Case No. 07-1304

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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THOMPSON R2-J SCHOOL DISTRICT,
Plaintiff-Appellant,

v.

LUKE P., by and through his next friends, JEFF and JULIE P.,
Defendant-Appellee.

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On Appeal from the United States District Court for the District of Colorado
The Honorable Walker D. Miller
United States District Judge
District Court Civil Action No. 1:05-cv-02248-WDM-CBS

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# BRIEF OF *AMICI CURIAE* COLORADO ASSOCIATION OF SCHOOL BOARDS, COLORADO BOCES ASSOCIATION, COLORADO SPECIAL EDUCATION DIRECTORS CONSORTIUM, AND NATIONAL ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF THE THOMPSON R2-J SCHOOL DISTRICT'S APPEAL FOR REVERSAL OF THE DISTRICT COURT'S ORDER

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Come now the Colorado Association of School Boards ("CASB"), Colorado Boards of Cooperative Educational Services Association ("CBA"), the Colorado Special Education Directors Consortium ("Consortium"), and the National School Boards Association ("NSBA") by and through their respective counsel, to submit this *Amici Brief* in support of the Brief of Plaintiff-Appellant Thompson R2-J School District (the "School District").

## I. INTEREST OF AMICI

CASB, CBA, the Consortium and NSBA appear as *amici curiae* to urge the Court to overturn the decisions of the Impartial Hearing Officer ("IHO"), the Administrative Law Judge ("ALJ") and the United States District Court ("District Court") in this case. Specifically, CASB, CBA, the Consortium, and NSBA urge the Court to find that a school district satisfies the substantive standard of the Individuals with Disabilities Education Act ("IDEA") when it offers a child with a disability an Individualized Education Plan ("IEP") that confers benefit on the child in terms of the acquisition of skills in the school environment.

CASB is an association created and existing in accordance with C.R.S. §§ 29-1-401 and 29-1-402, which authorize political subdivisions of the state to form and maintain associations for various cooperative purposes. CASB's membership includes the boards of education of all 178 Colorado school districts, including the Thompson R2-J School District.

All services and activities of CASB are provided exclusively for the benefit of the boards of education of Colorado public school districts. As stated in its articles of incorporation, CASB's purpose is to work for the improvement of public education through the operation of a mutual agency by and in which school districts may cooperatively consider all aspects of school operation.

CBA is an association of boards of cooperative educational services ("BOCES") formed pursuant to C.R.S. § 22-5-101, *et seq.* CBA represents all twenty-two BOCES in Colorado, which among them include all but eleven of Colorado's school districts. Sixteen BOCES are also designated as the "administrative unit" responsible for overseeing and providing special education services to these BOCES's member school districts, generally in areas of lower population. Children with disabilities in approximately 140 of Colorado's school districts receive special education and related services through and under the supervision of the BOCES of which their local school district is a member.[1] In these situations, the BOCES, not the individual district, bears ultimate responsibility for the implementation of and compliance with the IDEA and Colorado's Exceptional Children's Education Act (ECEA).

The Consortium is an association of educational executives responsible for special education and represents all administrative units in Colorado, including BOCES and individual school districts. The Consortium's members are responsible for all elements of special education service delivery and legal compliance for the school district or BOCES by whom they are employed.

NSBA is a federation of state associations of school boards from throughout the United States, the Hawaii State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents over 95,000 of the nation's school board members who, in turn, govern

## II. STATEMENT OF THE ISSUES

CASB, CBA, the Consortium and NSBA, as *amici curiae,*

The District Court's decision not only disregards the statute and case law, but also has grave fiscal and practical implications for public education in Colorado and the other Tenth Circuit states. If school districts are obligated to ensure progress at home and in the community in order to defend the appropriateness of the public education program, then school districts will need to operate around-the-clock public education programs in multiple private settings, including grocery stores, restaurants, and churches. Moreover, families of students with disabilities will be forced to open their doors and invite educational authorities into their homes in the name of public education. Congress clearly never intended and never provided funding for the IDEA substantive standard that this case prescribes.

Where, as here, there is simply no doubt that a student made progress in the school's program, there is no justification for a finding that a school district has failed to satisfy IDEA and ordering a publicly funded residential placement. If this Court upholds the District Court's decision, the reformulated IDEA substantive standard adopted in this case will have wide-ranging implications, not only for litigants and judges but also for every IEP team intent on developing appropriate educational programs, for every family required to make their home a mere extension of the classroom, and for every community that will be called upon to fund the novel and extensive services that would be required.

## V. ARGUMENT

To be eligible for federal education funding, the IDEA requires states to have policies and procedures in place to ensure that "[a] free appropriate public education is available to all children with disabilities residing in the State. . ." 20 U.S.C. § 1412(a)(1)(A).[2] As the United States Supreme Court stated, a free appropriate public education ("FAPE") "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 102 S.Ct. 3034, 3042 (1982). It is the level of educational benefit required by IDEA that lies at the heart of this case.

Many courts, including the United States Supreme Court and United States Court of Appeals for the Tenth Circuit, have spoken as to the level of educational benefit required by IDEA. *Id.*; *O'Toole v. Olathe District Schools Unified Sch. Dist. No. 233*, 144 F.3d 692 (10th Cir. 1998). Rather than following controlling precedent in this Circuit, the IHO, ALJ, and District Court relied on a constrained reading of the Supreme Court's foundational *Rowley* decision and distinguishable cases to hold the School District responsible for ensuring Luke's progress at home

[2] Though Congress reauthorized and amended the IDEA in 2004, the citations herein reference IDEA 1997, the statute in effect at the time that the case *sub judice* was subject to administrative review.

and in his community. Essentially, the decision-makers below erred in applying a long-rejected maximization standard, here characterized as self-sufficiency, for the substantive question of whether a school system has offered an IEP reasonably calculated to enable the child to make educational benefit. In so doing, these decision-makers obligated Colorado school districts to implement a highly subjective, extremely costly, and unprecedented IDEA standard of educational benefit.

### A. IDEA REQUIRES AN IEP REASONABLY CALCULATED TO

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benefits." *O'Toole*, 144 F.3d at 708; *see also Johnson v. Ind. Sch. Dist. No. 4,* 921 F.2d 1022, 1025-26 (10th Cir. 1990).

This Court's substantive requirement—that some educational benefit means more than *de minimis*, but less than maximization—represents the authoritative view across every Circuit. *Devine v. Indian River County Sch. Bd.,* 249 F.3d 1289, 1292-93 (11th Cir. 2001)(as applied to a child with autism exhibiting severe behaviors in the home, anything "more than making measurable and adequate gains in the classroom, [is] not required by IDEA or *Rowley"); Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1031 (9th Cir. 2006)(appropriate standard for determining whether an IEP provides FAPE is whether it is reasonably calculated to enable the child to receive some educational benefit); *Neosho R. Sch. Dist. v. Clark,* 315 F.3d 1022, 1027 (8th Cir. 2003)("[T]he requirements of the IDEA are satisfied when a school district provides individualized education and services sufficient to provide disabled children with 'some educational benefit.'"); *M.M. v. Sch. Dist. of Greenville County*, 303 F.3d 523, 526 (4th Cir. 2002)("must only be calculated to confer some educational benefit on a disabled child"); *Todd*

maximize potential); *Cypress-Fairbanks Ind. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997)(IEP need not be the best or maximize a child's potential, must be "likely to produce progress, not regression or trivial educational advancement"); *Doe v. Board of Educ. of Tullahoma City Schs*., 9 F.3d 455, 459-460 (6th Cir. 1993)(setting forth the well-worn analogy—FAPE requires a "Chevrolet," not a "Cadillac"); *Lenn v. Portland Sch. Committee*, 998 F.2d 1083, 1086 (1st Cir. 1993)("an IEP must afford some educational benefit"); *Polk v. Central Susquehanna Int. Unit 16*, 853 F.2d 171 (3d Cir. 1988)(discussed *infra)*.

Here, the IHO, ALJ, and the District Court ignored binding precedent and adopted an unsupported, separate standard that departs dramatically from accepted law.[5] First, rather than setting forth and applying

Next, although the ALJ corrected the IHO's inaccurate and incomplete citation of *Rowley*, the ALJ erroneously relied on a nearly twenty year old Third Circuit case—*Polk v. Central Susquehanna Int. Unit 16*, 853 F.2d 171 (3d Cir. 1988), rather than Tenth Circuit authority, in an apparent effort to buttress the "self-sufficiency" standard. The ALJ held,

> Based upon a careful reading of *Rowley* and taking guidance from the Third Circuit's decision in *Polk*, the ALJ concludes that although self-sufficient (sic) is not the substantive standard of the act, it remains an important element in determining whether the services provided to a handicapped child are educational (sic) beneficial.

(App. at 498). Ironically, the ALJ adopts the standard *rejected* by *Polk.* 853 F.2d at 182 ("We acknowledge that self-sufficiency cannot serve as a substantive standard by which to measure the appropriateness of a child's education under the Act"). In fact, *Polk* reiterated the established *Rowley* standard—that IDEA requires some educational benefit, meaning more than "mere trivial advancement." 853 F.2d at 184.

Finally, the District Court purported to correct the obvious mistakes in the IHO and ALJ's analyses, then followed in their erroneous footsteps:

> I agree with the District that the hearing officer's decision was in error to the extent that it imposed a substantive "self-sufficiency" standard of achievement, which is not supported by the governing case law. [cites to *Rowley*]. Nonetheless, as noted by the ALJ, self-sufficiency is an important underlying policy goal and serves to explain the importance of the areas of challenge to Luke, specifically basic life skills and behavioral self-regulation skills, which are the essential prerequisites to academic progress.

(App. at 227). Significantly, all of the decision-makers below failed to acknowledge that this Court addressed *Polk* previously and reiterated this Circuit's determination that, in order to satisfy IDEA's substantive standard, "the 'benefit' conferred by the [IDEA] and interpreted by *Rowley* must be more than *de minimis." Urban,* 89 F.3d at 726-727 (*citing Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988)).

Important policy reasons led the *Rowley* Court and its progeny to reject the self-sufficiency standard. As explained by the *Rowley* Court, it specifically refused to establish "any one test" for determining the requisite level of educational benefit because "[i]t is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." 102 S.Ct. at 3049. Though all children should be afforded access to education, self-sufficiency for some is simply not a realistic goal. *See Rowley*, 102 S.Ct. at FN23 (self-sufficiency may be "an overly demanding requirement"); *Polk*, 853 F.2d at 182 (the student "is not likely ever to attain this coveted status, no matter how excellent his educational program."). Rather than guaranteeing the particular result of self-sufficiency, Congress installed an educational process through which school districts must systematically plan to move even the most disabled children forward. *Rowley,* 102 S.Ct. at 3043

## B. PROGRESS IN SCHOOL CONSTITUTES SOME EDUCATIONAL BENEFIT AND SATISFIES IDEA'S SUBSTANTIVE OBLIGATION

IDEA's plain language makes clear that Congress intended to bring disabled children into the education system. In justifying its spending clause legislation, Congress found that "children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers." 20 U.S.C. § 1400(2)(C). In order to address this finding, Congress embedded throughout IDEA the student's involvement in the general school environment and curriculum by requiring each student's IEP to: 1) state how the child's disability affects "involvement and progress in the general curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(I); 2) set annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum." 20 U.S.C. § 1414(d)(1)(A)(ii)(I); and, 3) include "a statement of services to be provided for the child to be involved and progress in the general curriculum, to be educated and participate with other children with disabilities and nondisabled children." 20 U.S.C. § 1414(d)(1)(A)(iii).

Congress further underscored its intent to bring children with disabilities into the public schools with IDEA's least restrictive environment requirement that "removal of children with disabilities from the regular educational environment

occurs only when the nature and severity of the disability of the 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). In thoroughly examining the purpose and construct of IDEA, the *Rowley* Court found "the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States…", 102 S.Ct. at 3042, and that "the intent of the Act was more to open the door of public education to handicapped children than to guarantee any particular level of education once inside." 102 S.Ct. at 3043.

Consistent with Congress' intent and IDEA's plain language, school districts satisfy IDEA's substantive standard when they develop an IEP that allows a child with disabilities to make some progress, more than *de minimis*, in the school setting. *O'Toole*, 144 F.3d at 707-708. In *O'Toole*, the school district addressed the needs of a child with hearing impairments through her IEP's six annual goals and attendant short-term objectives, all of which concerned her performance of tasks at school. *Id.* at 704-705 and FN11-17. This Court found that the school district satisfied its substantive FAPE obligations when the child "met certain [IEP] objectives, made adequate progress toward certain objectives, and did not make adequate progress toward other objectives." *Id*. at 696. Accordingly, this Court rejected the parent's claim for tuition reimbursement despite the family's proffered

evidence that the child made more progress in the residential program and would better achieve her potential in that placement. *Id.* at 708; *see also Urban*, 89 F.3d 720 (student made progress in the school district's program, even if he had difficulties with generalization and was not receiving transition services in the community in which he intended to live and work post-school).

Even for severely disabled children with autism who evidence extreme behaviors at home, some progress in the classroom is as far as Congress intended IDEA to go.[6] *See, e.g., JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1573 (11th Cir. 1991); *Devine,* 249 F.3d at 1292-93; *San Rafael Elementary Sch. Dist. v.*

[6] Clearly, a residential placement is not required to enable a child to make better or maximum progress. *O'Toole*, 144 F.3d at 708 (

*California Special Educ. Hearing Office*, 482 F.Supp.2d 1152 (N.D.Cal. 2007). Squarely addressing the same argument advanced here—that IDEA's substantive standard requires a student with autism to make gains beyond the school setting, the Eleventh Circuit found,

> We in fact do define "appropriate education" as making measurable and adequate gains in the classroom. If "meaningful gains" across settings means more than making measurable and adequate gains in the classroom, they are not required by [IDEA] or *Rowley.*

*JSK*, 941 F.2d at 1573. Similar to Appellee here, in *Devine*, the family of a child with autism specifically asserted that the school district's IEP failed because the child "demonstrated serious behavioral problems at home and that the [School District] make[s] no mention of an effort to address [the student's] educational needs in the home environment." 249 F.3d at 1292. Finding that the child made progress on the bulk of his IEP goals in the school setting, the Eleventh Circuit reiterated, "generalization across settings is not required to show an educational benefit." *Id.* at 1293.

Similarly, in *San Rafael*, a student with autism evidenced significant and disturbing behaviors at home including, *inter alia,* hitting, kicking and threatening a home aide worker and chasing, choking, hitting and pushing his toddler-age sister. 482 F.Supp.2d at 1158. At school, his behavior was sufficiently manageable (despite one significant incident of physical aggression where he grabbed a

teacher's throat and head-butted another) that he made educational progress and met or exceeded nine of twelve IEP goals in school. *Id.* at 1157-58, 1162-63. When his academic performance and behavior deteriorated again, his parents sought a residential placement for him asserting, with their pediatric neurologist's endorsement, that the child needed "constant structure, repetition, and consistency

evidence reveals that L.P. led two disparate lives, one at school where he seemed to make adequate progress, and the other at all other locations, where extreme behavioral aberrations jeopardized the well being of L.P.'s family."); *see also* App. at 489 ("During kindergarten and through his second year at Berthoud, L.P. made progress with his special education and was meeting many of the goals and objectives in his IEPs."). The IHO, ALJ and District Court's determination that Luke made progress is well-established in the record. *See* App. at 575, 578, 724, 727-28, 1241, 2080-83, 2145-47. Based on his progress, the IEP team determined that Luke's December 2002 IEP was providing Luke with some educational benefit and developed another IEP for him continuing the placement in which Luke was making progress.

Having found that the School District complied with IDEA's procedural requirements,[7] that Luke's IEP goals and objectives addressed Luke's disabilities (App. at 492), and that Luke made progress under the IEP, the District Court should have deferred to the professional educators and school authorities on Luke's IEP team. *Rowley*, 102 S.Ct. at 3051 (recognizing that IDEA's provision for administrative and judicial review "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review."); *Devine*, 249 F.3d at 1292 (noting that "great

[7] *See* Footnote 3, *supra*.

deference must be paid to the educators who develop the IEP"). Of Luke's educators, the decisions below recognized that the "professionals on the staff of the School District who testified in this matter are competent and diligent," (App. at 342), and that "the District's December 2003 IEP demonstrates a monumental and genuine effort on the part of the District to improve L.P.'s performance in a number of areas affected by his autism." (App. at 221, 348, 493, 499). Nonetheless, the District Court "succumbed to temptation which exists for judges and hearing officers alike in IDEA cases, to make his own independent judgment as to the best placement…instead of relying on the record evidence presented in the hearing" and " defer[ring] to educators' decisions as long as the IEP provides the child the basic floor of opportunity…." *A.B. v. Board of Educ. of Anne Arundel County*, 354 F.3d 315, FN 6 (4th Cir. 2004)(internal citations omitted). It is impossible to reconcile IDEA's purpose and the wealth of case law with a judicial finding that an IEP fails to offer FAPE when the evidence shows that the IEP team had adequate knowledge and understanding of the child's needs, developed appropriate goals and objectives addressing all areas of educational need, and the placement allowed the child to make progress on those goals.

To reach such a conclusion, the District Court disregarded its finding that Luke made progress at school and focused exclusively on whether Luke evidenced similar progress

> [W]hile the inability to generalize certain academic skills across environment would not always mean that an IEP is not providing an educational benefit, I must agree with the administrative decisionmakers that the lack of generalization of the most basic life skills, such as appropriate behavior, toileting, and eating indicate that the educational benefits received by Luke in December 2003 were *de minimis.*

(App. at 228); *see also* (App. at 489)("However, he was unable to take the skills he was learning at school and transfer them to his home and community life. L.P.'s home and community behavior was in stark contrast to his behavior at school."). Once the District Court makes plain its desired end—to assist the family in manaq0 0 3999 in s

school[8], had learned to take turns with a peer, and to willingly share materials. App. at 489, 580, 728, 2080-2083, 2147. These select examples of his acquired skills are the very skills that will allow Luke entry into the social world of his same-age peers—a central and express purpose of IDEA. Clearly, such progress is more than *de minimis*.

Reconciling the District Court's decision with the two-prong FAPE analysis requires adding an obscure third consideration—Is the benefit shown at school made to be *de minimis* by counter-balancing the benefit at the school with the poor performance in other settings such as church, the grocery store and home?[9] Requiring progress at home and in the community is not only contrary to the law, but also makes little educational or instructional sense. It is difficult to conceive how an IEP team could set goals for and instruct such skills as "sleeping through

[8] The District Court's focus on Luke's toilet-training at home belies the District Court's finding that such progress was trivial for Luke. (App. at 214, 227-228). In fact, even after a year and a half in the residential program, Luke was still not completely toilet trained. (App. at 335). If the District Court was examining the family's selected residential program under the articulated self-sufficiency standard, it is a reasonable question as to whether the District Court would find such progress *de minimis.*

[9] Applying this counter-balancing factor in other IDEA contexts highlights the inherent problems of adding this third factor. If applied to the essential IDEA consideration of eligibility, a non-eligible student could become eligible when the student's good performance at school becomes outweighed by difficulties at home. In such a case, what would the goals of the IEP address? While such a question may seem simply argumentative or far-fetched, Colorado school districts report receiving such arguments from parent advocates and private evaluators purporting to follow the District Court's analysis in this case.

the night at home" or “sit quietly during religious services.” To assure that such learning would occur and be generalized, IEP teams would have to make goals and teachers would have to provide resources, curricula, and instruction in multiple private settings. If school districts are responsible for such progress, then school personnel also must have the authority to control the variables of these settings so as to teach and maintain these skills. What happens to the privacy and autonomy of the family if the school district is obligated to serve the student during these times of day and in these settings and the family does not want to permit access to these aspects of a student's/family’s life?

As IDEA does not permit school districts to leave out IEP elements necessary to FAPE, if school districts are obligated to ensure generalization into the home and community, then families will have the Hobson’s choice of allowing complete access to their lives or rejecting special education services for their child. Moreover, litigation under IDEA would surely become more adversarial, emotional, and personal with school districts and families pitted against each other and families’ home lives put on trial. Such a result, from a statute designed by Congress to provide access to education to children with disabilities, would be tragically absurd.

federal and state law place the legal responsibility on local school districts to provide special education services, the state and federal government combined provide funding equaling less than a third of the total cost of such services.[10] Colorado school districts pay the remaining approximately seventy (70) percent of the cost of providing special education services from their general operating revenues, meaning each of many dollars spent to fulfill the District Court's expansive interpretation of IDEA's substantive standard will mean a dollar taken from the School District's other educational programs. School districts would be forced to seek exponential increases in their local tax burdens to meet the demands of such programs. Clearly, such a holding is at odds with Congress' intent as recognized by this Court, "Congress was mindful of the financial burdens which such expanded services imposed, and was not utopian in its goals." *Johnson*, 921 F.2d at 1029.

As explained *infra*, a proper analysis of a school district's compliance with IDEA's substantive standard must focus on the IEP's reasonable calculation to afford the student some educational benefit at school. When an IEP is designed appropriately, delivered with fidelity, and results in a student's educational progress at school, yet the child struggles at home, such indicators affirm the

[10] Colorado Legislative Council, Issue Brief 04-3, Special Education: Focus on Funding (April 13, 2004). Available online: www.state.co.us/gov_dir/leg_dir/lcsstaff/2004/research/issuebrief04-03SpecialEducation.pdf

appropriateness of the educational services being delivered to the child. Although families experiencing significant difficulties in the home are compelling in their requests for assistance in meeting the needs of their children with disabilities, Congress did not place all of those responsibilities on school districts under the current terms and conditions of the States' IDEA contract with Congress. If Congress wishes to expansively broaden IDEA's substantive standard, it may only do so by acting unambiguously. Absent such Congressional authorization, the judiciary may not impose this burden upon the States via IDEA.

## VI. CONCLUSION

For all of the foregoing reasons, CASB, CBA, the Consortium, and NSBA as *amici curiae* respectfully request that the Court reverse the decision of the District Court 9999c61a0000 18dn schof (Distrire camidact wien IDEA's substantthe)Tj ET Q

s/Darryl Farrington

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this contains 6317 words. I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(7)(B) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version X in 14 point Times New Roman.

s/Kathleen Sullivan
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Dated: October 9, 2007

## CERTIFICATE OF SERVICE

I certify that on this 9th day of October, 2007, a true and correct copy of the foregoing BRIEF OF *AMICI CURIAE* OF COLORADO ASSOCIATION OF SCHOOL BOARDS, COLORADO BOCES ASSOCIATION, COLORADO SPECIAL EDUCATION DIRECTORS CONSORTIUM, AND NATIONAL ASSOCIATION OF SCHOOL BOARDS, was submitted via hand delivery and digital submission:

United States Court of Appeals for the Tenth Circuit
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## CERTIFICATE OF DIGITAL SUBMISSION

This is also to certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written documents filed with the Clerk, and the digital submissions have been scanned for viruses with the most recent version of Norton Antivirus, Version 10.1.

s/Virginia Panzer