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### Civil Rights/Education - Accommodating Disabilities: How Far Must Schools Go in Providing Related Services of a Medical Nature for Students with Disabilities - Cedar Rapids Community Sch. Dist. v. Garret F.

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**CIVIL RIGHTS/EDUCATION—Accommodating Disabilities: How Far Must Schools Go in Providing Related Services of a Medical Nature for Students with Disabilities? *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999).**

INTRODUCTION

In 1993, the Cedar Rapids Community School District (District) declined to provide continuous one-on-one nursing care during school hours to Garret F., a quadriplegic, ventilator-dependent student.<sup>1</sup> The District maintained that the care was a “medical service,” which it was not required to provide under the Individuals with Disabilities Education Act (IDEA).<sup>2</sup> The Supreme Court disagreed, holding that the care was not a “medical service,” but was a “related service” that the District was obligated to provide under the IDEA.<sup>3</sup>

Garret was four years old when his spinal cord was severed in a motorcycle accident.<sup>4</sup> His mental capacity was unaffected by the accident, and he attended regular classes in the District, despite his physical limitations.<sup>5</sup> He could speak, control his wheelchair with a puff and suck straw, and operate a computer device using head movements.<sup>6</sup> However, Garret still needed someone near to take care of routine physical needs and to assist him in case of an emergency.<sup>7</sup> Prior to 1993, the family provided an attendant to take care of these needs.<sup>8</sup> In addition to those physical needs, Garret also needed help with his educational activities.<sup>9</sup> The District employed a teaching associate to provide this educational assistance.<sup>10</sup>

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1. *Cedar Rapids Community Sch. Dist. v. Garret F.*, 106 F.3d 822 (8th Cir. 1997), *aff'd*, 526 U.S. 66 (1999).

2. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1491 (1994) [hereinafter *IDEA*]. The Court used the 1994 version of the law in its *Garret* opinion because it was the version in effect when this dispute arose. The IDEA was reauthorized and substantially revised by Congress in 1997. However, no changes were made to the language at issue in *Garret*. 20 U.S.C. § 1401(22) (1997).

3. *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66, 79 (1999).

4. *Id.* at 69.

5. *Id.*

6. *Id.*

7. These needs include: 1) urinary bladder catheterization (daily); 2) suctioning of his tracheotomy tube as needed (at least every 6 hours and with food or drink); 3) ambu-bagging, which is manual pumping of an air bag attached to his Tracheotomy tube, occasionally (during suctioning and in the event of ventilator maintenance or failure); 4) Monitoring of Garret and the ventilator equipment for signs of problems; 5) immediate response to emergencies such as autonomic hyperflexia, a life-threatening autonomic nervous system response that sometimes occurs in ventilator dependent individuals as a result of anxiety or full bladder. *Id.* at 69 n.3.

8. *Id.* at 70.

9. The duties of the teaching associate included helping Garret move around the building, turn pages and manipulate educational materials. Petitioner’s Brief at 6-7, *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999) (No. 96-1793).

10. *Garret*, 526 U.S. at 77 n.9.

In 1993, Garret's parents asked the District also to assume the responsibility for providing Garret's physical care at school and requested a hearing after the District denied their request.<sup>11</sup> The District conceded that Garret's physical care was a necessary supportive service, but argued that the continuous nature and extent of Garret's one-on-one nursing care made it an excluded "medical service" under the IDEA.<sup>12</sup> The District obtained a declaratory ruling from the Iowa Board of Nursing stating that Garret's care could not be delegated to a non-licensed practitioner.<sup>13</sup> The District then offered to contribute the cost of Garret's teaching associate toward the cost of a full-time nurse who could also perform the teaching associate's duties, if the family would pay the balance of the cost.<sup>14</sup>

The family agreed that one person could provide all Garret's educational and physical support needs, but contended that the cost was the District's responsibility.<sup>15</sup> They also argued that it was unnecessary to require the more costly services of a registered nurse.<sup>16</sup> The District allowed the use of lesser-trained attendants when the family was arranging the care.<sup>17</sup> The state Board of Nursing later revised its decision, "ruling that the District's registered nurses may decide to delegate Garret's care to an LPN."<sup>18</sup> Though Garret faced some risk of life threatening emergencies, both the family and Garret's physician testified that his condition was very stable and emergencies were unlikely.<sup>19</sup>

The District's receipt of federal funds through the IDEA obligated it to provide "special education services,"<sup>20</sup> including all necessary "related services"<sup>21</sup> to qualifying children with disabilities.<sup>22</sup> The IDEA expressly excludes "medical services" from the list of required "related services," except when necessary for diagnostic or evaluation purposes.<sup>23</sup> However, the statute contains no definition or clarification of what the term "medical

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11. *Id.* at 70.

12. *Id.* at 72.

13. Petitioner's Brief at 7, *Garret* (No. 96-1793). The Iowa Board of Nursing later revised this ruling, allowing the District's registered nurses to delegate Garret's care to a licensed practical nurse (lesser qualified than a registered nurse). *Garret*, 526 U.S. at 77 n.9.

14. Petitioner's Brief at 6, *Garret* (No. 96-1793).

15. Respondent's Brief at 9, 11, *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999) (No. 96-1793).

16. *Id.* at 9, 11, 41-42.

17. *Garret*, 526 U.S. at 70.

18. *Id.* at 77 n.9.

19. Respondent's Brief at 4-5, *Garret* (No. 96-1793).

20. 20 U.S.C. §1401(a)(16) (1994). The law defines "special education" as specially designed instruction, provided at no cost, which meets the unique needs of a child with a disability whether he or she is in a classroom, home, hospital, institution or elsewhere. *Id.*

21. §1401(a)(17). "Related services" are defined broadly as developmental, corrective, or other supportive services a child with a disability needs in order to benefit from their "special education." *Id.*

22. §§ 1412(1), 1401(a)(18).

23. § 1401(a)(17).

services” means.<sup>24</sup> The Secretary of Education interpreted “medical services” to encompass only services that must be performed by a licensed physician.<sup>25</sup> In 1984, a unanimous Supreme Court deferred to that interpretation in *Irving Independent School District v. Tatro*, a case involving a simpler and less expensive “medical service.”<sup>26</sup>

The present case was heard first by an Administrative Law Judge (ALJ) who found in favor of Garret.<sup>27</sup> The District appealed this decision to the federal district court, which granted summary judgment in Garret’s favor.<sup>28</sup> The district court’s decision was then affirmed by the Eighth Circuit Court of Appeals which applied *Tatro* and held that: 1) the nursing care was a necessary “related service” in order for Garret to benefit from special education; and 2) the service was not an excluded “medical service” because it did not need to be administered by a physician.<sup>29</sup>

The Supreme Court granted *certiorari* in *Garret* to address a circuit split.<sup>30</sup> The question to be answered was whether non-physician-provided services of a medical nature could be “excludable medical services” if the nature and extent of these services were too involved, costly, or otherwise unduly burdensome to a school.<sup>31</sup> The Court found that, under the current statute and regulations, they could not.<sup>32</sup> In a seven-to-two decision, it reaffirmed and extended *Tatro*, finding no justification or authority for expanding “excludable medical services” beyond the definition contained in the regulations.<sup>33</sup>

This case note discusses the reasons why the Supreme Court’s decision was correct. First, the statute, regulations, and prior Supreme Court precedent clearly defined excludable “medical services.” In consideration of the principle of *stare decisis* any changes to the existing law would more properly be undertaken by Congress. Second, the Court’s decision supports the important policy goals of the IDEA: Protecting a disabled student’s educational and disability rights. Third, the decision promotes judicial economy by providing an unequivocal definition of the scope of a school district’s obligation.

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24. *Id.*

25. 34 C.F.R. §§ 300.16(a), (b)(4), (b)(11) (1998).

26. 468 U.S. 883 (1984). *Tatro* adopted the regulation’s bright-line physician/non-physician test to define “medical services” as services provided by a licensed physician. *Id.* at 892.

27. *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66, 71 (1999).

28. *Id.* at 72.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 79.

33. *Id.* The Court appeared impatient with the District, stating “[w]e obviously have no authority to rewrite the regulations, and we see no sufficient reason to revise *Tatro*, either.” *Id.* at 75 n.6 (emphasis added).

## BACKGROUND

According to Congressional findings, in 1975, less than half of the estimated eight million disabled students in the United States were receiving appropriate educational services.<sup>34</sup> An estimated one million children with disabilities were completely excluded from any type of public education.<sup>35</sup> The lack of opportunities left these children with little hope of obtaining the education and skills needed to become self-sufficient adults, which, in turn, led to high unemployment among people with disabilities and their dependence on public assistance.<sup>36</sup> Around this time, a growing body of case law began to recognize a disabled student's right to public education, and found that states often violated that right.<sup>37</sup>

Congress attempted to address these problems as early as 1958 with the appropriation of funds to train teachers of the mentally retarded.<sup>38</sup> Congress granted federal subsidies to public schools.<sup>39</sup> In 1975, the Education of the Handicapped Act (EHA) was passed in response to the increasing pressure from states, the public, and the judiciary.<sup>40</sup> EHA is considered a milestone because it built the foundation for the "special education" of children with disabilities that exists today, primarily by establishing a statutory right to a "free and appropriate public education"<sup>41</sup> for all children with disabilities.<sup>42</sup>

34. 20 U.S.C. § 1400(b) (1994). As of 1975, Congress found that there were over eight million children with disabilities in the United States whose educational needs were not being fully met. § 1400(b)(2). More than half were not receiving appropriate educational services that would enable them to have full equality of opportunity. § 1400(b)(3). One million were completely excluded from the public school system and would not receive an education with their peers. § 1400(b)(4). In addition, there were an unknown number of students whose disabilities prevent them from having a successful educational experience because they went undetected. § 1400(b)(5).

35. *Id.*

36. S. Rep. No. 94-168, at 9 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433. The Senate report found the disturbing implication that public agencies and taxpayers would spend billions of dollars over these individual's lifetimes just to maintain them as dependents in a minimally acceptable lifestyle. The report also found that with proper education services, many of these individuals would become productive citizens who could contribute to society rather than being forced to remain burdens. *Id.*

37. *Id.* at 7, 1431. The Senate report found more than thirty-six court cases recognizing the states' obligation to provide an appropriate public education for children with disabilities. The states were struggling with financial constraints in their attempts to comply with the decisions. *Id.*

38. Mentally Retarded Children Grants for Training Teachers, Pub. L. No. 85-926, 72 Stat. 1777 (1958) *reprinted in* 1958 U.S.C.C.A.N. 2140.

39. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958) *reprinted in* 1958 U.S.C.C.A.N. 1894.

40. 20 U.S.C. §§ 1400-1491 (1994) (originally named the Education of the Handicapped Act but frequently referred to as Public Law 94-142 and now called the IDEA). The act was based on "a series of landmark court cases establishing in law the right to education for all handicapped children." In *Pennsylvania Association for Retarded Children v. Commonwealth*, 334 F. Supp. 127 (E.D.Pa. 1971), a federal court found colorable claims of equal protection and due process violations in the statutory denial of public education to mentally retarded children and the failure to provide sufficient process in the diagnosis and subsequent denial of this education. Another, *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972), addressed essentially the same constitutional claims but also found the increased cost of educating these children was not sufficient cause for exclusion. S. Rep. No. 94-168 at 6 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1430.

41. 20 U.S.C. § 1401(18) (1994). The term "free appropriate public education" is defined within the [https://scholarship.law.uwo.edu/land\\_water/vol35/iss2/13](https://scholarship.law.uwo.edu/land_water/vol35/iss2/13)

In 1990, the Education of the Handicapped Act was renamed the Individuals with Disabilities Education Act, more commonly known as the IDEA.<sup>43</sup> Throughout many changes and reauthorizations, the law has maintained a fundamental mandate to ensure a “free appropriate public education” in the “least restrictive environment.”<sup>44</sup> The IDEA also provides states with substantial federal funding, though the amount has dwindled in recent years. This decreased funding has led to mounting fiscal tensions.<sup>45</sup> By accepting federal funds, a state becomes obligated to provide special education services to children with disabilities in the manner specified in the IDEA.<sup>46</sup> Even if a state declines the IDEA funds, it remains obligated to provide an “equal” educational opportunity to all children with disabilities.<sup>47</sup>

The IDEA defines the necessary “related services” as:

[T]ransportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education.<sup>48</sup>

The definition is fairly amorphous, allowing various interpretations of its meaning, especially when read in conjunction with other portions of the IDEA. “Numerous varied services have been held by the courts to be serv-

Act to mean “special education” and “related services” that are provided at public expense, under public supervision and direction, and without charge. They must meet the standards of the state’s educational agency and include an appropriate preschool, elementary, or secondary school education that is provided within an individualized education program. *Id.*

42. § 1400(b)(8). Congressional finding contained in the Act declare that state and local educational agencies are required to provide an education for all children with disabilities, but recognize that the states have limited financial resources to meet these special educational needs. *Id.* Congress found it was in the national interest to help provide funding for programs to meet these educational needs in order to assure equal protection of the law. § 1400(b)(9). See also, Daniel H. Melvin II, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 615-22 (1995).

43. 20 U.S.C. § 1400(a) (1994).

44. § 1400(c). The term “least restrictive environment” relates to where a child is to receive their “special education.” The law mandates that “to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled.” § 1412(5)(B).

45. Leslie A. Collins & Perry A. Zirkel, *To What Extent, if Any, May Cost be a Factor in Special Education Cases?* 71 ED. LAW REP. 11, 11-12 (1992). The article notes that special education is now financed primarily by states and localities. Though the federal government is authorized to fund up to fifty percent of the cost, federal funding was at nine percent in 1990. This has led to disputes over balancing the IDEA’s mandated services with fiscal constraints. *Id.*

46. 20 U.S.C. § 1412 (1994).

47. § 1400(b). The constitutional theory is rooted in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), where the Court found that an education is so important that “where the state has undertaken to provide it, it is a right which must be made available to all on equal terms.” Melvin *supra* note 42, at 606. For further discussion on the constitutional right to an education for children with disabilities, see *Id.* at 606-613.

48. § 1401(a)(17).

ices that are required by the EHA . . . under the appropriate circumstances on the basis that the services were within the meaning of the terms 'special education,' 'related services,' or 'free appropriate public education.' ”<sup>49</sup>

Shortly after passage of the 1975 act, the Secretary of Education clarified the law through regulations that defined school health services as “related services,” and excluded only physician-provided services as “medical services.”<sup>50</sup> In essence, this meant that school-nursing services were considered “related services.”<sup>51</sup> Also, no limitation was placed on the extent of such required services once they were defined as “related services.”<sup>52</sup>

These definitions generated cost concerns for local and state education associations. Responding to the complaints, the Secretary of Education issued proposed revisions to the regulations in 1982.<sup>53</sup> The proposed revisions changed the definition of “related services” by removing school health services and changed the definition of “medical services” from “services provided by a licensed physician” to “services related to the practice of medicine.”<sup>54</sup> Members of Congress criticized the changes.<sup>55</sup> Subsequently, some of the proposed changes, including the redefinitions of both “related services” and “medical services” were withdrawn.<sup>56</sup> In a further response the following year, Congress amended the EHA to prohibit the Secretary from implementing any regulation that would “procedurally or substantively lessen the protections provided to handicapped children . . . as embodied in regulations in effect on July 20, 1983.”<sup>57</sup> This prohibition still remains in the IDEA.<sup>58</sup>

The next significant historical event came in 1984. The Supreme Court was given an opportunity in *Irving Independent School District v. Tatro* to further clarify what, if any, “medical services” fell within the scope of the EHA’s “related services.”<sup>59</sup> The *Tatro* Court identified three requirements or criteria for determining what “related services” schools were obligated to

49. Annotation, *What Services Must Federally Assisted School Provide for Handicapped Children Under Education of the Handicapped Act*, 63 A.L.R. FED. 856, 859 (1983).

50. 45 C.F.R. 121a.13 (1978).

51. *Id.*

52. *Cedar Rapids Community Sch. Dist. v. Garret F.*, 520 U.S. 66, 77 (1999).

53. Amicus Brief for the United States at 21, *Cedar Rapids Community Sch. Dist. v. Garret F.*, 520 U.S. 66 (1999) (No. 96-1793).

54. *Id.* at 21-22.

55. *Id.* at 22.

56. *Id.* at 23.

57. H.R. Rep. No. 98-410 at 21 (1983), *reprinted in* 1983 U.S.C.C.A.N. 2088, 2108.

58. 20 U.S.C. 1407(b) (1994). This strongly worded prohibition has remained unchanged. “The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this Chapter that would procedurally or substantively lessen the protections provided to children with disabilities under this Chapter, as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to . . . related services . . .), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation.” *Id.*

59. 468 U.S. 883 (1984).

provide.<sup>60</sup> First, the child had to qualify for “special education” by having a qualifying disability.<sup>61</sup> Second, the requested service had to be a supportive service, “necessary” in order for the child to benefit from special education.<sup>62</sup> Third, the requested procedure could not be a “medical service” unless it was for diagnostic or evaluation purposes.<sup>63</sup> After applying these requirements, the Court found that the clean intermittent catheterization (CIC)<sup>64</sup> at issue in that case was a supportive service which was necessary to help Amber Tatro benefit from special education.<sup>65</sup> The Court explained that:

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. . . . Services like CIC 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.<sup>66</sup>

Next the Court found that providing CIC was not a “medical service”:<sup>67</sup>

We begin with the regulations of the Department of Education, which are entitled to deference. The regulations define “related services” for handicapped children to include “school health services,” 34 CFR § 300.13(a) (1983), which are defined in turn as “services provided by a qualified school nurse or other qualified person,” § 300.13(b)(10). “Medical services” are defined as “services provided by a licensed physician.” § 300.13(b)(4). Thus, the Secretary has determined that the services of a school nurse otherwise qualifying as a “related service” are not subject to exclusion as a “medical service,” but the services of a physician are excludable as such. This definition of “medical services” is a reasonable interpretation of congressional intent. . . . [T]he Secretary could reasonably have concluded that Congress intended to impose the obligation to provide school nursing services.<sup>68</sup>

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60. *Id.* at 894.

61. *Id.* Congress defines a child with a disability as a child with mental retardation; hearing, speech, language, visual or orthopedic impairments; serious emotional disturbance; autism; traumatic brain injury; specific learning disabilities; or other health impairments who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(a)(1)(A) (1994).

62. *Tatro*, 468 U.S. at 894.

63. *Id.*

64. CIC is a simple procedure that may be performed in a few minutes by a layperson with less than an hour’s training. It involves the insertion of a catheter into the urethra to drain the bladder. *Id.* at 885.

65. *Id.* at 890.

66. *Id.* at 891.

67. *Id.*

68. *Id.* at 891-93 (internal citations and footnotes omitted).



Thus, the Court found that: 1) Amber Tatro qualified for special education services; 2) CIC was a necessary supportive service and; 3) CIC was not an excludable "medical service" because it could be performed by a trained professional other than a physician.<sup>69</sup>

Following *Tatro*, a split developed among circuits. Some circuits applied the *Tatro* analysis strictly, adhering to a bright-line physician/non-physician test.<sup>70</sup> Other circuits concluded that strict adherence would unduly burden schools, which, as technology advanced, were increasingly faced with caring for medically fragile children.<sup>71</sup> Those circuits based their decision on dicta<sup>72</sup> within the *Tatro* opinion, which they read as suggesting a cost-based analysis.<sup>73</sup> They then developed factors or tests, which generally considered the difficulty and expense of providing a specific service to determine whether the service was "medical."<sup>74</sup>

One of the first cases to depart from a strict reading of *Tatro* was a Second Circuit case, *Detsel v. Board of Education of the Auburn Enlarged City School District*.<sup>75</sup> It involved a complaint filed to compel the school district

69. *Id.* at 895.

70. See *Morton Community Unit Sch. Dist. No. 709 v. J.M.*, 152 F.3d 583 (7th Cir. 1998) (finding no explicit undue burden defense in IDEA and ordering the District to provide necessary continuous monitoring, adjustments and suctioning for a medically fragile child); *Cedar Rapids Community Sch. Dist. v. Garret F.*, 106 F.3d 822 (8th Cir. 1997) *aff'd* 526 U.S. 66 (1999); *State of Hawaii Dep't of Educ. v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), *cert denied*, 105 S.Ct. 2360 (1985) (finding repositioning of suction tube in child's throat a related service); *Skelly v. Brookfield LaGrange Park Sch. Dist.*, 968 F. Supp. 385 (N.D.Ill. 1997) (finding tracheotomy tube suctioning during bus ride was not an excludable "medical service").

71. See *Fulginiti v. Roxbury Township Public Schs.*, 116 F. 3d 468 (3rd Cir. 1997) (affirming the lower courts holding that services of a full time attendant to monitor and suction student's tracheostomy tube were "medical services"); *Neely v. Rutherford County Sch.*, 68 F.3d 965 (6th Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996) (distinguishing *Tatro* as not involving care of a constant nature with life-threatening consequences); *Detsel v. Bd. of Educ. Of Auburn Enlarged City Sch. Dist.*, 820 F.2d 587 (2nd Cir. 1987), *cert. denied*, 484 U.S. 981 (1987) (finding the student required complicated and continuous care which was "decidedly different from the situation presented in *Tatro*"); *Granite Sch. Dist. v. Shannon M.*, 787 F. Supp. 1020 (D.Utah 1992), (finding full-time nursing care to monitor student's tracheostomy tube fell within "medical service" exclusion).

72. The italicized portion of the following dicta from *Tatro* has been used to support the inference that the Court advocated a balancing test, considering the cost and difficulty of the service, to determine what related services a school must provide. "Thus, the Secretary has determined that the services of a school nurse otherwise qualifying as a 'related service' are not subject to exclusion as a 'medical service,' but that the services of a physician are excludable as such. This definition of 'medical services' is a reasonable interpretation of congressional intent. *Although Congress devoted little discussion to the 'medical services' exclusion, the Secretary 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.* From this understanding of congressional purpose, the Secretary could reasonably have concluded that Congress intended to impose the obligation to provide school nursing services." *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 892-93 (1984) (emphasis added).

73. See *Allan G. Osborne, Jr., Supreme Court Rules That Schools Must Provide Full-Time Nursing Services for Medically Fragile Students*, 136 ED. LAW REP. 1, 5 (1999) (citing Court dicta in *Tatro* as saying that the medical services exclusion was to spare schools from providing services that were unduly expensive or beyond the limits of their competence.)

74. See *supra* note 72.

75. 820 F.2d 587 (2nd Cir. 1987) (*per curium*), *cert. denied*, 484 U.S. 981 (1987).

to provide constant nursing care. Melissa Detsel required constant respirator assistance and constant vigilance, which, according to the court's finding, was "beyond the competence" of the school nurse.<sup>76</sup> The State's Department of Social Services had provided Melissa's nursing care when she was at home.<sup>77</sup> When she entered kindergarten the Department refused to pay for the nurse to accompany Melissa to school.<sup>78</sup> After finding that Melissa qualified for "special education," the district court applied the next two steps of the *Tatro* analysis, finding that the services were necessary for Melissa to attend school, but also that the service was an "excludable medical service."<sup>79</sup> The opinion refers to the Supreme Court's *Tatro* dicta as an indication that the Court considered the nature and extent of the service involved when making its decision in *Tatro*.<sup>80</sup> The *Detsel* court reasoned that, despite the fact that the service need not be administered by a physician, it was "beyond the competence" of the school nurse:<sup>81</sup>

The instant case is decidedly different from the situation presented in *Tatro*. The care essential for Melissa's well-being is complicated and requires the skill of trained health professionals. In its analysis, the Supreme Court recognized that although meaningful access to education must be afforded handicapped children, medical services that would entail great expense are not required.<sup>82</sup>

In *Granite School District v. Shannon M.*, a federal district court in the Tenth Circuit also rejected the physician/non-physician test.<sup>83</sup> *Shannon* involved a young girl with orthopedic impairments requiring care similar to that needed by Garret. Shannon M., a first-grader, sought placement in school under the care of a nurse rather than the homebound placement proposed by the school district.<sup>84</sup> The *Shannon* court agreed with *Detsel*, holding that "[t]he Court in *Tatro* did not hold that all health services are to be provided as related services so long as they may be performed by one other than a licensed physician."<sup>85</sup>

As time passed, the exclusion of non-physician provided "related services" of a medical nature became more widely accepted. However, the amount of undue burden necessary to exclude a "related service" of a medical nature varied. In a more recent case, *Neeley v. Rutherford County*

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76. *Detsel v. Bd. of Educ. of the Auburn Enlarged City Sch. Dist.*, 637 F. Supp. 1022, 1026-27 (N.D.N.Y. 1986).

77. *Id.* at 1023.

78. *Id.*

79. *Id.* at 1027.

80. *Id.* at 1026.

81. *Id.* at 1026-27.

82. *Id.* at 1026.

83. 787 F. Supp. 1020, 1026 (D.Utah 1992).

84. *Id.* at 1021.

85. *Id.* at 1027 (emphasis added).

*School*, a young girl with a tracheostomy needed regular suctioning of her nose, throat, and mouth area.<sup>86</sup> These services were less extensive than the services at issue in either *Shannon* or *Detsel*,<sup>87</sup> but the Sixth Circuit still found that “the services requested by Samantha are inherently burdensome.”<sup>88</sup> The court held that, though *Tatro* could be read to establish a bright-line physician/non-physician test, it was not the only interpretation.<sup>89</sup> “We believe the better interpretation of *Tatro* to be that a school district is not required to provide every service which is ‘medical in nature,’ . . . [w]e believe it is appropriate to take into account the risk involved and the liability factor of the school district.”<sup>90</sup> The Sixth Circuit found that the services sought in *Neeley* were unduly burdensome because the student would need constant observation to determine when suctioning was necessary.<sup>91</sup> By the time *certiorari* was granted in *Garret*, the Sixth Circuit was one of three circuits that read *Tatro* as providing an undue burden exception based on the cost, nature, or extent of the service,<sup>92</sup> while three circuits, including the Eighth Circuit in *Tatro*, adopted the bright-line physician/non-physician test.<sup>93</sup> This split was brought to the Court’s attention in *Garret*.<sup>94</sup>

#### PRINCIPAL CASE

The Court granted *certiorari* to resolve the post-*Tatro* conflict among the circuits.<sup>95</sup> The majority opinion, written by Justice Stevens and joined by six other Justices, reaffirmed *Tatro* and rejected the undue burden exceptions which some lower courts had grafted onto the *Tatro* decision.<sup>96</sup> Upon review of the lower court decisions in *Garret*, the majority found that *Tatro* had been applied correctly. First, *Garret* met the definition of disability contained in the IDEA.<sup>97</sup> Second, the requested service was a supportive

86. 68 F.3d 965 (6th Cir. 1995).

87. *Id.* at 967. The extent of Samantha’s care varied with the season and her health. When she was in good health, she may only have needed suctioning after meals, but when she had a cold she might have needed to be suctioned every twenty minutes. *Id.*

88. *Id.* at 971.

89. *Id.* at 970.

90. *Id.* at 971 (emphasis added).

91. *Id.* at 973.

92. *Fulginiti v. Roxbury Township Public Schs.*, 116 F.3d 468 (3rd Cir. 1997); *Neely v. Rutherford County Sch.*, 68 F.3d 965 (6th Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996); *Detsel v. Bd. of Educ. of Auburn Enlarged City Sch. Dist.*, 820 F.2d 587 (2nd Cir. 1987), *cert. denied*, 484 U.S. 981 (1987).

93. *Morton Community Unit Sch. Dist. No. 709 v. J.M.* 152 F.3d 583 (7th Cir. 1998); *Cedar Rapids Community Sch. Dist. v. Garret F.*, 106 F.3d 822 (8th Cir. 1997), *aff’d* 526 U.S. 66 (1999); *State of Hawaii Dep’t of Educ. v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), *cert. denied*, 105 S.Ct. 2360 (1985).

94. *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66, 72 (1999). The District pointed out that some federal courts have not applied *Tatro*’s physician/non physician test, “but instead have applied a multi-factor test that considers, generally speaking, the nature and extent of the services at issue.” *Id.*

95. *Id.* at 72.

96. *Id.* at 77.

97. See *supra* note 61.

service that was necessary for Garret to benefit from special education.<sup>98</sup> The District had never disputed these first two requirements.<sup>99</sup>

Finally, the Court addressed the disputed question, whether continuous nursing services were “excludable medical services.”<sup>100</sup> The majority found that the care sought by Garret F. was “no more ‘medical’ than the care at issue in *Tatro*.”<sup>101</sup> The Court ruled unequivocally that the care sought also was not an “excluded medical service.”<sup>102</sup> The majority referred to its earlier *Tatro* holding to clarify its intent. “The phrase ‘medical services’ in § 1401(a)(17) does not embrace all forms of care that might loosely be described as ‘medical’ in other contexts, such as a claim for an income tax deduction.”<sup>103</sup> The definition of “medical” also must fit within the context of the IDEA’s definition of related services.<sup>104</sup> In this light, the fact that many of the other categorical examples (i.e. speech therapy, physical therapy or psychological services) fall within a broad definition of medical services indicates that Congress was using the term “medical” in a more limited way.<sup>105</sup> The Court reiterated the *Tatro* definition of “medical services,” indicating its impatience with the subsequent attempts by lower courts to reinterpret the meaning of “medical services”:

[W]e concluded that the Secretary of Education had reasonably determined that the term “medical services” referred only to services that must be performed by a physician, and not to school health services. . . . We referenced the likely cost of the services and competence of school staff as justification for drawing the line . . . but our endorsement of that line was unmistakable.<sup>106</sup>

The majority considered but dismissed the District’s argument. The District attempted to distinguish Garret’s care as much more extensive than that dealt with in *Tatro*. The District argued that it was not the specific services taken individually, but the combination of services that brought the services sought within the scope of “medical services.”<sup>107</sup> This was, essentially, the District’s only argument since most of the care Garret needed was already being provided to other students in the District, including the clean

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98. *Garret*, 526 U.S. at 72, 73.

99. *Id.* at 73.

100. *Id.* at 73-75.

101. *Id.* at 74.

102. *Id.* at 74-75.

103. *Id.*

104. *Id.* at 73.

105. *Id.*

106. *Id.* at 73-74 (internal citations omitted).

107. *Id.* at 75. The District did not dispute that the individual items of care Garret needed would not have been considered excludable if considered individually. In fact, one of the services Garret needed was the catheterization at issue in *Tatro* and most of the other services at issue were already provided to other student in the District. “While more extensive, the in-school services Garret needs are no more ‘medical’ than was the care sought in *Tatro*.” *Id.*

intermittent catheterization at issue in *Tatro*.<sup>108</sup> The Court found that “[t]he District’s multi-factor test is not supported by any recognized source of legal authority.”<sup>109</sup> While acknowledging the District had “legitimate financial concerns,” the Court found that cost was not an allowable factor for determining what are and what are not “related services,” and held that adopting the District’s approach would be “judicial lawmaking without . . . guidance from Congress.”<sup>110</sup> “Continuous services may be more costly and may require additional school personnel, but they are not thereby more ‘medical.’”<sup>111</sup>

The Court further held that a contrary conclusion would “create some tension with the purposes of the IDEA.”<sup>112</sup> “Congress intended ‘to open the door of public education’ to all qualified children and ‘require[] participating States to educate handicapped children with non-handicapped children whenever possible.’”<sup>113</sup> The Court concluded its opinion by holding:

This case is about whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained. It is undisputed that the services at issue must be provided if Garret is to remain in school. Under the statute, our precedent, and the purposes of the IDEA, the District must fund such “related services” in order to help guarantee that students like Garret are integrated into the public schools.<sup>114</sup>

Justice Thomas, in a dissent joined by Justice Kennedy, argued that “*Tatro* cannot be squared with the text of IDEA,” which excludes “medical services” unless they are for diagnostic or evaluation purposes.<sup>115</sup> Giving deference, therefore, to the Secretary of Education’s definition of “medical services” in *Tatro* was wrong.<sup>116</sup> Alternatively, Justice Thomas argued that Congress’s Spending Power precluded such a broad construction of the IDEA’s mandated services.<sup>117</sup>

108. *Id.*

109. *Id.*

110. *Id.* at 77.

111. *Id.* at 76.

112. *Id.* at 77.

113. *Id.* at 78.

114. *Id.* at 79.

115. *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66, 79 (1999) (Thomas, J., dissenting).

116. *Id.* at 80. The majority found this argument unconvincing, noting that the dissent’s rejection of a unanimous *Tatro* decision was fifteen years too late and offered nothing in its place. It found the dissent’s definition of “medical services” to be circular, risking the exclusion of most ordinary school nursing services that are routinely provided to non-disabled children, “an anomalous result [that] is not easily attributable to congressional intent.” *Id.* at 78 n. 10. The majority also took issue with the dissent’s position for being similar to the 1982 proposed changes that were ultimately withdrawn. *Id.*

117. *Id.* at 83-85. Here Justice Thomas noted that since the IDEA was enacted pursuant to Congress’ spending powers requiring the interpretation to give clear notice of what a State would be obligated to

## ANALYSIS

The Supreme Court's decision in *Garret* was correct for a number of reasons. First, the IDEA, the regulations and a prior Supreme Court decision had clearly defined excludable "medical services." The majority recognized that unless the Court were to ignore the principle of *stare decisis* and overrule *Tatro*, a unanimous, statutory construction decision only fifteen years old, any effort to change the existing law on this question should be directed to Congress. Second, the decision protected important education and disability rights by acknowledging Congress's underlying policy reasons for passing the legislation. Third, the Court's position promoted judicial economy by avoiding diverse interpretations of "excludable medical services," which would have led to uncertainty in the law and increased litigation.

*Redefining "Medical Services" is a Congressional Prerogative*

"Medical services" within the context of "related services" mean only services provided by a licensed physician.<sup>118</sup> This definition of "medical services" used in the IDEA regulations is unambiguous and was established through legitimate legislative and regulatory procedures.<sup>119</sup> After the regulations defined "medical services," Congress provided a clear indication of its satisfaction with this interpretation in 1983 when it deflected an attempt to broaden the definition of excludable "medical services."<sup>120</sup> In light of this, the Supreme Court was correctly reluctant to reinterpret or alter the meaning of "medical services" because the meaning was already clearly established under existing law, including authorized agency regulations and the Court's own prior decision in *Tatro*.<sup>121</sup>

Despite this, the *Garret* Court was prodded to further clarify what Congress intended the term "medical services" to mean by the growing division among the circuits.<sup>122</sup> The Court still found no reasonable evidence that Congress intended a different interpretation.<sup>123</sup> The United States, as *amicus curiae* also argued that Congress prohibited any redefinition of "medical services."<sup>124</sup> The government criticized the District's position, stating "petitioner's attempt to construe the 'medical services' exclusion to depend on factors such as cost is, in essence an effort to obtain through the

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provide, in order to avoid saddling States with unanticipated obligations. *Id.* at 83-84. He concluded that the only services the school should be obligated to provide are those that a school nurse can perform as part of their normal duties. *Id.* at 85.

118. 34 C.F.R. § 300.13(b)(4) (1983).

119. See *supra* notes 50-52 and accompanying text.

120. See *supra* notes 53-58 and accompanying text.

121. *Garret*, 526 U.S. at 77.

122. *Id.* at 72.

123. *Id.* at 77.

124. Amicus Brief for the United States at 7-8, *Garret* (No. 96-1793).

courts what Congress rejected.”<sup>125</sup> Congress demonstrated this rejection when it amended the statute to prohibit the regulatory redefinition of “medical services.”

Given the risks to a vulnerable minority and the complexity of the issue, Congress is in a better position to study the problem carefully and propose changes in a legislative forum that can freely debate the issue with input from all stakeholders. The alternative proposed by the District in *Garret* and favored by the dissent would allow impermissible cost considerations to be introduced into the law.<sup>126</sup> In 1987, Congress estimated the number of “technology dependent children”<sup>127</sup> at somewhere between two thousand-three hundred and seventeen thousand.<sup>128</sup> Of those, between six hundred and two thousand disabled students require respiratory assistance.<sup>129</sup> This small number of high-need students may be an easy political target, but any significant cost increase to schools as a result of *Garret* is debatable.<sup>130</sup>

#### *The Decision Supports Policy Goals of the IDEA*

The Court’s decision in *Garret* also supports important education and disability policy goals of the IDEA.<sup>131</sup> When enacting the legislation, Congress intended “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE]<sup>132</sup> that includes “special education” and “related services” designed to meet their unique needs.”<sup>133</sup> The IDEA requires participating States to educate children with disabilities with non-disabled children whenever possible.<sup>134</sup> The use of cost-based

125. *Id.*

126. *Garret*, 526 U.S. at 77. The Court makes it very clearly that there are no cost factors in the IDEA, which could limit the definition of “related services,” and allowing the judiciary to create such a limit would be “judicial lawmaking without guidance from Congress.” *Id.*

127. U.S. Congress, Office Of Technology Assistance, *Technology-Dependent Children: Hospital v. Home Care—A Technical Memorandum*, 4 (13 OTA-TM-H-38, 1987). Technology-dependent children are those that depend on medical devices for life or health support such as, intravenous delivery of food or drugs, respiration support such as ventilators and tracheostomies, medical devices that replace a vital body function such as renal dialysis, and other devices such as catheters and colostomy bags. *Id.*

128. *Id.*

129. *Id.*

130. See, e.g., Deborah Rebores and Perry A. Zirkel, *The Supreme Court’s Latest Special Education Ruling: A Costly Decision?* 135 ED. LAW REP. 331, 338 (1999). The authors state it is unlikely that most school districts will feel any substantial financial effects from *Garret* because of the small number of students needing care and a school’s ability to receive financial assistance for the care from outside sources. *Id.*

131. See 20 U.S.C.S. 1401(c)(1) (1997). (“FINDINGS- 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.”) *Id.* See also *supra* notes 34-47 and accompanying text.

132. See *supra* note 41.

133. 20 U.S.C. §1400(c) (1994).

134. 20 U.S.C. §1412(5)(B). See also *Board of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 192 (1982).

measures proposed by the District would have “created tension with these purposes of the IDEA.”<sup>135</sup> When necessary supplementary aids and services are withheld by the public school, parents are left with one of two unsatisfactory options: 1) they may be forced to pay for their child’s supplementary aids and services, in violation of the “at no cost” provision of FAPE; or 2) they may be forced to accept their child’s placement in a more restrictive educational setting, such as an institutional or homebound placement. This latter option is contrary to Congress’s “least restrictive environment”<sup>136</sup> [LRE] policy.

Accepting the District’s position would have subverted the IDEA’s mandate of providing special education “at no cost.”<sup>137</sup> School funding of special education is complicated and usually involves a combination of state, federal, and local funding.<sup>138</sup> In order to receive federal funds for the education of children with disabilities, each state must comply with the IDEA.<sup>139</sup> The IDEA prohibits a school from making a parent pay for, or use his/her private insurance for, any services necessary to provide a “free and appropriate public education” unless the parent has given his/her informed consent.<sup>140</sup> Similar restrictions exist if the school wants to seek coverage of services under a public insurance program, such as Medicaid.<sup>141</sup> These provisions are meant to safeguard the family from depleting limited funds or incurring unnecessary costs for services a public school is required to provide as part of a “free appropriate public education.” Also, “[v]irtually all very-long-term technology-dependent children requiring a high level of nursing assistance will exceed the limits of their families’ private insurance policies, will be uninsurable in the self-purchase market because they are a poor risk, and will end up on Medicaid,”<sup>142</sup> Because of this practical reality, the issue of providing nursing care for technology-dependent children at

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135. Cedar Rapids Community Sch. Dist. v. Garret F., 526 U.S. 66, 77 (1999).

136. 20 U.S.C. §1412(5)(B) (1994).

137. *Garret*, 526 U.S. at 77. As the Court noted, “the District seeks to establish a kind of undue-burden exemption primarily based on the cost of the requested services.” *Id.*

138. See *supra* note 45 and accompanying text.

139. 20 U.S.C. § 1412 (1994).

140. 34 C.F.R. §300.142(f) (1999). The applicable portions of this provision state that “a public agency may access a parent’s private insurance proceeds only if the parent provides informed consent. . . .” *Id.* The agency must inform parents that, if they refuse to permit the access, it does not relieve the agency of its responsibility to provide the required services at no cost. §300.142(f)(2)(ii). If a parent would incur a cost for the insurance claim (i.e. a deductible or co-payment), the agency is allowed to use IDEA funds to pay costs the parents would otherwise have to pay. § 300.142(g).

141. §300.142(e). As with private insurance this section states that a school “may use the Medicaid or other public insurance benefits programs in which a child participates to provide or pay for services required under this part.” § 300.142(e)(1). When the services are required to provide FAPE, the public agency can’t require the parent to sign up for or incur any out-of-pocket expenses. § 300.142(e)(2)(i). They also can’t use the benefits if it decreases the available lifetime coverage or benefit, increases their premiums, cause a discontinuation of insurance or risks the loss of eligibility for home and community-based waivers. 300.142(e)(2)(iii).

142. U.S. Congress, Office Of Technology Assistance, *Technology-Dependent Children: Hospital v. Home Care—A Technical Memorandum*, 4 (13 OTA-TM-H-38, 1987).



school often comes down to simply a struggle over which government entity—the school or Medicaid—will pay for the care.

The District's proposed redefinition of medical services also threatened the goal of educating children with disabilities in the "least restrictive environment."<sup>143</sup> The language of the statute demonstrates Congress's preference for mainstreaming children with disabilities.<sup>144</sup> "The legislative history evinces Congress's view that desegregating children with disabilities is a matter of constitutional dimension."<sup>145</sup> Due process protections were enacted in part "to assure that every child with a disability is 'in fact' afforded an education in the 'least restrictive environment.'"<sup>146</sup> Further, segregating students on the basis of disability involves labeling children, a practice which itself poses a threat to individual liberty.<sup>147</sup> "In making its [*Garret*] decision, the Court has further supported the IDEA's least restrictive environment provision."<sup>148</sup> The funding issues and cost pressures previously discussed created an incentive toward cheaper, more restrictive placements of students with extensive health care needs.<sup>149</sup> Allowing the broad exclusion of "medical services" would continue the incentive for schools to choose more restrictive placements to avoid paying health care costs or possibly to maintain the outside funding for a student's health care.<sup>150</sup>

Medicaid programs often contain "at-home" limitations for nursing services that do not allow a school district to access payment for "at-school" care, even if the parent consents.<sup>151</sup> In fact, this scenario is similar to the facts of *Detsel*, which was the first case to reject the physician/non-

143. 20 U.S.C. §1412(5)(B) (1994). The IDEA mandates 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 educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . ." (emphasis added). *Id.*

144. Melvin, *supra* note 42, at 617.

145. *Id.* at 616.

146. *Id.* at 617.

147. *Id.* at 611.

148. Osborne, *supra* note 73, at 13.

149. Respondent's Brief at 37-38, *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999) (No. 96-1793). *Garret F.* argues that the District's "multifactor test would be a practical nightmare with school districts tenaciously litigating IEP's [Individualized Education Plans] against financially overmatched disabled children with the potential outcome of sending the children to home-bound or hospital-based education programs." *Id.*

150. See Osborne *supra* note 73, at 14. However, the Court found that cost was not a permissible factor in the determination of "related services." *Id.* at 13. This "indicates that school districts may be required to expend large sums in order to fully implement the IDEA's least restrictive environment provision. In the past lower courts have held that cost could be a factor in determining whether a student should be educated in a segregated special education setting or in an integrated regular education classroom with supportive aids and services. The Court's Cedar Rapids opinion certainly indicates that school districts are required to fund related, or supportive, services that will allow severely disabled students to be integrated into the public schools." *Id.*

151. April L. Forbes, *Skubel v. Fuoroli: Children With Disabilities Challenge The At-Home Limitation on Medicaid-Covered Home Health Nursing Services*, 4 LOY. POVERTY L.J. 297, 307-08 (1998).

physician test. In *Detsel* the social services agency funding Melissa's care would only provide the care at home. The Department of Health and Human Services has interpreted the Medicaid statute as not covering many health services outside an individual's home.<sup>152</sup> This interpretation means that a school, though allowed to seek other funds to cover a student's nursing care, may not be able to collect from Medicaid if the care is provided at school. This is the case even if the cost of providing the services is the same in either place.<sup>153</sup>

In *Garret*, the District was apparently seeking to circumvent the IDEA funding restrictions on access of public or private insurance funding. It argued that "Garret will not be homebound. . . . [T]here are nondistrict resources available to pay for Garret's nursing services: A combination of private medical insurance and a settlement trust fund expressly established to cover Garret's needs."<sup>154</sup> This statement indicates the District thought the labeling of his care as a "medical service" would allow it either to access private insurance funds without the parent's informed consent, or allow it to refuse to provide Garret the educational services required by the IDEA if parental consent was withheld.

Congress incorporated the doctrine of "least restrictive placement" into the original version of the IDEA.<sup>155</sup> The 1999 regulations further strengthened the provision by prohibiting the exclusion of a child with a disability from the regular classroom "solely because of needed modifications in the general curriculum."<sup>156</sup> Under the IDEA, the placement decision is to be made after a team has developed an appropriate "individualized education plan"(IEP) for the student. The IEP team makes this decision based on the student's education goals, and placement outside the regular classroom should occur only when the IEP goals cannot be successfully implemented in the regular classroom with the use of supplementary aids and services.<sup>157</sup> It appears that an extremely small number of students in the United States struggle with such severe health, emotional, or behavior challenges that they cannot be safely or effectively educated in regular public schools. Those challenges are legitimate reasons for a student's separate education. *Garret*,

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152. *Id.* at 297-98. In *Skubel v. Fuoroli*, 113 F.3d 330 (2d Cir. 1997), the Second Circuit found that defining home health services as only services provided in the recipient's home was an unreasonable interpretation of the Medicaid statute. However, "the holding is only applicable in the Second Circuit, which means that without clear guidelines from the Supreme Court regarding the at-home limitation, different circuits will devise their own standards." *Id.* at 307-08.

153. *See, e.g., Detsel v. Bd. of Educ. Of Auburn Enlarged City Sch. Dist.*, 637 F.Supp. 1022, 1023 (N.D.N.Y., 1986) (noting the Department of Social Services refused to continue paying for the services of the nurse who accompanied Melissa to school.)

154. Petitioner's Reply Brief at 4, *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999) (No. 96-1793).

155. 20 U.S.C. §1412(5)(B) (1994).

156. 34 C.F.R. § 300.552(e) (1999).

157. *See supra* notes 143-50 and accompanying text.

however, does not belong in this category. First, he faces no greater health risk at school than at home, provided that simple monitoring measures are taken, and second, he presents no danger to others.

In *Garret*, the District appears not to have considered the full implications of its obligation to provide Garret with a “free and appropriate education.” If the private funds available for Garret were depleted, as his family claimed, then a homebound placement was a very likely alternative.<sup>158</sup> If the District were permitted to decline to provide Garret’s nursing care at a public school, it would still be obligated to develop an IEP that provided Garret an education “at no cost.” If this involved educating Garret at home instead of school, which actually may cost more, then an IEP should have been developed to reflect this. The fact that the District denied this eventuality is perhaps indicative of how inappropriate it would be to educate Garret at home.

The *Tatro* and *Garret* decisions continue the proud tradition of integration in public schools established so clearly in *Brown v. Board of Education*.<sup>159</sup> As Chief Justice Warren wrote:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms.<sup>160</sup>

The question here is how to define equality in public education for children with such diverse needs. Basing the definition on cost would undermine the IDEA goals of self-sufficiency and equal opportunity and continue the segregation of children with disabilities.<sup>161</sup>

### *The Proposed Redefinition was Unworkable*

The Court’s adoption of a bright-line test in *Tatro* also made the “medical services” exclusion clear and easy to interpret. It provided clear notice of what schools are obligated to provide and what a student is entitled to receive. The alternative approach, advocated by the District and embraced by some circuits, was unsupported by the IDEA and created uncertainty and wasteful litigation in attempts to define legal standards or limitations. The definition of an undue burden could vary tremendously from court to court.

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158. Respondent’s Brief at 38, *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999) (No. 96-1793).

159. 347 U.S. 483 (1954).

160. *Id.* at 493.

161. See, e.g., Melvin *supra* note 142, at 601-609.

The District's proposal began with a broad definition of "medical services."<sup>162</sup> Any service that was medical in nature would be subjected to further testing to determine whether it was within the "medical services exemption" of the IDEA.<sup>163</sup> The District suggested that the exemption should "depend upon a series of factors, such as: 1) whether the care is continuous or intermittent; 2) whether existing school health personnel can provide the service; 3) the cost of the service; and 4) the potential consequences if service is not properly performed."<sup>164</sup> Apparently, these factors could be applied separately or in concert, and no factor was more important than another.<sup>165</sup>

The ambiguity of the proposed factors made them difficult to apply. In addition, all of the factors were, at least indirectly, cost-based.<sup>166</sup> Compounding this, none of the factors are found in the IDEA, its regulations, or the *Tatro* decision.<sup>167</sup> "[T]he District offers no explanation why these characteristics make one service any more 'medical' than another."<sup>168</sup> "Continuous services may be more costly and may require additional school personnel, but they are not thereby more 'medical.'"<sup>169</sup> The District focused on the cost issue, but the Court looked at the overall efficiency of the definition's application as well as the law's intent.

Even using the District's own factors, Garret's circumstances did not support the District's claim that he required excessive care of a medical nature. First, his care could be considered intermittent because one person would have been able to provide both educational assistance and personal care. Second, existing school health personnel could provide the service, if the teaching assistant were trained to provide the physical care. Third, the cost of the service probably was not prohibitive when compared to the alternative of hiring an additional teacher to provide homebound instruction and the cost savings that could have been realized by combining the duties of teaching assistant and physical assistant. Fourth, the health risk to Garret was minimal, according to his doctor.<sup>170</sup>

#### CONCLUSION

Garret F. and students like him have a well established right to a "free appropriate public education" that provides "special education" and necessary "related services." If these services are of a medical nature, coverage

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162. Cedar Rapids Community Sch. Dist. v. Garret F., 526 U.S. 66, 76 n.8 (1999).

163. *Id.*

164. *Id.* at 75.

165. *Id.* at 76 n.8.

166. *Id.* at 77.

167. *Id.* at 75.

168. *Id.* at 75-76.

169. *Id.* at 76.

170. Respondent's Brief at 1, *Garret* (No. 96-1793). See also *supra* note 19 and accompanying text.

can be determined by applying the *Tatro* test reaffirmed in *Garret*. The test requires that: 1) a student qualifies for special education and related services based on the IDEA's definition; 2) the services are necessary to assist the student in benefiting from special education; and 3) the service does not need to be provided by a licensed physician or, if so, the service is for diagnostic or evaluation purposes. Necessary related services of a medical nature no longer can be limited or denied because they are costly, difficult, extensive, require additional personnel, or involve risks if improperly performed. The holding in *Garret* correctly interprets the existing law. It reflects Congress's intent in enacting the IDEA and also supports important policy goals of the legislation. Alternatives were impermissibly cost-based and would have led to uncertainty in the law. The Court also clearly indicated that any change in the definition of "medical services" must be made by Congress. Additionally, both school districts and parents of handicapped children will benefit from the certainty that the Court's holding in *Garret* provides.

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