

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT,  
Petitioner v. GARRETT F., A MINOR BY HIS MOTHER  
AND NEXT FRIEND, CHARLENE F.

CASE NO: 96-1793 02

PLACE: Washington, D.C.

DATE: Wednesday November 4, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CEDAR RAPIDS COMMUNITY SCHOOL :

4 DISTRICT, :

5 Petitioner :

6 v. : No. 96-1793

7 GARRETT F., A MINOR BY HIS :

8 MOTHER AND NEXT FRIEND, :

9 CHARLENE F. :

10 - - - - -X

11 Washington, D.C.

12 Wednesday November 4, 1998

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States at  
15 11:05 a.m.

16 APPEARANCES:

17 SUSAN L. SEITZ, ESQ., Des Moines, Iowa; on behalf of  
18 the Petitioner.

19 DOUGLAS R. OELSCHLAEGER, ESQ., Cedar Rapids, Iowa; on  
20 behalf of the Respondent.

21 BETH S. BRINKMANN, ESQ., Assistant to the Solicitor  
22 General, Department of Justice, Washington, D.C.; on  
23 behalf of the United States, as amicus curiae,  
24 supporting the Respondent.

25

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 96-1793, Cedar Rapids Community School  
5 District v. Garrett F.

6 Ms. Seitz.

7 ORAL ARGUMENT OF SUSAN L. SEITZ

8 ON BEHALF OF THE PETITIONER

9 MS. SEITZ: Mr. Chief Justice, and may it please  
10 the Court:

11 The Federal statute, the Individuals With  
12 Disabilities Education Act, specifically provides that  
13 school districts are not required to provide medical  
14 services to students except for evaluation and diagnostic  
15 purposes. Therefore, the fundamental issue in this case  
16 is whether nursing services which must be continuous and  
17 exclusive for one student constitutes medical services.

18 When we go to a physician's office and we see a  
19 nurse, and the nurse gives us an injection, we certainly  
20 think we're getting a medical service. Similarly, if we  
21 go to a dialysis clinic and a technician administers  
22 dialysis we think we're getting medical services.

23 QUESTION: Ms. Seitz, I follow what you're  
24 saying, but we do have the Tatro case, and I would have  
25 said in one sense the CIC is a medical service, so it

1 seems to me, at least from your brief, that you're not  
2 resting on the character of the care that's rendered -- is  
3 it a catheter, or what it is -- but the volume of it and  
4 the cost, so it's -- the nature of the service seems to be  
5 not part of your calculus.

6 In other words, if you took this string of care-  
7 giving and you broke it down and you just had one, would  
8 you say, oh, that's not -- that's a medical service, it's  
9 not diagnostic?

10 MS. SEITZ: Justice Ginsburg, catheterization,  
11 even clean intermittent catheterization, is also commonly  
12 thought of as a medical service. However, we have to find  
13 a balance between those things that are the broad medical  
14 service and those things which are school nursing services  
15 which are required under the regulations as a related  
16 service, so somehow we have to find a test that will be,  
17 what is a school health service provided by a school nurse  
18 versus those things that are just generally thought of as  
19 medical?

20 Certainly, CIC, as this Court found, was a  
21 service that could be provided by a school nurse in a  
22 short period of time. In fact, Amber Tatro was the young  
23 girl and was quickly going to be able to --

24 QUESTION: But my question to you is, are you  
25 saying every one of these services on the list fits within

1 the medical service exception, or they do cumulatively but  
2 not individually?

3 MS. SEITZ: Justice Ginsburg, we're saying they  
4 do cumulatively, because obviously the Cedar Rapids  
5 Community School District does provide clean intermittent  
6 catheterization to other students. They also section  
7 tracheostomies for other students.

8 But the difference is, those are services that  
9 can be done by a school nurse, or someone trained by the  
10 school nurse, versus having to hire a person full-time to  
11 attend to that child all day.

12 QUESTION: Well, so you stipulate that the  
13 tracheotomy procedure is -- can be a nursing service?

14 MS. SEITZ: Yes, Your Honor. The -- if it was  
15 just -- in fact, we have other students in the Cedar  
16 Rapids District who have suction of tracheostomy tubes.  
17 That by itself could be done by a school nurse, and that  
18 school nurse could continue to perform his or her other  
19 functions.

20 The difference with Garrett is that he needs  
21 continuous monitoring and assessment to make sure that  
22 he's not in respiratory distress, and at that point then  
23 the school nurse cannot perform those functions. There  
24 are only six nurses in Cedar Rapids.

25 QUESTION: It's not because the nurse lacks the

1 competence, I take it, but just because she's charged with  
2 a number of other responsibilities as school nurse.

3 MS. SEITZ: Mr. Chief Justice, that would be  
4 correct.

5 QUESTION: Well, isn't it also --

6 MS. SEITZ: I'm sorry.

7 QUESTION: It just depends on how many school  
8 nurses you have. I mean, if you have enough school  
9 nurses, it's no problem.

10 MS. SEITZ: Actually, Your Honor, you would  
11 have --

12 QUESTION: It's sort of hard to think that, you  
13 know, that that makes a difference in the nature of the  
14 service.

15 MS. SEITZ: Your Honor, I don't believe it makes  
16 a difference in the nature of the service. It's either  
17 medical or it's not medical, but we need to find a way to  
18 give credence to the agency definition of school health  
19 services, which we are not contesting that school health  
20 services are related services. However --

21 QUESTION: Well, but you -- it seems to me you,  
22 even on that assumption you've got a problem, because the  
23 testimony in the case was, as I understand it, that you  
24 don't even need a nurse to do this. My recollection is  
25 that the ALJ found that any, you know, competent person



1 could be trained to do these things.

2 The reason, as I understand it, that a nurse  
3 would be required in Iowa is because the Iowa nursing  
4 regulations so provide, but it seems to me that's Iowa's  
5 problem and it doesn't have anything to do with the way we  
6 should draw the definitional line under the statute.

7 So that even on your assumption, that the  
8 statute said in effect, or meant, that continuous service  
9 by a nurse would be within the exclusion, that in fact is  
10 not the case here except under the Iowa regulations, and  
11 surely the Iowa regulations can't govern the meaning of  
12 the Federal statute.

13 MS. SEITZ: Your Honor, first, you're correct  
14 that the Iowa Board of Nursing did rule his care needed to  
15 be provided by a nurse. However, the services that could  
16 be delegated, even to a lay person, are clearly medical  
17 services that would typically be either performed or  
18 supervised by the nurse.

19 QUESTION: Okay. Then the criterion then is not  
20 the continuous nature of the service or the, in effect the  
21 ultimate cost, it is in a more strictly analytical sense  
22 it's the kind of service itself.

23 MS. SEITZ: We're proposing a multi-factored  
24 test, Your Honor, that would be both --

25 QUESTION: And then you -- you seem to be going

1 back on what I thought was very candid and clear of you  
2 earlier when you said, if we took each one of these, the  
3 tracheotomy, each one separately, it would be a related  
4 service that wasn't within the medical exception, but when  
5 you cumulate them altogether, it's the all-day,  
6 continuous, that makes it medical service, so it seems to  
7 me you were not -- your line depends upon duration and  
8 expense, and not the character of the individual  
9 services --

10 MS. SEITZ: Your Honor --

11 QUESTION: -- in the package.

12 MS. SEITZ: I'm sorry. Your Honor, we need to  
13 determine the character first to determine whether it's  
14 medical. Then we need to apply other factors to see if it  
15 comes under the school health.

16 QUESTION: But I thought you told me there was  
17 not medical in the event of, say, the tracheotomy.

18 MS. SEITZ: No -- excuse me? That it is  
19 medical --

20 QUESTION: The tracheotomy is not medical, I  
21 thought, because nurses routinely do this.

22 MS. SEITZ: Excuse me. It would still be a  
23 medical service, but it would come under the school health  
24 rather than the medical services exemption.

25 I'd also like to come back to Justice Souter's

1 comment about State licensure. Even the physician-  
2 nonphysician bright line would come down to a State  
3 licensure issue, because States obviously allow nurse  
4 practitioners, they allow physician assistants to perform  
5 services, so even under the physician-nonphysician there's  
6 going to be some looking at State statutes.

7 QUESTION: Well, that's right, but because on  
8 the assumption of the bright line test, what the bright  
9 line is drawn between is what, I presume, in fact doctors  
10 do and what, in fact, nurses do, but it seems to me that  
11 that doesn't necessarily implicate the point that I was  
12 trying to make earlier.

13 MS. SEITZ: Your Honor, if, in fact, it were  
14 physician-nonphysician bright line, it's difficult to  
15 comprehend how there would be any meaning given to the  
16 statutory exclusion.

17 What services would a physician --

18 QUESTION: Well, I don't understand that. I  
19 mean, we would look to see who's doing the procedure, and  
20 if in your State nurses are doing it, that would be the  
21 end of the issue.

22 MS. SEITZ: But what physician services would be  
23 necessary during a school day, at school, to enable a  
24 child to benefit from education. If it really is, it's  
25 only physician services, we render that statutory

1 provision meaningless.

2 Physicians see patients in clinics, in doctor's  
3 offices, in hospitals.

4 QUESTION: Well, it would mean that if there is  
5 some procedure that can only be performed by a doctor, and  
6 a doctor would have to come in once a day to do it, and it  
7 was not diagnostic, et cetera, then it would be excluded.  
8 I don't know how many such procedures there might be, but  
9 certainly the test would have meaning.

10 MS. SEITZ: Your Honor, we cannot conceive of  
11 any procedure that a physician would have to come in and  
12 perform for a student during --

13 QUESTION: Then what gave Chief Justice Burger  
14 the misimpression which he evidently had on your argument?  
15 He said, I understand this line because doctors are  
16 expensive and hospitals are expensive, so he must have  
17 thought that without this exception some things that  
18 doctors only do and some things that are done only in the  
19 hospital could have been covered.

20 MS. SEITZ: Justice Burger in the Tatro case  
21 indicated that CIC could be done by a school nurse or a  
22 lay person.

23 QUESTION: Yes, but when he talked about where  
24 the line is drawn, he said, doctors cost a lot of money  
25 and hospitals cost a lot of money.



1           Now, you are now telling us that doctors and  
2 hospitals just don't fit into this picture, so was he  
3 wrong in the impression that he had that they somehow  
4 would have but for this medical services exception?

5           MS. SEITZ: No. We are in agreement with  
6 Justice Burger that they carved out physician's services  
7 because of cost, but we also believe that medical services  
8 was never intended to mean only physicians. Certainly  
9 one-on-one nursing all day -- this case indicates \$20 to  
10 \$30,000 a year -- could be more costly than a physician.

11           QUESTION: But you're recognizing that he wasn't  
12 dealing with an imaginary case when he thought that  
13 doctors and hospitals could have been part of this  
14 picture.

15           MS. SEITZ: That doctors and hospitals could be  
16 part of the included services, or --

17           QUESTION: If but for this exception, because he  
18 mentioned them in his opinion. He said, you see, those  
19 things are very expensive, so I understand that Congress  
20 wouldn't want them to be covered.

21           MS. SEITZ: I believe Justice Burger said that  
22 the agency definition of included services which made a  
23 distinction between physicians and nonphysicians, and then  
24 went on to say in Tatro that they have carved out  
25 physician's services because it added additional expense

1 to districts.

2 But in fact if we use that analysis, the  
3 additional expense to districts of intensive nursing  
4 services would be greater than what an intermittent  
5 physician's service could be.

6 We also have to remember that this Court decided  
7 in the Rowley case in 1982 that the IDEA was in the nature  
8 of a contract with the States and, as such, that any  
9 conditions attached to the funding must be unambiguously  
10 stated.

11 This is particularly true in education, which is  
12 traditionally left to States and localities. Congress did  
13 not specifically list in section 17 that nursing services  
14 would be provided, and we would have to assume that there  
15 is some indication in the act itself that felt -- they did  
16 not think it should be provided.

17 If you look at the literal language of the  
18 statute it says that all corrective, developmental, and  
19 supporting services needed to allow a child to benefit  
20 from education is included, and then it has some medical  
21 service exclusion.

22 But Congress went on and gave some specific  
23 listings such as physical therapy, occupational therapy,  
24 social work services, psychological services. If Congress  
25 had intended for medical services to be a narrow

1 definition of physical physician's services they would not  
2 have needed to list all those specific ones, because it  
3 would have been covered under any supportive service.

4           However, a better interpretation would be that  
5 they intended a broad definition of medical and then  
6 listed those in order that they would be provided.

7           QUESTION: Well, if you are saying that the act  
8 imposes just a reasonable burden but not an extensive  
9 burden on the States, we could argue on that.

10           As I understood the case, I was going to be  
11 asked to determine whether or not this was a medical  
12 service, and it seems to me that the two are different  
13 questions.

14           MS. SEITZ: Whether one-on-one nursing is a  
15 medical service, Your Honor? We believe that any -- any  
16 definition of medical services, whether you look to the  
17 Internal Revenue Code, where you look to Worker Comp, have  
18 always viewed private duty type nursing as a medical  
19 service, and suddenly we're asking in this statute to give  
20 it an uncommon meaning and say, no, medical means only  
21 physicians.

22           QUESTION: Oh, I would assume nonprivate duty  
23 nursing as well. I mean, what I -- I can understand the  
24 reasonableness of your position when you say that nursing  
25 services are medical services, but you don't say that.

1           You say, we can do CIC, and the trouble is, we  
2 can't do too much of it, and I don't know that the word  
3 medical has anywhere in it the distinction between -- a  
4 distinction in volume. If you do more of it, it becomes  
5 medical. If you do less of it, it's not medical.

6           It's either medical or not. I mean, CIC is  
7 either medical or not, so you -- it seems to me you have  
8 to say nurses -- you know, nursing services, at least CIC,  
9 is not covered.

10           MS. SEITZ: Justice Scalia, actually I don't  
11 think there's any question that CIC is a medical service  
12 in common understanding. However, we --

13           QUESTION: Well, but we had the Tatro decision,  
14 and it said that was not a medical service. I mean, we  
15 dealt with that, so you have to come to grips with that, I  
16 think. Are you asking us to modify, or --

17           MS. SEITZ: Justice O'Connor, we're in  
18 agreement --

19           QUESTION: -- overrule Tatro?

20           MS. SEITZ: We're in agreement with the result  
21 of Tatro. We're not asking you to overrule the result in  
22 Tatro.

23           We do believe that the Department of Education  
24 could legitimately say to school districts, you have  
25 school nurses, and they should provide some school health



1 services.

2 They are still medical services, as Justice  
3 Scalia --

4 QUESTION: But that isn't what the Department  
5 has said. The Government doesn't support your position,  
6 the Federal Government, and you're asking us to say that  
7 continuous nursing services are medical services --

8 MS. SEITZ: Yes, Your Honor.

9 QUESTION: But broken down and doing it  
10 intermittently they're not, and that's a very hard line to  
11 draw, as Justice Scalia has pointed out.

12 I don't think it's going to work. Do you have a  
13 fall-back position?

14 MS. SEITZ: Your Honor, we believe that if we  
15 allow a multi-factor test to be used, where you can  
16 determine whether school nurses who traditionally serve  
17 hundreds -- in fact, the ratio is 1 to 3,000 students --  
18 can do the services, that it would be treated as a school  
19 health service under the regulations.

20 I agree that it would be easier to say it's  
21 either all medical or not medical, but this Court in Tatro  
22 determined that the school health service regulation was a  
23 reasonable regulation, so therefore we have to find where  
24 is the limit drawn when it quits being a reasonable school  
25 health service and becomes a medical service, and that's

1 why we have proposed the multi-factor test at looking  
2 at --

3 QUESTION: You keep saying multi-factor test,  
4 but it seems to me in all candor that your argument comes  
5 down to, all day is too much, and we have brackets on this  
6 target. CIC, once a day, twice a day, not too much, all  
7 day, too much, and then there may be cases in between.

8 But it seems to me what you're arguing is the  
9 all day is the other extreme, and so it's duration, all  
10 day is the most it could be, and expense, because it's all  
11 the hours of the day.

12 So you keep talking about multi-factor tests,  
13 but we have this case, and I'm trying to understand your  
14 position. It isn't based on the character of the care,  
15 but it's duration and expense.

16 MS. SEITZ: Yes, Your Honor. That becomes the  
17 determining factor. Once you determine that the character  
18 of the care is medical -- which I think as Justice Scalia  
19 pointed out, even CIC, it's either medical or it isn't --  
20 once you determine that it's medical, then you need to  
21 make that multi-factor.

22 However, I agree that I cannot conceive of any  
23 situation where it's continuous care that would not make  
24 it fall under the medical services exception.

25 QUESTION: Well, I thought the simple

1 requirement to have an attendant of any sort would be a  
2 continuous care requirement.

3 MS. SEITZ: That's correct.

4 QUESTION: But it wouldn't -- it certainly  
5 wouldn't be medical.

6 MS. SEITZ: They'd still be performing medical  
7 functions. Assessing whether he's in respiratory  
8 distress, suctioning a tracheotomy, catheterizing the  
9 student, positioning the student --

10 QUESTION: No, but I thought your statement was  
11 merely that any continuous care that might occur in a  
12 situation like this would be medical, and in fact he's  
13 getting continuous care right now, isn't he?

14 MS. SEITZ: I'm sorry, that's because the  
15 continuous care that he's getting -- you're referring to  
16 the educational associate the district's providing --

17 QUESTION: Yes.

18 MS. SEITZ: -- that helps him move about the  
19 building, manipulate materials. That's because that's  
20 being provided under the special education section, not  
21 the related service.

22 QUESTION: But if it were being provided under  
23 this section, that would be medical, too.

24 MS. SEITZ: If it were being provided as a  
25 related service. If you look at the other --

1 QUESTION: Well, it would be provided as a  
2 related service, wouldn't it?

3 MS. SEITZ: You mean now the educational  
4 continuous care, or the nursing continuous care? I'm  
5 sorry.

6 QUESTION: The -- I'm not sure that I have the  
7 proper term, but I thought there was some individual who  
8 attended this student at all times --

9 MS. SEITZ: There are actually two --

10 QUESTION: -- to move around, and so on.

11 MS. SEITZ: There are actually two individuals  
12 who attend this child all the time. There's one provided  
13 by the school district, who --

14 QUESTION: Okay.

15 MS. SEITZ: -- helps him with his materials,  
16 raise his hand, move him about the building.

17 QUESTION: If that were provided under this  
18 section, would you call that medical service because it  
19 was continuous?

20 MS. SEITZ: I don't know how to answer that,  
21 because it's purely an educational --

22 QUESTION: Well, I thought you had said earlier  
23 that if in fact the service is continuous, you really  
24 couldn't conceive of a service that would not therefore be  
25 medical, and I'm saying, if it were provided under this



1 section it would be medical, then, on your test, wouldn't  
2 it?

3 MS. SEITZ: Actually, no, Your Honor, because  
4 you first have to make the initial determination of what  
5 the nature of the care is, and if he's helping him move  
6 materials, raise his hand, manipulate the computer,  
7 nobody's arguing that's a medical service.

8 QUESTION: Okay, then continuity is not itself a  
9 criterion, and the only thing that continuity goes to, I  
10 guess, is the likelihood of the expense which is going to  
11 follow the continuity, is that about it?

12 MS. SEITZ: Your Honor --

13 QUESTION: It's a bottom line test.

14 MS. SEITZ: No, I don't think that's it. I  
15 think you have to first make the nature test, and then you  
16 have to go to the continuity.

17 QUESTION: But you're not really willing to do  
18 that, because you're not willing to say that all services  
19 involving the physical well-being of a student that are  
20 provided by nurses or anyone else, you're not willing to  
21 say that they're medical services.

22 MS. SEITZ: Actually I think they are medical  
23 services for determining the nature, but we also need to  
24 look at the school health service --

25 QUESTION: Yes, but I'm talking about medical

1 services within the meaning of the statute. That's the  
2 only --

3 MS. SEITZ: Actually, the easiest argument would  
4 be that all medical services that are traditionally  
5 thought of are medical, are medical and are excluded and  
6 the school health service goes too far.

7 Okay, the other thing that we would like to  
8 point out is that the other things on the list of the  
9 related services such as OT, physical therapy, social work  
10 services are all intermittent care. They're not  
11 continuous care. I think that gives some indication of  
12 Congress' intent when they use the term medical, that they  
13 did not mean for it to be continuous services.

14 Also, unfortunately the legislative record does  
15 not give us much of a discussion of why medical services  
16 was ever put into the act. In fact, when it was first  
17 proposed in bill form Senate 6 and the House file included  
18 medical services. It was then excluded, but there's no  
19 discussion in the record of why.

20 But there was a lot of discussion of the cost of  
21 special ed, so I think the only plausible explanation can  
22 be that Congress did not want school districts to intrude  
23 into areas they had not historically performed that had  
24 historically been paid by other payers, which would also  
25 give some legitimacy to a broad definition of medical

1 services.

2 QUESTION: On that, in your response to Justice  
3 Scalia are you saying that we should overrule the Tatro  
4 case, because that's what you seem to be saying if you say  
5 that all of these are really medical service.

6 MS. SEITZ: They are. All of those services are  
7 really medical services, but we don't believe you have to  
8 overrule Tatro to get to the result in our case, because  
9 there was already deference given in Tatro to the school  
10 health regulation, and school districts can do the school  
11 health regulation, but they need guidance on what they're  
12 to do beyond those simple services that can be done on an  
13 intermittent basis by existing personnel.

14 QUESTION: You're saying we went as far as we  
15 did in Tatro only because there was a regulation that  
16 pushed us that far, and that the regulation doesn't push  
17 us any further.

18 MS. SEITZ: That's correct, Justice Scalia.

19 Okay. Also the regulations themselves, which  
20 even the Department of Education has not interpreted as  
21 requiring a bright line test until this particular case  
22 surfaced does give us some indi -- even if we follow those  
23 regulations, does give us some indication that continuous  
24 one-on-one service were not required.

25 QUESTION: May I go back to your assertion about

1 the regulations? One of the appendices has the so-called  
2 1996 letter in it, and that certainly is not a bright  
3 line -- that is not an example of the Department  
4 administering a bright line test.

5 At the time of Tatro, however, I understood they  
6 were following a bright line, and I'm not sure that  
7 there -- and Tatro as I read the case endorsed that as a  
8 reading of the regulation.

9 Apart from the 1996 letter, is there clear  
10 evidence that they are -- that the Department is following  
11 a multi-factor as opposed to a bright line approach?

12 MS. SEITZ: Actually the 1996 letter, one of  
13 which is attached to our petition for certiorari, were the  
14 only times that the Department was asked whether one-on-  
15 one continuous nursing, or in fact nursing services at  
16 all, were required.

17 The earlier letter ruling had to do with  
18 psychotherapy services, and that's because psychological  
19 services were also listed in the statute.

20 QUESTION: So they didn't have to get to the  
21 bright line versus multi-factored --

22 MS. SEITZ: They really didn't, and in fact they  
23 applied what looked like a bright line on the included  
24 psychotherapy services, because you have the psychologist,  
25 the medical service distinction.



1 QUESTION: Well, assuming, then, that's the --  
2 sort of the state of the administrative record, don't we  
3 have to confront Tatro in this way: Tatro seems to  
4 involve a recognition, an endorsement of the -- what the  
5 Court then understood to be the Department's bright line  
6 approach to interpreting the statute.

7 Once the regulation has so been approved by a  
8 decision of this Court, doesn't the agency have to go  
9 through some procedure to amend its regulation if it's  
10 going to change its interpretive approach?

11 MS. SEITZ: Absolutely, Your Honor.

12 QUESTION: Well, it hasn't done it here, has it?  
13 I mean, the only thing we've got is the 1996 letter, and  
14 that may express uncertainty or confusion on the part of  
15 whoever wrote that letter, but it certainly doesn't rise  
16 to the level of the Department's formally reassessing its  
17 interpretive stance.

18 MS. SEITZ: Your Honor, first I think the Tatro  
19 case actually approved the included definition of medical  
20 services as services by a physician for purposes of  
21 evaluation and diagnosis. It didn't deal with the  
22 excluded -- all it is is, it has that footnote 10 that  
23 says presumably excluded services would be services by a  
24 physician for other services.

25 So this Court even in Tatro did not adopt -- and

1 there isn't a regulation on excluded services, so the  
2 Court clearly did not adopt an excluded bright line  
3 physician-nonphysician test.

4 QUESTION: You know, even if I don't accept --  
5 even if we reject what is the nice bright line test that's  
6 expressed in Tatro --

7 MS. SEITZ: Yes.

8 QUESTION: It certainly is expressed there,  
9 hospitals and doctors. Do I have to go all the way to  
10 your, over to -- I hate multi-factor tests. I -- you  
11 know.

12 (Laughter.)

13 MS. SEITZ: No, we don't think you do have to --

14 QUESTION: Can we -- can you give us any other  
15 clearer line? I mean, what, normal school nursing  
16 services, or --

17 MS. SEITZ: Actually, we would be happy to give  
18 that line, and a line that particularly was drawn at  
19 continuous one-on-one which, other than physician  
20 services, is the most intensive medical services you can  
21 get. A nurse for just you? Certainly there can be a line  
22 drawn there to say, that's medical.

23 Unless there's further questions right now, I'd  
24 like to --

25 QUESTION: I'd like to ask one question.

1 MS. SEITZ: Yes.

2 QUESTION: You deal with this area quite a lot.

3 MS. SEITZ: Of special education?

4 QUESTION: Yes.

5 MS. SEITZ: Yes, I do.

6 QUESTION: Good. All right. If, in fact, a  
7 nurse provides a diagnostic or evaluative service, a  
8 nurse, or a counselor of some kind --

9 MS. SEITZ: Uh-huh.

10 QUESTION: Do you view that as coming within the  
11 act?

12 MS. SEITZ: Yes, and in fact the law requires  
13 multidisciplinary assessments as well.

14 Mr. Chief Justice, may I reserve my time?

15 QUESTION: Very well, Ms. Seitz.

16 MS. SEITZ: Thank you.

17 QUESTION: Mr. Oelschlaeger.

18 ORAL ARGUMENT OF DOUGLAS R. OELSCHLAEGER

19 ON BEHALF OF THE RESPONDENT

20 MR. OELSCHLAEGER: Mr. Chief Justice, and may it  
21 please the Court:

22 In Tatro this Court held that clean intermittent  
23 catheterization was a related service which the school  
24 district had to provide at its expense in order for Amber  
25 Tatro to remain in school and benefit from her education.

1           In this case, the issue is whether additional  
2 services such as tracheostomy suctioning, periodic  
3 positioning, and other services not provided by a  
4 physician, are also related services which the district  
5 must provide at its expense in order for Garrett Fry to  
6 remain in school and obtain an education --

7           QUESTION: But I guess these services are  
8 acknowledged in this instance to be of a continuous  
9 nature, as the petitioner's lawyer described, that a nurse  
10 would have to be there full-time.

11           MR. OELSCHLAEGER: Justice O'Connor, the  
12 petitioner has categorized these services as continuous.  
13 We've categorized them as intermittent. We believe the  
14 record in the case is probably once or twice in the  
15 morning and once or twice in the afternoon, with the  
16 exception of the positioning services. Garrett would need  
17 some form of intervention, either suctioning the  
18 tracheostomy once a day, catheterization once a day,  
19 positioning for 5 minutes every hour.

20           Other than that, alls he needs is someone within  
21 earshot, and I would propose if you had a classroom that  
22 had a teacher's aide or associate for some other child,  
23 you could basically train that aide to listen and  
24 intervene infrequently during the day and the services  
25 could be provided in that way, and that was certainly the



1 record in the case, was that --

2 QUESTION: There is an educational aide --

3 MR. OELSCHLAEGER: Yes.

4 QUESTION: -- with the child at all times?

5 MR. OELSCHLAEGER: Right. Garrett has an  
6 educational aide.

7 QUESTION: And can that person do any of the  
8 listening or the positioning?

9 MR. OELSCHLAEGER: They certainly could with  
10 minimal training and that was the record.

11 For example, in Garrett's kindergarten year his  
12 18-year-old aunt, Stephanie Madison, provided these  
13 services, no nursing training, unlicensed person. The  
14 school district agreed for this unlicensed person --

15 QUESTION: So you say the record in this case  
16 shows that such a person could do these more continuous  
17 things.

18 MR. OELSCHLAEGER: Yes.

19 QUESTION: And that the rest of it is  
20 intermittent need.

21 MR. OELSCHLAEGER: Yes.

22 Congress enacted the IDEA to provide a basic  
23 floor of educational opportunity and access for children  
24 with disabilities.

25 QUESTION: If most of this is just listening to

1 see whether he needs assistance, why doesn't that come  
2 under the diagnostic exception to the medical exception?

3 MR. OELSCHLAEGER: Well, we believe Congress,  
4 Justice Scalia, in 1401(a)(17), when it defined related  
5 services broadly and included supportive services and  
6 listed some, didn't list all, we believe they defined it  
7 to include a service to assist a child with a  
8 disability --

9 QUESTION: I think you're mistaking my question,  
10 because it is not a hostile question.

11 MR. OELSCHLAEGER: Okay.

12 (Laughter.)

13 QUESTION: Even if these were medical services,  
14 since you say most of the time they're not doing anything  
15 except listening to see whether he needs medical  
16 assistance, now, I would take listening to see if he needs  
17 medical assistance to be diagnostic, and diagnostic  
18 services are excepted from the exception for medical  
19 services.

20 MR. OELSCHLAEGER: Except in this case they're  
21 not provided by a physician, so I suppose if a physician  
22 sat there and listened all day to see if there was some  
23 difficulty in breathing, then that expressly would be an  
24 included service.

25 QUESTION: So it's not diagnostic unless it's

1 done by a physician.

2 MR. OELSCHLAEGER: That seems to be the  
3 statutory definition, yes.

4 QUESTION: I don't follow that, because --

5 QUESTION: I don't, either.

6 QUESTION: -- diagnostic is covered, even if  
7 it's a physician. I thought the purpose was to rule out  
8 things that were medical but not diagnostic.

9 In other words, anybody can do -- diagnostic is  
10 covered by the statute. It's in this nondiagnostic area  
11 that we have a problem, isn't that so?

12 MR. OELSCHLAEGER: That is so. 1401(a)(17) says  
13 that, Your Honor, yes.

14 QUESTION: Yes, so if it's diagnostic, whoever  
15 does it it comes -- it's covered.

16 MR. OELSCHLAEGER: Right. I am mistaken in my  
17 response to Justice Scalia.

18 QUESTION: But there's also -- you know, if a  
19 parent sat up at night with a kid who had whooping cough  
20 waiting for him to get into a spasm you wouldn't say the  
21 parent was diagnosing whooping cough. You just diagnose  
22 whooping cough once, then you have a lot of consequences  
23 from it.

24 MR. OELSCHLAEGER: Right. That would be in a  
25 treatment --

1 QUESTION: Yes.

2 MR. OELSCHLAEGER: Treatment modality at that  
3 point, yes, Your Honor.

4 The point I was trying to make is, the  
5 district's position here appears to be cost-based, and I  
6 think that's fairly clear. We do not believe that the  
7 IDEA is some form of blank check legislation. This Court  
8 recognized in the Florence County case that the IDA --  
9 IDEA is a broadly remedial statute, and that States, if  
10 participating, will have to spend a substantial amount of  
11 money.

12 We believe Congress recognized this as well in  
13 other parts of the statute, not in the part of the statute  
14 where one defines what is a medical or related service,  
15 but in other parts of the statute.

16 QUESTION: Do you think that the agency has the  
17 power to define diagnostic -- to define medical services  
18 one way or the other?

19 MR. OELSCHLAEGER: Yes. In 1407 --

20 QUESTION: All right. If they have the power,  
21 then I take it -- one of the arguments here that I'm  
22 concerned about is that you and the Solicitor General say  
23 they exercise that power along the lines you say, and they  
24 say, no they didn't, and indeed the letter in the  
25 appendix, Appendix C, says that quite late in the game



1 they were saying, no we didn't. We think it all depends  
2 on a lot of different circumstances.

3 So I'd appreciate at some point your addressing  
4 that.

5 MR. OELSCHLAEGER: Okay. I'll address that  
6 right now, Your Honor.

7 First of all, the letter in the appendix I  
8 believe was raised -- asked in the context of what the  
9 current judicial interpretation was of the related service  
10 and medical service issue, and the letter itself goes  
11 through not to explain necessarily --

12 QUESTION: Where is the letter in the record,  
13 Mr. Oelschlaeger?

14 MR. OELSCHLAEGER: I think the letter is  
15 Exhibit D to the petition for certiorari. It's at page  
16 64a.

17 QUESTION: Page what?

18 QUESTION: Appendix D of 64a.

19 QUESTION: 64a?

20 MR. OELSCHLAEGER: 64a, and the letter starts  
21 out and talks about the case-by-case analysis, which is  
22 what is required under the IEP, or individualized  
23 education plan procedures of the statute, and then  
24 proceeds to explain how various district courts, the  
25 Detsel court, various circuit courts have interpreted

1 those provisions.

2 The legislative, or the regulatory action in  
3 this case, Justice Breyer, came in 1977 when the initial  
4 regulations were promulgated under the IDEA by the  
5 Department of Education. They included the regulations  
6 that are involved in this case, the definition of medical  
7 services, the definition of school health services, and  
8 those regulations have remained unchanged since 1977.  
9 They've been on the books 21 years.

10 QUESTION: Well, if the facts were different  
11 than you say they are in this case and if, in fact,  
12 continuous care by a registered nurse were necessary 24  
13 hours a day, would your answer be any different?

14 MR. OELSCHLAEGER: Well, the 24 hours a day  
15 might be different. The fact that an RN were required as  
16 opposed to an LPN, or a nonlicensed aide, doesn't change  
17 the analysis in my regard simply because the statutory  
18 definition gives the medical service exclusion, and that  
19 has been defined by the agency to be something required to  
20 be done by a physician. Now --

21 QUESTION: So if an ambulance has to stand by  
22 for every hour the child is at school, it's not a  
23 physician --

24 MR. OELSCHLAEGER: That's true.

25 QUESTION: -- and the school has to do it.

1 MR. OELSCHLAEGER: Although again, given the  
2 facts of this case, an ambulance could be summoned by a  
3 911 call.

4 QUESTION: No, I'm asking some hypotheticals,  
5 obviously.

6 MR. OELSCHLAEGER: I understand.

7 QUESTION: Because you told me that the facts of  
8 this case are different, but I want to know how far your  
9 argument takes us, and would it be different --

10 MR. OELSCHLAEGER: The --

11 QUESTION: -- if a nurse had to be there full-  
12 time and the ambulance had to be outside the school all  
13 the time.

14 MR. OELSCHLAEGER: Okay. I think the question  
15 really gets to the heart of what is a related service and  
16 what limitations did the Court adopt --

17 QUESTION: I'm asking you --

18 MR. OELSCHLAEGER: Okay.

19 QUESTION: -- what you see are the limitations,  
20 if any.

21 MR. OELSCHLAEGER: The limitations in Tatro were  
22 expressed to be, the child is handicapped so as to require  
23 special education. We have that here. Only those  
24 services necessary to aid the handicapped child to benefit  
25 from special education must be provided. That's true

1 here. And school nursing services must be provided only  
2 if they can be performed by a nurse or other qualified  
3 person, not if they must be performed by a physician.

4 So 24-hour-a-day nursing service while the child  
5 is not at school does not qualify, we believe, as a  
6 related service, but while he's at school --

7 QUESTION: But while the child is at school --

8 MR. OELSCHLAEGER: Yes.

9 QUESTION: -- full-time nursing care required  
10 and, if necessary, an ambulance right there in the  
11 driveway.

12 MR. OELSCHLAEGER: Again you'd have to get into  
13 the IEP procedure. In a sense you do have to go on a  
14 case-by-case basis, but if the IEP team looked at it,  
15 found that an ambulance was there, was needed to prevent  
16 some form of severe --

17 QUESTION: Well, because of the high risk of  
18 autonomic hyperreflexia, for example.

19 MR. OELSCHLAEGER: Right, and again that's a  
20 virtually nonexistent risk in this case on the record, but  
21 yes.

22 QUESTION: All right, so I think if I were in  
23 Congress I might have thought the agency will resolve  
24 this. They'll define it. And I might think as a judge  
25 they know a lot more about it than I do.



1 Well, thinking that, how do I decide this case?

2 MR. OELSCHLAEGER: Well, I think this case is  
3 merely an extension of the Tatro case. Where Tatro  
4 recognized clean intermittent catheterization as a related  
5 service, we're asking the Court -- and I think perhaps the  
6 school district conceded this in their portion of the  
7 argument, that tracheostomy care be recognized as a  
8 related service, that positioning services be recognized  
9 as a related service, and the definition in 1401(a)(17)  
10 and the regulations be followed.

11 There's -- nowhere in there does there appear an  
12 exception to what constitutes a related service based  
13 on --

14 QUESTION: I can't find a regulation -- I can  
15 find a regulation that says that diagnostic services, when  
16 given by a doctor, do get covered, but I didn't find any  
17 other regulation that defined whether or not a medical  
18 service was or wasn't a medical service. I found no other  
19 definition that would help me here.

20 MR. OELSCHLAEGER: Right. The two regulations  
21 at issue, Your Honor, would be 300.16, subpart (4) of the  
22 definition of medical services. That's at --

23 QUESTION: That's the one that says, when you  
24 diagnose a child, if a doctor diagnoses a child, that is a  
25 covered medical service.

1 MR. OELSCHLAEGER: Right, and that was the one  
2 that the Tatro --

3 QUESTION: I take it here we're not dealing with  
4 diagnostic services.

5 MR. OELSCHLAEGER: Not by a physician, anyhow.

6 QUESTION: So therefore, what regulation covers  
7 this case?

8 MR. OELSCHLAEGER: Then you have to look at the  
9 regulation (b) (11), 300.16 (b) (11). It's at page --

10 QUESTION: School health services?

11 MR. OELSCHLAEGER: Right, and it's our  
12 position --

13 QUESTION: What page are you on?

14 MR. OELSCHLAEGER: That would be page 8a of the  
15 appendix to the United States' brief on the merits.

16 QUESTION: Is it fair to say that the  
17 petitioner's position reads, school health services means  
18 services usually or traditionally provided by a qualified  
19 school nurse? Is that a fair characterization of the  
20 petitioner's position?

21 MR. OELSCHLAEGER: I think there's an element of  
22 that, Your Honor, and of course we believe that to be  
23 directly refuted by the statute, particularly in regards  
24 to the 1997 amendments.

25 In other words, not having enough nurses

1 shouldn't be considered when you define what is or is not  
2 a medical service.

3 QUESTION: Well, on the other hand, if you say  
4 school health service means services provided by a  
5 qualified school nurse and that they're provided by the  
6 nurse in this case, therefore they're automatically  
7 covered, that, it seems to me to be a somewhat circular  
8 definition on your part.

9 MR. OELSCHLAEGER: Well, there is also the  
10 second half of the definition, Your Honor, qualified  
11 school nurse or other qualified person.

12 QUESTION: Well, I guess the statute that we  
13 look to first is probably 20 U.S. Code section  
14 1401(a)(17).

15 MR. OELSCHLAEGER: Yes. That's, we believe --

16 QUESTION: And it defines the term related  
17 services, and it says that that means transportation and  
18 such developmental, corrective, and other supportive  
19 services, including speech pathology, audiology,  
20 psychological services, physical and occupational therapy  
21 and so forth.

22 Every one of those things, it seems to me, is  
23 something that's given episodically, not continuously. I  
24 mean, somebody has to be transported. Somebody needs a  
25 little speech pathology periodically. Someone needs

1 therapy occasionally, or counseling occasionally.

2 But nothing in that list suggests, does it, a  
3 level of just, 24-hour-a-day, or even school-hour day  
4 care?

5 MR. OELSCHLAEGER: Justice O'Connor, I think  
6 that's a fair comment. I think other portions of the  
7 statute do suggest that, however. In 1412(2)(C) and  
8 1412(3), I don't -- unfortunately I don't think either of  
9 these sections are reproduced in the brief. It's clear  
10 that Congress' intent here was the most severely disabled  
11 child, the intent of the --

12 QUESTION: \*Where is the statute --

13 MR. OELSCHLAEGER: They're both in 20 U.S.C.  
14 section 1412(2)(C), all children residing in the State who  
15 are disabled, regardless of the severity of their  
16 disability, and then subsection (3) of that same 1412, the  
17 State has to have a plan first to address children who got  
18 no education, which was the problem discussed in Rowley,  
19 and then children with the most severe disabilities.

20 QUESTION: It's unfortunate that these weren't  
21 reproduced to help us analyze it.

22 MR. OELSCHLAEGER: I understand that.

23 The other area of the IDEA which I think  
24 supports this position is the area of residential  
25 placements.



1           There are reported circuit and district court  
2 decisions -- there are several in our brief -- where  
3 placements in the approximate range of \$100,000 per year  
4 are accepted. In fact, in one of the cases they were  
5 arguing over whether a \$50,000 placement was appropriate,  
6 or \$150,000 placement was appropriate.

7           IDEA is broad legislation. It's clear that  
8 Congress intended, for States that accepted the money,  
9 that there would be substantial sums --

10           QUESTION: Has any State refused to go along --

11           MR. OELSCHLAEGER: No.

12           QUESTION: -- with this program? I thought they  
13 all had gone along.

14           MR. OELSCHLAEGER: It's my understanding that  
15 initially New Mexico didn't get involved, but now all 50  
16 States are involved in the program.

17           QUESTION: You know, actually I suppose we  
18 really don't begin with the definition of related  
19 services, but we probably begin with a provision that uses  
20 related services, and that reads, the term free  
21 appropriate public education means special education and  
22 related services, and I suppose in attacking this problem  
23 we should regard that whole phrase, special education and  
24 related services.

25           MR. OELSCHLAEGER: Right, and there is --

1 there's statutory definitions for your help, Your Honor.

2 QUESTION: Okay, and then it defines related  
3 services to mean transportation and such developmental,  
4 corrective, and other supportive services, including blah,  
5 blah, blah, blah, as may be required to assist a  
6 child with disability to benefit from special education.

7 I mean, I guess keeping him alive would assist  
8 him to benefit from special education, but I don't think  
9 that's what was meant by related services.

10 MR. OELSCHLAEGER: No, and again I think the  
11 limitation in the Tatro case relates to services provided  
12 during the school day to get the child in the front door,  
13 to keep them there for the school day, and then to get  
14 them home.

15 QUESTION: And what's necessary to enable him to  
16 benefit. I mean, he has a disability that distinctively  
17 prevents his making use of the educational facilities, but  
18 I don't -- to say that making sure the person can stay  
19 alive --

20 MR. OELSCHLAEGER: Oh, I think --

21 QUESTION: -- is a related service, it seems to  
22 me a great stretch.

23 MR. OELSCHLAEGER: It is a broad definition. I  
24 think the Court in Tatro recognized that and placed some  
25 limitations upon it, but the IDEA --

1 QUESTION: Oh, I don't think it's a broad  
2 definition. I mean, you can say Tatro is a broad  
3 decision, but the definition says, transportation and  
4 other supportive services as may be required to assist a  
5 child with a disability to benefit from special education.

6 MR. OELSCHLAEGER: Right, to benefit from the  
7 education.

8 QUESTION: Now, that would include enabling him  
9 to move around the room, enabling him to use books and so  
10 forth, but to say keeping him alive is part of it, I mean,  
11 that just expands related services --

12 MR. OELSCHLAEGER: Well --

13 QUESTION: -- beyond any limitation.

14 MR. OELSCHLAEGER: Except if the child dies  
15 obviously there's no benefit from education.

16 QUESTION: Well, of course. I mean, that's my  
17 point.

18 MR. OELSCHLAEGER: Then the other cost  
19 limitation, Your Honor, and again I think the district's  
20 primary position here is the cost, in the Rowley case the  
21 Court held that IDEA provides for a floor of educational  
22 opportunity.

23 Once the floor is met, if there are better and  
24 more expensive related services that would get a better  
25 result, the school district's not required to pay that,

1 and we're not asking for that in this case, so that is an  
2 additional cost limitation we believe contained in the  
3 IDEA, but again, cost just is not a factor in how you  
4 define related service or medical service.

5 QUESTION: Under the act, if it's determined  
6 under the plan that the child can't benefit from education  
7 in the school setting but could in some other  
8 institutional setting --

9 MR. OELSCHLAEGER: Right.

10 QUESTION: -- the school district is required to  
11 provide that institutional care?

12 MR. OELSCHLAEGER: In some circumstances, yes,  
13 in the institutional placement, and there are reported  
14 decisions on that, Your Honor.

15 There's also a home-based program, but we  
16 believe that the act also expresses a preference for  
17 mainstreaming. In section --

18 QUESTION: And that's what this case at this  
19 stage turns on, because as I understand it this child was  
20 in school with these services being -- the tab being  
21 picked up by something other than the school district's  
22 funds, and now the -- one of the answers that we have from  
23 the school district is, oh, don't worry, there'll be other  
24 funds to keep this child in school, but if you have to use  
25 our funds, then the alternative is home instruction, and



1 how would that -- what would -- how would the home  
2 instruction work?

3 MR. OELSCHLAEGER: Well, home-based instruction,  
4 Your Honor, and there's materials in the brief on this, is  
5 typically an hour or two a -- per week of instruction for  
6 the child at home, and that we would submit is not in  
7 keeping with the intent of the IDEA --

8 QUESTION: Thank you, Mr. --

9 MR. OELSCHLAEGER: -- mainstreaming in  
10 paragraph -- thank you.

11 QUESTION: -- Mr. Oelschlaeger.

12 Ms. Brinkmann, we'll hear from you.

13 ORAL ARGUMENT OF BETH S. BRINKMANN

14 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

15 SUPPORTING THE RESPONDENT

16 MS. BRINKMANN: Thank you --

17 QUESTION: Ms. Brinkmann, I notice that the  
18 letter to which Justice Breyer referred, it appears that  
19 it was -- the date of the inquiry was October 1, 1993, and  
20 the date of response was February 22, 1996. Does that  
21 mean that the Office of Special Education took 2-1/2 years  
22 to answer it?

23 MS. BRINKMANN: Your Honor, I'm not aware of the  
24 circumstances surrounding that delay. I apologize for  
25 that lack of knowledge. I do know that sometimes these

1 inquiries come in and the Department of Education may ask  
2 informally for additional information in a particular  
3 case. I'm not sure of the circumstances surrounding this,  
4 but --

5 QUESTION: It certainly shouldn't have taken 2-  
6 1/2 years to write such an unhelpful letter.

7 MS. BRINKMANN: I would --

8 (Laughter.)

9 MS. BRINKMANN: I would think not, Your Honor.  
10 The important facts here -- and I think that  
11 what the Court has to focus on is that the services here  
12 are not excluded as medical services because they do not  
13 need to be provided by a physician.

14 There are three main reasons why that is  
15 correct. First, it's consistent with the Secretary of  
16 Education's longstanding interpretation, which I will  
17 discuss.

18 Second, that interpretation was adopted by  
19 Congress in 1983 when it said no to the Secretary's  
20 attempt to broaden the medical exclusion, and when  
21 Congress enacted a specific prohibition, section 806 of  
22 IDEA, telling the Secretary of Education that he could not  
23 promulgate new regulations that lessened the protections  
24 of those regulations, these regulations at issue here,  
25 including the related services provision.

1           And third, because this Court in Tatro  
2 recognized that the Secretary's regulations are properly  
3 interpreted to exclude only physician-provided services  
4 and to include school health services, and --

5           QUESTION: Well, is there no --

6           QUESTION: What's the date of Tatro? Did that  
7 amendment come before or after Tatro was on the books?

8           MS. BRINKMANN: It came before Tatro, Your  
9 Honor, in fact, the year before.

10           I've looked into the briefs and did not find it  
11 brought to the Court's attention, unfortunately.

12           QUESTION: Is there no limit, in your view, to  
13 the extent of nursing care services that may have to be  
14 provided to a child?

15           MS. BRINKMANN: There are limits in other  
16 aspects of the act, Your Honor. One of those provisions  
17 we cited -- we quote at page 9 of our brief. It's section  
18 1412(5)(B). That's what's often called the least  
19 restrictive environment provision, or the mainstreaming  
20 provision, and that explains that the preference, as my  
21 cocounsel indicated, is to put children with disabilities  
22 in a regular classroom environment, but it recognized that  
23 that may not always occur.

24           There may be instances when -- and I'm quoting  
25 from page 9 -- the nature or severity of the disability is

1 such that education in the regular classroom with the use  
2 of supplementary aids and services cannot be achieved  
3 satisfactorily, so there are -- that's certainly a  
4 limitation on services that would be required.

5 QUESTION: -- alternative, placing the child in  
6 an institutional facility, is that required?

7 MS. BRINKMANN: Yes, it is. It all comes  
8 down -- the core of a placement for a child, Your Honor,  
9 under this program is the individualized education  
10 program. That placement may be at home. That may be in  
11 some kind of institutional setting. That's correct.

12 If I could, I'd like to address the Secretary of  
13 Education's interpretation, and it's very important, I  
14 think, to look at that time period when Congress adopted  
15 this in 1983, and if you look at the appendix to our brief  
16 at page 4a you'll see at the bottom the codified section  
17 is 1407(b), and the heading of that section is lessening  
18 of procedural or substantive protections as in effect on  
19 July 20, 1983 is prohibited.

20 These are the substantive protections that were  
21 in effect at that time, and the prior year, 1982, the  
22 Secretary of Education had issued a proposed rule-making  
23 explaining that it wanted to -- he wanted to broaden the  
24 medical services exclusion.

25 On page 22 of our brief --



1 QUESTION: But we didn't know at that time that  
2 what those regulations meant was Tatro.

3 MS. BRINKMANN: We did, Your Honor, because on  
4 page 22 in the Federal Register at the last sentence of  
5 our second full paragraph on page 22 we quote from that  
6 Federal Register proposal, quote: The existing  
7 regulations define medical services as services provided  
8 by a licensed physician, and the proposed changes, the  
9 Secretary is very explicit that he wanted to broaden that  
10 medical exclusion to consider factors precisely what  
11 petitioner is urging, such as cost. Moreover --

12 QUESTION: All right, so that isn't what they  
13 provided. I mean, the existing regulations were  
14 regulations that talked about when a doctor diagnoses,  
15 like a nurse, is that right?

16 MS. BRINKMANN: The existing regulation is what  
17 we currently have, where it has --

18 QUESTION: Yes, the --

19 MS. BRINKMANN: -- the inclusion of school  
20 health services and then defines the excluded medical  
21 services, but it's certainly a legitimate --

22 QUESTION: Did I -- the one we read before? In  
23 other words, the one at the end of your brief.

24 MS. BRINKMANN: Yes.

25 QUESTION: The one on page 8a -- all right.

1           Now, is there any -- is there a way that we can  
2 use a -- there are two things that we have to suggest this  
3 is the agency's position. One, of course, is just what  
4 you read, a statement, perhaps not too accurate, of what  
5 the position previously had been in a request for --

6           MS. BRINKMANN: Uh-huh.

7           QUESTION: -- comments, et cetera, and second,  
8 your brief, so if I were to go on those two things I'd say  
9 yes, that is what the agency's --

10          MS. BRINKMANN: No, Your Honor. We believe  
11 there are additional things.

12          QUESTION: All right.

13          MS. BRINKMANN: There is that statement in the  
14 notice of proposed rule-making in 1982, and that's fully  
15 consistent with earlier letters.

16                 It had only been since 1977 that the regulation  
17 was in place, and at pages 17 to 18 of our brief we talk  
18 about the letters the petitioner's counsel referred to  
19 about psychotherapy services and the Department had  
20 explained there that if those services are administered by  
21 a licensed physician, those are excluded medical services,  
22 but if there are services provided by other professionals  
23 such as a psychiatric social worker, et cetera, those  
24 would not be excluded.

25                 And there's also a footnote on page 18 in note

1 11 explaining the distinction in the context of optometry.  
2 That note also -- footnote also explains then answers the  
3 questions about diagnosis being able to be provided by  
4 people other than physicians.

5 I would also point out, sir, there were the  
6 earlier letters. There's the 1992 proposed regulation  
7 that clearly states it. Moreover, looking at what the  
8 Secretary of Education wanted to do was -- just reinforces  
9 the fact that the status quo at that time, which is what  
10 we still have, was this bright line distinction.

11 QUESTION: Ms. Brinkmann, I find it difficult to  
12 accept that, for this simple reason. If there had been  
13 this bright line physician-nonphysician, you would expect  
14 that to be broadcast all over the agency so that when --  
15 bright line test, easy for all the administrators. You  
16 would never get a letter like that letter in '96.

17 MS. BRINKMANN: I'd like to explain that letter.  
18 I think in order to understand the letter you have to  
19 understand the circumstances.

20 That letter actually does reinforce the  
21 Secretary's position. What it says is that you have to  
22 look at it on a case-by-case basis to determine whether  
23 it's a required related service.

24 You have to decide under the Tatro thing, for  
25 example, whether or not the child is disabled, requires

1 special education, whether it needs to be provided by  
2 the --

3 QUESTION: Where does it say there's a bright  
4 line between physician and nonphysician?

5 MS. BRINKMANN: No, it doesn't say bright line,  
6 Your Honor, not at all. You're correct about that, of  
7 course. But what the letter was doing was responding to  
8 this question, and if petitioner were correct, the answer  
9 in that letter would have been, it's excluded medical, end  
10 of story, and there would have been no further analysis  
11 of --

12 QUESTION: Well, Ms. Brinkmann, a whole -- a  
13 majority of the courts of appeals have rejected your  
14 bright line approach.

15 MS. BRINKMANN: Yes.

16 QUESTION: I mean, if we affirm here we  
17 certainly will be going against a majority of the Federal  
18 appellate courts.

19 MS. BRINKMANN: Your Honor, I think to rule  
20 otherwise would clearly be inconsistent with the Court's  
21 ruling in Tatro, and Congress' positive statutory  
22 enactment that we cite at page 8a that adopts as a floor  
23 these regulations.

24 And I have to add, Your Honor, several of those  
25 courts of appeals are on summary affirmances without much



1 analysis, and also there's just straightforward statements  
2 about disagreeing with the policy undergirding the  
3 Secretary's regulations, so we think that that's no reason  
4 to ignore the Court's precedents about the deference that  
5 is owed to the Department of Education.

6 QUESTION: What are we supposed to do if I  
7 think, look, this is a question that cries out for agency  
8 interpretation, but the agency doesn't interpret it, so  
9 instead you have seven courts who know little about it  
10 going in 15 different directions.

11 MS. BRINKMANN: Again, Your Honor --

12 QUESTION: What is the -- what is our ability to  
13 cure that problem?

14 MS. BRINKMANN: Well, again Your Honor, I would  
15 urge you to look at this letter in the context, if you --  
16 you realize that what the agency was explaining is that  
17 yes, this is an eligible school health service. It's not  
18 an excluded medical service. But just because it's  
19 eligible doesn't mean it's a required related service.

20 These letters could not decide that. It has to  
21 be decided by the individual education program in the  
22 context of a particular case.

23 Moreover, petitioners have cited nothing that  
24 the agency has ever published that has ever said anything  
25 is excluded as a medical service that was not provided by

1 a physician, nothing.

2 QUESTION: Your position is clear in your brief.  
3 I have seen nothing from the agency that was clear up  
4 until the position that it is now taking in this Court.

5 MS. BRINKMANN: Your Honor, I would point out in  
6 addition to the proposed rule-making that we cite on page  
7 22, which I think is the unequivocal statement in those  
8 earlier letters about the psychotherapy and the  
9 optometrist, that also at the time of this proposed change  
10 in the regulation, and Congress' adoption, incorporation,  
11 codification, ratification of this regulation, the lower  
12 courts actually agreed with that bright line.

13 You had the Fifth Circuit -- may I finish?

14 QUESTION: No. Your time has expired.

15 MS. BRINKMANN: Thank you, Your Honor.

16 QUESTION: Ms. Seitz, you have 4 minutes  
17 remaining.

18 REBUTTAL ARGUMENT OF SUSAN L. SEITZ

19 ON BEHALF OF THE PETITIONER

20 MS. SEITZ: Thank you. I would like to address  
21 just a couple of questions that were raised of my  
22 colleague, Ms. Brinkmann.

23 I believe that Justice Scalia asked why if a  
24 nurse is making assessments of his health condition that  
25 doesn't fall under the exception to the exception. That's

1 because the diagnostic and evaluation services referred to  
2 in the statute are diagnostic and evaluation services for  
3 determining eligibility for special education under the  
4 act. It's not dealing with diagnosis and evaluation of a  
5 medical condition for medical treatment.

6 Okay, I'd also like to deal with Ms. Brinkmann's  
7 discussion of the agency proposed rule-making in 1982 --  
8 excuse me.

9 I'm looking, and I -- this is not cited in any  
10 of the appendix, so I'm going to have to give you a  
11 citation to the Federal Register. It's Volume 47, and it  
12 appears at page 33,838, probably -- excuse me. 33846  
13 through 33848.

14 In fact, the proposed agency regulations in  
15 1982, it says in the prelude, the prologue to the proposed  
16 regulation, the most persistent problems involve  
17 determining whether certain health-related services are to  
18 be provided, clearly finding that there was confusion over  
19 what was a medical service, over what was a related  
20 service. It does not say there was a longstanding bright  
21 line rule going back to 1977.

22 Nor do I think you can look at the statutory  
23 amendment in '83 as ratifying the bright line, because if  
24 you look at the proposed regulation in the area of medical  
25 services, what was being proposed by the Secretary in 1982

1 was to exclude all life sustaining procedures that could  
2 be performed under sterile conditions -- that would be  
3 CIC. It would have been clearly excluded -- must be  
4 administered by licensed health care professionals, would  
5 have excluded all school nursing services, medication  
6 administration.

7 Just because Congress went on in 1983 and said  
8 you can't lessen the procedural or substantive rights, I  
9 don't think you can say they endorsed a bright line  
10 physician-non --

11 QUESTION: It doesn't mean that Congress knew  
12 what those rights were. They just knew, whatever they  
13 were, we don't want them lessened.

14 MS. SEITZ: That's correct, and there were six  
15 areas, not just related services that were being proposed,  
16 amendments. I don't think we can draw any conclusion from  
17 that legislative amendment in '83.

18 QUESTION: Why isn't a -- why isn't a sort of  
19 vague rule, unclear, et cetera, now interpreted, better  
20 than nothing?

21 MS. SEITZ: That would be helpful. I don't  
22 think that we can -- when Ms. Brinkmann said that we have  
23 not cited any agency regulation on excluded -- any agency  
24 interpretation on excluded medical services, I agree,  
25 there aren't any agency regulations or interpretations on



1 excluded, so you have to look to the case law. That's why  
2 we've had six circuits.

3 QUESTION: Is there any information in the  
4 population that's covered by this statute, how many  
5 children, or what percentage would require the continuous  
6 care?

7 MS. SEITZ: Unfortunately, there really isn't.  
8 The stat -- the Federal statute, unlike our State statute,  
9 has specific categories of disabilities. Most of these  
10 children, though not necessarily all of them, would come  
11 under other health-impaired, and all we know is that 5  
12 percent of those treated are treated as other health-  
13 impaired, but we don't have any statistics --

14 QUESTION: Well, Ms. Seitz, if the fact is that  
15 if a child needs so much care that the school district  
16 thinks that it can't do it on site, it may cost the school  
17 district a lot more money to place the child in  
18 institutional care.

19 MS. SEITZ: Okay, I'm glad you brought that up,  
20 because I wanted to respond to your question on that,  
21 Justice O'Connor.

22 What the statute provides is that the district  
23 has to provide -- may I finish my answer?

24 QUESTION: Yes, surely.

25 MS. SEITZ: Okay. Has to provide educational

1 and related services in homes, hospitals, institutions.  
2 They don't pay for the institution. They provide the  
3 educational and related services.

4 QUESTION: Okay.

5 CHIEF JUSTICE REHNQUIST: Thank you.

6 MS. SEITZ: Thank you.

7 (Whereupon, at 12:06 p.m., the case in the  
8 above-entitled matter was submitted.)

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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT, Petitioner v. GARRETT F., A MINOR BY HIS MOTHER AND NEXT FRIEND, CHARLENE F.  
CASE NO: 96-1793

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.