No. 12-1175

IN THE

Supreme Court of the United States

JEFFERSON COUNTY SCHOOL DISTRICT R-1

Petitioner,

v.

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

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

AMICI CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AND COLORADO ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF *AMICI CURIAE*[1]

The National School Boards Association (NSBA), founded in 1940, is a not-for-profit organization representing state associations of school boards and their approximately 13,800 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.

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 care providers. Under the Individuals with Disabilities Education Act (IDEA), residential placements should be limited to those that are either determined to be necessary by the Individualized Education Program (IEP) team or are made unilaterally by parents for primarily educational purposes following a determination that

[1] Pursuant to Supreme Court Rule 37.6, no part of this brief was authored by counsel for any party, and no person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. In accordance with Supreme Court Rules 37.2(a), counsel for both parties received timely notice of *amici's* intention to file this brief and granted consent; the requisite consent letters have been filed with the Clerk of this Court.

the school district did not offer their child a free appropriate public education (FAPE). If left unreviewed, the Tenth Circuit decision will facilitate the improper transfer of the enormous costs of medical and mental health care to schools under the guise of the IDEA and open 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. For the reasons more fully explained below, *Amici* urge this Court to grant review to ensure that the IDEA is not stretched beyond its intended limits to provide free appropriate public *education* to children with disabilities.

SUMMARY OF THE ARGUMENT

This Court should grant review to bring definitive guidance to what has been more than thirty years of uncertainty regarding unilateral residential placements of students with disabilities to address and treat mental health issues and provide medical care. The issue in dispute has been adjudicated by the circuit courts using disparate standards and without any consensus, impermissibly leaving schools without the necessary clear notice of their obligations under the IDEA in this regard. The conflicting decisions from the circuit courts force key stakeholders into positions of adversarial mistrust rather than cooperation and facilitate costly and lengthy litigation between parents and public schools, as this case proves. A workable, nationally-

applicable standard will recognize that public schools should not be tasked with functions that are beyond their competence or fiscal capabilities. If the question presented is not addressed, public schools and students with disabilities protected under the IDEA will suffer, as will the rest of the nation's public school student population, who must now be educated with less funding due to the significant costs that will accrue.

ARGUMENT

I. THE ACKNOWLEDGED CONFUSION REGARDING MEDICALLY NECESSITATED RESIDENTIAL PLACEMENTS UNDER THE IDEA IMPOSES INTOLERABLE BURDENS ON SCHOOLS, PARENTS AND STUDENTS WITH DISABILITIES.

A. The circuit courts have long been hopelessly divided on the question presented.

This case is of national importance because the circuit courts' competing standards, if left unaddressed, carry serious adverse consequences for public school districts, parents, and students throughout the country. The disharmony and ambiguity among lower courts on the question presented can be corrected only by this Court's review. Jefferson County School District R-1 (the District) accurately sets out the conflicting tests articulated by the courts to determine whether the

IDEA requires a school district to pay for a residential placement that is required to treat a child's mental health illness or medical needs. Pet. 13-21. Although a case of first impression for the Tenth Circuit below, the question presented to this Court has been addressed by every other circuit court throughout the past thirty years to varying degrees and with sharply contrasting results. Their decisions lack any common or consistent approach to the question presented, either in theory or in practice. *See, e.g., Abrahamson v. Hershman*, 701 F.2d 223, 227 (1st Cir. 1983); *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114 (2nd Cir. 1997); *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687 (3rd Cir. 1981); *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286 (5th Cir. 2009); *Tennessee Dep't of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466 (6th Cir. 1996); *Dale M. v. Board of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307*, 237 F.3d 813 (7th Cir. 2001); *Independent Sch. Dist. No. 284 v. A.C.*, 258 F.3d 769 (8th Cir. 2001); *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635 (9th Cir. 1990); *Jefferson Cnty. Bd. of Educ. v. Breen*, 853 F.2d 853 (11th Cir. 1988); *McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985).

The Tenth Circuit acknowledges this fracture among the circuit courts and its struggle with the conflicts illustrates the need for review by this Court. Pet. 10a-22a. In discussing the circuit split, the Tenth Circuit noted both "the interpretive difficulties presented by the approaches of the other circuits" as well as the "frequently imprecise" case

law when a determination is made that a residential placement is reimbursable. Pet. 20a. It refused to apply the "inextricably intertwined test," noting that the term was not coined by any circuits purporting to apply it, and finding that no matter whether courts professed to adopt the test or eschew it, they frequently conflated the two statutory provisions related to "special education" and "related services." Pet. 20a. The Tenth Circuit went on to characterize the "primarily oriented" standard of the Fifth and Seventh Circuits as "amorphous," "judicially crafted," and "both over-inclusive and under-inclusive." Pet. 21a-22a.

Rather than apply any previous test offered by the other circuits, the Tenth Circuit instead claimed to resolve the case through a "straightforward application of the statutory text," but as the concurring opinion discussed, the Tenth Circuit added to the discord with a new four-step test of its own. Pet. 18a-20a. Tellingly, much like their counterparts in the Fifth Circuit in *Michael Z.*, the judges in the Tenth Circuit were unable to agree on what test they were applying or creating; the majority opinion claimed it was not "nearly so ambitious as to propose a new test," but the concurring opinion found the majority to "venture beyond this terra firma to offer a new (four step) test of their own." *Compare* Pet. 20a *with* 33a. The concurrence further criticized the test announced by the Tenth Circuit, stating "one might forgive future litigants if they wonder whether my colleagues believe public school districts must pay for private school placement even if the new school's 'instruction' is limited to addressing social or

emotional problems or life challenges." Pet. 33a-34a.

The Tenth Circuit decision thus highlights and exacerbates a long-standing problem of crucial importance that only this Court can remedy. Moreover, the confusion and conflict are compounded by unnecessary tension between the Tenth Circuit's test and the IDEA's least restrictive environment (LRE) mandate. That mandate obligates schools to educate disabled children alongside nondisabled children to the maximum extent appropriate. 20 U.S.C. § 1414(d)(1)(A)(IV)(cc) (2013). The Tenth Circuit's four-step test and analysis do not properly account for this requirement nor address whether the placement is educationally appropriate for the unique needs of the child.

Residential placements like the one in this case, which separate a child from his or her public school peers, should be a last resort under the LRE mandate. Yet the Tenth Circuit's test allows residential placements in a broad range of cases—practically as a first resort. The conflicting statutory obligations leave schools and parents without clear guidance about when a residential placement for treatment of a student's mental health issues is appropriate and reimbursable under the IDEA.

The tension with the LRE mandate well illustrates how the turbulence imparted by the divergent circuit court decisions on this issue negatively affects parents, students and schools alike. The confusion among the circuit courts creates unevenness in administration, inequity in protection, unsettled expectations among the key stakeholders, unpredictability in litigation, and uncertainty in the legal rights afforded under the

IDEA. The lack of uniformity aggravates the relationship between parents and schools, defeats the cooperative process envisioned by Congress in enacting the IDEA, promotes litigation and depletes limited resources to the detriment of all involved.

B. The legal uncertainty undermines the IDEA's cooperative process and promotes litigation.

A clear pronouncement of the law is needed in this case so that school officials and parents know in which cases reimbursement is likely to be ordered. The existing uncertainty fosters non-cooperation and encourages litigation to test which party is responsible to fund residential placements made for the treatment of students with mental health illness or medical needs. This is contrary to the underlying purpose of the IDEA.

This Court has described the cooperative processes Congress crafted in the IDEA, including development of the child's IEP, as the "core of the statute." *Schaffer v. Weast*, 546 U.S. 49, 53 (2005). Indeed, the IEP is recognized as the "centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988). Ideally, the IDEA contemplates that parents and school official will work together to make decisions regarding residential placements. Under the IDEA, the IEP is not developed by the parents unilaterally, but rather 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) (2013).

In *Schaffer*, this Court noted that the collaborative emphasis of the IDEA is present even in its dispute-resolution mechanisms, which promote prompt and amicable resolutions, pointing out "Congress has repeatedly amended the Act in order to reduce its administrative and litigation-related costs." 546 U.S. at 59. When the district fails to provide FAPE, "parents and schools [have] . . . expanded opportunities to resolve their disagreements in positive and constructive ways." 20 U.S.C. § 1400(c)(8) (2013). But rather than promoting the collaborative and efficient process of engagement that Congress intended under the IDEA, the decisional morass created by the circuit conflict is an inducement to litigation. Whether by engendering bewilderment over rights and obligations, or sincere disagreement or strategic cherry-picking of select decisions or rationales, the circuit courts' vague and conflicting tests foster disputes over the responsibility of school districts to reimburse the costs of medical care for students unilaterally placed in residential facilities.

The Tenth Circuit decision's permissive approach further exacerbates the likelihood of litigation, as parents, in an effort to obtain what they believe to be the best medical care and mental health treatment for their children, urge other courts to adopt this new line of reasoning. Given the relatively low bar set by the Tenth Circuit to establish school district responsibility for placements in exclusive medical facilities and the few statutory disincentives,[2] parents may hold out hope and be

[2] The IDEA does have cost-shifting fee provisions allowing recovery for public schools, 20 U.S.C. §§ 1415(i)(3)(B)(II), (III)

more willing to risk litigation against a school district in such cases. They will always be able to argue that any improvement in a student's mental health or behavior will also have the beneficial side-effect of improving the child's education.

Parents need not even try a school district's offered program prior to seeking private placement reimbursement. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009). This leaves school districts at the significant disadvantage of having to prove the appropriateness of its proposed education program in the abstract. The resulting costs of litigation in an IDEA dispute are often prohibitive for school districts. As the Senate Report from the 1997 IDEA amendments pronounced, "[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). Since that report the cost of litigation has remained substantial. Even when school districts prevail against claims for residential placement reimbursement, they still incur the high costs of litigation, which depletes their limited resources and funds meant to serve the entire student population. This places school districts in the dilemma of having to choose to litigate or capitulate to avoid such costs, even when they believe they have appropriately served the student.

(2013), but the standard for relief thereunder is difficult to satisfy, discretionary, and rarely exercised by courts.

C. The ambiguity created by the circuit split is particularly intolerable in light of the Spending Clause's clear notice requirement.

The IDEA was enacted under the Spending Clause. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295-98 (2006). This Court consistently recognizes Spending Clause legislation as "much in the nature of a contract." *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (internal citations omitted); *see also* U.S. CONST. ART. I, § 8, CL. 1. The legitimate exercise of the spending power "thus rests on whether the State voluntarily and knowingly accepts the terms of the contract." *Id.* (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). States cannot "knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Pennhurst,* 451 U.S. at 17. The power to legislate under the Spending Clause, although broad, also forbids "surprising participating States with post-acceptance or 'retroactive' conditions." *Sebelius*, 132 S. Ct. at 2606.

In the seminal *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley* decision, 458 U.S. 176 (1982), this Court instructed that Congress did not intend that "the requirement of an 'appropriate education' was to be limitless," recognizing that to hold otherwise would be contrary to the fundamental constitutional precept that Congress, when exercising its spending power, could impose no burden upon the States unless it did so unambiguously, concluding that Congress did not

intend to "impose upon the States a burden of unspecified proportions and weight." *Id. at* 190, n. 11.

In *Murphy* the Court set out the controlling inquiry in the IDEA context, asking whether the statute furnished clear notice regarding the liability at issue. 548 U.S. at 296. In assessing whether the IDEA provides clear notice of the conditions attached, the Court instructed, "we must view the [statute] from the perspective of a state official who is engaged in the process of deciding whether the State should accept [federal] funds and the obligations that go with those funds." *Id.* The Court went on to reject 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) (2013), 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.* at 294-304.

A similar lack of clear notice exists as to the obligations of state and local education agencies to pay for medical treatment or mental health care for children with disabilities who are unilaterally placed in a residential facility. The mix of law left by the circuits' protracted inconsistency on this issue leaves the nation's schools subject to unanticipated liability for such placements without the clear and unambiguous notice that the Spending Clause requires.

Even assuming that the "straightforward text" of the IDEA facially provided clear notice upon enactment, the statute as applied by the courts is

anything but clear on this issue. The admitted circuit split in this case, in fact, proves that public schools are not receiving the unambiguous notice of their obligations under the IDEA as required by the Spending Clause. This lack of clear notice impermissibly deprives public schools of the ability to understand the scope of their obligations under the IDEA. Specifically, the circuit split here prevents public schools from making reasoned decisions regarding what may or may not constitute a free appropriate public education, in the least restrictive environment, for a student with a disability unilaterally withdrawing from public school to enroll in a residential placement to treat his or her mental health illness or medical needs. The Tenth Circuit's new approach to this issue amply demonstrates this point; there is no way that either the State of Colorado or Jefferson County school officials could have guessed, much less known, that the District's liability for the residential placement at issue here is properly determined under the test ultimately espoused by the Tenth Circuit.

II. TREATING STUDENTS' MENTAL HEALTH PROBLEMS IS BEYOND THE ROLE, CAPACITY AND COMPETENCY OF PUBLIC SCHOOLS.

It is the role of public schools to provide an education to our nation's children. The treatment of a child's mental health issues is a function for state or federal health agencies. The recent passage of the Patient Protection Affordable Care Act, Pub. L. 111-

148 (Mar. 23, 2010), and state health care laws[3] demonstrate that community needs, available funding, service delivery models and perspectives on the role of government determine how public policy makers may assign this responsibility. These underlying and dispositive questions about governmental obligations, citizen entitlements and resource allocation properly belong in the legislative realm and should not be fundamentally changed as an unanticipated outgrowth of judicial interpretation of the IDEA, a statute intended to ensure that public schools provide a free appropriate public *education* to students with disabilities.

The Tenth Circuit decision and unsettled circuit split, if left unaddressed, have the potential to effect such a change by imposing on school districts a responsibility they are ill equipped to handle. Requiring public schools to fund unilateral residential placements that provide little to no educational services and expensive mental health and/or medical treatment: (i) imposes a mandate upon school districts that is outside their traditional and intended function as a local governmental entity; (ii) is not a role that public school districts supported by public taxpayer monies can viably sustain; and (iii) threatens to undermine a school district's ability to educate its entire student population at the levels required by state and federal law.

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[3] *E.g.*, HAW. REV. STAT. § 1 (2013); MASS. GEN. LAWS ANN. Ch. 111M, § 1 *et seq.* (West 2013); UTAH CODE § 63-M-1-2504 (West 2013).

A. The current legal uncertainty imposes a potentially massive financial burden on public schools not intended by the IDEA and which they cannot sustain.

The IDEA requires school districts to provide a continuum of placement options for approximately 6.5 million children with disabilities.[4] 34 C.F.R. § 300.115 (2013). Part of the continuum of educational placements includes residential placements. 34 C.F.R. § 300.104 (2013). Public school districts do voluntarily place students in residential settings when *educationally* warranted. In 2005, for example, there were 88,098 students with disabilities 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). Many of these students were placed in these private settings with the agreement of public school districts. 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. *Id.* at Table 2-4, p. 190.

The Office of Special Education and Rehabilitative Services has noted that such

[4] In 1990, 4,710,089 students between the ages 3 and 21 were served under the IDEA. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *Digest of Education Statistics*: Table 48 (2011). In 2009, that number had risen to 6,480,540, representing 13.1 percent of public school enrollment. *Id.*

placements are expensive with the total annual cost sometimes exceeding $100,000 for a single child in a school year. Memorandum from Patricia J. Guard, Acting Director, Office of Special Education Programs, U.S. Dep't of Educ. to State Directors of Special Education (Mar. 17, 2005). This cost is in stark contrast to the projected average per pupil expenditure for public elementary and secondary schools for the 2012-2013 school year: $11,467. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC. *Fast Facts* (2012).

However, *educational* residential placements are far different from the *mental health* 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 budgets for education. *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635, 645-46 (9th Cir. 1990). With the passage of the IDEA amendments, it was noted that the "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." S. Rep. No. 104-275 at 85 (1996); *see also* H.R. Rep. No. 108-77 at 85 (2003); 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). This Court has reaffirmed the notion that the IDEA 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). For example, the statute's 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 Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 892 (1984)).

B. Health care agencies, not public schools, are the proper institutions for ensuring children receive the medical care and mental health services they need.

Nationally, health expenditures have grown since 2000 from $1.38 trillion to $2.7 trillion in 2011, representing a per capita increase from $4,878 to $8,680. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *National Health Expenditures Aggregate, Per Capita Amounts, Percent Distribution:* Table 1 (2012). During this same time period hospital care expenditures alone rose from $415.5 billion to $850.6 billion between 2000 and 2011. *Id.* at Table 2. Health costs arising from residential care facilities also grew exponentially, from $64.5 billion to $133.1 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 had 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, 1996 through 2007*, ARCHIVES OF GENERAL PSYCHIATRY (Aug. 1, 2011). These young patients are only a small portion of the four million children in the U.S. who suffer from a *serious* mental disorder,[5] over 75 to 80 percent of whom do not receive the mental health services they need.[6]

The solution to this serious gap in mental health care services to young people cannot be to shift the responsibility to school districts. Such a result would be in sharp contrast to federal and state policies developed to promote the health and welfare of children. The U.S. Department of Health & Human Services, Center for Medicare and Medicaid Services, recognizes that Medicaid, not public schools, is the governmental lynchpin for the provision of mental 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

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[5] *Facts on Children's Mental Health in America*, Child & Adolescent Action Center, National Alliance on Mental Illness, http://www.nami.org/Template.cfm?Section=federal_and_state_policy_legislation&template=/ContentManagement/ContentDisplay.cfm&ContentID=43804.

[6] Shannon Stagmon and Janice L. Cooper, *Children's Mental Health: What Every Policymaker Should Know,* National Center for Children in Poverty (Apr. 2010), *available at* http://www.nccp.org/publications/pdf/text_929.pdf.

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

provide services that are more appropriately left to other governmental agencies, such as Medicaid, or to private sources.

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) (2013). 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 that are statutorily left to their purview.[8]

Significantly, the Colorado Legislature itself has not sought to transfer the costs of mental health treatment to its public school districts. Instead, the Colorado Legislature has mandated through its Medical Assistance Act that "each Medicaid-eligible child who is diagnosed as a person with a mental

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[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.

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 (2013) (emphasis added).

That this 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 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. 20 U.S.C. § 1412(a)(25) (2013). Colorado has a similar law. COLO. REV. STAT. § 22-32-109 (1)(z)(ee) (2013). 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 and funding to undertake that function.

This Court has acknowledged 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." *See Wyke v. Polk Cnty. Sch. Bd.*, 129 F.3d 560, 573 (11th Cir. 1997).

CONCLUSION

Given the rising number of students receiving services under the IDEA and the skyrocketing costs of health care, a better solution must be found than what has been created by the thirty years of differing circuit court decisions addressing the question presented. Schools lack the competency or capacity to treat or fund a student's mental health treatment or medical care. Moreover, the IDEA does not provide clear notice that this is an obligation that must be accepted in exchange for the receipt of public funds. As this issue stands today, the purposes of the IDEA are not served by the circuit split or the Tenth Circuit decision below. Without further intervention from this Court, the cooperative process under IDEA to ensure children with disabilities receive a free appropriate public *education* will be subverted, as public schools are faced with litigation seeking to make them the payer of first resort for services that they are neither suited nor funded to provide directly.

For the foregoing reasons, *Amici* urge the Court to grant the petition for writ of *certiorari*.

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