DEPARTMENT OF EDUCATION
(Cite as 12 DoE App. Dec. 103)

In re Garret F.	)	
Charlene F.,	)	
Appellant	)	DECISION
vs.	)	
Cedar Rapids Community School District, and	)	
Grant Wood Area Education Agency 10	)	Admin. Doc. SE-98
Appellees	)	

The above entitled matter was heard on October 31, 1994, before Administrative Law Judge (ALJ) Larry Bartlett. With agreement of the parties, the hearing was recessed until November 1, and later until November 14. The hearing was concluded on November 14. The parties mutually agreed on December 2 as the date to have briefs postmarked. Briefs were received by the ALJ on December 5.

The Appellant was represented by Attorney Douglas Oelschlaeger, and the Cedar Rapids Community School District (District) was represented by Attorney Sue Seitz. The Executive Director of Special Education from Grant Wood Area Education Agency 10 (AEA), Paula Vincent, was present on behalf of the AEA, but the AEA was not represented by legal counsel.

The hearing was held pursuant to the authority of Section 256B.6, The Code of Iowa, and was conducted pursuant to the terms of Chapter 281-41, Iowa Administrative Code. The hearing was open to the public at the request of Appellant. The witnesses were sequestered upon motion of the Appellant. Garret was in attendance on the third day of hearing.

The record was kept open at the end of the hearing for the purpose of receiving a full and certified copy of a Declaratory Ruling of the Iowa Board of Nursing. That copy was received on December 5.

On or about October 12, 1993, the Appellant filed an affidavit of appeal regarding her son, Garret. (The affidavit was first sent by telephonic facsimile on October 8, 1993). In it, the Appellant challenged the District's refusal to provide Garret with a health care provider to "assist Garret with physical needs during the school day." The hearing of the appeal was delayed on numerous occasions at the request of the parties, who attempted to find a mutually satisfactory resolution to the dispute.

At the conclusion of the hearing, this ALJ announced that his goal for completion of a decision would be five working days following his receipt of the briefs. The extensive record and important legal issues involved resulted in that time estimate being off the mark by about one week. For this he apologizes.

Finding of Fact

The ALJ finds that he and the Department of Education have jurisdiction over the parties and subject matter involved in this proceeding.

The facts are largely undisputed.

Garret F. is a twelve-year-old boy who lives with his divorced mother and older brother in the District. Garret's father resides in the general community area, and Garret visits his father's home every other weekend. Garret has attended school in the District since kindergarten and is currently a sixth-grade student. He attends a typical middle school program at Roosevelt School. He appears to be friendly, creative, above-average in ability and is considered academically successful in school. His most recently received grade report included one C, one B-plus, and the rest were A's. Garret receives no specially designed instruction. He does receive a number of support services.

When Garret was four years old, he was injured in an unusual motorcycle accident. While riding on the rear seat of a motorcycle, a blanket Garret had with him became entangled in the drive mechanism of the cycle, suddenly jerking his head and causing injury to his spinal column. He has since been paralyzed from his neck down. He is wheelchair bound and is ventilator dependent. He does have complete head movement, is able to speak, and controls his motorized wheelchair through use of a puff and suck straw. Being ventilator dependent means that he breathes only with external aids, usually an electric ventilator, and occasionally by someone else's manual pumping of an air bag attached to his tracheotomy tube when the ventilator is being maintained. This later procedure is called ambu bagging.

While in school, Garret needs a responsible person in his vicinity to attend to his personal needs. He needs assistance with urinary bladder catheterization once a day, the suctioning of his tracheotomy tube as needed, but at least once every six hours, with food and drink at lunchtime, in getting into a reclining position for five minutes of each hour, and ambu bagging occasionally as needed when the ventilator is checked for proper functioning. He also needs assistance from someone familiar with his ventilator in the event there is a malfunction or electrical problem, and someone who can perform emergency procedures in the event he experiences autonemic hyperreflexia. Autonemic hyperreflexia is an uncontrolled visceral reaction to anxiety or a full bladder. Blood pressure increases, heart rate increases, and flushing and sweating may occur. Garret has not experienced autonemic hyperreflexia frequently in recent years, and it has usually been alleviated by catheterization. He has not ever experienced autonomic hyperreflexia at school. Garret is capable of communicating his needs orally or in another fashion so long as he has not been rendered unable to do so by an extended lack of oxygen.

It is disputed as to whether a registered nurse licensed by the state (RN), a licensed practical nurse (LPN), or a skilled and trained care provider is required, or necessary, as the responsible person to be in Garret's proximity while he attends school. It is also disputed as to who is responsible for providing or paying for this person's services.

At first, health care at school was provided through health insurance obtained through Garret's father's employment. At some later time, however, the maximum payment limit was reached and the insurance coverage ceased. Garret's mother has since been able to obtain insurance coverage through a special program for which she pays an annual premium of $1,183. However, its annual coverage limit for health care is normally exceeded by mid-year. Health care assistance the remainder of the calendar year, including the first part of each new school year in the fall, is provided as a result of money placed in a trust fund for Garret's support that was established following his accident. The current cost of health care to Garret's family is $22.00 per hour ($18.50 for 1993-94), including the seven-hour school day when school is in session.

Health care is provided Garret at home and school for a total of about 16 hours a day during the week. (This includes school time on school days.) No professional health care provider is employed in Garret's care on weekends. Care between school-time and 11:00 p.m. weekdays and on weekends is provided by Garret's family and friends. His friends are familiar with his needs and his ventilator management. A health care provider is in the home during the week-night sleeping hours to attend to Garret's needs, including being turned in his sleep every two hours, and to allow the family undisturbed sleep time. Garret's pediatrician testified that he has certified the need of licensed nursing services for purposes of insurance coverage. Garret's mother testified that she would hire a nonlicensed trained health care provider at a lower cost if the insurance company would allow it.

At the current time, professional health care is provided by three LPNs employed and provided by a local health care agency. The LPNs are supervised by RNs employed by the agency. A RN visits the home about two times per year in a supervisory capacity. Even though insurance pays for care only for the first half of the year, Garret's mother testified that it is impractical to not maintain the same health care year around.

The pediatrician that has attended Garret since his accident testified about Garret's medical needs. In 1989, when Garret returned to school following his accident, the physician provided the school with detailed suggestions and recommendations for his care at school. He listed eight competencies necessary to the person or persons to have in caring for Garret at school. He testified that a health care provider or nurse's aid could be trained in or taught all of the competencies. The record indicated that Rns and LPNs also needed to be trained on Garret's specific equipment. According to the doctor, none of the eight competencies required the training or experience of a physician.

As a result of a change in procedures for dealing with the health needs of students with disabilities initiated by the Department of Education, in the summer of 1993 the District undertook a detailed assessment of Garret's health care needs while at school. The District requested and obtained a physical

examination, health status report, and responses from the pediatrician to specific health related questions. In response to the question of training or skills needed by the person providing health care to Garret, the pediatrician partially responded:

> "I would think a minimum degree of LPN or a skilled care provider who has demonstrated the competencies as directed in the 1988 letter would be necessary to adequately and safely perform the above procedures."

In the fall of 1993, the physician was asked by the District to respond in writing to additional clarifying questions about Garret's health care needs at school. Nothing that was provided in the way of additional information from the physician indicated that he had changed his opinion that an LPN or trained and skilled health care provider could provide adequate and appropriate care to Garret while at school. He did state in response to questions from the ALJ during testimony that an LPN, or trained and skilled health care provider, did need general supervision from a RN or a physician, but the supervisor did not have to be on-site so long as contact with the supervisor was available within 10 to 15 minutes.

For Garret's first year in school (1988-89), his health care services were performed by his aunt, who was 18-years-old at the beginning of the school year. The aunt had no formal training in medical services and was not an LPN or RN. She apparently learned by experience during time she spent with the family in the hospital and at home. Garret's physician was aware that the aunt would provide the services, and he had no objection.

Garret has never needed emergency care at school. The LPNs keep a daily log of health care of Garret at school for sharing with Garret's mother.

Garret's mother testified that she first sought District payment for health care services in the summer of 1988 before Garret started his first year of school. She stated that she had brought up the subject several times since. The most recent request was in March, 1993, when she orally asked a District administrator whether the District would pay for the health care provider. In June, 1993, Garret's mother had not received a response, and telephoned the District Director of Special Services. The Director responded by letter dated June 7 that the matter was being referred to the District's legal counsel. In a subsequent letter dated June 17, the Director notified Garret's mother that the District needed additional medical information so that the District could comply with new Department of Education rules regarding provision of special health services (281-41.21-.23 I.A.C.). He stated in the letter that once the information was provided, a meeting would be held to prepare a health care plan for Garret.

By letter dated July 28, 1993, Garret's mother expressly requested District payment of health care service cost while Garret was at school. She cited legal authority on the point that such service provision was required by law. By letter dated August 3, the District's Director again requested detailed health information on Garret.

In response to the August 3 letter, Garret's mother and physician responded to a number of questions. The materials provided the District in

that letter stated that Garret's health has been quite good. It stated that he required urinary bladder catheterization as needed, normally once a day during school hours. Suctioning (cleaning) of his tracheostomy on an as-needed basis, and assistance with food and drink. The only emergency situation foreseen was a potential problem with the ventilator, airway obstruction, or respiratory infection. His ventilation could be supported temporarily by ambu bagging while problems with the ventilator were investigated. Garret's ventilator has an alarm system which provides a loud report when air pressure is low due to a leak, or when plugged and suctioning is needed. A low battery is also reported through an alarm. Garret's mother testified that she recently used the ambu bag for Garret's breathing during a highway trip from Cedar Rapids to Denver, Colorado with no apparent consequence.

A meeting between Garret's mother and District staff to discuss his health care needs and to develop an individual health care plan (IHP) was scheduled for September 2, 1993. School started August 30, but District staff conflicts resulting from preparations for the opening of school resulted in the meeting not being scheduled earlier. On September 1, Garret's mother requested postponement of the meeting so that she might be better prepared. She also stated that she would seek the help of an attorney since the District had advised her that the District's attorney might be present at the meeting.

A meeting to develop an IHP was held on September 10. Garret's mother was accompanied by a parent advocate. About 13 to 14 persons were present, including two of the District's school nurses and the District's Manager of health Services, who is an experienced nurse. An individualized education program (IEP) was developed which provided only for the services of an occupational therapist on a consultative basis of 60 minutes per semester. Attached to and made part of the IEP was the IHP developed at the same meeting primarily by the District's nursing staff present with input from Garret's mother. Garret's pediatrician was not present. After outlining Garret's specific health care needs, the IHP concluded that because Garret "requires continuous monitoring and assessment: highly technical and extensive nature of care, life threatening prospect of inadequate care, mastery of numerous competencies," Garret needed "continuous care by an appropriate licensed practitioner." The level of supervision required was considered to be "In school setting-registered nurse." District staff concluded orally at that meeting that the items in the IHP were medical services rather than health care services, and thus, were not the responsibility of the District to provide. This position was reiterated in a letter dated September 13 from the District Director of Special Services to Garret's mother.

In a six-page dissenting opinion dated September 20, Garret's mother outlined the reasons for her disagreement with decisions on the IHP. She stated that, except for tracheostomy obstructions blocking his air source, Garret was capable of and able to advise a care provider of his needs and the manner in which they should be met. She pointed out that Garret's presence in the classroom had been "remarkably, uneventful," and "non-disturbing to the regular education environment," while providing Garret with a positive physical, social, and healthy setting. She complained that inadequate attention had been given to Garret's physician's recommendations about the training needed for a person to care for Garret while at school. She reminded the District that his health care needs were met during the 1988-89 school

year by a "properly-trained non-licensed care provider," and from 1989-1993 by a properly trained LPN. She suggested that some of the care items (e.g., skin) in the IHP were no longer needed, or should be modified.

In response to the dissent, the AEA Executive Director of Special Education conducted an investigation of the situation. She found, as documented on October 28, that the parties continued to be interested in resolving the situation and were willing to explore alternative possibilities. The District was willing to consider employing a non-licensed health provider for Garret while at school, but was concerned with a conflict with the standards of the State Board of Nursing. Obtaining a waiver of licensed nursing services from the Department of Human services was explored, but was not feasible because the family income exceeded established guidelines. Continued efforts at a mutually satisfactory resolution was encouraged, but no specific decision with regard to the dissent was rendered.

The District does provide a number of services and special equipment for Garret, but except for occupational therapy, they are not contained in the September 10 IEP. A full-time teacher associate has assisted Garret since first-grade with his educational needs, such as page turning, setting up his computer, assisting him in getting around the building. He is provided access to a personal computer and has special equipment provided to assist his access to the computer. He receives transportation to and from school, use of a lap tray on occasion, occupational therapy, and for two years he was in the school's extended learning (talented and gifted) program. He is in a regular physical education program with appropriate modifications. (This is mentioned, but not detailed in the IHP.)

It was stipulated by the District that a TA and a health care provider may not both be necessary to assist Garret at school. Should it be determined that the school is responsible for Garret's health care needs, the TA's duties may be assigned to the health care provider.

In 1993-94, District nurses salaries were governed by a master bargaining agreement. Under that contract, beginning nurses received an annual salary of $19,550. In addition, the District provided additional funds for insurance, retirement, and miscellaneous benefits in the amount of $8,681.75. The total expense for the employment of a beginning nurse in the District for the 1993-94 school year was $28,231.75. For a nurse with 10 years experience and no advanced college credits, the amount was $37,270.84. At the current time, the District employs no nurses with less than 10 years seniority.

The District does not currently employ LPNs, only RNs or Bachelor of Science Nurses (BSNs). Some teacher associates (TA) happen to have LPN licensure, but are not employed to perform LPN duties. The District does not hire nonlicensed health care providers and would not allow health care to be provided by an unlicensed provider at school, even if arranged for and paid for by parents. No District school building currently has a full-time nurse. No student currently has a full-time nurse assigned to him or her.

The current TA assigned to assist Garret holds licensure as a LPN. The District made an effort to hire someone who could be delegated his health care services in the event it was later determined that they could be delegated.

The TA does not currently provide LPN services due to the Board of Nursing Ruling on delegation.

The record establishes that for the purposes of employment, i.e. contracting, transfer, negotiating and termination, nurses are treated by state law and the District the same as licensed teachers. If the District hires a RN to serve Garret's needs at school, he or she will be doing so on the continuing contract law basis and would be employed for at least the entire remainder of the year whether or not Garret continued to need those services.

Garret is currently the only ventilator-dependent student in the District's schools; however, another such student may be coming to school in the near future. The District has provided, and currently does provide, many health care services for other students. Included are such services as care for students who need urinary catheterization, food and drink, oxygen supplement positioning, and suctioning. The primary difference between Garret's situation and that of other students is his dependency on his ventilator for life support.

The District currently has about 17,500 students in 33 school buildings. Approximately 2,200 students are identified as needing special education or special services. Eight different persons are hired to provide nursing services to the District's K-12 students with a full-time equivalency (FTE) of 6.1 staff members. (Brief of the District said 5.8, but the District staff in testimony said 6.1.) Only 1.4 FTE school nurses are funded with special education funds, and only one full-time school nurse serves students with disabilities.

In preparing for Garret's IHP meeting, District staff members made inquiries nationally about how supervision of a ventilator dependent child are handled. They learned that a wide variety of levels of supervision, a "whole gambit of care," is used in the care of ventilator dependent children at school. The range of training required for direct care and the supervision of such students nationally was from nonlicensed personnel to RNs.

The District's Manager of Health Services, a trained and experienced pediatric nurse, testified that it was her opinion that Garret's care at school required the supervision of a RN. She testified, along with other District staff members, that if the school were responsible for Garret's health care while at school, a RN would have to be on the school site to provide for care directly, or for supervision of the care provider. If the district were not responsible for Garret's health care at school, and Garret's family was responsible, he would be allowed to attend school with a LPN under the general supervision of a RN.

Apparently, the issues of delegation and supervision of health care duties by nurses are not static. A RN may "delegate" health care services requiring specialized training, but not licensure, to nonlicensed persons through the use of his or her "best judgment." On the other hand, "supervision" refers to overseeing or monitoring the provision of health care given by a licensed health care provider, such as a LPN. From time to time, the Iowa Board of Nursing apparently attempts to provide direction on the scope of nursing practice. The result may be more confusing than helpful.

The District's special education school nurse testified that prior to 1988, she was able to exercise a considerable degree of delegation based on her professional judgment. As an example, she stated that prior to 1988, she was able to and did delegate in a number of situations, the feeding and administration of medications through gastronomy tubes to students while at school. Delegation was required practically because the District, as part of its effort to comply with the least restrictive environment mandate of the law, was attempting to close a segregated school facility serving, among other needs, students needing health care. Since it was not possible for the special education nurse to be on several sites at once while the gastronomy tube feeding and medication administration were taking place, she delegated the duties to nonlicensed staff she had personally trained.

Apparently, in 1988, the Board of Nursing issued a "guideline" or "position paper" outlining specific tasks that must be conducted in school settings by a RN, those that may be conducted by an LPN, and those that may be performed by nonlicensed staff. That 1988 document provided that only a RN could provide gastronomy tube feeding and medication and delegation of those tasks at District schools was stopped. The District then received a temporary waiver from the Board of Nursing for students in its many different buildings. That waiver was later rescinded. Even later, the guideline itself was rescinded and RNs again were able to delegate gastronomy tube feeding and medication administration. There is no indication in the record that these changes in Board of Nursing interpretations ever occurred through the rule-making process envisioned in the Iowa Administrative Procedure Act (Chapter 17A, Iowa Code) and a review of current rules of the Board of Nursing contained in the Iowa Administrative Code contain no reference to specific duties and services that must be conducted by RNs or any other health care provider.

On May 20, 1994, the District filed a petition for a declaratory ruling with the Board of Nursing. The petition outlined Garret's health care needs and asked whether they could be delegated by a school employed RN to nonlicensed personnel. Under Section 17A.9 of The Code of 1993, state administrative agencies are authorized to issue rulings "as to the applicability of any statutory provision, rule, or other written statement of law or policy decision or order of the agency."

The Board of Nursing, in issuing a response to the District's request in Declaratory Ruling No. 63, dated September 22, 1994, accepted the competencies needed for a person providing care for Garret as described by his physician and mother, and concluded that they were competencies "within the scope of the practice of nursing and require the knowledge and skills attributed to nurses." An analysis of each of the nine needed tasks (competencies) being considered for delegation had been requested and received by the Board. The District response to the request stated that Garret's condition in regard to autonomic hyperreflexia was not stable, which is contrary to the remainder of the record in this hearing.

As authority for its conclusion, the Board cited a March 1988 "Position Statement of School Nurse Task Force," a "guideline for RN delegation to nonlicensed personnel," and a December 7, 1990, "Position Paper on Delegation" issued by the National Council of State Boards of Nursing, Inc. No citation was provided to state rules or statutes which specifically control the

question and none has been found by this ALJ. (Perhaps, the 1988 document is that referenced in testimony of the school nurse, but she testified it had been recinded.) There was citation in the Ruling to 655-6.2(5) Iowa Administrative Code which reads as follows:

> 6.2(5) The registered nurse shall recognize and understand the legal implications of accountability. Accountability includes but need not be limited to the following:
> a. Performing or supervising those activities and functions which require the knowledge and skill level currently ascribed to the registered nurse and seeking assistance when activities and functions are beyond the licensee's scope of preparation.
> b. Assigning and supervising persons performing those activities or functions which do not require the knowledge and skill level currently ascribed to the registered nurse.
> c. Supervising among other things includes any or all of the following:
> (1) Personally observing a function or activity.
> (2) Providing leadership in the assessment, planning, implementation and evaluation of nursing care.
> (3) Delegating functions or activities while retaining accountability.
> (4) Determining that nursing care being provided is adequate and delivered appropriately.
> d. Executing the regimen prescribed by a physician. In executing the medical regimen as prescribed by a physician (e.g., medication not administered) is not carried out, based on the registered nurse's professional judgment, accountability shall include but need not be limited to the following:
> (1) Timely notification to the physician who prescribed the medical regimen that the order(s) had not been executed and reason(s) for same.
> (2) Documentation on the patient/client medical record that the physician has been notified and reason(s) for not executing the order(s). Iowa Administrative Code 655-6.2(5)

That rule is extremely vague and provides no guidance to this ALJ as to "those activities and functions which require the knowledge and skill level currently ascribed to the registered nurse." (What are they and who ascribes them?)

The Ruling recognized, as does this ALJ, that the above rules "clearly" authorize a registered nurse to delegate functions or activities and holds the nurse accountable for such delegation, but, without being specific, the Ruling also stated that care included in the "core of the nursing process requires specialized nursing knowledge and judgment that may not be delegated." (What is the core of the nursing process?) The Board also stated in its Ruling that a nurse should "not delegate practice pervasive functions of assessment, evaluation, and nursing judgement." The Board Ruling concluded that the care of a student with Garret's medical needs at school could be delegated to nonlicensed personnel, but only if a supervising licensed RN was in the same building.

The Ruling in two places mentions Garret's current situation of service provided at home and school by a LPN and the year that services were provided

at school by a "relative, both without criticism." It also recognized that his weekend care is provided by his family. The Ruling does not discuss the adequacy of this weekend care in the absence of a registered nurse on-site. The Ruling does not provide citation to the situational differences in nursing practice dependent upon whether a child is in school or in another situation. The record does not indicate whether or not the District appealed the Ruling under state law.

District staff, especially the school nurses, are under the belief that failure to follow the Ruling of the Board of Nursing may be punished by loss of nursing licensure.

The salary for the TA assigned Garret to assist with his educational needs for the 1994-95 school year is $8,366.09. With staff benefits of $1,182.13, the total cost of the TA to the District is $9,548.22. This amount of expense for Garret's education would be saved if the District assigned TA duties to the health care provider. For purposes of equal comparison only, a beginning registered nurse in the District for 1994-95 would cost (salary and benefits) the District $28,630.79 ($28,231.75 for 1993-94), and a nurse with 10 years experience would cost the District $37,828.03 ($37,270.84 for 1993-94). Thus, if the District had to assign a RN full-time to Garret's attendance center and maintain a teaching assistant, the total District cost would be about $38,179.01 when a first year nurse is used and $47,376.25 when a nurse with 10 years experience is used. These figures would be reduced by a savings equivalent to .2 FTE nurse because a part-time nurse would not any longer need to be assigned to the attendance center. Reducing the building nursing costs by one-fifth, a full-time RN, and a TA assigned to the building for Garret in 1994-95 would cost the District about $32,452.85 for a nurse with one year's experience, and $39,810.64 for a nurse with 10 years experience. That is $22,904.63 and $30,262.42, respectively, more than the District currently pays for Garret's TA, only. If the teaching associate were reduced and her duties assigned to a RN supervising Garret's health care needs, the .2 FTE nurse currently assigned to the building could not be reduced, because the nurse assigned to Garret would not be able to give his or her attention to the students in the rest of the building. The approximate cost then would be $28,630.79 for a first year nurse and $37,828.03 for a nurse with 10 years experience. Added to that would be the cost of a .2 FTE nurse ($5,726.16 for a first year nurse, $7,565.61 for a 10-year nurse). Thus, using cost figures for nurses with no previous experience and those with 10 years experience, the additional cost range to the District for taking over responsibility for Garret's health care at school, and complying with the Board of Nursing interpretation of having a RN on-site would range between $28,630.79 and $39,810.64. (First year nurse assigned teacher associate duties v. nurse with 10 years experience, teacher associate and reduction of the .2 FTE nurse).

These are potential increased costs to the District over the current cost of a TA only of $19,082.57 and $30,262.42, respectively. These potential costs reflect the use of a RN on-site to supervise or provide directly Garret's health care needs. The amount of difference depends on how the District would determine to provide the services. The record did not establish other potentially less costly approaches to those outlined here. Presumably, the District did not appeal the Declaratory Ruling of the Board of

Nursing pursuant to the Iowa Administrative Procedures Act, and may be bound by it. 17A.9, 17A.19 I.A.C.

Garret is currently weighted for state aid funding purposes at 3.54 under a state rules exception which generates about $12,700 revenue to be divided between regular education and special education funds. No more than $3,600 is assigned to regular education funding. Normally, a student weighted 3.55 generates only .27 of the approximately $3,600 (1.0 weighting) for the regular education account ($972), and the remainder is placed in the special education account, but the record here is not clear on the exact amount due to Grant's weighting resulting from a rule exception. Garret receives no special education instructional services. Occupational therapy is provided by the AEA.

About $1200 average cost per special education pupil is spent for transportation in the District. Dollars generated through the weighted enrollment count are not assigned to any one child. District special education funds are pooled and may be used for the individual needs of any student with disabilities without regard to the amount of revenues actually generated as a result of that individual student's enrollment in school. If District expenditures in special education in any fiscal year exceed revenues, the District may petition the state of Iowa through the School Budget Review Committee (SBRC) for replacement of the deficit funds. This is accomplished by the SBRC giving the District a pro-rated amount of funds returned to the state as a result of other districts having a surplus in their special education accounts and authority to raise the remainder through local property tax. At the current time, local deficit spending for special education can be made up through procedures provided in state law, and the educational needs of other students, both regular and special education, do not have to be affected. The District normally expends more funds annually on special education students than it generates under the weighted state aid formula.

Legal requirements and legal definitions of related services and the cost to the District are the only reason the District does not currently pay for Garret's health care services provided while at school.

The District Director of Special Services testified that, although Garret had previously been allowed to attend one year without a licensed health care provider, as provided by the family, the Ruling by the Board of Nursing now places that option in doubt. If health care at the school continues to be provided by the family, the District may not allow again the use of a nonlicensed health care provider in the future.

In response to the ALJ's question about the type of program someone like Garret would be provided without external funding support through a trust fund, insurance or Medicaid, and with the District's continued refusal to provide health care services, the District's Director of Special Needs indicated that a homebound program would be the likely alternative to the current situation. In objecting to the question, the Attorney for the District opined that some type of funding would likely be available in the event that insurance and trust fund resources become exhausted. The record is not clear on that point.

In rebuttal testimony, Garret's pediatrician expressed disagreement with the District's IHP conclusion that Garret required constant health care supervision, monitoring, and assessment by a registered nurse on site. He stated that someone specially trained on the ventilator would need to be within "earshot" at all times to respond to Garret's health needs, especially when his ventilator signals problems, but that constant health monitoring was not required. In his opinion, medical judgment would be more important in later determining an underlying cause of a problem, but was not necessary in immediate response situations. For instance, a monitor would need to unplug a clogged tracheostomy tube, but medical judgment would not be required until later in an effort to determine why the tube became plugged. The physician again stated that Garret is in generally good health and has not required his professional attention for some time, except for colds and sore throats. He stated that Garret's autonomic hyperreflexia condition was stable.

Also, in rebuttal testimony, Garret's father testified that Garret visits him in his home every other weekend without nursing or other health care services. He is frequently accompanied by a young friend who can be with Garret and see to his needs when the father is not in the immediate vicinity.

Garret's mother reiterated in rebuttal testimony that there is no nursing service provided Garret from the end of the school day until about 11:00 p.m. on school days or at any time on weekends. Garret has friends over and sometimes goes to the homes of friends. He frequently goes outside into the family yard by himself. Persons are not always in his immediate proximity, but neither is he left completely alone. She stated that health care at school can be provided by a properly trained nonlicensed care provider just as occurs at times at home and that she would prefer to do the training herself. She stated that she had previously trained all the nurses herself. She strongly denied that a licensed nurse was required to care for Garret. She stated again during rebuttal that a LPN and services of a health care agency were used by her only because the insurance company would not pay a nonlicensed person to provide care.

Conclusions of Law

The issues presented in this appeal are clearly the result of honest differences of opinions on what the law and best practice require. There is no evidence that personal animosity or hostility have been present.

The primary issue in this appeal is whether Garret's mother is responsible for providing his health care needs while he is at school or whether his health care at school must be provided at no cost to the parent as part of a free appropriate public education. 20 U.S.C. Section 1412. This issue has been the subject of dispute and litigation in numerous locations around the country, but appears to be one of first impression in Iowa.

Federal statutes at 20 U.S.C. Section 1412 provide that children with disabilities, including "orthopedic impairments" and "other health impairments," are to be provided "special education and related services" when their disabilities adversely affect their academic performance. 34 C.F.R. 300.7(a)(1); 300.7(b)(7); 300.7(b)(8). Federal law is mirrored in state law which requires children handicapped in obtaining an education because of

disabilities, including physical, be provided "special education." That term includes instruction, "transportation and corrective and supportive services required to assist children requiring special education" in obtaining "educational programs and opportunities." Section 256B.1, Iowa Code 1993; 281-41.2 and 41.3, Iowa Administrative Code.

Federal law requires that special education and related services be provided to the maximum extent appropriate with children who are nondisabled. 20 U.S.C. Section 1412; 34 C.F.R. 300.550. Iowa may be more proscriptive when it requires that:

> to the maximum extent possible, children requiring special education shall attend regular classes and shall be educated with children who do not require special education. Whenever possible, hindrances to learning and to the normal functioning of children requiring special education within the regular school environment shall be overcome by the provision of special aids and services rather than by separate programs for those in need of special education. Special classes, separate schooling or other removal of children requiring special education from the regular educational environment, shall occur only when, and to the extent that the nature or severity of the educational handicap is such that education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily. (emphasis added). 256 B.2(3), Iowa Code 1993.

Unlike state law, which includes corrective and supporting services in its definition of special education, federal law treats special education and related services somewhat separately. As defined in federal law, a related service is defined as any service "required to assist a child with a disability to benefit from special education," and includes "school health services." 34 C.F.R. 300.16. "School health services means services provided by a qualified school nurse or other qualified person." 34 C.F.R. 300.16 (b)(11). "Medical services" are expressly included as a related service, but are limited in definition to "services provided by licensed physician to determine a child's medically related disability." 34 C.F.R. 300.16 (b)(4). Related services, thus, includes a physician's diagnostic and evaluation services, but not treatment services. 20 U.S.C.A. Section 1401(a)(17), 1994 Supp.

The issue of exclusion of medical treatment as a related service was the primary issue before the Supreme Court in Irving Independent School District v. Tatro, 104 S.Ct. 3371 (1984). Amber Tatro was an 8-year-old girl with spina bifida. As a result, she had orthopedic impairments and was, like Garret, unable to empty her bladder voluntarily. In order to prevent injury to her kidneys, she was catheterized every three to four hours, including the time she was at school. The Court characterized catheterization as a simple procedure that could be "performed in a few minutes by a lay person with less than an hour's training." Id., at 3374. Amber's parents, babysitter, and teenage brother were all qualified to administer the procedure.

The legal issue arose, however, when school officials refused to allow school personnel to administer catheterization while Amber was at school. The school argued that catheterization was a medical service which exceeded the

diagnosis and evaluation limitations of the medical service requirement of related services.

In its analysis, the Court determined that catheterization was a related service because it "enabled a handicapped child to remain at school during the day" and thus have meaningful access to education. Id., at 3377. The Court also determined that catheterization did not fall into the medical treatment exclusion of the statute or Department of Education rules. It affirmed the Department's interpretation, through rule making, that the services of a school nurse could be required as a related service, and treatment by a "licensed physician" could be excluded.

In dicta, which later became important in other subsequent litigation on the issue, the Court noted that a distinction between nursing services and treatment by a physician as a related service was reasonable. Part of the reasonableness was concluded to be a consideration of differentiation of costs between nursing and physician services and the fact that school nurses "have long been a part of the educational system." Id., at 3378.

The Court did not say that cost was a factor to be considered by courts. It merely speculated that Congress and the Department of Education may have used expense, as well as limitations of educators' expertise in medical matters, for making a distinction between nursing services and physician treatment as a related service. The Court expressly rejected the school's argument that services provided in accordance with a physician's prescription and general supervision fell within the medical treatment exclusion. It noted that nurses in the school were authorized to dispense medications and administer emergency injections to nondisabled students in accordance with a physician's prescription. Id.

Thus, in Tatro, the Court affirmed a Congressional and administrative distinction between nursing services and medical treatment as a related service under the Education of the Handicapped Act, now Individuals with Disabilities Education Act (IDEA).

A number of courts have been asked to further clarify the issue of medically related services in the school setting. The case of Detsel v. Board of Education, 637 F.Supp. 1022 (N.D.N.Y. 1986), involved a seven-year-old child with severe physical disabilities who had greater health care needs than does Garret. She required constant respirator assistance and a continuous supply of 40% oxygen. Her vital signs had to be checked regularly and appropriate medication administered through a tube. As a result of a tracheostomy, the nurse would cause a saline solution to be ingested into the lungs of the girl, she would strike her about the lungs for several minutes, and then suction out the mucous collected in her lungs. The nurse had to be prepared to perform cardiopulmonary resuscitation and to act in the life-threatening situation of possible respiratory distress. The girl's own physician testified that the services of a regular school nurse would not be adequate. She required the service of specially trained nurses 24 hours a day. The legal issue of related services arose when she started kindergarten and the county department of social services, who had been supplying the nursing care, refused to pay for a nurse to accompany the girl to school. The girl's school was asked to pay for the nursing care while she was at school, but the school declined

arguing that the extensive medical attention required exceeded the related services requirement.

In its analysis, the district court included an expense factor which it incorrectly attributed to the Supreme Court ruling in Tatro. The district court said that the Supreme Court had said that "medical services which would entail great expense are not required," and that Congress had intended to protect schools from unduly expensive services. Id., at 1026. Both statements are taken out of context and the Supreme Court had actually said neither. As stated previously, the Supreme Court had merely speculated on the possible reasons Congress may have had in differentiating between nursing services and medical treatment and said that cost and medical competence of educators may have been among such reasons. Irving Indep. Sch. Dist. v. Tatro, 104 S.Ct. 3371, 3378 (1984).

The district court in Detsel incorrectly said that the Supreme Court in Tatro had "clearly" considered the extent and nature of the services required and thus took Tatro as a license to do the same. Detsel v. Board of Educ., 637 F.Supp. 1022, 1026 (N.D.N.Y. 1986). It concluded that because constant monitoring was required to protect the student's life, the procedures required were much more extensive than mere catheterization, and the procedures required a person specially trained beyond that which a school nurse would have been, that the health care services required in the situation before it fell within the medical services exclusion. However, as stated earlier, there is nothing in the Tatro decision, express or implied, that established the relevancy of the nature or extent of the services required. The closest thing it said was a comment as an aside that something less than nursing services were required in the factual situation before it. Irving Indep. Sch. Dist. v. Tatro, at 3371, 3379 (1984).

The district court concluded in Detsel that the health care services needed in the situation before it did not require a physician, but neither did they qualify as "simple school nursing services." Detsel v. Board of Educ. 637 F.Supp. 1022 (N.D.N.Y. 1986). (Where the word "simple" came from is unclear because it was not used in Tatro.) It held that even though a physician's services were not expressly required, excluding the services required of the girl while at school, was in keeping with the "spirit" of the exclusion. It ruled that the school did not have to provide the services requested.

The Second Circuit upheld the district court in a brief per curiam decision. Detsel v. Board of Educ., 820 F.2d 587 (2nd Cir. 1987). The Detsel family, after additional litigation, was able to obtain Medicaid payment for the services. Detsel v. Sullivan, 895 F.2d 58 (2d Cir. 1990).

The Detsel result was followed in another ruling, Bevin H. v. Wright, 666 F.Supp. 71 (W.D. Pa. 1987), which involved an even more severely disabled student. The seven-year-old had Robinow Syndrome (fetal face syndrome), severe broncho-pulmonary dysplasia, profound mental disability, spastic quadriplegia, seizure disorder, visual impairment and hydrocephalus. She breathed through a tracheostomy tube, and was fed and medicated through a gastrostomy tube. Nursing services at school were extensive.

> The attending nurse must accompany Bevin to and from school. She is responsible for the care and cleaning of the tracheostomy and gastrostomy tube. She administers a constant oxygen supply to Bevin. She supervises positioning for physical and occupational therapy. She administers chest physical therapy each day to break up mucous, and must suction the mucous from the lungs. Above all, though, the nurse must remain with Bevin at all times because of the constant possibility of a mucous plug in the tracheostomy tube. Such a plug is a common event, occurring several times each day, and must be cleaned by the nurse within 30 seconds to prevent injury to Bevin. Id., at 73.

The student's parents at first agreed to pay the health care costs for their daughter to attend school, and did so through insurance. As the insurance coverage ceiling was being approached, they requested the school to pay the $1,850 monthly nursing cost for health care while Bevin was at school. The school refused, and the parents challenged the refusal. After two administrative proceedings, the issue was appealed into federal court.

Before the district court, the parents argued that under the Tatro ruling, a clear line between health services provided by a physician and other health services should be drawn, and the nature and extent of the services provided should be otherwise irrelevant. If a physician's services were not required, health care services at school should be considered a related service to be provided by the school. Id., at 74. The court, however, found the reasoning in Detsel to be "persuasive," and declined to follow the "bright line" definition of "school health services" and "medical services." Id., at 75.

Instead, it followed the ruling in Detsel and found the health care services required by Bevin to be inconsistent with the "spirit" of related services. Id. They were "varied and intensive," "must be provided by a nurse," were "time-consuming and expensive," demanded the "constant attention of the nurse," and were "life-threatening." The court concluded, the services required were more in the way of "medical services" than related services. Id. at 76.

The decisions in Detsel and Bevin H. have recently been followed in Granite School District v. Shannon M., 787 F.Supp. 1020 (D. Utah 1992). The Shannon M. case involved a six-year-old student with congenital neuromuscular atrophy, severe scoliosis, and confinement to a motorized wheelchair. She was fed through a nasogastric tube and breathed through a tracheostomy tube. The latter tube had to normally be cleared five times during a three-hour school day, and occasionally became plugged anyway, causing a life-threatening situation. Someone had to be nearby and Shannon's doctor had issued a "do not resuscitate" order (heroic measures were not to be used if Shannon suffered cardiac arrest). The issue before the court was whether the health care needed to attend school was required to be provided by the school: "whether full-time nursing care for Shannon is a supportive service required by the Act, or whether it is a medical service excluded under the Act." The school estimated the annual cost of care at $30,000.

The court rejected the "bright line" argument put forth by Shannon's parents. It said that it would not judge whether the needed services were

excluded as medical services solely on the facts of whether a physician's services were required. Instead, it made its determination on the extent and nature of the services. It concluded that the constant nursing care required did fall within the medical services exclusion of IDEA. Id., at 1030.

In a decision based on facts nearly identical to those involved in this appeal, a New York appellate court expressly followed the Detsel ruling. Ellison v. Board of Education, 597 N.Y.S.2d 483 (A.D. 3 Dept. 1993).

Other courts have been more reluctant to stray from the Supreme Court ruling in Tatro. In Macomb County Intermediate School District v. Joshua S., 715 F.Supp. 824 (E.D. Mich. 1989), the issue was the obligation of the school to provide health care services during transportation to and from school. Joshua was "severely multiply impaired," and required suctioning of his tracheostomy tube. Other details of his health care needs were not provided by the court, but a local hearing officer had referred to his "medically fragile nature." The school did not object to providing Joshua's health care needs either at school or at home. It objected to providing the services during times of transportation between home and school.

In its analysis, the court twice expressly rejected the legal conclusions of both the Detsel and Bevin H. cases. In doing so, the court stated:

> As Tatro repeatedly stressed, the reason for mandating the provision of supportive services under the EAHCA 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 EAHCA, 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. Id., at 827.

The court in Joshua S. concluded that the medical services exclusion is limited to services provided by a licensed physician.

> While disagreement exists as to whether a trained lay person could adequately service the defendant's needs, we believe that Tatro supports the use of a medical professional, other than a physician, if necessary to the safe transport of the [student]. Id., at 828.

The most recent court ruling on the subject has taken more of a middle ground on the issue. The case of Neely v. Rutherford County Schools, 881 F.Supp. 888 (M.D. Tenn. 1994), involved a seven-year-old child with congenital Central Hypoventilation Syndrome, a rare condition that results in trouble breathing. She had undergone a tracheostomy procedure to aid in her breathing and needed a ventilator while she slept. Her breathing passages had to be suctioned regularly to remove secretions. An ambu bag was used to assist her breathing when her tube had become blocked or dislodged. A "well-trained, poised individual" was required to provide health care services. She required constant monitoring, and the attendant could never be far away.

In its analysis, the court in Neely rejected both the bright line rule and the nature of services and cost test and settled on a "direct" test. Id.

at 893. It proposed to examine the "direct" burden imposed on a school rather than artificial effects of such things as the status or title of the care provider.

In its direct burden analysis, it noted that a full-time nurse or respiratory care specialist was required to provide the student with nearly full attention while in school. However, the cost to the school was merely a base salary of $13,680, so that while the services were considered medical in nature, the overall cost was not burdensome on the district. The court also noted that a home-schooling program would not be without its costs to the school. The court concluded that, "absent evidence that the care requested would be unduly burdensome to the school district, the nursing care will be deemed a related supportive service that falls outside the medical services exclusion." Id., at 894.

With at least three different perspectives or interpretations, it is little wonder that differences of opinion, such as we have here, may arise.

Since the issuance of the Tatro ruling ten years ago, this ALJ has had occasion to read it at least a dozen times. Every time it has been read, it was thought to have affirmed a "bright line" distinction between "school health services" ("Services provided by a qualified school nurse or other qualified person") and "medical services" provided by a physician that are not related to evaluation and assessment. If a nurse's services were needed, the school had to provide them as a related service. If the service "must be provided" as treatment by a licensed physician, the services were not a related service. The Court in Tatro even discussed with approval the provision of health care services under a physician's prescription and "ultimate supervision." Irving Ind. Sch. Dist. v. Tatro, 104 S.Ct. 3371, 3378 (1984). The Court did not ever say that the cost and extent of medical expertise were relevant, only that Congress and the Department of Education may have considered them.

Nothing in the subsequent rulings in Detsel, Bevin H., Shannon M., Ellison, or Neely has changed this ALJ's understanding of Tatro. Like the Court in Joshua S., he is not able to find the distinctions made in these rulings. It appears more to this ALJ that those courts were substituting their own judgment for that of Congress and the Department of Education. They stretched some statements of the Supreme Court completely, and took others out of context to fashion what they thought "should be." As much as this ALJ may disagree with the public policy of spending education funds on health services, he does not feel he has the authority to change the law.

The brief for the District argues that the bright-line test for the medical exclusion is weak because it is based on the title of the person providing services (p. 13). Indeed, this was the rational used by several of the courts cited above that distinguished Tatro. This argument falls short of the mark because the bright-line test does not use the title of the person providing the service, i.e. lay person, nurse, physician, but whether the service "must be performed by a physician" (emphasis added). Irving Ind. Sch. Dist. v. Tatro, 104 S.Ct. 1371, 1378 (1984). See Max M. v. Thompson, 592 F.Supp. 1737 (N.D. Ill. 1984). Thus, the issue to be determined in the medical exclusion exception is not who provides the service, but whether the service is in the special training, knowledge, and judgment of a physician to

carry out. This appears to be the position of the office of Special Education Programs in the Department of Education. See Guard to Johnson, 20 IDELR 175 (1993).

The Department of Education rules clearly require nursing services as a related service. 34 C.F.R. 300.16(b)(11). If limitations as to amount, cost or special training were meant to apply, they could have been expressly stated. They were not.

Several citations to pre-Tatro rulings on related services were provided by the parties. Because they were issued prior to the Supreme Court review of the issue, and provide no great insight, they are of limited value in understanding where we are now.

This ALJ finds under Tatro and Joshua S. that the health care needs of Garret F., while at school do not require the direct attention and provision by a physician and do not fall within the physician treatment exclusion of related services. He further finds that the health care services, which are needed by Garret, must be provided by a "qualified school nurse or other qualified person" and are thus "school health services" required by IDEA as a related service.

This ALJ also finds that even when the other tests and criteria found in Detsel, Bevin H., and Shannon M. are used, the health care services necessary for Garret are a related service. While Garret needs much in the way of the same health care services as the students in those cases, his general good health, ability to communicate his needs, intelligence, and other factors weigh heavily in distinguishing him from the students in these rulings. Clearly, the students in Detsel, Bevin H., and Shannon M. were more "fragile" in the true sense of the word. While testimony differed at the hearing as to the proper level of licensure needed by the person to care for Garret at school, it was obvious that in most situations a conscientious lay person could be, and has been in the past, trained to provide the necessary care. Unless Garret's situation changes in the future, such as a reoccurrence of antonemic hyperreflexia, which may need assessment of a professional nature on a reoccurring basis, there appears no practical need for Garret to be attended by even a licensed health care professional. His attending pediatrician has repeatedly so stated.

If one were to apply the balancing test used by the court in Neely, the same result occurs. The increased expense to the District of hiring a full time RN, as required by the Board of Nursing Ruling and its own practices over what it now expends for Garret, would range between $20,000 and $30,000. For a special education budget as large as the District's in serving 2,200 special education students, that is not "over-burdensome." (In one recent ruling, the $94,000 annual cost of one student's special education program was not considered relevant, even when the district's total special education budget was $572,000; Cremeans v. Fairland Local Sch. Dist. 633 N.E. 2d 570 (Ohio App. 4 Dist. 1994). This is even more true when it is remembered that special education revenues generated by a district are pooled to serve the needs of all students with disabilities in a district, and the state provides ways for schools to recover special education funds expended in excess of revenues generated under the state's controlled budget for schools.

While the District would point to the additional cost of $20,000 to $30,000 for RN services arguably required additionally to meet Garret's health care needs while at school, it should be remembered that little actual difference exists between the services needed by Garret while at school and services the District now provides, or has provided, other students. Other students have required tracheostomy suctioning, ambu bagging, help with food and drink, catheterization and positioning. Other students have received additional health care services, such as gastronomy tube feeding and administration of medication. The main difference between Garret's needs and those currently or historically met by the District is the monitoring of Garret's ventilator.

Under Iowa statute, the dichotomy of specific related services is not as apparent as it is under federal law. Section 256B.2, subsection 1 defines "children requiring special education" as persons between the ages of 0 and 21 who are handicapped in obtaining an education because of a disability, including physical disabilities. Subsection 2 defines "special education" as instruction "designed to meet the needs of children requiring special education, transportation, and corrective and supporting services required to assist children requiring special education," in taking advantage of "educational programs and opportunities" (not only special education programs).

Clearly, Garret is physically handicapped and, under state statute, requires "corrective and supporting services" to take advantage of "education programs and opportunities." Read together with the least restrictive environment (LRE) provisions of subsection 3, the District has clear responsibility under state law, as well as federal law, for providing Garret with the health care services he needs in the school setting. The Iowa LRE requirements are quite specific:

> This chapter is not to be construed as encouraging separate facilities or segregated programs designed to meet the needs of children requiring special education when the children can benefit from all or part of the education program as offered by the local school district. To the maximum extent possible, children requiring special education shall attend regular classes and shall be educated with children who do not require special education. Whenever possible, hindrances to learning and to the normal functioning of children requiring special education within the regular school environment shall be overcome by the provision of special aids and services rather than separate programs for those in need of special education. Special classes, separate schooling, or other removal of children requiring special education from the regular education environment, shall occur only when and to the extent that the nature or severity of the educational handicap is such that education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily. (Emphasis added.) 256 B.2(3), Iowa Code 1993.

Under Iowa statute, Garret is a child requiring special education, and a six-year history of successful functioning in the regular classroom, with aids and services provided by his family and the school prove beyond a doubt that it can be accomplished satisfactorily. Under state law, Garret must be

provided an education program "within the regular school environment," and under the same state law; it is the District's responsibility to do so. Section 256B.2 Iowa Code; see also 280.8 Iowa Code.

It should be noted that state provisions for special education determined to create a higher standard of duty on schools than what the federal law may require have been deemed by some courts to be automatically incorporated into IDEA. See David D. v. Dartmouth Sch. Comm., 615 F.Supp. 639 (D. Mass. 1984); Barwacz v. Michigan Dept. of Educ. 674 F.Supp. 1296 (W.D. Mich. 1987); Pink v. Mt. Diablo Unif. Sch. Dist., 738 F.Supp. 345 (N.D. Cal. 1990); Doe v. Board of Educ., 9 F.3d 455 (6th Cir. 1993).

As a second issue, the District has raised an interesting argument regarding Garret's eligibility for related services under federal law. (In light of the foregoing discussion of state law in which supportive services are part of the definition of special education, federal law may not be of great significance on this point, however.) The District argued that under federal law, a student who does not need special instruction is not entitled to related services. Since Garret has never had special instruction and does not now ask for any, he is not entitled to any related services, including health services, or not.

This argument is interesting because in the strict language of the law, it appears to be correct, but in actual practice, it is not.

In the Supreme Court ruling in Tatro, the Court attempted to establish that schools did not have to provide students with unlimited related services. It said that in order to be entitled to related services, "a child must be handicapped so as to require special education." Irving Ind. Sch. Dist. v. Tatro, 104 S.Ct. 3371, 3378 (1984). The Court went on to say:

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

Authority for this position is found in the Note to the Department of Education Rules found at 34 C.F.R. 300.17. The relevant part of that comment states:

> The definition of special education is a particularly important one.... [i]f a child does not need special education, there can be no related services, and the child is not a child with a disability and is therefore not covered under the Act.

The definitions of special education contained in Rule 300.17 encompassed only "specially designed instruction...to meet the needs of a child with a disability," and a related service "if the service consists of a specially designed instruction... and is considered special education rather than a related service under state standards."

At first glance, the above quoted rules and the language from Tatro might be interpreted to mean that a student with a disability who needs only related services to be successful in school and does not need special instruction, does not qualify to be identified as a special education student. However,

the problem with that argument becomes apparent fast. Amber Tatro was born with spina bifida and as a result required only a related service, catheterization, to remain in the regular school environment. There was no indication in the ruling in Tatro to indicate that she also needed a special or modified education program. Yet the Court ruled in her favor on the issue of related services. The Court distinguished a service required for a student during non-school hours. Irving Ind. Sch. Dist. v. Tatro, 104 S.Ct. 3371, 3378 (1984).

A closer look at federal rules may provide the answer. Rule 300.17 and its following note quoted above was meant to define "special education" only, and to be differentiate special education from related services. Rule 300.7 provides that "children with disabilities," including physical disabilities, means those children who because of their disabilities need special education and related services. Thus, related services can stand alone for those students who need only those services to succeed in regular education. The Court said in the ruling in Tatro: "A service that enables a handicapped child to remain at school during the day is an important means of providing the child with a meaningful access to education that Congress envisioned." Id. at 3377. Clearly, that is Garret's situation.

For six years, the District has provided the related services of a teacher associate, special transportation to and from school (which under state law should be in an IEP, but wasn't, 281-41.8 I.A.C), occupational therapy, and special equipment, which may be considered assistive technology. For at least that time, the District has identified and weighted Garret for funding under state law, and provided an IEP for Garret. It is more than a little inconsistent for the District to disavow its past now that Garret's family also wants assistance with health care costs.

As stated previously, federal distinctions between the entitlement to special education and related services, if any, are not included in Iowa statute. By statutory definition, "special education" means specialized instruction, transportation and "corrective and supporting services." Thus, even if federal law did not require school health care services for Garret, state law does.

Until now, and possibly into the future, Garret has had insurance and a trust fund to aid in the financial support of health care services at home. District staff members anticipate that a second ventilator dependent student may soon be attending school in the District. That student's health care needs are likely to be met through Medicaid. Yet, it is possible that some ventilator dependent student, who like Garret is bright, personable and creative, may come along some day who does not have, or does not qualify, for outside support for health care needs while at school. The only apparent alternative is a home-bound program. If the District refuses to provide health care and the family can't provide it, there is no middle ground. 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 home-bound program would certainly not be an education with nondisabled children to the "maximum extent appropriate." 34 C.F.R. 300.550. 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. Under Iowa statute, only when a child "cannot sufficiently profit from the work in the regular classroom" may he be removed. Section 256B.8, Iowa Code 1993.

A significant bone of contention in this appeal is the Board of Nursing interpretation that the health care services needed by Garret must be provided or supervised by an on-site RN. This requirement increases the annual cost of such services to the District by about $20,000. If this requirement were not present, the District could assign Garret's health care duties at school to his current TA, who is a LPN, as well as her current TA duties at a minimum of additional expense (perhaps, training in Garret's particular ventilator).

Clearly, District nurses and other District staff fear that the nursing licenses of District nurses who supervise the TA, who is also a LPN, without being on-site full time, or who delegate Garret's health care needs to a nonlicensed provider without being on-site, will be placed in jeopardy. Both Garret's mother and pediatrician testified that a RN is not actually required to be present on site to provide adequate health care for Garret while at school. All Garret really needs is a qualified, conscientious, and trained person within earshot to respond to his immediate needs.

The District argues that this ALJ has no authority to determine issues of professional licensure or delegation of nursing duties. This ALJ is happy to concede this lack of authority. That does not, however, resolve the District's responsibility to provide health care services to Garret at school. The Appellant argues that the Declaratory Ruling issued by the Board of Nursing is not binding on her because she was not a party to its request. While that may be true, it has a practical impact on services to Garret because the District is likely bound by the Ruling.

The practical result is that the issue of proper licensure in this appeal remains a mess, a mess which should be better resolved by the Board of Nursing. Iowa statute provides the Board of Nursing with the role of determining the parameters of nursing duties. Section 152.1, Iowa Code 1993. If it has done so before now, this ALJ has not been able to identify where it is to be found. The rules of the Board of Nursing found in Rule 655-6.2 I.A.C. speak only in vague terms like "scope of nursing practice," which shall not include those practices currently ascribed to the advance registered nurse practitioner;" "nursing process in the practice of nursing consistent with accepted and prevailing practice," and "knowledge and skill level currently ascribed to the registered nurse." These definitions certainly provide little guidance to the lay person, or likely anyone else.

The rules certainly provide little guidance to Rns and maybe even the Board, itself. (The above quoted rule was published in the I.A.C. on 8-26-87). A RN employed by the District testified that she had delegated some health care for students at school on the basis of her own professional judgment until 1988 when the Nursing Board issued a "guideline" on in-school delegation. The guideline apparently said that nurses could not delegate the particular procedure. A waiver was requested and received by the District, only to later be withdrawn by the Board. Even later, the Board apparently withdrew the entire guideline.

In the Declaratory Ruling in question, the Board was to provide the "applicability of any statutory provision, rule, or other written statements of law or policy, decision or order of the agency." 17A.9, Iowa Code 1993. If the Board Ruling did this, this ALJ is not aware of it. The only citation to law in the Ruling was to the vague and largely confusing rule at 655-6.2 I.A.C. Reference was made in the Ruling to two named documents, but nothing like them adopted as Board rule or policy has been determined. They were not even attached to the Ruling for proper reference. Yet, the whole purpose of the Administration Procedure Act is to make agency rules and policy known and understood. Nursing rules and policy, or the lack thereof, certainly have resulted in a great deal of confusion in this situation. We have here a situation where it has been determined by the Board of Nursing that a RN must be at the school site to supervise the health care needs of Garret. No mention is made of the current situation with services of a LPN provided by the family with distant RN supervision, or the same at home, or not having nursing services during part of the day or on weekends. Why is Garret's situation in school, if the school is responsible, different than when the school is not responsible or Garret is elsewhere?

The Board of Nursing does a great disservice to the licensed nurses it supervises and the persons they serve by not doing a better job of carrying out its statutory duty to identify the role of nurses.

The Appellant contends that she has requested assistance with the costs of Garret's health care needs at school for several years, and she may well have done so. The record, however, establishes this with some certainty only since the spring and summer of 1993. Because that is the most definite time the issue arose and the District specifically declined, the District responsibility to provide Garret's health care services under this appeal ruling shall be considered to have begun with the 1993-94 school year.

It should be noted that the District did not fully comply with the parental rights requirement of full detailed notice when it refused to request payment of health service costs in the fall of 1993. 34 C.F.R. 300.504 (a)(2); See Evans v. District No. 17, 841 F.2d 824 (8th Cir. 1988). However, this appeal is evidence that the failure did not prejudice Garret's mother in the exercise of her legal rights, and no major harm resulted. See Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618, 625 (6th Cir. 1990); Miles S. v. Montgomery County Bd. of Educ., 824 F.Supp. 1549, 1557-58 (M.D. Ala. 1993).

All motions and objections not previously ruled upon are hereby overruled.

The affidavit of appeal filed by the Appellant raises only the issue of the District's refusal to provide health care services for Garret after the September 10, 1993, IEP meeting. On that issue, the Appellant prevails.

Decision

The Cedar Rapids Community School District is hereby directed to reimburse the Appellant for Garret F.'s health care costs while at school for the 1993-94 school year. While no other school year was specifically included in the appeal affidavit, it should not be forgotten that this appeal has been

pending for over a year. There is certainly nothing in the record to indicate any reason that the District should not currently be providing school health care for Garret as a related service.

Respectfully submitted.

Larry D. Bartlett, J.D., Ph.D.
Administrative Law Judge

December 16, 1994
Date