No. 11-1334

In the United States Court of Appeals For the Tenth Circuit

JEFFERSON COUNTY SCHOOL DISTRICT R-1,
PLAINTIFFS – APPELLANT

v.

ELIZABETH E., BY AND THROUGH HER PARENTS, ROXANNE B. AND DAVID E.
DEFENDANTS – APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE JUDGE WILLIAM J. MARTINEZ
D.C. NO. 10-CV-00741-WJM-KMT

***AMICI CURIAE* BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, COLORADO ASSOCIATION OF SCHOOL BOARDS, KANSAS ASSOCIATION OF SCHOOL BOARDS, NEW MEXICO SCHOOL BOARDS ASSOCIATION, OKLAHOMA STATE SCHOOL BOARDS ASSOCIATION, AND UTAH SCHOOL BOARDS ASSOCIATION IN SUPPORT OF APPELLANT**

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CORPORATE DISCLOSURE STATEMENT

All of the amici are organized as nonprofit corporations. None has any parent corporation, nor does any publicly held corporation own stock in them.

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Francisco M. Negrón, Jr.

Dated: September 26, 2011

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This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of both parties.

STATEMENT OF INTERESTS

The National School Boards Association ("NSBA"), founded in 1940, is a not-for-profit organization representing state associations of school boards and their over 14,500 member districts across the United States which serve the nation's 50 million public school students.

The Colorado Association of School Boards ("CASB") represents more than 1000 school board members and superintendents from across the state. Established in 1940, CASB provides the structure through which school board members unite in efforts to promote the interests and welfare of Colorado school districts.

The Kansas Association of School Boards ("KASB") represents 292 school districts and 39 cooperatives, service centers, community colleges and technical colleges in the state. KASB's mission is to assist local boards of education and related educational entities in their responsibilities to assure a quality public education for all students.

The New Mexico School Boards Association ("NMSBA") is the member organization for all of New Mexico's school boards to support their efforts in providing a quality education for all students of New Mexico. The NMSBA serves its members through commitment to local autonomy; advocacy at the state and

federal level for commonly held needs; leadership development services and training for local school boards; and collaboration with community, elected officials and other educational organizations in areas of common interest.

The Oklahoma State School Boards Association ("OSSBA") created in 1944 to serve school board members across the state works to promote quality public education for the children of Oklahoma through training and information services to school board members. Its mission is to provide services that safeguard, represent and improve public education.

The Utah School Boards Association ("USBA") provides leadership, advocacy, training, and quality services for effective school board governance. It members are advocates for all children in its public schools, working to ensure that every child has access to the education needed to become a contributing, productive member of society.

This case is of importance to all school districts represented by *Amici*. While these school districts are dedicated to educating children with disabilities, they are not designed or funded to function as medical providers. Under the IDEA, residential placements should be limited to those that are either determined to be necessary by the IEP team or are made unilaterally by parents for primarily educational purposes following a determination that the school district did not offer their child a FAPE. Transferring the costs of medical and mental health care to

schools under the guise of the IDEA opens the door to school district liability that will ultimately prove detrimental to the entire student population, as the limited public funds available to school districts will be depleted by increased litigation and the escalated costs of medical care in private residential facilities. The IDEA was not founded for this purpose, and this Court should not allow it to be stretched beyond its intended limits to provide free appropriate public *education* to children with disabilities.

INTRODUCTION

Congress enacted the Individuals with Disabilities Education Act ("IDEA"), to provide children with disabilities a free appropriate public education ("FAPE"). 20 U.S.C. §§ 1400(c)(2), (d) (2011). The IDEA's mandate that school districts educate children with disabilities does not additionally obligate schools to ameliorate a child's disability or to cure an underlying medical condition. This case however brings that basic tenet into question for the Tenth Circuit's resolution.

This case is of national importance to public school districts because, as a matter of first impression for the Tenth Circuit, it requires consideration of how it will assess when school districts are required to pay for unilateral residential placements. School districts should not be responsible for unilateral residential placements made for medical purposes; such responsibility is not only beyond the

range of their competence and funding but also exceeds the requirements of the IDEA. In deciding whether a school district should be obligated to fund a unilateral residential placement under the IDEA, courts have employed various tests to delineate when the placement is for educational purposes, and when it is for medical purposes. What underlies most of the tests and factors considered by courts across the nation is the logical principle that school districts should not be obligated to fund a unilateral residential placement when the placement is made for non-educational reasons and education is of only secondary concern or ancillary benefit. However, this fundamental principle can be too easily ignored if this court adopts the "inextricably intertwined" test discussed in *Kruelle v. Newcastle County Sch. Dist.*, 642 F.2d 687, 693 (3d Cir. 1981). *Amici* respectfully submit that this test is unworkable and should not be utilized in adjudicating this matter.

ARGUMENT

I. PROVIDING MEDICAL CARE IS NOT MANDATED BY THE IDEA AND IS BEYOND A SCHOOL DISTRICT'S COMPETENCE AND FINANCIAL CAPACITY.

The potential financial burdens imposed on States receiving IDEA funds may be relevant to arriving at a sensible construction of the statute. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 892 (1984), the U.S. Supreme Court specifically recognized that Congress did not intend that "the requirement of an 'appropriate education' was to be limitless". It declared in *Board of Educ. of Hendrick Hudson*

Central Sch. Dist., Westchester County v. Rowley, 458 U.S. 176, 190, n. 11 (1982), that Congress did not intend to "impose upon the States a burden of unspecified proportions and weight." Instead, the Supreme Court explained that the intent of the IDEA "was more to open the doors of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.* at 192. Accordingly, the focus of the IDEA has been to provide *access* to public education by requiring schools to design and implement a program that provides an *opportunity* for a student to receive some educational benefit. *Id.* A school district provides FAPE by providing each child the "basic floor of opportunity," or an educational benefit that might be found to be "more than *de minimus*." *Id.* at 200. The educational program to be provided under the IDEA "need not be the best possible one, nor one that will maximize the child's educational potential; rather it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him 'to benefit' from the instruction." *Rowley*, 458 U.S. at 188-89. The IDEA further does not seek to promote its broad goals "at the expense of fiscal considerations." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 303 (2006).

Nothing within the IDEA evinces a Congressional intent to impose a duty upon school districts to pay for the medical care of children with disabilities. The

plain text of the statute limits the provision of medical services under the IDEA to those for diagnostic and evaluation purposes only. 20 U.S.C. § 1401(26) (2011). The Supreme Court previously acknowledged that this medical services exclusion was designed to spare schools from an obligation to provide a service that would prove to be unduly expensive and lie far outside both the role and competency of public schools. *Tatro*, 468 U.S at 892. In *Tatro*, the Supreme Court held that the medical services exclusion extended to those services provided by a physician or hospital. *Id*. at 892-893. In *Cedar Rapids Community Sch. Dist. v. Garrett F.*, 526 U.S. 66, 74 (1999), the Court again confirmed that the "likely cost of the services and the competence of school staff" justifies drawing a line between excluded and covered medical services. Thus, the "IDEA ensures that all disabled children receive a meaningful *education*, but it was not intended to shift the costs of treating a child's disability to the public school district." *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 300 (5th Cir. 2009) (emphasis in original).

The IDEA requires school districts to provide a continuum of placement options for children with disabilities. 34 C.F.R. § 300.115 (2011). Part of the continuum of educational placements includes residential placements. 34 C.F.R. § 300.104 (2011).[1] Public school districts are not hesitant to place a child in a

[1] Under the IDEA, school districts are obligated to administer a child's IEP in the least restrictive environment ("LRE") to the maximum extent appropriate. 20 U.S.C. §1412 (a)(5)(A) (2011); *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th

residential placement when educationally warranted. School districts frequently agree to private placements when they find themselves unable to provide an appropriate public education. In 2005, for example, 88,098 students with disabilities were educated in private schools at public expense. *See* U.S. Dep't of Educ., *Twenty-Ninth Annual Report to Congress on the Implementation of the IDEA*, Table 2-5 (2007).[2] This willingness extends to private residential facility placements. From 1996 through 2005, the number of students served under the IDEA in private residential facilities increased from 13,623 to 17,016, with a total of 34,048 students being served under the IDEA in public and private residential facilities. U.S. Dep't of Educ., *Twenty-Ninth Annual Report to Congress on the*

Cir. 2004); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1045 (5th Cir. 1989). This requirement contemplates that a student's IEP will provide a placement that will permit the student to be educated alongside and participate with nondisabled children to the maximum extent appropriate. 20 U.S.C. § 1414(d)(1)(A)(IV)(cc) (2011). Clearly, a residential placement rests at the far, restrictive end of the IDEA's LRE continuum, placing a child far from his/her peers at the public school, and should be selected only after careful consideration of the entire IEP team. *Amici* do not suggest that a unilateral private placement is inappropriate simply because it does not satisfy the LRE preference, but the restrictiveness of the environment is properly considered when analyzing what educational benefit the child may potentially receive there. *See Sumter County Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 488 (4th Cir. 2011).[1] Unilateral private residential placements are also at odds with the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581, 598 (1999), which emphasized the similar requirement that patients suffering from mental disabilities be provided care, to the maximum extent practicable, within the community rather than in institutional settings, as institutionalization absent a reasoned professional judgment of the appropriate placement for each person among all available alternatives itself is a form of discrimination.

[2] Available at https://www.ideadata.org/tables29th/ar_2-5.htm.

Implementation of the IDEA, Table 2-4, pg. 190 (2007). School districts therefore voluntarily expend hundreds of millions of dollars each year on private educational placements for students with disabilities arrived at through the IDEA's collaborative process.

However, educational residential placements are far different from the medical residential placement at issue in this case. Hospital care is, and was understood by Congress and the U.S. Department of Education to be, a far more expensive proposition than an educational residential placement and a greater burden than states could ordinarily be expected to shoulder in their education budgets. *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635, 645-46 (9th Cir. 1990). The Fourth Circuit observed that the medical services exclusion "was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." *Tice v. Botetourt*, 908 F.2d 1200, 1209 (4th Cir. 1990), quoting *Irving Sch. Dist. v. Tatro*, 468 U.S. 883, 892 (1984). There is a wide range of conditions that might require residential treatment for medical reasons. For example, children suffering from drug addiction, substance abuse problems, anxiety disorders, eating disorders, bipolar disorder, schizophrenia, depression and other psychiatric disorders all may be placed in residential facilities for medical care. All of these conditions no doubt could interfere with a child's ability to learn

and warrant appropriate medical care, but the IDEA still cannot be read to require public schools to pay for the costs of that treatment.

That school districts could not possibly foot the bill for medical care of children with disabilities is graphically illustrated by the soaring cost of health care that has occurred in just the last decade. Nationally, health expenditures have grown since 2000 from $1.38 trillion to $2.5 trillion in 2009, representing a per capita increase from $4,878 to $8,086. *See* U.S. Dep't of Health and Human Services, *National Health Expenditures Aggregate, Per Capita Amounts, Percent Distribution,* Table 1.[3] Hospital care expenditures rose from $415.5 billion to $759.1 billion between 2000 and 2009. *Id.* at Table 2. The category of health expenditures tracking costs arising from residential care facilities also grew exponentially, from $59.8 billion to $122.6 billion in the same timeframe. *Id.* The U.S. Department of Health and Human Services, National Institute of Mental Health commissioned a survey that reported that hospitalization rates for psychiatric illnesses increased for children ages 5-12 from 155 per 100,000 children in 1996 to 283 per 100,000 children in 2007, and for teens, the rate increased during the same time period from 683 to 969 per 100,000 children. Blader J.C., *Acute Inpatient Care for Psychiatric Disorders in the United States,*

[3] Available at https://www.cms.gov/NationalHealthExpendData/downloads/tables.pdf

1996 through 2007, Archives of General Psychiatry, August 1, 2011.[4] The Office of Special Education and Rehabilitative Services also noted that the number of children with disabilities in private residential treatment facilities continued to rise, and that such placements were often expensive; in some cases, the total annual cost for placement could exceed $100,000 for a single child in a school year.[5]

The number of children served under the IDEA is also rising. In 1996, 5,213,666 students between the ages 6 and 21 were served under the IDEA. In 2005, that number had risen to 6,110,829. *See* U.S. Dep't of Educ., *Twenty-Ninth Annual Report to Congress on the Implementation of the IDEA*, Table 2-5 (2007). Colorado, in budget year 2011-2012, will serve approximately 83,000 students with disabilities, or about 10% of the total pupil enrollment. Colorado Dep't of Education, *Understanding Colorado School Finance and Categorical Program Funding*, July 2011.[6]

The U.S. Department of Health & Human Services, Center for Medicare and Medicaid Services, recognizes that when private health insurance is unavailable, Medicaid, not public school funding, is the lynchpin for the provision of mental

[4] Available at http://www.nimh.nih.gov/science-news/2011/survey-assesses-trends-in-psychiatric-hospitalization-rates.shtml

[5] Available at http://www2.ed.gov/policy/speced/guid/idea/letters/2005-1/osep0508fape1q2005.pdf

[6] Available at http://www.cde.state.co.us/cdefinance/download/pdf/FY2011-12Brochure.pdf

health services, providing services and support for 58 million adults and children.[7] Congress did not intend for public schools to bear the responsibility or financial burden to provide services more appropriately left to private insurers or other governmental sources, such as Medicaid. Indeed, Congress specified that when any public agency *other than an educational agency* is otherwise obligated under Federal or State law or assigned responsibility under State policy to provide for or pay for any services that are also considered "special education and related services," that other public agency shall fulfill that obligation or responsibility. 20 U.S.C. § 1412(a)(12)(A), (B) (2011). Thus, even for *educational* residential placements, Congress recognized that other governmental agencies aside from the public school should be responsible for providing those special education and related services statutorily left to their purview.[8]

Significantly, the Colorado Legislature itself has not sought to transfer the costs of mental health treatment to public school districts. Instead, the Colorado

[7] *See* https://www.cms.gov/MHS/

[8] Clearly, Section 1412(a)(12) cannot be read to require schools to provide for medical, non-educational residential placements and thereafter seek reimbursement from another public agency, as it is expressly limited to an allocation of financial responsibility for only those services that are defined as necessary "special education and related services." If Congress had intended for public schools to subsume the role of parents and other federal and state health agencies to provide for *all* services a child might need, it would not have needed to limit Section 1412(a)(12) to only those services "considered special education and related services" necessary to ensure the provision of a FAPE. To hold otherwise renders Section 1412(a)(12)'s limitation superfluous.

Legislature has mandated through its Medical Assistance Act that "each Medicaid-eligible child diagnosed as a person with a mental illness shall receive mental health treatment, which may include in home family mental health treatment, other family preservation services, residential treatment, or any post-residential follow-up services, *that shall be paid for through federal Medicaid funding.*" Colo. Rev. Stat. § 25.5-5-307 (2011)(emphasis added).

That responsibility for medical care is not the intended role of public schools is further demonstrated by Federal and state laws prohibiting public schools from prescribing medical treatment of children. The IDEA, 20 U.S.C. § 1412(a)(25) (2011), bars schools from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school or receiving services under the IDEA. Colorado has a similar law. Colo. Rev. Stat. § 22-32-109 (1)(z)(ee) (2011). Clearly, the caretaking duty to address medical and mental health issues remains either with parents, or with other federal and State health agencies that possess both the competency to carry out and responsibility for funding those services. The Supreme Court acknowledges that although for many purposes schools act *in loco parentis*, they do not have such a degree of control over children as to give rise to a constitutional duty to protect. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995). The Eleventh Circuit validated a school's claim "that it cannot reasonably be expected to solve all the problems faced by

children in today's society," agreeing that "the school's primary function is to educate students, not replace parents." *Wyke v. Polk County Sch. Bd.*, 129 F.3d 560, 573 (11th Cir. 1997). As shown more specifically below, the inextricably intertwined test, through its breadth and ambiguity, fails to account for the divisions of responsibility between parents and other state health agencies for the medical care and mental health treatment of children. Given the rising number of students receiving services under the IDEA and the costs of health care, this Court should not permit the circumvention of both Congress' and the Colorado Legislature's mandates that other public agencies bear the responsibility of medical care not covered by private insurance. A decision in favor of the parents here however would do just that, and further encourage additional litigation against schools, seeking to make them the payer of first resort for services that they are neither suited nor funded to provide directly.

II. THE DISTRICT COURT'S DECISION HERE CONFLICTS WITH THE IDEA'S COLLABORATIVE FRAMEWORK AND IMPOSES UNNECESSARY FINANCIAL BURDENS ON SCHOOL DISTRICTS BY ENCOURAGING LITIGATION FOR REIMBURSEMENT OF UNILATERAL PRIVATE MEDICAL PLACEMENTS.

To achieve its broad educational goals the IDEA establishes a collaborative framework for parents and educators to develop, implement, monitor and revise an individualized education program ("IEP") specifically tailored to the educational needs of each child with a disability. The IEP team process is the appropriate

vehicle for making decisions regarding residential placements. The IEP is the "centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988). The IEP development process unquestionably focuses on addressing the child's unique needs with a program that will allow the child to be involved in and make progress in the general education curriculum alongside nondisabled children to the maximum extent appropriate. 20 U.S.C. §§ 1414(d)(1), (3) (2011). Under the IDEA, the IEP is not developed by the parents unilaterally, but by a group of individuals, including the parents, who review the child's needs and determine the appropriate educational placement for that student. 20 U.S.C. § 1414(d)(1)(B) (2011). As the Seventh Circuit has determined, a physician's diagnosis and input on a child's medical condition, although worth consideration, is not dispositive of a child's needs under the IDEA: "a physician cannot simply prescribe special education; rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local educational agency." *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 616 F.3d 632, 640-41 (7th Cir. 2010).

The IDEA's collaborative framework extends to the resolution of disputes that may arise between school districts and parents about the education of a child with disabilities. Congress purposefully intended that "parents and schools should be given expanded opportunities to resolve their disagreements in positive and

constructive ways." 20 U.S.C. § 1400(c)(8) (2011). This cooperative process was confirmed by the U.S. Supreme Court in *Schaffer v. Weast*, 546 U.S. 49, 57 (2005), which recognized that the IDEA's collaborative dispute-resolution mechanisms promote prompt and amicable resolutions and "reduce its administrative and litigation-related costs."[9]

Although the IDEA's dispute resolution mechanisms are intended to reduce legal costs, expenditures for administrative and legal proceedings under the IDEA are often substantial for school districts. As the Senate Report from the 1997 IDEA amendments makes clear, "[t]he growing body of litigation surrounding IDEA is one of the unintended and costly consequences of this law." S. Rep. No. 104-275 at 85 (1996). As part of the implementation of the IDEA amendments, it was noted that "IDEA is already one of the largest underfunded Federal mandates; it is wrong for courts to impose even greater financial burdens on these financially strapped districts as punishment for trying to do their job." *Id.*; *see also* H.R. Rep. No. 108-77 at 85; 150 Cong. Rec. S5250, S5337 (daily ed., May 12, 2004) (statement of Sen. Corzine); 149 Cong. Rec. H3458, H3470 (daily ed., Apr. 30, 2003)(statement of Rep. McKeon).

[9] As demonstrated by the District in its Brief, the parents' failure to either provide the statutorily required notice under Section 1412(a)(10)(C) or otherwise present the child for an evaluation by the District violates the IDEA's intended collaborative scheme and provides separate justifications for the denial of the requested reimbursement and relief.

Upholding the District Court's decision here will interfere with the IDEA's cooperative process and exacerbate the significant legal costs that districts already incur. By holding that school districts may be responsible for these types of medical placements, the ruling will encourage more litigation as parents will quite understandably pursue any available means to acquire the best care for their children and secure a funding source for same. Parents may even reject Medicaid funded treatment in anticipation of full funding from school districts for their preferred health care facility.

Given the Supreme Court's decision in *Forest Grove v. T.A.*, 129 S. Ct. 2484 (2009), parents need not even try a school district's offered program prior to seeking private placement reimbursement, leaving school districts at a major disadvantage, with few safeguards to protect against parents initiating litigation to try to obtain public school funding of their child's medical care. Even when school districts prevail against claims for residential placement reimbursement, they still incur the high costs of litigation, which deplete their limited resources and funds meant to serve the educational needs of the entire student population. This places school districts in the dilemma of having to choose to litigate or to capitulate to avoid such costs, even when they believe they have appropriately served the student. Affirming the District Court's decision here will only intensify this

dilemma, while undermining the IDEA's emphasis on collaborative decision-making.

III. TO PROMOTE THE PURPOSES OF IDEA, SCHOOL DISTRICT LIABILITY FOR A RESIDENTIAL PLACEMENT SHOULD BE IMPOSED ONLY WHEN THE PLACEMENT IS PRIMARILY FOR EDUCATIONAL REASONS.

A. The "inextricably intertwined" test should not be adopted.

The District in its brief has accurately set forth the full spectrum of tests utilized by courts thus far in resolving whether a residential placement is reimbursable under the IDEA. *Amici* respectfully submit that the "inextricably intertwined" test discussed in *Kruelle v. Newcastle County Sch. Dist.*, 642 F.2d 687, 693 (3rd Cir. 1981), is not one that should be adopted by this Court as it would eviscerate the line separating the public school's educational function from the parent's role. The breadth of the inextricably intertwined test lies at an extreme end of the spectrum, making it highly likely that parents would prevail in virtually every case involving a claim for reimbursement. The Fifth Circuit, in *Richardson ISD Michael Z.*, 580 F.3d 286, 299 (5th Cir. 2009), recognized this deficiency and its adverse impact on public schools, stating:

> By requiring courts to undertake the Solomonic task of determining when a child's medical, social and emotional problems are segregable from education, *Kruelle* expands school district liability beyond that required by IDEA. Put another way, it is not difficult to imagine a case where a disabled child's various difficulties may be impossible for a court to segregate, but the child is still capable of receiving an

> educational benefit without private residential placement. *Kruelle* does not account for this situation.

The Fifth Circuit rejected the inextricably intertwined test, and adopted a test requiring the parents to prove that the residential placement was: 1) essential in order for the disabled child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education. *Id. at* 299-300.

As suggested by the Fifth Circuit in *Michael Z.*, a school district will almost always lose under the inextricably intertwined test, since plaintiffs will be able to show that almost any health condition requiring medical interventions will have some impact on a child's ability to learn. At minimum, it places a school district at a major disadvantage by exclusively focusing upon the child's medical needs and forsaking any analysis of the propriety of the school district's program provided or offered to provide educational benefit to the student. This cannot be what Congress intended. Further, this effectively shifts the burden of proof from the parents to school districts, leaving school districts with the challenge to prove a child's non-educational needs are somehow segregable, instead of requiring parents to prove that the school's program was not reasonably calculated to enable the child to receive educational benefit. This type of burden-shifting is contrary to this Court's precedent. *See Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008) (holding that the burden of proof rests with the party

claiming a deficiency in the school district's efforts, the parents); *Johnson v. Independent Sch. Dist. No. 4 of Bixby*, 921 F.2d 1022, 1026 (10th Cir. 1990) (same), quoting *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1983)("the Act creates 'a presumption in favor of the education placement established by [a child's individualized education plan],' and 'the party attacking its terms should bear the burden of showing why the educational setting established by the [individualized education plan] is not appropriate.").

Moreover, the inextricably intertwined test does not even take into account whether a student is actually receiving an education at the residential placement, let alone an appropriate education, thus ignoring the fundamental purpose of the IDEA. The inextricably intertwined test therefore fails to accord with Congressional intent. *See* 20 U.S.C. § 1400(d)(1)(A) (2011) (the purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education).

The amorphous nature of the inextricably intertwined test also violates the Spending Clause of the United States Constitution. *See* U.S. CONST., ART. I, § 8, cl. 1; *Schaffer*, 546 U.S. at 51 (acknowledging that the IDEA is a Spending Clause statute). Because the IDEA was enacted pursuant to the Spending Clause, any conditions imposed upon the acceptance of federal funds must be spelled out

unambiguously, and States cannot be held to accept knowingly conditions of which they were unaware or unable to ascertain. *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 294-304. The central inquiry for the *Murphy* Court was whether the IDEA furnished a state official, deciding whether to accept IDEA funds, with notice that one of the obligations imposed upon such acceptance would be the obligation to compensate prevailing parties for expert fees. *Id.* In *Murphy*, the Supreme Court rejected the argument that expert fees should be interpreted to be part of the costs that could be recovered under 20 U.S.C. § 1415(i)(3)(B) (2011), concluding that neither the plain language of the IDEA, nor the Court's previous rulings on the meaning of the term "costs" could provide the clear notice required to attach such a condition to the receipt of IDEA funds. *Id*. Similarly, the IDEA does not provide notice to schools that as a condition of accepting federal funds they will be responsible for funding a unilateral residential placement, primarily chosen for non-educational reasons. For all of these reasons, the inextricably intertwined test should be rejected by this Court in its adjudication of this case.

B. Other courts have provided guidance on when a residential placement is properly educational and reimbursable.

As an initial matter, it is worth noting that parents who remove their child from a public school without the school district's consent do so at their own financial risk and are entitled to reimbursement *only* if they can prove: 1) the public placement violated the IDEA, and 2) the private school placement was

proper under IDEA. *Town of Burlington v. Department of Educ.*, 471 U.S. 359, 369-370 (1985). To satisfy the second prong of the *Burlington* test, *Amici* submit that the residential placement cannot be made for non-educational purposes. A review of federal jurisprudence outside of that applying the inextricably intertwined test provides substantive guidance to all parties involved in assessing whether a residential placement is reimbursable under the IDEA. The inquiry in all of these cases focuses on whether the placement is actually to provide educational services, the school's core function and responsibility under the IDEA.

In *Tatro*, 468 U.S. 883, the Supreme Court discussed those medical services that should be excluded from "related services" provided under the IDEA. Although not involving medical treatment provided through residential placement, *Tatro* established standards that provide persuasive guidance here. *Tatro* involved a female student who required insertion of a catheter every three or four hours, at school and during school hours. *Id.* The *Tatro* Court held that the school nurse should perform this procedure as a related service, basing its decision not only on the fact that it did not have to be performed by a licensed physician, but also by focusing on the nature of the requested service, and the burden which it would place on the school district. *Id.* at 893-94.

In *Shaw v. Weast*, 364 Fed. Appx. 47, 53-54 (4th Cir. 2010), the Fourth Circuit focused on the reason for the residential placement, concluding that the

student's residential placement was based on a desire to ensure that she did not hurt herself, took her medication, and that she was in a safe environment. *Id.* at 53. The Court found that the student's safety, mental health and medical issues were distinct from her educational needs and thus did not obligate the District to fund a residential placement. *Id.* The Fourth Circuit also assessed the student's performance at school, noting that although the child's educational progress was slowed at the public school during her psychiatric episodes, the record was clear that during periods when her mental health issues were stabilized, her education progressed. *Id.* at 54. The Court determined that a residential placement is required only if residential care is essential for the child to make *any* educational progress, stating:

> That [the student's] emotional and mental needs required a certain level of care beyond that provided at [the day school] does not necessitate a finding that the school should fund that extra care when it can adequately address her educational needs separately.

The Third Circuit's more recent decision in *Mary Courtney T. v. School Dist. of Philadelphia*, 575 F.3d 235, 244 (3rd Cir. 2009) is also instructive. The Third Circuit held that a school district's liability for reimbursement does not arise simply because a facility is called a residential treatment facility, as opposed to a medical facility or psychiatric hospital. *Id*. The Court held that a wide variety of facilities can claim to be residential programs, but stated "[o]nly those residential facilities that provide special education, however, qualify for reimbursement under

Kruelle and IDEA." *Id.* The Third Circuit recognized that the IDEA required residential placements made by public agencies for *educational purposes. Id.*, citing *Kruelle*, 642 F.2d at 692. The Court also rejected the argument that the services provided at the facility amounted to "related services," noting that prior case law made it clear that the term "related services" excludes "hospital services," and finding "the facility is nonetheless far more similar to a hospital than a school or even a residential educational facility." *Id.*

The Third Circuit went on to find that the fact that a facility may utilize some of the same modalities employed by schools does not equate to the provision of special education and related services, stating "[t]he relevant consideration is not the tool the institution uses, but rather the substantive goal sought to be achieved through the use of that tool." *Mary T.*, 575 F.3d at 245. In that case, the student's admission to the facility was necessitated by a need to address the student's acute medical condition, not by a need for special education. *Id.* The Third Circuit acknowledged that the school could neither prevent the onset of the child's acute medical condition nor control when it would subside. *Id.* at 245-46. It found, "a change in environment would not by itself bring about an improvement in Courtney's medical condition—she required medical intervention, including psychiatric treatment and drug therapies, to address the biological pathology underlying her medical condition. This is far beyond the capacity and the

responsibility of the School District." *Id.* at 246. The Third Circuit also correctly noted that the Supreme Court's determination in *Tatro*, that related services excluded medical services provided by a physician *or hospital*, meant that hospital services were specifically excluded as a related service, without regard to whether those services were actually provided by a physician, nurse, aide or therapist in the hospital setting. 575 F.3d at 247.

In *Clovis Unified Sch. Dist.*, 903 F.2d 635, 643-44 (9th Cir. 1990), the Ninth Circuit held similarly, finding that hospitalization of a child primarily for medical, psychiatric reasons was not an educationally related service for which the school district was responsible, and concluded that medically excluded services are not only those services provided by a physician, but also those services provided in a psychiatric hospital. The Seventh Circuit in *Butler v. Evans*, 225 F.3d 887 (7th Cir. 2000), held that in-patient psychiatric hospitalization is not a special education placement nor is it a "related service" compensable under the IDEA. The court stated that when a residential placement is in response to medical, social, or emotional problems the treatment of which is "necessary quite apart" from the learning process, then it is not an educational placement for purposes of the IDEA. *Id*. at 893. In *Dale M. v. Board of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307,* 237 F.3d 813, 817 (7th Cir. 2001), the Seventh Circuit denied reimbursement for residential placement reimbursement, determining that although

the student had the intelligence to perform well, he suffered from a lack of socialization and the purpose of his private placement was to keep him out of jail, stating "[a]nother way to put this is that Dale's problems are not primarily educational."

The D.C. District Court in *McKenzie v. Jefferson*, 566 F.Supp. 404, 413 (D. D.C. 1983), concluded that the public school was not financially responsible for the student's inpatient or outpatient hospitalization, succinctly analyzing Congress' intent in delineating the extent of public schools' obligations under the IDEA, finding:

> If [the student] had not been medically treated, she would have been unable to take advantage of and receive the benefit of her special education, but the same would apply to any illness. A handicapped child who is struck by an automobile or who suffers a severe fall, or who suffers a heart attack or stroke, may require medical treatment before he can benefit from a special education course, but the state is not responsible for such treatment.

Although these cases involved the application of varying tests, they collectively provide guidance for the Tenth Circuit that should demonstrate that the District Court's decision here is erroneous and should be reversed.

C. Common denominators emerge from the courts that have ruled on this issue

At bottom, the amalgam of tests collectively stand for the proposition that when a residential placement is made to care for and address medical, mental health, behavioral, or any other non-educational concerns so that the education of a

student is only of *secondary* concern and ancillary benefit, school districts should not be responsible for funding the placement under the IDEA. The District's suggestion that the Ninth Circuit's "necessary quite apart" test, restated as a "but for" or "necessary in and of itself" analysis, is consistent with the tests set forth by the Third, Fifth, and Seventh Circuits. *Amici* respectfully submit that the Ninth Circuit's test is worthy of adoption for the reasons articulated by the District, as are the "primarily oriented for educational purposes" tests employed by the Fifth and Seventh Circuits, which call for a direct assessment of whether non-educational, medical concerns are the underlying purpose for the placement.

A straightforward application of the facts to the law, under any of the credible tests employed by other courts establishes that the District here should not be held liable for the requested relief. To hold otherwise will open the floodgates to school district funding and oversight of functions outside the realm of a school's traditional competence and impermissibly transfer the role of parents and other government health agencies to public schools.

D. Even when a residential placement serves a primarily educational purpose, a school district is financially responsible only for those related services identified in a child's IEP.

If after applying these tests a residential placement is determined to be appropriate, a court must still then "examine each constituent part of the placement to weed out inappropriate treatments from the appropriate (and therefore

reimbursable) ones. In other words, a finding that a particular private placement is appropriate under the IDEA does not mean that all treatments received there are *per se* reimbursable; rather, reimbursement is permitted only for treatments that are related services as defined by the IDEA." *Michael Z.*, 580 F.3d at 301.

Additionally, students are not entitled to receive services simply because those services may fall within the definition of related services under the IDEA. Any reimbursement must be limited to only those related services specifically defined as part of the IEP developed for the student to enable the student to receive educational benefit. 20 U.S.C. § 1401(26) (2011); 34 C.F.R. § 300.34 (2011). The IDEA limits related services to those developmental, corrective, and other supportive services that are *required to assist a child with a disability to benefit from special education.* 20 U.S.C. § 1401(26) (2011); 34 C.F.R. § 300.34 (2011) (emphasis added). Any special education and related services must be provided in accordance with an IEP, which must be in effect before any such services are provided. 34 C.F.R. §§ 300.320; 300.323(c) (2011). The IEP must include a statement of *all* of the special education and related services and supplementary aids and services that are being provided to a child to enable him or her to receive educational benefit. 20 U.S.C. § 1414 (d)(1)(A)(IV) (2011); 34 C.F.R. § 300.320(a)(4) (2011). Thus, any services provided by the residential facility that

go beyond what is listed in the IEP developed for the child are not the responsibility of the school district to fund.

The IDEA does not require a school district to pay for all the additional services made necessary by a child's disability; rather, reimbursement is only recoverable for educational and related services. *Butler*, 225 F.3d at 893. Services that are not provided for in a child's IEP as related services necessary to enable a student to receive a benefit from special education are not provided for educational purposes, and are therefore not reimbursable. *Id.*; *see also Clovis*, 903 F.2d at 645. Furthermore, reimbursement should only be made if those services delineated in the IEP are provided by appropriately qualified personnel as required by 34 C.F.R. § 300.34 (2011). To step beyond these qualifiers is contrary to the IDEA and *Rowley's* prohibition against maximization. 458 U.S. at 188-89.

CONCLUSION

The District here has properly articulated the reasons why reimbursement should not be afforded to the parents. Unquestionably, the student's residential care and services arose from completely non-educational purposes focused entirely upon psychiatric clinical care that school districts could never provide directly. The ancillary educational recommendations for the student did not require residential placement.

The inextricably intertwined test is inconsistent with the IDEA, and as established by the District, the District Court in this case wholly misapplied the "necessary quite apart" test. The underlying District Court's finding that "Elizabeth's psychiatric conditions played a prominent role in her initial placement at Innercept" establishes that reimbursement is improper under both the Ninth Circuit "necessary quite apart" test as well as the remaining "primarily oriented for educational purposes" tests employed by the Third, Fifth and Seventh Circuits. Applying the facts of this case to the underlying dictate that school districts should not be responsible for non-educational medical placements establishes that the District Court's decision is erroneous as a matter of law and should be reversed.

Respectfully submitted,

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September 26, 2011

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Dated: September 26, 2011

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I hereby certify that a copy of the foregoing AMICI CURIAE BRIEF as submitted in Digital Form via the Court's ECF system, is an exact copy of the written document filed with the clerk and has been scanned for viruses with the most recent version of Malwarebytes Anti-Malware 1.50.1 dated September 19, 2011 and Norton Protection Suite Enterprise Edition 4.0 dated July 25, 2011, and according to these programs, is free of viruses. In addition, I certify all required privacy redactions have been made.

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I hereby certify that a copy of the foregoing AMICI CURIAE BRIEF was furnished through (ECF) electronic service to the following on this 26th day of September 2011:

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