No. 97-1793

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,
Petitioner,
v.
GARRET F., A MINOR BY HIS MOTHER AND NEXT FRIEND, CHARLENE F.,
Respondent.

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

BRIEF OF NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, AMERICAN MUSIC THERAPY ASSOCIATION, ARC OF THE UNITED STATES, BRAIN INJURY ASSOCIATION, INC., CENTER FOR LAW AND EDUCATION, CHILDREN AND ADULTS WITH ATTENTION DEFICIT DISORDERS, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC., HIGHER EDUCATION CONSORTIUM FOR SPECIAL EDUCATION, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, NATIONAL ASSISTIVE TECHNOLOGY ADVOCACY PROJECT, NATIONAL PARENT NETWORK ON DISABILITIES, AND TASH, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Are the health services required by Garret F. "related services" within the meaning of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*?

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BRIEF OF NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, *ET AL.*, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE* [1]

Amici curiae National Association of Protection and Advocacy Systems (NAPAS), American Music Therapy Association (AMTA), Arc of the United States, Brain Injury Association, Inc. (BIA), Center for Law and Education, Children and Adults with Attention Deficit

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[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief, and letters of consent have been filed with the Clerk of the Court.

Disorders (CH.A.D.D.), Disability Rights Education and Defense Fund, Inc. (DREDF), Higher Education Consortium for Special Education (HECSE), Judge David L. Bazelon Center for Mental Health Law, the National Assistive Technology Advocacy Project, National Parent Network on Disabilities (NPND), and TASH are organizations that advocate for the rights and interests of persons with disabilities, including the rights of students under the IDEA.

NAPAS is a membership organization for the nationwide system of protection and advocacy (P&A) agencies. P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. Approximately 39% of the cases handled by the protection and advocacy agencies in 1997 were special education cases or cases that included special education issues. NAPAS provides training and technical assistance to the P&A network, and has participated as *amicus curiae* in a number of cases before this Court, including *Florence County Sch. Dist. No. 4 v. Carter,* 510 U.S. 7 (1993) and *Honig v. Doe*, 484 U.S. 305 (1988).

AMTA is a nonprofit organization committed to increasing public awareness of the benefits of music therapy and to increasing access to quality music therapy services throughout the United States. AMTA provides technical assistance necessary to make music therapy accessible and available to both children and adults with disabilities. AMTA assists parents in advocating for their children to receive music therapy services as a component of a free appropriate public education and recognizes the obstacles faced by parents in obtaining music therapy and other related services that will enable their children to benefit from special education.

The Arc of the United States, a national organization on mental retardation, is an open membership organiza-

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families, friends, interested citizens, and professionals in the disability field. With 140,000 members in 1,100 state and local chapters nationwide, the Arc is the largest voluntary organization devoted solely to working on behalf of the estimated seven million people with mental retardation in the United States and their families. Children with mental retardation historically have faced discrimination by our nation's public schools. The Arc has played a significant role over the last three decades in securing the right to a free, appropriate public education for all students with mental retardation and other disabilities.

BIA is a national, non-profit organization dedicated to improving the quality of life of persons with brain injury, as well as promoting research, education, and prevention of brain injuries. With 42 state associations, BIA serves persons with brain injuries, their families, and caregivers in all 50 states and the territories. BIA serves numerous young adults and children who require special education and a wide variety of related services, including school health services.

The Center for Law and Education is a national legal support and advocacy organization representing parents and students in efforts to improve the quality of public education for low-income children and youth. Since its founding in 1969, the Center has worked to vindicate the rights of all students with disabilities to full and equal opportunity in public education, through participation in litigation, legislative and administrative advocacy, the provision of technical assistance to other attorneys, and training for attorneys, parents, and other advocates. The Center has participated as counsel and as *amicus curiae* in numerous cases implicating rights under the IDEA, including *Florence County Sch. Dist. No. 4 v. Carter,* 510 U.S. 7 (1993) and *Honig v. Doe,* 484 U.S. 305 (1988).

CH.A.D.D. is a nonprofit organization that works to improve the lives of people with Attention Deficit/Hyperactivity Disorder through education, advocacy, and sup-

port. CH.A.D.D. is comprised of 35,000 professional and parent members, with approximately 500 parent-based chapters throughout the United States. CH.A.D.D. is committed to ensuring that all students with disabilities receive appropriate special education and related services to meet their individual needs.

DREDF is a national law and policy center dedicated to protecting and advancing the civil rights of people with disabilities, and securing equal citizenship for all people with disabilities. Pursuing its mission through education, advocacy, and law reform efforts, DREDF is nationally recognized for its expertise in the development and the interpretation of federal disability civil rights laws. DREDF assists hundreds of parents and their children and recognizes the importance of the provision of related services to ensure that children with significant disabilities are educated in public schools in their communities.

HECSE is comprised of colleges and universities that grant doctorates in special education. HECSE has a general interest in policy issues affecting special education.

The Judge David L. Bazelon Center for Mental Health Law, formerly the Mental Health Law Project, is a national legal advocacy organization representing adults and children with mental disabilities. Since 1972, the organization has been involved in efforts to promote appropriate special education for children with emotional and behavioral disorders. The Bazelon Center has appeared as *amicus curiae* in *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) and *Honig v. Doe*, 484 U.S. 305 (1988).

The National Assistive Technology Advocacy Project, a project of Neighborhood Legal Services in Buffalo, New York, provides technical assistance, training, and a range of support services to attorneys, paralegals, and advocates nationwide, who are seeking to obtain funding for assistive technology devices and services that will allow persons with disabilities to overcome the limitations imposed by their disabilities. The National Assistive Technology Ad-

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vocacy Project has an interest in ensuring that children who are dependent on technological intervention in order to fully participate in school activities have access to the individual services and technology they need in order to attend and remain in school.

NPND is an organization comprised of parent training and information centers, parent organizations, and parents and professionals who work together on behalf of children and youth with disabilities by assisting their parents and other family members. NPND is committed to ensuring that all children and youth with disabilities obtain appropriate special education and related services.

TASH is an international advocacy organization comprised of persons with disabilities, their relatives, other advocates, and persons who work in the disability field. TASH's mission is to eliminate physical and social obstacles that prevent equity, diversity, and quality of life, and to advocate for full inclusion of all people in all aspects of society. TASH places a premium on the inclusion of all students with disabilities in their schools and their communities.

Amici curiae are extremely familiar with the barriers faced by students with disabilities as they attempt to obtain the free appropriate public education to which they are entitled under the IDEA and other laws. These organizations and the members they represent have direct experience with students who have been excluded from school, denied the appropriate services they need to obtain a meaningful education, or who have failed to receive appropriate services in a timely manner. These organizations and the members they represent have a direct stake in the interpretation of the IDEA, including the scope of the definitions of "related services" and "medical services," and have an interest in ensuring that students with disabilities have full access to appropriate special education and related services in the least restrictive environment, as required by federal laws.

Amici curiae file this brief to establish a context for the interpretation of these terms, and to highlight the critical difference the provision of health services can make for students who would otherwise be deprived of the opportunity to attend school.

SUMMARY OF THE ARGUMENT

In enacting the IDEA in 1975, Congress sought to end the long history of exclusion of children with disabilities from our nation's public schools. Congress mandated that *all* children with disabilities, regardless of the nature or the severity of their disabilities, be provided with a free appropriate public education. Recognizing that educational services alone would not guarantee all children with disabilities access to an appropriate education, Congress also mandated the provision of related services. Related services, which include such services as physical and occupational therapy, speech therapy, and other health services are a critical element of an appropriate education for some students; without these services, their entitlement to an appropriate public education would be rendered meaningless.

In *Irving Independent School District v. Tatro*, 486 U.S. 833 (1984), this Court clearly distinguished between health services that are included within the scope of the IDEA and medical services that are excluded under the IDEA, by concluding that if the service can be provided by a non-physician, it is a health service that school districts must provide under the IDEA. Subsequent cases refusing to apply this "bright-line" test have impermissibly included additional criteria as part of the process of developing an individualized education plan (IEP) for a child. Such criteria, which include the nature and scope of the service, the complexity of the service, the frequency of the service, the burden of providing the service, and cost, are criteria that are not applied to decisions regarding other related services and, in fact, these criteria have no place in the decisionmaking process. The IDEA requires

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that decisions regarding necessary related services, and the amount and frequency of those services, be based on the unique needs of the student, not on extrinsic criteria such as frequency of service or the burden to the school system of providing the service.

Whether or not the services needed by Garret F. and a small number of other students were provided in schools prior to enactment of the IDEA is not relevant to the determination of whether the services are "school health services" or "related services" under the IDEA. Traditionally, schools provided very few, if any, special education services or related services to students with disabilities. The IDEA was first enacted to remedy this situation, and it required schools to provide a range of new services so that children with disabilities would be able to attend school. The IDEA is a "zero reject" statute; it requires that appropriate special education and related services be provided to *all* children, regardless of the severity of their disabilities. To deny students such as Garret F. access to school-based health maintenance services would undermine the intent of the IDEA and reverse 25 years of legislative policy and legal mandates.

The IDEA's mandate that students receive their special education in the least restrictive environment requires that states ensure that students such as Garret F. receive the health services they need. Garret F. and other similarly situated students have disabilities that require ongoing monitoring and health maintenance services, but they are not ill; they are able to attend and participate in school if the necessary health services are made available. Without these services, students such as Garret F. are destined to spend their days at home or in institutions, in isolation from their peers and from the stimulation that children derive from being in a school setting.

There is no reason for this Court to reverse its ruling in the *Tatro* case by expanding the medical services exclusion. In fact, changes in law and public policy and in

medical technology since the *Tatro* decision provide even more support for a limited view of the medical services exclusion, rather than a broader approach. Enactment of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, and the reauthorization of the IDEA in 1997, are strong legal and policy statements that persons with disabilities are to be integrated as much as possible into the life of their communities, and that support services or accommodations are to be provided to persons with disabilities to enable them to be as independent as possible. Affirming the decision by the Eighth Circuit will safeguard these rights and further this public policy by allowing the small group of students whose school attendance depends on the availability of health services to benefit fully from the promise of the IDEA by attending school and participating in school life.

ARGUMENT

I. THE IDEA REQUIRES THE PROVISION OF HEALTH SERVICES TO STUDENTS WITH DISABILITIES SUCH AS GARRET F.

A. This Court's Decision in *Irving Independent School District v. Tatro*, 486 U.S. 833 (1984), Established A Bright-Line Test to Distinguish Between Required Health Services and Excluded Medical Services Under the IDEA.

In the *Tatro* case, this Court addressed the question of whether the IDEA's predecessor statute, the Education of All Handicapped Children Act, 20 U.S.C. 1400 *et seq.*,[2] required a school district to provide a student with disabilities with clean intermittent catheterization. In resolving this issue, this Court analyzed the construction of

[2] The statute has been reauthorized and renamed several times since the *Tatro* case was decided. For ease of reference, the statute is referred to as the IDEA throughout this brief, and references are to the current statutory sections. Likewise, the regulations were revised and reissued in 1992; reference to regulatory sections will be to the 1992 regulations, which remain in effect today.

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A. This Court's Decision in *Irving Independent School District v. Tatro*, 486 U.S. 883 (1984), Established A Bright-Line Test to Distinguish Between Required Health Services and Excluded Medical Services Under the IDEA.

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several provisions of the statute and the implementing regulations issued by the United States Department of Education.

This Court noted that the statute mandated the provision of special education and related services to children with disabilities to meet their unique needs. 20 U.S.C. 1400(c).[3] Related services are those "developmental, corrective, and other supportive services" that are necessary to assist a child with disabilities to benefit from special education. 20 U.S.C. 1401(22). Related services include medical services for the purpose of diagnosis or evaluation only. *Id.*

In examining the regulations issued by the Department of Education, this Court noted that the definition of related services includes "school health services," and that such services are defined as "services provided by a qualified school nurse or other qualified person." 34 C.F.R. 300.16(b)(11). The regulations define "medical services" as "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 C.F.R. 300.16(b)(4).

In reaching its decision, this Court set out a three part test for determining if a health service is a related service under the IDEA. First, in order to be entitled to health services, the child must be disabled and in need of special education. Second, the services must be necessary for the child to benefit from special education. If the service can be provided to the child at a time of the day other than during school hours, for instance, the school system does

[3] In the IDEA Amendments of 1997, Pub. L. 105-17 (June 4, 1997), Congress emphasized that another purpose of the IDEA is to prepare students for employment and independent living. Congress did not, in this reauthorization of the IDEA, undermine the pertinent United States Department of Education regulations or change the statutory definition of related services, other than to add orientation and mobility services to the definition.

not have to provide the service. Finally, the health services must be able to be provided by a nurse or other qualified person. If the services must be provided by a physician, they are not considered "related services." *Tatro,* 468 U.S. at 894. This Court found that the regulations promulgated by the Department of Education constituted a "reasonable" interpertation of the statute. *Tatro,* 468 U.S. at 892.[4]

Since this Court has already determined that the Department's regulations regarding medical services and related services constitute a reasonable interpretation of the statute, departure from this decision should occur only if there is "special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984). The Garret F. case presents no such reason for this Court to depart from its *Tatro* ruling. The physician/non-physician test is an easy, workable test for determining if a health service is a related service under the IDEA, and it was unanimously adopted by this Court. *See, e.g., Swift and Co. v. Wickham,* 382 U.S. 111, 116 (1965) (departure from precedent may occur if rule defies practical workability). The test has been used to help define the scope of related services required to be provided to students with disabilities; altering the

[4] In reviewing an agency's construction of a statute, the court must look at whether or not Congress has spoken directly to the precise question at issue; if not, the court asks, as this Court did in the *Tatro* case, whether or not the agency's regulations are based on a permissible construction of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

It is also important to note that in reauthorizing the IDEA in 1997, Congress retained the requirement prohibiting the promulgation of any regulations that would "procedurally or substantively lessen the protections provided to children with disabilities under this Act, as embodied in regulations in effect on July 20, 1983. . . ." 20 U.S.C. 1406(b). Thus, Congress has approved the Department's 1983 regulations, which include the school health services and medical services definitions addressed by this Court in the *Tatro* case.

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test laid out in *Tatro* would, in fact, jeopardize the programs of all students with disabilities who receive related services, since many of the services listed in the definition, such as occupational and physical therapy, are "medical" as well as educational in nature.

The *Tatro* test has proven to be a vibrant, viable doctrine. *See, e.g., Patterson v. McLean Credit Union,* 491 U.S. 164, 173-74 (1989) (departure from precedent if development of related principles of law have left the old rule no more than a remnant of abandoned doctrine). It has been followed by other courts besides the Eighth Circuit. *See, e.g., Macomb County Intermediate Sch. Dist. v. Joshua S.,* 715 F. Supp. 824 (E.D. Mich. 1989), and *Skelly v. Brookfield Lagrange Park Sch. Dist.* 95, 968 F. Supp. 385 (N.D. Ill. 1997).[5] There has been no change of facts that warrants a rejection of the *Tatro* bright-line test. *See, e.g., Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406 (1932) (facts have so changed that old rule has been robbed of significant application). Nor is there any provision of the recently reauthorized IDEA that would justify, or even permit, reversing this Court's ruling in the *Tatro* case. To the contrary, the lengthy deliberative process during the reauthorization of the IDEA in 1997 provided Congress with the opportunity to amend the statute with the intended effect of overruling the *Tatro* holding, and Congress chose not to do so.[6] Furthermore, the *Tatro* "bright-line" test is based

[5] In *Morton Community Sch. Dist. No. 709 v. J.M.,* 986 F. Supp. 1112 (C.D. Ill. 1997), No. 97-3962 (7th Cir., July 27, 1998), the District Court adopted the *Tatro* bright-line test as well. The Seventh Circuit Court of Appeals did not adopt the bright-line test, but found, in its decision of July 27, 1998, that the student was entitled to receive, in school, the health services he needs.

[6] Congress was well aware of its authority to undermine the *Tatro* holding; during the 1986 reauthorization of the IDEA, Congress deliberately chose to overrule legislatively this Court's decision in *Smith v. Robinson,* 468 U.S. 992 (1984).

exactly upon the wording of the regulation, which has not changed. Today, as in 1984, the Department of Education's interpretation of the statute is entitled to due deference.[7]

The *Tatro* bright-line test promotes the intent of Congress to ensure that all students with disabilities, including those with health-related needs, have the opportunity to attend school and receive appropriate educational and related services in the least restrictive environment. If this Court effectively reverses the *Tatro* decision by reversing the Eighth Circuit decision in the instant case, there is a very real threat that school systems will impose impermissible criteria when determining whether to provide other related services as well. This would eviscerate the IDEA because it would shift the focus of the decisionmaking process from a determination of whether the services are necessary to enable the child to benefit from his or her special education in light of the child's unique needs—the standard set out in the statute—to a determination of the self-interest of the school district, factoring in considerations that have nothing to do with the child's unique needs. This is clearly not the intent of the IDEA.

B. Subsequent Cases Refusing to Apply the *Tatro* Test Impermissibly Restrict the Scope of "Related Services" Required by the IDEA, and Impose Unjustified Criteria on the Decisionmaking Process Regarding Appropriate Special Education and Related Services for Students with Disabilities.

Some of the cases decided subsequent to *Tatro* have misconstrued this Court's decision, improperly injecting

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[7] Significantly, the Department's proposed regulations implementing the IDEA as reauthorized and amended by the IDEA Amendments of 1997, retain the current regulatory provisions concerning the medical services exclusion and school health services. *See* Notice of Proposed Rulemaking, 62 Fed. Reg. 55025, 55071-55072 (October 22, 1997).

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other factors into the determination of whether health-related services necessary to allow a child to benefit from special education will, in fact, be provided. These additional improper criteria include the nature and scope of the health service, the complexity of the health service, the frequency with which the service must be performed, the burden to the school system of providing the service, and cost. *See, e.g., Neeley v. Rutherford County Schools,* 68 F.3d 965 (6th Cir. 1995), *cert. denied,* 517 U.S. 1134 (1996); *Clovis Unified Sch. Dist. v. California Office of Administrative Hearings,* 903 F.2d 635 (9th Cir. 1990); *Detsel v. Board of Educ. of Auburn Enlarged City Sch. Dist.,* 820 F.2d 587 (2d Cir. 1987) (per curiam), aff'g 637 F. Supp. 1022 (N.D.N.Y. 1986), *cert. denied,* 484 U.S. 981 (1987); *Fulginiti v. Roxbury Township Pub. Sch.,* 921 F. Supp. 1320 (D.N.J. 1996), *aff'd without published opinion,* 116 F.3d 468 (3d Cir. 1997); *Granite Sch. Dist. v. Shannon M.,* 787 F. Supp. 1020 (D. Utah, C.D. 1992); *Bevin H. v. Wright,* 666 F. Supp. 71 (W.D. Pa. 1987).

The problem with this approach is threefold. First, it is grounded on a misunderstanding and misuse of language from this Court's opinion in *Tatro.* In *Tatro,* this Court stated that the Department of Education's interpretation of the statutory limitation on medical services, i.e., the Department's view that 1) this limitation excludes only services provided by a physician, and 2) health-related services provided by a non-physician are within the statutory mandate for the required related services, was reasonable because the Department "could reasonably have concluded that it was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." 468 U.S. 883, 892.

Taking this language out of its context, decisions such as *Detsel, supra,* and *Neeley, supra,* have relied upon it in improperly limiting the availability of school health

services. From its context in the *Tatro* decision, however, it is clear that this Court's statement concerning unduly expensive services was intended to buttress this Court's determination that the Department's regulations interpreted the statute in a reasonable manner. The statement was not made in the context of articulating a standard for determining whether the assistance sought by the student in *Tatro* was required to be provided as a related service. This Court simply did not make the cost of school health services part of a test of any sort for determining whether school health services fall within the medical services exclusion.

Second, there is no basis in the statute or the regulations, or in the *Tatro* decision interpreting the statute and regulations, for adding these considerations to the determination of whether a particular service meets the definition of a "related service" which must be provided. This Court determined in the *Tatro* case that the Department of Education's regulations constituted a permissible construction of the statute. Therefore, the regulations are binding. Courts cannot substitute their judgment for that of the agency designated by Congress to interpret the statute. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).[8]

Third, and more fundamental, use of additional criteria to determine if health services are a necessary component of a student's IEP warps the decisionmaking process by improperly subjecting consideration of health services to an analysis that cannot legitimately be done for other

[8] Significantly, the United States Department of Education has consistently continued to adhere to this interpretation of its regulations in its policy letters. *See, e.g.,* Letter to Anonymous, 25 Ind. Disab. Educ. L. Rep. 531 (Nov. 13, 1996); Letter to Anderson, 24 Ind. Disab. Educ. L. Rep. 180 (Feb. 22, 1996); Letter to Johnson, 20 Ind. Disab. Educ. L. Rep. 174 (Apr. 20, 1993); Letter to Greer, 19 Ind. Disab. Educ. L. Rep. 348 (July 14, 1992); Letter to Del Polito, Educ. Handicap L. Rep. 211:392 (June 24, 1986).

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services the student may need, such as physical or occupational therapy. The IDEA does not permit a decision about physical therapy, for example, to be made on the basis of the frequency of therapy hours needed, the cost of the physical therapist, the type of physical therapy services, or the complexity of the student's physical therapy needs. The sole criterion governing the determination of services a student should receive is whether or not the student's unique needs make those services necessary for the child to receive meaningful educational benefit. 20 U.S.C. 1414(d).

There should be nothing unique about health services that makes the decisionmaking process different for those services, and in fact, it is illogical to define a service by extraneous factors such as frequency of service. If the health service is a developmental, corrective, or supportive service, it can be performed by a non-physician, and it is necessary for the student to benefit from his or her special education, then it is a related service that must be provided under the IDEA.[9]

By including related services in the statute, Congress clearly recognized the need for schools to provide sup-

[9] The concern with cost in this case is legally misplaced. The IDEA has never been interpreted to permit the denial of programs or services *necessary to* provide a child with a free appropriate public education simply on the basis of cost. Some Courts of Appeals have held that cost may be taken into account in choosing between two educational placements, each capable of providing a free appropriate public education, *see, e.g. Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514 (6th Cir. 1984), and that, under certain limited circumstances, cost considerations may justify centralizing certain kinds of special education services within a particular school within a school system, rather than offering these services in all schools. *See, e.g., Barnett v. Fairfax Co. Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991). These, however, are separate questions entirely from the question of whether or not a service is a related service. Cost is not, and cannot be, part of the definition of a related service under the IDEA.

portive services to students with disabilities as part of an appropriate education program. The Department of Education's inclusion of school health services in its definition of related services recognizes that nurses are part of the group of service providers intended to provide services to children with disabilities in the school setting. The Department's regulation has been approved by this Court and promotes Congressional intent by recognizing that some students who traditionally were institutionalized or excluded from school will need health and other related services in order to attend school and benefit from education services.

C. Because the IDEA When Enacted Imposed New Requirements on School Districts by Mandating a Range of Services not Previously Provided by Schools, Whether or Not Certain Health Services Were Provided by Schools Prior to Enactment of the IDEA is Not Relevant.

Contrary to the position of Petitioner (Pet. Br. at 39) and its Amicus (Am. Br. for Pet. at 20-21), the fact that certain health services were not provided by schools prior to enactment of the IDEA is not relevant. Special education itself was not traditionally provided to students. Neither were many of the other services required by the IDEA, which is why so many students with disabilities were excluded from school, and why the IDEA was enacted in the first place.[10] The fact, therefore, that schools have not in the past provided health services to students

[10] In enacting the Education of the Handicapped Act in 1975, Congress found that "more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity" and that "one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers." 20 U.S.C. Section 1400(b); *See also Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 191 **n.13.**

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such as the services needed by Garret F. is irrelevant to the determination of whether those services qualify as related services that belong on his IEP.

Under the IDEA, many services, some costly, are required to meet the individual needs of students with disabilities, and this Court noted in *Tatro* that "Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as 'trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel.'" 486 U.S. at 893 (cite omitted). This Court also declared in *Tatro*: "A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned." *Id.* at 891.

If Petitioner's argument is adopted, students such as Garret F., who have severe physical disabilities, will return to the status they held before the IDEA was enacted; that is, they will be excluded from public school. It is incontrovertible that in enacting the IDEA, Congress intended to make appropriate educational services available to *all* children with disabilities:

> The language of the Act could not be more unequivocal. The statute is permeated with the words 'all handicapped children' whenever it refers to the target population. It never speaks of any exceptions for severely handicapped children. Indeed, the Act gives priority to the most severely handicapped . . . The language of the Act in its entirety makes clear that a 'zero reject' policy is at the core of the Act, and that no child, regardless of the severity of his or her handicap, is ever again to be subjected to the deplorable state of affairs which existed at the time of the Act's passage, in which millions of handicapped children received inadequate education or none at all.

Timothy W. v. Rochester, New Hampshire Sch. Dist., 875 F.2d 954, 960-61 (1st Cir. 1989).

Petitioner proposes that public schools abandon children such as Garret F. at home, denying to them the opportunity to receive the health maintenance services they need in order to attend school and live full lives in the community. Significantly, Petitioner offers no reasonable alternative for Garret F.: If he does not receive these services at school, he simply cannot attend school. It is beyond doubt not only that Congress did not intend this result when it enacted the IDEA, but also that Congress intended exactly the opposite—in other words, that Congress intended that children such as Garret F., children traditionally excluded from school, be provided with the services that would enable them to attend school. *See, e.g., Timothy W.*, 875 F.2d at 962-68 (extensive discussion of legislative history).

D. The Least Restrictive Environment Requirements of the IDEA Support the Inclusion of the Disputed Health Services as Related Services.

The IDEA requires that to "the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled" and that "special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. 1412(a)(5). The IDEA regulations establish a presumption that "unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled." 34 C.F.R. 300.552(c).

The health services required by Garret F. and a small number of other students [11] are necessary in order for

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these students to attend school at all. In the *Tatro* decision, this Court noted that the statute requires services such as transportation and authorizes grants for physical alterations to make buildings and equipment accessible to students with disabilities and declared: "Services like [clean intermittent catheterization] that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school." 486 U.S. at 891. Without provision of these services, Garret F. and other similarly situated students cannot attend school at all. They are unnecessarily relegated to their homes, where they might inappropriately receive a few hours a week of home teaching from an itinerant teacher in an unduly restrictive placement that violates least restrictive environment rights, isolates them from their peers, fails to prepare them for independent living, fails to meet the legal standards of a free appropriate public education, and violates the rights of these children under Section 504 of the Rehabilitation Act of 1973, 20 U.S.C. 794, *et seq.* to receive benefits and services comparable to those afforded their peers. *See* 34 C.F.R. 104.4(b).

Typically, home teaching consists of only a few hours per week, with a single teacher expected to cover all of

IDEA disability categories of "other health impaired" and "multiply disabled." During the 1995-96 school year, children identified as having other health impairment or multiple disabilities represented only 4.5% of the total number of students aged six to 21 who were receiving special education services. *See* United States Department of Education, Office of Special Education and Rehabilitative Services, 19th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, Table AA9, pages A-20, A-25, and A-28. Since children with disabilities as diverse as attention deficit disorder, asthma, and HIV infection may be identified as other health impaired, and since many students with multiple disabilities do not have ongoing health service needs, it can also be assumed that the number of students like Garret F. who need ongoing health services in order to attend school safely is very small.

the subjects the student is studying. American Academy of Pediatrics, Children with Health Impairments, 86 Pediatrics 636 (1990). Moreover, without health services at home during school hours, home teaching itself might prove impossible. Parents might be forced to give up their employment or to institutionalize their children in order to obtain for them basic health maintenance services that could easily be provided in the community. Institutionalization in order to obtain services that can actually be provided in the community is a drastic means of addressing the issue and violates the basic principle of providing services in the least restrictive environment.

Even if a child is able to receive health services at home, home teaching is an inadequate means of providing educational services. While home teaching is recognized as a part of the continuum of services required by the IDEA regulations, 34 C.F.R. 300.551, it is considered one of the most restrictive placement options, if not the most restrictive option, and it should not be used unless a child is too ill to attend school. The statutory definition of the 'free appropriate public education' to which all children with disabilities are entitled under the IDEA requires as much. Under the IDEA, "free appropriate public education" means:

> special education and related services that (A) have been provided at public expense, under public supervision and direction, without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary or secondary education in the State involved, and (D) are provided in conformity with the individualized education program . . .

20 U.S.C. 1401(8). Home instruction, particularly the time and subject matter-limited type routinely provided by many school districts, can rarely meet this standard. In addition, most states and many local school systems have adopted minimum requirements regarding the length of the school day, the content of curricula and the amount

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of time during the day that must be devoted to academic instruction. These requirements define in part "an appropriate elementary or secondary education in the state involved," 20 U.S.C. 1401(8)(C), and, to the extent that they are adopted or approved by the state, are "standards of the state agency" that must be met pursuant to 20 U.S.C. 1401(8)(B). Home teaching often fails to provide a "free appropriate public education" on these bases as well.[12]

In addition, home teaching deprives children of their peers, of the multiple pedagogical strategies and other benefits of being in a classroom setting, of the intellectual stimulation of school attendance, of field trips, assemblies, recess, and of the range of activities both during and after school that are available to students in the school setting. As this Court recognized in *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982) one of the basic purposes of the IDEA was to "open the door of public education" to children with disabilities.

Use of home teaching for a student who would be able to attend school with the provision of health services is a

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[12] In addition, it is significant that in reauthorizing the IDEA in 1997, Congress required that even children with disabilities who are placed in an "interim alternative educational setting" for up to 45 days for discipline reasons receive educational programming not feasibly provided in a home setting. *See* 20 U.S.C. 1415(k)(3)(b) (interim alternative educational setting must "be selected so as to enable the child to continue to participate in the general curriculum . . . to continue to receive those services and modifications, including those in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and . . . include services and modifications designed to address the behavior [that led to placement in the interim alternative setting] . . . so that it does not recur.")

In this context, it becomes even clearer how directly contrary to the IDEA and public policy it would be to permit a construction of the IDEA that would deprive students of the ability to attend school, simply because they have a need for health maintenance services during the school day.

clear violation of the least restrictive environment provisions of the IDEA because it denies the student the opportunity to participate fully in the school program and to learn through interaction with others. As the Ninth Circuit Court of Appeals has stated:

> Hospitalized and homebound care should be considered to be among the least advantageous educational arrangements [and are] to be utilized only when a more normalized process of education is unsuitable for a student who has severe health restrictions.

Department of Education, State of Hawaii v. Katherine D., 727 F.2d 809, 818 (9th Cir. 1983).

Particularly because Congress was clear that even children in institutions are to receive services with nondisabled children to the maximum extent appropriate, 20 U.S.C. 1412(a)(5), the medical services exclusion of the IDEA cannot be read so broadly as to undermine the statute's least restrictive environment mandate.[13] That is exactly what will happen, however, if the services needed by Garret F. and other similarly situated students are excluded from the IDEA's coverage, even though the services are supportive and can be provided by someone other than a physician. It is important to note that while the

[13] In addition, in amending the IDEA in 1997, Congress strengthened the statutory presumption that students with disabilities are to be educated alongside peers. Prior to the 1997 amendments, schools were required to include in each child's IEP "a statement of . . . the extent to which such child will be able to participate in regular educational programs." 20 U.S.C. 1401(a)(19)(C). However, now schools must include in the IEP "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in clause (iii)." 20 U.S.C. 1414(d)(1)(A)(iv). Activities described in "clause (iii)" include "to be involved and progress in the general curriculum . . . and to participate in extracurricular and other nonacademic activities" and "to be educated and participate with other children with disabilities and nondisabled children. . . ." 20 U.S.C. 1414(d)(1)(iii)(II), (III).

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services needed by Garret F. may be essential to maintain life, they are routine, common services that a person, when trained, can perform without difficulty.[14] This Court must recognize that these services are included within the scope of the IDEA so that the students in need of these

[14] Much has been made in this case, and in other cases involving a student's need for ongoing health services, about whether the services must be provided by a licensed nurse or can be delegated to a trained but unlicensed person, such as a paraprofessional. Often, the parties have agreed that, but for the existence of a state law governing nursing practice and delegation of nursing tasks, the care could be provided by a trained, unlicensed person, and in fact, parents and family members have often been trained to provide this health care in their homes and communities.

The fact that a state's nurse practice act may pose a barrier to the use of unlicensed persons to provide health services to students in school is the state's issue to resolve; it does not have a bearing on whether the student is entitled to the services under the IDEA. Rather, it has a bearing only on whether an unlicensed person may provide the services or a licensed nurse is required. In either case, the service is required by the IDEA. If a state chooses to prohibit properly trained, qualified paraprofessionals from providing services, it must bear the costs. In the alternative, it may change its law or policy to permit the use of paraprofessionals. It may not, however, choose to prohibit the use of paraprofessionals and use that prohibition as an excuse for denying children services that are required by the IDEA.

Obviously, to the extent that unlicensed persons are allowed to provide health services to students in school, the cost of such services will be reduced. Should licensed nurses be required, a school system may reduce the cost by obtaining reimbursement for the services from Medicaid or private insurance benefits to the extent that the student's access to health insurance is not reduced or jeopardized by such utilization of benefits, and that lifetime benefits or the level of services provided to the student outside of school are not reduced by such utilization of benefits. In fact, pursuant to the reauthorized IDEA, state education agencies are obligated to arrange for payment from other public agencies for the costs of providing a free appropriate public education to students with disabilities. 20 U.S.C. 1412(a)(12). The obligation to provide the services rests with the education agency in the first instance; if no other agency is responsible for payment, the education agency also becomes the payor of last resort.

services can attend school. The IDEA does not contemplate that a certain group of children with particular health care needs can be carved out from the statute's least restrictive environment requirements.[15]

II. PUBLIC POLICY, CODIFIED IN EVERY LEGISLATIVE ENACTMENT AFFECTING THE RIGHTS OF PERSONS WITH DISABILITIES SINCE 1973, REQUIRES THE PROVISION OF SERVICES THAT WILL ENABLE STUDENTS WITH DISABILITIES TO ATTEND SCHOOL.

A. The Legislative History of the IDEA and the Findings Made by Congress in Reauthorizing the IDEA in 1997 Make Clear that All Children with Disabilities are to Receive Services to Enable Them to Attend School.

In its first interpretation of the IDEA, this Court stated: "Congress sought primarily to make public education available to handicapped children" and "to make such access meaningful." *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 192 (1982). In 1975, when the statute was enacted, many children with disabilities were excluded from school entirely, were not properly identified, did not receive appropriate services, or were placed in private schools by their parents because of a lack of services within the public school system. *See generally,* 20 U.S.C. 1400(c). That society has increased its expectations for students with disabilities and has recognized the importance of education in enabling students wtih disabilities to meet these raised expectations is evident from the findings made by Congress when it reauthorized the IDEA in 1997:

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[15] In fact, in reauthorizing the IDEA in 1997, Congress strengthened even more the systemic requirements regarding placement of students in the least restrictive environment by mandating that states have policies and procedures in effect that ensure that their funding mechanisms do not result in placements that violate the least restrictive environment provisions of the statute. 20 U.S.C. 1412(a)(5)(B).

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t restrictive environment requirements.[15]

. **PUBLIC POLICY, CODIFIED IN EVERY LEGISLATIVE ENACTMENT AFFECTING THE RIGHTS OF PERSONS WITH DISABILITIES SINCE 1973, REQUIRES THE PROVISION OF SERVICES THAT WILL ENABLE STUDENTS WITH DISABILITIES TO ATTEND SCHOOL.**

A. The Legislative History of the IDEA and the Findings Made by Congress in Reauthorizing the IDEA in 1997 Make Clear that All Children with Disabilities are to Receive Services to Enable Them to Attend School.

n its first interpretation of the IDEA, this Court
ed: "Congress sought primarily to make public educa-
available to handicapped children" and "to make such
ss meaningful." *Board of Educ. of Hendrick Hudson*
tral Sch. Dist. v. Rowley, 458 U.S. 176, 192 (1982).
1975, when the statute was enacted, many children
ı disabilities were excluded from school entirely, were
properly identified, did not receive appropriate serv-
, or were placed in private schools by their parents
ıuse of a lack of services within the public school
em. *See generally,* 20 U.S.C. 1400(c). That society
increased its expectations for students with disabilities
has recognized the importance of education in enabl-
students wtih disabilities to meet these raised expecta-
s is evident from the findings made by Congress when
authorized the IDEA in 1997:

In fact, in reauthorizing the IDEA in 1997, Congress strengthen-
even more the systemic requirements regarding placement of
ents in the least restrictive environment by mandating that
ıs have policies and procedures in effect that ensure that their
ing mechanisms do not result in placements that violate the
restrictive environment provisions of the statute. 20 U.S.C.
(a)(5)(B).

> The Congress finds the following:
>
> (1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving 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 . . .
>
> (4) . . . the implementation of this Act has been impeded by low expectations . . .
>
> (5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—
>
> (A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible; . . .
>
> (D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate . . .

20 U.S.C. 1400(c).

In reauthorizing the IDEA, Congress affirmed

> the longstanding concept of the least restrictive environment, including the policy that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of special education and related services or supplementary aids and services cannot be achieved satisfactorily.

Reort of the Committee on Education and the Workforce House of Representatives, May 13, 1997, p. 91. *See also* 20 U.S.C. 1412(a)(5).

With an increased emphasis in the reauthorized IDEA on higher expectations, participation in the general curriculum, and the goal of independence and community participation by children with disabilities, Congress clearly intended to strengthen the ability of children with disabilities to receive appropriate special education and related services in the least restrictive environment. It would be anomalous and in direct contravention of Congress' intent to deprive a group of children with disabilities of the opportunities outlined by Congress, simply because they have an ongoing need for particular health services a school district does not wish to provide.

B. The Enactment of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, Underscores the Public Policy Imperatives of Integrating Persons with Disabilities Into Their Communities.

Petitioner's arguments, if adopted, threaten to undercut more than 20 years of disability policy. Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The ADA builds on the nondiscrimination and integration requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 *et seq.*, 34 C.F.R. Part 104, expanding the scope of Section 504 to public accommodations and local and state governments.

In enacting the ADA, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities" and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress also found that

> individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to

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> individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5).

Ttile II of the ADA prohibits discrimination against individuals with disabilities in the provision of services by state and local governments. The legislative history of the ADA makes clear that, as with Section 504, the purpose of Title II is "to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life." H.R. Rep. No. 101-485, pt. 3 at 49-50, reprinted in 1990 U.S.C.C.A.N., Vol. 4 at 472-473. Recognizing the damage that segregation of persons with disabilities causes, the House Report further noted that "segregation for persons with disabilities 'may affect their hearts and minds in a way unlikely ever to be undone.'" H.R. No. 101-485, pt. 3 at 26, reprinted in 1990 U.S.C.C.A.N., Vol. 4 at 448-449 (cite omitted). Further, the House Report explained:

> The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under Section 504 of the Rehabilitation Act or this title . . . . The existence of such programs can never be used as a basis to . . . refuse to provide an accommodation in a regular setting.

H.R. Rep. No. 101-485, pt. 3 at 50, reprinted in 1990 U.S.C.C.A.N., Vol. 4 at 473.

According to the regulations governing Title II, "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified persons with disabilities." 28 C.F.R. 35.130(d). This "integration mandate" as it has come to be called, has been analyzed and upheld in recent

court cases. The Third Circuit Court of Appeals analyzed the legislative history of the ADA and found that the Pennsylvania Department of Public Welfare violated Title II of the ADA by failing to provide community-based attendant care services to persons who were unnecessarily confined in the overly restrictive setting of a nursing home. *Helen L. v. Didario*, 46 F.3d 325 (3d Cir. 1995). The Court found that the 28 C.F.R. 35.130(d) has the "force of law" and that "the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled." *Helen L.*, 46 F.3d at 332, 333.

Most recently, the Eleventh Circuit Court of Appeals held that the state of Georgia violated the ADA by unnecessarily confining two individuals with mental illness in a state psychiatric facility, rather than providing community-based services to them. The court analyzed the legislative history of the ADA and found that the plain language of the ADA regulations prohibits a state from providing services to individuals with disabilities in an unnecessarily segregated setting. *L.C. v. Olmstead*, —— F.3d —— (11th Cir. 1988).

Students such as Garret F. are included within the scope, not only of the IDEA, but of the ADA as well. The legislative history of the ADA, the language of the ADA, and the court interpretations of this civil rights statute make clear that community integregation is the foundation of erasing discrimination against persons with disabilities. To confine students such as Garret F. to their homes or to institutions simply because they need particular health services in order to attend school safely would undermine the spirit and the intent of the ADA.

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C. Public Policy and Legal Mandates Have Recognized that Persons with Disabilities Can, with Appropriate Supports, Services, and Accommodations, be Productive, Participating Members of Their Communities, and that Access to Education is an Important Foundation for this Community Participation.

There has been a significant change in public policy over the last 25 years as the benefits of the Rehabilitation Act of 1973, 20 U.S.C. 794 *et seq.*, with its focus on maximizing employability and community integration of individuals with disabilities, and the IDEA, and then the enactment of the ADA and the reauthorized IDEA were recognized, and it is apparent that persons with disabilities now have many more opportunities available to them. With the protection of the legal framework that bars discrimination and mandates appropriate supports, services, and accommodations, persons with disabilities have unprecedented opportunities to participate in the life of their communities. Without access to the benefits of attending school, however, these opportunities are unlikely to be fulfilled.

As noted above, in reauthorizing the IDEA, Congress found 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). *Access* to school is a critical element of improving educational results for children with disabilities. The importance of education has long been recognized. For children with disabilities who have health care needs, the opportunity to be educated in a school setting is nothing more than what the law already guarantees and public policy supports. To deprive a small group of students of the opportunity to benefit from attending school runs

counter to all of the principles of the IDEA, the ADA, and other disability laws.

Should this Court overrule the Eighth Circuit, the result will be that a group of students with disabilities *will* be deprived of the opportunity to attend school, unless their parents are able to pay for or otherwise obtain the health care services needed by those students. At a time when society supports the inclusion of persons with disabilities in education, in employment, and in the other activities that make up the fabric of our daily lives, it is essential that this inclusion encompass *all* students with disabilities.

CONCLUSION

For the reasons stated above, the decision of the Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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