SUPREME COURT OF THE UNITED STATES

No. 96–1793

CEDAR RAPIDS COMMUNITY SCHOOL DISTRICT, PETITIONER *v.* GARRET F., A MINOR BY HIS MOTHER AND NEXT FRIEND, CHARLENE F.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[March 3, 1999]

JUSTICE THOMAS, with whom JUSTICE KENNEDY joins, dissenting.

The majority, relying heavily on our decision in *Irving Independent School Dist.* v. *Tatro*, 468 U. S. 883 (1984), concludes that the Individuals with Disabilities Education Act (IDEA), 20 U. S. C. §1400 *et seq.*, requires a public school district to fund continuous, one-on-one nursing care for disabled children. Because *Tatro* cannot be squared with the text of IDEA, the Court should not adhere to it in this case. Even assuming that *Tatro* was correct in the first instance, the majority's extension of it is unwarranted and ignores the constitutionally mandated rules of construction applicable to legislation enacted pursuant to Congress' spending power.

I

As the majority recounts, *ante*, at 1, IDEA authorizes the provision of federal financial assistance to States that agree to provide, *inter alia*, "special education and related services" for disabled children. §1401(a)(18). In *Tatro*, *supra*, we held that this provision of IDEA required a school district to provide clean intermittent catheterization to a disabled child several times a day. In so holding, we relied on Department of Education regulations, which

we concluded had reasonably interpreted IDEA's definition of "related services"[1] to require school districts in participating States to provide "school nursing services" (of which we assumed catheterization was a subcategory) but not "services of a physician." *Id.*, at 892–893. This holding is contrary to the plain text of IDEA and its reliance on the Department of Education's regulations was misplaced.

A

Before we consider whether deference to an agency regulation is appropriate, "we first ask whether Congress has 'directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *National Credit Union Admin.* v. *First Nat. Bank & Trust Co.*, 522 U. S. 479, 499–500 (1998) (quoting *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984)).

Unfortunately, the Court in *Tatro* failed to consider this necessary antecedent question before turning to the Department of Education's regulations implementing IDEA's related services provision. The Court instead began "with the regulations of the Department of Education, which," it said, "are entitled to deference." *Tatro, supra,* at 891–892. The Court need not have looked beyond the text of IDEA,

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[1] The Act currently defines "related services" as "transportation and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, *except that such medical services shall be for diagnostic and evaluation purposes only*) as may be required to assist a child with a disability to benefit from special education . . . ." 20 U. S. C. §1401(a)(17) (emphasis added).

which expressly indicates that school districts are not required to provide medical services, except for diagnostic and evaluation purposes. 20 U. S. C. §1401(a)(17). The majority asserts that *Tatro* precludes reading the term "medical services" to include "all forms of care that might loosely be described as 'medical.'" *Ante*, at 8. The majority does not explain, however, why "services" that are "medical" in nature are not "medical services." Not only is the definition that the majority rejects consistent with other uses of the term in federal law,[2] it also avoids the anomalous result of holding that the services at issue in *Tatro* (as well as in this case), while not "medical services," would nonetheless qualify as medical care for federal income tax purposes. *Ante*, at 8.

The primary problem with *Tatro*, and the majority's reliance on it today, is that the Court focused on the provider of the services rather than the services themselves. We do not typically think that automotive services are limited to those provided by a mechanic, for example. Rather, anything done to repair or service a car, no matter who does the work, is thought to fall into that category. Similarly, the term "food service" is not generally thought to be limited to work performed by a chef. The term "medical" similarly does not support *Tatro*'s provider-specific approach, but encompasses services that are "of, *relating to, or concerned with* physicians *or* the practice of

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[2] See, *e.g.*, 38 U. S. C. §1701(6) ("The term 'medical services' includes, in addition to medical examination, treatment and rehabilitative services . . . surgical services, dental services . . . , optometric and podiatric services, . . . preventive health services, . . . [and] such consultation, professional counseling, training, and mental health services as are necessary in connection with the treatment"); §101(28) ("The term 'nursing home care' means the accommodation of convalescents . . . who require nursing care and related medical services"); 26 U. S. C. §213(d)(1) ("The term 'medical care' means amounts paid— . . . for the diagnosis, cure, mitigation, treatment, or prevention of disease").

medicine." See Webster's Third New International Dictionary 1402 (1986) (emphasis added); see also *id*., at 1551 (defining "nurse" as "a person skilled in caring for and waiting on the infirm, the injured, or the sick; *specif*: one esp. trained to carry out such duties under the supervision of a physician").

IDEA's structure and purpose reinforce this textual interpretation. Congress enacted IDEA to increase the *educational* opportunities available to disabled children, not to provide medical care for them. See 20 U. S. C. §1400(c) ("It is the purpose of this chapter to assure that all children with disabilities have . . . a free appropriate public education"); see also §1412 ("In order to qualify for assistance . . . a State shall demonstrate . . . [that it] has in effect a policy that assures all children with disabilities the right to a free appropriate public education"); *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176, 179 (1982) ("The Act represents an ambitious federal effort to promote the education of handicapped children"). As such, where Congress decided to require a supportive service– including speech pathology, occupational therapy, and audiology– that appears "medical" in nature, it took care to do so explicitly. See §1401(a)(17). Congress specified these services precisely because it recognized that they would otherwise fall under the broad "medical services" exclusion. Indeed, when it crafted the definition of related services, Congress could have, but chose not to, include "nursing services" in this list.

B

Tatro was wrongly decided even if the phrase "medical services" was subject to multiple constructions, and therefore, deference to any reasonable Department of Education regulation was appropriate. The Department of Education has never promulgated regulations defining the scope of IDEA's "medical services" exclusion. One year before

Tatro was decided, the Secretary of Education issued proposed regulations that defined excluded medical services as "services relating to the practice of medicine." 47 Fed. Reg. 33838 (1982). These regulations, which represent the Department's only attempt to define the disputed term, were never adopted. Instead, "[t]he regulations actually define only those 'medical services' that *are* owed to handicapped children," *Tatro*, 468 U. S., at 892, n. 10) (emphasis in original), not those that *are not*. Now, as when *Tatro* was decided, the regulations require districts to provide services performed "'by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.'" *Ibid*. (quoting 34 CFR §300.13(b)(4) (1983), recodified and amended as 34 CFR §300.16(b)(4) (1998).

Extrapolating from this regulation, the *Tatro* Court presumed that this meant "that 'medical services' not owed under the statute are those 'services by a licensed physician' that serve other purposes." *Tatro*, *supra*, at 892, n. 10 (emphasis deleted). The Court, therefore, did not defer to the regulation itself, but rather relied on an inference drawn from it to speculate about how a regulation might read if the Department of Education promulgated one. Deference in those circumstances is impermissible. We cannot defer to a regulation that does not exist.[3]

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[3] Nor do I think that it is appropriate to defer to the Department of Education's litigating position in this case. The agency has had ample opportunity to address this problem but has failed to do so in a formal regulation. Instead, it has maintained conflicting positions about whether the services at issue in this case are required by IDEA. See *ante*, at 7–8, n. 6. Under these circumstances, we should not assume that the litigating position reflects the "agency's fair and considered judgment." *Auer* v. *Robbins*, 519 U. S. 452, 462 (1997).

II

Assuming that Tatro was correctly decided in the first instance, it does not control the outcome of this case. Because IDEA was enacted pursuant to Congress' spending power, *Rowley*, *supra*, at 190, n. 11, our analysis of the statute in this case is governed by special rules of construction. We have repeatedly emphasized that, when Congress places conditions on the receipt of federal funds, "it must do so unambiguously." *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981). See also *Rowley*, *supra*, at 190, n. 11; *South Dakota* v. *Dole*, 483 U. S. 203, 207 (1987); *New York* v. *United States*, 505 U. S. 144, 158 (1992). This is because a law that "condition[s] an offer of federal funding on a promise by the recipient . . . amounts essentially to a contract between the Government and the recipient of funds." *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274, 276 (1998). As such, "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, *supra*, at 17 (citations omitted). It follows that we must interpret Spending Clause legislation narrowly, in order to avoid saddling the States with obligations that they did not anticipate.

The majority's approach in this case turns this Spending Clause presumption on its head. We have held that, in enacting IDEA, Congress wished to require "States to educate handicapped children with nonhandicapped children whenever possible," *Rowley*, 458 U. S., at 202. Congress, however, also took steps to limit the fiscal burdens that States must bear in attempting to achieve this laudable goal. These steps include requiring States to provide an education that is only "appropriate" rather that re-

quiring them to maximize the potential of disabled students, see 20 U. S. C. §1400(c); *Rowley, supra,* at 200, recognizing that integration into the public school environment is not always possible, see §1412(5), and clarifying that, with a few exceptions, public schools need not provide "medical services" for disabled students, §§1401(a)(17) and (18).

For this reason, we have previously recognized that Congress did not intend to "impos[e] upon the States a burden of unspecified proportions and weight" in enacting IDEA. *Rowley, supra,* at 176, n. 11. These federalism concerns require us to interpret IDEA's related services provision, consistent with *Tatro,* as follows: Department of Education regulations require districts to provide disabled children with health-related services that school nurses can perform as part of their normal duties. This reading of *Tatro,* although less broad than the majority's, is equally plausible and certainly more consistent with our obligation to interpret Spending Clause legislation narrowly. Before concluding that the district was required to provide clean intermittent catheterization for Amber Tatro, we observed that school nurses in the district were authorized to perform services that were "difficult to distinguish from the provision of [clean intermittent catheterization] to the handicapped." *Tatro,* 468 U. S., at 893. We concluded that "[i]t would be strange indeed if Congress, in attempting to extend special services to handicapped children, were unwilling to guarantee them services of a kind that are routinely provided to the nonhandicapped." *Id.*, at 893–894.

Unlike clean intermittent catheterization, however, a school nurse cannot provide the services that respondent requires, see *ante,* at 3, n. 3, and continue to perform her normal duties. To the contrary, because respondent requires continuous, one-on-one care throughout the entire school day, all agree that the district must hire an addi-

tional employee to attend solely to respondent. This will cost a minimum of $18,000 per year. Although the majority recognizes this fact, it nonetheless concludes that the "more extensive" nature of the services that respondent needs is irrelevant to the question whether those services fall under the medical services exclusion. *Ante*, at 9. This approach disregards the constitutionally mandated principles of construction applicable to Spending Clause legislation and blindsides unwary States with fiscal obligations that they could not have anticipated.

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For the foregoing reasons, I respectfully dissent.