan-Altobelli

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9th Circuit Case Number*(s)* 16-56472

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