10-1983

Irving Independent School District v. Tatro

Lewis F. Powell Jr.

April 13, 1984

TATRO GINA-POW

83-558 Irving Independent School District v. Tatro, et al.

MEMO TO FILE

This is one of my customary memos merely to serve as an aid in refreshing my recollection.

The Facts

Amber Tatro (Amber) is a five-year old female suffering from a mal-functioning of the bladder known as spinal bifida. As a result of birth defects, Amber suffers from orthopedic and speech impediment as well as a "neuroganic bladder". She is unable to void voluntarily, and must be catheterized several times a day. The method is known as Clean Intermittent Catherization ("CIC").

The Tatros live in Independence School District, Texas, (School District). At request of the parents, the District undertook to provide Amber with special education, and recommended her for placement in a school district for Early Childhood Development classes. The School District developed an Individual Education Program for Amber that would provide the necessary educational and

therapeutic services, but declined to assume responsibility for paying for the CIC service. This resulted in the present litigation that commenced with a Hearing Officer, proceeded to the State Commissioner of Education, the State Board of Education (the latter agreed with the School District that there was no obligation to provide CIC), and then to the District Court in Dallas before Judge Higginbotham.

The Statutes and the Litigation

Respondents claim the right to free CIC service under the Education of All Handicappped Children Act (EAHCA), and the Rehabilitation Act, and particularly §504 thereof. The specific issue is whether CIC is "a related service" within the meaning of §1401(17) of EAHCA. In the first of two DC decisions, Judge Higginbotham held that CIC is not "a related service", and therefore the School District is not required to furnish it. The DC considered the CIC a medical service not covered by the Act, as it was not a service related to education.

CA5(opinion by Judge Goldberg) reversed the DC. Apparently, there was a misunderstanding as to whether a written stipulation of facts had been agreed upon. The CA was advised, following the DC's opinion, that it had acted

under an erroneous assumption with respect to the stipulation. Thus, even the CA recognized that "there was no factual record upon which to base an opinion", it "nevertheless proceeded to address the merits of the case". It held that the School District was obligated under both the EAHCA and section 504 of the Rehabilitation Act to furnish CIC. See, p. 4A of petition for cert.

On remand, the DC - bound by CA5's ruling - held the School District libel to provide the CIC service. On appeal to CA5 for the second time, the panel composed of Brown, Green and Jolly affirmed. Curiously, this panel stated:

> "Were we writing on a clean slate, we would share the District Court's reluctance to read a statute designed to aid education to require provision for medical necessities of life which are required by a child whether or not she participates in the state's educational program. Nevertheless, Tatro I was the authoritative intrepretation of EAHCA in this Circuit, and under 'law of the case' principles must be followed by us ...". Petition for cert 67a, 68a.

We granted cert.

The Parties Argue

Petitioner, citing this Court's opinion in Penhurst I (WHR), emphasized that EACHA is a "funding statute" that

does not create a "federal right to education nor a federal right to free appropriate medical treatment in order to receive a 'free appropriate education'". In accepting federal funds, the states do not undertake to provide particular methods for educating handicapped children. It is necessary under the Act for a state receiving funding to have a State Plan approved by the Secretary. The Texas Plan was approved, and did not include provision for delivery of medical treatment prescribed by a doctor.

Petitioner argues that the effect of the decisions below is to "create a federal right to medical treatment" even though EAHCA creates no federal right to an education.

Respondents, for the most part, bases its argument on the plight of handicapped children in families financially unable to provide medical treatment. They also emphasize that CIC is a "related service" because without it Amber would be denied the benefits of the special education that the statute contemplates for handicapped children. Moreover, they point out - apparently correctly - that administering catheterization of CIC is a simple process that can be performed by lay personnel - even though it is

related to a medical problem and is prescribed by a physician.

There are several amici briefs, although not as many as we usually have in cases of this kind. It is interesting to note that the DC and one panel of CA5 would have decided this case against respondents, and yet the "law of the case" as it comes to us was decided by the Goldberg panel without the benefit of a record.

LFP, JR.

dac 04/12/84

Renewed 4/14

David would affirm CA 5's interpretation of § EAHCA; He would reverse its award of atty's fees, as an EAHCA provides elaborate remedies & contains no authorization that fees be paid.

BENCH MEMORANDUM

Irving Independent School District v. Tatro

No. 83-558

David A. Charny April 12, 1984

Question Presented

1. Whether a school district may be required under the Education of All Handicapped Children Act (EAHCA) to provide "clean intermittent catheterization" to a handicapped student.

2. Whether the attorney's provisions of the Rehabilitation Act apply in suits that seek relief alternately under that Act and under the EAHCA.

Outline

I. Background

The Education of All Handicapped Children Act of 1975 (EAHCA) provides monies to states and localities for the education of the handicapped and establishes procedural and substantive requirements for fund recipients. For each handicapped student, the school district in cooperation with the parents must formulate an "individualized education program" (IEP) that provides for instruction and "related services" to "meet the unique needs" of the handicapped child. 20 U.S.C. §1401(19). "Related services" include "developmental, corrective, and other supportive services ... as may be required to assist a handicapped child to benefit from special education." Id. §1401(17).

The EAHCA provides for judicial review of the parents' complaints about the IEP following exhaustion of administrative remedies mandated by the Act. §1415(e). The Act does not provide attorney's fees. In contrast, the Rehabilitation Act, that generally prohibits discrimination against the handicapped in programs receiving federal financial assistance, was amended in 1978 to grant attorney's fees to prevailing parties. 29 U.S.C. §794a.

The present case concerns (1) the definition of the EAHCA term "related services" and (2) the applicability of the Rehabilitation Act's attorney's fees provision. Resps are parents of a child with spina bifida, a congenital defect that causes various neurological and orthopedic disorders. Among these, the child cannot empty her bladder except by insertion of a catheter. Catheterization must be performed several times daily. The

"clean intermittent catheterization" (CIC) procedure that the child uses need not be performed by a doctor or nurse, in a sterile environment or with sterile equipment. It is easily learned, and could be performed by the child when she reaches the age of eight or nine.

Pursuant to the EAHCA, petr school district and resps developed an IEP. Because that plan did not provide for CIC, resps filed suit in the DC as provided by 20 U.S.C. §1415(c)(2). The DC held that CIC was not a "related service" that could be required by an IEP adopted under the Act. The CA disagreed. CIC fell within the statutory language because the child could not attend classes at school without CIC. Such a construction did not expand the statutory definition to include all "life support" services, because it would apply only to services that were necessary to allow the child to benefit from special education. services that could be provide outside of school would not be covered. Further, the Act requires that the state to the maximum extent appropriate educate handicapped children with others not handicapped. 20 U.S.C. §1412(5). "Related services" thus includes those required to permit handicapped children to attend school.

DC

CA's view of "related services"

The CA also agreed with resps that §504 of the Rehabilitation Act, 29 U.S.C. §794, that prohibits discrimination against the handicapped in all programs that receive federal financial assistance, might require the school district to provide CIC. Refusal to provide the child with CIC would exclude the child

from participation in school because of her handicap in violation of that section.

On remand, the DC ordered the school to provide CIC and awarded attorneys' fees under §504 of the Rehabilitation Act. The CA affirmed. The record showed that CIC was necessary to enable the child to attend school and could be performed by a nurse or properly trained layman. Further, because the IEP provided for attendance at school classes, CIC should have been include in the IEP. The CA also found itself bound by the previous decision in the case to uphold the attorneys' fees award based upon §504.

On remand, CA5 - div. panel was bound by CA5's dec'n on appeal,

II. Discussion

A. Application of the EAHCA

The CA was correct in ruling that CIC is a "related service" within the meaning of the EAHCA. CIC must be performed at school if the student is to attend classes. Attendance of classes is required by the IEP formulated by the parents and the school district and advances the Act's policy of enabling handicapped students as much as appropriate to attend classes with other children. See 20 U.S.C. §1412(5).

But CIC is not a "medical service" that schools may not be required to provide under the Act, §1401(17). Neither the Act nor the legislative offer a definition of the terms. The Act, however, includes in its definition of "related services" services, such as physical therapy, that are likely to be provided by a health care professional rather than a teacher. And the regulations promulgated by HEW define "medical services" to mean

Regs

"services provided by a licensed physician," 34 CFR 300.13(b)(4), while defining "related services" to include "services provided by a qualified school nurse or other qualified person. These regulations draw a reasonable distinction as they apply in this case. Most schools probably would have a nurse available. The CIC procedure is safe, routine and virtually costless to a school that already has personnel available to perform it. For this reason, the Court need not decide in this case the extent to which more costly or dangerous procedures may be required to be performed by the school. There is no indication that the EAHCA was intended to transform the schools into general provides of social and medical services for the handicapped. In some cases, factors such as cost or safety, as well as whether the service is performed by a physician, should be relevant to whether a service is a "medical service" that a school should not be required to perform.

Nor should the Court hold that ~~that~~ the school was required to provide CIC or other related services rather than educate a student at home or through special classes. This general question was not before the CA. Under Board of Education v. Rowley, 103 S.Ct. 3034 (1982), the courts review the IEP "developed through the Act's procedures" to determine whether the program is "reasonably calculated to enable the child to receive educational benefits." Id., at 3051. It is apparent that the IEP as initially formulated did not meet that standard, as the student would have been unable to attend classes at all under the plan. Although petr would have been free to argue that the appropriate

remedy for resps' complaint was alternative placement rather than provision of CIC in the public schools, petr did not present this argument to the DC. As the CA found, therefore, the record contains no support for petr's contention that this would have been an appropriate revision of the IEP. Thus, the Court's affirmance of the CA will imply no general requirement that the schools in all circumstances must provide CIC to children afflicted with spina bifida.

In this regard, the CA's reasoning was erroneous in one respect. The CA wrongly held that "the standard of review developed in Rowley gives rise to a presumption in favor of the eductional placement established by [the] IEP." Petn. 76a. Rather, Rowley establishes a presumption that the plan as a whole is correct but says nothing about the appropriate remedy when the plan is found, as it was in this case, to be inadequate. Once a court determines that the plan is insufficient in one respect, it may prove that other aspects of the plan should be modified as well. In the first instance, the deference to local educational decisionmaking established in Rowley might call for deference to proposals for changing the IEP made by the school board. The CA arrived at the correct result in the present case, however, as the school board made no attempt to present to the DC an alternative remedy to that sought by the parents.

B. Attorney's Fees under §504

When the EAHCA and §504 of the Rehabilitation Act are alleged to confer the same substantive right upon a plaintiff, the EAHCA should be construed to provide the exclusive remedy for

that right. Attorney's fees then would not be available to resps in the present case.

The Court's cases clearly establish that when Congress has provided a detailed remedial scheme specifically to vindicate a right, a more general, background remedial provision is no longer applicable. See, e.g., Middlesex Cty. Sewerage Authority v. Sea Clammers, 453 U.S. 1, 20 (1981) (§1983 remedy no longer available); Great American Fed. S. & L. Ass'n v. Novotny, 442 U.S. 366, 376 (1979) (§1985(3) remedy) (citing also Brown v. GSA, 425 U.S. 820). This inference is drawn even where the legislative history is entirely silent on the question of the relation between the two remedies. The rationale for the inference is that the general cause of action otherwise may enable litigants to circumvent the more specific remedial provisions carefully considered by Congress.

Although the Court has applied this principle as yet only to preclude suit under the Reconstruction Civil Rights statutes, it is equally applicable to the relation between the Rehabilitation Act and the EAHCA. As a substantive matter, the EAHCA in the field of education confers the same rights -- if not more extensive rights -- as those conferred by §504 of the Rehabilitation Act. The EAHCA is designed to guarantee handicapped children "equal access" to education. Rowley, 102 S.Ct., at 3047. Similarly, §504 provides for "evenhanded treatment" of the handicapped by federally funded programs. Southeastern Community College v. Davis, 442 U.S. 397. 411 (1979). The EAHCA may go farther than the Rehabilitation Act in that it contemplates specific

affirmative steps by school administrators to educate the handicapped. In any event, it seems clear, as the Dept. of HEW has indicated in its regulations under §504, 34 CFR 104.33(b)(2), that an educational program that is in compliance with the EAHCA complies with §504 as well.

There is then no substantive reason to preserve the §504 cause of action in cases governed by the EAHCA. And the right of action under the Rehabilitation Act could undermine the specific remedial scheme established by the EAHCA. The EAHCA creates an elaborate system of administrative remedies, whose purpose is to protect the primary responsibility of local officials and parents to set educational policies and standards; and the IEP substantively is reviewed under a deferential standard. See Bd. of Educ. v. Rowley, 102 S.Ct., at 3051-3052. In contrast, it is unclear whether plaintiffs under the Rehabilitation Act must first exhaust state remedies. Compare Fells v. Brooks, 552 F. Supp. 30 (DDC 1981); Sanders v. Marquette Public Schools, 561 F. Supp. 1361 (WD Mich 1983) (no exhaustion), with Turillo v. Tyson, 535 F. Supp. 577 (DRI 1982) (exhaustion required). And the Rehabilitation Act makes no provision for deference to state decisionmaking.

Further, the recent proliferation of attorney's fees provisions in federal statutes suggests that the omission of such a provision for EAHCA actions was not mere oversight. To require local school districts to pay for attorneys throughout the lengthy process of administrative and judicial review would impose an enormous burden upon them. If the omission of an attor-

ney's fees provision indicates an affirmative congressional decision not to subsidize these suits, that decision should not be nullifed by the general language of the Rehabilitation Act, that was passed without any intent to alter the more specific provisions of the EAHCA.

If the Court holds that §504 remedies are not available to obtain relief available under the EAHCA, the Court need not consider the issue whether §504 would require petr to provide CIC to resp's child. That issue is difficult. Southeastern Community College suggests that affirmative steps that did not impose "undue financial and administrative burdens" might be required to accommodate the handicapped. 442 U.S., at 412. That case, however, addressed a request that the college alter the substantive requirements imposed uopn all students, rather than provide a special service for a particular student. More fundamentally, it is difficult to articulate a meaningful standard by which to decide what accommodations impose "undue" burdens. That standard, that involves the allocation of scarce educational resources, should be made legislatively, by Congress or the local school boards. §504 itself provides no guidance on the issue, the legislative history of that section does not mention the problem, and the Court correctly questioned in Southeastern Community College the extensive reach that the Dept. of HEW had attempted to give to the statute. The absence of any clear standard under §504 again suggests that the Court should hold that the EAHCA exclusively governs judicial review of any educational decision that is within the scope of that Act.

III. Conclusion

The CA interpretation of the EAHCA should be affirmed; its award of attorney's fees should be reversed.

December 2, 1983

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 83-558

IRVING INDEP. SCH. DIST.

vs.

TATRO

Also motion of National School Boards Association for leave to file a brief as amicus curiae.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.			✓										
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Court ..... Voted on ....., 19... November 23, 1983

Argued ....., 19... Assigned ....., 19... No. 83-558

Submitted ....., 19... Announced ....., 19...

IRVING INDEP. SCH. DIST.

vs.

TATRO

Also motion of National School Boards Association for leave to file a brief as amicus curiae.

Hold

Grant

Relist for BRW to take 2nd look

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.	✓												
Brennan, J.			✓										
White, J.		✓		~~Jenn 3~~									
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.	✓												
Rehnquist, J.		✓		or Hold									
Stevens, J.			✓										
O'Connor, J.				Join 3									

Held

PRELIMINARY MEMORANDUM

November 23, 1983 Conference
List 3, Sheet 3

No. 83-558-CFX

IRVING INDEPENDENT SCHOOL DIST. Cert to CA5 (Brown, Gee, Jolly)

v.

TATRO, HENRI, ET UX. Federal/Civil Timely

1. SUMMARY: Whether a school's failure to provide clean intermittent catheterization for a handicapped child violates the Education for All Handicapped Children Act (EAHCA) and/or the Rehabilitation Act.

2. FACTS AND PROCEEDINGS BELOW: Amber Tatro, who is by now about 7 years old, is a female child born with spina bifida. As

Hold for Consolidated Rail v. Darrone No. 82-862 - ~~Cert~~ memo writer recommends a hold for Smith No. 82-2120, but Darrone will address the Rehab Act issues & actions directly. It will not,

a result of this congenital defect, Amber suffers from orthopedic and speech handicaps and from a neurogenic bladder. The latter condition prevents her from emptying her bladder voluntarily, and thus she must be catheterized every 3 or 4 hours to prevent chronic kidney infection. The method chosen by Amber's doctors, the most widely accepted method, is Clean Intermittent Catheterization (CIC). The procedure is a relatively simple one, involving the insertion of a clean catheter into the bladder to allow proper drainage. It can be performed by a layperson after minimal training, and Amber will be able to do it by herself when she is 8 or 9 years old. Appendix at 97a n.3.

In 1979 when Amber was about 3 1/2 years old, resps, her parents, asked petr, the Irving Independent School District, to provide special education for her. After a series of meetings, the School District developed an Individual Education Program (IEP) for Amber as required by the EAHCA. The IEP provided for Amber's placement in the School District's Early Childhood Development (ECD) classes and for the provision of other services for Amber, including physical and occupational therapy. The IEP did not provide for CIC, and the School District maintained that it had no legal obligation to do so.

Resps pursued administrative review of the School District's failure to provide CIC, and eventually brought an action in federal district court pursuant to 20 U.S.C. §1416(e)(2). Resps argued that the School District had failed to provide Amber with a "free appropriate education," which is defined in the EAHCA to include both "special education and related services." 20 U.S.C.

§1401(18). Specifically, they argued that CIC is a "related service" under the EAHCA. They also argued that the failure to provide CIC is a violation of section 504 of the Rehabilitation Act which prohibits discrimination against the handicapped in federally funded programs. 29 U.S.C. §794.

The DC (Higginbotham, DJ) rejected resp's arguments. He first examined the EAHCA claim, where the issue is whether CIC is a "related service." That term is defined as follows:

> ""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, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped person to benefit from special education, and includes the early identification and assessment of handicapping conditions in children."

20 U.S.C. §1401(17). The DJ concluded that the "related services" statute contains only 2 categories: 1) transportation required to assist a handicapped child to benefit from special education, and 2) supportive services required to assist a handicapped child to benefit form special education. Category 1 is clearly inapplicable here, and category 2 is also inapplicable because CIC is not a "supportive service" directly related to Amber's ability to benefit from her special education; she will require CIC whether or not she is attending school. Although it is essential to Amber's life, once it is provided, it is unrelated to her learning skills. Also if the procedure could be classified as a "medical service," it clearly would not fit

within the statute because it is not for "diagnostic and evaluation purposes."

The DJ also rejected resps' argument that the regulations implementing the EAHCA indicate that CIC qualifies as a "related service." The regulations state that "related services" include "school health services," 45 C.F.R. §121a.13(a), and they define "school health services" as "services provided by a qualified school nurse or other qualified person." 45 C.F.R. §121a.13(b)(10). The DJ concluded that the regulation read in its entirety is consistent with the foregoing interpretation of the statute and simply requires the provision of "school health services" which are directly related to the effort to educate.

The DJ also rejected resps' claim under section 504 of the Rehabilitation Act. That section provides:

> "No otherwise qualified handicapped individual in the United States...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance."

29 U.S.C. §794. The DJ concluded that a statute aimed at preventing discrimination in certain governmental programs could not be converted into a statute requiring the "setting up of governmental health care for people seeking to participate in such programs."

On appeal CA5 in Tatro I reversed the DJ's interpretation of both statutes and remanded for further factual findings. As to the EAHCA claim, CA5 concluded that CIC fits within a literal interpretation of the statutory definition of "related services."

It is a supportive service required to assist Amber to benefit from her special education program because without it, she can not be present in the classroom at all. CA5 noted that its interpretation of the statute would not require schools to furnish every necessary life support service because the EAHCA itself contained limitations. First, a child has to be handicapped so as to require special education in order to qualify for any services at all. Second, the life support service must be necessary to aid the child to benefit from the special education to be provided. For example, if the life support service did not need to be performed during school hours (e.g., a once-a-day insulin shot), it would not be a "related service." Third, pursuant to the implementing regulation, in order for the life support service to be a "related service," it must be one that can be performed by a nurse or other qualified person.

As to the Rehabilitation Act claim, CA5 concluded that the failure of the school to provide CIC will result in the exclusion of Amber from the school's ECD program, and that that exclusion violates section 504. CA5 rejected petr's argument that Southeastern Community College v. Davis, 442 U.S. 397 (1979), dictates a contrary result. CA5 concluded that the Court in that case held only that section 504 does not require a school to provide services to a handicapped person for a program for which the person's handicap precludes him ever from realizing the principal benefits of the training. Here, with the provision of

CIC, Amber will be able fully to benefit from the school's ECD program.

On remand for appropriate factual findings, addressing the EAHCA claim, the DJ found that Amber was a child entitled to special education, that CIC must be performed during school hours, and that under Texas law, CIC could be performed by a nurse or a qualified person in accordance with a valid medical prescription. With all 3 prerequisites of Tatro I satisfied, the DJ ordered the School District to provide CIC for Amber. Turning to the section 504 claim, the DJ noted that he had to reach that claim because resps were seeking attorneys fees and that the Rehabilitation Act, but not the EAHCA, provided for fees. See 29 U.S.C. §749a(b). The DJ quite obviously disagreed with CA5's decision that resps stated a claim under section 504 and explicitly noted that his reading of Southeastern, reenforced by the intervening decision of this Court in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981), made CA5's result questionable. Nonetheless, he felt bound by the decision and awarded resps attorneys fees.

The School District then appealed, and CA5 rendered its Tatro II decision. The new CA5 panel expressed much reluctance on the EAHCA issue, but recognized Tatro I as the law of the case. It also expressed doubt that the Rehabilitation Act imposed any affirmative obligations on school districts, but felt that Pennhurst was not so clear as to require departure from the decision of the prior panel.

3. CONTENTIONS: Petr argues that CA5 erred in interpreting "related services" in the EAHCA to include CIC. It recognized that the only other circuit to address the issue agreed with CA5, and that this Court denied cert in the case. Pennsylvania Department of Education v. Tokarcik, 665 F.2d 443 (CA3 1981), cert. denied, 102 S. Ct. 3508 (1982). Petr argues that this case is distinguishable because all the parties here have stipulated that CIC is "medical treatment" and that that designation makes it an even clearer case for noninclusion within the statutory language. Petr argues that CA5's decision is in conflict with Pennhurst and with Board of Education v. Rowley, 102 S. Ct. 3034 (1982), and that it will open the floodgates and lead to the imposition of all sorts of medical treatment obligations on school districts. Petr barely makes mention of CA5's Rehabilitation Act holding, but does argue that it is erroneous in light of Southeastern, Rowley, and Pennhurst. Two amici, the National School Boards Association and the Texas Association of School Boards, make similar arguments in support of petr.

Resps argue that the decision in Tatro II is correct under the language of the EAHCA and consistent with the only other circuit to address the issue. They argue that the section 504 issue is also correct and consistent with all of the post-Southeastern circuit court decisions. They also argue that the impact of the decision is slight given the small number of children with spina bifida and given CA5's explicit limitations on the kind of life support services that the school districts must provide. The parties' stipulation that CIC is "medical

treatment" has no legal significance. The decision is not in conflict with Rowley; in fact the Court held the cert petition in Tokarcik until after Rowley was decided and simply denied it rather than remanding for reconsideration in light of Rowley.

4. DISCUSSION: As to the EAHCA issue, I tend to believe that the DJ's original interpretation of the statute is correct, although CA5's limiting language does mitigate the burden on schools of its otherwise sweeping holding. Although CA5 may be in error, there is no circuit conflict, and resps are correct that the Court denied the cert petition in Tokarcik after Rowley was decided. Furthermore, resps properly point out a possible problem in taking this case, a problem which was also present in Tokarcik. Because Amber will be able to perform CIC by herself apparently in the near future, there is an argument that the case might be moot by the time the Court could consider it.

The Rehabilitation Act issue presents an important question in my view, although petrs do not seem nearly so interested in it. To find a violation of section 504 here, first you must assume that that act imposes some affirmative obligation on schools and also that there is a private cause of action to enforce those obligations (a question which the Court reserved in Southeastern). The Rehabilitation Act is by its own terms an anti-discrimination act, and in Southeastern the Court clearly recognized a distinction between the obligation to treat qualified handicapped persons even-handedly in federally funded programs and the obligation to make affirmative efforts in administering those programs to overcome the disabilities caused

by handicaps. In my view (and apparently in the view of the DJ and the Tatro II panel), Southeastern and the Court's more recent comments in Pennhurst create a substantial question as to whether section 504 does impose any such affirmative obligations. In Pennhurst the Court stated:

> "Relying on that distinction [the distinction between congressional encouragement of state programs and the imposition of binding obligations on states], this Court in Southeastern Community College v. Davis, 442 U.S. 397 (1979), rejected a claim that §504 of the Rehabilitation Act of 1973, which bars discrimination against handicapped persons in federally funded programs, obligates schools to take affirmative steps to eliminate problems raised by an applicant's hearing disability. Finding that 'state agencies such as Southeastern are only "encouraged...to adopt and implement such policies and procedures,"' id., at 410 (quoting the Act), we stressed that 'Congress understood [that] accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.' Id., at 411."

451 U.S., at 27. See also University of Texas v. Camenisch, 451 U.S. 390, 399 (BURGER, C.J., concurring). Although the circuit courts considering the issue appear to be reaching results consistent with CA5 here, in reaching those results, all the courts express confusion as to the meaning of Southeastern and how to distinguish it. See, e.g., Tatro I and II; New Mexico Association for Retarded Citizens v. New Mexico, 678 F.2d 847 (CA10 1982); Dopico v. Goldschmidt, 687 F.2d 644, 649-53 (CA2 1982). The Court's Pennhurst dicta may well indicate that the attempts to distinguish Southeastern are erroneous. See also Smith v. Cumberland School Committee, 703 F.2d 4, 9 (CA1 1983), cert. granted sub nom. Smith v. Robinson, No. 82-2120.

Thus I think that there is a good argument that both of the issues in this case were wrongly decided. Accordingly, I think that both issues are potentially certworthy even though there are no circuit conflicts yet. The EAHCA issue, however, is fairly narrow, not in conflict with any decision of this Court, and suffers from a possible mootness problem. The Rehabilitation Act issue on the other hand presents a broader question of the overall purpose of the Act, is arguably in conflict with decisions of this Court, and I suppose would not present the same mootness concerns because of the attorneys fees aspect of the case. Of course there is a chance that the Pennhurst dicta will clear up the confusion in the lower courts' interpretations of Southeastern, but at some point I think that the Court will have to address the Rehabilitation Act issue. I note that the Court has already granted cert in a Rehabilitation Act case, and that case may have some bearing on the issue here. In Smith v. Robinson, No. 82-2120, the Court will decide whether, if plaintiffs prevail under the EAHCA, they can collect attorneys fees under the Rehabilitation Act or under §1988, even though the DC did not address their identical claims under those laws. If the Court reaches the attorneys fees question under the Rehabilitation Act in Smith, it may well discuss the nature of the obligations and the private cause of action, if any, under that Act. Will address this question directly in Consolidated Rail

Thus, assuming that the Court is troubled by the Rehabilitation Act issue here and sees no need to wait for a conflict, I recommend at a minimum a hold for Smith. If that

case does not address the Rehabilitation Act issue with sufficient clarity, the Court could grant this petition after Smith is decided. If the Court is equally interested in the EAHCA issue, and not troubled by the possible mootness problem, it could grant the petition now on both issues and perhaps consider this case with the Smith case.

There is a response, and there are two amici petitions in support of petr.

November 14, 1983 Martin Opns in petn

moment, address the question of what affirmative actions are required under § 504. The Court may want to grant on this issue if Darrone or Smith fail to address the question.

The EAHCA issue is narrow, there is no conflict, & thus it is not worthy now.

CRR

83-558 IRVING INDEPENDENT SCHOOL v. TATRO Argued 4/16/84

See definition of "related services" (p21 of Petr. Br)

Weatherdye (Petr)

There was a "medical" treatment — no quest. in record re ~~the~~ this characterization.

SO'C asked if medicine had to be taken at school. Counsel's answer was ~~equivocal~~ equivocal.

Texas statute allows medication to be administered to students by school teachers & employees. (Appendix to Petr's Reply Br.)

Responding to Q by HHB identical to SO'C's Q above, counsel answered that giving ~~a~~ prescription drugs in school is not adm. medication.

"Related services" - as defined by Regulations (not in Act) include "medical services".

check this

"Medical services" are defined ~~in~~ to specific services

Todd (Resp) (argues not a "medical service")

CIC is analogous to dispensing medicine

School Dist. not required to provide catheter - or any other medical facility or drug.

No additional personnel at school required. Same result

Act provides for "classroom" aids to assist teachers.

It was stipulated that CIC is a "medical service"

"Medical" is not used in EAHCA as broadly as in other

What is stipulated.

The stipulated that CIC is required by physician - i.e. is a medical need, But the adm. of CIC is not a medical service

BRW argued

Court also found violation under § 504. Could have won on this alone.

Deathridge (for Pet'r - Rebuttal)

The Q is whether a "medical service" prescribed by a physician can be a "related service" within EAHAC's provisions.

BRW noted that CA5 construed state law, & thereby we must accept its view of state law.

?

BRW's view { CA5 held that was not a "medical service" & that was consistent with state law

See p 25-26 of Pet's Br.

Not "medical record"

no name or physician

no specialized eq.

Not suitable material

file

83-558

Irving Independent School Dist v Tatro

("Clean Intermittent Catheterization - CIC)

Two statutes involved:

I Ed. of all Handicapped Children Act [EAHCA]

Requires an "individualized education program" for each handicapped child," and

The program must provide "related services"

EAHCA does not provide for attys fees

II Rehabilitation Act - prohibits discrimination vs handicapped children.

Amended in '78 to allow attys fees.

III Two Questions - answer as follows

1. "Related services" do include providing CIC. Easily adm. by anyone - even an older child

CIC must be available here if this child is to attend school

Definition of "related" is broad. but does not include medical services No physician or nurse needed for CIC.

2. No lawyers fees

EAHCA creates full Adm. remedies. It was enacted in '75 ~~but~~ + was known to Congress when it amended ~~Rehabilitation~~ Rehabilitation Act to allow fees, & did not do same for EAHCA

Aff'm 8-1 on EAHCA
Rev 7-2 on §504 (some tentative)

No. 83-558, Irving Independent school v. Tatro Conf. 4/18/84

The Chief Justice Affirm under EAHCA.
Reverse on §504
Not a "medical service" — need not be performed by physician or nurse.
Prescribing a procedure is not enough in all cases to make service "medical"
CIC is related service.
§504 doesn't apply. There no atty's fee. EAHCA provides adm. remedies

Justice Brennan Affirm on both.
Agree with C.J. on EAHCA.
But may infer law
School Dist ~~is~~ that accepts money under §504 is liable for atty's fee
Check this BRW cites my opinion under Southeastern (?)

Justice White Agree on EAHCA; tentatively Rev. on fee
Not at rest on fee. The adm. remedies are relevant.

Justice Marshall Aff in both

Agree with W & B.

Justice Blackmun Reverse on EAHCA; Reverse on 504

The "medical services" question is close. Would hold ~~that~~ them talentedly than in a med. service

Reverse.

Justice Powell Aff in on EAHCA

Rev. on §504 [illegible]

Has to be written very narrowly

Justice Rehnquist

Agree with LEP on both issues

Justice Stevens Affirm on EAHCA; Rev on 504 (tentative)

Agree with LEP.

Not inclined to think there is a violation of § 504. Need other violate (EAHCA) to reach this case.

Justice O'Connor Affirm on EAHCA

Rev. tentatively on § 504

Supreme Court of the United States
Washington, D. C. 20543

Full

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 19, 1984

Re: 83-558 - Irving Independent School District v. Tatro (This is EAHCA case on Q whether use of a ~~cath~~ catheter (CIC) is "medical treatment")

Dear Chief:

Prior to conference I did not focus on the attorneys' fees question. After reviewing the certiorari petition, I have concluded that the fee issue is as not really here. The questions presented in the cert. petition are:

John is right about this

"1. Whether 'medical treatment' such as clean intermitten chaterization is a 'related service' required under the Education for All Handicapped Children Act and, therefore, required to be provided to the minor respondent.

"2. Is a public school required to provide and perform the medical treatment prescribed by the physician of a handicapped child by the Education for All Handicapped Children Act or the Rehabilitation Act of 1973?

"3. Whether the Fifth Circuit Court of Appeals misconstrued the opinions of this Court in Southeastern Community College v. Davis, Pennhurst State School & Hospital v. Halderman, and State Board of Education v. Rowley."

I do not read any of these questions as putting at issue anything but the injunction requiring the school district to provide CIC. I do not think that they fairly present the question whether the school district is liable for attorneys' fees under the Rehabilitation Act. Since we have answered the first question presented (and the EAHCA aspect of the second question,

to the extent it differs from the first) affirmatively, that would seem to be sufficient to support entry of the injunction without reliance on the Rehabilitation Act.

Since I read the questions presented in the petition to place only the injunction requiring provision of CIC to Amber at issue, my vote is to affirm under the EAHCA only, and not to reach any question under the Rehabilitation Act.

Respectfully,

John

The Chief Justice

Copies to the Conference

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P.

From: **The Chief Justice**

Circulated: MAY 23 1984

Recirculated: _____

Renewed 5/23

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–558

IRVING INDEPENDENT SCHOOL DISTRICT, PETITIONER *v.* HENRI TATRO, ET UX., INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR

On first reading, this looks fine to me

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

[May ——, 1984]

Join 5/24

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether the Education of the Handicapped Act or the Rehabilitation Act of 1973 requires a school district to provide a handicapped child with clean intermittent catheterization during school hours.

I

Amber Tatro is an eight-year-old girl born with a defect known as spina bifida. As a result, she suffers from orthopedic and speech impairments and a neurogenic bladder, which prevents her from emptying her bladder voluntarily. Consequently, she must be catheterized every three or four hours to avoid injury to her kidneys. In accordance with accepted medical practice, clean intermittent catheterization (CIC), a procedure involving the insertion of a catheter into the urethra to drain the bladder, has been prescribed. The procedure is a simple one that may be performed in a few minutes by a layperson with less than an hour's training. Amber's parents, babysitter, and teenage brother are all qualified to administer CIC, and Amber soon will be able to perform this procedure herself.

In 1979 petitioner Irving Independent School District agreed to provide special education for Amber, who was then three and one-half years old. In consultation with her parents, who are respondents here, petitioner developed an individual education program for Amber under the requirements of the Education of the Handicapped Act, 84 Stat. 175, as amended significantly by the Education for All Handicapped Children Act of 1975, 89 Stat. 773, 20 U. S. C. §§ 1401(19), 1414(a)(5). The individual education program provided that Amber would attend early childhood development classes and receive special services such as physical and occupational therapy. That program, however, made no provision for school personnel to administer CIC.

Respondents unsuccessfully pursued administrative remedies to secure CIC services for Amber during school hours.[1] In October 1979 respondents brought the present action in District Court against petitioner, the State Board of Education, and others. See 20 U. S. C. § 1415(e)(2). They sought an injunction ordering petitioner to provide Amber with CIC and sought compensatory damages and attorney's fees. First, respondents invoked the Education of the Handicapped Act. Because Texas received funding under that statute, petitioner was required to provide Amber with a "free appropriate education," 20 U. S. C. §§ 1412(1), 1414(a)(1)(C)(ii), which is defined to include "related services," § 1401(18). Respondents argued that CIC is one such "related service."[2] Second, respondents invoked § 504 of the

---

[1] The Education of the Handicapped Act's procedures for administrative appeal are set out in 20 U. S. C. § 1415. In this case a hearing officer ruled that the Education of the Handicapped Act did require the school to provide CIC, and the Texas Commissioner of Education affirmed. The State Board of Education reversed, holding that CIC was a medical service falling outside the obligation the Act imposed on school districts.

[2] As discussed more fully later, the Education of the Handicapped Act defines "related services" to include "supportive services (including . . . medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a

Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. §794, which forbids an individual, by reason of a handicap, to be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under" any program receiving federal aid.

The District Court denied respondents' request for a preliminary injunction. 481 F. Supp. 1224 (ND Tex. 1979). That court concluded that CIC was not a "related service" under the Education of the Handicapped Act because it did not serve a need arising from the effort to educate. It also held that §504 of the Rehabilitation Act did not require "the setting up of governmental health care for people seeking to participate" in government programs. *Id.*, at 1229.

The Court of Appeals reversed. 625 F. 2d 557 (CA5 1980) (*Tatro I*). First, it held that CIC was a "related service" under §602 of the Education of the Handicapped Act, 20 U. S. C. §1401(17), because without the procedure Amber could not attend classes and benefit from special education. Second, it held that petitioner's refusal to provide CIC effectively excluded her from a federally funded educational program in violation of §504 of the Rehabilitation Act. The Court of Appeals remanded for the District Court to develop a factual record and apply these legal principles.

On remand petitioner stressed the Education of the Handicapped Act's explicit provision that "medical services" could qualify as "related services" only when they served the purpose of diagnosis or evaluation. See n. 2, *supra*. The District Court held that under Texas law a nurse or other qualified person may administer CIC without engaging in the unauthorized practice of medicine, provided that a doctor prescribes and supervises the procedure. The District Court then held that, because a doctor was not needed to administer CIC, provision of the procedure was not a "medical service" for purposes of the Education of the Handicapped

handicapped person to benefit from special education." 20 U. S. C. §1401(17).

Act. Finding CIC to be a "related service" under that Act, the District Court ordered petitioner to modify Amber's individual education program to include provision of CIC during school hours. It also awarded compensatory damages against petitioner and the State Board of Education.[3] 516 F. Supp. 968 (ND Tex. 1981).

On the authority of *Tatro I*, the District Court then held that respondents had proved a violation of § 504 of the Rehabilitation Act. Although the District Court did not rely on this holding to authorize any greater injunctive or compensatory relief, it did invoke the holding to award attorney's fees against petitioner and the State Board of Education.[4] The Rehabilitation Act, unlike the Education of the Handicapped Act, authorizes prevailing parties to recover attorney's fees. See 29 U. S. C. § 794a.

The Court of Appeals affirmed. 703 F. 2d 823 (CA5 1983) (*Tatro II*). That court accepted the District Court's conclusion that state law permitted qualified persons to administer CIC without the physical presence of a doctor, and it affirmed the award of relief under the Education of the Handicapped Act. In affirming the award of attorney's fees based on a finding of liability under the Rehabilitation Act, the Court of Appeals found no change of circumstances since *Tatro I* that would justify a different result.

We granted certiorari, —— U. S. —— (1983), and we affirm in part and reverse in part.

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[3] The District Court dismissed the claims against all defendants other than petitioner and the State Board, though it retained the members of the State Board "in their official capacities for the purpose of injunctive relief." 516 F. Supp. 968, 972–974 (ND Tex. 1981).

[4] In denying a later motion to amend the judgment, the District Court held that § 505 of the Rehabilitation Act, 29 U. S. C. § 794a, which authorizes attorney's fees as a part of a prevailing party's costs, abrogated the State Board's immunity under the Eleventh Amendment. See App. to Pet. for Cert. 56a–60a. The State Board did not petition for certiorari, and the Eleventh Amendment issue is not before us.

II

This case poses two separate issues. The first is whether the Education of the Handicapped Act requires petitioner to provide CIC services to Amber. The second is whether § 504 of the Rehabilitation Act creates such an obligation. We first turn to the claim presented under the Education of the Handicapped Act.

States receiving funds under the Act are obliged to satisfy certain conditions. A primary condition is that the state implement a policy "that assures all handicapped children the right to a free appropriate eduation." 20 U. S. C. § 1412(1). Each educational agency applying to a state for funding must provide assurances in turn that its program aims to provide "a free appropriate education to all handicapped children." § 1414(a)(1)(C)(ii).

A "free appropriate education" is explicitly defined as "special education and related services." § 1401(18).[5] The term "special education" means

> "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." § 1401(16).

"Related services" are defined as

> "transportation, and such developmental, corrective, and other *supportive services (including* speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and *medical* and counseling *services, except that such medical services shall be*

[5] Specifically, the "special education and related services" must

"(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) [be] provided in conformity with the individualized education program required under section 1414(a)(5) of this title." § 1401(18).

for diagnostic and evaluation purposes only) as may be required to assist a handicapped person to benefit from special education, and includes the early identification and assessment of handicapping conditions in children." § 1401(17) (emphasis added).

The issue in this case is whether CIC is a "related service" that petitioner is obliged to provide to Amber. We must answer two questions: first, whether CIC is a "supportive servic[e] . . . required to assist a handicapped person to benefit from special education"; and second, whether CIC is excluded from this definition as a "medical servic[e]" serving purposes other than diagnosis or evaluation.

A

The Court of Appeals was clearly correct in holding that CIC is a "supportive servic[e] . . . required to assist a handicapped person to benefit from special education."[6] It is clear on this record that without having CIC services available during the school day, Amber cannot attend school and thereby "benefit from special education." CIC services therefore fall squarely within the definition of a "supportive service."[7]

---

[6] Petitioner claims that courts deciding cases arising under the Education of the Handicapped Act are limited to inquiring whether a school district has followed the requirements of the state plan and has followed the Act's procedural requirements. However, we held in *Henrick Hudson District Board of Education* v. *Rowley*, 458 U. S. 176, 206, n. 27 (1982), that a court is required "not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has created an IEP for the child in question which conforms with the requirements of § 1401(19) [defining an IEP]." Judicial review is equally appropriate in this case, which presents the legal question of a school's substantive obligation under the "related services" requirement of § 1401(17).

[7] The Department of Education has agreed with this reasoning in an interpretive ruling that specifically found CIC to be a "related service." 46 Fed. Reg. 4912 (1981). Accord *Tokarcik* v. *Forest Hills School District*, 665 F. 2d 443 (CA3 1981). The Secretary twice postponed temporarily the

As we have stated before, "Congress sought primarily to make public education available to handicapped children" and "to make such access meaningful." *Henrick Hudson District Board of Education* v. *Rowley*, 458 U. S. 176, 192 (1982). A service that enables a handicapped child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned. The Act makes specific provision for services, like transportation, for example, that do no more than enable a child to be physically present in class, see 20 U. S. C. § 1401(17); and the Act makes specific grants for schools to alter buildings and equipment to make them accessible to the handicapped, § 1406. See Sen. Rep. No. 168, 94th Cong., 1st Sess., 38 (1975); 121 Cong. Rec. 19,484 (1975) (remarks of Sen. Stafford). Services like CIC that permit a child to remain at 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.

We hold that CIC services in this case qualify as a "supportive service . . . required to assist a handicapped person to benefit from special education."[8]

B

We also agree with the Court of Appeals that provision of CIC is not a "medical servic[e]," which a school is required to provide only for purposes of diagnosis or evaluation. See 20

effective date of this interpretive ruling, see 46 Fed. Reg. 12,495 (1981); *id.* at 18,975, and later postponed it indefinitely, *id.* at 25,614. But the Department presently does view CIC services as an allowable cost under the Act. *Ibid.*

[8] The obligation to provide special education and related services is expressly phrased as a "conditio[n]" for a State to receive funds under the Act. See 20 U. S. C. § 1412; see also Sen. Rep. No. 168, 94th Cong., 1st Sess., 16 (1975). This refutes petitioner's contention that the Act did not "impos[e] an obligation on the States to spend state money to fund certain rights as a condition of receiving federal moneys" but "spoke merely in precatory terms," *Pennhurst State School & Hospital* v. *Halderman*, 451 U. S. 1, 18 (1981).

U. S. C. § 1401(17). We begin with the regulations of the Department of Education, which are entitled to deference.[9] See, *e. g.*, *Blum* v. *Bacon*, 457 U. S. 132, 141 (1982). *Udall v. Tallman*, 380 U. S. 1, 16 (1965). The regulations define "related services" for handicapped children to include "school health services," 34 CFR § 300.13(a) (1983), which are defined in turn as "services provided by a qualified school nurse or other qualified person," § 300.13(b)(10). "Medical services" are defined as "services provided by a licensed physician." § 300.13(b)(4).[10] Thus, the Secretary has determined that the services of a school nurse otherwise qualifying as a "related service" are not subject to exclusion as a "medical service," but that the services of a physician are excludable as such.

This definition of "medical services" is a reasonable interpretation of congressional intent. Although Congress devoted little discussion to the "medical services" exclusion, the Secretary could reasonably have concluded that it was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence.[11] From this understanding of

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[9] The Secretary of Education is empowered to issue such regulations as may be necessary to carry out the provisions of the Act. 20 U. S. C. § 1417(b). This function was initially vested in the Commissioner of Education of the Department of Health, Education, and Welfare, who promulgated the regulations in question. This function was transferred to the Secretary of Education when Congress created that position, see Department of Education Organization Act, §§ 301(a)(1), (2)(H), 93 Stat. 677 (1979).

[10] The regulations actually define only those "medical services" that *are* owed to handicapped children: "services by a licensed physician to determine a child's medically related handicapping condition which results in the need for special education and related services." 34 CFR § 300.13(b)(4) (1983). Presumably this means that "medical services" *not* owed under the statute are those "services by a licensed physician" that serve other purposes.

[11] Children with serious medical needs are still entitled to an education. For example, the Act specifically includes instruction in hospitals and at

congressional purpose, the Secretary could reasonably have concluded that Congress intended to impose the obligation to provide school nursing services.

Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as "occupational therapists, speech therapists, psychologists, social workers, and other appropriate trained personnel." Sen. Rep. No. 168, *supra*, at 33. School nurses have long been a part of the educational system, and the Secretary could therefore reasonably conclude that school nursing services are not the sort of burden that Congress intended to exclude as a "medical service." By limiting the "medical services" exclusion to the services of a physician or hospital, both far more expensive, the Secretary has given a permissible construction to the provision.

Petitioner's contrary interpretation of the "medical services" exclusion is unconvincing. In petitioner's view, CIC is a "medical service," even though it may be provided by a nurse or trained layperson; that conclusion rests on its reading of Texas law that confines CIC to uses in accordance with a physician's prescription and under a physician's ultimate supervision. Aside from conflicting with the Secretary's reasonable interpretation of congressional intent, however, such a rule would be anomalous. Nurses in petitioner's school district are authorized to dispense oral medications and administer emergency injections in accordance with a physician's prescription. This kind of service for nonhandicapped children is difficult to distinguish from the provision of CIC to the handicapped.[12] It would be strange indeed if Congress,

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home within the definition of "special education." See 20 U. S. C. § 1401(16).

[12] Petitioner attempts to distinguish the administration of prescription drugs from the administration of CIC on the ground that Texas law expressly limits the liability of school personnel performing the former, see Tex. Educ. Code Ann. § 21.914, but not the latter. This distinction, however, bears no relation to whether CIC is a "related service." The introduction of handicapped children into a school creates numerous new pos-

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.

To keep in perspective the obligation to provide services that relate to both the health and educational needs of handicapped students, we note several limitations that should minimize the burden petitioner fears. First, to be entitled to related services, a child must be handicapped so as to require special education. See 20 U. S. C. § 1401(1); 34 CFR § 300.5 (1983). In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the Act. See 34 CFR § 300.14 Comment (1) (1983).

Second, only those services necessary to aid a handicapped child to benefit from special education must be provided, regardless how easily a school nurse or layperson could furnish them. For example, if a particular medication or treatment may appropriately be administered to a handicapped child other than during the school day, a school is not required to provide nursing services to administer it.

Third, the regulations state that school nursing services must be provided only if they can be performed by a nurse or other qualified person, not if they must be performed by a physician. See 34 CFR §§ 300.13(a), (b)(4), (b)(10) (1983). It bears mentioning that here not even the services of a nurse are required; as is conceded, a layperson with minimal training is qualified to provide CIC. See also, *e. g., Department of Education* v. *Katherine D.*, 727 F. 2d 809 (CA9 1983).

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sibilities for injury and liability. Many of these risks are more serious than that posed by CIC, which the courts below found is a safe procedure even when performed by a nine-year-old girl. Congress assumed that states receiving the generous grants under the Act were up to the job of managing these new risks. Whether petitioner decides to purchase more liability insurance or to persuade the State to extend the limitation on liability, the risks posed by CIC should not prove to be a large burden.

Finally, we note that respondents are not asking petitioner to provide *equipment* that Amber needs for CIC. Tr. of Oral Argument 18. They seek only the *services* of a qualified person. A school's obligation may be quite limited with respect to health-related equipment needed by children even when they are not in school.

We conclude that provision of CIC to Amber is not subject to exclusion as a "medical service" under the Act, and we affirm the Court of Appeals' holding that CIC is a "related service" under the Education of the Handicapped Act.[13]

III

Respondents sought relief not only under the Education of the Handicapped Act but under § 504 of the Rehabilitation Act as well. After finding petitioner liable to provide CIC under the former, the District Court proceeded to hold that petitioner was similarly liable under § 504 and that respondents were therefore entitled to attorney's fees under § 505 of the Rehabilitation Act, 29 U. S. C. § 794a. We hold today, in *Smith* v. *Robinson*, —— U. S. —— (1984), that § 504 is inapplicable when relief is available under the Education of the Handicapped Act to remedy a denial of educational services. Respondents are therefore not entitled to relief under § 504, and we reverse the Court of Appeals' holding that respondents are entitled to recover attorney's fees. In all

[13] We need not address respondents' claim that CIC, in addition to being a "related service," is a "supplementary ai[d] or servic[e]" that petitioner must provide to enable Amber to attend classes with nonhandicapped students under the Act's "mainstreaming" directive. See 20 U. S. C. § 1412(5)(B). Respondents have not sought an order prohibiting petitioner from educating Amber with handicapped children alone. Indeed, any request for such an order might not present a live controversy. Amber's present individual education program provides for regular public school classes with nonhandicapped children. And petitioner has admitted that it would be far more costly to pay for Amber's instruction and CIC services at a private school, or to arrange for home tutoring, than to provide CIC at the regular public school placement provided in her current individual education program. Tr. of Oral Argument 12.

other respects, the judgment of the Court of Appeals is affirmed.

It is so ordered.

May 24, 1984

83-558 Irving Independent School District v. Tatro

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 24, 1984

Re: No. 83-558 Irving Independent School District v. Tatro

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

Re: Irving Independent School District v. Tatro, No. 83-558

Dear John:

Your partial dissent prompts me to respond informally rather than in the Court's opinion.

The Court of Appeals found petitioner liable under the Education of the Handicapped Act and the Rehabilitation Act. We granted certiorari to review both holdings. Question 3 in the petition for certiorari asked, inter alia, whether the Court of Appeals' finding of liability under the Rehabilitation Act conflicted with our holding in Southeastern Community College v. Davis, 442 U.S. 397 (1979). Contrary to your suggestion, there is no reason to think that this plain language contained an implicit qualification that the issue of liability under the Rehabilitation Act should not be reached if nothing but the $27,000 attorney's fee award turned on the answer. The questions presented were drafted by petitioner, who surely intended no such qualification.

The petition makes this clear when it asserts that the District Court and the Court of Appeals violated Davis and two other cases in "determining that medical treatment is a related service and that failure to provide same violated both the EAHCA and the Rehabilitation Act and [in] awarding attorneys' fees under § 504." Pet. for Cert. 13 (emphasis added). Squarely presented with the question of petitioner's liability under the Rehabilitation Act as interpreted by Davis, we answer that question with reference to our holding in Smith v. Robinson, ___ U.S. ___ (1984).

The Rehabilitation Act issue is also presented by question 2 in the certiorari petition in this case, which asks whether petitioner was liable to provide CIC under the Education of the Handicapped Act or the Rehabilitation Act. You believe that the question is not fairly read to imply the phrase "or both," but I think this is a grudging reading of the question presented. Petitioner's position all along has been that it is obliged to provide CIC under neither statute. For the reasons just stated, I am still persuaded that petitioner sought the Court to review its liability under the Rehabilitation Act (and consequent liability for attorney's fees) even if the Court found it liable to provide CIC under the Education of the Handicapped Act.

If this does not persuade you, I'll write it into the opinion.

Regards,

WRO

Justice Stevens
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 25, 1984

Re: 83-558 - Irving Independent School District v. Tatro

Dear Chief:

Thank you for your letter responding to my concern that you have written the opinion more broadly than necessary. Let me first digress by recalling the conversation that you, Lewis, and I had at lunch yesterday concerning the Grove City case. You will recall that I wrote separately in that case taking the position that the case could be decided in favor of the Government without delivering an advisory opinion on the controversial issue in the case. The Court nevertheless went forward and rendered an opinion which has invited a congressional reaction that will increase the business of judges. I really think Grove City is a good example of a "self-inflicted wound."

I do not suggest that the same potential for an excessive legislative reaction inheres in this case. I do believe, however, that by going farther than necessary to make sure that this handicapped child's family must pay its own attorney's fees very likely will produce a legislative reaction that will include an attorney's fee provision in the EAHCA as well as the Rehabilitation Act. Your letter puts forward a legitimate justification for the position you take, but it still does not persuade me that it is necessary to reach out to impose the fee obligation on the handicapped family. In other words, I am still persuaded that we should adhere to the practice, whenever it is legitimate to do so, to write our opinions as narrowly as possible.

I appreciate your taking the time to write to me.

Respectfully,

John

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 25, 1984

Re: Irving Independent School District v. Tatro,
No. 83-558

Dear Chief:

Please join me in Parts I & II of your opinion. I will await the writings in Smith v. Robinson before deciding what action to take with regard to Part III.

Sincerely,

Bill

WJB, Jr.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 4, 1984

Re: No. 83-558 Irving Independent School District v. Tatro

Dear Chief,

Please join me.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 5, 1984

Re: 83-558 - Irving Independent School District v. Tatro

Dear Chief,

I join Parts I and II and will join Part III if I join Harry in Smith v. Robinson, which I expect to do.

Sincerely yours,

Bym

The Chief Justice

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 13, 1984

Re: No. 83-558, Irving Independent School Dist. v. Tatro

Dear Chief:

I can give you a Charlie Whittaker "graveyard dissent" and join your opinion. I would be a lot more comfortable, however, if footnote 14 were just omitted. I say this because I think it is unnecessary and serves to detract from your opinion.

You cite Smith v. Robinson on pages 11 and 13, so this case will have to be held for that one. You have not voted in Smith v. Robinson, however.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 15, 1984

Re: 83-558 - Irving Independent School District v. Tatro

Dear Harry:

Thanks for your note of June 13.

Note 14 has served its purpose for some who have joined and I am glad to delete it. I don't like long notes but it had a purpose.

I will hold off on Smith v. Robinson and maybe this case will not be ready until Smith is ready; I will focus on that case.

Regards,

WEB

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 28, 1984

Re: No. 83-558-Irving Independent School District v. Tatro

Dear Bill:

Please join me in your concurring in part opinion.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

83-558 Irving Independent School District v. Tatro (David)

CJ for the Court 4/30/84
1st draft 5/23/84
2nd draft 6/4/84
3rd draf6 6/18/84
Joined by LFP 5/24/84
WHR 5/24/84
WJB joins Parts I and II 5/25/84
SOC 6/4/84
BRW joins Parts I and II and will join Part III if he joins Smith v. Robinson.

JPS concurring in part and dissenting in part
Typed draft 5/24/84
1st printed draft 5/24/84
2nd draft 6/6/84

WJB concurring in part and dissenting in part
Typed draft 6/28/84
1st draft 6/29/84
Joined by TM 6/28/84