No. 18-3157

In The United States Court of Appeals For The Third Circuit

LEJEUNE G., INDIVIDUALLY AND ON BEHALF OF T.T.,
Plaintiff-Appellant

v.

PENNSYLVANIA DEPARTMENT OF EDUCATION, ET AL.,
Defendants-Appellees

APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED ON AUGUST 29, 2018 IN CASE NO. 17-4965

APPELLANT'S BRIEF

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Subject Matter Jurisdiction

This action was brought under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 *et seq*. Jurisdiction is based on 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

Appellate Jurisdiction

Appellant LeJeune G., individually and on behalf of her child, T.T., timely filed this appeal on September 27, 2018. The appeal arises from a final order issued on August 29, 2018 by the United States District Court for the Eastern District of Pennsylvania in Civil Action No. 17-4965.

RELATED CASES AND PROCEEDINGS

Ida D. et al. v. Pennsylvania Department of Education (PDE), No. 17-5272 (E.D. Pa.) raises issues similar to those presented here. In *Ida D.*, parents of children with disabilities alleged, like LeJeune G., that PDE must step in for Khepera Charter School and provide their children the relief necessary to secure a free and appropriate public education (FAPE) under the IDEA. The parents requested, among other relief, private school tuition. On November 19, 2018, the district court granted in part and denied in part the parents' motion for summary judgment and ordered PDE to pay the private school tuition.

ISSUES PRESENTED

Issue 1

The IDEA defines FAPE as an appropriate education "at public expense, under public supervision and direction, and without" cost. 20 U.S.C. § 1401(9)(A). In seventh grade, T.T. did not receive an education at public expense. Khepera Charter School outsourced his education to a private special needs school and then failed to fund it.

Did T.T. receive FAPE in seventh grade?

Issue 2

The IDEA affords courts broad equitable authority, including the authority to order State Educational Agencies like PDE to assume responsibility for a child's educational funding. Charter School placed T.T., a child with multiple disabilities who requires intensive special education services, at a private special needs school, but Charter School never paid (and is unable to pay) T.T.'s tuition. T.T. cannot return to the school until the tuition is paid.

Even if Charter School's funding failure did not deprive T.T. of FAPE, should the district court have held PDE responsible for his tuition under the court's IDEA equitable authority?

STATEMENT OF THE CASE

T.T. is a child with learning and behavioral disabilities who qualifies for special education under the IDEA. In 2015, his charter school, Khepera Charter School, agreed to fulfill its IDEA duties to him by funding his placement at a private special needs school rather than providing him special education services directly. But after Charter School passed T.T. off to the special needs school, it never paid his tuition. Charter School is in financial disarray, on the verge of closing, and unable to fulfill its IDEA obligations to T.T.

So T.T.'s guardian, LeJeune G., sought the tuition from PDE. PDE is T.T.'s State Educational Agency and therefore is the "central point of accountability" for securing his IDEA rights. *See Kruelle v. New Castle Cty. Sch. Dist.*, 642 F.2d 687, 697 (3d Cir. 1981). PDE disclaimed responsibility, though, and denied LeJeune G.'s request. As a result, she commenced this action.

I. Statutory background: the IDEA

Before Congress enacted the IDEA, states failed to provide children with disabilities "appropriate educational services," and families were "forced . . . to find services outside the public school

system." 20 U.S.C. § 1400(c)(2). States, in other words, shifted the costs of educating children with disabilities to families and private third-party providers, denying the children and their families the benefits of a free, publicly supervised education.[1]

In passing the IDEA, Congress outlawed this burden shifting. The hallmark of the statute is its guarantee that all children with disabilities receive a free and appropriate public education (FAPE). *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 754 (2017) (stating that FAPE is the "sine qua non" of the IDEA). FAPE entitles children with disabilities to not only an appropriate education but also a *free public education*, one provided "at public expense, under public supervision and direction, and without charge." 20 U.S.C. § 1401(9)(A); *see also E.R.K. v. State Dep't of Educ.*, 728 F.3d 982, 988 (9th Cir. 2013) ("[A] 'free public education' is one that is 1) provided at public expense, under public supervision and direction, and without charge; and 2) involves

[1] The benefits of a free, publicly supervised education include an education at public expense, an education informed by the state's educational expertise, access to the array of services that states are able to provide, and oversight which protects against substandard services and harmful educational disruptions. *Cf.* 20 U.S.C. § 1400(d)(2) (acknowledging that states have the capacity to provide educational services through "comprehensive, coordinated, multidisciplinary, interagency system[s]"); *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017) (recognizing that state and school officials have educational expertise).

preschool, elementary, or secondary education."); *K.L. v. R.I. Bd. of Educ.*, 907 F.3d 639, 642 (1st Cir. 2018) (concluding that the "public education" required by FAPE is an education that "involve[s] government funding and administration or oversight").

The IDEA has several features that secure this right to a free public education. First, it affords states millions of dollars in federal funding each year to help them provide appropriate special education services without shifting costs to families. Pennsylvania alone receives "approximately a half-billion dollars a year." *Charlene R. v. Solomon Charter Sch.*, 63 F. Supp. 3d 520 n.3 (E.D. Pa. 2014).

Second, the IDEA imposes an organizational scheme on states that is designed to prevent funding failures. Under the scheme, Local Educational Agencies such as school districts and charter schools are tasked with providing special education services directly to children, while State Educational Agencies like PDE serve as the "central point of accountability" for FAPE, assuming "primary responsibility [for] provid[ing] a publicly-supported education [to] all children." *See Kruelle*, 642 F.2d at 696–97; *M.A. v. State-Operated Sch. Dist.*, 344 F.3d 335, 340 (3d Cir. 2003) ("[T]he participating state retains primary

responsibility for ensuring compliance with the IDEA and for administering educational programs for disabled children."). As the "central point of accountability" for FAPE, State Educational Agencies must not only serve as a backstop for FAPE but also ensure that children with disabilities have access to adequate special education funding. *See Kruelle*, 642 F.2d at 696–97; *Charlene R.*, 63 F. Supp. 3d at 520. Each State Educational Agency must (a) allocate federal funds to Local Educational Agencies and supervise their use of the funds, (b) develop a plan which outlines Local Educational Agencies' and state agencies' funding duties to ensure that no child is denied access to public funding, and (c) provide funding directly to a child when he requires it to receive FAPE and his school district or charter school cannot or will not provide it. *See* 20 U.S.C. § 1412(a)(12); *Charlene R.*, 63 F. Supp. 3d at 516.

Third, the IDEA requires Local Educational Agencies to provide ongoing supervision and direction over each child's education. They must monitor all children in their catchment areas and identify those who require special education services. *See* 20 U.S.C. § 1412(a)(3). And once a Local Educational Agency identifies a child, it has an ongoing

duty to supervise her education. *See D. K. v. Abington Sch. Dist.*, 696 F.3d 233, 244 (3d Cir. 2012) ("The IDEA protects the rights of disabled children by mandating that public educational institutions identify and effectively educate those children . . . ."). Though a Local Educational Agency can arrange for a child to receive services from a third-party provider such as a private school, the Local Educational Agency cannot abandon oversight of the child's education. *See* 34 C.F.R. § 300.2(c). It "[can]not divest itself of its obligations under the IDEA by placing" a child in a private school. *Tyler W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427, 437 (E.D. Pa. 2013). Congress "place[d] the duty for complying with the IDEA upon public agencies," so "even when a private entity is the means of effectuating the mandate of the IDEA, public agencies retain responsibility." *Koehler v. Juniata Cty. Sch. Dist.*, 2008 U.S. Dist. LEXIS 32079, at *21–22 (M.D. Pa. Apr. 17, 2008).

Finally, recognizing that State and Local Educational Agencies from time to time will nevertheless deny a child a free, publicly supervised education, the IDEA gives courts "broad discretion" to remedy denials of the right to a free public education. *See Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). Courts can

order a State or Local Educational Agency to make payments to private schools, private evaluators, or parents when necessary to protect a family from educational costs. *See id.* (noting that courts can order payment for services at a private school); 34 C.F.R. § 300.502(a) (stating that parents in some circumstances are entitled to funding for independent educational evaluations). Courts can also order a State or Local Educational Agency to reimburse a parent for private school tuition if absent reimbursement, the "right to a *free* appropriate public education . . . would be less than complete." *Burlington*, 471 U.S. at 370 (emphasis in original).

II. Facts

LeJeune G. is T.T.'s great aunt and legal guardian. JA074 (2015 Hearing Officer Dec'n). T.T.'s father was killed when T.T. was three years old, and his mother later lost custody "due to alleged emotional disorder and drug use." JA076.

T.T. attended Khepera Charter School from kindergarten through sixth grade (the 2014-2015 school year). *See* JA063 at ¶ 62 (Stipulated Facts for Summary Judgment). Charter School failed to identify him as a child in need of special education, so in November 2014 LeJeune G.

requested an IDEA due process hearing. JA064 at ¶ 64. She prevailed, and the hearing officer recognized that T.T. is a child with a specific learning disability, Attention Deficit Hyperactivity Disorder, and Oppositional Defiant Disorder. JA079 (2015 Hearing Officer Dec'n); *see also* JA126 (District Court Op.). The hearing officer ordered Charter School to provide T.T. FAPE. *See* JA092–93 (2015 Hearing Officer Dec'n).

But Charter School kept denying T.T. FAPE, so LeJeune G. in August 2015 requested another due process hearing. She and Charter School ultimately resolved her claims and entered a resolution agreement under § 1415(f)(1)(B) of the IDEA. *See* JA095 (Parties' Resolution Agreement). Resolution agreements are "created under the IDEA for the purpose of enforcing a child's right to a FAPE." *Charlene R.*, 63 F. Supp. 3d at 518. When a parent files a due process complaint against a charter school or another educational agency, the IDEA requires the parties to meet to afford the agency an opportunity to resolve the complaint. *See* 20 U.S.C. § 1415(f)(1)(B)(i). If the parties resolve the complaint, the agreement is reduced to writing and becomes a "resolution agreement." Because resolution agreements secure a

child's IDEA rights, they are enforceable in federal court. *See* § 1415(f)(1)(B)(iii)(II).

Under LeJeune G.'s resolution agreement, Charter School remained T.T.'s Local Educational Agency, but instead of providing him services directly, Charter School agreed to outsource his education to a private special needs school, the Y.A.L.E. School, for his seventh-grade year. *See* JA098 (Parties' Resolution Agreement); JA112 at ¶ 9 (LeJeune G. Declaration) ("As part of the settlement, beginning in the 2015-2016 school year when T.T. was in seventh grade, Khepera and I agreed for Khepera to place T.T. at the Y.A.L.E. School . . . .").

Again, however, Charter School flouted its IDEA duties. It failed to fund T.T.'s education, instead shifting the burden to LeJeune G. and Y.A.L.E. Charter School paid none of T.T.'s seventh-grade tuition, which totaled $44,519.08. JA127 (District Court Op.); JA066 at ¶ 80 (Stipulated Facts for Summary Judgment). So LeJeune G. had to assume the role of bill collector and repeatedly contact Charter School about the missing funding. Dkt. No. 31 at 73–83 (emails attached to LeJeune G.'s Motion for Summary Judgment). And Y.A.L.E. was left providing T.T. special education services without public funding.

After seventh grade, LeJeune G. continued seeking the missing funding, but Charter School rebuffed her. *See id.* Charter School is financially insolvent, on the verge of closing, and unable to provide the funding. *See* JA143–44 (District Court Op.). Therefore, LeJeune G. sought the funding from PDE in June 2017. *See* JA130. It rebuffed her too. *See id.*

T.T. no longer attends Y.A.L.E., but LeJeune G. wants him to return to the school. JA113 at ¶ 20 (LeJeune G. Declaration). He is attending a public high school in Philadelphia and is struggling. *Id.* at ¶¶ 14–18. A child with both a learning disability and complex socio-emotional needs, T.T. requires a unique educational placement, one like Y.A.L.E. which specializes in educating children with disabilities and that can provide him "weekly counseling"; daily "direct and explicit instruction in reading comprehension strategies"; "a positive behavior support plan"; "in-school suspensions for all infractions" rather than out-of-school suspensions "to avoid . . . inadvertent reinforcement of [his] problem behaviors"; "small classes or small learning groups"; "hands-on activities and learning opportunities"; special accommodations for "mathematics activities"; "visual support" during

class instruction; consistent "praise and other reinforcement"; and "direct teaching of memory strategies." *See* JA079 (2015 Hearing Officer Dec'n). It is difficult to find a school that can provide these services and meet T.T.'s unique blend of academic and socio-emotional deficits. Y.A.L.E. can, though. *See* JA112 at ¶ 9 (LeJeune G. Declaration).

Yet Y.A.L.E. will not allow T.T. to return until his outstanding tuition is paid. JA116 at ¶ 6 (Y.A.L.E. Business Administrator Declaration).

III. Procedural history

In November 2017, three years after LeJeune G. first tried to secure T.T. FAPE, she filed this action in the Eastern District of Pennsylvania against both Charter School and PDE. She sought to enforce her resolution agreement and her hearing officer decision against Charter School. JA126–27 (District Court Op.). LeJeune G. requested payment of T.T.'s seventh-grade tuition, as well as compensatory education to which T.T. is entitled under the hearing officer decision. *Id.* She alleged that Charter School must provide the tuition and compensatory education but "[t]o the extent that Charter

School is unwilling or unable to," PDE must do so. JA014–15 at ¶ 2 (LeJeune G.'s Amended Complaint).

LeJeune G.'s claims raised novel questions about "which entity and in what manner IDEA obligations are fulfilled after a charter school experiences financial difficulties." JA123 (District Court Op.); JA144. The claims required the district court to identify and apply a standard for determining a State Educational Agency's duties when a charter school cannot fulfill its IDEA obligations to a child. *See* JA144–45.

The parties filed motions for summary judgment, with LeJeune G. filing motions against both Charter School and PDE. JA123. In her filings against PDE, LeJeune G. argued that, when a child's charter school cannot fulfill a resolution agreement, the State Educational Agency must step in and fulfill all the agreement's outstanding terms. Dkt. No. 38 at 17–18 (LeJeune G.'s Response to PDE's Motion for Summary Judgment). PDE, on the other hand, contended that when a charter school cannot honor an agreement, the State Educational Agency has no duty to fulfill the terms of the agreement. Instead, the Agency must provide only relief that it, in its sole discretion, believes is

necessary to secure the child FAPE. Dkt. No. 35 at 9–10 (PDE's Motion for Summary Judgment).

The district court granted LeJeune G.'s motion against Charter School and granted in part and denied in part her motion against PDE. JA119 (District Court Order). The court held that Charter School is liable for T.T.'s seventh-grade tuition and compensatory education. JA137 (District Court Op.). It then determined, however, that Charter School is unable to fulfill such obligations, so PDE must step in. JA144. But the court adopted neither LeJeune G.'s nor PDE's standard for determining a State Educational Agency's duties when it must step in for a charter school. According to the court, PDE is required to fulfill some but not all the terms of a resolution agreement—it must fulfill the terms only to the extent required to correct a past deprivation of FAPE. *See* JA144–46.

Applying this new standard, the district court held that PDE must provide T.T. compensatory education but that it has no duty to pay his seventh-grade tuition. JA145–47. The compensatory education corrects a FAPE denial, the court concluded, but the tuition does not because Charter School's failure to pay it, in the court's view, did not deprive

T.T. of FAPE. *See* JA146. T.T., the court asserted, received an appropriate education at Y.A.L.E., and Charter School's funding failure did not disrupt his education, so the failure did not deprive him of FAPE. *See id.* The court therefore denied LeJeune G.'s claim against PDE for the tuition. *See* JA147.

LeJeune G. timely appealed.[2]

IV. Ruling presented for review

LeJeune G. challenges the district court's order denying her request that PDE pay T.T.'s outstanding tuition. The dispositive ruling—the ruling underlying the order—is the court's holding that the tuition is not necessary to secure T.T. FAPE. *See* JA146 ("T.T.'s claim against PDE for . . . tuition under the [r]esolution [a]greement turns on whether T.T. will be denied a FAPE if PDE does not step in . . . .").

LeJeune G. contests only that holding. She does not challenge the standard that the district court adopted for determining a State Educational Agency's duties when a charter school cannot fulfill a

[2] PDE did not appeal. It thus challenged neither the district court's holding that Charter School is unable to fulfill its IDEA obligations to T.T. nor the court's standard for determining a State Educational Agency's duties when it steps in for a charter school.

resolution agreement. Rather, she contends that under the standard, PDE must pay T.T.'s tuition.

SUMMARY OF ARGUMENT

LeJeune G. is entitled to reversal because T.T. did not receive FAPE in seventh grade. Denied public funding for his education, he was denied an education "at public expense." *See* 20 U.S.C. § 1401(9)(A). He was therefore deprived of FAPE. *See id.* (defining FAPE as an appropriate education "at public expense"). To correct that deprivation and fulfill its IDEA duties, PDE must step in and pay the outstanding tuition.

In concluding that T.T. was not denied FAPE, the district court misapplied the IDEA. It interpreted FAPE as requiring only that children receive an appropriate education. LeJeune G. does not dispute that Y.A.L.E. provided T.T. an appropriate education, but FAPE requires more than an appropriate education—it requires an appropriate education "at public expense, under public supervision and direction, and without charge." *See* 20 U.S.C. § 1401(9)(A).

But even if T.T. received FAPE, reversal is warranted. FAPE violation or no FAPE violation, the district court should have held PDE responsible for the missing funding. Courts have equitable authority to order State Educational Agencies to assume financial responsibility for

IDEA obligations owed to a family. And here, the equities compel using that authority. Even if the missing funding is not necessary to secure FAPE, it is an IDEA obligation that Charter School owes LeJeune G. under her resolution agreement. Since Charter School cannot fulfill the obligation and since T.T. cannot return to Y.A.L.E. until the funding is provided, it is appropriate to order PDE to assume responsibility for it.

STANDARD OF REVIEW

I. This Court reviews de novo the district court's FAPE ruling.

De novo review applies to whether the district court, in granting summary judgment to PDE, properly interpreted and applied the IDEA's FAPE requirement. The Court reviews de novo "orders entered on motions for summary judgment, applying the same standard as the district court." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014). Further, whether a court properly "applied the law to the facts" is a de novo inquiry. *See Welch & Forbes, Inc. v. Cendant Corp.*, 235 F.3d 176, 181 (3d Cir. 2000).

II. The Court reviews for abuse of discretion whether the district court erred in not holding PDE responsible for T.T.'s tuition on equitable grounds.

When an issue requires a "balancing of the equities," the Court reviews for abuse of discretion. *See Bermuda Express, N.V. v. M/V Litsa*, 872 F.2d 554, 557 (3d Cir. 1989).

ARGUMENT

I. Charter School's failure to fund T.T.'s education deprived him of FAPE. The district court therefore erred in denying LeJeune G.'s claim against PDE for the funding.

A. T.T. did not receive FAPE because he did not receive an education at public expense.

Most FAPE cases turn on FAPE's command that children with disabilities receive an appropriate education, but this appeal implicates a different FAPE requirement: that children with disabilities receive a free public education. Under that requirement, State and Local Educational Agencies must provide each child with disabilities an education (1) "at public expense," (2) "under public supervision and direction," and (3) "without charge." *See* 20 U.S.C. § 1401(9)(A); *E.R.K.*, 728 F.3d at 988; *K.L.*, 907 F.3d at 642. A State or Local Educational Agency satisfies this free-public-education requirement and thus provides FAPE only if it fulfills all three elements. *See* 20 U.S.C. § 1401(9)(A) (stating that FAPE is an appropriate education provided "at public expense, under public supervision and direction, *and* without charge" (emphasis added)); *Reese Bros., Inc. v. United States*, 447 F.3d 229, 235–36 (3d Cir. 2006) ("The usual meaning of the word "and" . . . is conjunctive . . . .").

In seventh grade, however, T.T. did not receive an education at public expense. Charter School decided, by way of LeJeune G.'s resolution agreement, to fund T.T.'s placement at Y.A.L.E. rather than provide him special education services directly. But after T.T. started attending Y.A.L.E., Charter School failed to pay his tuition. T.T. received no public funding, no education at public expense. Charter School shifted the burden for his education to Y.A.L.E. and LeJeune G., thus denying him a free public education and shirking its FAPE duties. *See* 20 U.S.C. § 1401(9)(A).

The district court found no FAPE violation because it did not apply the free-public-education requirement. The court read § 1401(9)(A) out of the IDEA, construing FAPE as requiring only that T.T. receive an appropriate education. The court offered two reasons for finding no FAPE violation, and both take into account only whether T.T. received an appropriate education.

First, the court suggested that the IDEA did not require Charter School to fund Y.A.L.E. because Charter School never agreed that Y.A.L.E. is an appropriate placement. *See* JA146 ("T.T.'s Resolution Agreement states that '[n]othing in this Agreement shall constitute an

acknowledgement by Charter School that placement at The YALE School . . . is necessary to provide [T.T.] with a Free and Appropriate Education. . . .'"). But even if Charter School did not agree that Y.A.L.E. was necessary to afford T.T. an appropriate education, he was entitled to funding for his education there. When T.T. was in seventh grade, Charter School had a choice: it could have provided T.T. an education at public expense by providing him services directly or by funding his education at a private special needs school like Y.A.L.E. *See* 34 C.F.R. § 300.2(c) (recognizing that educational agencies can fulfill their IDEA duties by placing a child in a private school). Even though Charter School may not have believed that doing so was necessary, it chose the latter.

That Charter School did not agree that Y.A.L.E. was necessary to provide T.T. an appropriate education might have been relevant if Charter School offered T.T. an education at public expense somewhere other than Y.A.L.E. If, for example, Charter School offered T.T. special education services in its own program after realizing it could not pay Y.A.L.E., it might have fulfilled its FAPE duties. But Charter School offered T.T. nothing during seventh grade. It flouted its duty to fund

Y.A.L.E. without providing an alternative option for T.T. to receive an education at public expense.

Second, the court pointed to evidence that T.T. received an appropriate education at Y.A.L.E. and that Charter School's funding failure did not disrupt his education. JA146. Again, though, a child receiving an appropriate education does not absolve State and Local Educational Agencies of their FAPE duty to provide the child an education at public expense. A child who receives an education that is appropriate but not "at public expense, under public supervision and direction, and without charge" does not receive a free and appropriate public education—he receives only an ~~free and~~ appropriate ~~public~~ education. *See* 20 U.S.C. § 1401(9)(A).

Sure, such a child might in theory suffer no immediate educational harm from the violation of the free-public-education requirement, but that is irrelevant.[3] In making the requirement a distinct component of FAPE, Congress established that a failure to provide a publicly funded education violates the IDEA regardless of whether the failure results in an immediate denial of an appropriate

[3] Of course, T.T. has suffered harm. He has lost an educational opportunity: the chance to return to Y.A.L.E.

education. The requirement reflects Congress' determination that public funding failures are ills themselves. *Cf.* 20 U.S.C. § 1400(c)(2) (stating that funding failures and exclusion from the public school system are ills that Congress intended the IDEA to eliminate).

That determination is consistent with the IDEA's emphasis on educational stability. Funding failures inject uncertainty into a child's education and impose burdens on families, forcing them to take action to secure their child's access to education. *See M.R. v. Ridley Sch. Dist.*, 744 F.3d 112, 125 (3d Cir. 2014) (recognizing that the IDEA includes provisions "designed to ensure educational stability for children with disabilities"). This case is illustrative. Because T.T. did not receive a free public education in seventh grade, LeJeune G. has had to act as a bill collector, spending time and her family's scarce resources trying to wrangle educational funding from Charter School and PDE.

This case also illustrates that funding failures directly impact children by diminishing their "educational opportunity." *See* 20 U.S.C. § 1412(a)(2). Because of Charter School's failure to pay T.T.'s tuition, the doors of Y.A.L.E. are closed to him. He is denied access to the only educational placement that has provided him the comprehensive

academic and socio-emotional supports that he requires. Forced to attend a different placement, T.T.'s education is at risk. When T.T. attended Charter School, for example, his behavior was "totally out of control." JA077 (2015 Hearing Officer Dec'n). He fought other children, threw chairs, had suicidal ideation, and on one occasion, had to go to the hospital after hitting an object. JA076–78.

And so, in seventh grade, T.T. may have received an appropriate education, but he did not receive an education at public expense. Under the plain language of § 1401(9)(A), then, he did not receive FAPE.

B. Finding no FAPE denial would create a loophole that runs afoul of the IDEA's broad remedial purpose.

The "public policy principles underlying the IDEA" are important to consider in determining whether FAPE was denied. *See D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 273 (3d Cir. 2014); *cf. M.R. v. Ridley Sch. Dist.*, 868 F.3d 218, 227 (3d Cir. 2017) ("[I]n considering the [IDEA's] statutory context, we must consider . . . practical consequences."). The IDEA is a broad remedial statute, designed by Congress to secure "full educational opportunity" for children with disabilities. *See* 20 U.S.C. § 1412(a)(2); *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 803 (3d Cir. 2007) (discussing the "comprehensive nature

of the IDEA's remedial scheme"). No matter a child's disability, no matter his family's income, no matter where he lives, he is entitled to a meaningful opportunity to develop the skills that he needs to become an independent, self-sufficient adult. *See* 20 U.S.C. § 1400(c)(1). This ambitious guarantee permeates the IDEA. The IDEA affords children and their families robust protections that are designed to remedy "violations of *any* right relating to the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education to such child." *See A.W.*, 486 F.3d at 803 (emphasis added) (internal quotation marks omitted).

The district court's conclusion that T.T. received FAPE is inconsistent with these principles. The court's decision punctures the IDEA's broad remedial scheme, leaving a loophole that denies children who attend charter schools equal access to educational opportunity. Under the decision, charter schools and PDE can escape responsibility for providing children like T.T. an education at public expense. This loophole will curtail such children's access to private special needs schools.

Far too often, charter schools, due to limited resources, cannot meet the needs of their special education students, so the students must attend a special needs school like Y.A.L.E. to obtain appropriate services. A child, however, can access a special needs school only if her charter school agrees to fund her education there *and* the special needs school admits her. But under the district court's decision, special needs schools will be loath to admit children from charter schools. The financial risk will be too great. Charter schools in Pennsylvania frequently close, so accepting any child from a charter school will present a risk of nonpayment.[4] The doors of special needs schools will slowly slam shut for children like T.T.

The IDEA does not contemplate such a result. It contemplates charter schools and PDE providing an education at public expense so that T.T. and his peers have access to "full educational opportunity." *See* 20 U.S.C. § 1412(a)(2).

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[4] In the Philadelphia area alone, several charter schools have closed in the past few years, spawning litigation over PDE's IDEA responsibilities. *See, e.g.*, *H.E. v. Walter D. Palmer Leadership Learning Partners Charter Sch.*, 220 F. Supp. 3d 574 (E.D. Pa. 2016); *Charlene R. v. Solomon Charter Sch.*, 63 F. Supp. 3d 520 (E.D. Pa. 2014); *Olivia B. v. Sankofa Acad. Charter Sch.*, 2014 U.S. Dist. LEXIS 155993 (E.D. Pa. Nov. 4, 2014); Avi Wolfman-Arent and Dale Mezzacappa, *SRC votes to ax three Philly charter schools*, WHYY.org, Dec. 14, 2017.

II. Even if the funding failure did not deny T.T. FAPE, the district court should have held PDE responsible for the funding under the court's IDEA equitable authority.

When a charter school is struggling and is unable to provide a child FAPE, a court must order the State Educational Agency to assume responsibility for the direct educational services that the child needs to receive FAPE. *Charlene R.*, 63 F. Supp. 3d at 516 (concluding that PDE must provide compensatory education services to a child whose charter school went defunct). "While the [State Educational Agency] ordinarily delegates actual provision of [a child's] education to [charter schools], the [State Educational Agency] by statute must step in where a [charter school] cannot or will not provide a child with a FAPE." *Id.*

In contrast, when a charter school can fulfill its IDEA duties, a court cannot order the State Educational Agency to provide the child direct educational services. But the court has the power to order the State Educational Agency to assume financial responsibility for IDEA obligations owed to the child. That power is inherent to courts' broad equitable authority under the IDEA. *See Kruelle*, 642 F.2d at 696–97 (upholding a district court's decision to assign financial responsibility for a child's education to a State Educational Agency).

The IDEA gives courts "broad discretion" in fashioning relief for a family. *Burlington*, 471 U.S. at 369. After finding an IDEA violation, a court can grant a family "such relief as [it] determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). This broad equitable authority includes the authority to order State Educational Agencies to assume financial responsibility for IDEA obligations owed to a family. *See Kruelle*, 642 F.2d at 696–97. "There is nothing in either the language or the structure of [the] IDEA that limits [a] court's authority to award . . . costs against the [State Educational Agency], the [Local Educational Agency], or both in any particular case." *Gadsby v. Grasmick*, 109 F.3d 940, 955 (4th Cir. 1997). Indeed, "both the language and the structure of [the] IDEA suggest that" a court may hold "either or both entities" liable after "considering all relevant factors." *Id.*; *see also St. Tammany Par. Sch. Bd. v. Louisiana*, 142 F.3d 776, 783–84 (5th Cir. 1998) (adopting *Gadsby*'s analysis); *John T. v. Iowa Dep't of Educ.*, 258 F.3d 860, 865 (8th Cir. 2001) (awarding IDEA attorney's fees against a State Educational Agency after considering equitable factors).

Here, even if the district court was correct that paying T.T.'s seventh-grade tuition is not necessary to secure him FAPE, the court

abused its discretion in not using its equitable authority to hold PDE responsible for the tuition. The tuition, even if not necessary to secure FAPE, is an IDEA obligation owed to T.T. since Charter School guaranteed it to him in an IDEA resolution agreement. *See* 20 U.S.C. § 1415(f)(1)(B)(iii).[5] And the equities strongly favor allocating responsibility for the tuition to PDE.

First, because Charter School cannot pay the tuition, if responsibility is not allocated to PDE, the doors of Y.A.L.E. will remain shut to T.T. He will be denied access to an educational placement which has proven that it can meet his unique academic and socio-emotional needs.

Second, requiring PDE to pay the tuition would impose only a financial obligation on PDE—it would not require PDE to take on the more burdensome task of providing T.T. direct educational services. *See Kruelle*, 642 F.2d at 697 (approving of a district court order against a State Educational Agency in part because the order required the

[5] T.T.'s right to the tuition arising from the resolution agreement is not merely a contractual right. It is a "right relating to . . . [his] educational placement": the resolution agreement established a right to the tuition to secure T.T.'s placement at Y.A.L.E. *See A.W.*, 486 F.3d at 803 ("The IDEA includes a judicial remedy for violations of any right relating to the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education to such child." (internal quotation marks omitted)).

Agency to only "insure funding" rather than "engage in the detailed development of a specific educational program").

Third, LeJeune G. notified PDE of Charter School's IDEA failures months before commencing this action, thus affording PDE an opportunity to take corrective action, but PDE did nothing. *See St. Tammany Par. Sch. Bd.*, 142 F.3d at 785 (finding relevant that the State Educational Agency's assistance was sought before the parents filed suit).

Finally, PDE at bottom is culpable for LeJeune G. and T.T.'s hardship. In exchange for millions of dollars in IDEA funding, PDE promised to implement a comprehensive plan to uphold the rights of children with disabilities. *See Charlene R.*, 63 F. Supp. 3d at 520 & n.3. But then it "encouraged the growth of charter schools" without establishing safeguards for when charter schools shutter. *See id.* at 519. If PDE had fulfilled its IDEA promise and developed a plan that effectively addresses charter school closures, this litigation would have been unnecessary.

CONCLUSION

The IDEA has a "broad remedial purpose." *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 618 (3d Cir. 2015). In enacting it, Congress sought to transform the public education system from an institution that turns a blind eye to children with disabilities to one that provides them equal access to the benefits of a public education. *See* 20 U.S.C. § 1400(c)(2), (7). Achieving that aim, Congress decided, requires more than just guaranteeing children with disabilities an appropriate education—it requires states to properly supervise and fund each child's education. That duty was flouted here, so FAPE was denied. *See* 20 U.S.C. § 1401(9)(A).

LeJeune G. respectfully requests that the Court reverse the district court's denial of her request for T.T.'s seventh-grade tuition.

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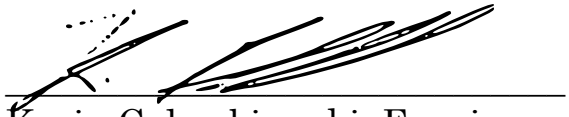

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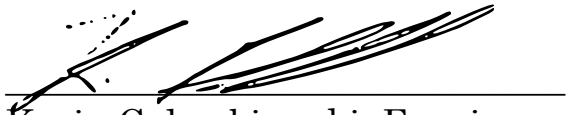

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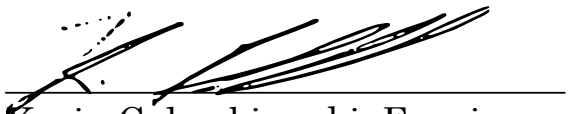

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