STATEMENT OF IDENTITY AND INTERESTS OF THE *AMICI* AND SOURCE OF AUTHORITY TO FILE

The **National School Boards Association** ("NSBA"), founded in 1940, is a non-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students, including approximately 6.4 million students with disabilities.

Formed in 1938, the **Louisiana School Boards Association** ("LSBA") is a non-profit service organization representing local school board members in 69 local systems. The association interfaces with other state, regional, and national organizations having the common goal of improving student performance. LSBA's mission is to provide leadership, services, and support for its members so that they become more effective as policy makers in meeting the educational needs of all students. Dedicated to the premise that all citizens must receive the finest education possible, LSBA has sponsored progressive school legislation, advocated improved teaching through increased salaries for teachers and administrators, adopted a code of ethics for school board members, and through its own activities and cooperation with other educational agencies has stressed that efficient public schools are the foundation of American democracy.

The **Mississippi School Boards Association** ("MSBA") is a professional, nonprofit organization whose mission is to ensure quality school board performance through advocacy, leadership training, technical assistance and information dissemination. MSBA represents all public school boards of education in the State of Mississippi. MSBA is the lobbying wing of Mississippi school boards at the State and federal levels and assists school districts with their grassroots lobbying efforts at the local level. MSBA is also the primary technical resource for school boards and superintendents on school board governance and other related issues. MSBA also serves as a principle resource for statewide educational and parental organizations in helping them understand the governance role of the board and the administrative role of the superintendent. MSBA is Mississippi's primary leadership training entity for public school boards of education.

Nearly 800 public school districts in Texas are members of the **Texas Association of School Boards Legal Assistance Fund** ("TASB Legal Assistance Fund"), which advocates the interest of school districts in litigation with potential statewide impact. The TASB Legal Assistance Fund is governed by three organizations: the Texas Association of School Boards, Inc. ("TASB"), the Texas Association of School Administrators ("TASA"), and the Texas Council of School Attorneys ("CSA").

TASB is a non-profit corporation whose members are the approximately 1,030 public school boards in Texas. As locally elected boards of trustees, TASB's members are responsible for the governance of Texas public schools. [1]

TASA represents the State's school superintendents and other administrators responsible for carrying out the education policies adopted by their local boards of trustees.

CSA is comprised of attorneys who represent more than ninety percent of the public school districts in Texas.

The **National Association of State Directors of Special Education** ("NASDSE") is a not-for-profit organization established in 1938 to promote and support education programs and related services for children and youth with disabilities. Its members are the state directors of special education in the states, District of Columbia, Department of Defense Education Agency, federal territories and the Freely Associated States. NASDSE's primary mission is to serve students with disabilities by providing services to state educational agencies to facilitate their efforts to maximize educational and functional outcomes for students with disabilities.

Amici regularly represent their members' interests before Congress, state legislatures, and federal and state courts and have participated as *amicus curiae* in

[1] *See* Tex. Educ. Code § 11.151 (b) & (d).

numerous cases involving the interpretation of the Individuals with Disabilities Education Act ("IDEA"). *Amici*'s members are committed to providing a free appropriate public education to children with disabilities as required by law. In carrying out these obligations, they must take into consideration the educational needs of all children entrusted to them as well the responsible use of public tax dollars allocated to carry out their educational mission.

Amici file this brief to emphasize to this Court the importance of interpreting the IDEA's statutory and regulatory provisions regarding publicly-funded independent educational evaluations in a manner that not only protects the educational interests of children with disabilities but also permits school districts to impose reasonable conditions that ensure public dollars are spent on valid and useful IEEs that parents seek to assist in the development of an appropriate educational plan for their children.

Amici have authority to file under Fed. R. App. P. 29(a), as counsel for both the Plaintiffs-Appellants and Defendant-Appellee have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The most compelling reason to require publicly-funded independent educational evaluations ("IEEs") to meet state and local school district evaluation criteria is to establish a threshold of minimally acceptable pedagogical standards

designed to address the educational needs of a child with disabilities. Without a requirement that publicly-funded IEEs meet this threshold, well-meaning parents could require school districts to pay for IEEs that at best either fail or only marginally address the educational needs of a child, or at worst provide information that impedes the collaborative development of an individualized education program ("IEP") designed to provide a free appropriate public education ("FAPE"). Neither of these possibilities would serve the interests of the child.

Unwitting, yet well-meaning, parents might seek and rely on the opinions of "experts" to influence a child's IEP, even when those opinions fall outside considered, established educational norms and the professional judgment of experienced educators. Parents might argue that such an IEE merits consideration because it is more comprehensive than the school district's evaluation, and that any departure from state and local requirements is offset by the expansiveness of other factors considered by the IEE. If accepted by this Court, such an interpretation would, in effect, render meaningless the state and local requirements for special education evaluations, and contravene clear federal regulatory language. Such a result would come at untenable costs to the school district budgets, but more importantly to the educational wellbeing of children with disabilities. *Amici* urge this Court to avert these potentially detrimental consequences by affirming the ruling below.

ARGUMENTS AND AUTHORITIES

I. An IEE provides parents the opportunity to submit relevant and meaningful data for the IEP Team to consider in developing a child's individualized educational program.

States receiving federal financial assistance pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. (2015), must provide a free appropriate public education for all eligible children with disabilities. To ensure children receive FAPE, the IDEA establishes a comprehensive system of procedural safeguards designed to provide meaningful parental participation in all aspects of developing an IEP for a child with a disability. *Honig v. Doe*, 484 U.S. 305, 305 (1988); *see* 20 U.S.C. § 1412(a)(6) (2015) (obligating States, through their educational agencies, to ensure, among other matters, that they develop and implement policies and procedures that meet the IDEA's procedural safeguards); *see also* 34 C.F.R. § 300.500 (2015). Among the many procedural safeguards included in the IDEA is a parent's right to obtain an independent educational evaluation at public expense. *See* 20 U.S.C. § 1415(b)(1), (d)(2)(A) (2015).

The statute itself contains no definition of, and no standards for, an independent educational evaluation. The U.S. Department of Education's Office of Special Education Programs ("OSEP"), within the Office of Special Education and Rehabilitative Services ("OSERS"), is charged with issuing regulations that implement the IDEA and policy letters that interpret the statute and those

regulations. 20 U.S.C. §§ 1402, 1406(a), (d)-(f) (2015). The federal regulations define the right to an IEE, providing that when a parent of a child with a disability disagrees with an evaluation obtained by the school district, the parent may obtain an IEE at public expense under certain circumstances and subject to certain criteria. *See* 34 C.F.R. § 300.502 (2015). An IEE is defined as an "evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." *Id.* § 300.502(a)(3)(i). The right to a publicly-funded IEE is not unlimited. The school district may require the IEE to meet the same criteria the school district applies to its own evaluations. *Id.* § 300.502(e). When an IEE that meets these criteria is presented to a school district, whether it is at public or private expense, the school district has an affirmative obligation to consider the evaluation in any decision with respect to the provision of FAPE to the child. *Id.* § 300.502(c)(1).

A parent's right to an IEE at public expense serves several functions. Primarily, "[t]he right to a publicly financed IEE guarantees meaningful participation throughout the development of the IEP." *Phillip C. ex rel. A.C. v. Jefferson Cnty. Bd. of Educ.*, 701 F.3d 691, 698 (11th Cir. 2012). An appropriate IEE can provide additional information or data to present and discuss during the development of a child's IEP, and "provides a check on the judgments being made by school officials regarding the child." *Community Consol. Sch. Dist. No. 180*, 27

IDELR 1004, 1005-06 (SEA Ill. 1998). A publicly-funded IEE provides parents "access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion." *Schaffer v. Weast*, 546 U.S. 49, 60-61 (2005).

An IEE may provide valuable information to the IEP Team for use in developing an IEP. For example, the assessment instruments and evaluation strategies in an IEE that are different from those used by the school district in its evaluation may tease out information that establishes a student's eligibility for special education services under IDEA. The results of an IEE may indicate that specific educational targets should be included in the IEP, such as targets for the student to develop phonemic awareness or specific social skills. The IEE may provide valuable information regarding teaching strategies that may be effective for the student based on evaluation data.

For an IEE to fulfill its purpose and provide parents the opportunity to submit relevant and meaningful data for consideration by the IEP Team, the IEE must meet the same standards and criteria as the school district's evaluation. Otherwise, the value of the IEE may be negligible. An IEE based on a medical model, for example, or that fails to gather assessment data on the child relevant to the educational setting or environment, fails to fulfill the purpose of an IEE under IDEA. To ensure that IEEs offers meaningful and relevant data, federal regulations require that the IEE

meet the criteria the school district uses when it conducts an evaluation. *See* 34 C.F.R. § 300.502(e)(1) (2015).

II. Upholding the regulatory requirement that publicly-funded IEEs meet the school district's criteria for educational evaluations is educationally and fiscally sound.

A. *The regulatory language unambiguously requires that publicly-funded IEEs are to meet the criteria the school district applies to its own evaluations*.

Educational evaluations conducted by school districts of children who have or are suspected of having a disability must meet certain federally-imposed standards. *See* 20 U.S.C. § 1414(b) (2015); 34 C.F.R. §§ 300.304-300.311 (2015). The IDEA further requires that States establish standards, consistent with federal law, for the evaluation of children with disabilities. *See* 20 U.S.C. § 1412(a)(7) (2015). While the State may not remove or reduce the federal requirements for an evaluation, it may impose additional criteria. *See* 34 C.F.R. § 300.199 (2015) (requiring States to identify to LEAs and the Secretary any state-imposed rules, regulations, or policies not required by IDEA). While parents have a right to obtain publicly-funded IEEs under certain circumstances, the federal regulation unambiguously requires school districts to impose the same evaluation criteria (*i.e.*, standards) on an IEE as are imposed on a school district's evaluation, to the extent the criteria are consistent with a parent's right to an IEE. *See Id.* § 300.502(a)(2), (e).

In this case, the Louisiana Department of Education has implemented regulations outlining specific and comprehensive criteria for the evaluation of children with disabilities. The Orleans Parish School Board must comply with those state requirements and has imposed the additional state criteria on publicly-funded IEEs. *See* 28 LA. ADMIN. CODE PT. CI, §§ 501-517 ("Bulletin 1508"). Louisiana is not alone in this. For example, California's Education Code and state regulations outline additional assessment and report requirements. *See* CAL. EDUC. CODE § 56320 *et seq.* (2015); CAL. CODE REGS. tit. 5, § 3023 (2015). California school districts impose these same state-created standards as a condition for obtaining an IEE at public expense. *See, e.g.*, Solano County Special Education Local Plan Area, Policies and Procedures, Policy 11, Independent Educational Evaluations (IEE) Criteria (revised 12/1/14), http://sonomaselpa.org/docs/Policy11_IEE_12-01-14.pdf (last visited June 2, 2015). Texas imposes a number of standards regarding eligibility criteria and the professionals who must be part of the multidisciplinary team that evaluates a student for specific disabilities. For example, the multidisciplinary team that evaluates a student for "other health impairments" (20 U.S.C. § 1401(3)(A) (2015); 34 C.F.R. § 300.8(a)(1), (c)(9) (2015)) must include a licensed physician. *See* 19 TEX. ADMIN. CODE § 89.1040(c)(8). The multidisciplinary team that evaluates a student for a speech impairment must include a certified speech and hearing therapist, a certified speech language therapist, or a licensed

speech/language pathologist. *See Id.* § 89.1040(c)(10). In turn, Texas school districts impose these state criteria on publicly-funded IEEs.

A school district must require an IEE to comply with the criteria the school district uses when it initiates an evaluation. For example, if the school district requires its evaluator to have certain professional credentials, then the IEE provider must possess the same qualifications. The administrative hearing officer's decision in *Humble Independent School District* illustrates this situation. 55 IDELR 150 (SEA Tex. 2010). In evaluating students for a learning disability, the school district required an educational diagnostician or a licensed specialist in school psychology ("LSSP") to conduct the evaluations. These certifications or licenses are issued by two different state agencies. The school district granted the parent's request for an IEE, but required the IEE provider to have one of these professional qualifications. The professional chosen by the parent, while qualified to conduct the evaluation, did not hold the specific licensure and/or certification required by the school district for its own evaluations. The parent presented no evidence of unique circumstances that would justify an IEE by a person who was not an educational diagnostician or an LSSP. The administrative hearing officer upheld the application of the local criteria to the IEE, ruling that the school district was not required to pay for the IEE.

The plain language of the IDEA regulation states clearly that an IEE at public expense must comply with the criteria the school district uses when it conducts an

evaluation "to the extent those criteria are consistent with the parent's right to an [IEE]." 34 C.F.R. § 502(e)(1). Because federal, state, and local criteria are in place to ensure validity, reliability, and a level of quality in school district evaluations that form the basis of a student's IEP, *Amici* urge this Court to read this regulation in a manner that ensures publicly-funded IEEs meet the same basic standards of quality, comprehensiveness and consistency in the interpretation of assessment results. To accomplish this end, the regulatory language excepting the applicability of criteria that are not "consistent with the parent's right" to an IEE should be interpreted narrowly. For example, the school district could not apply the criterion that the IEE provider must work for the school district, which would violate the very definition of an IEE. 34 C.F.R. § 300.502(a)(3)(i) (2015). The exception should not be construed as a broad license permitting parents to contest every criterion that they assert limits their personal preferences in obtaining an IEE.

The commentary accompanying the publication of the IDEA regulations in 2006 emphasizes compliance with the school district's evaluation criteria. The commentary includes the following:

- "… it would be appropriate for a public agency to require an IEE examiner to hold, or be eligible to hold a particular license when a public agency requires the same license for personnel who conduct the same types of evaluations for the agency."

- "It is the Department's longstanding position that public agencies should not be required to bear the cost of unreasonably expensive IEEs."
- "… the regulations already require that the standards be the same for all evaluators, as long as the agency's criteria for evaluators do not prohibit a parent from obtaining an IEE."

See 71 Fed. Reg. 46,540, 46,690-91 (Aug. 14, 2006).

Local criteria regularly imposed by school districts on IEEs have been deemed reasonable and acceptable in a number of OSEP policy letters. Those criteria include acceptable qualifications/credentials of evaluators (*Letter to Thorne*, 16 IDELR 606 (OSEP 1990); *Letter to Anonymous*, 56 IDELR 175 (OSEP 2010); *Letter to Anonymous*, 20 IDELR 1219 (OSEP 1993); *Letter to Parker*, 41 IDELR 155 (OSERS 2004); *Letter to Young*, 39 IDELR 98 (OSEP 2003)); reasonable cost limits (*Letter to Fields*, 213 IDELR 259 (OSERS 1989); *Letter to Thorne*, 16 IDELR 606 (OSEP 1990)); mileage or geographical limits; and reasonable timelines for requesting an IEE (*Letter to Thorne*, 16 IDELR 606 (OSEP 1990)).

B. *Compliance with school district criteria increases the likelihood that IEEs will be meaningful and relevant to the development of an IEP that meets the unique needs of the child.*

The cornerstone of the IDEA is the IEP developed through collaborative and cooperative educational planning and decision-making by parents and school staff.

The foundation for the design of the IEP is evaluation and assessment data. This Court has deemed current evaluation data as one of the key components of an IEP reasonably calculated to confer educational benefit on a child with disabilities. *See Cypress Fairbanks Indep. Sch. Dist. v. Michael F. by Barry F.*, 118 F.3d 245 (5th Cir. 1997) (an IEP must be individualized based on assessment and performance). Valid and comprehensive evaluation data is needed to identify the student's unique educational needs which then drive the development of an IEP. If an IEE is to play any useful role in that process, it must meet the criteria the school district applies to its own evaluations.

The current system allows parents to seek publicly-funded IEEs without an adequate basis or justification. Once a request for an IEE is made, a school district may request the parent's reason for disagreement with the school district's evaluation; however, the school district may not require the parent to provide an answer to that question as a condition for payment for an IEE. *See* 34 C.F.R. § 300.502(b)(4) (2015). This regulation deprives school districts of the opportunity to engage in discussions with parents and attempt to address or remedy the potential problems without having to fund an entirely new evaluation.

Absent this opportunity, parental requests for IEEs may present additional challenges for school districts in providing a FAPE to children with disabilities. Parents sometimes request an IEE months or even years after the school district's

evaluation is completed and used by the IEP Team to develop the student's IEP. *See, e.g., T.P. v. Bryan County Sch. Dist*., 114 LRP 13925 (S.D. Ga. 2014) (parent requested IEE 26 months after district's evaluation); *Placentia-Yorba Linda Unified Sch. Dist*., 112 LRP 41903 (SEA Cal. 2012) (parent requested IEE more than two years after the school district's evaluation); *Beaumont Indep. Sch. Dist*., 114 LRP 7471 (SEA Tex. 2013) (parent requested IEE more than two years after the school district's evaluation). It is not unusual for a parent to agree that a student meets the criteria for a specific category of eligibility, such as intellectual disabilities, and then later request an IEE in the cognitive and adaptive behavior areas directly applicable to the eligibility category of intellectual disabilities. It is also not unusual for a parent to agree to the results of a school district evaluation and all IEPs based on the same district evaluation, and subsequently request an IEE on the same district evaluation that was previously agreeable. In all these cases, the school district must choose between either funding the IEE or expending scarce financial resources defending the appropriateness of its evaluation in a due process hearing.

This vulnerability to a parent's demand for an IEE without a stated basis for disagreement with the school district's evaluation is counterbalanced by a school district's ability to require compliance with federal, state, and local criteria in publicly-funded IEEs. Because in most cases, it will be less expensive to fund the IEE than to proceed to a due process hearing, school districts often select the first

option to conserve scarce school district resources for educational purposes. Requiring that publicly funded IEEs meet established evaluation criteria increases the likelihood that such resources will be spent in a way that benefits children with disabilities.

Such compliance also increases the probability that the resulting IEE will meet minimum professional standards and yield valid and reliable data that will be useful to the IEP Team in developing an educational plan tailored to the child's needs. This furthers the very purpose of an IEE, which is to provide parents with meaningful and pertinent information and data in order to assist and participate in the development of the child's IEP. Compliance with state and local criteria is necessary to make certain that those charged with designing IEPs have access to comprehensive and relevant educational information that will help appropriately identify the disabilities affecting a child's ability to learn and inform the special education and related services that will meet the child's unique needs. The United States Department of Education ("ED") directly recognized and emphasized the importance of school districts establishing and enforcing criteria by requiring school districts to consider IEEs only if the IEE "meets agency criteria." *See* 34 C.F.R. § 300.502(c)(1) (2015).

While IEEs must comply with school district criteria, parents must be allowed to show any unique or special circumstances that justify a publicly-funded IEE that falls outside of school district criteria, according to guidance from ED. *See Letter*

to Anonymous, 56 IDELR 175 (OSEP 2010); *Letter to Thorne*, 16 IDELR 606 (OSEP 1990); *Letter to Fields*, 213 IDELR 259 (OSERS 1989); *Letter to Parker*, 41 IDELR 155 (OSERS 2004); *Letter to Young*, 39 IDELR 98 (OSEP 2003). For example, if a school district sets a cost range for a psychological evaluation, a parent must be allowed the opportunity to show unique circumstances that would justify an IEE that exceeds the upper limit of the cost range. *See* 71 Fed. Reg. 46,540, 46,690-91 (Aug. 14, 2006); *G.V. v. Shenendehowa Cent. Sch. Dist.*, 60 IDELR 213 (N.D.N.Y. 2013) (district not required to waive fee cap where parent was provided list of qualified IEE evaluators who would perform the evaluation for a cost within the fee cap). This opportunity to show unique circumstances further strengthens the parent's right to an IEE while simultaneously supporting the school district's right to require compliance with its criteria in all but the most unusual circumstances.

Appellants and their *Amici* insist that the imposition of what they deem to be "irrelevant" criteria is an attempt to eliminate a parent's right to a second opinion or access to an independent expert. The very opposite is true. The imposition of criteria on IEEs directly serves the interest of the child and the parents by ensuring that they receive quality outside evaluations or "second opinions" that are psychometrically and educationally valid. This policy directly encourages private evaluators to adhere to accepted practices and to become familiar with the child's educational setting and functioning before making recommendations about eligibility and programming in

the educational environment. The policy helps to avoid the production of unsupportable evaluations that give parents false hope or a misguided understanding of their child's educational needs. There simply are no countervailing policy reasons to exempt IEEs paid for with public funds from the same evaluation criteria applied to school districts. To do so would not only ignore the plain language of the regulation, but also decrease the likelihood that the IEE will contain the kind of valid and relevant information that is a building block of the IEP.

C. *School districts must be able to rely on the regulatory requirement that IEEs must comply with school district criteria.*

The IDEA is a statute enacted pursuant to Congress' Spending Clause power. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006). "Legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see also Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 296; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2640 (2012). Consistent with basic contract law principles, the terms of the bargain that Congress requires States to accept by imposing conditions on federal funding must be "set out unambiguously." *See Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 296; *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17. "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily accepts the terms of the

'contract.'" *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17. If the terms are not clear, States cannot make a knowing, fully informed decision regarding the obligations that will be imposed on them and their governmental subdivisions. *See id.*

In considering whether a spending clause statute, such as the IDEA, provides clear, unambiguous notice, courts begin with the text of the statute. Courts, however, often look to other sources such as legislative history, court decisions, and federal regulations in construing spending clause statutes and determining whether the terms are unambiguous. *See, e.g., Pennhurst State Sch. & Hosp.*, 451 U.S. at 17-21 (reviewing both the text of the statute and legislative history for purposes of spending clause analysis in determining whether Congress unambiguously imposed obligation on States); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641-42 (1999) (citing related Supreme Court decisions, Title IX federal regulations, and trade association publications as sources of notice to recipients of federal funding that recipients could be held liable for student-on-student harassment); *School Bd. of Nassau County Fla. v. Arline*, 480 U.S. 273, 290-91 (1987) (reviewing text of statute, the relevant regulations, and the legislative history in analyzing whether provision under Section 504 of the Rehabilitation Act provided unambiguous notice of States' duties) (Rehnquist, J., dissenting); *County Sch. Bd. of Henrico Cnty., Va. v. RT*, 433 F. Supp. 2d 692, 714, n.35 (E.D. Va. 2006) (stating courts employ

different sources, including federal regulations, in construing spending clause statutes).

With regard to IEEs, the text of the IDEA provides nothing more than the affirmative obligation on States to provide the opportunity for parents of a child with a disability "to obtain an independent educational evaluation of the child." 20 U.S.C. § 1415(b)(1) (2015). The statute is silent as to the scope of an IEE or the standards for an IEE. Federal regulations, promulgated to better clarify and define the intent and scope of the statute, help shed light on whether States have received clear notice of their obligations. *See, e.g., Mr. I. ex rel. L.I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 16 (1st Cir. 2007) (addressing issue of whether, as a condition of accepting federal money, §1401(3)(a)(i) of the IDEA properly put States on notice of their legal obligation by looking to text of statute and the relevant federal regulations).

Thus, the statute in combination with the regulation (*i.e.*, the "contract") unambiguously establishes both a State's obligations and rights with regard to IEEs if it opts to accept the federal funding. The regulation provides the States the explicit right to establish and impose certain criteria on IEEs. *See* 34 C.F.R. § 300.502(e). As is the case when interpreting statutes, when the language is plain, the sole function of courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 548

U.S. at 296-97. For this Court to impose a requirement on school districts to fund IEEs that do not meet established criteria, and for which the parent has shown no exceptional circumstances to justify deviation from these criteria, would directly contradict the unambiguous language of the regulation, would impose a requirement not clearly set forth in the "contract" between the States and the federal government under the IDEA and would, in fact, be an absurd result.

D. *Requiring districts to fund IEEs that do not meet school district criteria is not fiscally sound public policy and does not contribute to the development of the IEP.*

School districts across the nation face significant underfunding and limited resources; yet, they have an affirmative obligation to provide FAPE to students with disabilities, substantively as well as procedurally, without regard to the amount of funds budgeted by either state or federal sources. By allowing school districts to impose federal, state and local criteria on publicly-funded IEEs, the IEE regulation directly contemplates reasonable limits on a school district's responsibility to expend public funds on outside evaluations. This requirement should be read strictly both to protect the children IDEA intends to serve and to ensure that already limited education funds are utilized in a way that most effectively serves the needs of students with disabilities.

Obligating school districts to pay for IEEs that do not meet established criteria is fiscally unsound. Such a policy would force school districts to pay for IEEs

regardless of whether they are comprehensive, educationally valid, and relevant to assist in the development of the child's IEP, resulting in a significant waste of public funds. Nothing in the law suggests Congress intended school districts that initially acquiesce to a request for a publicly-funded IEE to be forced to fund private evaluations that fail to conform to criteria established by the state or local agencies.[2] Such an approach would make compliance with state and local criteria a meaningless requirement.

Appellants' and their *Amici*'s recommended solution is unreasonable and encourages futile expenditures of public funds. Appellants and their *Amici* point out that the regulation only requires a public agency to "consider" an IEE. Thus, they assert that while a school district should be obligated to fund an IEE even if it fails to conform to established criteria, the solution is that the school districts (*i.e.*, the

[2] For these same public policy reasons, *Amici* for Appellee encourage this Court to uphold the district court's finding that the school district did not waive its right to refuse funding for an IEE that did not meet state criteria by failing to file for a due process hearing. As the district court properly recognized, the school district granted the parents' request for an IEE, provided the required criteria, and then refused to pay for the IEE until the evaluation appropriately met the state-established criteria. The plain language of the IEE regulation does not affirmatively place the burden on a school district to file a due process hearing to demonstrate that an IEE does not meet established criteria. *Compare* 34 C.F.R. § 300.502(b)(2)(i) (2015) *with* 34 C.F.R. § 300.502(b)(2)(ii) (2015). If the intent was for school districts to be required to file a due process hearing to avoid paying for an IEE that fails to conform to established criteria, the regulation would have affirmatively and unambiguously established such a requirement. *See Pennhurst State Sch. & Hosp.*, 451 U.S. at 17; *see also* Section II.C., *supra* for discussion of legislation, such as the IDEA, enacted pursuant to the Spending Clause. Requiring a school district to file suit every time an IEE fails to meet criteria results in a significant waste of public funds, or alternatively, encourages school districts to expend limited public resources on IEEs that are of no value.

IEP Team) must only consider the evaluation and "need not adopt any of its recommendations or discuss its substance." *See* Appellants' Brief at pp. 38-39; Brief for *Amicus Curiae* National Disability Rights Network, *et al.*, at p. 15. In effect, Appellants and their *Amici* argue that school districts should be required to fund IEEs that may potentially be worthless because the school district can reject the outcome.

This logic is flawed in several respects. First, the regulation requires consideration of the results of an IEE only "if it meets agency criteria." 34 C.F.R. § 300.502(c)(1). This requirement further underscores ED's intent that a school district should not be required to fund an IEE that it has no obligation to consider, and in fact, is prohibited from considering. Second, such a solution is a poor public policy choice because it discourages parents from obtaining meaningful IEEs and wastes public funds. Finally, and most importantly, requiring a school district to pay for an IEE that it otherwise has no obligation to consider or use in the development of the child's program is directly contrary to the purpose of an IEE, which is to provide parents an additional tool to use in their meaningful participation in the educational decision-making process that occurs in an IEP Team meeting.

The end result of a policy requiring school districts to fund IEEs regardless of whether they meet established criteria is fewer safeguards for all stakeholders involved – the child, the parent, and the school district. *Amici* for the Appellee,

therefore, encourage this Court to avoid such a result and uphold a school district's undeniable right to impose both state and local criteria on publicly-funded IEEs.

CONCLUSION

Amici for the Appellee pray that the Court will affirm the judgment of the district court.

Respectfully submitted,

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