No. 96-1793

In the Supreme Court of the United States

OCTOBER TERM, 1997

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

SETH P. WAXMAN
Solicitor General
Counsel of Record

BILL LANN LEE
Acting Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

DAVID K. FLYNN
SETH M. GALANTER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, requires States receiving federal special education funds to provide special education and "related services" to students with disabilities. "Related services" are defined to include supportive services that are required to assist a child with a disability to benefit from special education, but exclude "medical services" unless they are for diagnosis or evaluation. 20 U.S.C. 1401(a)(17).

The question presented is:

Whether the Secretary of Education's "related services" regulation, 34 C.F.R. 300.16, reasonably interprets the "medical services" exclusion to exclude only services provided by a physician, and not health services provided by a qualified school nurse or other qualified non-physician.

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INTEREST OF THE UNITED STATES

The United States Department of Education has responsibility for the administration and enforcement of the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. 1413(c), 1416(a), 1417(b), 1420. In response to the Court's invitation, the United States filed a brief as amicus curiae at the petition stage in this case.

STATEMENT

1. a. Respondent is a student in the petitioner school district. He was severely injured in an accident in 1987, when he was four years old. Pet. App. 9a, 19a.[1] The accident left him paralyzed from the neck down. Respondent has com-

[1] Our factual statement includes facts set forth in the decision of the Iowa state administrative law judge (ALJ), as well as the record before the ALJ. Neither party introduced any additional evidence before the district court. The ALJ's factual findings are treated as correct in petitioner's submissions to this Court and are entitled to due weight. See *Board of Educ. of Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 206 (1982).

plete head movement, has normal mental capacity, is able to speak, is able to operate his motorized wheelchair through use of a puff and suck straw, and is able to control his computer through the use of a device attuned to his head movements. *Id.* at 9a, 19a; Tr. 29, 84-85, 291-292. Respondent is "academically successful in school" and, at the time of the administrative hearing, his most recent report card included several A's, one B-plus, and one C. Pet. App. 19a. Respondent is knowledgeable about his health care and is able orally to instruct others about his needs. *Id.* at 20a; Tr. 79-80, 85, 463.

Respondent's respiratory muscles are paralyzed, so that he needs external aids to breathe, usually an electric ventilator. Pet. App. 19a, Tr. 41. The ventilator is connected to a tube inserted into an incision in his trachea (a tracheotomy tube). Tr. 332. From time to time, it is necessary to suction respondent's lungs through the tube to remove secretions that would normally be discharged by swallowing or coughing; the ventilator signals when that is necessary. Tr. 37. During the suctioning process, and during any other period when the ventilator is not functioning, air must be pumped in manually through an air bag attached to the tracheotomy tube. Pet. App. 19a, 24a. That suctioning and bagging are simple processes regularly performed by respondent's friends and family. Pet. App. 21a; Tr. 32, 176-177.

When respondent is not at school, his health care is provided during the day and on weekends by family members and friends who are familiar with his needs. Pet. App. 21a. On week nights, a health care provider is in respondent's home during the sleeping hours to attend to his needs, including turning him in his sleep every two hours. *Ibid.* That health care provider is a licensed practical nurse (L.P.N.) who is supervised by a registered nurse (R.N.) who is not on site. *Ibid.*

b. In the fall of 1988, respondent began attending school in the petitioner school district. Pet. App. 19a, 23a. Re-

spondent needs special assistance with his education program and with health matters in order to benefit from that education program. Pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, Iowa receives federal special education funds and is, therefore, required to provide "special education and related services" to respondent and other students with disabilities. 20 U.S.C. 1400(c). "[R]elated services" are defined by statute to include supportive services that are required to assist a student with a disability to benefit from special education, but exclude "medical services" unless they are for diagnosis or evaluation. 20 U.S.C. 1401(a)(17).

Petitioner provides respondent special education and certain related services, including special assistance through a one-on-one teacher associate who continuously helps with respondent's needs such as page turning, note taking, computer set up, transporting of books, and maneuvering about the school building; special transportation services; and occupational therapy. Pet. App. 27a, 58a; Tr. 29-30. And petitioner provides devices, such as a computer, special software, and other instructional materials, that serve respondent's unique educational needs. Pet. App. 27a; Pet. 3. Petitioner does not dispute its statutory responsibility to provide the foregoing services.

In 1993, when respondent was about to start fifth grade, his family requested that the petitioner school district, pursuant to its obligations under IDEA and Iowa special education law, provide respondent certain health services that he needs in order to assist him to benefit from special education.[2] Respondent requested that petitioner make

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[2] In earlier years, respondent's parents apparently had made similar requests that had been denied, Pet. App. 23a, Tr. 94-95, 637-638, and the family had managed to pay for the health services through a combination of a settlement fund from respondent's accident and insurance policies (of which one ceased payment because the coverage limit was reached and an-

available someone to be in the vicinity of respondent: to assist with the ventilator management as described above; to assist with urinary bladder catheterization once a day; to suction respondent's tracheotomy tube as needed (or once every six hours); to get respondent into a reclining position for five minutes of each hour; and to be available for emergency procedures in the unlikely event respondent experiences autonomic hyperreflexia. Pet. App. 20a.[3] Respondent has never needed emergency care at school. *Id.* at 23a; Tr. 392.

Petitioner refused to pay for the requested health services. Although an individualized education program (IEP) was developed for respondent as required by IDEA,[4] school district staff members declined to include the requested services as part of that IEP, based "on advice from legal counsel" that the services were excluded "medical services" rather than "related services." Pet. App. 25a; Tr. 512, 524, 568-569; Exh. 93 at 390.

2. Respondent pursued an administrative appeal and, after a three-day evidentiary hearing, an Iowa state administrative law judge (ALJ) ruled in his favor. Pet. App. 17a-63a. The Iowa ALJ held that the health care services required by respondent are "related services" which must be

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other has an annual coverage limit that is normally exceeded by mid-year), Pet. App. 20a-21a.

[3] The ALJ found that autonomic hyperreflexia is an adverse reaction to anxiety or a full bladder that affects blood pressure and heart rate; respondent has experienced autonomic hyperreflexia rarely, and never at school, and it has usually been alleviated by catheterization. Pet. App. 20a.

[4] In States receiving IDEA funds (which as of August 1998 includes all States), each child with a disability must receive an "individualized educational program" (IEP) each year designed by a team that includes school representatives and parents. The team determines what services a child requires to receive a "free appropriate public education" in a regular education environment "to the maximum extent appropriate." 20 U.S.C. 1401(a)(18) and (20), 1412(5)(B), 1414(a)(5); *Honig* v. *Doe*, 484 U.S. 305, 311 (1988); *Rowley*, 458 U.S. at 181-182, 202.

provided by the district and not "medical services" excluded from that requirement by IDEA under 20 U.S.C. 1401(a)(17). Pet. App. 52a. The ALJ relied on *Irving Independent School District* v. *Tatro*, 468 U.S. 883 (1984), in which "the Court affirmed a Congressional and administrative distinction between nursing services and medical treatment as a related service" under IDEA. Pet. App. 43a. *Tatro* applied the Secretary's regulation providing that "the services of a school nurse could be required as a related service, and treatment by a 'licensed physician' could be excluded" under IDEA as a "medical service," finding that the regulation was a reasonable interpretation of the statute. *Id.* at 42a, 44a. The ALJ noted that *Tatro* did not treat expense, or the extent of the services required, as a factor for courts to consider. *Id.* at 42a. The ALJ ruled that a service is an excluded "medical service" if "the service '*must* be performed by a physician.'" *Id.* at 51a (quoting *Tatro*, 468 U.S. at 894). Applying that standard, the ALJ determined that the health care services required by respondent at school can be "provided by a 'qualified school nurse or other qualified person' and are thus 'school health services' required by IDEA as a related service." Pet. App. 52a.

Furthermore, the ALJ ruled that, even under the multifactor test applied by some courts that weighs expense, burden, extent and nature of the services, the health care services required by respondent are "related services" under IDEA. Pet. App. 52a.[5] The ALJ noted that the services

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[5] The cost of the required services depends primarily on the licensure of the person providing them, *i.e.*, a registered nurse (R.N.) is more expensive than a licensed practical nurse (L.P.N.) or a nonlicensed trained care provider. See Pet. App. 34a-36a. The parties agree that the services at issue need not be provided by a physician, but disagree regarding whether an R.N., an L.P.N., or a trained care provider is required. *Id.* at 20a. Petitioner contended below that an R.N. was required, but the Iowa Board of Nursing ruling on which petitioner relied was changed at petitioner's request following its loss below. See U.S. Amicus Br. on Pet. 9-10.

needed by respondent are similar to services already provided to other students in petitioner's school district—petitioner provides other students urinary catheterization, help with food and drink, oxygen supplement positioning, tracheostomy suctioning and bagging. The only service needed by respondent and not already provided by the school to other students is the monitoring of his ventilator. *Id.* at 53a. Finally, the ALJ held that "even if federal law did not require school health care services for [respondent], state law does." *Id.* at 58a; see also *id.* at 54a-55a. Thus it ordered petitioner to reimburse respondent for health-care costs incurred for the 1993-1994 school year. *Id.* at 63a.

3. Petitioner filed suit in federal district court pursuant to 20 U.S.C. 1415(e)(4) and 28 U.S.C. 1367, challenging the ALJ's decision on both state and federal grounds. Pet. App. 9a. On cross-motions for summary judgment, the district court affirmed the ALJ's determination, "[i]n accordance with the appropriate standards, in light of *Tatro*, and for the reasons set forth in the ALJ's thorough decision." *Id.* at 15a. The court ruled that the needed services were not excluded "medical services" under IDEA, but instead required "related services." *Id.* at 11a-15a. The court did not address the state law issues. *Id.* at 15a.

4. The court of appeals affirmed. Pet. App. 1a-7a. After finding that the services respondent requires "qualify as supportive services necessary to enable him to enjoy the benefit of special education" and that such services need not be provided by a physician, it held that they are "related services" which petitioner is required to provide. *Id.* at 6a. It explained that *Tatro* "established a bright-line test: the services of a physician (other than for diagnostic and evaluation purposes) are subject to the medical services exclusion, but services that can be provided in the school setting by a nurse or qualified layperson are not." *Ibid.* While acknowledging that its reading of *Tatro* conflicts with that of other circuits, it "decline[d] to seize dicta in *Tatro* to go beyond the

physician/non-physician test which the Supreme Court sets forth therein." *Id.* at 7a.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, requires that States receiving federal special education funds provide special education and "related services" to students with disabilities. "[R]elated services" are defined to include supportive services that are required to assist a child with a disability to benefit from special education, but exclude "medical services" unless they are for diagnosis or evaluation. 20 U.S.C. 1401(a)(17). The Secretary of Education properly interprets the term "medical services" in this context to mean only services provided by a physician, and not school health services that can be provided by a non-physician. That interpretation is supported by the plain language of the statute.

The Secretary of Education is authorized by Congress to issue regulations as necessary to carry out the requirements of IDEA, and his interpretation of the statutory term is entitled to administrative deference for that reason. Moreover, that interpretation is additionally entitled to respect because Congress ratified it when, in 1982, Congress opposed the then-Secretary's attempt to expand the medical services exclusion and to restrict the related services provision. And, in 1983, Congress enacted Section 6 of the Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, 97 Stat. 1357, 1359 (codified as amended, 20 U.S.C. 1407(b)), which prohibits the Secretary from implementing any regulation that would lessen the protections afforded children with disabilities under IDEA, as embodied in the Secretary's regulations then in effect, unless such new regulation reflects the clear and unequivocal intent of Congress in legislation. Thus, petitioner's attempt to construe the "medical services" exclusion to depend on factors such as cost is, in

essence, an effort to obtain through the courts what Congress rejected.

Petitioner's arguments concerning the financial burden it claims would be imposed by affirmance of the court of appeals' judgment ignore the steps Congress has taken to ensure that other federal and state sources assist local school districts to pay the costs of related services for many students.

ARGUMENT

THE SECRETARY OF EDUCATION'S REGULATION CORRECTLY INTERPRETS THE "MEDICAL SERVICES" EXCLUDED FROM COVERAGE UNDER IDEA TO BE SERVICES THAT MUST BE PROVIDED BY A PHYSICIAN

A. The Plain Language Of IDEA Shows That Excluded "Medical Services" Are Services Provided By A Physician And Not Health Services Provided By Non-Physicians

1. The central purpose of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, is to ensure that children with disabilities have available to them a "free appropriate public education" (FAPE) which includes "special education and related services designed to meet their unique needs." 20 U.S.C. 1400(c).[6] In order to qualify

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[6] The statute originally was entitled the Education of the Handicapped Act (EHA), Pub. L. No. 91-230, 84 Stat. 175 (1970), and has since been amended on numerous occasions, including when Congress enacted the Education for All Handicapped Children Act of 1975 (EAHCA) to amend the EHA in significant respects, and to define, for the first time, the terms "special education" and "related services." Pub. L. No. 94-142, 89 Stat. 773, 775. In 1990, Congress changed the title of the statute to the Individuals with Disabilities Education Act (IDEA). Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(a)(1) and (3), 104 Stat. 1103, 1141, 1142 (1990 Amendments). Most recently, Congress reauthorized and amended IDEA on June 4, 1997. See Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-

for assistance under IDEA, a State must demonstrate to the Secretary of Education (Secretary), *inter alia*, that it has in effect "a policy that assures all children with disabilities the right to a free appropriate public education," 20 U.S.C. 1412(1), and "procedures to assure that, to the maximum extent appropriate, children with disabilities, * * * are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily," 20 U.S.C. 1412(5)(B).

Congress defined FAPE to mean "special education and related services" that meet certain standards and are "provided at public expense, under public supervision and direction, and without charge." 20 U.S.C. 1401(a)(18). "[S]pecial education" is defined as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability," including instruction in classrooms, the home, hospitals and other settings. 20 U.S.C. 1401(a)(16). "[R]elated services" are:

> 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, and includes the early identi-

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17, 111 Stat. 37 (1997 Amendments). For a more detailed history of the statute's early evolution, see *Rowley*, 458 U.S. at 179-180.

> fication and assessment of disabling conditions in children.

20 U.S.C. 1401(a)(17).[7]

The term "related services" is not limited to the services enumerated in the statute as "other supportive services," as is plain from the fact that Congress introduced that list by use of the term "including." See *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 n.9 (1985); *American Surety Co.* v. *Marotta*, 287 U.S. 513, 517 (1933). On its face, the statute requires States to provide as "related services" all services "as may be required to assist a child with a disability to benefit from special education," with the single exception of nondiagnostic and nonevaluative medical services. 20 U.S.C. 1401(a)(17).

It is undisputed that the services at issue in this case are required to assist respondent to benefit from his special education program. The services "fall squarely within the definition of a 'supportive service'" for the same reason that catheterization did in *Irving Independent School District* v. *Tatro*, 468 U.S. 883 (1984): because without the services respondent "cannot attend school and thereby 'benefit from special education.'" 468 U.S. at 890; Pet. App. 59a ("If the District refuses to provide health care and the family can't provide it," the "only apparent alternative is a homebound program."); Tr. 87, 637-638, 661. As the *Tatro* Court explained, "[s]ervices * * * that permit a child to remain at

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[7] The statutory provisions at issue in this case have been altered only slightly during the course of the various statutory amendments described in note 6, *supra*. See, *e.g.*, 1990 Amendments, § 101(c), 104 Stat. 1103 (adding "therapeutic recreation," "social work services," and "rehabilitation counseling" as examples of supportive services that are included under the "related services" definition); 1997 Amendments, § 101, 111 Stat. 45 (adding "orientation and mobility" to the listed examples of supportive services). Unless otherwise noted, we cite to the 1994 codified version of IDEA in effect before the 1997 amendments and during the year for which respondent sought payment from petitioner for the challenged services.

school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school," all of which are required by IDEA. 468 U.S. at 891.

2. Petitioner contends that the services respondent requires are not "related services" under IDEA because they fall within the exception carved out by Congress for "medical services." In defining "related services" Congress listed, as an example, "medical services, except that such medical services shall be for diagnostic and evaluation purposes only." 20 U.S.C. 1401(a)(17). It is undisputed that the services at issue here are not for diagnosis or evaluation. Therefore, if they are "medical services," they are not "related services" under IDEA.

Congress did not define the term "medical services" in IDEA. Thus, we start with the "'ordinary, contemporary, common meaning.'" *Walters* v. *Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 664 (1997). The adjective "medical" is commonly understood to mean "of, relating to, or concerned with physicians or with the practice of medicine often as distinguished from surgery." *Webster's Third International Dictionary* 1402 (1986). For example, a person who goes to "medical school" is understood to be training to be a physician. In most States, the "Medical Practice Act" regulates physicians and generally bars anyone but physicians from "practicing medicine." See generally Federation of State Medical Boards of the United States, *A Guide to the Essentials of a Modern Medical Practice Act* (1985), *reprinted in Medical Malpractice: Hearings Before the Subcomm. on Health & the Env't of the House Comm. on Energy & Commerce*, 99th Cong., 2d Sess. 393-421 (1986). Iowa, for example, has a "Board of Medical Examiners" to license and regulate physicians, and a "Board of Nursing" to license and regulate nurses. See Iowa Code Ann. 148.1-148.13, 152.1-152.12 (West 1997).

Petitioner suggests (Br. 14-15, 34) that the statutory language should be interpreted not according to its plain meaning but instead according to a five-factor test; in determining whether services are "medical," courts should consider whether they are complex, continuous, outside the capabilities of existing school health personnel, expensive, or likely to have serious repercussions when improperly performed. That five-factor test finds no support in the statutory language. Moreover, each of the factors is contradicted by the examples of "related services" contained in the statute, or otherwise indisputably included among the services that schools must provide.

Many of the "related services" expressly listed in the statute, including "psychological services" and "physical and occupational therapy," may vary widely in complexity depending on the needs of the student receiving the services. 20 U.S.C. 1401(a)(17). Yet the statute is correctly interpreted to require provision of those services regardless of complexity otherwise the "cardinal principle of statutory construction" would be violated by not giving effect to every word of the statute. *Bennett* v. *Spear*, 117 S. Ct. 1154, 1166 (1997); *United Food and Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 517 U.S. 544, 550 (1996).

So too, numerous continuous services are indisputably required by IDEA. Congress heard testimony about the provision of continuous services to children with various disabilities during the legislative proceedings surrounding enactment of the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (EAHCA), which defined "related services" for the first time.[8] Indeed, peti-

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[8] See 121 Cong. Rec. 23,707 (1975) (statement of Rep. Quie) (readers for blind children); *Financial Assistance for Improved Educational Services for Handicapped Children: Hearings Before the Select Subcomm. on Educ. of the House Comm. on Educ. & Labor*, 93d Cong., 2d Sess. 261 (1974) (ratio of one-to-one may be required for most severely handicapped); *Education for All Handicapped Children, 1973-1974: Hearings*

tioner does not contest (Br. 5, 6-7, 19) that IDEA requires it to provide a full-time one-on-one associate to help respondent move about the building, turn pages, and manipulate other materials. Exh. 91 at 364; Pet. App. 27a; see also Tr. 546.

Persons other than existing school health personnel are often needed to provide many of the related services expressly listed in the statute including "speech pathology and audiology, psychological services, [and] physical and occupational therapy." 20 U.S.C. 1401(a)(17). As this Court recognized in *Tatro*, "Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as 'trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel.'" 468 U.S. at 893, quoting S. Rep. No. 168, 94th Cong., 1st Sess. 33 (1975).

Congress recognized that providing a free appropriate public education under IDEA would be costly. "There is no doubt that Congress has imposed a significant financial burden on States and school districts that participated in IDEA." *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 15 (1993). In enacting the EAHCA in 1975, Congress understood that, on average, special education and related services for a child with a disability cost two to three times more than a regular education. H.R. Rep. No. 332, 94th Cong., 1st Sess. 12 (1975). That ratio has remained constant over the ensuing 20 years. See S. Chaikind et al., *What Do We Know About the Costs of Special Education? A Selected Review*, 26 J. Spec. Educ. 344, 344-345 (1993).[9] The text and

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on S. 6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Public Welfare, 93d Cong., 1st Sess., Pt. 1 at 1467 (1973) (one to one relationship required in some instances).

[9] The costs of IDEA services should be viewed comparatively. If a child with a disability cannot receive the free appropriate public education he requires at school, then the school district will have to provide it in a home or an institutional setting. It thus could be necessary for school

history of the statute show that Congress addressed cost concerns through other provisions of IDEA, and not by excluding related services on the basis of cost. See pp. 24-30, *infra*.

Finally, services that can have catastrophic consequences when improperly performed are indisputably included among the related services required by IDEA. The statute expressly lists psychological services, which can, in the case of a suicidal child, have extremely serious consequences. And catheterization—the service held to be a non-medical related service in *Tatro*—can lead to death if improperly performed. See *Lee* v. *Andrews*, 545 S.W.2d 238 (Tex. Civ. App. 1976).

Thus, none of petitioner's "factors" was intended or understood by Congress to be a basis for excluding services from IDEA's "related services" requirement. Neither alone nor in combination can those factors transform a nonmedical "related service" into an excluded "medical service."

3. Petitioner attempts (Br. 20-21) to find in this Court's precedents a general principle that statutes enacted pursuant to Congress's power under the Spending Clause, U.S. Const., Art. I, § 8, Cl. 1, should be construed to minimize the costs imposed on States, citing, *inter alia*, *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), and *Gebser* v. *Lago Vista Indep. Sch.Dist.*, 118 S.Ct. 1989 (1998), but it is mistaken. There is nothing in those cases to suggest that, when it is clear that Congress intended to impose privately enforceable obligations on recipients of federal funds to provide special education and related services, the scope of those obligations should be determined by anything other than normal rules of statutory construction. *Tatro*, 468 U.S.

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districts to pay for a one-on-one teacher to teach the child in his home. In Iowa, such services are paid for by an area education agency rather than by the school district, Tr. 284, which may explain why petitioner does not discuss them.

at 891 n.8; *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 665-666 (1985); *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987). In any event, IDEA was enacted not only pursuant to Congress's authority under the Spending Clause, but also pursuant to Section 5 of the Fourteenth Amendment. See 20 U.S.C. 1400(b)(9) (Congress declaring intent in enacting EAHCA to "assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law"); *Smith* v. *Robinson*, 468 U.S. 992, 1013 (1984) (holding that IDEA precludes claim based on Equal Protection Clause because Congress intended IDEA to be the exclusive "vehicle for protecting the constitutional right of a handicapped child to a public education"); *Rowley*, 458 U.S. at 180 n.2., 192-200.

Moreover, two principles of statutory construction point in the opposite direction from petitioner's proposed approach: first, the canon that exceptions should be narrowly construed, see *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 731-732 (1995); *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993); and second, the principle that statutes, including those creating federal programs under the Spending Clause, are to be construed with deference to the regulations of the administering agency, see, *e.g.*, *Regions Hosp.* v. *Shalala*, 118 S. Ct. 909, 915 (1998); *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 414-420 (1993); *Rust* v. *Sullivan*, 500 U.S. 173, 184-190 (1991).

B. The Secretary Of Education's Interpretation Of The "Medical Services" Exclusion Is Reasonable, Longstanding, And Entitled To Deference

1. Congress delegated substantial authority to the Secretary under IDEA, including the power to review state plans, 20 U.S.C. 1413(c), to disburse federal funds, 20 U.S.C. 1420, and to withhold federal funds if there is a failure to comply with statutory requirements, 20 U.S.C. 1416(a). Congress

also entrusted the Secretary with the authority to issue "such rules and regulations as may be necessary," to carry out the requirements of IDEA. 20 U.S.C. 1417(b). The Secretary's regulations are "entitled to 'legislative effect,' and [are] controlling 'unless [they are] arbitrary, capricious, or manifestly contrary to the statute.'" *Atkins* v. *Rivera*, 477 U.S. 154, 162 (1986) (citations omitted); see *Tatro*, 468 U.S. at 891-892 (deferring to Secretary's IDEA regulations); *Honig* v. *Doe*, 484 U.S. 305, 325 n.8 (1988) (same); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Deference to the Secretary's interpretation of his own regulation is particularly appropriate here because of the longstanding nature of his interpretation. See *Zenith Radio Corp.* v. *United States*, 473 U.S. 433, 450 (1978); see also *Auer* v. *Robbins*, 117 S. Ct. 905, 911 (1997); *Honig*, 484 U.S. at 325 n.8 (deferring to Department of Education policy letter).

2. The "related services" regulation at issue here was initially promulgated in its current form in 1977, 42 Fed. Reg. 42,479 (1977) (codified at 45 C.F.R. 121a.13 (1978)), and is currently found at 34 C.F.R. 300.16. Throughout the intervening 20 years, the regulation has specified that "related services" include, *inter alia*, "school health services," which it defines as "services provided by a qualified school nurse or other qualified person." 34 C.F.R. 300.16(a) and (b)(11).[10] The regulation also has provided that "related services" include "medical services for diagnostic or evaluation pur-

[10] A "qualified" person is "a person [who] has met [state educational agency] approved or recognized certification, licensing, registration, or other comparable requirements that apply to the area in which he or she is providing special education or related services." 34 C.F.R. 300.15. The licensing requirements for performance of various tasks by non-physicians may vary from State to State but, as petitioner concedes (Pet. Br. 36), these requirements do not affect a student's entitlement to provision of related services under IDEA. See also Br. of Amici Curiae National Ass'n of Protection and Advocacy Systems et al. 23, n.14.

poses," and that "medical services," as used in the related services regulation, are those "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 C.F.R. 300.16(a) and (b)(4). Read together, those definitions establish that services provided by physicians, known as "medical services," are to be treated differently from all other health-related services that are necessary to assist a child with a disability to benefit from special education. Services provided by physicians are excluded unless they are diagnostic or evaluative, while services that can be provided by other qualified health personnel are "related services" so long as they are necessary to assist a child with a disability to benefit from special education.

In *Tatro*, this Court so construed the Secretary's regulation (then codified at 34 C.F.R. 300.13(b)(4)(1983)). The Court concluded that, because the regulation defines the "medical services" that are owed under IDEA as services provided by licensed physicians for purposes of diagnosis or evaluation, "[p]resumably this means that 'medical services' *not* owed under the statute are those 'services by a licensed physician' that serve other purposes." 468 U.S. at 892 n.10. That presumption derives from the common-sense principle that a single term—"medical services"—normally has a single meaning in determining both what is included and what is excluded under a single statutory provision.

3. The Secretary has consistently read his regulations in that manner. Following initial promulgation of the regulation (and before *Tatro*), the Secretary's representatives expressly repeated, in policy letters responding to inquiries about the provision of psychotherapy, the principle that coverage under the statute depends on whether a service is provided by a physician. The Secretary explained that "[i]f psychotherapy is interpreted in your State as a medical service (i.e. administered by a licensed physician), this service would not be required." Letter to Minsky, Educ. Handi-

cap. L. Rep. 211:19, 20 (Apr. 7, 1978); accord Letter to Janda, Educ. Handicap. L. Rep. 211:205, 206 (Jan. 25, 1979). On the other hand, "in some States (and with certain professional disciplines) 'psychotherapy' might be provided by someone other than a psychiatrist (*e.g.*, a psychiatric social worker, etc.). In such cases, the provision of psychotherapy by someone other than a psychiatrist could be considered to be an appropriate related service under the regulations—if the service is needed to assist a handicapped child to benefit from special education." Letter to Millman, Educ. Handicap. L. Rep. 211:104, 105 (June 5, 1979).[11]

Petitioner errs in contending (Br. 25-27) that the above-cited letters and other policy letters by the Secretary's delegates do not apply a bright-line distinction between services provided by a physician and services provided by non-physicians. Petitioner (Br. 25-27) and its amicus (Br. of Amici Curiae National Ass'n of Protection and Advocacy Systems et al. 14 (NSBA Br.) specifically focus on a February 22, 1996, policy letter (Letter to Anderson, 24 Ind. Disab. Educ. L. Rep. 180, *reprinted at* Pet. App. 64a-67a), to contend that the Secretary "renounced" the bright-line test. See also *Morton Community Unit Sch. Dist. No. 709* v. *J.M.*, No. 97-3962, 1998 WL 420393 (7th Cir. July 27, 1998) (criticizing letter as evasive and noncommittal).

The February 22, 1996, letter was a response to a general inquiry whether the Secretary considers "one-to-one nursing services necessary for a student with disabilities to attend a public school setting" to be "a required related service or a medical service as determined by several recent court deci-

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[11] See also Letter to Jacobs, Educ. Handicap. L. Rep. 211:54 (Aug. 14, 1978) (explaining that an optometrist, *i.e.*, a non-physician, may provide "diagnostic services" with IDEA funds, just as an audiologist may, but specifying that he is not qualified to provide "medical diagnostic services, because (among other things) they do not meet the definition of 'medical services' * * * (i.e. 'medical services' means services provided by a licensed physician").

sions?" 24 Ind. Disab. Educ. L. Rep. at 180. Because the question specifically referenced court decisions, the letter cited the various court decisions and acknowledged that courts have reached differing conclusions, and have based their analysis on various factors. *Ibid.* The letter clearly attributes that analysis to courts and does not, contrary to petitioner's claim (Br. 27), endorse it as the policy of the Department of Education. See also Letter to Anonymous, 25 Ind. Disab. Educ. L. Rep. 531, 532 (Nov. 13, 1996)(cited at Pet. Br. 27) (discussing distinction as one made by courts, not by the Department of Education).

The February 22, 1996, letter further notes that the question posed "could arise in a variety of factual contexts," and that the Secretary cannot "express a view as to whether or not 'one-to-one nursing' services are a required related service for an individual disabled student," because "the determination as to whether these services are required related services for an individual disabled student must be made on a case-by-case basis * * * by the participants on the student's IEP team." 24 Ind. Disab. Educ. L. Rep. at 180. The letter then unequivocally states that, "[i]f the student's IEP team determines that nursing services are a required related service for a particular student, those services must be provided at no cost to the parents." *Ibid.* Thus, that letter reaffirmed the Secretary's longstanding interpretation of IDEA that services provided by a nurse are not excluded medical services.

The case-by-case analysis required by the Secretary's policy letters is not, as petitioner contends (Br. 27), a rejection of the bright-line physician/non-physician rule. Rather, it is the three-prong test that the Secretary derived from

Tatro to be applied on a case-by-case basis to determine whether a health service must be provided:

> First, in order to be entitled to receive the service, the child must be handicapped * * * Second, the service must be necessary to aid a handicapped child to benefit from special education. If the treatment or medication could be given during non-school hours, then the school district is not required to provide the service, even if the burden would be minimal. Third, the service need only be provided if it can be provided by a nurse or other qualified person, not a physician.

Letter to Del Polito, Educ. Handicap. L. Rep. 211:392, 393 (June 24, 1986); Letter to Greer, 19 Ind. Disab. Educ. L. Rep. 348, 349 (July 14, 1992) (same); Letter to Johnson, 20 Ind. Disab. Educ. L. Rep. 174, 175 (Apr. 20, 1993) (same); 25 Ind. Disab. Educ. L. Rep. at 532 (same).

4. The courts that have adopted some type of balancing test based on the nature of the service and the economic burden it would place on a school district apparently view the Secretary's regulation to be an imperfect measure of the policies underlying the statutory "medical services" exclusion. See, *e.g.*, *Detsel* v. *Board of Educ. of Auburn*, 637 F. Supp. 1022 (N.D.N.Y. 1986), aff'd, 820 F.2d 587 (2d Cir.) (per curiam), cert. denied, 484 U.S. 981 (1987). Such an approach misconceives the proper relationship between the courts and the Secretary's delegated authority to issue regulations necessary to carry out the requirements of IDEA. 20 U.S.C. 1417(b). The Court explained in *Tatro* that the Secretary could have reasonably selected his definition of "medical services" in an attempt to spare school districts from unduly expensive services, reasoning that services provided by physicians were, on average, more expensive than other health services. See 468 U.S. at 892-893.

The Secretary's regulation reflects a reasonable determination that a bright-line rule regarding the meaning of

"medical services" will serve the policies of the statute better than a multi-factored test requiring individualized determinations in each case. See *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 600-601 (1981); *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 48-50 (1981); *Mourning* v. *Family Publications Serv., Inc.*, 411 U.S. 356, 371-374 (1973). The regulation eliminates the costs and confusion that would result from a multi-factored test that would require adjudication of varied factual circumstances through the extensive appellate processes provided under the Act. See *Gray Panthers*, 453 U.S. at 48; *Weinberger* v. *Salfi*, 422 U.S. 749, 782-785 (1975); *American Hosp. Ass'n* v. *NLRB*, 899 F.2d 651, 659 (7th Cir. 1990) (Posner, J.) ("A rule makes one or a few of a mass of particulars legally decisive, ignoring the rest. The result is a gain in certainty, predictability, celerity, and economy, and a loss in individualized justice. Often the tradeoff is worthwhile; at least the prevalence of rules in our legal system so suggests."), aff'd, 499 U.S. 606 (1991).

C. Congress Has Ratified The Secretary's Interpretation Of "Related Services" And The "Medical Services" Exclusion In IDEA

After the statute had been interpreted to require States to provide school health services as "related services," and to exclude only physician-provided services as "medical services," Congress ratified that interpretation in the Education of the Handicapped Act Amendments of 1983, § 6, Pub. L. No. 98-199, 97 Stat. 1357, 1359.

On August 4, 1982, the then-Secretary of Education had issued proposed regulations that would have changed various regulations governing assistance to States for the education of handicapped children. 47 Fed. Reg. 33,836-33,860 (1982). One of his proposals was to narrow the "related services" regulation. The proposal was motivated by concerns about cost. The Secretary stated, in language similar to that of petitioner's amicus (NSBA Br. 24-28), that "[s]chools face

increasing costs in providing related services as health agencies and insurers which formerly paid them shift this responsibility * * * Many school officials have expressed their belief that some limitations must be placed on their responsibility for providing related services in light of their agencies' limited funds." 47 Fed. Reg. at 33,837-33,838.

The proposed regulations would have eliminated "school health services" from the definition of "related services"; they would have changed the meaning of excluded "medical services" from "services provided by a licensed physician" to "services relating to the practice of medicine"; and they would have allowed school districts to place "reasonable limitations" on provision of related services, based *inter alia* on the "level, frequency, location, and duration of the services" and the qualifications of the service providers. 47 Fed. Reg. at 33,838. Illustrations of services that were meant to be excluded by the changes included "[l]ife-sustaining procedures that * * * [m]ust be administered by specially trained, licensed health care professionals; or * * * [e]ntail a significant risk of illness or more than minimal injury to the child." *Id*. at 33,846.

In the course of explaining the proposed changes, the Secretary unequivocally confirmed the Department of Education's longstanding interpretation of the current statute and regulation to rest on a bright-line distinction between services provided by a physician and those provided by non-physicians: "[t]he statute defines related services to exclude medical services except where they are for diagnostic or evaluation purposes. The existing regulations define medical services as services provided by a licensed physician." 47 Fed. Reg. at 33,838.

Members of Congress criticized the proposed regulations, and specifically targeted a few of the proposed changes, including the amendment to the "related services" regulation. See 128 Cong. Rec. 20,620 (1982) (statement of Rep. Biaggi); *id*. at 21,793 (statement of Rep. Bonker); see also H.R. Rep.

No. 906, 97th Cong., 2d Sess. 4-5 (1982). On September 8, 1982, Congress enacted Section 305(b) of the Supplemental Appropriations Act, 1982, Pub. L. No. 97-257, 96 Stat. 818, 874, expressing the sense of Congress that the proposed regulations should not become effective and should not be transmitted to Congress while it was not in session.

On November 3, 1982, the Secretary withdrew six of the most controversial changes, including the proposal to narrow the "related services" regulation. See 47 Fed. Reg. 49,871-49,872 (1982); *Oversight Hearings on Proposed Changes in Regulations for the Education for All Handicapped Children Act: Before the Subcomm. on Select Educ. of the House Comm. on Educ. & Labor*, 97th Cong., 2d Sess. 122, 126-127, 175 (1982).

The following year, Congress added a new Section 608 to the Education of the Handicapped Act, which states that the Secretary

> may not implement * * * any regulation prescribed pursuant to this chapter which would procedurally or substantively lessen the protections provided to handicapped children under this chapter, as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to * * * related services * * *), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation.

Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, § 6, 97 Stat. 1357, 1359 (codified as amended, 20 U.S.C. 1407(b)). That provision was enacted in direct response to the proposed, then withdrawn, 1982 regulatory changes. See 129 Cong. Rec. 33,316 (1983) (statement of Rep. Biaggi) (explaining that provision was reaction to Secretary's 1982 proposals); see also H.R. Rep. No. 410, 98th Cong., 1st Sess. 21 (1983).

Thus, Section 608 constitutes a ratification of the Secretary's "related services" regulation, which includes school health services and excludes as medical services only services provided by a physician. It also reflects congressional disapproval of a multi-factor determination of "medical services" that would expand the exclusion to take into account the extent or nature of the services by excluding services provided by any "specially trained, licensed health care professionals" or services that involve "a significant risk of illness or more than minimal injury to the child." 47 Fed. Reg. at 33,846. "Where, as here, 'Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation,' we cannot but deem that construction virtually conclusive." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986). Hence, in asking this Court to construe the "medical services" exclusion to depend on factors such as cost, petitioner is, in essence, attempting to obtain through the courts what Congress rejected.

D. Petitioner's Cost-Based Arguments To Expand IDEA's "Medical Services" Exclusion Are Not Supported By The Statutory Structure And Are Inconsistent With The Intent Of Congress.

Petitioner and its amicus devote significant portions of their briefs to describing the fiscal burden they claim they would be required to shoulder should the court of appeals' judgment be affirmed. In doing so, they ignore steps Congress has taken to ensure that costs of "related services" for many disabled students are borne by other agencies.

Congress has provided States with tools to ensure that local educational districts are not unfairly burdened with health care costs. In 1975, when the predecessor to IDEA was enacted, the Senate Committee Report on EAHCA explained that, while Congress "has provided that the State education agency is to be the final responsible authority for

assuring that all handicapped children have available to them free appropriate public education, it does not intend that State and local educational agencies must be the sole providers of such services." S. Rep. No. 168, 94th Cong., 1st. Sess. 22 (1975).

In 1986, Congress took steps to facilitate the payment of expenses by sources other than educational agencies. Section 203 of the Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 100 Stat. 1145, 1158-1159, entitled "Sharing of Costs of Free Appropriate Public Education," declared that, although the statute provides that state educational agencies bear the responsibility for ensuring that IDEA's requirements are carried out, that provision "shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State." §203, 100 Stat. 1159 (codified as amended, 20 U.S.C. 1412(6)). Section 203 also required that States

> set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to—(A) define the financial responsibility of each agency for providing handicapped children and youth with free appropriate public education, and (B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of the agreement.

§ 203, 100 Stat. 1159 (codified as amended, 20 U.S.C. 1413(a)(13)). In particular, Congress contemplated that child welfare funds and Medicaid would absorb part of the costs. Section 203 specified that the statute "shall not be construed to permit a State to reduce medical and other assistance

available or to alter eligibility under titles V [Maternal and Child Health Services Block Grant] and XIX [Medicaid] of the Social Security Act [42 U.S.C. 701 et seq., 1396 et seq.] with respect to the provision of a free appropriate public education." § 203, 100 Stat. 1159 (codified at 20 U.S.C. 1413(e)).[12]

Section 203 was enacted in response to the General Accounting Office's (GAO) report in 1986 that some States had successfully established interagency agreements that recovered for school districts the costs of related services required by IDEA from Medicaid[13] and private insurers.[14] See H.R. Rep. No. 860, 99th Cong., 2d Sess. 21 (1986).

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[12] Medicaid is a jointly funded federal-state program that provides health insurance to people, *inter alia*, who receive Aid to Families with Dependent Children or are disabled for purposes of the federal Supplemental Security Income program. See 42 U.S.C. 1396-1396v. Approximately 27% of all children with disabilities ages 1 to 17 receive Medicaid, and a significant additional number are eligible but unserved. See Nat'l Inst. on Disability and Rehabilitation Research, *Disability Statistics Reports: Medical Expenditures for People with Disabilities in the United States, 1987* 33, 34 (1996). Under Medicaid, each State is required to provide Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services for children under 21, which include any services covered by the federal Medicaid program, mandatory or optional, that are necessary to treat conditions identified through screening. Such services could include home health care, private duty nursing, or personal care services, see 42 U.S.C. 1396d(r) (incorporating services in 1396d(a)), all of which can include school health services. See *Skubel* v. *Fuoroli*, 113 F.3d 330 (2d Cir. 1997); *Detsel* v. *Sullivan*, 895 F.2d 58 (2d Cir. 1990). See generally Health Care Financing Admin., U.S. Dep't of Health & Human Servs., *Medicaid and School Health: A Technical Assistance Guide* (Aug. 1997).

Respondent apparently is not currently income-eligible for Medicaid because the monetary fund established as a settlement of liability for his injury has not yet been exhausted. Tr. 598.

[13] The GAO report noted that Connecticut had estimated that the State's school districts could recover approximately $5-6 million per year from Medicaid alone. U.S. Gen. Accounting Office, *Special Education: Financing Health and Educational Services for Handicapped Children* 12 (July 1986).

[14] While the scope of coverage varies considerably, many employers offer insurance plans that cover nursing and health aide services (although

In 1988, Congress took further action to facilitate the use of Medicaid funds for payment of services included in a student's IEP under IDEA. Section 411(k)(13) of the Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 360, 102 Stat. 683, 798, specified that nothing in the Medicaid statute should "be construed as prohibiting or restricting," payments "for medical assistance for covered services furnished to a child with a disability because such services are included in the child's" IEP under IDEA. 102 Stat. 798 (codified at 42 U.S.C. 1396b(c)). Contrary to petitioner's contention (Pet. Br. 17), Congress did not thereby indicate that the medical assistance paid for by Medicaid would be for services not covered by IDEA. The assumption underlying that legislation was that some services qualify both as related services in IEPs and as services covered by Medicaid, and not that those categories are mutually exclusive as petitioner suggests. The legislative history explained:

> Federal Medicaid matching funds are available for the cost of health services, covered under a State's Medicaid plan, that are furnished to a handicapped child * * *, even though such services are included in the child's individualized education program * * * While the State education agencies are financially responsible for educational services, in the case of Medicaid-eligible handicapped child, State Medicaid agencies remain responsible for the 'related services' indentified [sic] in the child's IEP if they are covered under the State's Medicaid plan.

H.R. Rep. No. 661, 100th Cong., 2d Sess. 268-269 (1988).

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with co-payments and other limitations) for their employees' dependents. See 1 Task Force on Technology-Dependent Children, U.S. Dep't of Health & Human Servs., *Fostering Home and Community-Based Care for Technology-Dependent Children*, 136, 143-144 (Apr. 7, 1988). School districts may recover costs from the child's insurance, so long as there is no "financial loss" to the child or his family. See 45 Fed. Reg. 86,390 (1980); *Shook* v. *Gaston County Bd. of Educ.*, 882 F.2d 119 (4th Cir. 1989).

Despite those legislative amendments, by 1990 over half the States were still not using interagency agreements. See A. Katsiyannis, *Provision of Related Services: State Practices and the Issue of Eligibility Criteria*, 24 J. Spec. Educ. 246, 249 (1990). A more recent report, based on results of a national survey of state special education finance systems, noted that, as of 1994-1995, "all but one of 42 reporting states used Medicaid as another source of special education revenue," and "[o]ver a quarter of the states reported that they used state mental health funds" or "private medical insurance" as sources of special education revenue. See T. B. Parrish et al., Center for Spec. Educ. Fin., *State Special Education Finance Systems, 1994-95*, at 29 (June 1997). Nonetheless, the report found that "[f]unding sources like Medicaid clearly have the potential to offset a greater share of special education costs," but are still being underutilized or underreported. *Id.* at 32.

In 1997, Congress strengthened the coordination provisions in IDEA to provide that the State "shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect" and that the agreements must be in writing. 1997 Amendments, § 612(a)(12)(A) and (C), 111 Stat. 64-65, 66. Such agreements must provide that the "financial responsibility of each public agency * * * , including the State Medicaid agency and other public insurers of children with disabilities, shall *precede* the financial responsibility of the local educational agency." *Id.* at § 612(a)(12)(A)(i) and (B)(ii), 111 Stat. 65, 66 (emphasis added). That subsection was "to reinforce two important principles: (1) that the State agency or [local educational agency] responsible for developing a child's IEP can look to non-educational agencies, such as Medicaid, to pay for or provide those services they (the non-educational agencies) are otherwise responsible for; and (2) that the State agency or [local educational agency] remains responsible for ensuring that children receive all the services described in

their IEPs in a timely fashion, regardless of whether another agency will ultimately pay for the services." H.R. Rep. No. 95, 105th Cong., 1st Sess. 92 (1997); S. Rep. No. 17, 105th Cong., 1st Sess. 12 (1997).[15]

In addition to Medicaid, other federal and state programs are also available to pay for related services required by children with disabilities to benefit from special education in the regular classroom. For example, the Maternal and Child Health Block Grant program, 42 U.S.C. 701 *et seq.*, provides States with funds to provide direct services to children with special heath care needs. See Office of Technology Assessment, U.S. Congress, *Technology-Dependent Children: Hospital v. Home Care: A Technical Memorandum* 70-71 (May 1987). The Balanced Budget Act of 1997 created the State Children's Health Insurance Program (CHIP), which will provide $48 billion over the next ten years for States to provide health services to low-income children who do not have health insurance and are not eligible for Medicaid. See Pub. L. No. 105-33, Tit. IV, 111 Stat. 251, 552 (to be codified at 42 U.S.C. 1397 *et seq.*); see also Nat'l Inst. on Disability and Rehabilitation Research, *Disability Statistics Reports: Medical Expenditures for People with Disabilities in the United States, 1987*, at 32, 34 (1996) (7% of children with disabilities had no insurance and were not covered by Medicaid or any other government program).

Moreover, the size of the financial burden that is placed on petitioner and other local school districts depends in large

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[15] See also 143 Cong. Rec. S4300 (daily ed. May 12, 1997) (statement of Sen. Harkin) ("[I]n States that have voluntarily provided interagency supports, cost savings to [local education agencies] have been significant. For instance, the Chicago public schools receive[] $40 million in support for medically related services for students with disabilities, which has enabled the district to contain costs for related services and increased the access of poor children with disabilities to comprehensive health care services."); *id.* at S4373 (daily ed. May 13, 1997) (statement of Sen. Murray); *id.* at S4407 (daily ed. May 14, 1997) (statement of Sen. Grassley).

part on their State's choice of a special education financing system. IDEA places the ultimate responsibility on state educational agencies to ensure that IDEA's requirements are carried out, and IDEA does not dictate how States structure their funding of special education and related services. Different States have adopted a variety of financing systems that spread the costs in different ways. See Parrish, *supra*. Of particular significance here, States are increasingly making special provisions for exceptionally high-cost students in their financing systems. *Id.* at 52. For example, under Vermont's special education funding program, if a local district spends in excess of three times the base amount per pupil on a single student with a disability, the State provides an "extraordinary services reimbursement" that reimburses the district for 90% of the excess expenditures. Vermont also provides "intensive services reimbursment," based on a district's ability to pay, for expenditures not covered by federal funds, the state and locally funded block grant, and the extraordinary cost allocation. *Id.* at 90; see also D. L. Montgomery, Am. Insts. for Research, *State Analysis Series, A Profile of Special Education Finance Reform in Vermont* (Mar. 1995). Thus, States have the flexibility to alter their financing systems to control the size of the financial burden placed on any particular local educational agency by the provision of related services.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
BILL LANN LEE
Acting Assistant Attorney General
BARBARA D. UNDERWOOD
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
DAVID K. FLYNN
SETH M. GALANTER
Attorneys

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APPENDIX

1. The Individuals with Disabilities Education Act, as codified in 1994 at 20 U.S.C. 1400 *et seq.*, provided in relevant part:

§ 1400. Congressional statements and declarations

* * * * *

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

§ 1401. Definitions

(a) As used in this chapter—

* * * * *

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

(17) The term "related services" means 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, and includes the early identification and assessment of disabling conditions in children.

(18) The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

* * * * *

(20) The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include—

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency reponsibilities [sic] or linkages (or both) before the student leaves the school setting,

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an

annual basis, whether instructional objectives are being achieved.

In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives.

* * * * *

§ 1407. Regulation requirements

* * * * *

(b) Lessening of procedural or substantive protections as in effect on July 20, 1983, prohibited

The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this chapter which would procedurally or substantively lessen the protections provided to children with disabilities under this chapter, as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines [sic], attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation.

* * * * *

§ 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

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(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, * * *.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for children with disabilities within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided children with disabilities in the State.

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§ 1413. State plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall—

* * * * *

(13) set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to—

(A) define the financial responsibility of each agency for providing children and youth with disabilities with free appropriate public education, and

(B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of the agreement;

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(e) Prohibition on reduction of assistance

This chapter shall not be construed to permit a State to reduce medical and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act [42 U.S.C. 701 et seq., 1396 et seq.] with respect to the provision of a free appropriate public education for children with disabilities within the State

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§ 1417. Administration

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(b) Rules and regulations

In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

2. 34 C.F.R. 300.16 provides in relevant part:

§ 300.16 Related services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

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(4) "Medical services" means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

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(11) "School health services" means services provided by a qualified school nurse or other qualified person.

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