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Scott Shanker

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NOTE

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT V. GARRET: PROVIDING MEDICALLY RELATED SERVICES TO CHILDREN WITH DISABILITIES IN PUBLIC SCHOOLS

INTRODUCTION

In 1975, eight million children suffered from disabilities in the United States.[1] The majority of these children were insufficiently educated and more than one million were barred from the public school system entirely.[2] Currently, there are nearly 2.5 million children with disabilities that receive an inadequate education.[3] The Individuals with Disabilities Education Act[4] (IDEA), originally entitled the Education for All Handicapped Children Act of 1975[5] (EAHCA), was created as Congress's response to the lack of educational opportunities for children with disabilities.[6] In its most recent IDEA case, *Cedar Rapids Community School District v. Garret,*[7] the High Court continued to expand upon this Congressional goal by affirming the lower court's decision to provide "related services" and a "free appropriate public education" to children with disabilities.[8]

Prior to *Garret*, but within the past ten to fifteen years, burdens on school districts to provide the educational opportunity the IDEA requires have grown

1. Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 189 (1982) (citing Education for All Handicapped Children Act of 1970, 94 Pub. L. No. 142, 89 Stat. 774 (1975)); *see generally* 20 U.S.C. § 1400(b)(1) (1994).
2. 20 U.S.C. § 1400(b)(3)-(4) (1994); *Rowley*, 458 U.S. at 189.
3. Matthew J. Schaefer, *Individuals with Disabilities Education Act: "Related Services" Versus "Medical Services?"*, 39 WASHBURN L.J. 143, 143 (1999).
4. 20 U.S.C. § 1400 (1994).
5. 94 Pub. L. No. 142, 89 Stat. 773 (1975).
6. *Rowley*, 458 U.S. at 180.
7. 119 S. Ct. 992 (1999).
8. *Id.* at 1000.

substantially.[9] In response to state and local concerns, the pre-*Garret* courts delivered numerous decisions absolving school districts from furnishing full-time health "related services" to students with disabilities.[10] Those courts held that Congress did not intend the IDEA to impose unexpected financial and administrative burdens upon states.[11]

The *Garret* Court addressed this issue and resolved that school districts are required to provide "related services" to special education students, as long as the services do not fall into the "medical services" exemption.[12] The IDEA limits "medical services" to those services provided for diagnostic and evaluative purposes only.[13] In *Irving Independent School District v. Tatro,*[14] the forerunner to the *Garret* decision, the Court restricted "medical services" even further by holding that health services provided by a physician are excluded from "related services."[15] However, services provided by a nurse or other non-physician health care professional are included as "related services."[16] Affirming and clarifying *Tatro*, the Supreme Court in *Garret* unreasonably held that a school district must supply a one-on-one nurse to provide extensive and intense health services to children with life-threatening conditions so children with disabilities can receive a public education.[17]

This Note will first examine the foundation, rationale and relevant statutory regulations of the IDEA. This section will also study the case history leading to the initiation of the IDEA. Section two will review the case history prior to *Garret* and the problems raised by a "provider-based" rule. It will distinguish "related services" from "medical services" and clarify why the extent and nature of the services must be considered. This Note will evaluate Congress's intent and the purpose of the IDEA regarding the responsibilities of school districts as reasonable, fair and not excessively burdensome. In the third section, the *Garret* decision will be thoroughly assessed and critically analyzed.

This Note concludes that the extent and nature of the services provided must be balanced with a reasonably anticipated financial and educational

9. *See infra* notes 123, 154-55 and accompanying text.

10. *See* Neely v. Rutherford County Sch., 68 F.3d 965 (6th Cir. 1995); *see also* Detsel v. Bd. of Educ. of Auburn Enlarged City Sch. Dist., 820 F.2d 587 (2nd Cir. 1987). *See* Granite Sch. Dist. v. Shannon M., 787 F. Supp. 1020 (D. Utah 1992). *See* Bevin H. v. Wright, 666 F. Supp. 71 (W.D. Pa. 1987). *See also* Cedar Rapids Cmty. Sch. Dist. v. Garrett, 119 S. Ct. 992 (1999) (abrogating *Neely* and *Detsel*).

11. *See infra* notes 118, 123, 149, 153 and accompanying text.

12. *See infra* notes 218-21 and accompanying text.

13. 20 U.S.C. § 1401(a)(17) (1994).

14. 468 U.S. 883, 883 (1984) (holding that children with disabilities deserve a public education and "related services," but not "medical services").

15. *Id.* at 892.

16. *Id.*

17. *See infra* note 220 and accompanying text.

commitment of a school district to determine whether full-time nursing services are feasible.[18] A bright line "provider-based" rule is inadequate and discounts the purpose of the IDEA to educate and attend to "medically fragile" students when appropriate.[19]

HISTORY

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

A. Origin of the IDEA and Congress's Intent

Congress first addressed the issue of educating children with disabilities in 1966.[20] It revised the "Elementary and Secondary Education Act of 1965 to establish a grant program 'for the purpose of assisting the states in the initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children.'"[21] This program was repealed in 1970 and replaced by the Education of the Handicapped Act (EHA).[22] While both programs were implemented to encourage states to develop financial resources for education, neither Act proposed specific guidelines for the utilization of federal money.[23]

In 1974, Congress granted large sums of federal money to the states to enroll and educate children with handicaps in the public school system.[24] The following year Congress passed the EAHCA to establish state education programs supported by federal funds.[25] Then, in 1991, Congress amended the EAHCA by substituting and codifying the registered name to the IDEA.[26]

In order for a state to qualify for federal financial assistance under the IDEA, it must demonstrate that students with handicaps are afforded a "free appropriate public education."[27] States must also devise an educational policy in a state plan to be approved by the Secretary of Education.[28] This policy must identify and detail the curriculum, services and objectives that will be

18. *See infra* notes 130 and 168 and accompanying text.

19. *See infra* notes 147, 154-55 and 158 and accompanying text.

20. Board of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley, 458 U.S. 176, 179 (1982) (citing Elementary and Secondary Education Act of 1965, 89 Pub. L. No. 750, § 161, 80 Stat. 1204 (1966)).

21. *Id.*; *Rowley*, 458 U.S. at 179-80 (quoting 89 Pub. L. No. 750, § 161, 80 Stat. 1204).

22. Education of the Handicapped Act, 91 Pub. L. No. 230, 84 Stat. 175 (1970).

23. *Rowley,* 458 U.S. at 180.

24. *Id*. (citing 93 Pub. L. 380, 88 Stat. 579, 583 (1974) (allowing Congress an interim of one year "to study what if any additional Federal assistance [was] required to enable the states to meet the needs of handicapped children").

25. *Rowley*, 458 U.S. at 180.

26. 102 Pub. L. No. 119, § 25(b).

27. 20 U.S.C. § 1412(1) (1994); *Rowley*, 458 U.S. at 180-81.

28. 20 U.S.C. § 1412(1) (1994); *Rowley*, 458 U.S. at 181.

implemented and accomplished to improve special education.[29] The policy must also give priority "first with respect to children with disabilities who are not receiving an education, and second with respect to children with disabilities, within each disability category, with the most severe disabilities who are receiving an inadequate education. . . ."[30] Congress stated in the statute that it is in the national interest to provide financial resources to the states to ensure that local schools meet the educational needs of children with disabilities.[31]

B. Landmark Cases for the Initiation of the IDEA and the Provision of "Related Services": PARC and Mills

In the early 1970's, two district court cases served as milestones to Congress's enactment of the IDEA.[32] The first, *Pennsylvania Ass'n. for Retarded Children v. Commonwealth of Pennsylvania,*[33] determined that school-aged children with disabilities were entitled to free public education and training.[34] The court adopted a consent agreement, written by the parties, obligating the Commonwealth of Pennsylvania to provide access to education and training for children with mental and physical disabilities suitable to each child's capacities.[35] Under this consent agreement, school districts had to provide notice of the educational opportunity and plan to name, locate and evaluate all children with handicaps that were eligible for public education.[36]

Further, the court required the Secretary of Education to assure that an Individualized Education Program (IEP) appropriate to each child's capability was in place.[37] The court also required that the Secretary be informed of the educational status of each child with mental handicaps.[38] Because Congress's intent was to integrate these students into the public school system, the court

29. *Rowley*, 458 U.S. at 181 (citing 20 U.S.C. §§ 1412, 1413 (1994)).

30. 20 U.S.C. § 1412(3) (1994); *Rowley*, 458 U.S. at 181.

31. 20 U.S.C. § 1400(b)(9) (1994).

32. *Rowley*, 458 U.S. at 180 n.2 (identifying Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866 (D.C. 1972) and Pennsylvania Ass'n. for Retarded Children v. Commonwealth of Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) [hereinafter *PARC*] as the most prominent cases in the endorsement of the IDEA).

33. 343 F. Supp. 279 (E.D. Pa. 1972).

34. *PARC*, 343 F. Supp. at 302 (enjoining the defendants from applying the Public School Code of 1949, 24 PA. STAT. ANN. §§ 13-1304, 1330(2), 13-1371(1) and 13-1375, to postpone, deny, or terminate the education or training of mentally handicapped students).

35. *Id.* at 306-07 (explaining in Paragraphs 6 and 7 of the consent agreement that the Commonwealth of Pennsylvania assumed this responsibility); *see Rowley*, 458 U.S. at 192.

36. *PARC*, 343 F.Supp. at 314 (pursuing handicapped children by television and radio broadcasting, newspaper publishings, school records, and hospital or other related facilities listings).

37. *Id.* at 313.

38. *Id*. at 313-14.

declared homebound instruction to be the least favorable alternative to primary public education.[39] Rather, the court opined that primary public education benefits a child with handicaps through efficient and thorough classroom instruction and social learning. The court relied on expert testimony to conclude that people with mental handicaps are able to attain self-sufficiency and aptitude through proper training and instruction.[40]

The second case, *Mills v. Board of Education of District of Columbia*,[41] held that children with handicaps could not be entirely excluded from publicly supported education.[42] *Mills* required equity in funding for programs and a balance in importance of services for students with and without disabilities alike.[43] The seven minor plaintiffs were alleged to have "behavioral problems," mental retardation and physical abnormalities.[44] These disabilities led to their expulsion or denial from public schools.[45] The court enjoined the school district from eliminating these students and ordered that the students must be afforded due process and a hearing before a hearing officer prior to suspension, expulsion, denial or transfer from public education.[46]

The court required the school to devise a plan detailing its efforts to develop educational assessments, courses, goals and additional services for these "exceptional" students.[47] The court further determined that the Board of Education was responsible for providing the opportunity and facility for this

39. *Id*. at 313-14 (stating that home instruction shall only occur when it is not feasible to educate in the public or special schools and commands re-evaluation every three months to ensure that it is most appropriate to the child's capacity).

40. *Id.* at 296 (stating that achieving self-care and social independence is highly probable). *PARC*, 343 F. Supp. at 296 n.50 (citing DR. AUBREY J. YATES, BEHAVIOR THERAPY 234 (1970)).

41. 348 F. Supp. 866 (D.D.C. 1972).

42. *Id.* at 878 (stating that providing adequate educational alternatives, a prior hearing and periodic re-evaluation of the handicapped student, is essential in the absence of public education); *see* Kelly S. Thompson, *Limits on the Ability to Discipline Disabled School Children: Do the 1997 Amendments to the IDEA Go Far Enough*, 32 IND. L. REV. 565, 567 (1999).

43. Mills v. Board of Educ. of D.C., 348 F. Supp. 866, 876 (D.C. 1972) (stating that failing to retain these students due to lack of financial resources is inexcusable).

44. *Id*. at 869-70; *see also* Thompson, *supra* note 42, at 567.

45. *Mills*, 348 F. Supp. at 869-70 (promising placement in the public school system, the school district again denied admittance and divested tuition grants for private special education).

46. *Id*. at 880-81 (recognizing that disciplinary actions are permitted up to two days without first notifying the student's parent or guardian); *see also* Thompson, *supra* note 42, at 567 (stating that violating this regulation infringes upon constitutional guarantees of equal protection and due process).

47. *Mills*, 348 F. Supp. at 879; Pennsylvania Ass'n. for Retarded Children v. Commonwealth of Pennsylvania, 343 F. Supp. 279, 310 (E.D. Pa. 1972) (defining "exceptional children" as "children of school age who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational facilities or services . . . .") (citing 24 PA. STAT. ANN. § 13-1371(1)).

teaching.[48] Additionally, the Board of Education was compelled to coordinate educational, vocational and recreational activities for individual and civic purposes.[49] In reaching these conclusions, the court relied on the Supreme Court decision in *Brown v. Board of Education:*[50]

> Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[51]

C. IDEA Statutory Principles, Policies and Definitions

The IDEA targets children with disabilities who are between the ages of three and twenty-one.[52] "Children with disabilities" includes children challenged with "orthopedic impairments . . . [and] other health impairments . . .; who, by reason thereof, need special education and related services."[53] Special education is characterized as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability . . . ."[54]

The phrase "related services" is defined as:

> transportation, and such developmental, corrective, and other supportive services (including . . . physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical 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, and includes the early identification and assessment of disabling conditions in children.[55]

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48. *Mills*, 348 F. Supp. at 876 The Board is ultimately responsible for "maximiz[ing] coordination of educational and other municipal programs and services in achieving the most effective educational system and utilization of educational facilities." *Id.*

49. *Id*. at 876-77 (using these services and resources to promote the prominence of the school in the community).

50. 347 U.S. 483 (1954).

51. *Mills*, 348 F. Supp. at 874-75 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

52. *Public Law 94-142: The Individuals with Disabilities Education Act, What is IDEA?*, *at* http://www.granite.k12.ut.us/Special_Ed/p194142.html (last visited Oct. 3, 1999).

53. 20 U.S.C. § 1401(a)(1)(A)(i)-(ii) (1994).

54. *Id*. at § 1401(a)(16), (a)(16)(A)-(B) (1994) (including classroom, homebound, hospital, institution, and physical education).

55. *Id*. at § 1401(a)(17) (1994); *see* 34 C.F.R. § 300.16(a) (1998).

Within the "related services" provision is the "medical services" exemption.[56] The term "medical services" means "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services."[57] Importantly, "medical services" only include those services that are provided by a licensed physician, not services provided by a nurse or other professional health care provider.[58]

In addition, the term "school health services" refers to "services provided by a qualified school nurse or other qualified person."[59] A student with a disability will qualify for a "free appropriate public education" if the provided services are "school health services" or "related services," but not when the services are "medical services."[60]

The expression "free appropriate public education" means "special education and related services that A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, . . . and D) are provided in conformity with the individualized education program . . . ."[61] The term "free" means that the education is provided without cost to the family.[62] While the term "appropriate" may include an out-of-district school or a private institution, "appropriate" does not necessarily mean the "best" education.[63] The student's "appropriate" educational needs are set forth in the IEP.[64]

An IEP is a written legal document that is specifically formulated to describe the curriculum and special services of each child with a disability.[65] An IEP is developed by a parent or guardian and a teacher, while one in an administrative position supervises the execution of the plan.[66] Congress requires that each IEP include:

> A) a statement of the present levels of educational performance of such child,
>
> B) a statement of annual goals, including short-term instructional objectives,

56. 20 U.S.C. § 1401(a)(17) (1994).

57. 34 C.F.R. § 300.16; *see also infra* note 203 and accompanying text.

58. *See also supra* notes 15-16 and accompanying text.

59. 34 C.F.R. § 300.16(b)(11) (1998); *see also infra* note 202 and accompanying text.

60. *See also infra* notes 219, 222-23, 240 and 242 and accompanying text.

61. 20 U.S.C. § 1401(a)(18)(A)-(D) (1994).

62. *See supra* note 61 and accompanying text.

63. *Id.*

64. *Id.*

65. 20 U.S.C. § 1401(a)(20) (1994); *see also Public Law 94-142: The Individuals with Disabilities Education Act, What is IDEA?*, *supra* note 52 (pledging to reach the educational needs, goals, and services the child requires).

66. 20 U.S.C. § 1401(a)(20); *see also Public Law 94-142: The Individuals with Disabilities Education Act, What is IDEA?*, *supra* note 52 (identifying the student and other people involved in the child's education when appropriate).

C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

D) a statement of the needed transition services[67] . . .,

E) the projected date for initiation and anticipated duration of such services, and

F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.[68]

When a parent or guardian is dissatisfied with the IEP, he or she is entitled to examine the records to inspect the child's educational development[69] and can obtain an evaluation of the student's academic performance.[70] If the IEP is unsatisfactory, then a complaint may be filed with a state, local, or intermediate educational agency.[71] Pending the decision of a local or intermediate hearing, a party may appeal to the state agency.[72]

An action to modify the IEP can be made after the administrative remedies provided by the IDEA have been exhausted.[73] The purpose of exhausting the administrative remedies is to allow the school district to utilize its educational proficiency to develop a special education curriculum and to compose a factual record.[74] An aggrieved party, who is denied the right to an appeal or who is still frustrated by the state agency decision, may bring a civil action in the federal district court or a state court of competent jurisdiction.[75]

D. Purpose of the IDEA

The IDEA resolves to establish a "free appropriate public education" program for students with disabilities on an individualized basis in the least

67. 20 U.S.C. § 1401(a)(19) (1994) (stating that transition services incorporate post-secondary education, vocational training, and independent living preparation, based on the individual student's needs).

68. 20 U.S.C. § 1401(a)(20)(A)-(F) (1994).

69. *Id*. at § 1415(b)(1)(A) (1994).

70. *Id*.

71. *Id*. at § 1415(i)(E).

72. *Id*. at § 1415(c).

73. Farmers Ins. Exch. v. South Lyon Cmty. Sch., 602 N.W.2d 588, 592-93 (Mich. Ct. App. 1999) (citing 20 U.S.C. § 1415).

74. Moubry v. Indep. Sch. Dist. No. 696 (Ely), 951 F. Supp. 867, 888 (D. Minn. 1996) (allowing the school district the opportunity to correct the educational program of the current IEP).

75. 20 U.S.C. § 1415(2) (1994) (stating that filing a complaint in the federal court is permitted, regardless of the amount in controversy).

restrictive environment.[76] It obligates a school district to sustain and evaluate the effort and success of such education.[77] The statute says that children with handicaps will receive "a free appropriate public education that emphasizes special education and related services designed to meet their unique needs . . . ."[78] Although "related services" are required by the IDEA, the statute does not expressly state that a school district must provide a one-on-one nurse or full-time individualized nursing services to children with disabilities.[79]

Each participating state must devise a plan to provide children with disabilities a full educational opportunity and "related services."[80] States must draft a comprehensive schedule for achieving this plan and explain the type and quantity of facilities, personnel and services that are needed throughout the State to accomplish the goals set therein.[81] Additionally, in order to effectuate the "free appropriate public education," the IDEA requires that students "in need of special education and related services [be] identified, located, and evaluated."[82]

Another purpose of the IDEA is to educate children with disabilities along with children without disabilities "to the maximum extent appropriate."[83] The IDEA, however, does not obligate public schools to "mainstream" children with disabilities or to maximize each child's learning potential.[84] Despite the "mainstreaming" preference, "the nature or severity of the disability [may be] such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . ."[85] The ability to learn and retain information differs for each student, and providing equal educational opportunities to children with disabilities is an "entirely unworkable standard requiring impossible measurements and comparisons."[86]

76. *Public Law 94-142: The Individuals with Disabilities Education Act*, *What is IDEA?, supra* note 52 (summarizing the basic tenants of the IDEA).

77. *Id*.

78. 20 U.S.C. § 1400(d)(1)(A) (Supp. IV 1998).

79. *Id.* at § 1401(22).

80. *Id*. at § 1412(a)(1)-(2).

81. *Id*. at § 1412(2)(A)(i)-(iii).

82. *Id*. at § 1412(a)(3)(A).

83. Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 181 (1982), 198-99.

84. *Id.* at 189 (stating that "[n]oticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children").

85. 20 U.S.C. § 1412(5)(B) (1994); *Rowley*, 458 U.S. at 181 n.4.

86. *Rowley*, 458 U.S. at 198 (noting that "furnishing handicapped children with only such services as are available to nonhandicapped [sic] children would in all probability fall short of the statutory requirement of 'free appropriate public education'; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go").

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

II. JUDICIAL INTERPRETATION OF THE IDEA

A. *Bright Line Physician/non-physician Test for "Related Services"*

In *Tatro*, an eight-year old girl suffered from spina bifida,[87] which impaired her speech and voluntary secretion of urine.[88] She required clean intermittent catherization[89] (CIC) from a school nurse, or other qualified individual, as a "supportive service" to stay in school.[90] The *Tatro* Court applied the statutory definition of "related services" to determine whether CIC is within the scope of the IDEA.[91] Because CIC is not specifically listed in the "related services" provision of the IDEA, the Court established a two-step test to aid it in its decision.[92]

First, the Court declared that it must decide if CIC was a "'supportive servic[e] . . . required to assist a handicapped child to benefit from special education'; and second, whether CIC is excluded from this definition as a 'medical servic[e].'"[93] If the CIC services did not meet the "related services" definition, or did meet the "related services" definition, but qualified as a "medical services" exemption, then the school district was relieved of the responsibility to provide a "free appropriate public education."[94] In order to minimize the burden of the school district from providing an array of health services, the Court noted several statutory limitations.[95] A school district was only obligated to provide "related services" if: 1) the child had disabilities and required special education, 2) the services were essential to the student's success in special education, and 3) the services were not performed by a licensed physician.[96]

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87. *Spina Bifida, at* http://members.tripod.com/~imaware/sb.html (last visited Oct. 25, 1999). Spina Bifida is a physical disability caused by a prenatal malformation of the spine in which the spinal column does not fasten together. *Id*.

88. Irving Indep. Sch. Dist. v. Tatro, 468 U.S. at 885.

89. *Id*.; Cincinatti Children's Hospital Medical Center, *Intermittent Catherization – Males (Clean Technique), at* http://www.chmcc.org/family/pep/pep2031.asp (last visited Jan. 14, 2000). CIC is a mechanism used to excrete urine from the bladder via a catheter. *Id*. CIC is a simple service requiring little training and can be performed in just a few minutes. *Tatro,* 468 U.S. at 885.

90. *Tatro,* 468 U.S. at 890-91, *aff'g* Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983).

91. *Id*. at 890.

92. 20 U.S.C. § 1401(22) (Supp. IV 1998); *Tatro*, 468 U.S. at 890.

93. *Tatro,* 468 U.S. at 890.

94. *See id.* at 895.

95. *Id*. at 894.

96. *Id.* at 894. "In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the Act." *Id.*

The Supreme Court found CIC to be a "related service" and that it fit the definition of a "school health service."[97] As a supportive service, CIC benefited the plaintiff and allowed her to attend public school and receive an appropriate education.[98] Because a licensed physician did not deliver CIC and the services were not beyond diagnostic or evaluative purposes, the Court did not regard CIC as falling under the "medical services" exclusion.[99] In reaching this conclusion, the Court relied on the statutory interpretation by the Secretary of Education that "medical services" provided by a physician or hospital are excludable, but not when the services are provided by a school nurse.[100] Thus, the Court did not consider CIC to be extrinsically burdensome. The Court stated that the Secretary's determination was reasonable even though the Court recognized that Congress spent practically no time or effort explaining the "medical services" exemption.[101]

Providing CIC at school tendered the plaintiff with "meaningful access" to public education and was no more demanding "than are services that enable the child to reach, enter, or exit the school."[102] Congress' desire when enacting the IDEA was to provide students with disabilities access to public education.[103] The IDEA does not require that school districts guarantee a particular level of learning or that the provision of "related services" will maximize a student's learning potential.[104]

Although the defendant in *Tatro* contested that CIC fell under the "medical services" exclusion regardless of the provider, the *Tatro* Court said that this exclusion was only intended to excuse school districts from excessively expensive and onerous services, such as those provided by a physician.[105] The Court evaluated services that are administered by a nurse to students without disabilities, but prescribed by a physician, as indicative and inclusive of the services to be provided to students with disabilities as well.[106] Thus, the Court said that CIC was not unlike or easily distinguishable from those services that are routinely provided to students without disabilities.[107]

97. *Id.* at 892 (citing 34 C.F.R. § 300.13(a) (1983), *revised by* 34 C.F.R. § 300.16(b)(11) (1998)).

98. *Tatro*, 468 U.S. at 890.

99. *Id*. at 892, 895.

100. *Id.* at 892-93.

101. *Id.* at 892.

102. *Id*. at 891.

103. Board of Educ. of the Hendrick Hudson Cent. Schl. Dist. v. Rowley, 458 U.S. 176, 191 (1982).

104. *Id.* at 200.

105. *Tatro*, 469 U.S. at 892 (specifying that children with extreme medical conditions are entitled to special education through homebound or hospital instruction).

106. *Id*. at 893-94 (extending special services to non-handicapped students, such as emergency injections, is analogous to the provision of CIC for handicapped students).

107. *Id.* at 893-94.

School nurses are an integral element of the educational system; it is reasonable to infer that Congress did not intend the "medical services" exclusion to apply to the services nurses provide.[108] In contrast, the services provided by a physician or hospital are significantly more expensive and may be beyond the competence of a school nurse.[109] As a result, the *Tatro* Court created a bright-line "provider-based" rule; those services that are provided by a physician, other than for diagnosis and evaluation, are excluded from "related services" as a "medical services" exemption.[110]

B. *The Expansion of the Tatro Rule*

1. Full-Time Nursing Services are not "Related Services": They Create an Undue Burden and Financial Encumbrance on a School District

Courts have rejected *Tatro's* "physician-based" rule as determinative of whether health-care services qualify as related or medical services.[111] Congressional intent was interpreted more broadly and a reasonableness standard was initiated to replace the "physician-based" rule. These cases stressed the importance of fairness and practicality when balancing the inherent burdens on the school district with the uncertain benefits to the student.[112]

Since *Tatro*, numerous cases involving more extensive and intense health related services have come before the lower courts. In *Bevin v. Wright*,[113] the seven-year old plaintiff suffered from severe mental retardation, seizures, blindness and extreme difficulty in breathing.[114] Because of these disabilities, it was necessary for a nurse to regularly suction Bevin's tracheostomy tube, provide a constant source of oxygen and stay with Bevin throughout the day to prevent injury.[115] In contrast to students who required intermittent treatment,

108. *Id.* at 893 (nursing services are not a significant burden on a school district).

109. *Id.* The court noted that medical services performed by a licensed physician "serve other purposes." *Tatro,* 468 U.S. at 892 n.10.

110. *Id*. at 891-95; Cedar Rapids Community School District v. Garret, 106 F.3d 822, 825 (8th Cir. 1997).

111. *See, e.g.*, Clovis Unified Sch. Dist. v. California Office of Admin. Hearings, 903 F.2d 635, 643 (9th Cir. 1990).

112. *See infra* note 130 and accompanying text.

113. 666 F. Supp. 71 (W.D. Pa. 1987).

114. *Id.* at 72. Bronchopulmonary dysplasia is a chronic lung disease incident to infants with lung infection or resulting from mechanical respiration because of premature birth. *Brochopulmonary Dysplasia, at* http://www2.medsch.wisc.edu/childrenhosp/parents_of_preemies/bpd.html (last visited Oct. 25, 1999). Common symptoms include wheezing, rapid breathing and slowed growth. *Id.*

115. *Bevin*, 666 F.Supp. at 73. In order to prevent serious injury to Bevin in case a mucous plug blocks her tracheostomy tube, she must get immediate nursing attention within thirty seconds. *Id*.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

like the plaintiff in *Tatro*, Bevin needed constant care and attention as the "private duty" of a health care provider.[116] The plaintiff contended that the type of health-care provider was conclusive and that the extent and nature of the services provided was irrelevant.[117]

The court found that the chronic health services Bevin required were expensive, comprehensive and time-consuming.[118] Bevin's services did not comport with the exact terms of the "medical services" definition, nor did they qualify as simple school health services.[119] Even though a physician did not provide these services, their exclusion corresponded with the general spirit of the IDEA.[120]

The court recognized that states receive the benefit of federal money and may be required to provide special services or acquire additional personnel.[121] The plaintiffs argued that "[t]he determination of what is a medical service and therefore not the obligation of the school district is based solely on the status of the health care provider. The nature and extent of the services are irrelevant."[122] However, the court held that school districts were not required to provide extensive nursing services that are so intensive and costly that they more closely resemble the excluded "medical services" than the included "related services."[123]

The *Bevin* court relied on the Third Circuit case, *Tokarcik v. Forest Hills School District*,[124] for the proposition that time and money are significant criterion to be considered in the determination of whether services are includable "related services" or excludable "medical services."[125] The *Bevin* court noted that *Tokarcik* did not restrict its analysis to the professional status of the health care provider.[126] The *Bevin* court followed this line of reasoning to determine that the nursing services Bevin required were outside the spirit of the IDEA.[127] The court concluded that full-time nursing services are beyond

116. *Id*. at 75. "Because of this need for constant vigilance, a school nurse or any other qualified person with responsibility for other children within the school could not safely care for Bevin." *Id.*

117. *Id.* at 74.

118. *Bevin,* 666 F. Supp. at 74-5. Life-threatening prospect is far beyond the burden the court will delegate to the school district, however, it is not the intent of the court that only inexpensive, simple services be provided. *Id.*

119. *Id*.

120. *Id*.

121. *Id*. at 76.

122. *Id.* at 74.

123. *Bevin*, 666 F. Supp. at 76.

124. 665 F.2d 443 (3rd Cir. 1981).

125. *Bevin,* 666 F. Supp. at 75 (citing Tokarcik v. Forest Hills Sch. Dist., 663 F.2d 443, 456 (3rd Cir. 1981)).

126. *Id.*

127. *Id*.

the "related services" provision and are more in the nature of "medical services."[128]

The *Bevin* court referred to *Tokarcik* to emphasize that "related services" include what is required within reason to make an educational setting suitable for a child with disabilities to benefit from it.[129] A standard of reasonableness and fair balance in assessing the adequacy of the services and the educational environment is the more proper criteria.[130] Thus, Bevin's required services were representative of the intended "medical services" exclusion enumerated in the IDEA, as opposed to the incorporated "related services" which the IDEA imposes upon school districts.[131]

In a similar case, the court in *Granite Sch. Dist. v. Shannon*[132] denied Shannon's motion to affirm the judgment of the State Review Panel and granted Granite's motion for summary judgment.[133] Shannon, a kindergarten student, suffered from congenital neuromuscular disorder[134] and severe scoliosis,[135] and was thus confined to a motorized wheelchair.[136]

Shannon also endured tracheostomy suctioning, feeding through a nasogastric tube[137] and manually assisted respiration when her inhalation of oxygen was restricted.[138] Shannon requested full-time nursing care as a "related service" under the IDEA as part of her "free appropriate public

128. *Id.* at 75-6.

129. *Id.* at 75. "The Court proceeded not by ascertaining the status of the health care provider as plaintiffs urge here, but on a careful review of the nature and extent of the services required by the child and their impact on the school district." *Id.* (referring to Department of Educ. v. Katherine, 727 F.2d 809, 813 (9th Cir. 1983)).

130. *Bevin*, 666 F. Supp. at 75 (examining the cost, treatment, time involved, existing school health care providers, and the reasonableness of the requested services is more acceptable than limiting the inquiry to the professional capacity of the provider).

131. *Id*. at 76.

132. 787 F. Supp. 1020 (D. Utah 1992).

133. Granite Sch. Dist. v. Shannon, 787 F. Supp. at 1021, 1030.

134. Compton's Encyclopedia Online, *Neuromuscular Disease* (Visited Oct. 25, 1999) <http://www.optonline.com/comptons/ceo/26754_Q.html>. Neuromuscular disorders can transpire from damage to the spinal cord and can weaken muscles to the point of inability or atrophy. *Id*.

135. KidsHealth.org, *Straighten Up! Scoliosis Can Be Treated, at* http://kidshealth.org/kid/normal/scolio.html (last visited Oct. 25, 1999); *What is Scoliosis, at* http://www.medhelp.org/lib.scolio.htm (last visited Oct. 25, 1999). Scoliosis is an abnormal "S-shaped" curve in the spine which may cause body disfigurement, asymmetry, back pain, or correlate to heart failure. *Id*.

136. *Shannon*, 787 F. Supp. at 1022.

137. *While You Are Waiting, ICU Equipment: Nasogastric Tube, at* http://www.waiting.com/nasogastric.html (last visited Oct. 25, 1999). A nasogastric tube is a clear plastic tube inserted through the nose, down the esophagus, and into the stomach and is used for feeding or cleansing. *Id*.

138. *Shannon*, 787 F. Supp. at 1022. Occasioning a heart attack, Shannon is not to be given cardio-pulmonary resuscitation (CPR). *Id.*

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

education."[139] The court distinguished Shannon's care from the care delivered in *Tatro* by focusing on the continuous duty of a school nurse to provide immediate and life-preserving treatment.[140]

Additionally, the court found that the extensive nursing services Shannon required fell within the "medical services" exclusion of the IDEA.[141] The court expressly stated that the *Tatro* "physician-based" rule was a "narrow construction of the medical services exclusion of the Act."[142] The court stressed the significance of the differences in the levels of care required in *Tatro* to the more extensive services required in the present case.[143] The court concluded that Granite was not required to provide Shannon with full-time nursing care as a supportive or related service under the IDEA.[144]

Further, the court found that Shannon received an educational benefit from her homebound instruction.[145] Though recognizing that Shannon would receive more benefits from attending a public school with constant vigilance, the *Granite* court concluded that the IDEA does not require schools to provide every educational opportunity to completely dependent students suffering from multiple or severe disabilities.[146] Rather, the IDEA allows students to be removed from the classroom when supplementary aids and services are inadequate to facilitate satisfactory learning.[147] The court was of the opinion that "mainstreaming" or educating Shannon with other students without disabilities could not be achieved satisfactorily.[148] Shannon's IEP bestowed sufficient services to present her with educational opportunity and benefits at home without burdening the school functionally or financially.[149]

In *Detsel v. Bd. of Educ. of the Auburn Enlarged City Sch. Dist.*,[150] the plaintiff, a seven-year old elementary school girl, required respirator support, a

139. *Id.* at 1022-23.

140. *Id*. at 1029-30. "The harsh reality of Shannon's case is that she requires the full-time care of at least a licensed practical nurse because of the constant possibility of a mucous plug in her tracheostomy tube . . . . Without the appropriate care, Shannon's disability becomes life threatening." *Id.*

141. *Id*.

142. *Id.* at 1030.

143. *Shannon,* 787 F. Supp. at 1030.

144. *Id.*

145. *Id*. at 1028-29.

146. *Id.* at 1023, 1025, 1029 (relying on Thomas v. Cincinatti Bd. Of Educ., 918 F.2d 618 (6th Cir. 1990)) (reasoning that the court was not deciding if placement in public education would be more advantageous, but that the revised IEP provided an education benefit and that the school district satisfied the IDEA substantive provisions).

147. *Id*. at 1023 (citing 20 U.S.C. § 1412(a)(5)(A) (Supp. IV 1998)). *See also supra* note 87 and accompanying text.

148. *Shannon,* 787 F. Supp. at 1030.

149. *Id.* at 1029 (costing Granite about $30,000 a year to provide Shannon constant nursing care and detracting from other school programs).

150. 820 F.2d 587 (2nd Cir. 1987), *aff'g* 637 F. Supp. 1022 (N.D. N.Y. 1986).

continuous supply of oxygen and constant therapeutic attention.[151] The plaintiff emphasized the status and degree of the person performing the duty and attempted to minimize the extent to which the services were provided.[152] The district court recited the statement of the Secretary of Education in *Tatro*, emphasizing that section 1401(a)(17) of the IDEA was "intended to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of [a nurse's] competence."[153] Furthermore, the court invoked the principle from *Tatro* that not all health services are required, regardless of their magnitude, if performed by another health-care professional as opposed to a physician.[154]

The extreme nursing services in the instant case imposed a significant burden on the defendant and the IDEA does not mandate a school district to provide constant, expensive and intense in-school health care.[155] Like *Bevin*, the services in *Detsel* did not conform to the terms of the "medical services" exclusion, nor were they simple examinations.[156] Although the services Detsel required did not meet the physician requisite, the burdensome full-time nursing services were deemed to be outside the "related services" provision of the IDEA and more akin to the "medical services" exclusion.[157] As seen from this interpretation, *Tatro's* narrow evaluation of a provider-based analysis, "as the sole criterion for determining when services fall under the medical exclusion from liability," is inadequate.[158]

In another case, *Neely v. Rutherford County Sch.*,[159] the court reversed the district court decision and held that certain requested services fell within the "medical services" exception of the "related services" component of the IDEA.[160] Neely, a seven-year-old child who suffered from breathing complications,[161] demanded extensive attention and instant availability in case

151. *Detsel*, 637 F. Supp. at 1023.

152. *Id.* at 1026.

153. *Id.*; *see also supra* note 109 and accompanying text.

154. *Detsel*, 637 F. Supp. at 1027.

155. *Id.* at 1027 (noting that "[s]imple school nursing services do not similarly burden the schools . . . [and] the *Tatro* decision does not require the provision of all health services, regardless of their magnitude, if provided by one other than a physician").

156. *Id.*

157. *Id.*

158. *Shannon,* 787 F. Supp. at 1026.

159. 68 F.3d 965, 972 (6th Cir. 1995).

160. Neely v. Rutherford County Sch., 68 F.3d 965, 972 (6th Cir. 1995).

161. Congenital Central Hypoventilation Syndrome, *Congenital Central Hypoventilation Syndrome: Central Hypoventilation Syndrome: Ondine's, at* http://www.cafamily.org.uk/Direct/c60.html (last visited Jan. 14, 2000). Central Hypoventilation Syndrome is a condition where a child cannot adequately breathe for him or herself and requires support from a ventilator attached to a tracheostomy. *Id.*

of an emergency situation.[162] Additionally, she required a tracheostomy tube inserted into her stoma[163] to aid her breathing, as well as regular suctioning of her mouth, nose and throat to clear mucous blockage.[164] The tracheostomy tube could easily be dislodged and Neely could lose consciousness or even die if respiration was not restarted promptly.[165] Because Neely could not dispense her own tracheostomy care, she required a competent and well-trained health provider to administer the appropriate services.[166]

The court determined that such services were "medical in nature," and interpreted the *Tatro* decision to alleviate the obligation of providing every such service.[167] Hiring a school nurse to provide extensive medical services specifically for Neely distinguished the instant case from *Tatro.*[168] Rejecting the traditional "provider-based" interpretation from *Tatro*, the *Neely* court expanded the analysis of the care involved to include the extent and nature of the services provided, regardless of the title or income of the actual provider.[169] The court also notably considered the inherent risk and liability of the school district in providing such controversial services.[170] Granting deference to the *Bevin* decision, the court in *Neely* agreed that it was the "private duty" component of Neely's necessary health care that made the services intrinsically burdensome, and therefore within the "medical services" exemption of "related services."[171]

2. In Accordance with Tatro: "Related Services" Include Full-Time Nursing Services

In *Morton Community Unit Sch. Dist. No. 709 v. J.M.*,[172] the court affirmed a district court holding that J.M. was entitled to a full-time nurse as a "related

162. *Neely*, 68 F.3d at 967.

163. *MedicineNet.com, Smart Medicine, at* http://www.medicinenet.com/Script/Main/Art.asp?li=MNI&d=28&ArticleKey=5559 (last visited Aug. 2, 2000). A stoma is "[a]n opening into the body from the outside created by a surgeon." *Id.*

164. *Neely*, 68 F.3d at 967. Suctioning is done using a mechanical device and secretion obstruction varies with the seasons and her health. *Id.*

165. *Id.* Coughing or simple clothing adjustments can dislodge the tracheostomy tube.

166. *Id.* Training must be sufficient to prevent panic in emergency situations and provide care with little margin of error.

167. *Id.* at 971 (resolving that *Tatro* does not require school districts "to provide every service which is medical in nature").

168. *Neely*, 68 F.3d at 971.

169. *Id*. at 970-71 (allowing such practice so long as the person possesses the requisite licensing and training); *see also* Max M. v. Thompson, 592 F. Supp. 1437, 1444 (N.D. Ill. 1984) (noting that the "restrictions imposed by Congress in section 1401(17) were intended to limit the nature of the services required rather than the personnel who may provide the service").

170. *Neely*, 68 F.3d at 971.

171. *Id.* at 972-73; *see also supra* note 116 and accompanying text.

172. 152 F.3d 583 (7th Cir. 1998), *cert. denied,* 119 S.Ct. 1140 (1999).

service" of his special education program.[173] J.M. was regarded as "medically fragile" and required invariable attention by an attendant to aid and observe his respiration, lung and throat congestion and mobility.[174] The court grappled with distinguishing the definition of "medical services" as difficult to distinguish between "related services of a medical nature that are covered by the IDEA and medical services that are not covered."[175]

The court concluded that "[c]atherization is obviously a medical service, so after *Tatro* we know that the term 'medical services' in the statute and regulation is not to be read literally."[176] Further, the court acknowledged that restricting the "medical services" definition to only those services provided by a physician would be illogical and unreasonable.[177] Finally, the court reasoned that while the IDEA does not expressly elicit an undue burden defense, one may imply such a defense from "the statutory concepts of an 'appropriate' education and 'related' services."[178] After this discussion, however, the appellate court retreated to the judicial findings and judgment of the district court, and merely recognized the indistinct line separating supplementary educational services from medical interventions.[179]

CEDAR RAPIDS COMMUNITY SCH. DIST. V. GARRET

I. FACTUAL BACKGROUND

In 1987, at the age of four, Garret's spinal column was severed in a tragic motorcycle accident leaving him paralyzed and ventilator dependant.[180] As a result of the accident, Garret required numerous procedures to tolerate his debilitating condition, including:

> urinary bladder catheterization about once a day, suctioning of his tracheostomy[181] as needed, food and drink on a regular schedule,

173. Morton Cmty. Unit Sch. Dist. No. 709 v. J.M., 152 F.3d 583, 585 (7th Cir. 1998); Allan G. Osborne, Jr., Comment, *Supreme Court Rules That Schools Must Provide Full-Time Nursing Services for Medically Fragile Students*, 136 EDUC. L. REP. 1 (1999).

174. *J.M.*, 152 F.3d at 587.

175. *Id.* at 587.

176. *Id*.

177. *Id.*

178. *J.M.*, 152 F.3d at 586.

179. *Id.* at 587-88.

180. Cedar Rapids Cmty. Sch. Dist. v. Garret, 119 S.Ct. 992, 995 (1999).

181. AARON'S TRACHEOSTOMY PAGE, *What is Tracheostomy, at* http://www.twinenterprises.com/trach/what.htm (last visited Oct. 25, 1999). Tracheostomy is an opening into the windpipe in the throat, called a stoma. *Id.* Breathing is accomplished through a tube inserted into the stoma. *Id.*; Aaron's Tracheostomy Page, *Suctioning a Tracheostomy, at* http://www.twinendterprises.com/trach/suction.htm (last visited Oct. 25, 1999). Suctioning of the tracheostomy is done to remove mucus to make breathing easier. *Id.*

> repositioning, ambu bag[182] administration[183] if the ventilator malfunctions, ventilator setting checks, observation for respiratory distress[184] or autonomic hyperreflexia, [185] blood pressure monitoring and bowel [disimpaction][186] in cases of autonomic hyperreflexia.[187]

For individuals suffering from severe spinal cord injuries like Garret, excessive activity of the autonomic nervous system,[188] such as an overfull bladder, could suddenly lead to autonomic hyperreflexia.[189] In these emergency situations, the lack of nerve impulses to the brain could cause the blood pressure to rise uncontrollably and result in spasm, stroke and possibly even death.[190]

In addition, Garret is entirely dependent on his ventilator, which electrically sustains his breathing.[191] In the event of a malfunction or maintenance situation, manual pumping of an air bag attached to the ventilator is essential.[192] This process is known as ambu-bagging.[193] Fortunately, Garret

182. *Medspeak-The ER Dictionary, at* http://www.knfpub.com/axe/er/medical.html#b (last visited July 23, 2000). An ambu bag is a "handheld squeeze bag attached to a face mask." *Id.*

183. Neely v. Rutherford County Sch., 68 F.3d 965, 967 (6th Cir. 1995). Controlled by manual operation, "an ambu bag is a device that artificially pumps air into the lungs." *Id*.

184. *Aaron's Tracheostomy Page*, *Tracheostomy Complications: Symptoms of Respiratory Distress, at* http:www.twinenterprises.com/trach/complica.htm (visited Oct. 25, 1999). Respiratory distress indicates difficulty in breathing and can also signify an increased heart rate or respiration rate. *Id*.

185. *RehabTeamSite*, *Other Complications of Spinal Cord Injury: Automatic Dysreflexia (Hyperreflexia), at* http://calder.med.miami.edu/pointis/automatic.html (last visited Sept. 27, 1999). Autonomic dysreflexia (hyperreflexia) occurs when an irritating stimuli is introduced to the body below the level of the spinal cord injury. *Id.* Nerve impulses are blocked at the site of the spinal cord injury and this causes increased activity of the sympathetic portion of the autonomic nervous system. *Id.* The blood pressure begins to rise and the brain receives impulses from nerve receptors in the heart. *Id.* The heartbeat slows down, but the blood pressure cannot be controlled due to the lesion in the spinal cord. *Id.* Spinal cord injuries that are most susceptible to autonomic hyperrflexia are those which occur at a Thoracic 5 level or above. *Id.*

186. *Medspeak, at* http://www.knfpub.com/axe/er/medical.html#b (last visited Oct. 25, 2000). Bowel disimpaction is the "manual removal of impacted fecal matter from a patient's rectum." *Id.*

187. Cedar Rapids Community Sch. Dist. v. Garret, 106 F.3d 822, 823 (8th Cir. 1997); *see also Garret*, 119 S. Ct. at 995 n.3.

188. *Femmer—The Autonomic Nervous System: The Autonomic Nervous System, at* http://deu.cctt.org/content/Femmer/Brian/AutonomicNervousSystem/AutonomicNervousSystem.htm (last visited Oct. 25, 1999). The Autonomic Nervous System regulates involuntary muscles and involuntary body processes through the complementary sympathetic and parasympathetic nervous systems. *Id.*

189. *RehabTeamSite, Other Complications of Spinal Cord Injury: Automatic Dysreflexia (Hyperreflexia), supra* note 185.

190. *Id.*

191. *Garret*, 119 S. Ct. at 995 n.2 (citing the A.L.J., App. to Pet. for Cert. 19a).

192. *Id.*

has not recurrently experienced autonomic hyperreflexia or a lack of oxygen in the past few years.[194]

Garret operates a motorized wheelchair through "a puff and suck straw," communicates orally and is mentally unaffected by his condition.[195] Although he is successful academically, he requires a personal attendant to care for his continuous health care needs throughout the school day.[196] In the fall of 1988, Garret began kindergarten and his aunt served as his attendant.[197] For the next four years, Garret's family employed a licensed practical nurse to provide one-on-one care and continuous supervision while Garret was in school.[198] When Garret reached the fifth grade, his mother requested that the Cedar Rapids Community School District (District) accept financial responsibility for Garret's vital health care services.[199] The District refused, denying that it had the responsibility to provide such intense and extensive services.[200]

II. THE PROCEDURAL HISTORY THAT LED *GARRET* TO THE SUPREME COURT

Subsequent to a hearing before the Iowa Department of Education, an Administrative Law Judge (ALJ) held that under the IDEA, the District was financially responsible for all of the services Garret required.[201] The ALJ relied upon 34 C.F.R. §§ 300.16(a), (b)(4) and (b)(11) to distinguish "'school health services,' which are provided by a 'qualified school nurse or other qualified person,' and 'medical services,' which are provided by a licensed physician."[202] This distinction, according to the ALJ, was not determined by " 'the title of the person providing the service,' but instead, the 'medical services' exclusion was limited to services that are 'in the special training, knowledge, and judgment of a physician to carry out.'"[203]

The District appealed this decision to the United States District Court for the Northern District of Iowa.[204] That court supported the ALJ's decision and granted summary judgment in favor of Garret.[205] Dissatisfied with this

193. *Medspeak, supra* note 186. "Bagging" is defined as the "manual respiration for a patient having breathing trouble that uses a handheld squeeze bag attached to a face mask." *Id.*

194. *Garret*, 119 S. Ct. at 995 n.3, (citing the A.L.J., App. to Pet. for Cert. 20a) (discussing the services Garret requires throughout the day).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id*. at 995-96.

199. *Garret*, 119 S. Ct. at 996.

200. *Id.*

201. *Id*.

202. *Id.* (quoting 34 C.F.R. §§ 300.16(a), (b)(4), (b)(11)); 20 U.S.C. § 1401(a)(17) (1994).

203. *Garret*, 119 S. Ct. at 996 (quoting App. to Pet. for Cert. 51(a)).

204. *Id.*

205. *Id.*

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

decision, the District appealed to the Eighth Circuit Court of Appeals.[206] Following the Supreme Court holding in *Tatro*, the Eighth Circuit Court of Appeals affirmed summary judgment for Garret.[207]

The Court of Appeals utilized *Tatro's* two-step test to first determine if the services Garret required were defined as "supportive services," and second, whether such services went beyond the "medical services" exception of diagnosis and evaluation by a physician.[208] Hence, the court followed *Tatro's* bright line "physician-based" rule: "the services of a physician (other than for diagnostic and evaluation purposes) are subject to the 'medical services' exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not."[209]

In its analysis, the court reasoned that without the aforementioned health services, Garret would not be able to attend school or benefit from special education.[210] In sum, the court held that Garret's services qualified as "school health services" or "related services" because a physician did not provide them.[211] The court stated that without these services Garret would be denied the very purpose for which the IDEA was enacted: to provide students with disabilities the opportunity for an appropriate level of special education in the public school system.[212]

Unlike the ALJ, the court focused on the title of the provider, rather than the training, credence and comprehension involved in providing the services.[213] The court made it clear that it would not interpret the dicta of *Tatro* beyond the physician/non-physician test as several other circuits had already done.[214] Although the court gave some indication that it may not have agreed with *Tatro*, it acknowledged that it was bound by the decision of the Supreme Court.[215]

III. THE DECISION OF THE *GARRET* MAJORITY

The Supreme Court granted certiorari in *Garret* to resolve the divergence in the lower courts concerning the appropriate test to determine if health care services qualify as "related services" or "medical services."[216] In essence, the Court stressed that the proper analysis is *not* the nature and extent of the

206. *Id.*
207. Cedar Rapids Cmty. Sch. Dist. v. Garret, 106 F.3d 822, 824-25 (7th Cir. 1998).
208. *Id.*
209. *Id.* at 825.
210. *Id.*
211. *Id.*
212. Cedar Rapids Cmty. Sch. Dist. v. Garret, 119 S. Ct. 992, 994 (1999).
213. *Garret*, 106 F.3d at 825.
214. *Id.*
215. *Id.*
216. *Garret*, 119 S. Ct. at 997.

services at hand.[217] The seven-to-two decision reaffirmed *Tatro* and explicitly declared that the essential distinction is between the provider of "related services" and "medical services," not the degree to which these services are provided.[218] The Court held that medical services, however, cannot be provided by a physician beyond diagnostic and evaluative purposes.[219] In sum, the Court affirmed summary judgment for Garret and ascertained that health related services must be made available by a school district, even if it demands extensive and continuous care.[220]

The majority opinion, delivered by Justice Stevens, emphasized that the intent of Congress and the purpose of the IDEA is to provide students with disabilities the opportunity for meaningful access to a "free appropriate public education."[221] In relying on its holding in *Tatro*, the Court reiterated "that the Secretary of Education had reasonably determined that the term 'medical services' referred only to services that must be performed by a physician [or hospital], and not to school health services."[222] While the Court stressed that a school nurse or other qualified individual provides "related services," the IDEA was held to make no such distinction.[223]

In *Tatro*, CIC was provided sporadically at school and was deemed a "related service" within the scope of the IDEA.[224] In the instant case, the Court mistakenly determined that the periodic CIC in *Tatro* was no more "medical" than the non-stop, life-preserving services required by Garret.[225] Therefore, the majority incorrectly decided that Garret's needs were "related services" that the District must provide.[226] According to the Court, however, the term "medical services" does not encompass every form of health care that may be described as "medical in other contexts."[227]

217. *Id.* (emphasis added).

218. *Id*. at 997-98, 998 n.7 (relying on the Secretary's authority under the IDEA to take into account the nature and extent of the services, both of which were excluded from 20 U.S.C. § 1401(22) (1994)) (citing Brief for United States as Amicus Curiae); *see also* Auer v. Robbins, 519 U.S. 452, 462 (1997).

219. *Garret*, 119 S. Ct. at 997-98, 998 n.6 (referring to 34 C.F.R. § 300.16(b)(4) (1998) defining "medical services;" the determination of the Secretary that services provided by a nurse qualify as "related services," but if similar services are provided by a physician they are excludable as "medical services").

220. *Id.* at 1000.

221. *Id*. (quoting Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891 (1984) and Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 192 (1982)).

222. *Id.* at 997-98.

223. *Id*. at 995 n.1; 20 U.S.C. § 1401(22) (1994).

224. *Garret*, 119 S. Ct. at 997; *Tatro*, 468 F.3d at 891, 895.

225. *Garret*, 119 S. Ct. at 998.

226. *Id*. at 1000.

227. *Id*. at 997-98.

Furthermore, the Court rejected the District's proposal of a multi-factor test to determine: "[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 the service is not properly performed."[228] In refusing to apply this test, the Court merely rebutted that the District's analysis "was not supported by any recognized source of legal authority."[229] Although the Court's definition of "medical services" cannot be found in the text of the IDEA, it criticized the District's four-pronged test as unsubstantiated.[230] While the Court does not elaborate on what makes one service more "medical" than another, other than the profession of the health-care provider, the Court asserted that the District presented no explanation as to the characteristics that make health-related services more or less "medical."[231]

The District further contended that the financial burden, exceeding $30,000, should be a sufficient reason to qualify Garret's services as an exemption.[232] The Court noted that Congress' definition of "related services" does not include cost as an enumerated factor when determining the services a school district is required to provide under the IDEA.[233] However, the Court acknowledged that "the IDEA requires schools to hire specially trained personnel to meet disabled student needs."[234] The District declared that the existing staff was insufficient to attend to other responsibilities while simultaneously making a commitment to Garret on a one-on-one basis.[235] Thus, the District argued that hiring new, specially trained personnel inherently increased its financial burden.[236] As resolved by the Court, however, even if continuous services like Garret demanded created an increase in cost and required additional personnel, such particulars have no apparent relationship to "related services."[237]

Although the Court recognized the District's concerns as legitimate, it concentrated on analyzing the interpretation of existing statutory and common law.[238] In reference to the ALJ, the Court agreed that the necessary care to support Garret's ventilator dependency does not require the training and

228. *Id*. at 998 (quoting Brief for Petitioner 11).
229. *Id.* at 998.
230. *Garret,* 119 S. Ct. at 998.
231. *Id*.
232. *Id*. at 999; Osborne, *supra* note 173, at 1.
233. *Garret*, 119 S.Ct. at 999.
234. *Id*. at 998 n.8 (referring to Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 893 (1984)).
235. *Id.* at 999.
236. *Id*. at 998.
237. *Id.* at 998.
238. *Garret*, 119 S. Ct. at 999.

knowledge of a physician.[239] Reiterating its decision in *Tatro*, the Court concluded that "a rule that limits the medical services exemption to physician services is unquestionably . . . reasonable and generally workable."[240]

The majority opinion focused on "school health services" as an essential component of a school district's capacity to enhance the education of students with special needs.[241] It discounted the level or quantity of services provided, even when continuous or cumbersome, so long as the services were not provided by a qualified physician.[242] The Court emphasized that the intent of Congress is to provide students with handicaps *the opportunity* to a "free appropriate public education" and "related services."[243] This conclusion, however, unreasonably extends congressional intent and concludes that the availability of "related services" is indispensable to ensure that students like Garret are integrated into the public school system.[244]

IV. THE DISSENTING OPINION

Justice Thomas, joined by Justice Kennedy, dissented, and formulated several important arguments against the majority view. First, the dissent asserted that the majority incorrectly relied on the *Tatro* ruling that public schools are required to provide "school nursing services" as a component of "related services," but not "medical services" provided by a physician.[245] Second, the dissent stated that the majority's conclusion is contrary to the text of the IDEA and moreover, that it improperly relied on the Department of Education's regulations.[246] The dissent criticized the majority opinion for adhering to and extending *Tatro,* without regard to the constitutional rules of construction that are applicable to the IDEA.[247] Third, the dissent determined that the majority violated the Spending Clause of the Constitution because states are now burdened with broad and expensive health care services beyond those anticipated.[248]

In support of its first argument, the dissent declared that the Court wrongly focused on the provider of the services, instead of the nature of the services themselves.[249] The dissent stated that "[t]he term 'medical' similarly does not

239. *Id*. at 996.
240. *Id.* at 998.
241. *Id*. at 997, 1000.
242. *Id*. at 997-98.
243. Board of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley, 458 U.S. 176, 200-01 (1982) (emphasis added).
244. *Garret*, 119 S. Ct. at 999-1000.
245. *Id.* at 1000 (Thomas, J., dissenting).
246. *Id.*
247. *Id*.
248. *Id.* at 1002-03 (Thomas, J., dissenting).
249. *Garret,* 119 S. Ct. at 1001 (Thomas, J., dissenting).

support *Tatro's* provider-specific approach, but encompasses services that are 'of, relating to, or concerned with physicians *or* the practice of medicine.'"[250] The dissent criticized the majority for failing to explain "why 'services' that are 'medical' in nature are not 'medical services.'"[251] By analogy, the dissent showed that automotive services are not limited to those performed by a mechanic, but include repair services no matter who performs the work.[252] Thus, the integral daily preventive health care services required by the IDEA for special education students fundamentally relates to "medical services."

Interpreting the IDEA in a practical manner, the dissent recognized that the "Department of Education regulations require districts to provide disabled children with health-related services that school nurses can perform as part of their normal duties."[253] A school nurse typically renders health services to many students throughout the day and is not responsible for one child only. While school nurses may provide more services to some students than to others, one-on-one supervision as a "private duty" is not within the normal duties of a school nurse.[254]

In respect to its second argument, the dissent concluded that the intent of Congress is pivotal to rendering a proper decision.[255] Congressional intent is revealed in the IDEA itself and the majority's analysis should have been complete simply by looking at the "related services" provision of the statute.[256] Congress explicitly defined "related services" in the statute and intentionally left out specific phrases and provisions.[257] Moreover, a "provider-based" determination is not expressed in the "related services" definition or the "medical services" exclusion.[258] In sum, the dissenters argued that the majority failed to consider this inquiry and that it inappropriately deferred to the Department of Education's regulations.[259]

If Congress intended to distinguish "medical services" in such a manner as to exclude those services provided by a physician, it would have done so. Prior to *Tatro,* the proposed regulations by the Secretary of Education

250. *Id.* at 1001 (Thomas, J., dissenting) (emphasis added) (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 1402 (1986)).

251. *Id.* at 1001 (Thomas, J., dissenting).

252. *Id.*

253. *Id.*

254. Fulginiti v. Roxbury Township Pub. Sch., 921 F. Supp. 1320, 1323 (N.J. 1996) (noting that the school board is not required to furnish "services of a full-time attendant to monitor [the plaintiff's] tracheostomy tube and provide suctioning when needed. . . [;][t]hose are medical services which the IDEA does not require a local school board to provide").

255. *Garret,* 119 S. Ct. at 1000 (Thomas, J., dissenting).

256. *Id.* at 1001.

257. *Id*. at 1000 n.1 (identifying "related services" as defined by 20 U.S.C. § 1401(22) (1994)).

258. 20 U.S.C. § 1401(22).

259. *Garret,* 119 S. Ct. at 1002 (Thomas, J., dissenting).

excluded medical services, defined as "services relating to the practice of medicine."[260] Although the proposed regulations were never adopted,[261] it is important to recognize that the proposed definition did not envision a "physician-based" rule. The dissent criticized the majority for erroneously relying on its previous decision in *Tatro*, in which the Supreme Court held that current regulations meant to exclude those services provided by a licensed physician.[262] According to the dissent, the *Garret* majority did not rely on the regulation itself and any deference to a statute that does not exist is impermissible.[263]

The dissent referred to other legislation that defines "[t]he term 'medical services' [to] include[], in addition to medical examination, treatment[,] and rehabilitative services[,] . . . preventive health services."[264] The purpose of the IDEA is "to increase the educational opportunities available to disabled children, not to provide medical care for them."[265] To hold states accountable for access to a wide range of health services in schools, the dissenters argued, is to expand the IDEA and the intent of Congress beyond rational and reasonable expectation.[266]

In its final argument, the dissent contended that the term "related services" should be construed narrowly and unambiguously so as not to burden school districts with unexpected fiscal obligations.[267] While drafting the IDEA, Congress limited the state's financial burdens by only requiring the opportunity for an appropriate level of education, not a maximum level of education.[268] In addition, the Department of Education's regulations provide that children with disabilities should be afforded those services that are part of the school nurse's normal responsibilities.[269] School districts are not obligated

260. *Id.* (citing 47 Fed. Reg. 3383[6] (1982)).

261. *Id.* at 1002 (Thomas, J., dissenting).

262. *Id.* at 1001-02.

263. *Id.* at 1002.

264. *Garret*, 119 S. Ct. at 1001 n.2 (Thomas, J., dissenting) (quoting 38 U.S.C § 1701(6)); *see also* 26 U.S.C. § 213(d)(1)(A) (1994). "The term 'medical care' means amounts paid—for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure of function of the body." *Id.*

265. *Garret*, 119 S. Ct. at 1001 (Thomas, J., dissenting).

266. *Id*. at 1002-03.

267. *Id*. at 1002 (Thomas, J., dissenting) (citing Pennhurst State Sch. And Hosp. v. Halderman, 451 U.S. 1, 17 (1981)); *see also Halderman*, 451 U.S. at 17 (1981); *see also* Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 190 n.11 (1982); *see generally* South Dakota v. Dole, 483 U.S. 203, 207 (1987). "[I]f Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *See also* New York v. U.S., 505 U.S. 144, 158 (1992) (spending power of Congress is subject to distribution restrictions).

268. *Garret*, 119 S. Ct. at 1002-03 (Thomas, J., dissenting).

269. *Id.* at 1003.

to hire additional personnel to provide expensive and onerous care for students with disabilities.[270] This argument is consistent with the Court's obligation to interpret Spending Clause legislation narrowly.[271]

Because the IDEA was enacted pursuant to Congress' spending power, it is limited in its application and by its construction.[272] The majority's holding that the extent and nature of the services is irrelevant to the relationship to "medical services" contradicts the "rules of construction principles that are applicable to Spending Clause legislation."[273] The dissent asserted that extending school nursing services to a continuous one-on-one basis imposes extraordinary and demanding obligations on school districts to absorb the financial encumbrances for unexpected health related services.[274] Such an imposition construes the IDEA in too broad a fashion.[275]

In conclusion, the dissent demanded a limited interpretation of the IDEA to prevent surprising economic burdens and excessive responsibilities beyond the scope of reasonable anticipation.[276] The IDEA was implemented to enhance the educational opportunity for special needs children, not to institutionalize medical services into the student's curriculum or into the school district's operation.[277] Hence, integrating students with handicaps into the public school system is to be done in accordance with Spending Clause legislation and Congressional intent when it is feasible and appropriate.[278]

ANALYSIS

The fundamental principle of the IDEA is to provide students with disabilities the opportunity for "meaningful access" to special education in the public school system when appropriate.[279] The operative term in the expression "free appropriate public education" is the word "appropriate." Limiting the determination of whether health services are appropriate to a "provider-based" distinction disregards the intent of Congress and the underlying purpose of the IDEA.[280]

270. *Id.*

271. *Id.*

272. *Id.* at 1002. "The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* (citing *Halderman*, 451 U.S. at 17).

273. *Garret,* 119 S. Ct. at 1003 (Thomas, J., dissenting); *see also supra* note 203 and accompanying text.

274. *Id.*

275. *Id.*

276. *See supra* notes 267 and 274 and accompanying text.

277. *See supra* note 265 and accompanying text.

278. *Garret,* 119 S. Ct. at 1002-03 (Thomas, J., dissenting).

279. *See supra* notes 78 and 83 and accompanying text.

280. *See supra* notes 128-30, 136, 147, 154-55 and 203 and accompanying text.

In *Garret*, the plaintiff was severely disabled and required vigilant nursing services at all times, not merely a series of effortless and infrequent examinations, like in *Tatro*.[281] The Court inappropriately held that the services Garret required were "related services," even though they were medical in nature.[282] The Court encumbered the District with unexpected financial obligations and the delivery of continuous medically related health services based solely on the profession of Garret's provider.[283] Moreover, the *Garret* majority failed to distinguish ancillary educational services from intense medical interventions.[284] *Garret* did not consider the risk or the plausible consequences in case of an accident or the potential liability of the District.

Congress intended to identify and educate children with disabilities, but did not expect school districts to supplement education with extreme medical care or provide them every educational opportunity.[285] Although unfavorable, homebound instruction arguably may provide more educational benefits than public schooling and may be more appropriate for students with extreme debilitating conditions.[286] Structuring an IEP for private education to include social, educational and vocational elements will enable a child with disabilities to learn and succeed in a more stable environment while simultaneously meeting their unique and individualized needs. Public education with students without disabilities may enhance social development and aptitude, but classroom instruction should only be afforded to children with disabilities when it is practical, economic and safe.

Hiring and training competent personnel to provide full-time nursing services to a dependent student burdens a school district with economic and accountability concerns.[287] In addition, the risk of a traumatic or fatal accident is presumably greater for students suffering from severe disabilities who require continuous medical attention. The extent and nature of the care provided will establish if the health care services must be delivered continuously and intensely as the "private duty" of a school nurse.[288]

Health services are deemed appropriate when they are "related services" and are provided by a school nurse or other qualified individual. "Medical services" are included in the definition of "related services," so long as they are not provided beyond diagnostic or evaluative purposes.[289] Although the IDEA makes no reference to a "provider-based" distinction regarding "medical

281. *See supra* notes 180 and 197 and accompanying text.
282. *See supra* notes 225-37 and 251 and accompanying text.
283. *See supra* notes 222, 238 and 240-41 and accompanying text.
284. *See supra* note 213 and accompanying text.
285. *See supra* notes 82-85, 118-19, 146 and 257 and accompanying text.
286. *See supra* notes 84-85, 145-47 and 149 and accompanying text.
287. *See supra* notes 118, 168-71, 233 and 234-36 and accompanying text.
288. *See supra* note 204 and accompanying text.
289. *See supra* notes 56 and 58-60 and accompanying text.

services," the *Tatro* Court improperly concluded that the difference between "medical services" and "related services" is that a physician provides the former, while the latter is provided by anyone other than a physician. Thus, services that are provided by a school nurse are included "related services," but if a physician performs the exact same services, then they are excluded "medical services." It is illogical to say that a medically related disability requiring constant health services includes "related services," but does not integrate "medical services" because of the profession of the provider.[290]

The definition of "medical services" in other legislation is written to include treatment, rehabilitation and preventative health services.[291] Again, there is no distinction based on the status of the provider. Although the IDEA did not explicitly define "medical services" to include the aforementioned services, the term "related services" does consist of these types of services as well as "medical services." While Congress did not specifically define "medical services," it is not evident from the IDEA that Congress intended or even considered that services provided by a physician should be excluded as "medical services."

School nurses provide extensive and intense health care services to children with disabilities, treatment in critical situations and rehabilitative and preventative health services to reduce and evade unfavorable health conditions. Thus, as an inherent responsibility of the profession, nurses provide medical services. These medical services should be excluded from the burden on school districts based on the extent and nature of the services provided by a school nurse to a student with severe disabilities.[292] It is unreasonable to limit the provision of health care services beyond evaluative or diagnostic purposes to a "physician-based" rule.[293]

The purpose of excluding "medical services" is to reduce the burden on school districts from providing complex "school health services."[294] However, simplistic "related services" can become extraordinarily complicated when problems arise for students with disabilities who require full-time nursing services. To maintain the spirit of the IDEA, it is more reasonable and fair to exclude burdensome nursing services that demand extensive health care and attention and that are more analogous to "medical services" than "related services."[295]

290. *See supra* note 204 and accompanying text.

291. 38 U.S.C. § 1701(8) (1994). Rehabilitative services means services "necessary to restore . . . the physical, mental, and psychological functioning of an ill or disabled person." *Id.*

292. *See supra* notes 118-20, 124, 129-31, 155 and 255 and accompanying text.

293. *See supra* note 204 and accompanying text.

294. *See supra* notes 119-21 and accompanying text.

295. *See supra* notes 118-20, 123 and 130 and accompanying text.

CONCLUSION

The Supreme Court's decision in *Garret* imposes upon school districts the responsibility of staffing specialized personal attendants for students with handicaps who cannot perform the daily functions of life without habitual supervision and assistance. Because of this onerous responsibility, it is conceivable that schools will be compelled to have immediate access to emergency care facilities in case of a crisis situation where expert services would be essential. The potential irreparable harm to a susceptible student with disabilities because of incompetent personnel or insufficient training also substantially increases the liability of a school district.[296]

The risk, obligation and liability of a school district should be balanced with the opportunity for "meaningful access" to a "free appropriate public education" for students with disabilities. Basing the distinction of "medical services" and "related services" on the title and education of the provider is simply inadequate and fails to define the "medical services" expression.[297] It is difficult to comprehend how medically related health services, which appear medical in nature, are not considered "medical services." Limiting health services to students with handicaps via a "provider-based" rule is unwarranted and should not be the deciding factor of the services that are provided.

The IDEA does not require school districts to provide an equal opportunity to public education for special needs students.[298] Although schools and teachers educate children to become productive citizens and future leaders in society, they are not in the business of providing private health services to children with extensive handicaps.[299] It is not suggested that students with disabilities do not deserve an education or that they cannot be productive citizens and/or future leaders. This Note plausibly advocates that the statutory interpretation of the IDEA does not require the maximum educational opportunity, but rather an appropriate education that considers the extent and nature of the health related services before requiring intense, comprehensive and expensive full-time nursing services for students with extreme disabilities.[300]

SCOTT SHANKER*

296. *See supra* notes 169-70 and accompanying text.

297. *See supra* note 130 and accompanying text.

298. *See supra* notes 78-9 and 83-4 and accompanying text.

299. *See supra* notes 155 and 266 and accompanying text.

300. See supra notes 84, 129-31 and 203 and accompanying text.

* J.D. candidate at Saint Louis University School of Law, Saint Louis, Missouri. The author wishes to express his deepest gratitude, respect and love for his parents, Stuart and Marcia, for their unconditional love and support.