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CASENOTES

THE PRACTICE OF PEDIATRICS IN PEDAGOGY? THE COSTLY COMBINATION IN *CEDAR RAPIDS* *COMMUNITY SCHOOL DISTRICT V. GARRET F.*

I. INTRODUCTION

The Individuals with Disabilities Education Act ("IDEA")¹ was enacted in 1975 to ensure that all children with disabilities, like their nondisabled counterparts, have access to a free appropriate public education designed to meet their unique needs.² This "appropriate education" mandate emphasizes the necessity of providing such children with special education and "related services,"³ and federal funding is offered to state and local educational agencies to assist in implementing this objective.⁴

Since it is impossible for Congress to enumerate all the circumstances in which schools are required to provide special education services for disabled students, many of the IDEA's provisions, established to guide state and local educational agencies in implementing its requirements, are imprecise. Consequently, courts are often petitioned to make determinations as to the meaning of these provisions on a case-by-case basis.⁵

One provision of the IDEA that has created particular difficulty in both interpretation and administration is the requirement that

1. 20 U.S.C. §§ 1400-1491 (1994 & Supp. IV 1998). The IDEA was also known as the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).

2. See 20 U.S.C. § 1400(d)(1)(A) (1994 & Supp. IV 1998).

3. *Id.*

4. See *id.* §§ 1411-1413 (1994 & Supp. IV 1998).

5. See generally Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103 (1979) (discussing the difficulties in interpreting the Education for All Handicapped Children Act, now known as the IDEA).

school districts provide "related services."⁶ Under the statute, "related services" are those services that are required to enable a disabled child to benefit from special education, and include medical services only to the extent that they are used for diagnosis and evaluation purposes, or they are otherwise excluded.⁷

The Department of Education regulations further expanded this notion of "related services" by distinguishing "school health services" that can be "provided by a qualified school nurse or other qualified person"⁸ from "medical services" that are "provided by a licensed physician to determine a child's medically related disability."⁹ Absent from the statutory language, however, is a clarification as to whether specialized nursing services, resembling medical treatment, qualify as "school health services" that must be provided under the IDEA or as "medical services" that are instead exempt.¹⁰

Courts have thus attempted to devise a standard for defining "related services" to determine whether costly, continuous nursing care falls within or outside the scope of the IDEA. In *Irving Independent School District v. Tatro*,¹¹ the U.S. Supreme Court unanimously held that clean intermittent catheterization ("CIC") was a "related service," concluding that the Secretary of Education had reasonably determined that "medical services" referred to services that cannot be performed by anyone other than a physician and not to "school health services."¹² Since the CIC procedure is

6. See generally Haekyoung Suh, Note, *The Need for Consistency in Interpreting the Related Provision under the Individuals with Disabilities Education Act*, 48 RUTGERS L. REV. 1321 (1996).

7. See 20 U.S.C. § 1401(22) (1997). The IDEA defines "related services" as: transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, 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.

Id. This list, however, is not exhaustive.

8. 34 C.F.R. § 300.24(b)(12) (1999).

9. *Id.* § 300.24(b)(4) (1999).

10. See Suh, *supra* note 6, at 1324 (citing *Deciding If a Related Service Is Medical or Educational*, SPECIAL EDUCATOR, Aug. 30, 1996, at 1, 4).

11. 468 U.S. 883 (1984).

12. See *id.* at 888-95. Justices Brennan, Marshall, and Stevens dissented, but only as to the matter of awarding attorney's fees. They concurred in finding that the school was required to provide catheterization as a medical service. See *id.* at 896 (Brennan, Marshall & Stevens,

often performed by a nurse, the school district was required to provide the service under the IDEA.¹³ The Court indirectly dealt with the issue of cost, offering in dicta the opinion that the medical services exclusion “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.”¹⁴

While several lower courts have read *Tatro* as requiring a physician-based, bright-line test regardless of cost,¹⁵ many others determined that a service is not a “related service” when it becomes an extraordinary medical need and its cost becomes too burdensome.¹⁶ In its most recent decision on this issue, however, the Supreme Court, in *Cedar Rapids Community School District v. Garret F.*,¹⁷ explicitly rejected a similar cost-based, multi-factor test proposed by the school district in considering whether the IDEA’s definition of “related services” required the district to provide a ventilator-dependent student with continuous nursing services during school hours.¹⁸ The Court ruled that the school district must provide a full-time, one-on-one nurse, finding no reason to depart from *Tatro*’s precedent, and presumably resolving any statutory ambiguity for special education agencies.¹⁹

This casenote explores the Supreme Court’s decision in *Cedar Rapids Community School District v. Garret F.*, appraising its economic impact on educators and students alike as schools attempt to offer “related services,” medical-in-nature, while maintaining a free and appropriate public special education for all disabled children under the IDEA. Part II traces the varying weight federal courts have given to cost considerations in cases involving “related service” claims prior to and following *Tatro*, prefacing the Supreme Court’s decision to hear *Garret F.* Part III examines the procedural and substantive history of *Garret F.*, following its course from administrative hearing to Supreme Court, and focusing on courts’

JJ., concurring in part and dissenting in part).

13. *See id.* at 894-95.

14. *Id.* at 892.

15. *See, e.g.,* Macomb County Intermediate Sch. Dist. v. Joshua S., 715 F. Supp. 824, 826 (E.D. Mich. 1989).

16. *See generally* Leslie A. Collins & Perry A. Zirkel, *To What Extent, If Any, May Cost Be a Factor in Special Education Cases?*, 71 EDUC. L. REP. 11, 13 (1992).

17. 119 S. Ct. 992 (1999).

18. *See id.* at 995.

19. *See id.* at 998.

views of *Tatro's* precedent. Lastly, Part IV evaluates the *Garret F.* decision and the impact it will have on similar claims involving the increasingly exorbitant expenses of school health-related services as well as on special education programs nationwide.

II. THE ESTABLISHMENT AND INTERPRETATION OF THE *TATRO* "RELATED SERVICES" TEST

A. Rowley: *Equal Access v. Equal Opportunity*

In interpreting and applying the definition of "related services" in special education cases, federal courts have taken an irresolute route in the two decades since the IDEA was initially enacted. The Supreme Court set forth some peripheral guidelines in *Board of Education v. Rowley*,²⁰ the first case in which the Court interpreted any provision of the IDEA.²¹

In this case, the parents of a hearing-impaired student, who received personalized tutoring and supportive services in a regular, participating New York public school, unsuccessfully sued local school officials, claiming that the school district's denial of a qualified sign language interpreter in all of the student's academic classes violated her access to a free appropriate public education.²² The Court, in reviewing the language and legislative history of the IDEA, maintained that simply because a student could benefit from "related services" did not inherently compel a school district to provide them.²³ Where disabled students are provided with meaningful access to educational programs, school districts are not required to furnish them with every related service needed to maximize their educational potential.²⁴ The Court noted that Congress could not have intended to impose such a significant financial burden upon state and local agencies unless it did so unambiguously.²⁵

20. 458 U.S. 176 (1982).

21. See Perry Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466, 467 (1983).

22. See *Rowley*, 458 U.S. at 184-86.

23. See *id.* at 199.

24. See *id.* at 198.

25. See *id.* at 190 n.11.

B. *Tatro and its Two-Part Test*

The Supreme Court narrowed its definition of a "related service" two years later in *Irving Independent School District v. Tatro*²⁶ by announcing a two-step analysis.²⁷ First, a court must determine whether a service constitutes a "supportive servic[e] . . . required to assist a handicapped child to benefit from special education" within the meaning of the IDEA.²⁸ Second, if a service is supportive, a court must then ascertain whether it is excluded from coverage as a "medical service" that serves "purposes other than diagnosis or evaluation."²⁹ In deciding whether a supportive service is medical, the Court relied on the federal definition of a "medical service,"³⁰ concluding that if the services are provided by a licensed physician and are not for diagnostic or evaluative purposes, the services are excludable.³¹ However, services that can be provided by a nurse or a qualified layperson are not excluded.³²

Eight-year-old Amber Tatro, as a result of spina bifida, was unable to voluntarily empty her bladder and had to be catheterized every few hours to avoid injury to her kidneys.³³ The catheterization was a simple procedure that could be performed safely with the assistance of a school nurse or a layperson with little training.³⁴ Relying more upon the professional position of the person performing the service than the nature and expense of it, the Court viewed the procedure as more similar to a "school health service" than a medical one, and determined that it qualified as a "related service."³⁵ The Court further held that without such assistance, Amber would have been unable to attend school and, therefore,

26. 468 U.S. 883 (1984).

27. *See id.* at 890.

28. *Id.* (quoting 20 U.S.C. § 1401(a)(17)).

29. *Id.*

30. Medical services constitute "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 C.F.R. § 300.24(b)(4) (1999).

31. *See Tatro*, 468 U.S. at 891-92.

32. *See id.* at 892; *see also* 34 C.F.R. § 300.24(b)(12) (1999) (defining "school health services").

33. *See Tatro*, 468 U.S. at 885.

34. *See id.*

35. *See id.* at 891; *see also* Ann Rozycki, Comment & Note, *Related Services under the Individuals with Disabilities Education Act: Health Care Services for Students with Complex Health Care Needs*, 1996 BYU EDUC. & L.J. 67, 76 (1996).

would have been denied access to a free and appropriate public education.³⁶

The Court nullified the clarity of its physician-based test, however, by noting in dicta that the Department of Education's definition of "medical services" was a reasonable interpretation of congressional intent "to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence."³⁷ Congress further included the "medical services" exclusion and limited it to the services of a physician or hospital, according to the Court, due to their "far more expensive" nature compared to school nursing services.³⁸ By alluding to the existence of a fiscal factor, the Court enabled school districts to justify their refusal to provide assistance to severely disabled children in school.³⁹

C. *Post-Tatro Litigation*

Several lower courts have followed *Tatro's* physician-based, bright-line test.⁴⁰ Most courts, however, have held that health care services do not constitute "related services" when they are more costly and complicated than catheterization.⁴¹ Such lawsuits typically require schools to hire additional full-time nursing personnel to care for technology-dependent children, often at a

36. See *Tatro*, 468 U.S. at 890.

37. *Id.* at 892.

38. *Id.* at 893.

39. See, e.g., *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 154 (4th Cir. 1991) ("Congress intended the states to balance the competing interests of economic necessity, on the one hand, and the special needs of a handicapped child, on the other, when making education placement decisions."); *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635, 646-47 (9th Cir. 1990) (justifying a school's refusal to pay for psychiatric hospitalization on the ground that it would impose an undue financial burden); *Granite Sch. Dist. v. Shannon M.*, 787 F. Supp. 1020, 1027 (D. Utah 1992) (finding that the *Tatro* test does not require a school district to provide every health service not furnished by a licensed physician); *Bevin H. v. Wright*, 666 F. Supp. 71, 75 (W.D. Pa. 1987) (interpreting the *Tatro* holding as a balancing of interests test); *Detsel v. Board of Educ.*, 637 F. Supp. 1022, 1026 (N.D.N.Y. 1986), *aff'd per curiam*, 820 F.2d 587 (2d Cir. 1987) (using dicta in *Tatro* to conclude that "medical services which would entail great expense are not required").

40. See, e.g., *Skelly v. Brookfield LaGrange Park Sch. Dist.* 95, 968 F. Supp. 385 (N.D. Ill. 1997); *Macomb County Intermediate Sch. Dist. v. Joshua S.*, 715 F. Supp. 824 (E.D. Mich. 1989).

41. See Allen G. Osborne, Jr., *Where Will the Supreme Court Draw the Line Between Medical and School Health Services under the IDEA?*, 128 EDUC. L. REP. 559, 561-62 (1998).

substantial cost to the district.⁴² Seizing on the dicta in *Tatro*, these courts instead have applied an undue burden, multi-factor, balancing test in which they have examined the frequency, duration, and intensity of the service, as well as the cost and degree of training required to provide the service.⁴³ Accordingly, the majority of these courts have determined that the services of a full-time nurse more closely resemble “medical services” than “school health services” and are thus exempt.⁴⁴

1. Full-Time Nursing Services Excluded as “Medical Services”

The issue of cost was considered by the U. S. District Court for the Northern District of New York in *Detsel v. Board of Education*⁴⁵ in 1986. The extensive nursing services required by seven-year-old Melissa Detsel, which included continual respirator assistance and a steady supply of oxygen, did not fall within a category of “related services” covered by the IDEA.⁴⁶ Her condition demanded constant supervision by an individual trained to monitor her health in order for her to attend school.⁴⁷ The district court ruled that such full-time nursing services did not clearly fall within the *Tatro* test, but it nevertheless determined that the exclusion of such services was consistent with the spirit of the regulation, as they were more akin to medical services than to school health services.⁴⁸ The court reasoned that the provision of constant nursing care would subject the schools to the “excessive costs and the burden of health care.”⁴⁹ On appeal, the Second Circuit affirmed, dismissing the statutory language and necessity of services, and choosing to focus instead on the proper balance of the nature, extent, and cost of the services.⁵⁰

Similarly, in *Bevin H. v. Wright*,⁵¹ a federal district court in Pennsylvania held that services provided to a seven-year-old disabled girl were too extensive to be considered “related services.”⁵²

42. *See id.* at 562.

43. *See id.*

44. *See id.* at 561.

45. 637 F. Supp. 1022 (N.D.N.Y. 1986), *aff'd per curiam*, 820 F.2d 587 (2d Cir. 1987).

46. *See id.* at 1023, 1026-27.

47. *See id.* at 1023.

48. *See id.* at 1027.

49. *Id.*

50. *See Detsel v. Board of Educ.*, 820 F.2d 587, 588 (2d Cir. 1987) (per curiam).

51. 666 F. Supp. 71 (W.D. Pa. 1987).

52. *See id.* at 76.

Bevin, a legally blind child with severe mental and physical disabilities, required a tracheostomy tube to breathe and a gastrostomy tube to eat and receive medication, as well as the administration of a constant supply of oxygen.⁵³ Her needs demanded the constant surveillance of a nurse at the cost of approximately \$1850 per month.⁵⁴ Bevin, like Melissa Detsel, argued that the provision of services should depend on the status of the health care provider and not on the nature and extent of the services.⁵⁵ The court, however, balanced the competing interests—the extent of services, the time commitment, and the costs involved—and determined that her services would impose an undue burden on the school district “in the guise of ‘related services.’”⁵⁶

In *Granite School District v. Shannon M.*,⁵⁷ a federal district court in Utah also rejected *Tatro*’s physician-based, “related services” classification as too narrow, stating that a service “does not become instantly “related” when it can be implemented by persons other than licensed physicians.”⁵⁸ Shannon, a six-year-old wheelchair-bound kindergartner, suffered from congenital neuromuscular atrophy and severe scoliosis.⁵⁹ Her condition required that someone with the qualifications of a licensed practical nurse be available to her at all times, at a cost of \$30,000 per year.⁶⁰ After examining the nature and extent of the requested service, the court determined that the constant nursing care required by Shannon fell within the “medical services” exclusion of the IDEA because it overburdened the school district.⁶¹ The court concluded that *Tatro* did not “stand for the proposition that *all* health services performed by someone other than a licensed physician are related services under the Act regardless of the amount of care, expense, or burden on the school system and, ultimately, on other school children.”⁶²

53. *See id.* at 72-73.

54. *See id.* at 72.

55. *See id.* at 74.

56. *Id.* at 75.

57. 787 F. Supp. 1020 (D. Utah 1992).

58. *Id.* at 1027 (quoting *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990)).

59. *See id.* at 1022.

60. *See id.*

61. *See id.* at 1029-30.

62. *Id.* at 1026.

The U.S. Court of Appeals for the Sixth Circuit also looked to additional factors in *Neely v. Rutherford County School*⁶³ in 1995. The court examined the nature and extent of the services provided as well as “the risk involved and the liability factor of the school district inherent in providing a service,”⁶⁴ and reversed a district court’s ruling that ordered the school district to provide the requested services.⁶⁵ The Sixth Circuit alternatively found that hiring a full-time nurse or respiratory-care professional for Samantha Neely, who suffered from a rare condition that caused breathing difficulties and required constant monitoring due to the life-threatening nature of the illness, was inherently burdensome—not because of the cost, but because of the nature of the care necessary.⁶⁶ The court reasoned that “the application of the medical services exclusion depends on who provides the service and the burdens associated therewith,”⁶⁷ and interpreted *Tatro* to mean that a school district is not required to provide every service that is “medical in nature,” especially when it entails hiring a health care professional to assist just one student.⁶⁸

The *Tatro* test was further renounced in *Fulginiti v. Roxbury Township Public Schools*,⁶⁹ a 1996 New Jersey case in which a student named Carissa, who had severe multiple disabilities, requested that a specially trained person constantly monitor her tracheostomy tube and provide suctioning when needed.⁷⁰ The district court upheld an administrative law judge’s findings that the training required was similar to that received by a nurse and that the school nurse or teacher could not be expected to perform the necessary services.⁷¹ It ruled that because Carissa’s care was medical in nature and unduly burdensome, the nursing services extended beyond the scope of a “related service.”⁷²

63. 68 F.3d 965 (6th Cir. 1995), *overruled by* Cedar Rapids Community Sch. Dist. v. Garret F., 119 S. Ct. 992 (1999).

64. *Id.* at 971.

65. *See id.* at 973.

66. *See id.* at 967, 972.

67. *Id.* at 970.

68. *See id.* at 971-72.

69. 921 F. Supp. 1320 (D.N.J. 1996).

70. *See id.* at 1321.

71. *See id.* at 1321-22, 1326.

72. *See id.* at 1325-26.

2. Full-Time Nursing Services Included as "Related Services"

Aside from *Garret F.*, the only other case concerning full-time, in-school nursing care is *Morton Community Unit School District No. 709 v. J.M.*,⁷³ in which a federal district court in Illinois eschewed the rationale of *Detsel* and its progeny as ignoring the Supreme Court's directive in *Tatro* and the spirit of the IDEA.⁷⁴ The court held that a school district was required to provide a student with a full-time nurse.⁷⁵ J.M. suffered from a number of severe medical conditions, used a portable ventilator system, and had tracheostomy and gastrostomy tubes.⁷⁶ As a result, he required a pediatric nurse or other trained individual to attend to his needs throughout the school day.⁷⁷ The court, using *Tatro's* bright-line test, found that the preponderance of the evidence demonstrated that J.M. required "school health services," not "medical services," because he did not require the services of a physician while he attended school.⁷⁸ Moreover, the school district was not necessarily overburdened by providing the services, as J.M.'s former school district had provided him with these health services for a number of years without any excess burden.⁷⁹ The court asserted that "if Morton objects to the obligations imposed by the IDEA, then it should take that grievance up with the legislature *not* the judiciary."⁸⁰

III. CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT V. GARRET F.

It was upon this backdrop that the U.S. Supreme Court granted certiorari to *Cedar Rapids Community School District v. Garret F.*⁸¹ By granting certiorari, the Court ostensibly would attempt to clarify the scope of the "medical services" exception to the "related services"

73. 986 F. Supp. 1112 (C.D. Ill. 1997), *aff'd*, 152 F.3d 583 (7th Cir. 1998).

74. *See id.* at 1125.

75. *See id.* at 1125-26.

76. *See id.* at 1115.

77. *See id.*

78. *See id.* at 1123. Although the district court applied the bright-line test, the Seventh Circuit, in its affirmance, declined to adopt either this approach or a balancing test. *See Morton Community Unit Sch. Dist. No. 709 v. J.M.*, 152 F.3d 583, 587 (7th Cir. 1998).

79. *See Morton*, 986 F. Supp. at 1124.

80. *Id.*

81. 119 S. Ct. 992 (1999).

provision of the IDEA.⁸² It would also be the first case at that level to directly address the issue of cost in a special education claim—a matter of great significance due to the increasing expenses involved in providing continuous nursing care.

A. *Facts*

Due to a childhood accident that left him a quadriplegic and ventilator-dependent, Garret Frey required a personal attendant to be within hearing distance of him throughout the school day to monitor his health.⁸³ The attendant's duties included urinary bladder catheterization, post-tracheotomy suctioning to maintain a clear airway, repositioning, observation for respiratory distress, and blood pressure monitoring.⁸⁴ Since Garret's mental capabilities remained unaffected by his physical disabilities, he was able to attend regular classes in the Cedar Rapids Community School District.⁸⁵

Garret's family provided the personal attendant from kindergarten through the fourth grade.⁸⁶ Upon his entrance into the fifth grade, however, the family requested that the school district provide the needed nursing services.⁸⁷ The school district refused, asserting that it was not responsible for providing such intensive and extensive care.⁸⁸

The school district, one of the largest in Iowa, operated approximately thirty-three schools for approximately 17,500 students, of whom approximately 2200 received special education services.⁸⁹ It employed six full-time registered nurses to serve all of its students and schools, but no building had a registered nurse continuously on-site.⁹⁰ The district did not provide one-on-one care for any other student, and was already providing a full-time educational aide to

82. See John W. Borkowski & Alexander E. Dreier, *The 1997-98 Term of the United States Supreme Court and Its Impact on Public Schools*, 129 EDUC. L. REP. 887, 916 (1998) (discussing the conflicting interpretations of *Tatro* among the circuits).

83. See *Garret F.*, 119 S. Ct. at 995.

84. See *id.* at 995 n.3.

85. See *id.* at 995.

86. See *id.* at 995-96.

87. See *id.* at 996.

88. See *id.*

89. See *id.*

90. See Brief for the Petitioner, 1998 WL 375420, at *6, Cedar Rapids Community Sch. Dist. v. Garret F., 119 S. Ct. 992 (1999) (No. 96-1793).

assist Garret in moving about the building.⁹¹ Due to his life-threatening disabilities, however, the district could not entrust the continuous monitoring of Garret to anyone other than a licensed practical nurse.⁹² The parties stipulated that it would cost at least \$27,000 to hire a special nurse for Garret.⁹³

B. *Procedural History*

Both an administrative law judge ("ALJ") and the U.S. District Court for the Northern District of Iowa determined that the requested nursing services were not within the scope of the "medical services" exclusion and that the school district, therefore, was required to provide them as "related services."⁹⁴ The ALJ followed the bright-line reasoning in *Tatro* that only services that require the special training, knowledge, and judgment of a physician were excluded from the "related services" mandate.⁹⁵ The school district appealed.

Applying *Tatro's* two-part analysis for determining whether a service is a "related service" under the IDEA,⁹⁶ the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's decision.⁹⁷ In a rather succinct opinion, the court first held that the requested services were supportive, as Garret, like Amber *Tatro*, would not have been able to attend school and would not, therefore, have been able to benefit from special education had these services not been received.⁹⁸ Second, the court interpreted *Tatro* as establishing a bright-line test for resolving the question of whether the services are "medical."⁹⁹ Services that must be provided by a licensed physician and are neither diagnostic nor evaluative 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.¹⁰⁰ In the former instance, the school is not responsible for

91. *See id.* at *6.

92. *See id.* at *7.

93. *See id.* at *6.

94. *See id.*

95. *See Garret F.*, 199 S. Ct. at 996.

96. *See supra* text accompanying notes 27-29.

97. *See Cedar Rapids Community Sch. Dist. v. Garret F.*, 106 F.3d 822, 825 (8th Cir. 1997).

98. *See id.*

99. *See id.* at 824-25.

100. *See id.*; *see also Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891-95 (1984).

providing the services, whereas in the latter, it is. Thus, the court ruled that since Garret's required services were provided by a nurse and not by a physician, they were not "medical services" but were "school health services" that the school district had to provide.¹⁰¹ In so doing, the Eighth Circuit acknowledged that several judicial decisions did not accept this bright-line analysis, but it considered itself bound by the *Tatro* precedent.¹⁰²

The school district appealed this ruling to the Supreme Court, challenging only the second part of the Eighth Circuit's analysis—the application of *Tatro's* bright-line test.¹⁰³ The school district asserted that the court should have instead applied a multi-factor test, similar to the one in *Detsel* that considered the nature and extent of the services involved.¹⁰⁴ Pointing to the individualized and continuous nature of Garret's requested care, the district suggested that the case's outcome should have been influenced by a number of factors, including the type of care and its relative time constraints, the district's personnel resources, the cost of the services, and the potential consequences should the services be improperly performed.¹⁰⁵

C. Majority Opinion

In a seven-two decision, with Justice Stevens writing for the majority, the Supreme Court affirmed the judgment of the Eighth Circuit.¹⁰⁶ The Court held that under the statutory language of the IDEA's "related services" definition, *Tatro* precedent, and the overarching spirit of the regulation, the school district was required to provide Garret with the nursing services he needed during school hours.¹⁰⁷

101. See *Garret F.*, 106 F.3d at 825.

102. See *id.* Citing *Detsel*, among others, the court expressed its reasoning for rejecting these authorities, stating: "[T]hese courts rely on dicta in *Tatro* in order to factor into the medical services exclusion considerations of the nature and extent of the services performed. The court declines to seize dicta in *Tatro* to go beyond the physician/non-physician test which the Supreme Court sets forth therein." *Id.*

103. See *Cedar Rapids Community Sch. Dist. v. Garret F.*, 119 S. Ct. 992, 997 (1999).

104. See *id.*; see also *supra* text accompanying note 50.

105. See *Garret F.*, 119 S. Ct. at 998.

106. See *id.* at 994, 1000.

107. See *id.* at 1000.

1. The Court Upholds the *Tatro* Bright-Line Test

Proclaiming that its “endorsement” of the so-called physician-based, bright-line test in *Tatro* was “unmistakable,”¹⁰⁸ the Court rejected the school district’s argument that the nursing services requested by Garret were “medical services” excluded under the “related services” provision of the IDEA. The Court began its two-step, related-service analysis¹⁰⁹ by first determining that the nursing services at issue in the case were “supportive services” in that they enabled Garret to remain in school during the day and provided him with meaningful access to special education.¹¹⁰ The Court then turned to its interpretation of the “medical services” exclusion under the IDEA.¹¹¹ Justice Stevens swept aside prior *Detsel*-line decisions by conclusively declaring that the “scope of the ‘medical services’ exclusion is not a matter of first impression in this Court” because in *Tatro* “we concluded that the Secretary of Education had reasonably determined that the term . . . referred only to services that must be performed by a physician, and not to school health services.”¹¹² The Court stated that it referenced cost and competence in dicta solely “as justifications for drawing a line between physician and other services,”¹¹³ and that the term “medical services,” as used in the IDEA, does not include all forms of care that could loosely be described as “medical” elsewhere.¹¹⁴ Thus, “medically-related” services are not necessarily excluded from the scope of “related services” under the IDEA.

2. The Combined and Continuous Character of the Services is Irrelevant

Although the school district conceded that Garret’s needs did not exceed the scope of the IDEA when considered individually, it argued that collectively, the continuous character of the services did.¹¹⁵ In summarily rejecting the school district’s four-factored

108. *Id.* at 997.

109. *See supra* text accompanying notes 27-29.

110. *See Garret F.*, 119 S. Ct. at 997.

111. *See id.*

112. *Id.*

113. *Id.*

114. *See id.* at 998.

115. *See id.*

proposal, however, the Court countered that the services Garret required, though more extensive, were no more “medical” than the care required by Amber Tatro.¹¹⁶ The school district offered no explanation as to why these characteristics might make these services more “medical.”¹¹⁷ The Court reasoned that continuous services might be more costly and might require additional school personnel, but these circumstances did not make the services more “medical.”¹¹⁸ The continuous character of the services associated with Garret’s ventilator dependency thus had no apparent relationship to “medical” services, according to the Court.¹¹⁹ In further concluding that the “multi-factor test [was] not supported by any recognized source of legal authority,” the Court found no cause to deviate from the settled law of *Tatro*.¹²⁰

3. Undue Financial Burden Is Also Irrelevant

Finally, the Court rejected the school district’s argument concerning the financial burden that it had to bear in providing the services that Garret needed to remain in school.¹²¹ Although the Court acknowledged that “the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA,” the Court specifically repudiated the establishment of an “undue-burden exemption” based on economic considerations in this case.¹²² Justice Stevens went on to state that since Congress made no mention of cost in its definition of “related services,” to use a cost-based standard as the sole test for determining the scope of the provision would require the Court “to engage in judicial lawmaking without any guidance from Congress” and might “create . . . tension with the purposes of the IDEA.”¹²³

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. *Id.*

121. *See id.* at 999.

122. *Id.* “Defining ‘related services’ in a manner that *accommodates* the cost concerns Congress may have had is altogether different from using *cost itself* as the definition.” *Id.* (citation omitted). *But see* Board of Educ. v. Rowley, 458 U.S. 176, 190 n.11 (1982) (recognizing that Congress did not intend to impose “upon the States a burden of unspecified proportions and weight” in enacting the IDEA); *see also* cases cited *supra* note 39.

123. *Garret F.*, 119 S. Ct. at 999.

D. Justice Thomas's Dissent

1. *Tatro* Was Wrongly Decided

The dissenting opinion, written by Justice Thomas and joined by Justice Kennedy, rejected the majority's holding on two grounds.¹²⁴ Justice Thomas primarily maintained that the *Tatro* Court improperly relied on the regulatory definition of "medical services" without first looking to the plain language of the IDEA.¹²⁵ Before turning to the Department of Education's regulations implementing the IDEA's "related services" provision, the dissent asserted, the Court in *Tatro* should have "first ask[ed] whether Congress has 'directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'"¹²⁶ Justice Thomas found this omission crucial, as the IDEA states that schools do not have to provide "medical services" to students, other than for evaluation or diagnosis, as "related services."¹²⁷ Insisting that Congress's intent was, in fact, unequivocal, Justice Thomas concluded that the Court improperly reached outside the scope of the IDEA.

The dissent next criticized the majority for failing to explain why services that are medical in nature are not "medical services," as they would be under other federal laws.¹²⁸ According to Justice Thomas, the majority incorrectly focused on the provider of the services, rather than on the nature of the services themselves.¹²⁹ In further support of its "medical services" interpretation, the dissent added that "where Congress decided to require a supportive service . . . that appears 'medical' in nature, it took care to do so explicitly."¹³⁰ Thus, Congress, in defining "related services," could

124. See *id.* at 1000 (Thomas, J., dissenting).

125. See *id.* at 1001 (Thomas, J., dissenting).

126. *Id.* at 1000 (Thomas, J., dissenting) (quoting *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 499-500 (1998) (quoting *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984))).

127. See *id.* at 1001 (Thomas, J., dissenting); see also *supra* note 7 and accompanying text.

128. See *Garret F.*, 119 S. Ct. at 1001 (Thomas, J., dissenting). The majority's reliance on the bright-line categorization, according to the dissent, could produce the anomalous situation where services, while not considered "medical services" under the IDEA, would qualify, for example, as a federal income tax medical expense deduction. See *id.* (Thomas, J., dissenting).

129. See *id.* (Thomas, J., dissenting).

130. *Id.* (Thomas, J., dissenting).

have added "nursing services" to the list of services that school districts are required to provide, but instead chose not to include them.¹³¹

2. Assuming *Tatro's* Precedent Was Correct, It Is Still Not Controlling

The dissent asserted that because the IDEA was enacted pursuant to Congress's spending power, its text must be analyzed using "special rules of construction."¹³² Justice Thomas emphasized that Congress's conditional disbursement of federal funding, as under the IDEA, must be unambiguous, allowing states to knowingly and voluntarily accept the terms of the funds.¹³³ Accordingly, the dissent reasoned that Spending Clause legislation, like the IDEA, must be interpreted narrowly to avoid unanticipated fiscal obligations.¹³⁴

Since the Court had "previously recognized that Congress did not intend to 'impos[e] . . . a burden of unspecified proportions and weight,'"¹³⁵ Justice Thomas proposed that the IDEA's "related services" provision should thus have been interpreted as requiring school districts to provide "health-related services that school nurses can perform as part of their normal duties."¹³⁶ Such an interpretation, the dissent felt, would allow the kind of services performed in *Tatro* and exclude those required in *Garret F.*, creating a result more consistent with Congress's intent to spare school districts from undue financial hardship.¹³⁷ Considering that the cost to provide Garret's necessary services would be a minimum of \$18,000 annually, Justice Thomas found that the majority, in treating this additional cost as irrelevant, ignored the "constitutionally mandated principles of construction applicable to Spending Clause legislation and blindsid[e] unwary [school districts] with fiscal obligations that they could not have anticipated."¹³⁸

131. *See id.* (Thomas, J., dissenting).

132. *Id.* at 1002 (Thomas, J., dissenting) (citing *Board of Educ. v. Rowley*, 458 U.S. 176, 190 n.11 (1982)).

133. *See id.* (Thomas, J., dissenting) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

134. *See id.* (Thomas, J., dissenting).

135. *Id.* at 1003 (Thomas, J., dissenting) (quoting *Rowley*, 458 U.S. at 176 n.11).

136. *Id.* (Thomas, J., dissenting).

137. *See id.* (Thomas, J., dissenting).

138. *Id.* (Thomas, J., dissenting).

IV. ANALYSIS AND IMPLICATIONS OF *GARRET F.*

Garret F. unequivocally affirms a physician-based, bright-line test for determining what necessary nursing services and other health care a school district must provide for a disabled child. The term "medical services," as used in the IDEA, clearly does not include intensive and expensive health care services, even those that resemble private-duty nursing. These services thus are not exempted services under the IDEA, but rather are "related services" that must be provided to a student with disabilities. The only health services that are excluded as "medical services" are those that must be performed by a licensed physician. The Court has also suggested that school districts are obligated to provide these services regardless of cost.

A. *The Court's Ruling in Garret F. Is an Inappropriate Extension of Tatro*

1. The Two Cases Are Irreconcilable

While the Supreme Court's decision in *Garret F.* is consistent with its prior ruling in *Tatro*, the two cases and their holdings cannot be reconciled. Although the issue considered in each action was nearly indistinguishable, the material facts in both lawsuits are incongruous. Further, a plain-language review of the IDEA's text does not support *Tatro's* provider-specific approach to medical services. Therefore, the Court in *Garret F.* was unjustified in applying the *Tatro* bright-line test to its analysis.

The Court in *Tatro* clearly declared that clean intermittent catheterization was a "related," rather than a "medical," service.¹³⁹ However, unlike catheterization, a school nurse could not provide the services *Garret* required while continuing to attend to his or her other duties during the day. Assuredly, the frequency in which a nurse's services were required in these cases was grossly disproportionate. In *Tatro*, the nurse needed to spend only a few minutes with the student every few hours.¹⁴⁰ In contrast, *Garret* required

139. See, *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 895 (1984); see also *supra* notes 27-35 and accompanying text.

140. See *Tatro*, 468 U.S. at 885.

continuous one-on-one care.¹⁴¹ The nurse needed to be in very close proximity to him at all times throughout the day.¹⁴²

Also in *Tatro*, a typical school nurse could easily provide the requested service with little, if any, additional cost to the school district.¹⁴³ Alternatively, in *Garret F.*, the school district had to employ additional personnel at a substantial cost.¹⁴⁴ However, in reauthorizing and emphasizing the application of *Tatro*'s test,¹⁴⁵ and implicitly overruling the *Detsel* line of cases,¹⁴⁶ the Court has indicated that the cost of these services is not a determinative factor in terms of a school district's obligation to provide them.

2. Federalism Concerns

In applying the bright-line *Tatro* test in *Garret F.*, the Court also journeyed into forbidden extra-textual statutory interpretation.¹⁴⁷ *Garret F.* and each of its predecessors involved an interpretation of congressional intent. The plain language of the IDEA's "related services" definition expressly states that, except for "diagnostic and evaluation purposes only," school districts are not required to provide "medical services" for disabled students.¹⁴⁸ Yet, the Court in *Tatro* and in *Garret F.* first turned to the Department of Education's regulations to clarify this denotation.¹⁴⁹

Pursuant to our federal government's tripartite structure and separation of powers, Congress, not the Department of Education, created the IDEA. Congress affirmatively chose to include specific language in the definition of "related services." Therefore, employing a strict reading of the statute, the school district should not have been required to provide individualized nursing services for Garret, irrespective of the meaning of "medical services."¹⁵⁰ Garret was

141. See *Garret F.*, 119 S. Ct. at 995-96.

142. See *id.*

143. See *Tatro*, 468 U.S. at 893.

144. See *Garret F.*, 119 S. Ct. 992, 1003 (Thomas, J., dissenting). The minimum additional cost would have been \$18,000. See *id.*

145. See *supra* text accompanying note 32.

146. See cases cited *supra* note 39.

147. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring) ("The starting point in every case involving construction of a statute is the language itself.").

148. 20 U.S.C. § 1401(22) (1994 & Supp. IV 1998).

149. See *Garret F.*, 119 S. Ct. at 1001 (Thomas, J., dissenting).

150. See *id.* (Thomas, J., dissenting).

injured and assessed for special education when he was a young child; thus, his requested services were not solely for diagnostic and evaluative purposes.¹⁵¹

Conversely, the language of the IDEA does not state that a school's responsibility for providing a free appropriate public education terminates when a child's disability becomes so severe that it becomes burdensome.¹⁵² Thus, the majority was justified in concluding that the school district's proposed burden-balancing, multi-factor test was unwarranted based upon its interpretation of Congress's intent.

B. *Should Cost Be Included in the Definition of "Related Services"?*

1. The Result in *Garret F.* Is Excessively Costly

With advancements in medical science and the opportunities provided by the IDEA, there has been a sharp rise in the number of students with costly technology-dependent health care needs entering the public school system.¹⁵³ These students require a significant amount of health-related services throughout their school day. Some even demand full-time personal nursing services.¹⁵⁴ It is no wonder that state and local educational agencies have questioned the extent and expense to which they are responsible for furnishing special education to these disabled children. The burden is far greater now than ever before.¹⁵⁵

Congress originally planned to appropriate approximately 40 percent of the total expenses necessary to achieve the IDEA provisions;¹⁵⁶ however, the federal share of funding is currently only about ten percent, leaving state and local sources to finance the

151. To his credit, Justice Thomas did touch upon the validity of the Court's actions in pursuing the proper interpretation of this provision in his dissent; however, he could have gone further to suggest that the services requested in *Garret F.* were simply *not* for diagnostic or evaluative purposes. See *id.* (Thomas, J., dissenting).

152. See 20 U.S.C. § 1400(d) (1994 & Supp. IV 1998).

153. See Rozycki, *supra* note 35, at 67 (citing Dick Sobsey & Ann W. Cox, *Integrating Health Care and Educational Programs*, in *EDUCATING CHILDREN WITH MULTIPLE DISABILITIES* 155 (Fred P. Orelve & Dick Sobsey eds., 1991)).

154. See *id.* at 70-71.

155. See Michael D. Simpson, *IDEA Ruling: How It Adds Up*, NEA TODAY, May 1, 1999, at 25.

156. See 20 U.S.C. § 1411(a)(2)(B) (1994 & Supp. IV 1998).

remainder.¹⁵⁷ The National School Boards Association estimates that the yearly cost of providing continuous assistance to the approximately 17,000 technology-dependent students in public schools totals about \$500 million.¹⁵⁸ According to the Department of Education, this means that while the average excess cost of educating a child with disabilities is \$7021, the federal government contributes only \$702 for each disabled student.¹⁵⁹ It stands to reason that every dollar spent on a continuous service for one disabled student reduces the amount that can be spent on other students, diminishing the quality of education for all.¹⁶⁰

By ruling, in *Garret F.*, that school districts are required to fund continuous one-on-one nursing services for disabled children, it appears that the Court would not place a ceiling on what a school district would be required to spend to fully implement the IDEA's special education provisions. What the school district in this case was reaching for, and what several courts have entertained,¹⁶¹ (and what *Garret F.* rejected) was a defense of undue burden. It can be argued that the notion of undue burden is implicit in the statutory concepts of an "appropriate" education and "related" services.¹⁶²

But at what amount does the cost of a particular service become unduly burdensome?¹⁶³ It apparently does not at \$18,000 or \$20,000, as in *Garret F.*¹⁶⁴ or *Morton*, respectively.¹⁶⁵ The stances taken by the parties involved in *Morton* do illustrate why the inclusion of cost in the definition of "related services" might be attractive. The parents, on the one side, argued that any service that would be necessary to enable their disabled child to benefit from an education cannot be excluded, and must be provided free of charge, regardless of the character or expense of the service.¹⁶⁶ The school district, on

157. See Simpson, *supra* note 155; see also Christopher P. Borreca & David B. Hodgins, *Education of Public School Students with Disabilities*, 34 HOUS. LAW. 12, 12 (Apr. 1997).

158. See Simpson, *supra* note 155.

159. See *id.*

160. See *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

161. See, e.g., *Neely v. Rutherford County Sch.*, 68 F.3d 965 (6th Cir. 1995); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991); *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635 (9th Cir. 1990).

162. See 20 U.S.C. § 1400(d)(1)(A) (1994 & Supp. IV 1998).

163. See *Osborne*, *supra* note 41, at 569.

164. See *Garret F.*, 119 S. Ct. at 1003 (Thomas, J., dissenting).

165. See *Morton Community Unit Sch. Dist. No. 709 v. J.M.*, 152 F.3d 583, 584 (7th Cir. 1998).

166. See *id.* at 585. The attorney for the parents actually argued that "the sky is the limit." *Id.*

the other hand, took another extreme position that apparently would exclude most ordinary school nursing services of the kind routinely provided to nondisabled students.¹⁶⁷

The size and overall wealth of school districts also vary. A cost of \$18,000, as the school board encountered in *Garret F.*, may have little effect on a large or wealthy school district, while severely impacting the budget of a small or impoverished district. Additionally, a district, like Cedar Rapids, that already provides expensive health care services to other students with disabilities,¹⁶⁸ may find that the costs associated with providing extensive one-on-one care for just one more will leave them strapped for funds.

2. Ancillary Issues

As school systems are increasingly called upon to provide more intensive levels of services to children with more complex health care needs, a new set of responsibilities presents itself, raising serious concerns about liability. In many situations, a student's particular medical condition may be life-threatening, especially if proper intervention is not instituted almost immediately. Although school nurses, classroom teachers, or other practitioners may be non-medically trained, this does not relieve them of responsibility if a service is provided ineffectively or improperly. If nonmedical staff provide nursing services without specific training and an injury occurs, they may be held to a higher medical standard of care.¹⁶⁹ Providing these types of services may thus be beyond the competence of school districts.

V. CONCLUSION

The Supreme Court, in *Cedar Rapids Community School District v. Garret F.*, has further stressed the interpretation of the "medical services" exclusion of the IDEA's "related services" provision as first set out in *Tatro*. In so doing, the Court indicated that the cost and character of special education services are irrelevant.¹⁷⁰ As long as

167. See *id.* at 586.

168. See *Garret F.*, 119 S. Ct. at 996.

169. See Cynthia A. Dieterich, *Health-Related Services under IDEA That Are Medical in Nature*, 100 EDUC. L. REP. 831, 839 (1995).

170. See *supra* notes 115-23 and accompanying text.

the services are genuinely necessary to enable the disabled child to benefit from an education and cannot be provided outside of school, the school district must provide the funding.¹⁷¹ The ruling represents a notice to the lower courts to end the dilution of *Tatro*—its bright-line test must be followed.

Garret F., however, has not necessarily guaranteed the uniformity of result that was expected in subsequent cases. In the few lower court cases concerning school health care services that have been decided since *Garret F.*,¹⁷² only one court has held, as did *Garret F.*, that a school district is responsible for paying for continuous nursing services provided to one of its special education students.¹⁷³ To the contrary, in *Andrew S. v. School Committee of Greenfield*,¹⁷⁴ the court asserted that Justice Stevens did recognize that “the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA.”¹⁷⁵

Thus, it appears that courts are still grappling with the issue of what costs Congress intended for school districts to bear in their mandate to provide special education services. The task of courts, however, is to interpret the law as it is written, not rewrite the law or even pass judgment on the law itself. If courts’ interpretations are not in line with congressional intent, then Congress may need to amend the IDEA to resolve any further doubt as to what services must be provided for children with disabilities. Congress has done this twice before.¹⁷⁶

171. See *supra* text accompanying note 107.

172. See *John T. v. Marion Indep. Sch. Dist.*, 173 F.3d 684 (8th Cir. 1999); *Andrew S. v. School Comm. of Greenfield*, 59 F. Supp. 2d 237 (D. Mass. 1999); *Farmers Ins. Exch. v. South Lyon Community Sch.*, 602 N.W.2d 588 (Mich. Ct. App. 1999).

173. See *Farmers*, 602 N.W.2d at 594.

174. 59 F. Supp. 2d 237 (D. Mass. 1999).

175. *Id.* at 245 (quoting *Garret F.*, 119 S. Ct. at 999).

176. Congress effectively reversed *Smith v. Robinson*, 468 U.S. 992, 1021 (1984) (holding that where relief was allowable under the IDEA, parents could not seek attorney’s fees under section 504 of the Rehabilitation Act), by amending the IDEA to include an allowance of attorney’s fees, and also effectively reversed *Dellmuth v. Muth*, 491 U.S. 223, 232 (1989) (allowing Eleventh Amendment immunity), by amending the IDEA to expressly nullify Eleventh Amendment immunity.

Ultimately, the express language of the IDEA currently specifies that special education must be provided "at the public's expense."¹⁷⁷ But if the quality of education for students diminishes as a result of decisions like *Garret F.*, Congress must reexamine this issue.

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177. 20 U.S.C. § 1401(8) (1994 & Supp. IV 1998).