No. 11-1334

CORPORATE DISCLOSURE STATEMENT

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

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Francisco M. Negrón, Jr.

Dated: September 26, 2011

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

STATEMENT OF INTERESTS

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

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

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

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

This case is of importance to all school districts represented by *Amici*. While these school districts are dedicated to educating children with disabilities, they are not designed or funded to function as medical providers. Under the IDEA, residential placements should be limited to

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

INTRODUCTION

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

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

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

ARGUMENT

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

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

Central Sch. Dist., Westchester County v. Rowley, 458 U.S. 176, 190, n. 11 (1982), that Congress did not intend to "impose upon the States a burden of unspecified proportions and weight." Instead, the Supreme Court explained that the intent of the IDEA "was more to open the doors of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.* at 192. Accordingly, the focus of the IDEA has been to provide *access* to public education by requiring schools to design and implement a program that provides an *opportunity* for a student to receive some educational benefit. *Id.* A school district provides FAPE by providing each child the "basic floor of opportunity," or an educational benefit that might be found to be "more than *de minimus*." *Id.*

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

The IDEA requires school districts to provide a continuum of placement options for children with disabilities. 34 C.F.R. [illegible]

residential placement when educationally warranted. School districts frequently 5th0Cir. 1989).

Implementation of the IDEA, Table 2-4, pg. 190 (2007). School districts therefore voluntarily expend hundreds of millions of

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

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

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

1996 through 2007, Archives of General Psychiatry, August 1, 2011.[4]

health services, providing services and support for 58 million adults and children.[7] Congress did not intend for public schools to bear the responsibility or financial burden to provide services more appropriately left to private insurers or other governmental sources, such as Medicaid. Indeed, Congress specified that when any public agency *other than an educational agency* is otherwise obligated under

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

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

children in today's society," agreeing that "the school's primary function is to educate students, not replace parents." *Wyke v. Polk County Sch. Bd.*, 129 F.3d 560, 573 (11th Cir. 1997). As shown more specifically below, the inextricably intertwined test, through its breadth

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

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

constructive ways." 20 U.S.C. § 1400(c)(8) (2011). This cooperative process was confirmed by the U.S. Supreme Court in *Schaffer v. Weast*, 546 U.S. 49, 57 (2005),

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

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

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

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

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

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

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

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

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

As suggested by the Fifth Circuit in *Michael Z.*, a school district will almost always lose under the inextricably intertwined test, since plaintiffs will be able to show that almost any health condition requiring medical interventions will have some impact on a child's ability to learn. At minimum, it places a school district at a major disadvantage by exclusively focusing upon the child's medical needs and forsaking any analysis of the propriety of the school district's program provided or offered to provid

unambiguously, and States cannot be held to accept knowingly conditions of which they were unaware or unable to ascertain. *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 294-304. The central inquiry for the *Murphy* Court was whether the IDEA furnished a state official, deciding whether to accept IDEA funds, with notice that one of the obligations imposed upon such acceptance would be the obligation to compensate prevailing parties for expert fees. *Id.* In *Murphy*, the Supreme Court rejected the argument that expert fees should be interpreted to be part of the costs that could be recovered under 20 U.S.C. § 1415(i)(3)(B) (2011),

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

responsibility of the School District." *Id.* at 246. The Third Circuit also correctly noted that the Supreme Court's determination in *Tatro*, that related services

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

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

> If [the student] had not been medically treated, she would have been unable to take advantage of and receive the benefit of her special education, but the same would apply to any illness. A handicapped child who is struck by an automobile or who suffers a severe fall, or who suffers a heart attack or str

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

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

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

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

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

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

CONCLUSION

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

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

Respectfully submitted,

s/Francisco M. Negrón, Jr.
Counsel for Amici Curiae
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
703-838-6722
fnegron@nsba.org

s/Joe R. Tanguma
Counsel for Amici Curiae
Walsh, Anderson, Brown,
Gallegos and Green, P.C.
10375 Richmond Avenue,
Suite 750
Houston, TX 77042
(713) 789-9318
jtanguma@wabsa.com

September 26, 2011

CERTIFICATE OF COMPLIANCE

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As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 6916 words.

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Francisco M. Negrón, Jr.
Counsel for Amici Curiae
National School board Assoc., et al.

Dated: September 26, 2011

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

By: **S**

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Francisco M. Negrón, Jr.

CERTIFICATE OF SERVICE

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

W. Stuart Stuller
Alyssa C. Burghardt
Caplan and Earnerst, LLC
1800 Broadway, Suite 200
Boulder, CO 80302
303-443-8010
Email Addresses:
sstuller@celaw.com
aburghardt@celaw.com
Attorneys for Plaintiffs-Appellants

Katherine Gerland
Louise Bouzari
Law Offices of Louise Bouzari, LLC
7887 E. Belleview, Suite 1100
Englewood, CO 80111
303-228-1616
Email Addresses:
kategerland@yahoo.com
lbouzari@msn.com
Attorneys for Defendants-Appellees

S

Francisco M. Negrón, Jr.