

No. 08-10604

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

RICHARDSON INDEPENDENT SCHOOL DISTRICT,

Plaintiff-Appellant-Cross-Appellee,

v.

MICHAEL Z.; CAROLYN Z., as next friends of Leah Z., a minor child,

Defendant-Appellees-Cross-Appellants.

On Appeal from the United States District Court for
the Northern District of Texas, Dallas Division

**BRIEF OF AMICUS CURIAE COUNCIL OF PARENT ATTORNEYS
AND ADVOCATES IN SUPPORT OF DEFENDANT-APPELLEES
SUPPORTING AFFIRMANCE**

ANKUR J. GOEL
TAMU K. FLOYD
JUSTIN M. HOLMES
ELIZABETH P. PHILPOTT
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, DC 20005-3096
Tel: (202) 756-8000
Fax: (202) 756-8087

Counsel for Amicus Curiae

November 24, 2008

SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record for Amicus Curiae Council of Parent Attorneys and Advocates certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Council of Parent Attorney and Advocates—Amicus Curiae
2. Counsel for Amicus Curiae:

Ankur J. Goel
Tamu K. Floyd
Justin M. Holmes
Elizabeth P. Philpott
McDermott Will & Emery LLP
600 Thirteenth Street, N.W.
Washington, DC 20005-3096

Respectfully submitted,



Ankur J. Goel
Tamu K. Floyd
Justin M. Holmes
Elizabeth P. Philpott
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, DC 20005-3096
Tel: (202) 756-8000
Fax: (202) 756-8087

Counsel for Amicus Curiae

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT.....	3
ARGUMENT	5
I. A RESIDENTIAL PLACEMENT IS NECESSARY AND REQUIRED UNDER THE IDEA WHERE A CHILD’S SOCIAL, EMOTIONAL, OR BEHAVIORAL PROBLEMS ARE INEXTRICABLY INTERTWINED WITH, OR ARE NOT SEPARABLE OR SEGREGABLE FROM, THE CHILD’S EDUCATIONAL NEEDS, AS DETERMINED BY EVERY CIRCUIT COURT THAT HAS ADDRESSED THE QUESTION.....	5
A. The Third Circuit’s “Segregable” Test.....	8
B. Development of the Law in Other Circuits.	9
II. SOCIAL, EMOTIONAL, AND BEHAVIORAL ISSUES MAY HAVE A PROFOUND EFFECT ON A CHILD’S EDUCATION, SUCH THAT RESIDENTIAL PLACEMENT IS NECESSARY FOR A CHILD TO OBTAIN EDUCATIONAL BENEFIT.	13
CONCLUSION	18

TABLE OF AUTHORITIES

Cases

<i>Abrahamson v. Hershman</i> , 701 F.2d 223 (1st Cir. 1983)	12
<i>Burke County Bd. of Educ. v. Denton</i> , 895 F.2d 973 (4th Cir. 1990)	10
<i>Butler v. Evans</i> , 225 F.3d 887 (7th Cir. 2000).....	11, 13
<i>Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings</i> , 903 F.2d 635 (9th Cir. 1990)	11, 13
<i>Dale M. v. Bd. of Educ.</i> , 237 F.3d 813 (7th Cir. 2001).....	13
<i>Indep. Sch. Dist. No. 284 v. A.C.</i> , 258 F.3d 769 (8th Cir. 2001).....	12, 13, 16, 20, 21
<i>Irving Indep. Sch. Dist. v. Tatro</i> , 468 U.S. 883 (1984).....	6
<i>Jefferson County Bd. of Educ. v. Breen</i> , 853 F.2d 853 (11th Cir. 1988)	11
<i>Kruelle v. Biggs</i> , 489 F. Supp. 169 (D. Del. 1980).....	9
<i>Kruelle v. New Castle County Sch. Dist.</i> , 642 F.2d 687 (3d Cir. 1981)	8, 9, 10, 11
<i>McKenzie v. Smith</i> , 771 F.2d 1527 (D.C. Cir. 1985)	10
<i>Mrs. B. v. Milford Bd. of Educ.</i> , 103 F.3d 1114 (2d Cir. 1997)	12
<i>Tenn. Dep’t of Mental Health and Mental Retardation v. Paul B.</i> , 88 F.3d 1466 (6th Cir. 1996).....	10

Statutes

20 U.S.C § 1412(a)(1)(A) (2008).....	5
20 U.S.C. § 1400(c)(1)	1
20 U.S.C. § 1401(26)(A)	4
20 U.S.C. § 1401(29).....	5
20 U.S.C. § 1401(3)(A)(i).....	14
20 U.S.C. § 1414(a)(1)(A) (2008).....	3
34 C.F.R. § 300.115(a) (2008).....	3, 5

34 C.F.R. § 300.39 (a)(1)(i) 5

34 C.F.R. § 300.8(c)(4)(i)(A)-(E) 15

Other Authorities

Department of Education, Office of Special Education
 Programs, Data Tables for OSEP State-Reported Data
 (Table 2-2), *available at*
http://www.ideadata.org/TABLES31ST/AR_2-2.xls. 16

Elaine Eberharter-Maki, *Students with Serious Emotional
 Disturbance: A Legal Guide to Identification* 26-29 (Office
 of Special Educ. and Rehabilitative Servs. 1996)..... 15

Heather J. Hair, *Outcomes for Children and Adolescents After
 Residential Treatment: A Review of Research from 1993 to
 2003*, 14 J. CHILD & FAMILY STUDIES 551 (2005)..... 16

Kathleen M. Beaudoin, Richard Knuth & Gregory J. Benner,
*Social Validation of Services for Youth with Emotional and
 Behavioral Disorders: A Comparative Study*, 23 Int’l J.
 Special Educ. 1, 1 (2008)..... 16

Steven R. Forness, Hill M. Walker, & Kenneth A. Kavale,
*Psychiatric Disorders and Treatments: A Primer for
 Teachers*, 36 TEACHING EXCEPTIONAL CHILDREN 42 (2003)..... 13

INTEREST OF AMICUS CURIAE

The Council of Parent Attorneys and Advocates (“COPAA”) is an independent, nonprofit organization of attorneys, advocates, and parents in forty-three states and the District of Columbia who are routinely involved in special education due process hearings throughout the country.

The primary goal of COPAA is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that “[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” 20 U.S.C. § 1400(c)(1) (2008).

Children with severe disabilities are among the most vulnerable in our society, and COPAA is particularly concerned with assuring a free appropriate public education (“FAPE”), as the Individuals with Disabilities Education Act (“IDEA” or “Act”) requires, for the small percentage of children with disabilities whose conditions are so severe that they require a residential placement in order to receive educational benefit.

COPAA submits this brief to address in particular appellant’s and amicus curiae’s arguments regarding the correct standards for assessing

whether and when residential placement is necessary and appropriate for children with disabilities.

SUMMARY OF THE ARGUMENT

Under the IDEA, Congress enacted a comprehensive program mandating a FAPE for children with disabilities. 20 U.S.C. § 1414(a)(1)(A) (2008). In doing so, Congress recognized a broad array of disabilities and required a “continuum of alternative placements,” 34 C.F.R. § 300.115(a) (2008), recognizing that some children would require residential placements. The Department of Education’s regulations provide that residential placement is reimbursable where it is “necessary” to provide special education services to a disabled child. 34 C.F.R. § 300.104 (2008). In determining whether a residential placement is “necessary,” courts consider whether an alternative placement is sufficient to provide FAPE to children in need of special education services. Additionally, courts have assessed whether a child’s medical, social, emotional, or behavioral problems are inextricably intertwined with or unsegregable from the educational needs of the child. If so, then the residential placement is necessary and required under the IDEA.

Where a child suffers from severe social, emotional, and behavioral issues, those issues are often central problems interfering with the child’s educational progress. In the ordinary course, schools address these kinds of disabilities through the provision of psychological, social work, and

counseling services, among other related services, in addition to special education services. *See* 20 U.S.C. § 1401(26)(A) (2008). But in some instances, such as those presented here, the child requires a more structured and intensive setting, of the sort that only a residential facility can provide, with a higher level of service to address the child's needs. In those instances, the child's educational needs are "inextricably intertwined" with and are not "separable" from the child's medical, social, emotional, or behavioral disabilities. Therefore, public funding for the residential placement to address all of the child's needs is required under the IDEA.

ARGUMENT

I. A RESIDENTIAL PLACEMENT IS NECESSARY AND REQUIRED UNDER THE IDEA WHERE A CHILD'S SOCIAL, EMOTIONAL, OR BEHAVIORAL PROBLEMS ARE INEXTRICABLY INTERTWINED WITH, OR ARE NOT SEPARABLE OR SEGREGABLE FROM, THE CHILD'S EDUCATIONAL NEEDS, AS DETERMINED BY EVERY CIRCUIT COURT THAT HAS ADDRESSED THE QUESTION.

The core principle of the IDEA is that children with disabilities are entitled to a FAPE. 20 U.S.C. § 1412(a)(1)(A) (2008). School districts are required to make available a “continuum of alternative placements” in order to ensure an appropriate placement for each child entitled to FAPE under the Act. 34 C.F.R. § 300.115(a). It is undisputed that the “continuum of alternative placements” includes residential facilities: indeed, the Act, the regulations implementing the Act, and caselaw all provide for residential placements funded by school districts. *See, e.g.*, 20 U.S.C. § 1401(29) (defining “special education” as “instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings”); 34 C.F.R. § 300.39 (a)(1)(i) (2008) (same).

The IDEA regulations expressly provide that “if placement in a public or private residential program is *necessary* to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the

child.” 34 C.F.R. § 300.104 (emphasis added). At issue in this case is determining when such residential placements should be considered “necessary” under the IDEA.

Without citing this regulation, appellants and amicus curiae apparently assert that the placement in this case was not “necessary” because it was for a medical, rather than an educational, purpose. Amicus curiae further assert that the “inextricably intertwined” test the district court adopted is erroneous. Yet, notwithstanding appellant’s and amicus curiae’s efforts to confuse the issue,¹ all of the courts of appeals that have addressed the question are in accord on this basic principle: residential placement is “necessary” to provide special education services to students with disabilities, where a child’s medical, social, behavioral, or emotional problems are “intertwined” with or “not segregable” or “unseverable” from the child’s educational needs. Amicus curiae incorrectly attempt to separate the “necessary” test as set forth by the IDEA into two separate tests—an “inextricably intertwined” test and a “necessary” test. Brief of Amicus Curiae Texas Association of School Boards Legal Assistance Fund

¹ Appellant’s discussion of *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), which distinguished between medical costs and related services, is inapposite because it addresses a fundamentally different issue. In this case, the district court ordered payment of *non-medical* costs incurred in a residential facility, consistent with the regulations, and denied payment for certain *medical* costs. Appellants do not argue that the costs incurred in this case are medical costs under the *Tatro* line of cases; rather, they assert that the residential placement, and its non-medical costs, was not educationally necessary.

(“Amicus Curiae Brief”) at 4-7. Amicus curiae suggest that the Second and Third Circuits support the “inextricably intertwined” test, while the other circuits follow a “necessary” test. *Id.*

However, the IDEA regulations authorize residential placement when it is “necessary,” and the circuit courts—including in cases cited by appellants and amicus curiae—have recognized that medical, social, behavioral, and emotional problems may necessitate residential placement as an essential component of the educational process, because the child’s social, emotional, behavioral, and educational needs are “intertwined.” Although this Court has not directly addressed the question, it should join the other circuits that have.

Whether or not the child’s medical, social, behavioral, or emotional problems affect other aspects of the child’s life, in addition to her educational needs, is irrelevant. Residential placement is necessary if the disability affects the child’s ability to access an education. This is precisely what the district court held: Leah’s emotional and behavioral problems, requiring residential placement, were the very source of the constraints on her educational needs—indeed, they were “inextricably intertwined” with her educational progress. District Court Memorandum Opinion and Order (“Mem. Op.”) at 24.

A. The Third Circuit’s “Segregable” Test.

The Third Circuit’s test has been adopted by every other circuit court to have addressed the issue. This test asks “whether full-time placement may be considered *necessary* for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.” *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 693 (3d Cir. 1981) (emphasis added).

The *Kruelle* case involved Paul, a child who was mentally disabled, afflicted with cerebral palsy, and who had a “history of emotional problems which result[ed] in choking and self-induced vomiting.” *Id.* at 688-89 (quoting *Kruelle v. Biggs*, 489 F. Supp. 169, 172 (D. Del. 1980)). After Paul was placed in respite care instead of residential placement, the Kruelles challenged Paul’s placement and the district court ordered a full-time residential program. *Id.* at 689-90. The school district appealed, arguing the residential placement was for medical, not educational, purposes. *Id.* at 690, 693. The Third Circuit held that because of Paul’s physical and mental disabilities, residential placement was necessary in order for Paul to learn. *Id.* at 694.

In essence, the court held that if a child’s medical, social, behavioral, or emotional problems are “segregable” from the learning process, then

residential placement would not be considered necessary. If, on the other hand, the child’s medical, social, behavioral, or emotional problems are *not* “segregable,” then the residential placement is necessary and reimbursement for the residential placement is appropriate. As the *Kruelle* court noted, if medical, social, emotional, or behavioral disabilities are so “intertwined” with a child’s educational progress that they are “unseverable,” then “the *unseverability* of such needs is the very basis for holding that the services are an essential prerequisite for learning.” *Id.* at 694 (emphasis added).

B. Development of the Law in Other Circuits.

The courts of appeals have followed *Kruelle* and approved residential placements in circumstances very similar to those presented here. *See, e.g., McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (D.C. Cir. 1985) (discussing *Kruelle* and affirming the district court holding that residential placement was appropriate and necessary because the child’s educational and emotional needs could not be segregated); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990) (adopting *Kruelle* and noting that “[w]here medical, social, or emotional problems are intertwined with educational problems, courts recognize that the local education agency must fund residential programs”); *Tenn. Dep’t of Mental Health and Mental Retardation v. Paul B.*, 88 F.3d 1466, 1471 (6th Cir. 1996) (following

Kruelle and noting that “[t]o assess whether a residential placement is appropriate, a determination must be made whether full time residential placement is necessary for educational purposes as opposed to medical, social, or emotional problems that are separable from the learning process”); *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990) (the “analysis must focus on whether [the child’s] placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process”); *Butler v. Evans*, 225 F.3d 887, 894 (7th Cir. 2000) (following *Clovis*); *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853 (11th Cir. 1988) (residential placement was necessary because the child’s medical and emotional disabilities were *unseverable* from her educational progress). *See also* *Indep. Sch. Dist. No. 284 v. A.C.*, 258 F.3d 769, 776-77 (8th Cir. 2001) (residential placement was necessary because the court could not conclude “that A.C.’s behavior problems are separable from the learning process”); *Abrahamson v. Hershman*, 701 F.2d 223, 227 (1st Cir. 1983) (residential care was essential for the child “to make any educational progress at all,” given the child’s behavioral and emotional disabilities); *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114 (2d Cir. 1997) (when residential placement is

primarily required due to emotional problems, reimbursement is not barred if the residential placement is necessary to educate the child properly).

Many of these cases involved situations in which a child's psychological, emotional, or behavioral problems had medical underpinnings that also had an impact both inside and outside the classroom, just as is true here. As the Eight Circuit noted in *Indep. Sch. Dist. No. 284*:

[i]f the problem prevents a disabled child from receiving educational benefit, then it should not matter that the problem is not cognitive in nature or that it causes the child even more trouble outside the classroom than within it. What should control our decision is not whether the problem itself is “educational” or “non-educational,” but *whether it needs to be addressed in order for the child to learn.*

Id. at 777 (emphasis added) (citing *Dale M. v. Bd. of Educ.*, 237 F.3d 813 (7th Cir. 2001)).

Amicus curiae make a confusing and ultimately unhelpful distinction, asserting that “‘Inseparability’ and ‘inextricably intertwined’ are two distinct set of circumstances.” Amicus Curiae Brief at 11. Yet amicus curiae's purported distinction is one without a difference: If two items are

inextricably intertwined, by definition they cannot be extricated from each other, and are therefore “inseparable.”²

The Fifth Circuit has not spoken on this issue, but this Court should follow the lead of the other circuit courts in applying the “necessary” test. Although the precise wording differs slightly among the circuits, the key concept is uniform across the circuits, and is identical to that adopted by the district court in this case. A child’s disabilities, whether medical, social, behavioral, or emotional, should not be compared or evaluated in order to determine which problem is controlling, as appellant and amicus curiae suggest. Instead, this Court should simply determine whether residential placement is necessary for the child’s educational progress, in the face of the child’s social, emotional, behavioral, or medical disabilities.

² Appellant and amicus curiae also make much of the decisions in *Clovis* and *Butler*, in which the courts declined to approve payment for hospitalization. But in both of those cases, there was no question that the child needed “a residential placement in order to receive an appropriate education.” *Clovis*, 903 F.2d at 639; *see also Butler*, 225 F.3d at 889 (the “local school recommended that she be placed in a residential educational facility that could provide a structured setting designed to accommodate her [severe emotional and psychological troubles]”). The issue in those cases was whether intensive hospitalization was required under the IDEA. *See, e.g., Clovis*, 903 F.2d at 641-42 (“*Clovis* agrees that Michelle’s needs are such that a residential placement of some kind is necessary. Nor does the district dispute that a highly structured and integrated program, offering regularly scheduled psychological services, including psychotherapy, is needed for Michelle to benefit from any educational program.”) (citations omitted); *Butler*, 225 F.3d at 893 (“Our Lady of Mercy Hospital is a medical hospital, not a residential education facility.”). By contrast, in this case, the dispute is over funding for the residential placement itself in lieu of a school setting.

II. SOCIAL, EMOTIONAL, AND BEHAVIORAL ISSUES MAY HAVE A PROFOUND EFFECT ON A CHILD’S EDUCATION, SUCH THAT RESIDENTIAL PLACEMENT IS NECESSARY FOR A CHILD TO OBTAIN EDUCATIONAL BENEFIT.

The issues that Leah faces are emblematic of the difficulties that may lead some students with severe social, emotional, or behavioral disabilities to require a residential placement for educational purposes, as numerous cases have recognized.³ Psychiatric disorders, in particular, may cause educational problems for students, impairing school learning and causing negative classroom behavior, thus necessitating a residential placement. *See* Steven R. Forness, Hill M. Walker & Kenneth A. Kavale, *Psychiatric Disorders and Treatments: A Primer for Teachers*, 36 *Teaching Exceptional Children* 42, 48 (2003). For example, children like Leah who suffer from oppositional defiant disorder, who have “persistent patterns of negativistic, hostile, or defiant behavior directed primarily toward adults,” may have symptoms that cause “significant impairment in social, *academic*, and related functioning,” resulting in the need for an alternative placement. *Id.* at 43 (emphasis added) (noting that oppositional defiant disorder is likely to be comorbid, that is, to exist at the same time as other conditions).

³ Although this brief focuses on residential placements for children with social, emotional, and behavioral disabilities, other disabilities, such as autism, visual impairments, and hearing impairments, may also require residential placements. Children may also have non-academic educational needs, such as social needs, emotional needs, and life skills needs, as well as fine and gross motor skills needs, that are also intertwined with their medical needs, requiring residential placement.

Congress has recognized “serious emotional disturbance” as a disability under the IDEA. *See* 20 U.S.C. § 1401(3)(A)(i) (2008). Emotional disturbances are the “grey area between normal, voluntary conduct and involuntary physiological response . . . where Congress has chosen to locate behavioral problems” as disabilities under the IDEA. *Indep. Sch. Dist. No. 284*, 258 F.3d at 775. Under the Act, a district is required to give a child the skills required to function effectively in light of the limitations caused by the child’s condition. For students with emotional disturbances, residential placement may be necessary for that to occur, as the disability affects, not just the child, but the educational process that must be instituted for a child to gain benefit from her education.

As the IDEA regulations state, in order for a child to suffer from a serious emotional disturbance that reaches the level of a disability, the condition must:

Exhibit[] one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.8(c)(4)(i)(A)-(E) (2008). These five characteristics are similar in that each one affects a child’s behavioral, social, or cognitive capabilities—each of which fundamentally impacts the child’s educational progress. *See generally* Elaine Eberharter-Maki, *Students with Serious Emotional Disturbance: A Legal Guide to Identification* 26-29 (Office of Special Educ. and Rehabilitative Servs. 1996). Consequently, all five characteristics drastically affect the educational techniques, tools, and time required for an instructor to make progress with a student.

Behavioral, emotional, and social disabilities that fall into the class of “serious emotional disturbances” make it virtually impossible for a student to derive benefit from their education unless the underlying cause of the disturbance is treated as a part of the educational process. Treatment of this type of disability can require alternative educational procedures designed to integrate treatment of the disability with properly tailored educational instruction. Where the issues are particularly severe, a residential facility may be the only placement through which this alternative educational process can be appropriately administered. Indeed, even the *amicus curiae* supporting appellant’s position note that residential placement is appropriate

and reimbursable where “the student . . . need[s] the residential placement in order to receive the meaningful educational benefit required by the law.” Amicus Curiae Brief at 8.

Thus, for a small number of children with severe social, emotional, or behavioral difficulties, placement in a residential treatment center may be necessary for the child’s educational progress.⁴ “[O]f the student groups with high incidence disabilities (*i.e.*, learning disabilities, mild cognitive disabilities, and emotional and behavioral disorders), students with [emotional and behavioral disorders] are the most likely to require access to the full continuum of placement options.” Kathleen M. Beaudoin, Richard Knuth, & Gregory J. Benner, *Social Validation of Services for Youth with Emotional and Behavioral Disorders: A Comparative Study*, 23 Int’l J. Special Educ. 1, 1 (2008). For these children, “residential treatment facilities can provide a consistent, nurturing environment with predictable, consistent expectations that are designed to help shape desirable behaviors and emotional responses.” Heather J. Hair, *Outcomes for Children and Adolescents After Residential Treatment: A Review of Research from 1993 to 2003*, 14 J. Child & Family Studies 551, 555 (2005).

⁴ In the aggregate, residential placements are miniscule: nationally, in October 2007, fewer than one half of one percent of children with disabilities were in residential facilities, according to data reported to the federal government. Department of Education, Office of Special Education Programs, Data Tables for OSEP State-Reported Data (Table 2-2), *available at* http://www.ideadata.org/TABLES31ST/AR_2-2.xls.

In recognizing emotional disturbances as a disability, Congress identified a class of children “who are disabled only in the sense that their abnormal emotional conditions prevent them from choosing normal responses to normal situations.” *Indep. Sch. Dist. No. 284*, 258 F.3d at 775-76. Under these circumstances, the emotional disturbance is so entangled with a student’s educational progress that it often makes separation of the two impractical. *Id.* at 776-77. Unlike other disabilities that may be treated without impacting educational instruction, the very nature of emotional disturbances often makes that unrealistic. “The mere fact that Congress regards emotional disturbances as disabilities entitling a child to special education shows that, at least in Congress’s judgment, *social and emotional problems are not ipso facto separable from the learning process.*” *Id.* (emphasis added). While treatment of certain other types of disabilities under the IDEA may be separable from a student’s education, the distinction between this type of disability and others is in the nature of the treatment required to deal with an emotional disturbance. Where a disability must be remedied in order for the child to learn, the appropriate treatment, including the appropriate placement, becomes necessary for a child to gain some benefit from her education. *Id.* at 777.

CONCLUSION

For the foregoing reasons, amicus curiae request that this Court affirm the decision of the United States District Court for the Northern District of Texas.

Respectfully submitted,



Ankur J. Goel
Tamu K. Floyd
Justin M. Holmes
Elizabeth P. Philpott
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, DC 20005-3096
Tel: (202) 756-8000
Fax: (202) 756-8087

Counsel for Amicus Curiae

Dated: November 24, 2008

CERTIFICATE OF SERVICE

In accordance with Federal Rule of Appellate Procedure 25(a)(2)(B) and Fifth Circuit Rule 31.1, the original and seven (7) paper copies and one (1) electronic copy of the attached Brief of Amicus Curiae Council of Parent Attorneys and Advocates were dispatched to the Clerk of this Court through Federal Express Overnight Delivery on November 24, 2008. On the same day, two (2) paper copies and one (1) electronic copy of the brief were served through Federal Express Overnight Delivery on counsel listed below:

Counsel for Petitioners-Defendants-Appellees-Cross-Appellants:

Myrna B. Silver
Attorney at Law
10501 N. Central Expressway, Suite 301
Dallas, TX 75231
Telephone: (214) 365-0050

Counsel for Respondent-Plaintiff-Appellant-Cross-Appellee:

Bridget Robinson
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
505 E. Huntland, Suite 600
Austin, TX 78768
Telephone: (512) 454-6864

Nona C. Matthews
Joe R. Tanguma
Walsh, Anderson, Brown, Schultze & Aldridge, P.C.
909 Hidden Ridge, Suite 410
Irving, TX 75016
Telephone: (214) 574-8800

One Courtesy Copy Served On:

**Texas Association of School Boards Legal Assistance Fund
Attorney for Amicus Curiae**

Christopher P. Borreca
Bracewell & Giuliani, L.L.P.
711 Louisiana, Suite 2300
Houston, TX 77002
Telephone: (713) 221-1408



Ankur J. Goel
Tamu K. Floyd
Justin M. Holmes
Elizabeth P. Philpott
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, DC 20005-3096
Tel: (202) 756-8000
Fax: (202) 756-8087

Counsel for Amicus Curiae

Dated: November 24, 2008

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,969 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2003 in 14 point Times New Roman.



Ankur J. Goel
Tamu K. Floyd
Justin M. Holmes
Elizabeth P. Philpott
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, DC 20005-3096
Tel: (202) 756-8000
Fax: (202) 756-8087

Counsel for Amicus Curiae