

REVISITING DE JURE EDUCATIONAL SEGREGATION: LEGAL BARRIERS TO SCHOOL ATTENDANCE FOR CHILDREN WITH SPECIAL HEALTH CARE NEEDS

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INTRODUCTION

*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.*¹

With these strong words, the United States Supreme Court declared de jure segregation unconstitutional in *Brown v. Board of Education*.² Almost twenty years later, the courts finally addressed the last remaining population excluded from schools—disabled children. Courts reiterated these ideas from *Brown* when holding that states are obligated by the Constitution to provide publicly supported education to disabled children.³ In 1975, Congress codified this policy in the Education of the Handicapped Act,⁴ and mandated that states provide a “free appropriate public education” to all disabled children.⁵ De jure segregation of disabled children was seemingly eliminated by the Education of the Handicapped Act. Discrimination has, however, persisted for one group of disabled children—those with special health care needs.

This problem was caused by judicial inconsistency in determining whether schools must provide nursing services to this population of children. Congress provided a “free appropriate public education,” which includes “special education” and “related services” designed to meet a disabled child’s unique needs, but these terms have proven difficult to

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¹ *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 875 (D.D.C. 1972) (emphasis removed) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

² 347 U.S. 483 (1954).

³ *See, e.g., Mills*, 348 F. Supp. at 874.

⁴ Education of the Handicapped Act (“EHA”), 20 U.S.C. § 1400 et seq. (1990) (amended and renamed the Individuals with Disabilities Education Act (“IDEA”) at 20 U.S.C.A. § 1400 et seq. (1998)).

⁵ 20 U.S.C. § 1401(8) (1998).

apply.⁶ Related services include the supportive services necessary to help a disabled child benefit from special education.⁷ The language of the related services provision encompasses only medical services used for diagnostic and evaluation purposes.⁸ Medical services for all other purposes are not covered by the Act and, therefore, are not included in the related services that a school must provide.⁹ In subsequent regulations, the Secretary of the Department of Education (DOE) attempted to clarify the scope of medical services covered by the related services provision. In particular, the Secretary noted that "school health services" are related services.¹⁰ School health services are defined as "services provided by a qualified school nurse or other qualified person."¹¹ The Secretary also attempted to clarify the scope of the medical services exclusion by defining medical services as "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services."¹² Unfortunately, the Secretary's definitions have not cleared up the confusion over which medical-type services are covered related services and which are excluded medical services. This confusion complicates the lives of children with special health needs, who require some medical assistance to attend school. Children with special health care needs include technology-dependent children and medically fragile children.¹³

The Supreme Court considered the scope of health-related services in *Irving Independent School District v. Tatro*.¹⁴ The Court examined whether a particular health procedure was a covered related service or an excluded medical service. The Court relied upon the Secretary of DOE's definitions of school health services (as those provided by a nurse) and of medical services (as those provided by a physician).¹⁵ The requested service at issue in *Tatro* could be provided either by a nurse or trained

⁶ See *id.*

⁷ See 20 U.S.C.A. § 1401(22) (1998).

⁸ See *id.*

⁹ See *id.*

¹⁰ See 34 C.F.R. § 300.16(a) (1997).

¹¹ 34 C.F.R. § 300.16(b)(11) (1997).

¹² 34 C.F.R. § 300.16(b)(4) (1997).

¹³ A technology-dependent child "is a person from birth through 21 years of age . . . ; has a chronic disability; requires the routine use of a specific medical device to compensate for loss of use of a life sustaining body function; and requires daily, ongoing care or monitoring by trained personnel." 11 REPORT TO CONGRESS AND THE SECRETARY BY THE TASK FORCE ON TECHNOLOGY DEPENDENT CHILDREN, vii-1 (1988) ("Task Force Report"). A medically fragile child is a child with a special health impairment that requires care from trained personnel but does not use any medical device.

¹⁴ 486 U.S. 883 (1984); see also *infra* Part II.A. (for a detailed discussion of the *Tatro* case).

¹⁵ See *id.* at 892.

layperson, or even by the student herself.¹⁶ The Court also mentioned that the service requested was not particularly expensive, complicated, or burdensome.¹⁷ The Court, therefore, held that the requested service was a covered related service and not an excluded medical service.¹⁸

Tatro has not been interpreted consistently by lower courts. In fact, lower courts have interpreted *Tatro* as providing two completely different tests for determining whether a service is a covered related service or an excluded medical service. One line of cases interpreted *Tatro* as stating the following test: if a nurse or trained layperson can provide the service then it is a covered related service, but if a doctor must provide the service then it is an excluded medical service.¹⁹ A second group of lower courts interpret *Tatro* differently, requiring an examination of the nature and extent of the service protected: if the service requested is intermittent, simple, and cheap then it is a covered related service, but if the service requested is constant, complex, and expensive then it is an excluded medical service.²⁰ These tests tend to be outcome determinative. Courts applying the former uniformly conclude that the service is a covered related service. Almost without exception, those that apply the latter refuse to direct the school to provide the service. Thus, for children with special health care needs, the opportunity to attend school is controlled by the jurisdiction in which they happen to live, a factor that is irrelevant to their educational needs and should be irrelevant to their educational opportunities.

For example, Melissa Detsel was²¹ a child who breathed through a tracheostomy tube and had a ventilator. Despite her need for nursing services, Melissa thrived at school.²² Unfortunately, when she brought suit to require the school to provide her with nursing services, the Second Circuit Court of Appeals determined that the school was not required to

¹⁶ See *id.* at 894.

¹⁷ See *id.* at 894-95.

¹⁸ See *id.* at 895.

¹⁹ See, e.g., *Cedar Rapids Community Sch. Dist. v. Garret F.*, 106 F.3d 822 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 1793 (1998); *Skelly v. Brookfield LaGrange Park Sch. Dist.*, 968 F. Supp. 385 (N.D. Ill. 1997); *Macomb County Intermediate Sch. Dist. v. Joshua S.*, 715 F. Supp. 824 (E.D. Mich. 1989).

²⁰ See, e.g., *Neely v. Rutherford County Sch.*, 68 F.3d 965 (6th Cir. 1995); *Detsel v. Bd. of Educ.*, 820 F.2d 587 (2nd Cir. 1987); *Granite Sch. Dist. v. Shannon M.*, 787 F. Supp. 1020 (D. Utah 1992).

²¹ Melissa passed away in February 1996. Her death should not lead to the inference that she was incapable of attending school prior to, and for a majority of the ten years after, the court's ruling.

²² "Melissa really enjoys going to school. She is very happy; she is excited before the school bus comes. She enjoys being in school. In fact, on several occasions when she had to leave school, . . . they literally had to drag her away crying because she didn't want to leave." Testimony of Gregory Liptak, M.D. at 15, *In re Melissa Detsel*, 506 EHLR 378 (SEA N.Y. 1984).

provide the services because they were complicated and costly.²³ As a result of the decision, Melissa would be limited to home-bound tutoring.²⁴

By contrast, Garret F. was injured in a motorcycle accident when he was three years old. As a result of spinal cord injuries, he is quadriplegic and ventilator dependent. Garret's intellectual capabilities are not affected by his disabilities. In order to attend school, he needs someone to suction his tracheostomy tube and provide emergency assistance if necessary. When Garret brought suit to require the school to provide these services, the Eighth Circuit Court of Appeals held that these were the type of services that Congress intended schools to provide to disabled children in order to ensure them meaningful access to public education.²⁵ Without the provision of these services, Garret would be unable to even enter the front door of the school.²⁶ Because of the court's interpretation, Garret is able to successfully attend public school.

Looking at the bare descriptions of Melissa and Garret, there is no clear explanation why one child is able to attend school and the other is excluded. The discrepancy is not due to a difference in their disabilities or the type of services they require. Rather, the differences result from inconsistent interpretations of the Supreme Court decision in *Tatro* regarding nursing services. The Supreme Court recognized the problems caused by these inconsistencies and granted certiorari to Garret F. during the 1997-98 term.²⁷ Hopefully, the Supreme Court will provide some guidance regarding the rights and obligations of families and schools regarding nursing services by the end of the 1998-99 term.

This article reviews existing tests and proposes an alternative method for determining whether the services requested by a child with special health care needs should be covered by the school. Part I contains a discussion of the relevant special education laws. Part II discusses *Tatro* and the two lines of interpretation that have flowed from it. Part III examines the extent/nature test. Part IV criticizes the physician/

²³ See *Detsel*, 820 F.2d at 587; see also *infra* notes 125-45 and accompanying text.

²⁴ Melissa was not removed from school to a homebound placement because she successfully challenged Medicaid's policy forbidding Medicaid-funded private duty nurses from serving children outside of their home. See generally *Detsel v. Sullivan*, 895 F.2d 58 (2d Cir. 1990); see *infra* notes 359-69 and accompanying text (discussing *Detsel v. Sullivan*).

²⁵ See *Cedar Rapids*, 106 F.3d 822; see also *infra* notes 206-15 and accompanying text (discussing the *Cedar Rapids* case).

²⁶ Respondent's Brief in Opposition to Certiorari in the Supreme Court at 17, *Cedar Rapids Community Sch. Dist. v. Garret F.*, No. 96-1793 (October Term 1996) ("[T]he opportunity Garret F. seeks in this case is merely to get in the front door of the school and survive for the school day. He is not seeking some ultimate level of educational experience.")

²⁷ See *Cedar Rapids Community Sch. Dist. v. Garret F.*, ___ U.S. ___, 118 S.Ct. 1793 (1998).

non-physician test. Part V proposes an alternative method for determining whether a child with special health care needs can attend school.

I. RELEVANT SPECIAL EDUCATION LAW

A. INDIVIDUALS WITH DISABILITIES EDUCATION ACT

In the late 1960s and early 1970s, Congress and courts expressed concern regarding the exclusion of children with disabilities from the educational system.²⁸ This concern led Congress to include an "Education of the Handicapped" title in the Elementary, Secondary, and Other Educational Amendments of 1969.²⁹ This new title provided grants to programs for disabled children.³⁰ Congress was also concerned with the marked shortage of effective special education programs.³¹ As a result, one of the explicit purposes of the title was to "assist the states initiating, expanding, and improving education programs designed to serve handicapped children."³² In order to further facilitate the development of special education programs, Congress codified this title into a separate act, entitled the "Education of the Handicapped Act" (EHA) in 1975.³³

At the same time, federal courts began deciding major special education cases using constitutional principles. In the first case, the parents of a group of developmentally disabled children brought a class action seeking to declare statutes that kept a majority of disabled children out of school unconstitutional.³⁴ The Eastern District of Pennsylvania held that the Equal Protection Clause of the Fourteenth Amendment prevents a state from denying children with disabilities access to a public education:³⁵

In an earlier case between the same parties, the court noted that . . . "[h]aving undertaken to provide a free

²⁸ See, e.g., *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pennsylvania 1971).

²⁹ See Elementary, Secondary, and Other Education Amendments of 1969, tit. VI, Pub. L. No. 89-750, § 611, 84 Stat. §§ 121, 178 (1969); see also S. REP. NO. 91-634, at 92 (1970), reprinted in 1970 U.S.C.C.A.N. 2768, 2834; H.R. REP. NO. 94-332, at 2 (1975).

³⁰ See *id.*

³¹ See, e.g., S. REP. NO. 91-634, at 90, reprinted in 1970 U.S.C.C.A.N. 2768, 2832. "As late as 1975, approximately 1,750,000 children of school age with disabilities were totally excluded from free public schooling, while 2,200,000 were in programs that did not meet their needs." MARC C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE 1:5 (1997).

³² S. REP. NO. 91-634, at 90, reprinted in 1970 U.S.C.C.A.N. 2768, 2832.

³³ See Pub. L. No. 94-142, 89 Stat. 773, 774 (1975).

³⁴ See *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pennsylvania 1972). In 1965, Pennsylvania estimated that "while 46,000 [disabled] children were enrolled in public schools, another 70,000 to 80,000 [disabled] children between the ages of five and 21 were denied access to any public education services in schools, home or day care or other community facilities, or state residential institutions." *Id.* at 296.

³⁵ See *id.* at 297.

public education to all of its children, including its exceptional children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training. It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity. . . . [P]lacement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training."³⁶

The court enjoined Pennsylvania from denying any developmentally delayed child access to a free appropriate education in violation of the Equal Protection Clause.³⁷ The court held that the state had a constitutional obligation to provide public education services in appropriate settings to disabled children.³⁸

In the second major special education case, another group of parents of disabled children brought a class action regarding the exclusion of most disabled children from publicly supported education.³⁹ The federal district court of the District of Columbia held that placement of disabled children in appropriate settings and the use of appropriate procedures is required by the Due Process Clause of the Fourteenth Amendment.⁴⁰ The court compared the exclusion of children with disabilities from schools to the situation of providing unequal educational opportunities to wealthy and less affluent students.⁴¹ Since the court found the latter situation to be a violation of the Equal Protection Clause,⁴² "[a] fortiori, . . . denying plaintiffs and their class not just an *equal* publicly supported education but *all* publicly supported education while providing such education to other children, violates the Due Process Clause."⁴³ Further-

³⁶ *Pennsylvania Ass'n for Retarded Children*, 334 F. Supp. at 1259-60 (citations omitted).

³⁷ *See id.* at 1259.

³⁸ *See id.* at 1260.

³⁹ *See Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). As of 1972, out of an estimated 22,000 disabled children in the District of Columbia, 18,000 disabled children were not being furnished with a public education despite mandatory education laws. *See id.* at 868.

⁴⁰ *See id.* at 874-76.

⁴¹ *See id.* at 875.

⁴² *See Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967); *but see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that there is no fundamental right to equal educational opportunities in public schools for wealthy and poor children).

⁴³ *Mills*, 348 F. Supp. at 875 (emphasis added). The court also compared the exclusion of disabled children to school segregation prior to *Brown v. Board of Education*, 347 U.S. 483 (1954). *See id.* at 874-75.

more, the court specifically rejected the school board's argument that insufficient funds excused the school board from its responsibility to provide public education to disabled students.⁴⁴ Thus, the court held that the school district had a federal constitutional requirement to provide appropriate special education services.⁴⁵ Based in large part on these federal court decisions, Congress later amended the EHA to create and strengthen the system of providing federal aid to states for the purpose of improving special education services.⁴⁶ In 1990, Congress renamed the EHA the "Individuals with Disabilities Education Act" (IDEA).⁴⁷ The purpose of the IDEA is:

[t]o assure that all children with disabilities have available to them, . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.⁴⁸

⁴⁴ See *id.* at 875. The court held that the child's interest in education outweighed the state's interest in preventing an increase in fiscal burden and noted:

If insufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies . . . [of] insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' child or handicapped child than on the normal child.

Id. at 876.

⁴⁵ See *id.*

⁴⁶ See S. REP. NO. 94-168 (1975), reprinted in 1975 U.S.C.C.A.N. 1425. The language of the EHA/IDEA is based upon language from the *Mills* and *Pennsylvania Association of Retarded Children* cases. By establishing a federal law dealing with the educational rights of disabled children, Congress avoided the waste of funds and judicial time and the possibility of inconsistent decisions that could arise if each school district was sued under the constitutional framework established in *Pennsylvania Association of Retarded Children* and *Mills*. The Senate noted that by 1975, more than 36 court cases had recognized the rights of handicapped children to an appropriate education. See S. REP. NO. 94-168, at 7 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1431.

⁴⁷ See Pub. L. No. 102-119, 105 Stat. 597 (substituting "Individuals With Disabilities Education Act" for "Education for the Handicapped Act."). The IDEA revised the language of the EHA, substituting the term "handicapped" for the more politically correct term "disabled." See Pub. L. No. 101-476, 104 Stat. 1103 (substituting provisions relating to children with disabilities for provisions relating to handicapped children). When discussing the language of the law generally, this comment will refer to the language of the IDEA unless otherwise stated.

⁴⁸ Compare 20 U.S.C.A. § 1400 (1990), with 20 U.S.C.A. § 1400 (1998). Congress specifically found that the special education needs of the more than eight million disabled children in the United States were not being met. See 20 U.S.C.A. § 1400(b)(1), (2) (1990). More than half did not receive an appropriate education that would give them a "full equality of

In order to ensure effective administration of this law, Congress established an Office of Special Education Programs, within the Office of Special Education and Rehabilitative Services in the DOE.⁴⁹ The Secretary of the DOE is charged with carrying out the provisions of the law by issuing, amending, and revoking regulations implementing the IDEA.⁵⁰

Congress also promised federal funds to assist states in providing education to disabled students.⁵¹ In order to qualify for funds, states must demonstrate that they have a policy that assures all children with disabilities the right to a free appropriate public education.⁵² The state is also required to show a goal of providing disabled children with such an education from birth until the age of twenty-one.⁵³ The state must also show that it has established procedures to assure that:

[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁵⁴

This passage is understood to mean that children must be educated in the "least restrictive environment" that is appropriate.⁵⁵

opportunity" and over one million disabled children were totally excluded from the public school system and, therefore, not educated with their peers. 20 U.S.C.A. § 1400(b)(1) (1998).

⁴⁹ See 20 U.S.C.A. § 1402 (1998). The Secretary of the Department of Education has the authority to clarify the Act through regulations. See 20 U.S.C.A. § 1417(b) (1998).

⁵⁰ See *id.*

⁵¹ See 20 U.S.C.A. § 1411 (1998). Federal funds are dispersed based on the number of children receiving special education and related services. See 20 U.S.C.A. § 1411(a)(2) (1998). Federal money can, however, only be spent once the state spends a certain amount of its own money on education of its own children (determined by a formula set out in 34 C.F.R. § 300.184 (1997)). This ensures that children with disabilities receiving services with federal aid "have at least the same average amount spent on them, from sources other than [the act], as do the children in the school district taken as a whole." 34 C.F.R. § 300.183 (1997). A local education agency must first spend its own money in an amount equal to its average expenditure on a non-disabled child and then federal money is added for the cost of educating a disabled child in excess of that amount. See 34 C.F.R. §§ 300.182-84 (1997)

⁵² See 20 U.S.C.A. § 1412(a)(1) (1998).

⁵³ See 34 C.F.R. § 300.123 (1997).

⁵⁴ 20 U.S.C. § 1412(5) (1998). This language parallels that of *Pennsylvania Association of Retarded Children and Mills*. See, e.g., *Pennsylvania Ass'n of Retarded Children v. Pennsylvania*, 334 F. Supp. 1257, 1259 (E.D. Pennsylvania 1971).

⁵⁵ 34 C.F.R. § 300.132 (1997).

Congress defines a "child with a disability" to include a child "with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services."⁵⁶ When Congress mandated a "free appropriate public education" (FAPE) it required that special education and related services be provided at public expense and in conformity with an individualized education program.⁵⁷

The Supreme Court clarified the meaning of FAPE in *Hudson School District Board of Education v. Rowley*.⁵⁸ When faced with determining what substantive level of education was required by the EHA, the Court held that the EHA's requirement of a FAPE is satisfied when a state provides individualized instruction with sufficient support services to permit the disabled child to receive an educational benefit from the instruction.⁵⁹ The EHA does not require states to "maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'"⁶⁰ The Court held that the EHA only requires the school to provide a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."⁶¹ A number of states, however, require more than the federal minimum floor of opportunity in their state education laws.⁶²

Congress added additional procedures for the education of a disabled student. One such procedure is that the school must develop an individualized education program (IEP) for each student with a disability.⁶³ An "individualized education program" is a written plan of education for each child with a disability created in a meeting with a representative of the local education agency, the student's teachers, par-

⁵⁶ 20 U.S.C.A. § 1401(3)(A) (1998).

⁵⁷ See 20 U.S.C.A. § 1401(8) (1998).

⁵⁸ 458 U.S. 176 (1982).

⁵⁹ See *id.* at 188-89.

⁶⁰ *Id.* at 189-90 (quoting *Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 531 (1980)).

⁶¹ *Rowley*, 458 U.S. at 201.

⁶² See, e.g., *Brimmer v. Traverse City Area Pub. Schs.*, 872 F. Supp. 447, 454 (W.D. Mich. 1994) (citing *Barwacz v. Mich. Dep't of Educ.*, 674 F. Supp. 1296, 1305 (W.D. Mich. 1987)) (applying Michigan law requiring maximizing a disabled child's potential, which "clearly suggests that something more than the federal 'basic floor of opportunity' standard is required to satisfy Michigan law"); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 991 (1st Cir. 1990) (applying Massachusetts special education law requiring maximization of disabled child's educational progress). In order to receive federal funding through the IDEA, a state must comply with both federal and state special education requirements. See 20 U.S.C.A. §§ 1412, 1413 (1998).

⁶³ See 20 U.S.C.A. § 1412(a)(4) (1998).

ents or guardian of the child, and the child when appropriate.⁶⁴ An IEP sets out the specifics of the child's special education program and necessary related services. According to the Act, special education constitutes "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability."⁶⁵ Related services are defined as:

[t]ransportation, and such developmental, corrective, and other supportive services (including⁶⁶ speech pathology and audiology, psychological services, 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 education⁶⁷

The Secretary of the DOE clarified the statutory language through regulations in an attempt to define the scope of the medical services exclusion. The regulations specifically state that "school health services" are a related service.⁶⁸ "School health services" are defined as "services provided by a qualified school nurse or other qualified person."⁶⁹ "Medical services" are "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."⁷⁰ Unfortunately, confusion still exists concerning the scope of the health services that a school must provide to disabled children.

The IDEA is a federal grant program with conditions attached. If a state chooses not to take the IDEA funding, it does not have to comply with the law. Although the federal constitution places some responsibility to educate disabled children on any state that provides public education,⁷¹ these duties are not specific when compared to the detailed

⁶⁴ See 20 U.S.C.A. § 1401(11) (1998).

⁶⁵ 20 U.S.C.A. § 1401(25) (1998).

⁶⁶ "Including" means that "the items named are not all of the possible items that are covered, whether like or unlike the ones named." 34 C.F.R. § 300.9 (1997).

⁶⁷ 20 U.S.C.A. § 1401(22) (1998) (emphasis added). This comment will refer to the italicized section as the medical services exclusion.

⁶⁸ 34 C.F.R. § 300.16(a) (1997).

⁶⁹ 34 C.F.R. § 300.16(b)(11) (1997).

⁷⁰ 34 C.F.R. § 300.16(b)(4) (1997).

⁷¹ See *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (holding that states must provide a free appropriate education to disabled children based upon the Due Process Clause of the Fourteenth Amendment), discussed *supra* notes 39-42 and accompanying text; *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pennsylvania 1972) (holding that states must provide disabled children with a free appropriate education

scheme imposed by IDEA. Other federal laws, however, place specific responsibilities on states in the provision of education to children with disabilities and these laws apply even if the states do not take the IDEA funds.⁷²

B. SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act of 1973⁷³ is an anti-discrimination statute. The law provides that “[n]o otherwise qualified individual with a disability in the United State . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁷⁴ The law prohibits recipients of *any* federal financial assistance from discriminating against disabled people because of their disability.⁷⁵ The statute defines an individual with a disability as a person who: “(i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”⁷⁶

Section 504’s regulations contain similar education provisions to those in the IDEA. Section 504 requires that a “free appropriate public education” be provided to all disabled children, regardless of the nature or severity of their disability.⁷⁷ As part of a FAPE, section 504 also requires schools to provide special education and related services.⁷⁸ Similar to the concept of least-restrictive environment in IDEA, section 504 requires school districts to educate disabled children with non-disabled children to the “maximum extent appropriate to the needs of the handicapped person.”⁷⁹ The regulations specifically state that one way schools can ensure compliance with section 504 is by implementing an IEP in accordance with the IDEA.⁸⁰ A state or local education agency that chooses not to receive the IDEA funds, but receives any other federal funds must, therefore, comply with essentially the same regulations under section 504 as it would under the IDEA.

based upon the Equal Protection Clause of the Fourteenth Amendment), discussed *supra* notes 34-36 and accompanying text.

⁷² See, e.g., Rehabilitation Act § 504, 29 U.S.C.A. § 794 (1998) (discussed *infra* Part I.B.); 42 U.S.C.A. § 12132 (1995) (discussed *infra* Part I.C.).

⁷³ See 29 U.S.C.A. § 794 (1998).

⁷⁴ 29 U.S.C.A. § 794(a) (1998).

⁷⁵ See H. RUTHERFORD TURNBULL III, FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES 19 (1990).

⁷⁶ 29 U.S.C.A. § 706(8)(B) (1998).

⁷⁷ 34 C.F.R. § 104.33(a) (1998).

⁷⁸ See 34 C.F.R. § 104.33(b)(1) (1998).

⁷⁹ 34 C.F.R. § 104.34(a) (1998).

⁸⁰ See 34 C.F.R. § 104.33(b)(2) (1998).

The scope of the IDEA and section 504 are not precisely the same. The IDEA only protects children who require special education services due to their disabilities.⁸¹ Section 504 covers all school-age disabled children, regardless of whether they require special education.⁸² For example, section 504 might apply to a child with AIDS who does not require special education services but requires reasonable accommodation for his health problems, whereas the IDEA would not apply. Additionally, the IDEA only encompasses the provision of a FAPE, while section 504 forbids discrimination generally.⁸³ Only section 504 applies to schools that do not allow a disabled individual to participate in an extracurricular activity.⁸⁴ A plaintiff may, therefore, have a claim under both IDEA and section 504 or under only one of the laws.

Claims under section 504 and the IDEA can be filed together.⁸⁵ Since compliance with the IDEA will generally result in compliance with section 504, the only time the addition of a section 504 claim might make a difference is in a case where the IDEA does not apply but section 504 does, or where the school complied with the IDEA, but not with section 504.⁸⁶ Whenever a student is covered by both laws, however, he must first pursue the IDEA procedures before he can go to court, even if he raises the issue of non-compliance with section 504.⁸⁷

C. AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA) is another anti-discrimination statute. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities or a public entity, or be subjected to discrimination by any such entity."⁸⁸ The ADA applies to any public entity, regardless of whether it receives any financial assistance.⁸⁹

⁸¹ See 1 BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, *THE LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW* 8:2 (1995); see also *Irving Indep. Sch. Dist. v. Tatro*, 486 U.S. 883, 894 (1984) (stating that the IDEA only requires schools to provide educational services to students who qualify as disabled).

⁸² See *id.* at 8:2-8:3.

⁸³ Compare 29 U.S.C.A. § 794(a) (1998) (forbidding discrimination against people with disabilities) with 48 U.S.C.A. § 1412(a) (1998) (requiring states to provide disabled children with a FAPE).

⁸⁴ See TUCKER & GOLDSTEIN, *supra* note 81, at § 8:3.

⁸⁵ See *id.* at 8:9.

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ 42 U.S.C.A. § 12132 (1995).

⁸⁹ See Suong Main Cavalli & Martin L. Chen, *An Overview of the Law Affecting Children with Special Needs: Section 504, the ADA, and the IDEA*, in REPRESENTING SPECIAL NEEDS CHILDREN 9 (Ga. Inst. of C.L.E. eds., 1996).

Unlike section 504, the ADA does not have a separate section dealing with the provision of education for disabled individuals. Title II was intended to be consistent with the regulations of section 504.⁹⁰ Title II regulations state that a public entity may not “[a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded to others”⁹¹ or “[p]rovide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.”⁹² When read in conjunction with the section stating that the ADA cannot be construed so as to permit lesser standards than those established by section 504,⁹³ these regulations require that schools districts provide a FAPE to the same extent as required under section 504.⁹⁴ Therefore, a disabled student denied a FAPE may also have a cause of action under the ADA.

Although the courts deciding special education cases have mainly focused on the IDEA, a plaintiff may be able to bring concurrent claims under the IDEA, section 504, and the ADA, or any combination of these laws. The substantive provisions of these laws are generally similar, including the scope of health related services to be provided to the child. These laws or their regulations, however, do not specifically define the scope of nursing services covered by the related services provision. As a result, the U.S. Supreme Court was faced with this issue in *Irving Independent School District v. Tatro*.⁹⁵

II. JUDICIAL TREATMENT

A. UNITED STATES SUPREME COURT

In *Tatro*, the Supreme Court held that some nursing services are related services that must be provided by schools.⁹⁶ The case concerned an eight year-old girl with spina bifida, named Amber Tatro.⁹⁷ Amber had multiple disabilities, including orthopedic and speech impairments and a neurogenic bladder, that she was unable to empty voluntarily. As a result, she was catheterized once every three or four hours to avoid kidney injuries. The medical process required, Clean Intermittent Catheterization (CIC), which involves inserting a catheter into the urethra to drain

⁹⁰ *See id.*

⁹¹ 28 C.F.R. § 35.130(b)(1)(ii) (1998).

⁹² 28 C.F.R. § 35.130(b)(1)(iii) (1998).

⁹³ *See* 28 C.F.R. § 35.103(a) (1998).

⁹⁴ *See* Cavalli & Chen, *supra* note 89, at 10.

⁹⁵ 468 U.S. 883 (1984).

⁹⁶ *Id.* at 895.

⁹⁷ *See id.* at 885.

the bladder.⁹⁸ Irving Independent School District agreed to provide Amber special education services and prepared an IEP for her. Amber's IEP provided that she would attend early development classes and would receive related services such as physical and occupational therapy. The IEP failed to provide for the administration of CIC.⁹⁹

After exhausting their administrative remedies, Amber's parents brought suit in federal court under the EHA and sought an affirmative injunction requiring that her IEP include the provision of CIC.¹⁰⁰ The Court noted that because Texas was receiving funds under the EHA, it was required to provide a FAPE to all children with disabilities.¹⁰¹ A FAPE includes both special education and related services at no cost to the parents.¹⁰² The Court framed the issue as whether CIC is a related service¹⁰³ and announced a two-part test for determining whether a school district is required to provide a service.¹⁰⁴ The first prong is whether the service requested is a "supportive servic[e] . . . required to assist a handicapped child to benefit from special education."¹⁰⁵ The second prong is whether the service is an excluded medical service.¹⁰⁶

Using this test, the Court held that CIC was a supportive service.¹⁰⁷ It noted that the purpose of the EHA was to make public education available to children with disabilities and for that access to be meaningful:¹⁰⁸

A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned. . . . Services like CIC that permit a child to remain at school during the day are no less

⁹⁸ *See id.*

⁹⁹ *See id.* at 886.

¹⁰⁰ *See id.* Her parents also tried to bring a claim under section 504 of the Rehabilitation Act of 1973. The Court, however, decided in *Smith v. Robinson*, 468 U.S. 992 (1984), that section 504 does not apply when relief can be obtained under the EHA. Therefore, the Court held that Amber was not entitled to relief under section 504. *See Tatro*, 468 U.S. at 894. In 1986, Congress amended the EHA to change this rule: "Nothing in this [law] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973 [citation omitted], or other Federal laws protecting the rights of children with disabilities." 20 U.S.C. § 1415(l) (1998) (citations omitted). A plaintiff bringing an action under other laws must exhaust remedies to the same extent as would be required under the IDEA. *Id.*

¹⁰¹ *See Tatro*, 468 U.S. at 889.

¹⁰² *See id.*

¹⁰³ *See id.* at 890.

¹⁰⁴ *See id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See id.* at 891 (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 192 (1982)).

related to the effort to educate than are services that enable the child to reach, enter, or exit the school.¹⁰⁹

The Court specifically rejected the district court's rationale that CIC was not a related service because it did not serve a need arising from the effort to educate.¹¹⁰ By this, the Court made clear that it would interpret supportive services broadly.

As for the second prong of the test, the Court held that CIC was not an excluded medical service.¹¹¹ The Court relied on the Secretary of the DOE's definition of school health services, as services provided by a nurse or other qualified individual, and of medical services as services provided by a physician.¹¹² The Secretary determined that:

the services of a school nurse otherwise qualifying as a 'related service' are not subject to exclusion as a 'medical service,' but that the services of a physician are excludable as such. . . . By limiting the 'medical services' exclusion to the services of a physician or hospital, . . . the Secretary has given a permissible construction to the provision.¹¹³

When discussing the reasons for the medical exclusion, the Court stated that Congress may have intended "to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence."¹¹⁴ The Court noted that Congress did require schools to hire certain trained personnel, such as occupational, physical, and speech therapists.¹¹⁵ It was reasonable for the Secretary to conclude that nurses were such trained personnel and that "nursing services are not the sort of burden that Congress intended to exclude as a 'medical service.'"¹¹⁶

¹⁰⁹ *Id.* The Court also noted that the Third Circuit had found CIC to be a related service, and that the Department of Education agreed with this finding in its interpretive ruling. *See id.* (citing *Tokarcik v. Forest Hills Sch. Dist.*, 665 F.2d 443 (3rd Cir. 1981)).

¹¹⁰ *See Tatro*, 468 U.S. at 891 (rejecting rationale in *Tatro v. Tex.*, 481 F. Supp. 1224, 1227 (N.D. Tex. 1979)).

¹¹¹ *See id.*

¹¹² *See id.* at 892; 34 C.F.R. §§ 300.16(b)(4), (11) (1997).

¹¹³ *Id.* at 892-93.

¹¹⁴ *Id.* at 892.

¹¹⁵ *See id.* at 893.

¹¹⁶ *Id.* at 893. The Court rejected the school district's argument that CIC was an excluded medical service because it must be ordered by a doctor and is ultimately under a doctor's supervision. *See id.* School nurses are authorized to give medication and administer emergency injections in accordance with a doctor's prescription. "It would be strange indeed if Congress, in attempting to extend special services to handicapped children were unwilling to guarantee them services of a kind that are routinely provided to the nonhandicapped." *Id.* at 893-94.

The Court also mentioned some specific limitations on the provision of health services to disabled children. First, a child must be disabled in order to qualify for special education services.¹¹⁷ Second, only services necessary to help a disabled child benefit from special education must be provided, regardless of how easily additional services could be furnished.¹¹⁸ Third, "the regulations state that school [health] services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician."¹¹⁹ The Court noted that in Amber's case, not even the services of a nurse were required because a layperson could easily be trained to perform CIC. Finally, in this case, Amber's family was planning to provide the necessary equipment for CIC.¹²⁰ As a result of their finding that CIC was a related service and was not a medically excluded service, the Court held that the school district must provide the requested nursing services to Amber.¹²¹ *Tatro*, however, has not been interpreted consistently by lower courts.

A significant source of the inconsistency is the *Tatro* court's failure to clearly articulate the test used in determining whether the school district was required to provide the nursing services. One line of cases interpret *Tatro* as applying a test that balances the extent and nature of the services requested in order to determine whether the service is so burdensome to the district that it becomes medical in nature and is therefore excludable.¹²² A second line of cases interpret *Tatro* to create a bright line test depending on the qualifications of the person required to provide the service.¹²³

¹¹⁷ See *id.* at 894; see also 20 U.S.C.A. § 1411(a)(1) (1998).

¹¹⁸ See *Tatro*, 468 U.S. at 895. The Court gave the example that if a disabled student could be given medication other than during the school day, then a school is not required to administer it as a related service. *Id.* at 894.

¹¹⁹ *Id.*; see also 34 C.F.R. § 300.16(11) (1997).

¹²⁰ The significance of this consideration may have been lessened by the amendment to the IDEA that requires schools to provide assistive technology devices. See 20 U.S.C.A. §§ 1401(1), (2); 1412(12)(B) (1998). An assistive technology device is "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with disabilities." 20 U.S.C.A. § 1401(1) (1998); see also 34 C.F.R. § 300.5 (1997).

¹²¹ See *Tatro*, 468 U.S. at 895.

¹²² See, e.g., *Neely v. Rutherford County Sch.*, 68 F.3d 965 (6th Cir. 1995) (discussed *infra* notes 152-69 and accompanying text); *Detsel v. Bd. of Educ.*, 820 F.2d 597 (2d Cir. 1987) (discussed *infra* notes 142-51 and accompanying text).

¹²³ See, e.g., *Cedar Rapids Community Sch. Dist. v. Garret F.*, 106 F.3d 822 (8th Cir. 1997) (discussed *infra* 215-18 and accompanying text); *Skelly v. Brookfield LaGrange Park Sch. Dist.*, 95, 968 F. Supp. 385 (N.D. Ill. 1997) (discussed *infra* notes 236-50 and accompanying text).

B. THE EXTENT/NATURE TEST

A number of courts interpret *Tatro* as applying a balancing test to determine if a service is a related or an excluded medical service. The "extent/nature test," balances such factors as cost of the service, complexity of procedure, and amount of time required to perform the service.¹²⁴

At least two circuits and a number of district courts have accepted the extent/nature test. The Second Circuit announced the extent/nature test in *Detsel v. Board of Education*,¹²⁵ the first case interpreting the scope of school nursing services after *Tatro*. Melissa Detsel was a child with significant physical disabilities who breathed through a ventilator and had a tracheostomy.¹²⁶ She had above average intelligence and was able to participate in activities with her class. In order to attend school, Melissa needed medical personnel to suction mucus from her tracheostomy, administer medication through a tube to her intestine, monitor her vital signs, and be prepared to perform emergency procedures arising from complications with her tracheostomy.¹²⁷ The trial court found that the school nurse could not provide the services, and that an LPN or RN would be required.¹²⁸

When Melissa began school in the Auburn School District, an IEP was created. Her IEP classified her as "other health impaired," and listed the related services to be provided to her, including speech and language therapy, physical therapy, occupational therapy, adaptive physical education and "appropriate school health services."¹²⁹ The IEP, unfortunately, failed to establish the appropriate health services required.¹³⁰

After the school district denied Melissa's request for additional services related to her disability, she initiated a due process hearing before a State Department of Education hearing officer. The hearing officer determined that the services requested were related services, and the school appealed to the Commissioner of the State Department of Education.¹³¹ The Commissioner concluded the procedures were not related

¹²⁴ See, e.g., *Detsel v. Bd. of Educ.*, 637 F. Supp. 1022, 1026 (N.D.N.Y. 1986) (examining cost, complexity, and time for the requested procedure); *Granite Sch. Dist. v. Shannon M.*, 787 F. Supp. 1020, 1029 (D. Utah 1992) (examining cost, complexity, and time for requested service).

¹²⁵ 820 F.2d 587 (2d Cir. 1987) (relying on reasoning of district court).

¹²⁶ See *Detsel*, 637 F. Supp. at 1026. A tracheostomy involves the insertion of a tube into the trachea to assist with breathing.

¹²⁷ See *id.* at 1024.

¹²⁸ See *id.* at 1025. It is worth noting that in New York state, a school nurse must at least be a registered nurse. N.Y. EDUCATION LAW § 902(1) (McKinney 1997); see *infra* Section III.B.4. (for a discussion of training required for different types of nurses).

¹²⁹ *Detsel*, 637 F. Supp. at 1024.

¹³⁰ See *id.* at 1023.

¹³¹ See *id.*

services.¹³² After exhausting her administrative remedies, Melissa appealed the Commissioner's decision to the federal district court.

The district court held that the services requested were not related services.¹³³ Melissa argued that the Court in *Tatro* established a bright line test: if a nurse can provide the service, then it is a school health service that the school must provide as a related service; contrarily, if a doctor must provide the service, then it is an excluded medical service that the school is not required to provide.¹³⁴ Melissa's argument focused on the nature of the provider. The school argued that although the disputed services did not necessarily require a physician, they were essentially medical in nature¹³⁵ and that "the question of whether a supportive service is a medical service is a matter of degree."¹³⁶ The school asked the court to focus on the nature of the service requested, not the status of the person performing the procedure. The school, however, did not offer any evidence about where the court should draw the line between supportive services and medical services.

Looking to *Tatro* for guidance, the district court reiterated the two-part test: first, do the services in question qualify as supportive services; and second, do they fall within the medical services exclusion.¹³⁷ As for the first prong, the court noted that the Supreme Court "analogized 'supportive services' to services which enabled a child to remain at school during the day."¹³⁸ Based on this definition, the court held that the services requested by Melissa were supportive because they allowed Melissa to attend school.¹³⁹ The court noted, however, that the school was not required to provide all supportive services.¹⁴⁰

The *Detsel* court examined the medical exclusion prong of the test. The court relied on the Supreme Court's discussion of cost and competence in *Tatro* in rejecting the bright line test regarding medical services,¹⁴¹ holding instead that "[i]t is clear that the Supreme Court considered the extent and nature of the service performed in the *Tatro*

¹³² *See id.*

¹³³ *See id.* at 1027.

¹³⁴ *See id.* at 1024.

¹³⁵ *See id.* at 1027.

¹³⁶ *Id.* at 1025.

¹³⁷ *See id.* at 1026.

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See id.* at 1027. The Supreme Court determined that the Secretary of DOE had interpreted the scope of the medical exclusion reasonably and stated that Congress's purpose in the medical exclusion might have been to "spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 892 (1984).

decision.”¹⁴² The court factually distinguished the services requested in *Tatro* from the service requested by Melissa and noted:

Unlike CIC, the services required by Melissa are extensive. This is not a simple procedure which the child may perform herself. Constant monitoring is required in order to protect Melissa’s very life. The record indicates that the medical attention required by Melissa is beyond the competence of a school nurse. A specially trained individual is required, preferably a health professional.¹⁴³

The court added factors such as cost,¹⁴⁴ complexity and time into the reasoning for the medical service exclusion.

The district court also relied on the Supreme Court’s decision in *Rowley*.¹⁴⁵ According to *Rowley*, the EHA only requires schools to provide a minimum floor of opportunity and schools are not required to maximize each disabled student’s potential.¹⁴⁶ The parties admitted that without the provision of the requested service, “Melissa must receive *only* in-home instruction.”¹⁴⁷ The district court determined that although this was not the ideal situation for Melissa, it did meet the minimum required by the EHA.¹⁴⁸

The court, therefore, held that if nursing services are complex and costly, they can be excluded as medical services because of their burden on the school.¹⁴⁹ If nursing services are simple and do not similarly burden the school, then they are related services that must be provided by the school.¹⁵⁰ The Second Circuit affirmed the decision.¹⁵¹

¹⁴² *Detsel*, 637 F. Supp. at 1026.

¹⁴³ *Id.* at 1026-27.

¹⁴⁴ It is worth noting that the attorney for the school district specifically denied basing his argument upon cost factors. *See* Record at 6-7, *Detsel*, 637 F. Supp. 1022 (N.D.N.Y. 1986).

¹⁴⁵ *See Detsel*, 637 F. Supp. at 1027 (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982)).

¹⁴⁶ *See Rowley*, 458 U.S. at 199-201.

¹⁴⁷ *Detsel*, 637 F. Supp. at 1026 (emphasis added).

¹⁴⁸ *See id.* at 1027. It appears, however, that the court misapplied *Rowley* to the case at hand. The nature of the educational program was not in question in *Detsel*. The issue ultimately was whether provision of health services, and as a result the least restrictive environment, would be in school or at home.

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

¹⁵¹ *See Detsel v. Bd. of Educ.*, 820 F.2d 587 (2d Cir. 1987). The circuit court mainly focused on distinguishing Melissa’s case from the Ninth Circuit decision, *Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983). The court in *Katherine D.* held that suctioning and monitoring a ventilator were both related nursing services. *See id.* The *Detsel* court distinguished Melissa’s case from that of Katherine by stating that Katherine’s care was only intermittent while Melissa’s was constant. *See Detsel*, 820 F.2d at 588. Moreover, the

The Sixth Circuit also adopted the extent/nature test in *Neely v. Rutherford County School*.¹⁵² Samantha Neely was a child with congenital central hypoventilation syndrome, a rare condition causing breathing difficulties.¹⁵³ Samantha required a tracheostomy in order to breathe. In order to attend school, Samantha needed an attendant to regularly suction her tracheostomy¹⁵⁴ and to administer emergency care if necessary.

The school district agreed to hire a full-time nurse or respiratory care specialist as stated in Samantha's IEP, but only hired a nursing assistant. The parents brought a suit requesting the school to hire a nurse to provide in-school care for Samantha.¹⁵⁵ The administrative law judge concluded that the requested services were excluded medical services.¹⁵⁶ On appeal, the district court determined that the requested nursing services were supportive services and were not excluded by the medical services provision.¹⁵⁷

The Sixth Circuit reversed, reiterating the two part *Tatro* test: first, whether the requested service is a supportive service; and second, whether the service is excluded as a medical service.¹⁵⁸ On the first prong, both parties agreed that the requested service was supportive because it was necessary for Samantha to be able to enjoy the benefits of

services provided to Katherine D. did not require as much expertise as did the services provided to Melissa. *See id.*

¹⁵² 68 F.3d 965 (6th Cir. 1995). A district court prior to this decision, however, rejected the extent/nature test. *See Macomb County Intermediate Sch. Dist. v. Joshua S.*, 715 F. Supp. 824 (E.D. Mich. 1989). That court stated that the extent/nature test "[u]nquestionably . . . ignores *Tatro's* conclusion that '[b]y limiting the 'medical services' exclusion to the services of a physician or hospital, . . . the Secretary has given a permissible construction to the provision.'" *Id.* at 828 (quoting *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 833, 893 (1984)). The district court, therefore, held that the medical services exclusion is limited to services provided by a licensed physician. *See id.* The *Joshua S.* decision was not specifically overruled or even mentioned in the *Neely* case. Other state hearing officers in the Sixth Circuit held that schools had to provide private duty nurses to students prior to *Neely*. *See, e.g., Caledonia Pub. Schs.*, 19 IDELR (LRP) 1125 (Apr. 19, 1993) (holding school must provide students with school health services necessary to meet her health care needs). *See also Tanya v. Cincinnati Bd. of Educ.*, 651 N.E.2d 1373 (Ohio Ct. App. 1995). In *Tanya*, the Ohio Court of Appeals held that a school had to provide a RN or LPN to a health impaired child to meet its obligations under the IDEA. However, the court did not explicitly adopt or reject either test.

¹⁵³ *See Neely*, 68 F.3d at 967.

¹⁵⁴ *See id.* at 967 (noting that an attendant, and not a nurse, would be able to perform the necessary procedures. The number of times Samantha needed to be suctioned varied and if Samantha was in good health, she might only need to be suctioned after meals. If she had a cold, she might need to be suctioned as often as every 20 minutes).

¹⁵⁵ *See id.*

¹⁵⁶ *See id.* at 968. It is unclear that the judge should have made this determination. The issue on appeal was whether the school had to provide a full-time nurse or respiratory care specialist or whether providing a nursing assistant was enough. On appeal, the judge said that the school was required to provide neither. *See id.*

¹⁵⁷ *See id.*

¹⁵⁸ *See id.* at 969.

special education.¹⁵⁹ In regard to the second prong, however, the court noted that *Tatro* had been interpreted in two different ways: a bright line physician/non-physician test and a balancing of interests extent/nature test.¹⁶⁰ The court relied upon decisions that rejected the bright line test and accepted the extent/nature test¹⁶¹ and held that “it is appropriate to take into account the risk involved and the liability factor of the school district inherent in providing a service of a medical nature such as is involved in this controversy.”¹⁶² Thus, the court added factors of risk and liability into the extent/nature balancing equation. The court held that the services requested in this case caused an undue burden on the school system because of the nature of the care involved.¹⁶³ The services requested were varied and intensive and the care of a Licensed Practitioner Nurse (LPN) or Registered Nurse (RN) was required.¹⁶⁴ Most importantly, the nursing services requested had to be provided on a constant basis.¹⁶⁵ The court held that the services caused an undue burden on the school district and, therefore, the services requested by Samantha fell into the medical services exclusion.¹⁶⁶

A district court in the Tenth Circuit also adopted the extent/nature test in *Granite School District v. Shannon M.*¹⁶⁷ Shannon was a child with congenital neuromuscular atrophy and severe scoliosis. Shannon used a wheelchair, breathed through a tracheostomy tube, and received food through a nasogastric tube. In order to attend school, Shannon required suctioning of her tracheostomy tube five times per three hour school day, monitoring, and provision of emergency services if neces-

¹⁵⁹ *See id.*

¹⁶⁰ *See id.* at 970.

¹⁶¹ *See id.* at 970-71. For decisions by courts rejecting the bright-line test and adopting the extent/nature test, see, e.g., *Granite Sch. Dist. v. Shannon M.*, 787 F. Supp. 1020 (D. Utah 1992); *Bevin H. v. Wright*, 666 F. Supp. 71 (W.D. Pennsylvania 1987); *Detsel v. Bd. of Educ.*, 637 F. Supp. 1022 (N.D.N.Y. 1986), *aff'd*, 820 F.2d 587 (2nd Cir. 1987).

¹⁶² *Neely*, 68 F.3d at 971.

¹⁶³ *See id.* at 971.

¹⁶⁴ *See id.* Tennessee law requires that the service requested be provided by a physician, registered practical nurse, licensed practical nurse, respiratory care specialist, the patient's relatives or the patient herself. *See id.* at 971; *see also infra* Section III.B.4. (for a discussion of training required for different levels of nurses).

¹⁶⁵ *See Neely*, 68 F.3d at 971-72. Samantha's parents argued that she did not require constant care. They argued that as long as the nurse had a pager and was nearby, the nurse could be outside of the classroom. The district court found that the cost of providing a nurse to Samantha was not an undue burden on the district and the school district agreed to provide Samantha with a nursing assistant and the cost of an LPN would not be much more. *See Neely v. Rutherford County. Sch.*, 851 F. Supp. 888, 894 (M.D. Tenn. 1994). The Sixth Circuit, however, reversed this finding based on a clearly erroneous standard concerning inappropriate cost comparisons considered by the trial court. *See Neely*, 68 F.3d at 972-73; *see also infra* Section III.B.1. (discussing Samantha's case in greater detail).

¹⁶⁶ *See Neely*, 68 F.3d at 973.

¹⁶⁷ 787 F. Supp. 1020 (D. Utah 1992).

sary. The parties agreed that, at the least, an LPN was required to perform the duties.¹⁶⁸

The court analyzed *Rowley* to determine whether Shannon could be provided with an appropriate education without the nursing services.¹⁶⁹ In *Rowley*, the Supreme Court determined that the EHA only requires that schools provide access to education sufficient to confer some educational benefit, and does not require schools to provide an opportunity to a disabled student equal to that of a non-disabled student.¹⁷⁰ Since the court determined that Shannon's school met the *Rowley* basic floor of opportunity, the court held that the school was not required to provide the additional services.¹⁷¹ The court also noted that the school did not have to place Shannon in the best environment, but only in an appropriate environment.¹⁷²

The court analyzed Shannon's situation under the two-part test of *Tatro* and acknowledged that the requested services were supportive.¹⁷³ Regarding the scope of the medical services exclusion, the court refused to accept the bright line physician/non-physician test.¹⁷⁴ Similar to *Detzel* and the line of cases based on it, the court held that *Tatro* created a test that distinguished between students needing intermittent care with procedures requiring less expertise and students requiring complex constant care.¹⁷⁵

¹⁶⁸ See *id.* at 1022 n.3 (noting that Shannon's parents were not concerned with who provides the care, but for purposes of litigation, they stipulated that at least an LPN was required).

¹⁶⁹ See *id.* at 1023-24.

¹⁷⁰ See *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); see also *supra* notes 58-61 and accompanying text.

¹⁷¹ See *Shannon M.*, 787 F. Supp. at 1029.

¹⁷² See *id.*; see also *Thomas v. Cincinnati Bd. of Ed.*, 918 F.2d 618, 627 (6th Cir. 1990) (holding that court must not examine which placement is most advantageous but whether the proposed placement is appropriate). It is worth noting that Shannon's placement was not a litigated issue but the a fortiori result of the related services issue. See *id.*

¹⁷³ See *Shannon M.*, 787 F. Supp. at 1024-25, 1028.

¹⁷⁴ See *id.* at 1026. The *Shannon M.* court partially based its decision on *Max M. v. Thompson*. 592 F. Supp. 1437 (N.D. Ill. 1984) (holding that psychotherapy, a recognized related service, does not become excluded as a medical service simply because a psychiatrist provides the service). The *Shannon M.* court described the bright line test as:

an arbitrary classification of services based solely on the licensed status of the service provider. If a licensed physician may provide related services without their becoming instantly 'medical,' we believe that by the same token a program clearly aimed at curing an illness—whether mental or physical—does not become instantly 'related' when it can be implemented by persons other than licensed physicians.

787 F. Supp. at 1026-27. The court, however, mistakenly believed that the purpose of the nurse was to aid in curing Shannon, and not only to help her benefit from special education. See *id.* The court held that it is arbitrary not to classify a certain service as medical just because it is not provided by a doctor. See *id.* The court then drew the conclusion that another service *can* be classified as medical because it would be just as arbitrary to conclude that service is medical even though it is not provided by a doctor. See *id.*

¹⁷⁵ See *Shannon M.*, 787 F. Supp. at 1030; see, e.g., *Bevin H. v. Wright*, 666 F. Supp. 71(W.D. Pennsylvania 1987); see also *infra* notes 167-78 and accompanying text (analyzing

The court found that the school provided Shannon with the minimum floor of opportunity by providing her home instruction. The court recognized that the IDEA requires mainstreaming unless it cannot be satisfactorily achieved, but held that mainstreaming was not possible in this case because of the high costs,¹⁷⁶ the constant care needed, and the complexity of the services requested.¹⁷⁷ The court, therefore, held that the requested services were excluded medical services and the school did not have to provide them.¹⁷⁸

The Ninth Circuit appears to have rejected the physician/non-physician test in *Clovis Unified School District v. California Office of Administrative Hearings*.¹⁷⁹ This case involved Michelle Shorey, a student with emotional disabilities. Michelle's parents rejected the school's proposed residential placement and requested that the school pay for a private placement for psychological services.¹⁸⁰ The school recognized that the IDEA can require residential placement, but it argued that Michelle's private placement was based upon a medical need rather than an educational need.¹⁸¹ The family argued that the placement was a required related service.¹⁸² The court looked to *Tatro* for guidance, interpreting it as relying in part, but not solely, on the status of the provider.¹⁸³ The *Clovis* court claimed that *Tatro* also relied in part on the extent and nature of the requested service and the burden the service would impose on the school district.¹⁸⁴ The court also approved of the reasoning of *Detsel* and applied the extent/nature test, holding that the services requested were excluded medical services.¹⁸⁵ Thus, it appears the Ninth Circuit has adopted the extent/nature test.¹⁸⁶

the *Bevin* case). The court rejected Shannon's reliance on *Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), and *Macomb County Intermediate School District v. Joshua S.*, 715 F. Supp. 824 (E.D. Mich. 1989). The court distinguished Shannon's case from that of Katherine D., stating that Katherine only required intermittent services while Shannon required constant care. The court rejected *Joshua S.* because, unlike Shannon, he was not offered home instruction. See *Shannon M.*, 787 F. Supp. at 1028.

¹⁷⁶ See *Shannon M.*, 787 F. Supp. at 1029. The cost of the nurse was estimated at \$30,000 per year. No cost of home instruction was presented. The court stated that "the expense of providing Shannon's requested care would undoubtedly take money away from other programs." *Id.*; but see *infra* note 346 and accompanying text. The estimate of \$30,000 appears to be an over-estimation. See *infra* Section III.B.1.b. (for discussion).

¹⁷⁷ See *Shannon M.*, 787 F. Supp. at 1029

¹⁷⁸ See *id.* at 1030.

¹⁷⁹ 903 F.2d 635 (9th Cir. 1990).

¹⁸⁰ See *id.* at 639.

¹⁸¹ See *id.* at 642.

¹⁸² See *id.* at 641-42.

¹⁸³ See *id.* at 642-44.

¹⁸⁴ See *id.* at 644.

¹⁸⁵ See *id.*

¹⁸⁶ The Ninth Circuit's earlier decision of *Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983) (holding that a school district was required to provide nursing services to a child with a traumatic brain injury, including monitoring, medication, and supervision for

A number of district courts in the Third Circuit also appear to have adopted the extent/nature text. One district court decision, *Fulginiti v. Roxbury Township Public Schools*,¹⁸⁷ was affirmed by the Third Circuit Court of Appeals in an unpublished decision of questionable precedential value.¹⁸⁸ Carissa Fulginiti was a child born with severe multiple disabilities, causing her to require a tracheostomy and feeding tube.¹⁸⁹ In order to attend school, Carissa needed a nurse to suction her tracheostomy tube, monitor her health, and provide emergency care if necessary. The Fulginiti family requested a due process hearing before an administrative law judge. The administrative law judge based his ruling that the requested services were excluded medical services on an application of the extent/nature test.¹⁹⁰ The district court affirmed the administrative law judge's decision, focusing on the cost of the service.¹⁹¹ The court concluded that the requested services were "medical in nature" and, therefore, outside of the school board's responsibilities.¹⁹² The Third Circuit affirmed the decision in an unpublished opinion, noting that this case "appears to have value only to the trial court or the parties. . . ."¹⁹³ Thus, it is not clear whether the Third Circuit will adopt the extent/nature test.

One of the most frequently cited district court decisions is *Bevin H. v. Wright*.¹⁹⁴ Bevin was a child with multiple disabilities, including

gency care when necessary), was not explicitly overruled or mentioned in the *Clovis* decision. *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635 (9th Cir. 1990). *Katherine D.* was decided before *Tatro*, so it is unclear what framework the court used to make that decision.

¹⁸⁷ 921 F. Supp. 1320 (D.N.J. 1996).

¹⁸⁸ *Fulginiti v. Roxbury Township Pub. Sch.*, 116 F.3d 468 (3rd Cir. 1997) ("The Third Circuit provides by rule for the reporting of opinions having 'precedential or institutional value. An opinion which appears to have value only to the trial court or to the parties is ordinarily not published.'")

¹⁸⁹ See *Fulginiti*, 921 F. Supp. at 1321.

¹⁹⁰ See *id.* at 1322.

¹⁹¹ The court accepted the school board's claim that the requested services would cost \$56,000 despite the claim by the Fulginiti family and their expert that the figure was unnecessarily high. See *id.* at 1325; see also *infra* Section III.B.1.b. (for a discussion of the school's over-estimation of costs).

¹⁹² *Id.* at 1325.

¹⁹³ *Fulginiti v. Roxbury Township Pub. Sch.*, 116 F.3d 468 (3rd Cir. 1997).

¹⁹⁴ 666 F. Supp. 71 (W.D. Pennsylvania 1987). Other district decisions adopted the extent/nature test. See *Fulginiti v. Roxbury Township Pub. Sch.*, 921 F. Supp. 1320, 1321, 1324 (D.N.J. 1996) (holding tracheostomy suctioning, feeding through a gastrostomy tube, and constant monitoring were excluded medical services because plaintiff failed to show that the requested services would not unduly burden the district when at-school nursing would cost \$56,000 per year (making the total of providing at-school special education \$95,000) while home instruction would cost \$56,000 per year); *Glen Rock Bd. of Educ.*, 17 EHLR (LRP) 713 (Feb. 27, 1990) (holding provision of medically trained one-to-one aide as an excluded medical service based on *Bevin H.*); but see *Tokarcik v. Forest Hills Sch. Dist.*, 665 F.2d 443 (3rd Cir. 1981) (holding that CIC was a related service because school nurses could perform it, it required little time, it was not expensive, and the alternatives were more expensive and violated the principles of the EHA).

Rainbow Syndrome, severe heart problems, quadriplegia, mental impairments, and blindness. She breathed through a tracheostomy tube and was fed and medicated through a gastrostomy tube. In order for Bevin to attend school, she needed a nurse to care for and clean her tracheostomy and gastrostomy tubes, suction the tracheostomy tube, and provide emergency assistance when necessary.¹⁹⁵ The court noted that a number of other courts had made determinations about related services,¹⁹⁶ but only *Detsel* involved services as extensive as those requested by Bevin.

The court rejected Bevin's argument for a bright line physician/non-physician test based on *Detsel*.¹⁹⁷ Like the *Detsel* court, the court in *Bevin H.* found the requested services resembled medical services even though they were not provided by a physician.¹⁹⁸ The court stated that a balancing of interests to determine the reasonableness of the requested service had been implicit in the prior decisions of other courts.¹⁹⁹ Such factors included: "cost of the service, the time involved and the capacity of existing school health personnel to provide the service."²⁰⁰

In Bevin's case, the court determined that requiring the school to provide services to Bevin was unreasonable:

The services required are varied and intensive. They must be provided by a nurse, not a layperson. They are time-consuming and expensive. Above all, the life threatening prospect of a mucus plug demands the constant attention of a nurse. Because this need for constant vigilance, a school nurse or other qualified person with responsibility for other children within the school could not safely care for Bevin. It is the "*private duty*" aspect of Bevin's nursing services that distinguishes this case from the others. [Other cases] all involved intermittent care which could be provided by the school district at relatively little expense in both time and money. The services Bevin requires are far beyond those, and to place that burden on the school district in the guise of

¹⁹⁵ See *Bevin H.*, 666 F. Supp. at 73.

¹⁹⁶ See *id.* at 74; see, e.g., *Detsel v. Bd. of Educ.*, 820 F.2d 587 (2nd Cir. 1987) (holding constant nursing not to be a related service); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 895 (1984) (holding CIC to be a related service); *Dep't of Educ. v. Katherine D.*, 727 F.2d 809, 813 (9th Cir. 1983) (holding tracheostomy care as a related service); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 210 (1982) (holding sign language interpreter not required as a related service); *Tokarcik*, 665 F.2d at 443 (holding CIC to be a related service).

¹⁹⁷ See *Bevin*, 666 F. Supp. at 74-75.

¹⁹⁸ See *id.*

¹⁹⁹ See *id.* at 74.

²⁰⁰ *Id.* at 75.

“related services” does not appear to be consistent with the spirit of the Act and its regulations.²⁰¹

The court also relied on *Rowley* for the proposition that schools are not required to “provide the best possible education without regard to expense.”²⁰² Not only did the court specifically note that it did not “intend to intimate that ‘related services’ [are] only those services which can be provided at low cost to the school district or which can be performed by existing school personnel,” but it also held that the nursing services requested by Bevin were “so varied, intensive, and costly, and more in the nature of ‘medical services’ that they [were] not properly includable as ‘related services.’”²⁰³ Thus, the *Bevin H.* court added intensity as a factor in the extent/nature test.

C. THE PHYSICIAN/NON-PHYSICIAN TEST

A separate line of cases interprets *Tatro* to provide a bright-line test based on the status of the provider of the services.²⁰⁴ If the provider is a nurse or other trained layperson, then the service is a related school health service; but if the provider must be a physician, the service is an excluded medical service. This is the “physician/non-physician test.” At least one circuit and a number of district courts adopted this interpretation.²⁰⁵

The Eighth Circuit Court of Appeals adopted the physician/non-physician test in *Cedar Rapids Community School District v. Garret F.*²⁰⁶ Garret was severely injured in an accident as a child. Although Garret’s mental abilities were unaffected, the accident injured his spinal cord causing him to become quadriplegic and ventilator dependent. In order to attend school, Garret required medical personnel to assist with CIC, suction his tracheostomy tube at least once every six hours and after meals, monitor his health, and provide emergency assistance as needed.²⁰⁷ The school refused to provide continuous, one-on-one nursing, and Garret’s parents challenged the school’s position. The administrative law judge and the district court both determined that the services

²⁰¹ *Id.* at 75 (emphasis added).

²⁰² *Id.*

²⁰³ *Id.* at 76. It is worth noting that the courts assume that the best possible education is always the most expensive.

²⁰⁴ *See, e.g., Cedar Rapids Community Sch. Dist. v. Garret F.*, 106 F.3d 822, 825 (8th Cir. 1997); *Skelly v. Brookfield LaGrange Park Sch. Dist.* 95, 968 F. Supp. 385, 394 (N.D. Ill. 1997).

²⁰⁵ *See, e.g., Cedar Rapids Community Sch. Dist. v. Garret F.*, 106 F.3d 822, 825 (8th Cir. 1997); *Skelly v. Brookfield LaGrange Park Sch. Dist.* 95, 968 F. Supp. 385, 394 (N.D. Ill. 1997); *Morton Community United Sch. Dist. v. J.M.* (C.D. Ill. 1997).

²⁰⁶ 106 F.3d 822 (8th Cir.1997), *cert. granted*, ___ U.S. ___, 118 S. Ct. 1793 (1998).

²⁰⁷ *See id.* at 823.

did not fall within the medical services exclusion and must be provided as related services.²⁰⁸

The Eighth Circuit agreed with the administrative law judge, relying on the two-part test from *Tatro*.²⁰⁹ The court held the services were supportive because without the services Garret could neither attend school nor benefit from special education.²¹⁰ The court applied the second part of the *Tatro* test and found that “[i]n *Tatro*, the Supreme Court established a bright-line test: 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.”²¹¹ The court noted the existence of other decisions rejecting such a bright-line test,²¹² but stated that those courts relied on dicta in *Tatro* and had improperly “factor[ed] into the medical services exclusion considerations of the nature and extent of the services performed.”²¹³ The court refused to rely on dicta to go beyond the physician/non-physician test which, it said, the Supreme Court set out in *Tatro*.²¹⁴

An opinion from a state DOE hearing officer, which was affirmed by the Eighth Circuit on appeal, stated larger policy reasons in favor of the physician/non-physician test.²¹⁵ The hearing officer stated that the IDEA requires districts to provide education programs in the least restrictive environment, and noted that children should only be removed from the regular school environment when they cannot be successfully integrated even with supportive services and aids.²¹⁶ The officer found that if the requested services were not provided to Garret, he would have to be educated in a home-bound program. In the officer’s findings, it is noted:

While the law anticipates that the appropriate program for some children will be an education program provided at home, that appears to be totally inappropriate for [Garret] and any similar student. The lack of stimulation he now receives from a variety of teachers and peers would have a profound effect on the rest of his life. A

²⁰⁸ See *id.* at 824.

²⁰⁹ See *id.* at 825.

²¹⁰ See *id.*

²¹¹ *Id.*

²¹² See, e.g., *Neely v. Rutherford County Sch.*, 68 F.3d 965, 971 (6th Cir. 1995); *Bd. of Educ. v. Detsel*, 637 F.Supp. 1022, 1027 (N.D.N.Y. 1986), *aff’d*, 820 F.2d 587 (2d Cir. 1987); *Granite Sch. Dist. v. Shannon M.*, 787 F. Supp. 1020, 1027 (D. Utah 1992).

²¹³ *Garret F.*, 106 F.3d at 825.

²¹⁴ See *id.*

²¹⁵ See *Cedar Rapids Community Sch. Dist.*, 22 IDELR(LRP) 278 (1994).

²¹⁶ See *id.* at 289.

home-bound program would certainly not be an education with nondisabled children to the "maximum extent appropriate." Clearly, [Garret] receives much more benefit from his being in school than his being at home, his presence is not substantially disruptive to the school environment and his teacher's time is not unduly taken up working with him individually.²¹⁷

Since Garret could be integrated successfully in the classroom with aid of supportive nursing services, the school was required to provide these services. The officer found that the physician/non-physician test was more true to the goals of the IDEA than the extent/nature test.²¹⁸ The Supreme Court granted certiorari to *Garret F.*²¹⁹ and will decide the case during the 1998-99 term.²²⁰

Two district courts in the Seventh Circuit also adopted the physician/non-physician test. The Central District of Illinois adopted the physician/non-physician test in *Morton Community United School District v. J.M.*,²²¹ which was affirmed by the Seventh Circuit Court of Appeals.²²² J.M. was a child with multiple physical disabilities which caused him to

²¹⁷ *See id.*

²¹⁸ *See id.*

²¹⁹ 118 S.Ct. 1793 (May 18, 1998).

²²⁰ All interested parties submitted briefs. Garret supports the adoption of the physician/non-physician test based on the language of the statute and regulations, legislative history, Congressional intent, and general policy of the IDEA. *See* Resp. Brief, Cedar Rapids Community Sch. Dist. v. Garret, 1998 WL 541985 (1998). Garret also argues that even if the court adopts the extent/nature test, Garret's services are not burdensome enough on the school district to become excluded medical services. *See id.* The Department of Justice (DOJ) and a group of disability organizations submitted briefs supporting Garret's position. *See* Dep't of Justice, Amicus Brief, Cedar Rapids Community Sch. Dist. v. Garret, 1998 WL 541989 (1998); Family Voices, Amicus Brief, Cedar Rapids Community Sch. Dist. v. Garret, 1998 WL 541990 (1998). The DOJ and disability organizations argue for the adoption of the physician/non-physician test based upon arguments similar to those of Garret—statutory interpretation of the statute and regulations, Congressional intent and legislative history, and policy arguments. *See id.* Cedar Rapids School District supports the adoption of the extent/nature test. *See* Pet. Brief, Cedar Rapids Community Sch. Dist. v. Garret, 1998 WL 375420 (1998). Cedar Rapids argues that the language of the statute and regulations do not mandate a bright-line test, and that the plain language supports the extent/nature test. *See id.* Cedar Rapids also contends that the Secretary of the DOE rejected the physician/non-physician test in an interpretive ruling, but the school district's main concern is that the cost of providing health services would be prohibitive and that it would take money away from other special education programs. *See id.* Cedar Rapids concludes that claims which only consider the extent/nature test allow schools greater flexibility. *See id.* The National School Board Association (NSBA) supports the school board's positions in a brief reiterating the argument that the school districts would be overwhelmed financially if they were required to provide nursing services. *See* NSBA, Amicus Brief, Cedar Rapids Community Sch. Dist. v. Garret, 1998 WL 546598 (1998).

²²¹ 986 F. Supp. 1112 (C.D. Ill. 1997) [*Morten I.*].

²²² *Morton Community United Sch. Dist. v. J.M.*, 153 F.3d 583 (7th Cir. 1998) [*Morten II.*].

breathe through a ventilator and to require a tracheostomy and gastrostomy.²²³ For his first five years of school, J.M. attended public school with a school-paid nurse and had no problems. When J.M.'s family moved, his new school refused to provide him with the requested nursing services. The school did not base its refusal on the financial burden²²⁴ of providing the services. Rather, the school maintained that it was prohibited by law from providing the services.²²⁵ J.M.'s parents brought a due process hearing, where the administrative law judge held that the requested services were related services that the school must provide.²²⁶

The district court affirmed the administrative law judge's decision and interpreted *Tatro* as providing a bright-line test.²²⁷ The court approvingly cited the reasoning of another district court in the Seventh Circuit that had rejected the extent/nature test.²²⁸ The court also explicitly rejected the extent/nature test and criticized the reasoning of courts that had adopted this test.²²⁹

The Seventh Circuit Court of Appeals affirmed the decision of the district court, but the Seventh Circuit also realized that the Supreme Court granted certiorari to *Garret F.* and elected not to resolve the underlying issue.²³⁰ The court viewed the arguments of both parties as extreme.²³¹ The court noted that the family's view that "the sky is the limit" on any medical services not provided by a doctor was not right, while it also rejected the school's view that it only had to provide services traditionally provided by a school nurse.²³² The court felt that the best solution was to allow school districts a defense of undue burden.²³³ The court recognized that, unlike the Americans with Disabilities Act (ADA), the IDEA did not explicitly include such a defense, but the court believed that such a defense is implicit in the Act.²³⁴ In applying this test, the court held that the requested services in this case would not

²²³ *Morton I*, 986 F. Supp. at 1115.

²²⁴ *See id.* at 1115. The school estimated that the cost of providing the requested nursing services to J.M. would be about \$20,000 per year out of their \$16.8 million budget. *See id.* at 1115 n.2.

²²⁵ *See id.* at 1115.

²²⁶ *See id.*

²²⁷ *See id.* at 1123-24.

²²⁸ *See id.* at 1119 (citing *Skelly v. Brookfield LaGrange Park Sch. Dist. 95*, 968 F. Supp. 385 (N.D. Ill. 1997)); *see also infra* notes 236-50 and accompanying text (discussing *Skelly* in greater detail).

²²⁹ *See id.* at 1123-24.

²³⁰ *See Morton II*, 152 F.3d at 585.

²³¹ *See id.*

²³² *Id.*

²³³ *Id.* at 586-87.

²³⁴ *Id.* at 586.

cause an undue burden on the district.²³⁵ Thus, it appears that the Seventh Circuit chose not to adopt one test over the other.

The Northern District of Illinois adopted the physician/non-physician test in *Skelly v. Brookfield LaGrange Park School District 95*.²³⁶ Eddie Skelly was a student with a rare neurological-muscular disease called Pelixaeus-Merzbacher Leukodystrophy. As a result of his disease, he was developmentally delayed,²³⁷ used a wheelchair, and had gastrointestinal and tracheostomy tubes. Eddie requested that the school provide nursing services for suctioning his tracheostomy on the bus ride to and from school.²³⁸ The facts indicate, although there was some disagreement, that a properly trained aide, and not only an LPN or RN, could perform the services.²³⁹

The court noted that the Seventh Circuit Court of Appeals never addressed the question presented in the case and looked to other circuit courts' interpretations of *Tatro* for guidance.²⁴⁰ The Skelly family advocated adoption of the physician/non-physician test followed by the Eighth Circuit,²⁴¹ while the school district argued for the adoption of the extent/nature test used by the Sixth Circuit.²⁴²

In defending the bright-line test, the court first compared the factual situations of the services requested in *Garret F.* and *Neely* to those in Eddie's case and found:

Although the facts in each of these aforecited cases show a greater burden on the respective school districts involved than is shown in the present case and are, therefore, factually distinguishable from Eddie Skelly's circumstance, this court declines to apply the burden test here because this court believes that *a bright-line test is not only appropriate legally, but is necessary according to public policy* in order to further the efficient and proper use of public funds earmarked for education.²⁴³

The court stated that education funds should be used for education and not for litigation.²⁴⁴ The court also noted that litigation is disruptive

²³⁵ *Id.* at 587.

²³⁶ 968 F. Supp. 385 (N.D. Ill. 1997).

²³⁷ Although Eddie was developmentally delayed, he was interactive, loved being around other people, and was motivated by being around other children. *Id.* at 388.

²³⁸ Eddie already received primarily one-on-one nursing during the school day from the school nurse. *Id.* at 389.

²³⁹ *See id.*

²⁴⁰ *See id.* at 392.

²⁴¹ *See Cedar Rapids Sch. Dist. v. Garret F.*, 106 F.3d 822, 825 (8th Cir. 1997).

²⁴² *See Neely v. Rutherford County Sch.*, 68 F.3d 965, 972 (6th Cir. 1995).

²⁴³ *Skelly*, 968 F. Supp. at 394 (emphasis added).

²⁴⁴ *See id.*

to the child's education, as well as to the school's efficient operation and courts have a duty to try to decrease this litigation, but "[w]ithout a hard and fast bright-line test that is factually easy for school districts to apply, litigation will continue to be spawned."²⁴⁵ The court cited this case as an example of the problems resulting from an ambiguous rule and observed that the school district was "bent on spending tens of thousands of dollars on litigation to try to save a few hundred dollars on an aide to ride the school bus with Eddie"²⁴⁶

The court also found that, as a matter of public policy, it is the responsibility of courts to assist in the administration of the IDEA by giving proper deference to the regulations promulgated by the Secretary of the DOE.²⁴⁷ These regulations allow schools and parents to know what is and is not covered by the IDEA without resorting to litigation. The court believed that the extent/nature test did not give proper deference to the regulations.²⁴⁸

After adopting the physician/non-physician test, the court stated that tracheostomy suctioning is a common, standard procedure and does not have to be performed by a doctor.²⁴⁹ It should not be excluded as a medical service, even if a nurse is required to perform the procedure.²⁵⁰ The court, therefore, held that the requested service was a related service that the school must provide.

The First Circuit has yet to rule on this issue. State DOE hearing officers in the First Circuit, however, disagree over which test the circuit would adopt. Based on other decisions by the First Circuit in the special education area, a number of judges and administrative hearing officers believe the First Circuit would probably reject the nature/extent test.²⁵¹ A hearing officer in the Massachusetts DOE used the physician/non-physician test in *Tewksbury Public Schools*.²⁵² The student, Christopher K., was a quadriplegic and had a tracheostomy tube. Christopher had academic skills commensurate with students his own age, and he had the

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *See id.*

²⁴⁸ *See id.* at 394-95.

²⁴⁹ *See id.* at 395

²⁵⁰ *See id.*

²⁵¹ *See, e.g.,* *Tewksbury Public Schools*, 17 EHLR 1221, 1231 (SEA Mass. 1991). Other courts in the First Circuit required schools to provide nursing services, although not explicitly adopting a particular test. *See, e.g.,* *Kevin G. v. Cranston Sch. Comm.*, 965 F. Supp. 261 (D.R.I. 1997), *aff'd* 130 F.3d 481 (1st Cir. 1997) (holding that school district must provide nursing services to student with tracheostomy, but that the services did not have to be provided at his home school); *Rhode Island Dep't of Elementary and Secondary Educ. v. Warwick Sch. Comm.*, 696 A.2d 281 (R.I. 1997) (holding that a school must provide nursing service to a student with a tracheostomy tube, but that the nurse did not have to be a certified nurse-teacher).

²⁵² *See Tewksbury*, 17 EHLR at 1229.

capacity and motivation to attend college and to obtain employment as an adult. To attend school, however, Christopher required nursing services to provide tracheal suctioning and monitoring Christopher requested these services.²⁵³

The hearing officer noted that, due to Christopher's disability, his medical and educational needs were intertwined.²⁵⁴ Looking to *Tatro* for guidance in determining whether health services are related or excluded, the officer held that the services requested by Christopher met both prongs of the *Tatro* test. First, the services were supportive, since Christopher could not attend school without them.²⁵⁵ Second, the officer interpreted *Tatro* to "look to the training and licensure of the person providing the supportive service to determine whether it met the statutory definition of a related service."²⁵⁶ The hearing officer concluded that services provided by a nurse are "not subject to exclusion as 'medical services.'"²⁵⁷ The officer, therefore, held that the requested nursing services must be provided as a part of a FAPE for Christopher.²⁵⁸

The hearing officer also noted that other courts interpreted *Tatro* as requiring an inquiry into the extent and nature of the service, but rejected this reasoning as it "impos[ed] a criterion additional to that stated by the Supreme Court in *Tatro* for determining whether health services are related to a handicapped student's education."²⁵⁹ The court quoted a decision that rejected the extent/nature line of cases:

The difficulty this court has with both *Detsel* and *Bevin* are [sic] their failure to adhere to certain principles developed in *Tatro*. . . . Rather, *Detsel* concludes that while the disputed services did not actually meet the statutory and regulatory definition of medical services, given that the regulation specifically addressed physician-performed services, denying the services 'is in keeping with [the regulation's] spirit.' Th[is] Court, however, believes that this conclusion ignores the spirit of the [EHA] itself. As *Tatro* repeatedly stressed, the reason for man-

²⁵³ See *id.* at 1222. Christopher K. had been attending the Kennedy Day School at Franciscan Children's Hospital. Christopher, however, applied to the Massachusetts Hospital School because it offered an academic program where he could get his high school diploma. Massachusetts Hospital School accepted him to the program on the condition that he provide a one-on-one licensed health care professional. See *id.* at 1222-23.

²⁵⁴ See *id.* at 1226.

²⁵⁵ See *id.* at 1228

²⁵⁶ *Id.*

²⁵⁷ See *id.*

²⁵⁸ See *id.* The court also said its finding was buttressed by the Massachusetts law that specifically, and without regard to qualification, held nursing services to be a related service. See 603 C.M.R. § 28, ¶ 503.1.

²⁵⁹ *Id.* at 1229.

dating the provision of supportive services under the [EHA] is to guarantee handicapped students an opportunity to gain an education. If granting such an opportunity entails furnishing medically-related services short of requiring a licensed physician, we believe such services are the student's right. Moreover, the [EHA], its legislative history, and its regulations are void of any suggestion that states are free to decide, on the basis of the cost and effort required, which related services fall within the medical services exclusion. Th[is] Court therefore rejects *Detsel's* conclusion that services provided by a nurse, no matter how comprehensive, are medical services entitled to exclusion under the [EHA].²⁶⁰

As there was no case directly on point in the First Circuit, the officer looked to the circuit's most recent decision interpreting special education statutes for guidance on how the circuit court might decide the issue.²⁶¹ Based in part upon the *Timothy W.* decision and "[g]iven the first [sic] Circuit's commitment of access to educational services for all handicapped students, and its strict reading of the Federal special educational law's language," the hearing officer stated that he "expect[ed] that the [Circuit] Court would approve of the reasoning" of the physician/non-physician decisions and not the extent/nature decisions.²⁶² The requested service, therefore, was a related service and the school was required to provide the service to Christopher.

On the other hand, another decision from the Massachusetts DOE reached the opposite result. In *Hopedale School District*,²⁶³ the hearing officer determined that nursing services to provide suctioning, monitoring, and CIC to a quadriplegic child were excluded medical services. The officer interpreted *Tatro* as requiring an inquiry into the nature and extent of services requested. Since the situation was similar to that of *Detsel*, the court held that the requested services were excluded as medical services.²⁶⁴

The officer also based her interpretation of the state laws and regulations on "common sense and reasonableness."²⁶⁵ In interpreting the relevant statutes and regulations, the officer stated:

²⁶⁰ *Id.* (quoting *Macomb County Intermediate Sch. Dist. v. Joshua S.*, 715 F. Supp. 824, 826 (E.D. Mich. 1989) (citations omitted)).

²⁶¹ See *Timothy W. v. Rochester, N.H. Sch. Dist.*, 875 F.2d 954 (1st Cir. 1989) (holding that a disabled child does not have to demonstrate that he can benefit from special education in order to be eligible for that education).

²⁶² See *Tewksbury*, 17 EHLR at 1229.

²⁶³ 17 EHLR 973 (Mass. SEA 1991).

²⁶⁴ See *id.* at 977-78.

²⁶⁵ *Id.* at 978.

“nursing services” have traditionally and consistently meant those services that are normally, on a day-to-day basis, delivered by a school nurse to the general population of students: administering medications with parental consent; evaluation of medical records and medical conditions; checking for head lice; screening for scoliosis, vision, and hearing; health education; first aid; etc.²⁶⁶

The officer decided that the requested services fell outside of this traditional scope, and, therefore, were not required related services.²⁶⁷

The remaining circuits have either not made any decisions in the area or have not clearly indicated the test upon which they will rely on.²⁶⁸ There is, however, clearly a division between the circuits on the proper interpretation of *Tatro*. The courts adopting the extent/nature test expanded upon *Tatro*'s dicta to create a balancing test of a number of factors in order to determine whether a nursing service is a related service.²⁶⁹ The courts adopting the bright-line test relied upon the language of *Tatro* to create a standard in which the qualifications of the provider are determinative of whether the requested nursing service is a related service.²⁷⁰ An analysis of the rationale and application of both tests shows that neither test leads to meaningful and appropriate results in light of the language of the IDEA, its regulations, and its policy.

III. CRITIQUE OF EXTENT/NATURE STANDARD

Courts are split on how to determine whether a nursing service is a covered related service or an excluded medical service. Because there is no clear rule, parents and school districts end up in court far too often. Children with similar needs are either allowed in or kept out of school simply depending on the district in which they live. An analysis of both standards under several relevant factors leads to the conclusion that the

²⁶⁶ *Id.*

²⁶⁷ *See id.* at 978-79.

²⁶⁸ No decisions were found on point in the Fourth or Eleventh Circuits. The Fifth Circuit appeared to use a bright-line type of test when it held the school responsible for providing nursing services to a student. *See Tatro v. Texas*, 625 F.2d 557, *appealed after remand*, 703 F.2d 823 (5th Cir. 1983), *aff'd in part, rev'd in part* in *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). In a later case, a state hearing officer analyzed a related service under both the physician/non-physician and the extent/nature tests and ruled in favor of the student. *See Silsbee Indep. Sch. Dist. v. Tatro*, 25 IDELR 1023, 1025-26 (SEA Tx. 1997).

²⁶⁹ *See, e.g., Granite Sch. Dist. v. Shannon M.*, 787 F. Supp. 1020, 1029 (D. Utah 1992) (examining cost, complexity, and time for requested services); *Detsel v. Bd. of Educ.*, 637 F. Supp. 1022, 1026 (N.D.N.Y. 1986) (examining cost, complexity, and time for the requested procedure).

²⁷⁰ *See, e.g., Cedar Rapids Community Sch. Dist. v. Garret F.*, 106 F.3d 822, 825 (8th Cir. 1997) (examining whether provider was physician or non-physician); *Skelly v. Brookfield LaGrange Park Sch. Dist.* 95, 968 F. Supp. 385, 394 (N.D. Ill. 1997) (examining whether provider was a physician or non-physician).

extent/nature test is not the correct interpretation of *Tatro* and the relevant IDEA provisions.

A. STATUTORY CONSTRUCTION

The extent/nature test is incorrect in light of the rules of statutory construction. Statutory interpretation begins with the language of the statute itself and statutes should be read according to the "ordinary, contemporary, common meaning" of the words used.²⁷¹ When the statutory language is clear and does not contradict clearly expressed legislative intent, the language controls.²⁷² In this case, the language of the IDEA does not clearly state whether the types of nursing services required by children with special health needs are related services.²⁷³

If the meaning of the statute is not clear on its face, the court should then look to the relevant administrative agency's construction of the statute.²⁷⁴ If Congressional intent on the issue is clear, the courts and agency must give effect to the "unambiguously expressed intent of Congress."²⁷⁵ In enacting the related services provision, Congress merely set out a broad principle that the provision of related services to disabled children is a necessary part of a FAPE.²⁷⁶ In the case of nursing services, Congress did not unambiguously state in the statute or legislative history whether nursing services are related services or excluded medical services. Congress did list a limited number of common related services.²⁷⁷ The Secretary of the DOE has not, however, interpreted this list to be exhaustive.²⁷⁸

Courts look to any agency regulations to fill in gaps when Congress has not directly adequately addressed the issue.²⁷⁹ The courts must examine whether the agency's interpretation is based on a permissible construction of the statute.²⁸⁰ The courts need not determine that the agency's interpretation was the only permissible interpretation or that it

²⁷¹ *Perrin v. United States*, 444 U.S. 37, 42 (1979).

²⁷² *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.").

²⁷³ *See IDEA*, 20 U.S.C.A. § 1401(22) (1998). The language of the IDEA does not specifically mention nursing services.

²⁷⁴ *See Chevron*, 467 U.S. at 843.

²⁷⁵ *Id.* at 842.

²⁷⁶ *See* 20 U.S.C. § 1401(8), (22) (1998).

²⁷⁷ *See* 20 U.S.C. § 1401(22) (1998) (listing related services include transportation, physical therapy, occupational therapy, and speech therapy).

²⁷⁸ *See* 34 C.F.R. § 300.9 (1997) ("the term 'includes' means that the items named are not all of the possible items that are covered. . . .").

²⁷⁹ *See Chevron*, 476 U.S. at 843; *see also Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

²⁸⁰ *See Chevron*, 476 U.S. at 843. Furthermore, if an agency regulation exists, a court is not allowed to simply impose its own construction on the statute as it would do if there was no

was the interpretation that the court would have reached.²⁸¹ Rather, the administrative regulations are “given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”²⁸²

The Secretary of the DOE established regulations to define the scope of related services and the medical services exclusion. The Secretary defined school health services, which he specially noted as covering related services, to mean those services provided by a qualified school nurse or other trained layperson.²⁸³ Moreover, the Secretary defined medical services as those “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.”²⁸⁴ The Supreme Court in *Tatro* held that the Secretary’s definitions were “a reasonable interpretation of congressional intent.”²⁸⁵ The *Tatro* court also held that, by limiting the medical services exclusion to the services of a physician, “the Secretary has given a permissible construction to the provision.”²⁸⁶ The DOE regulations, therefore, must be given deference.

The Secretary distinguished between covered school health services and excluded medical services based on the qualifications of the person providing the service.²⁸⁷ Proper deference to the agency regulations requires that the test for excludable medical services follow the same scheme. Notably, the extent/nature test does not follow this scheme.

It has been argued that Congress ratified the Secretary’s interpretation in the 1983 amendments to the EHA.²⁸⁸ In 1982, the Secretary of the DOE proposed narrowing the related services provision.²⁸⁹ The proposed revisions would have broadened the exclusions of medical services. Members of Congress opposed the changes to the related-services regulation,²⁹⁰ and the Secretary eventually withdrew the changes.²⁹¹ Congress responded to the Secretary’s actions by adding a new section to the EHA, providing that the Secretary of the DOE could not implement regulations that lessened the procedural or substantive protections of dis-

²⁸¹ See *id.* at 843 n.11 (citing cases).

²⁸² *Id.* at 843.

²⁸³ See 34 C.F.R. § 300.16(a), (b)(11) (1997).

²⁸⁴ 34 C.F.R. § 300.16(b)(4) (1997).

²⁸⁵ *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 892 (1984).

²⁸⁶ *Id.* at 893.

²⁸⁷ *Cf.* 34 C.F.R. § 300.16(b)(4), (11).

²⁸⁸ Prior to 1990, IDEA was referred to as the Education of Handicapped Act (EHA). Garret F. argued this position to the Supreme Court with the Department of Justice and the disability organizations writing in support of Garret. See DOJ, Amicus Brief, 1998 WL 541989 (1998); Family Voices, Amicus Brief, 1998 WL 541990 (1998).

²⁸⁹ See 47 Fed. Reg. 33,836 (1982).

²⁹⁰ See, e.g., 128 Cong. Rec. 20, 620, 21, 793 (1982); H.R. 906, 98th Cong.

²⁹¹ See 47 Fed. Reg. 49,871 (1982).

abled students without clear instruction from Congress.²⁹² These actions, however, are of limited use in determining Congressional intent, since they occurred prior to *Tatro*, and Congress has not clarified the language of the provision after such cases as *Detsel*.

Although agency regulations are an appropriate resource for statutory interpretation, the regulations promulgated by the Secretary do not fully answer the question of the scope of nursing service. The regulations define "school health services" as those health services that must be provided to students,²⁹³ but do not specifically state which medical services are excluded. The regulations do not clearly determine if there are any limits to the types of nursing services that schools must provide to students.

The controversy regarding the scope of nursing services exists largely because the Secretary has not spoken on the subject. The Secretary could easily solve the problem by clarifying the regulations or by writing a policy letter on the subject, but the Secretary has not provided a methodology for courts to use, and in its absence, courts developed their own tests. By failing to clearly define the scope of covered nursing services, the Secretary failed to protect many children with special health care needs.

B. RATIONALE OF THE EXTENT/NATURE TEST

Courts have stated a number of reasons for accepting the extent/nature test over the bright-line physician/non-physician test. These rationales include such factors as cost, liability, expertise, medical nature, complexity and training, intensity, number of services, and traditional roles.²⁹⁴ When nursing services are analyzed and compared with other covered related services, these arguments do not justify the adoption of the extent/nature test.

1. Cost

The cases adopting the extent/nature relied on the high costs of nursing services. Some courts determined that the high costs of nursing services place a burden on school districts that is very similar to the burden created by the medical services the IDEA excludes.²⁹⁵ The cost

²⁹² 20 U.S.C. § 1407(b), recodified as amended, 20 U.S.C. § 1406(b) (1998) (specifying "particularly as such provisions relate to . . . related services).

²⁹³ See 34 C.F.R. § 300.16(a).

²⁹⁴ See, e.g., *Fulginiti v. Roxbury Township Pub. Sch.*, 921 F. Supp. 1320, 1325 (D. N.J. 1996); *Neely v. Rutherford County Sch.*, 68 F.3d 965, 971 (6th Cir. 1995) (stating that it is appropriate to take into account the risk involved and the potential exposure of the school); EHA Policy Letter of March 25, 1988, 213 EHA 118-21.

²⁹⁵ See, e.g., *Fulginiti v. Roxbury Township Pub. Sch.*, 921 F. Supp. 1320, 1325 (D.N.J. 1996).

should not be an appropriate factor in determining whether a nursing service is related.

Congress realized that mandating the provision of education to disabled children would be expensive.²⁹⁶ In fact, Congress realized that the lack of funding was one of the main reasons that disabled children were not receiving an appropriate education.²⁹⁷ As a result, Congress set up a funding system for the provision of special education through the IDEA.²⁹⁸

Senate members noted cases stating that “lack of funding may not be used as an excuse for failing to provide educational services.”²⁹⁹ Congress reaffirmed the proposition from *Mills*, that insufficient funding cannot be used as an excuse and “certainly cannot be permitted to bear more heavily on the ‘exceptional’ child or handicapped child than the

burden because of the high costs); *Granite Sch. Dist. v. Shannon M.*, 787 F. Supp. 1020, 1029-30 (D. Utah 1992) (denying nursing services, in part, because “[t]he expense of providing Shannon’s requested care would undoubtedly take money away from other programs.”); *Bevin H. v. Wright*, 666 F. Supp. 71, 75 (W.D. Pennsylvania 1987) (holding requested service to be so varied, intensive and costly as to be an excluded medical service). The *Detsel* court was the first to bring cost in as a factor. *See Detsel v. Bd. of Educ.*, 637 F. Supp. 1022, 1026-27 (excluding requested nursing services in part because they were costly). It is worth noting, however, that the Auburn Enlarged City School District did not explicitly use cost as a basis for its argument:

THE COURT: What would be the cost to the School District of providing this type of service? I don’t have in front of me anything other than just general allegations that it would be prohibitive.

MR. HOOKS: I’m not – well, your honor, I am not arguing the expense is necessarily prohibitive.

THE COURT: Isn’t that a factor? You are not citing that as a factor in this case?

MR. HOOKS: I’m saying the sole factor in this situation is whether or not the type of services that we are looking to are the type of services which under the Education for Handicapped Children Act we are required to provide. I am putting to the side for the moment, the question of expense, whether the expense in this particular instance is—I really can’t speak to that, your Honor.

THE COURT: You are not arguing the economic—

MR. HOOKS: I am not arguing the economics.

Record at 6-7, *Detsel*, 637 F. Supp. at 1022.

²⁹⁶ *See, e.g.*, S. REP. NO. 94-168, 12-13 (1975); *reprinted in* 1974 U.S.C.C.A.N. 1425, 1436-37 (recognizing that the actual cost of educating a child with a disability was, on average, at least twice as much as educating a non-disabled child.).

²⁹⁷ *See id.* at 7 (“In recent years, decisions in more than 36 court cases in the States have recognized the rights of handicapped children to an appropriate education. States have made an effort to comply; however, lack of financial resources have prevented the implementation of the various decisions which have been rendered.”).

²⁹⁸ *See* 20 U.S.C.A. § 1412 (1998).

²⁹⁹ *See* S. REP. NO. 94-168, 8-9 (1975); *reprinted in* 1974 U.S.C.C.A.N. 1425, 1430, 1432-33. Congress mentioned that this proposition was also espoused by the court in *Mills v. Board of Education*, 348 F. Supp. 866, 876 (D.D.C. 1972). Congress noted that “[t]he failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly-supported education . . . cannot be excused by the claim that there are insufficient funds.” S. Rep. No. 94-168, at 6.

normal child.”³⁰⁰ The Supreme Court in *Rowley* reaffirmed the right of access to a *free* public education for all children with disabilities and stated that a lack of funds cannot be used to entirely exclude a disabled child from receiving a publicly supported education.³⁰¹

Furthermore, the IDEA provides for a FAPE for all children, regardless of the severity of their disability.³⁰² Congress directed that priority should be given to children with the most severe disabilities who are not receiving an adequate education.³⁰³ The Third Circuit noted that Congress “intended to offset any budgetary incentives to deal initially with the least afflicted and provide for the least expensive services first, since state receipt of money under the Act is conditioned on the number of handicapped children served regardless of their need.”³⁰⁴ Consequently, cost alone cannot be the determinative factor in the quality FAPE a child receives.

a. Cost As A Factor Only In Limited Contexts

Cost is only properly considered as a factor in two circumstances. First, cost may be relevant when choosing between two equally appropriate methods of providing related services.³⁰⁵ Second, cost has a limited role in determining whether and to what extent a child should be mainstreamed or should receive a residential placement.³⁰⁶

Cost may be relevant when determining the proper method for providing a related service. If a particular related service can be provided in two different ways, each providing an appropriate education the school may choose the least costly alternative.³⁰⁷ Cost considerations, however, are only relevant when choosing between several equally appropriate options.³⁰⁸ For example, if the school could provide the appropriate necessary related service through either an aide or a trained professional, the school may choose to hire the less expensive aide. But, the cases regarding nursing services are not about who can provide these services; they

³⁰⁰ See S. REP. NO. 94-168, at 8-9.

³⁰¹ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 199 (1982) (relying on *Mills*, 348 Supp. at 876, and *Pennsylvania Ass'n of Retarded Children v. Pennsylvania*, 334 F. Supp. 1257, 1260 (E.D. Pennsylvania 1971)).

³⁰² See 20 U.S.C. §§ 1414(a)(1)(A), 1412(a)(3)(A), 1400(d)(1)(A) (1998).

³⁰³ See 20 U.S.C. § 1412(3) (1997). The 1997 amendments mandate that all children with disabilities must be identified and provided a FAPE. See 20 U.S.C.A. §§ 1412(3)(A), (1)(A) (1998).

³⁰⁴ *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 693 n.21 (3rd Cir. 1981).

³⁰⁵ See, e.g., *Clevenger v. Oakridge Sch. Bd.*, 744 F.2d 514, 517 (6th Cir. 1984).

³⁰⁶ See, e.g., *Sacramento City United Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994).

³⁰⁷ See ROBERTA WEINER & MAGGIE HUME, . . . AND EDUCATION FOR ALL: PUBLIC POLICY AND HANDICAPPED CHILDREN 67-68 (1987).

are about whether or not these services must be provided at all. Thus, cost is not pertinent to the availability of related services discussion for children with special health care needs.

Cost may also be relevant to placement decisions. A school is required to place a child with a disability in the least restrictive environment.³⁰⁹ The IDEA specifically states that, if possible, disabled children should be mainstreamed in school with nondisabled children.³¹⁰ "Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment [should] occur[] only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . ." ³¹¹ For children with special health care needs, nursing services fall into the category of "supplementary aids and services" that should be provided.

A number of factors are relevant in determining whether a child can be mainstreamed satisfactorily. First, the court must examine the educational benefits available to a child in the regular classroom, supplemented with appropriate aids and services, as compared to the educational benefits of a non-mainstreamed placement.³¹² Second, the court must look at the non-academic benefits to the disabled child from interaction with non-disabled peers.³¹³ Third, the court must look at the effect of the presence of the disabled child on the teacher and the rest of the class.³¹⁴ Finally, the court may look at cost.³¹⁵

³⁰⁹ 20 U.S.C.A. §1412(a)(5) (1998); 34 C.F.R. § 300.132 (1996).

³¹⁰ 20 U.S.C.A. §1412(a)(5) (1998).

³¹¹ *Id.* "The Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad." *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989). "In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act." *Roncker v. Walter*, 500 F.2d 1058, 1063 (6th Cir. 1983).

³¹² *See Daniel R.R.*, 874 F.2d at 1047, 1048; *Roncker*, 700 F.2d at 1063.

³¹³ *See Daniel R.R.*, 874 F.2d at 1047-48.

³¹⁴ *See Roncker*, 700 F.2d at 1063; *Daniel R.R.*, 874 F.2d at 1049.

³¹⁵ *See Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994); *Roncker*, 700 F.2d at 1063. A number of courts, however, state that cost is a factor that is not relevant to any inquiry. *See, e.g., Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 695 (3rd Cir. 1981) (interpreting the EHA as requiring schools to "provide a comprehensive range of services to accommodate a handicapped child's educational needs, regardless of financial and administrative burdens. . . .") (emphasis added); *North Allegheny Sch. Dist. v. Gregory P.*, 687 A.2d 37, 39 (Pennsylvania Commw. Ct. 1996) (holding that if a related service was an integral part of a student's special education needs, then a district must provide the related service even if it would impose a substantial burden on the district); *D.S. v. Bd. of Ed.*, 458 A.2d 129, 139 (N.J. Super. Ct. App. Div. 1983) (rejecting lack of federal reimbursement funds as an excuse for providing FAPE's to disabled children).

The cost of supplementary aids and services necessary to mainstream the disabled child in the regular classroom is a relevant factor.³¹⁶ The cost inquiry must be limited.³¹⁷ Although a school does not have to provide every single possible service to a child, "this is not to say that a school district may decline to educate a child in a regular classroom because the cost of doing so, with the appropriate supplemental aids and services, would be incrementally more expensive than educating the child" in a non-mainstreamed environment.³¹⁸

Cost considerations, however, may only be a factor in placement when the school district must make appropriate cost comparisons.³¹⁹ The school district bears the burden of presenting the appropriate cost comparisons.³²⁰ If the district does not present the proper cost comparisons, then the court will refuse to take cost into consideration.³²¹

Cost considerations are only appropriate when choosing between two equally appropriate alternatives.³²² "Cost can be a legitimate consideration when devising an appropriate program for individual students. Nevertheless, the Sixth Circuit noted that while cost may be a legitimate factor in developing a student's education plan, "*cost considerations are only relevant when choosing between several options, all of which offer an 'appropriate' education. When only one is appropriate, there is no choice.*"³²³

The degree to which a child is restricted is also relevant in determining appropriate cost comparisons. The cost of total mainstreaming must

³¹⁶ See, e.g., *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 697 (11th Cir. 1991).

³¹⁷ See *Roncker*, 700 F.2d at 1063.

³¹⁸ *Greer*, 950 F.2d at 697.

³¹⁹ See, e.g., *Roncker*, 700 F.2d at 1063 (holding that cost can be a factor in mainstreaming questions when comparing two equally appropriate placements); *Cremeans v. Fairland Local Sch. Dist. Bd. of Ed.*, 633 N.E.2d 570, 581 (1993) (holding that cost can be a factor in mainstreaming questions if appropriate cost comparisons are made).

³²⁰ See *Rachel H.*, 14 F.3d at 1402; *Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514, 517 (6th Cir. 1984).

³²¹ See *Rachel H.*, 14 F.3d at 1402. The school merely presented evidence of how expensive it would be to mainstream the student. It did not make a comparison between the cost to mainstream her in a regular classroom and place her in a special education classroom in the same school (which was the least restrictive environment alternative).

By inflating the cost estimates and failing to address the true comparison, the District did not meet its burden of proving that regular placement would burden the District's funds or adversely affect services available to other children. Therefore, the court found that the cost factor did not weigh against mainstreaming Rachel.

Id.

³²² See *Clevenger*, 744 F.2d at 517; see also *Cremeans*, 633 N.E.2d at 581 (holding cost was not a relevant factor even though the program cost \$94,000 per year, because it was the only appropriate placement); *WEINER & HUME*, *supra* note 307, at 67 (stating that even where cost is great, courts must consider the appropriateness of differently priced options; cost considerations are only appropriate when choosing between several appropriate options).

be compared with the least restrictive appropriate environment.³²⁴ For example, it would be inappropriate for the school to compare the cost of mainstreaming with a very restrictive (but cheaper) environment or with the provision of no education. Additionally, cost cannot be a defense if the school district has not used its funds to provide a proper continuum of alternative placements for students with disabilities.³²⁵ For example, it is not appropriate for a school to provide either total mainstreaming or a home-bound education but nothing in between these options.

The least restrictive environment test reflects the belief that children with special health care needs should be educated in school whenever reasonably possible. Children with special health care needs receive academic benefits by being in school. For example, being around other children their age increases their cognitive and language development.³²⁶ Furthermore, there are numerous non-academic benefits to children with special health care needs when mainstreamed in school. The benefits of interaction with peers include learning social and communication skills, modeling appropriate behavior, and gaining self-confidence.³²⁷ Increased health performance is another extremely important additional non-academic benefit for children with special health care needs. Scientific studies have shown an association between relationships and health.³²⁸

The effect of the disabled child on the class also weighs in favor of placing children with special health care needs in schools. In measuring this factor, a court should keep in mind that the school has an obligation to provide supplementary aids and services to accommodate a disabled child. Provision of aids and services as part of an individualized education plan may prevent disruptions that may occur otherwise.³²⁹ A disabled child merely requiring more teacher attention than most other students is not the type of disruption that should be used to exclude children from the classroom.³³⁰ Courts have also noted that there are reciprocal benefits to mainstreaming. For example, the Third Circuit noted that “[t]eaching nondisabled children to work and communicate with children with disabilities may do much to eliminate the stigma, mistrust

³²⁴ See *Rachel H.*, 14 F.3d at 1402.

³²⁵ WEINER & HUME, *supra* note 307, at 67.

³²⁶ Testimony of Gregory Liptak, M.D. at 15, *In re Melissa Detsel*, 506 EHLR 378 (SEA N.Y. 1985).

³²⁷ See, e.g., *Rachel H.*, 14 F.3d at 1401.

³²⁸ See, e.g., James S. House et al., *Social Relationships and Health*, SCIENCE, July 29, 1988, at 540 (“More socially isolated or less socially integrated individuals are less healthy, psychologically and physically, and more likely to die.”).

³²⁹ See *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1217 (3rd Cir. 1993).

³³⁰ See *id.* (quoting *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 697 (11th Cir. 1991)).

and hostility that have traditionally been harbored against people with disabilities."³³¹

Considering the above, cost considerations should not keep these children out of the schools. In fact, cost issues should not arise at all for children with special health care needs because there simply are no equally appropriate alternatives. When courts have decided that nursing services are excluded medical services, they have implied that the alternative to education in the classroom is education through home-bound tutoring.³³² It is, however, inappropriate to weigh the costs of at-school instruction with nursing services against home-bound instruction unless they are equally appropriate alternatives. Home instruction and school placement are not equally appropriate, as evidenced by the IDEA least restrictive environment mandates. Even if the exact same educational program (including related services) is implemented, a child does not receive many of the benefits at home that he would receive if he were at school. When a child is placed at home, he is in the *most* restrictive environment. He has no contact with peers, disabled or non-disabled. All of the academic and non-academic benefits of mainstreaming are lost when the child is educated at home. As a result, mainstreaming and home placement cannot be considered equally appropriate alternatives. If the choice is between mainstreaming and home placement, cost should, therefore, be completely rejected as a factor in placement decisions for children with special health care needs.

In addition, the nursing services cases relying on cost do not make appropriate cost comparisons because they do not take into account the cost of an *appropriate* residential placement.³³³ Even if it is determined that home-placement is the appropriate placement, the courts must remember that home-placement is very expensive.³³⁴ Although it is clearly cheaper not to provide any related services, the provision of a related service may be required to make a placement appropriate.³³⁵ If the school is unable to provide a FAPE to the child with supplementary aids and services in the school, then the school may be forced to pay for a residential placement for the child, which would be much more expen-

³³¹ *Id.* at 1217 n.24.

³³² *See, e.g.,* Granite Sch. Dist. v. Shannon M., 787 F. Supp. 1020, 1028 (D. Utah 1992); Detsel v. Bd. of Educ., 637 F. Supp. 1022, 1026 (N.D.N.Y. 1986).

³³³ No cases adopting the extent/nature test compared the cost of providing the service with residential placement. The decisions merely stated the cost of providing the services without providing comparison. *See infra* Part III.B.1.b.i. (for discussion).

³³⁴ Even if it is determined that home-bound education is the least restrictive environment, a school is still required to provide special education and related services to that child as part of his FAPE. *See* 20 U.S.C. § 1401(8) (1998).

³³⁵ *See id.* (free appropriate education includes special education and necessary related services).

sive than providing nursing services in school.³³⁶ This occurs because the same related services that would be provided to the child in school must also be provided to the home-bound student as part of the child's education. Thus, the true costs of an appropriate residential placement may be far greater than the costs of providing the disabled child with nursing services in the school.

A number of courts adopting the extent/nature test also justify not providing nursing services to children with special health care needs based on *Rowley*, which held that schools must only provide a minimum floor of opportunity and not the best possible education.³³⁷ Courts adopting the extent/nature test and who look at cost as a factor have justified not providing nursing services by stating that the school is not required to provide the maximum or best environment.³³⁸ Unfortunately, the reliance on *Rowley* is misplaced. The question raised in *Rowley* did not involve determining the least restrictive environment for the child. Rather, the *Rowley* test assumes that the school has already met the mainstreaming requirements.³³⁹ *Rowley* cannot be read to provide a basis for denying nursing services when a school has not satisfied mainstreaming requirements. If the school has not met mainstreaming requirements, then the *Rowley* "minimum floor" test does not apply and the school must satisfy the least restrictive environment test.³⁴⁰ The cost of providing nursing services, therefore, cannot justify the adoption of the extent/nature test. As indicated above, cost never becomes a factor for children with special health care needs with regard to related services, placement decisions or under *Rowley*.

³³⁶ See 34 C.F.R. §§ 300.550-.554 (1997).

³³⁷ See, e.g., *Granite Sch. Dist. v. Shannon M.*, 787 F. Supp. 1020, 1028 (D. Utah 1992) (stating that the school met the minimum floor of opportunity by providing homebound instruction rather than providing nursing services in order for the child to attend school); *Bevin H. v. Wright*, 666 F. Supp. 71, 75 (W.D. Pennsylvania 1987) (holding that schools are not required to provide the best education without regard to expense); *Detsel v. Bd. of Educ.*, 637 F. Supp. 1022, 1027 (N.D.N.Y. 1986) (stating that providing homebound instruction, rather than providing nursing services so the child could attend, could meet the minimum floor of opportunity required by *Rowley*).

³³⁸ See *supra* note 337 (for examples).

³³⁹ In *Rowley*, the Supreme Court developed a two-part test to determine whether a school has provided a student with a FAPE: first, the court must determine whether the school complied with the procedures of the EHA; and second, is the IEP reasonably calculated to enable the child to receive educational benefits. 458 U.S. 176, 206-07 (1982). Courts determined, however, that this test is not appropriate for determining whether a school met its mainstreaming requirements. See *Daniel R.R. v. State Bd. of Ed.*, 874 F.2d 1036, 1044 (5th Cir. 1989); *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1987); *Roncker v. Walter*, 700 F.2d 1058, 1062 (6th Cir. 1983). It is often the case that "[t]he *Rowley* test assumes that the state has met all of the requirements of the Act, including the mainstreaming requirement. The *Rowley* test thus assumes the answer to the question presented in a mainstreaming case." *Daniel R.R.*, 874 F.2d at 1045.

³⁴⁰ See *Daniel R.R.*, 874 F.2d at 1044; *A.W.*, 813 F.2d at 163; and *Roncker*, 700 F.2d at 1062.

b. Realistic Estimation of Costs

i. Over-Estimation of Costs by Cases

The cases do not give a realistic estimation of costs. For example, in *Fulginiti*, the school district estimated that it would cost them \$56,000 to provide a student with nursing services, including tracheostomy suctioning, gastronomy feeding, and constant monitoring.³⁴¹ Although the court accepted this figure, it is unclear whether it was based upon the salary of an RN, LPN, or aide. In any case, the number may be exaggerated. The median salary for an RN was \$682 per week in 1994.³⁴² If the RN was paid a yearly salary, she would only earn \$34,100. If she was hired for the school year only, her salary would total \$23,870.³⁴³ The median weekly earnings of a full-time salaried LPN were \$450 in 1994.³⁴⁴ Even if a LPN worked year-round for the school, her salary would only be \$22,500.³⁴⁵ It is much more likely that an LPN would only work about 35 weeks of the year, earning a salary of \$15,750. A trained aid would earn even less. Thus, it seems that the court based its cost assumptions in *Fulginiti* upon possibly exaggerated estimates.

In *Shannon M.*, the court accepted the school's estimate of \$30,000 per year for nursing services.³⁴⁶ This estimate was based upon the cost for a LPN *for three hours per day*. A full-time, year-round salaried LPN would only earn \$22,500, and a full-time LPN that was paid based upon the school year would only earn \$15,750. Again, the *Shannon M.* court appears to have based its cost justifications upon potentially exaggerated figures. The *Neely* case gives more realistic figures of cost. In that case, Samantha needed a nurse to provide monitoring, suctioning, and emergency care as necessary. The district court concluded that the school could provide Samantha with a full-time attendant for a base salary between \$10,640 and \$13,680.³⁴⁷ This figure is possibly a more accurate measure of the salary of an LPN assisting a child during school hours.

The school district in *Morton Community*³⁴⁸ also gives realistic cost figures. In order to attend school, J.M. needed a full-time nurse to provide monitoring, suctioning, and emergency care as necessary. The Sev-

³⁴¹ See *Fulginiti v. Roxbury Township Pub. Sch.*, 921 F. Supp. 1320, 1321 (D.N.J. 1996).

³⁴² U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 175 (1997).

³⁴³ Based upon a salary of \$682 per week for 50 paid weeks.

³⁴⁴ See *id.* at 209.

³⁴⁵ Based upon \$450 per week for 50 paid weeks.

³⁴⁶ See *Granite Sch. Dist. v. Shannon M.*, 787 F. Supp.1020, 1029 (D. Utah 1992).

³⁴⁷ See *Neely v. Rutherford County. Sch.*, 851 F. Supp. 888, 894 (M.D. Tenn. 1994). Although the Sixth Circuit reversed upon appeal, the court specifically noted that the undue burden upon the school district "derives from the nature of the care involved rather than from the salary of the person performing it." *Id.* at 971.

³⁴⁸ *Morton II*, 153 F.3d 583, 585 (7th Cir. 1998).

enth Circuit Court of Appeals found that these private, full-time nursing services could be provided to J.M. for about \$20,000 per year.³⁴⁹

ii. Small Numbers and No Woodwork Effect

One underlying concern about cost is that schools will be forced to pay for nursing services for a large number of children. The rationale is that if the school district pays for nursing services for one child, then lots of children will ask the school to pay for their nursing services.³⁵⁰

First, the courts may be overestimating the total burden on the school district. Out of the over eight million disabled children qualifying for special education,³⁵¹ the estimates of technology-dependent children only range from 2,300 to 17,000.³⁵² Since technology-dependent students are less than 0.21 percent of the total disabled student population,³⁵³ it appears that school districts over-emphasize the potential burden of providing nursing services to these students.³⁵⁴

Secondly, there is also an underlying concern that there are a larger number of technology-dependent children than the schools currently realize. Schools and courts are cautious about making a broad policy decision to provide these new benefits because of this potential "woodwork

³⁴⁹ *See id.* The court also noted that:

[t]he school district has made no effort to show that the expense of a full-time nurse for J.M. would be undue in relation to the other calls on the district's budget. The district has more than 3,000 students, so that the annual cost of such a nurse would be less than \$7 per student.

Id. at 587.

³⁵⁰ *See, e.g.*, Report to Congress, *supra* note 13, at 9.

³⁵¹ *See* 20 U.S.C. § 1400(b)(1) (1997)(stating that as of 1997, there were more than eight million children with disabilities in the United States).

³⁵² OFFICE OF TECHNOLOGY ASSESSMENT, TECHNOLOGY-DEPENDENT CHILDREN: HOSPITAL V. HOME CARE—A TECHNICAL MEMORANDUM 4 (1987).

³⁵³ This percentage assumes eight million disabled students.

³⁵⁴ Garret F. addressed this issue in his brief to the U.S. Supreme Court:

All the litigated cases involving health monitoring in a regular classroom involve children who rely on ventilators and/or tracheotomy tubes for breathing. The congressional Office of Technology Assessment (OTA) estimated that in any given year there are between 680 and 2,000 children 21 years old and under who receive ventilator assistance. [citations omitted]. OTA also estimated that between 1,000 and 6,000 additional children under 21 breathe with the assistance of tracheotomy tubes. OTA's numbers overestimate the population relevant to school districts in two respects. First, they cover infants and toddlers (that is, children age 0-2) who do not receive school services and who may be weaned from the ventilator or tracheotomy by the time they are ready to enter school [citations omitted]. Second, they include children living in hospitals who receive health services from hospitals not school districts. . . . Thus the number of ventilator- and tracheotomy-dependent children who attend school and require ventilator/tracheotomy health services is likely at the lower end of the OTA estimates. . . . In any event, that population constitutes the barest fraction of the 5.6 million children currently receiving special education and related services.

effect.”³⁵⁵ This is created by “the concern that the known beneficiaries of a new benefit might only be a small portion of the total eligible population.”³⁵⁶ The Task Force Report stated that the woodwork effect is unlikely to occur with the population of technology-dependent children, because “the severity of their condition make[s] it unlikely that they would be unknown to tertiary medical care facilities in their area.”³⁵⁷ As a result, the small number of known technology-dependent children in the school systems are probably an accurate measure of the number of children who require the nursing services in question. The courts and schools, therefore, may be over-emphasizing the true possible burdens on schools in the extent/nature test.

iii. Medicaid

Medicaid funding can relieve at least a part of the school district’s responsibility for nursing services for children with special health care needs.³⁵⁸ Prior to 1991, Medicaid maintained a policy which provided that when a child received Medicaid private nursing services in his home, the child could not bring that nurse to school.³⁵⁹ After being denied nursing services under the EHA, Melissa Detsel brought a suit against the U.S. Department of Health and Human Services (HHS) to challenge this Medicaid restriction.³⁶⁰ Although Medicaid provided Melissa full-time private duty nursing services while she was at home,³⁶¹ it would not allow her to bring her nurse to school.

The Second Circuit determined that the HHS Secretary’s interpretation of the Medicaid at-home regulation as a limitation on private-duty nursing was unreasonable.³⁶² First, although at the time the regulation was promulgated it might have been common understanding that private-duty nursing could be provided only at home, the evolution of medical science has changed this assumption.³⁶³ Technology that would allow a child like Melissa to leave her home or institutionalized setting did not exist in 1965. With this change in technology, the common understand-

³⁵⁵ See REPORT TO CONGRESS, *supra* note 13, at 9.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ It is not automatic that a school or a state is able to be reimbursed by Medicaid for nursing services—a school or state must enter into inter-agency agreements. See 42 U.S.C. § 1396b(c). If a state chose not to apply, it would be the school’s own fault that the cost of providing nursing services to disabled students is too high. It would be a cost-defense killer for a school or state not to at least apply for the Medicaid reimbursement program.

³⁵⁹ See *Detsel v. Sullivan*, 895 F.2d 58, 61 (2d Cir. 1990) (discussing interpretation letter by Health and Human Services concerning 42 C.F.R. § 440.80).

³⁶⁰ See *id.*

³⁶¹ Melissa qualified for private duty nursing under 42 U.S.C. § 1396d(a)(8) (1997). See *id.* at 61.

³⁶² 42 C.F.R. § 440.80 (1997).

³⁶³ See *Detsel*, 895 F.2d at 63-64.

ing that private-duty nursing was only to be provided at home “would not necessarily remain reasonable today.”³⁶⁴ In fact, the court held that private-duty nursing is now commonly understood as being independent of any particular setting, and that private-duty nursing only referred to the level of care and not to the specific location where the care is provided.³⁶⁵

The court also determined that the limitation was not reasonable based on administrative efficiency or any line-drawing process that is part of allocating the limited resources among welfare programs.³⁶⁶ The *Detsel* court noted:

[T]he secretary fails to show how the at-home limitation furthers any of the department’s legitimate fiscal concerns. Medicaid pays for all the supplies and equipment that Melissa needs, whether she remains at home the entire day or attends school, and provides a private duty nurse around the clock in her home. Refusing to permit the nurse to accompany Melissa to school in effect confines Melissa to her home. But this saves no money, because Medicaid would still be responsible for paying for the nurse and for all supplies and equipment while Melissa remained at home. Moreover, since the state will be required to furnish a home tutor if Melissa cannot attend school, the secretary’s interpretation would require greater expenditure of public resources.³⁶⁷

The court, therefore, held that if a child qualified for private duty nursing under Medicaid, the child could bring the nurse to school in order to be educated in the school setting. In a settlement agreement in *Pullen v. Cuomo*,³⁶⁸ HHS agreed to adopt the Second Circuit’s position in *Detsel v. Sullivan* on a national basis.³⁶⁹

The *Detsel* and *Pullen* decisions apply to Medicaid-eligible children who require one-on-one and full-time nursing. In *Skubel v. Fuoroli*,³⁷⁰ the Second Circuit allowed a child to attend school with the help of a part-time Medicaid nurse who provided the child with less intensive

³⁶⁴ *Id.* at 64 (“In view of advances in the care of severely handicapped individuals over the past twenty-five years, we do not believe that the medical assumptions of the mid-1960s offer a valid basis for the secretary’s interpretation [of the at-home limitation to private duty nursing].”).

³⁶⁵ *See id.*

³⁶⁶ *See id.* at 64-65.

³⁶⁷ *Id.* at 65.

³⁶⁸ 18 IDELR 132 (N.D.N.Y. 1991).

³⁶⁹ *See id.*

³⁷⁰ 113 F.3d 330 (2d Cir. 1997).

services.³⁷¹ Prior to this case, children receiving home health care services under Medicaid could only receive these services while they were in their place of residence.³⁷² Similar to *Detsel v. Sullivan*, the *Skubel* court held that the Secretary of HHS's interpretation of the regulation³⁷³ as limiting these nursing services to a disabled child's residence was unreasonable:

There does not appear to be any rational connection between the regulation and the purpose to be served by the statute governing home nursing services. The regulation ignores the consensus among health care professionals that community access is not only possible but desirable for disabled individuals. . . . The presence of a nurse allows these people to go into their communities safely with the care they require. [citation omitted]. . . . [T]he assumptions behind restricting home nursing exclusively to the recipient's place of residence are no less medically obsolete than those we rejected in *Detsel*.³⁷⁴

The court also found that eliminating the in-home restriction would not result in any greater cost to Medicaid³⁷⁵ and, under this holding, a recipient of part-time home health services could now bring their nurse with them outside of their residence.³⁷⁶

After *Detsel*, *Pullen*, and *Skubel*, any child is able to bring any type of Medicaid nurse with him to school. For children who are Medicaid eligible, the scope of the IDEA nursing benefit is never an issue. There is no cost to schools for nursing services for Medicaid eligible children because the home nurse paid for by Medicaid comes to school. Unfortunately, not all children with special healthcare needs qualify for Medicaid assistance. Medicaid cases do not answer the question of what type of nursing services a school must provide to a child who is not Medicaid eligible, but these Medicaid policies at least reduce some of the total burden on the school district.

The above examples illustrate the general tendency of school districts and courts to over-emphasize the financial burdens of providing disabled children with nursing services. The evidence indicates that the actual cost to the schools is much less than many cases indicate. The extent/nature test should be rejected because it relies largely on exaggerate estimates of the actual financial burdens borne by school districts.

³⁷¹ See *id.* at 337.

³⁷² 42 U.S.C. § 1396d(a)(7) (1997).

³⁷³ 42 C.F.R. § 440.70 (1997).

³⁷⁴ *Skubel*, 113 F.3d at 336-37.

³⁷⁵ See *id.* at 337.

³⁷⁶ See *id.*

c. Comparing Cost of Nursing Services with Other Related Services

Courts adopting the extent/nature test use high cost as a justification for saying that schools are not responsible for providing nursing services to children with special health care needs.³⁷⁷ This reasoning does not make sense when the cost of nursing services is compared with the costs of other related services that the schools provide. For example, physical therapy, occupational therapy, speech pathology, and audiology are specially listed related services.³⁷⁸ A physical therapist earns about \$37,596 per year;³⁷⁹ occupational therapists make around \$39,634;³⁸⁰ a speech-language pathologist earns about \$31,000 per year;³⁸¹ and a certified audiologist makes around \$29,000 per year.³⁸² These services may be provided to disabled children one-on-one.³⁸³ A single disabled child may receive hours of a single service or a mixture of services each week.³⁸⁴ These services are not excluded because of their cost. Nursing services are not any more expensive than these other services.³⁸⁵ The cost rationality of the extent/nature test, therefore, breaks down when compared with other provided (and expensive) related services.

2. *Liability*

Some courts have considered liability as a factor in opting for the extent/nature test.³⁸⁶ More specifically, some courts use liability as a factor in determining whether the burden on the school is such that the service becomes "medical in nature."³⁸⁷ For example, the Sixth Circuit explicitly stated that it is "appropriate to take into account the risk involved and the liability factor of the school" that is inherent in providing a medical-type service.³⁸⁸ This issue usually arises when the child re-

³⁷⁷ See, e.g., *Fulginiti v. Roxbury Township Pub. Sch.*, 921 F. Supp. 1320, 1325 (D. N.J. 1996).

³⁷⁸ See 20 U.S.C.A. § 1401(a)(17)(1998).

³⁷⁹ See U.S. DEP'T OF LABOR, *supra* note 342, at 171 (based on median 1994 earnings for full-time physical therapist).

³⁸⁰ See *id.* at 167 (based on median 1994 earnings for a full-time occupational therapist).

³⁸¹ See *id.* at 179 (based on median 1994 earnings for a full-time speech-language pathologist).

³⁸² See *id.* (based on median 1994 earnings for full-time certified audiologist).

³⁸³ See, e.g., *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1402 (9th Cir. 1994); see also Part III.B.5.

³⁸⁴ See TUCKER & GOLDSTEIN, *supra* note 81, at 8:5.

³⁸⁵ The median salary of a full-time LPN in 1994 was \$23,294. See *id.* at 209. The median full-time RN in 1994 earned \$35,256. See U.S. DEP'T OF LABOR, *supra* note 342, at 175. A trained aid earns less than both LPN's and RN's per year.

³⁸⁶ See *Neely v. Rutherford County Sch.*, 68 F.3d 965 (6th Cir. 1995); see also *Fulginiti v. Roxbury Township Pub. Sch.*, 921 F. Supp. 1320, 1325 (D.N.J. 1996).

³⁸⁷ *Id.*

³⁸⁸ *Neely*, 68 F.3d at 971.

quires nursing assistance that, if not provided properly, could cause severe injury or death to the child.

The courts that rely on liability as a factor for identifying excluded medical services based on the burden on the school district claim to be relying on *Tatro*. Yet *Tatro* directly rejects the liability argument. The *Tatro* court expressly rejected the school district's argument that CIC should be excluded as a medical service because of liability of school personnel in performing the service:³⁸⁹

[Liability], however, bears no relation to whether CIC is a 'related service.' The introduction of handicapped children into a school creates numerous new possibilities for injury and liability. Many of these risks are more serious than that posed by CIC. . . . Congress assumed that states receiving the generous grants under the Act were up to the job of managing these new risks. Whether petitioner decides to purchase more liability insurance or to persuade the State to extend the limitation on liability, the risk posed by CIC should not prove to be a large burden.³⁹⁰

The Supreme Court also rejected liability for performing health procedures as an appropriate reason for failing to provide the service to a disabled child.³⁹¹ Schools permit a number of high risk activities, including sports teams and school trips, and such related services as occupational therapy and physical therapy. If a school is concerned about risk, then it can do what it does with every other activity—buy more liability insurance or have liability waivers.

Courts using liability as a factor stated a concern that if schools provide these health services, and if a catastrophic event occurs, then distraught parents may sue the school board.³⁹² It is unreasonable for schools to use liability as an excuse for not providing health services because schools are protected by qualified immunity.³⁹³ Qualified immunity protects teachers, school administrators, and school employees (including nurses or aides) from individual liability in a majority of circumstances.³⁹⁴

Qualified immunity shields state actors "from liability for civil damages insofar as their conduct does not violate clearly established statutory conduct or constitutional rights of which a reasonable person would have

³⁸⁹ See *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 893 n.12 (1984).

³⁹⁰ *Id.*

³⁹¹ See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

³⁹² See *Neely*, 68 F.3d at 971.

³⁹³ See *Harlow*, 457 U.S. 818.

known.”³⁹⁵ For a plaintiff to win a suit, he must show both that the state actor knew or should have known that his actions violated plaintiff’s rights and that those rights were clearly established at the time of the official’s action.³⁹⁶ When considering whether the law is applicable to a set of facts, it is clearly established that the facts of the precedents relied upon are important.³⁹⁷ This is a high standard for a plaintiff to meet.

In addition, a plaintiff must show a causal connection between the state action and his injury.³⁹⁸ Liability is, therefore, limited in the case of individual suits against school employees, administrators, and teachers. Based on *Tatro* and on the reality of immunity, liability is not an adequate justification for accepting the extent/nature test over the physician/non-physician test.

3. *Medical-In-Nature*

A number of courts adopted the extent/nature test because it excludes services that are “medical-in-nature.”³⁹⁹ The first and most basic problem is that no court has defined “medical-in-nature.” It is unclear if a service is classified as medical-in-nature by what procedures are required, by who performs those procedures, or by the intensity of the procedure. Furthermore, this justification does not make sense after examining the language of the IDEA. The IDEA anticipates the need to provide services that are medical-in-nature. These services are called “school health services” and are specially denoted by regulation as related services.⁴⁰⁰

Even if there was no health service regulation, the medical-in-nature justification does not make sense when compared with other related services that are provided. For example, the IDEA specifically lists speech pathology, audiology, physical therapy, and occupational therapy as related services.⁴⁰¹ All of these related services are medical services. For

³⁹⁵ *Id.*; see also *Davis v. Scherer*, 468 U.S. 183, 194 (1984) (“A plaintiff who seeks damages . . . may overcome the defendant official’s qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.”)

³⁹⁶ KENNETH F. WARREN, *ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM* 475 (1996).

³⁹⁷ *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (“[I]n light of pre-existing, law the unlawfulness [of the official action] must be apparent.”).

³⁹⁸ See *Martinez v. California*, 444 U.S. 277, 285 (1980) (holding a state official immune from suit because the harm caused by his actions was too remote).

³⁹⁹ See, e.g., *Neely v. Rutherford County Sch.*, 68 F.3d 965, 970-71 (6th Cir. 1995) (affirming lower court’s finding that the school was not required to provide the medical services because it was “medical-in-nature”); *Granite Sch. Dist v. Shannon M.*, 787 F. Supp. 1020, 1026 (D. Utah 1992) (relying on medical-in-nature language from *Detsel* to determine that the requested service was an excluded medical service); *Bd. of Educ. v. Detsel*, 637 F. Supp. 1022, 1027 (N.D.N.Y. 1986) (holding that the nursing services requested “more closely resemble the medical services specially excluded by § 1401(17) of the [EHA]”).

⁴⁰⁰ See 20 U.S.C.A. § 1401(22) (1998); 34 C.F.R. § 300.16(b)(11) (1998).

⁴⁰¹ See 20 U.S.C.A. § 1401(22) (1998).

example, a physical therapist's job includes many medical aspects. Physical therapists "improve mobility, relieve pain, and prevent or limit permanent physical disabilities of patients suffering from injuries or disease."⁴⁰² Physical therapists "evaluate patients' medical histories, test and measure their strength, range of motion, and ability to function, and then develop plans accordingly."⁴⁰³ In addition to treatment by exercise:

[p]hysical therapists also use electrical stimulation, hot or cold compresses and ultrasound to relieve pain, improve the condition of the muscles or related tissues, and to reduce swelling. They may use traction or deep-tissue massage to relieve pain and restore function. Therapists also teach patients to use crutches, prostheses, and wheelchairs to perform day-to-day activities, and show them exercises to do at home to expedite their recovery.⁴⁰⁴

The training includes such science courses as biology, chemistry, physics, biomechanics, neuroanatomy, human growth and development, and manifestations of disease and trauma.⁴⁰⁵ Physical therapy, a covered related service, is, therefore, at least as "medical-in-nature" as the provision of many nursing services to children with special health care needs.

Occupational therapy and speech pathology or audiology, which are specifically covered related services, also provide medical services. A speech pathologist or audiologist may provide treatment that includes "examining and cleaning the ear canal, fitting a hearing aid, auditory training, and instruction in speech or lip reading."⁴⁰⁶ An occupational therapist uses physical exercises to increase strength, dexterity, and coordination. For patients with functional disabilities, an occupational therapist "provide[s] such adaptive equipment as wheelchairs, splints and aids. . . ."⁴⁰⁷ Both professions require courses such as biology and anatomy. Speech therapists, audiologists, and occupational therapists, therefore, provide medical services specific to their discipline. For example, a school district in Idaho attempted to limit the physical and occupational therapy provided to a student with cerebral palsy on the basis that the need is medical rather than educational.⁴⁰⁸ The Assistant Secretary for the Office of Special Education and Rehabilitative Services (OSERS) specifically stated that "we [OSERS] find no support for this position in

⁴⁰² U.S. DEP'T OF LABOR, *supra* note 342, at 169.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 170.

⁴⁰⁵ *See id.*

⁴⁰⁶ *Id.* at 178.

⁴⁰⁷ *Id.* at 167.

either the EHA[] statute or regulations."⁴⁰⁹ Although OSERS recognized that there are medical elements to physical and occupational therapy, it noted that the medical services exclusion is extremely narrow.⁴¹⁰ Therefore, the OSERS held that these services could not be limited because of their medical nature.

The IDEA provides no objective way to compare the medical-relatedness of services provided by physical and occupation therapists, speech pathologists, or audiologists to those provided by nurses.⁴¹¹ All are medical and all can be related when they act as related services. Therefore, "medical-in-nature" does not provide a proper basis for distinguishing nursing services from these other specially listed related services.

4. *Complexity and Training*

A number of courts justify the adoption of the extent/nature test because they claim the requested services are too complex and that school nurses cannot provide them. A deeper analysis, however, makes it clear that this is not an appropriate justification.

There are a number of different types of nurses. There are two types of Registered Nurses (RN's)—Associate Degree in Nursing (ADN) and Bachelor of Science in Nursing (BSN).⁴¹² An ADN requires two years of training after high school, and a BSN requires about four or five years of training after high school.⁴¹³ A second type of nurse is a Licensed Practical Nurse (LPN), which requires a one-year program.⁴¹⁴ Additionally, paraprofessionals, trained lay-people, can provide a number of nursing services.

Each state defines by statute the qualifications necessary for each type of nurse. Each state's regulatory body for nursing also defines exactly which procedures each type of nurse may perform.⁴¹⁵ The qualifications of a school nurse and procedures that a school nurse can perform are defined by statute. The statutes often differ from state to state.

The court in *Detsel* ruled that the school nurse did not have to provide the requested procedure.⁴¹⁶ If the court had explained the conclu-

⁴⁰⁹ *Id.* at 120.

⁴¹⁰ *See id.*

⁴¹¹ *See* 34 CFR § 300.16 (1997).

⁴¹² *See* U.S. DEP'T OF LABOR, *supra* note 342, at 174.

⁴¹³ *See id.*

⁴¹⁴ *See id.* at 208 (most, but not all, LPN programs also require a high school diploma).

⁴¹⁵ *See, e.g.,* ALA. CODE § 34.21.1-93 (Michie 1997) (establishing a Board of Nursing to regulate licensing and educational requirements of nurses); ARIZ. REV. STAT. § 32.1601-1668 (Supp. 1998) (establishing a Board of Nursing to regulate licensing and educational requirements of nurses); COLO. REVISED STAT. ANN. § 12.38.101-38.133 (Supp. 1998) (establishing Arizona State Board of Nursing and nursing requirements).

⁴¹⁶ *See Detsel v. Bd. of Educ.*, 637 F. Supp. 1022, 1024 (N.D.N.Y. 1986).

sion, the court could have addressed the fact that the New York law, applied in *Detsel*, by statute requires school nurses to be RN's.⁴¹⁷ The New York Nurse Practice Act, which allows LPN's to provide suctioning and all of the other services Melissa required, is also relevant.⁴¹⁸ Thus, as a matter of law, a school nurse *could* have provided all the services that Melissa needed. The court's conclusion that a school nurse could not provide the services to Melissa can be explained either by the fact that the nurse had other responsibilities and could not be in two places at once, or that the nurse did not know the specific task. These reasons, however, cannot justify the denial of a related service. The school could have either hired another nurse or trained the existing nurse to learn the specific procedures. The "inability" conclusion of the *Detsel* court, therefore, was incorrect.

Courts also rely on an assumption that if a procedure requires a great amount of expertise, then it is a medical service. For example, courts distinguished *Tatro* factually by saying that CIC could be performed by a trained layperson, while suctioning required an LPN or RN.⁴¹⁹ The reality of the situation is that although the procedure itself may be the same state to state, who can provide the service often is not. For example, Hawaii allows suctioning by a trained aide,⁴²⁰ while Hawaii also requires a registered nurse to provide suctioning.⁴²¹ It does not make sense to say that even though the exact same service is provided to two students in different states, it is medical (and therefore excluded) in one instance and non-medical (and therefore covered) in the other case simply because of the training of the person providing the service. The expertise of the person providing the service is, therefore, not an appropriate measure of whether a service is medical or not.

Some courts rely on the training required by a nurse who can provide the services.⁴²² There are other providers of related services in the school system who require at least as much or more training than a nurse. For example, a special education teacher must have a four year bachelor's degree plus an additional year-long master's degree.⁴²³ A physical or occupational therapist must have a four year bachelor's degree plus a

⁴¹⁷ See N.Y. EDUCATION LAW § 902(1) (McKinney 1997).

⁴¹⁸ See *Detsel*, 637 F. Supp. at 1025.

⁴¹⁹ See, e.g., *Neely v. Rutherford County Sch.*, 68 F.3d 965, 971 (6th Cir. 1995); *Granite Sch. Dist. v. Shannon M.*, 787 F. Supp. 1020, 1029-30 (D. Utah 1992); *Detsel*, 637 F. Supp. at 1026.

⁴²⁰ See, e.g., *Dep't of Educ. v. Katherine D.*, 727 F.2d 809, 815 (9th Cir. 1983) (noting that laypersons could be trained to provide suctioning).

⁴²¹ See, e.g., *Detsel*, 637 F. Supp. at 1024 (stating suctioning must provided by a LPN or RN); N.Y. EDUCATION LAW § 902(1) (McKinney 1997) (requiring school nurses to hold RN degrees).

⁴²² See, e.g., *id.* at 1024.

one year master's degree.⁴²⁴ A speech pathologist or audiologist also requires a bachelor's and may require a master's degree.⁴²⁵ All of these providers of related services require at least as much or more training than an LPN or RN. The training required by a nurse to provide services to children with significant health care needs is, therefore, not an appropriate justification for adopting the extent/nature test.

5. *Intensity*

A number of courts adopted the extent/nature test because they believe that the more intensive a service is, the more it resembles the medical services the IDEA meant to exclude.⁴²⁶ In their interpretation of *Tatro*, these courts limit the decision to the facts so that the school is required to provide intermittent nursing services and not constant nursing services.⁴²⁷ In *Bevin H.*, the court stated that it is the "private duty" aspect that distinguishes the nursing services requested by Bevin (tracheostomy suctioning, gastronomy care, and monitoring)⁴²⁸ from other services held to be school health services and not excluded medical services—such as CIC⁴²⁹ and suctioning of tracheostomy tube that was only necessary a few times a day.⁴³⁰ The rationale behind the private duty argument is that the school nurse would not always be available to provide the service to the disabled student because she has a responsibility to all students, therefore, the school would have to hire a separate nurse.⁴³¹

When compared with other related services, this justification does not make sense. Other related services are equally or more intensive and are still provided. For example, schools provide a one-on-one aide to teach behavioral or communication modification to autistic children.⁴³² Schools also provide a one-on-one interpreter for deaf children.⁴³³

⁴²⁴ See *id.* at 167, 170.

⁴²⁵ See *id.* at 178.

⁴²⁶ See, e.g., *Granite Sch. Dist. v. Shannon M.*, 787 F. Supp. 1020, 1026-27 (D. Utah 1992); *Bevin H. v. Wright.*, 666 F. Supp. 71, 75 (W.D. Pennsylvania 1987).

⁴²⁷ See, e.g., *Detsel*, 820 F.2d at 587.

⁴²⁸ See *Bevin H.*, 666 F. Supp. at 75.

⁴²⁹ See *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 894 (1984); *Tokarcik v. Forest Hills Sch. Dist.*, 665 F.2d 443, 458 (3rd Cir. 1981).

⁴³⁰ See *Dep't of Educ. v. Katherine D.*, 727 F.2d 809, 812 (9th Cir. 1983).

⁴³¹ See *Shannon M.*, 787 F. Supp. at 1026; *Bevin H.*, 666 F. Supp. at 75; *Detsel*, 637 F. Supp. at 1025.

⁴³² See, e.g., *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 999 (4th Cir. 1997) (holding IEP that provided for full-time one-on-one aide to assist autistic child with facilitated communication was appropriate); *X v. New York State Educ. Dep't*, 975 F. Supp. 546 (S.D.N.Y. 1997) (holding provision of one-on-one aide to provide behavioral modification to autistic child was appropriate).

⁴³³ See, e.g., *Poolaw v. Bishop*, 67 F.3d 830, 832 (9th Cir. 1995) (holding provision of a full-time interpreter to a deaf child was appropriate).

Other related services are not excluded simply because they must be provided in a one-on-one fashion. No clear reason exists why nursing services should be treated any differently. Just because a service must be provided on an individual basis should not change whether it is considered a related service or an excluded medical service. Intensity is, therefore, not a legitimate reason for adopting the extent/nature test.

6. *Number of Nursing Procedures*

The number of nursing procedures that the nurse must provide to the disabled student is also not an appropriate justification for adopting the extent/nature test. As long as the provision of the requested service is within the skills of the nurse, it should not matter whether the nurse has to provide a single procedure (such as suctioning) once per day, a single procedure numerous times during a day, or a number of procedures (such as suctioning, provision of oxygen, and monitoring) once or many times during the day. Additionally, the number of nursing procedures justification ignores the fact that the procedure being done is the same each time. The courts give no guidance on how many times a procedure may be performed before it is transformed from a related service to an excluded medical service. Once a school day, once a period, or once an hour? This number of procedures test does not exist for other listed related services. The number of procedures rationale behind the extent/nature test must, therefore, be rejected because it provides no objective basis for capping the amount of nursing services a student can receive.

7. *Traditional Roles*

Some courts justify the adoption of the extent/nature test by stating that it is more true to the traditional roles of school nurses than the physician/non-physician test.⁴³⁴ These traditional nursing activities include such activities as administering medicine, providing first aid, and screening for vision and hearing problems.⁴³⁵ Traditional nursing services do not require school nurses to provide such services as monitoring a ventilator and suctioning a tracheostomy tube.

There is no traditional role of nurses in regard to disabled students. Before the passage of the EHA, many children with disabilities were not in school.⁴³⁶ In the early 1970's, the Bureau of Education for the Handicapped estimated that over 1.75 million disabled children were receiving no educational services at all.⁴³⁷ Over 2.5 million children were receiving an inappropriate education—meaning that those children were edu-

⁴³⁴ See, e.g., *Hopedale Sch. Dist.*, 17 EHLR 973 (SEA Mass. 1991).

⁴³⁵ See *id.* at 8.

⁴³⁶ See S. REP. NO. 94-168, at 8 (1975), reprinted in 1975 U.S.C.A.A.N. 1425, 1432.

cated in institutionalized, segregated facilities for the disabled.⁴³⁸ As of 1997, Congress still found that over “1,000,000 of the children with disabilities in the United States are excluded entirely from the public school system.”⁴³⁹ A school nurse’s traditional role regarding disabled students can only be described as a non-sequitor.

The EHA and IDEA do not support the notion that only traditional services should be provided to disabled students. The EHA changed the entire school system. For example, the EHA required schools to change everything from their physical buildings⁴⁴⁰ to their educational curriculum.⁴⁴¹ Schools were required to add new services that they had never offered before, including special education, speech pathology, physical therapy, and occupational therapy.⁴⁴² The statute forced the schools to make the changes quickly and under stringent time frames.⁴⁴³ Most importantly, there was nothing that the statute exempted from changing because of its “traditional role.”

In light of the history of the education of disabled children, courts’ reliance on traditional roles in schools seems quite misplaced. The traditional role of nurses, therefore, does not justify the adoption of the extent/nature test over the physician/non-physician test.

C. APPLICATION

The extent/nature test does not establish a clear objective test that can be applied with consistency. The extent/nature test is subjective; it is up to the school administrator, hearing officer, or judge to decide whether a service is so similar to a medical service as to require exclusion. The extent/nature test does not establish any clear guidelines of how courts should balance the interests of the individual disabled student and the interests of the school in light of the EHA/IDEA. It is similar to the “I know it when I see it test” espoused by Justice Stewart regarding pornography.⁴⁴⁴ The judge has total discretion in the application of the test. This lack of guidelines led to inconsistent application of the IDEA provisions.

Additionally, the extent/nature test fails to establish a single national standard. The current interpretation of the medical services exclusion makes jurisdiction the key factor in determining whether a nursing service will be provided to a student. For example, the students in *Gar-*

⁴³⁸ See *id.*

⁴³⁹ 20 U.S.C.A. § 1400(b)(4)(1997).

⁴⁴⁰ See 20 U.S.C.A. § 1404 (1998).

⁴⁴¹ For example, schools had to begin providing special education. See 20 U.S.C.A. §§ 1401(25), 1412(a) (1998).

⁴⁴² See 20 U.S.C.A. § 1401(22) (1998).

⁴⁴³ See 20 U.S.C. § 1412 (1997).

⁴⁴⁴ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

ret F. and *Detsel* requested the same services. The court in *Garret F.* adopted the bright line test and provided the nursing services. On the other hand, the court in *Detsel* adopted the extent/nature test and refused to provide the nursing services. This leads to the conclusion that nursing services are being provided by zip code. If the student happens to live in a jurisdiction where the court accepted the bright line physician/non-physician test, then the nursing service will be provided. If the students happens to live in a jurisdiction where the court has accepted the extent/nature test, the nursing service will probably not be provided. This result does not fit well with the national mandate that schools provide appropriate education to all disabled students.

Lastly, the result of the application of the extent/nature test is that only poor and insured children are able to go to school. The IDEA never contemplated such an economic-based result. If a child is poor enough to qualify for Medicaid, then the child can bring their Medicaid nurse to school.⁴⁴⁵ On the other hand, if a child's family has private insurance that will cover the costs of nursing services, then the child will be able to attend school.⁴⁴⁶ Other disabled children living in jurisdictions which apply the extent/nature test, however, will not be able to attend school. The IDEA created a national mandate for schools to provide an education to all disabled children. The Act did not anticipate educational opportunities for disabled children to be based upon how much money that child's family has. The application of the extent/nature test, therefore, is not consistent with the statute and its goals and purposes.

D. DISCRIMINATION

1. *Discrimination Vis-à-vis Other Disabled Individuals*

The entire process of deciding the scope of nursing services may be discriminatory in and of itself. As discussed above, it appears that the courts developed special tests to apply to related services that a health impaired individual might need which do not apply to related services needed by an individual with another disability. For example, schools are willing to provide a one-on-one aide for behavior management but are not willing to provide a one-on-one aide to provide nursing services. The school is willing to provide physical therapy, which is medical in nature, to a child with a physical disability but is not willing to provide

⁴⁴⁵ See, e.g., *Detsel v. Sullivan*, 895 F.2d 58 (2d Cir. 1990); *Pullen v. Cuomo*, 18 IDELR 132 (N.D.N.Y. 1991).

⁴⁴⁶ See, e.g., *Skubel v. Fuoroli*, 113 F.3d 330, 333 (2d Cir. 1997) (case was brought once a private insurance plan would not cover the majority of the nursing services and the extra hours had to be covered by Medicaid); *Bevin H. v. Wright*, 666 F. Supp. 71, 72 (W.D. Penn. 1987) (case was brought because parents had reached their insurance cap by paying for private nursing services in school for a number of years).

nursing services to a health impaired child *because* the services are medical in nature. This appears to be discrimination based on the type of disability that a child has.

Section 504 of the Rehabilitation Act is generally thought not only to cover claims of discrimination between disabled and non-disabled people, but also to cover claims involving one group of disabled people claiming discrimination vis-à-vis another group of disabled people.⁴⁴⁷ The Supreme Court has not ruled on whether such claims fall into the scope of section 504.⁴⁴⁸

The majority of courts have held that section 504 covers discrimination claims between different groups of disabled people.⁴⁴⁹ The language of the Statute appears to support such claims. The regulations of section 504 specifically state that a state receiving federal funding violates the law when it “[p]rovide[s] different or separate aid, benefits, or services to handicapped persons *or to any class of handicapped persons*” unless it is necessary to make the services equally effective.⁴⁵⁰

[A]s a matter of statutory construction, nothing in the language of § 504 suggests that it can never apply between persons with different handicaps. Rather, the language of § 504 evinces an intent to eliminate handicap-based discrimination and segregation. A strict rule that § 504 can never apply between persons with different disabilities would thwart that goal. Such a rule would, in effect, allow discrimination on the basis of disability. The relevant inquiry is whether the application of § 504 between persons with different or varying degrees of dis-

⁴⁴⁷ See generally TUCKER & GOLDSTEIN, *supra* note 81, at 6:27-6:29.

⁴⁴⁸ *But see* Traynor v. Turnage, 485 U.S. 535 (1988) (holding that a statute which excluded one group of individuals from its benefits does not violate section 504). The majority of courts have interpreted *Traynor* to apply narrowly to federal statutes that provide benefits to any one class or number of classes of people with disabilities. See TUCKER & GOLDSTEIN, *supra* note 81, at 6:29 n.149.

⁴⁴⁹ See, e.g., Doe v. Colautti, 592 F.2d 704 (3rd Cir. 1979) (allowing a § 504 suit claiming that statute discriminated against mentally disabled individuals vis-à-vis physically disabled people); Martin v. Voinovich, 840 F. Supp. 1175 (S.D. Ohio 1993) (allowing § 504 claims that mentally disabled individuals were discriminated against vis-à-vis people with other disabilities); McGuire v. Switzer, 734 F. Supp. 99 (S.D.N.Y. 1990) (allowing § 504 claim of discrimination against a paraplegic individual vis-à-vis blind people); *but see*, e.g., P.C. v. McLaughlin, 913 F.2d 1033, 1041 (2nd Cir. 1990) (stating that § 504 does not “clearly establish an obligation to meet [a person with a disability’s] particular need vis-à-vis the needs of other handicapped individuals, but mandate[s] only that services provided nonhandicapped individuals not be denied [to a disabled individual] because he is handicapped”); Colin K. v. Schmidt, 715 F.2d 1, 9 (1st Cir. 1983) (“[W]e have serious doubts whether Congress intended § 504 to provide plaintiffs with a claim for discrimination vis-à-vis other handicapped individuals. . .”).

⁴⁵⁰ 34 C.F.R. § 104.4(b)(1)(iv) (1998) (emphasis added).

ability furthers the goal of eliminating disability-based discrimination.⁴⁵¹

Additionally, the policy behind section 504 supports the idea that both claims of discrimination vis-à-vis non-disabled and other people with disabilities should be allowed. Two commentators point out that "Discrimination against particular classes or subclasses of people with disabilities is just as invidious as any other form of discrimination, and, as such, is within the scope of the discriminatory conduct Congress sought to prohibit when enacting § 504."⁴⁵²

A claim of discrimination vis-à-vis disability may also exist under the ADA. The language of Title II of the ADA is similar to that of section 504.⁴⁵³ Because of the similarities in language and purposes between the ADA and section 504, a number of courts held that a claim of discrimination vis-à-vis other disabled individuals also exists under the ADA.⁴⁵⁴

A child with special health care needs who is denied nursing services may, therefore, have a claim of discrimination vis-à-vis other classes of disabled children under section 504 or the ADA. Using the extent/nature test, courts are not requiring schools to provide nursing services as a related service to a child because it is medical in nature, costly, complex, requires training, or is intense. As discussed in Part II.B. of this article, however, other related services that are provided by the schools have these qualities. The process of using any test—especially the extent/nature test—in the provision of one related service while not placing a similar barrier in front of children with other disabilities who are getting the same or indistinguishable related services indicates that children with special health care needs are being discriminated against vis-à-vis children with other disabilities.

2. *Discrimination Through Fears and Stereotypes*

The policy of the IDEA to educate disabled children with non-disabled children was, in part, meant to eliminate prejudice against people with disabilities through exposure and interaction.⁴⁵⁵ The result of the extent/nature test, unfortunately only furthers discrimination. A school may not want to provide services for a number of inappropriate reasons.

⁴⁵¹ *Martin*, 840 F. Supp. at 1192.

⁴⁵² TUCKER & GOLDSTEIN, *supra* note 81, at 6:28.

⁴⁵³ See 42 U.S.C. § 12132 (1997) ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."); cf. 29 U.S.C. § 794 (1997).

⁴⁵⁴ See, e.g., *Martin*, 840 F. Supp. at 1192.

⁴⁵⁵ See *Oberti v. Bd. of Educ.*, 905 F.2d 1204, 1216 n.24 (3rd Cir. 1993).

A school may fear that a child might die while in its care or may fear liability for provision of services. The services requested may also be unpleasant to perform. The school may find it disagreeable for the other children to be around and see children with holes and tubes. Lastly, the school may have a traditional view that children with health care needs are "sick" and, therefore, do not belong in school. Keeping children with special health care needs out of the schools does nothing to dissipate this discrimination and fear. These reasons are inappropriate and only increase the fear and prejudice against people with disabilities. The extent/nature test, therefore, must be rejected because it allows schools to foster inappropriate, discriminatory reasons for excluding children with special health care needs.

IV. CRITIQUE OF THE PHYSICIAN/NON-PHYSICIAN TEST

Although the nature/extent test cannot be justified based upon the above discussed considerations, this does not necessarily mean that the physician/non-physician test is correct. The bright-line physician/non-physician test may be more appropriate based on the language of *Tatro*, the IDEA, and the DOE regulations. The physician/non-physician test also has its weaknesses.

For the most part, the extent/nature test leads to the result that any expensive, complex, or constant nursing service will be excluded and the child will not be placed in school. On the other hand, the physician/non-physician test leads to the result that all nursing services are covered and every child will be placed in the school. Although the physician/non-physician test might lead to better results in light of the general purposes of the IDEA, the test has no real meaning in application. In reality, there are few if any services required by a child as supportive services that must be provided by a doctor. A doctor might prescribe medication or generally supervise treatment, but these are not to be excluded medical services.⁴⁵⁶ A doctor would only be necessary for medical procedures that would not be considered supportive services by any definition of the word.⁴⁵⁷ Thus, both of the extent/nature and the physician/non-physician tests lead to extreme results.

⁴⁵⁶ See *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 893 (1984).

⁴⁵⁷ For example, no matter how broad the definition of supportive service is interpreted, having a doctor perform kidney surgery on a child at school is clearly an excluded medical service. It is, however, arguably a supportive service to have a doctor prescribe dialysis treatment that a child requires every four hours, since a child would be unable to be in school without the provision of that service.

V. SUGGESTIONS

Rather than adopt the extent/nature test or the physician/non-physician test, the best alternative is to have no test. Nothing in the language of the IDEA or its regulations require there to be any test for the provision of nursing services. The language only requires that medical services—those services provided by doctors—be excluded if they are not for evaluation or diagnostic purposes. Schools should not impose any extra tests and should simply treat children with special health care needs as they treat all other children:

All non-disabled children are presumed to be required to attend school unless their doctor or family decides they are too sick to attend. These same rules should apply to children with special health care needs. This premise fits into the statutory scheme of the IDEA regulations. The regulations provide that: “Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.”⁴⁵⁸ The default assumption would be that the disabled child will attend school, and that the school must assume responsibility for providing supportive services, including nursing. The school should have to meet a substantial burden in order to overcome the presumption and exclude a child. This test also fits within the holding of *Tatro*. *Tatro* established that schools have a responsibility to provide nursing services to children with special health care needs.⁴⁵⁹ It should not matter what particular nursing services are required. Furthermore, the need for nursing services should not affect placement. As long as a child with special health care needs does not have another need warranting removal from school, then the default assumption should apply.

None of the cases state that children with special health care needs cannot benefit from school. In fact, every case noted that the appropriate placement for these children was in school with their peers. There may exist a child that has such extreme health impairments that he would not be able to benefit from being in school, but none of the cases to date have identified such a child. In fact, the presumption is to the contrary.⁴⁶⁰ It follows that the default rule should reflect the norm and not the exception.

Instead of having the schools or courts decide whether a child should attend school, the child’s family and doctor should make that decision. If the child’s doctor gives the student medical clearance to attend

⁴⁵⁸ 34 C.F.R. § 300.552(c) (1997).

⁴⁵⁹ See *Tatro*, 486 U.S. at 883 (holding the school responsible for the provision of Clean Intermittent Catheterization to a student with special health care needs).

⁴⁶⁰ See, e.g., *Timothy W. v. Rochester, N.H. Sch. Dist.*, 875 F.2d 954 (1st Cir. 1989) (assuming a disabled child can benefit from being in school and receiving special education).

school, then the child should be able to attend; but if the child's doctor determines that the student is too ill to attend school, then the child should stay home. It is unlikely that a parent or doctor would force a school to admit a child that is too ill to attend. Like the case with all other children, this would put the choice of whether the child is able to attend school with the child's parents and his doctor, instead of with a school official who is not as familiar with the conditions and capabilities of the child. This policy makes the most sense in its application, provides a clear, objective standard and creates a single national rule. This presumption also has the benefit of focusing on the child. The problem with the extent/nature test is that it focuses on the requested services. The problem with the physician/non-physician test is that it focuses on the status of the provider. All other questions of special education, including provision of related and supportive services, focus on the needs of the child. This presumption effectively shifts the focus to the child and forces schools to treat the needs of children with special health care problems the same as they treat children with other disabilities. In light of the goals of the IDEA, it makes the most sense.

CONCLUSION

Many children with special health care needs are excluded from public schools. The IDEA and its legislative history do not clearly deal with the issue of whether schools must provide extensive nursing services to these children. The decision of the Supreme Court in *Tatro* did not give clear answer to this question. Lower courts have interpreted *Tatro* as suggesting two different tests.

The extent/nature test was adopted in several circuits and takes into account factors such as cost, liability, and intensity. These factors are not appropriate considerations and are not taken into account when analyzing other related services or in other areas of special education law. The extent/nature test does not give enough guidance to courts and cannot be applied to provide consistent results. The extent/nature test should, therefore, be rejected.

The physician/non-physician test is somewhat better. It makes more sense in light of the language of the IDEA, the DOE's regulations, and *Tatro*. While the physician/non-physician test also leads to better results based on the purposes of the IDEA, the physician/non-physician test has no real meaning since there are no services that doctors must provide to children in a school setting. A better alternative would, therefore, be to remove the decision-making process from the schools and courts and place them in the hands of the child's family and doctor.

Right now, children with special health care needs are being kept out of school while the courts argue about how to set appropriate stan-

dards. Just as *Brown v. Board of Education* opened the doors of public schools to African-American children, the government must eliminate the barriers keeping children with special health care needs out of school. The Supreme Court has the ability to remove those barriers by making the right decision in the *Garret F.* case. Hopefully the Supreme Court will take advantage of this opportunity to make the goal of providing a free appropriate public education to *all* children a reality.

