In the

# Supreme Court of the United States

DAISY JOHNSON, et al.,

Appellants,

v.

NEW YORK STATE EDUCATION DEPARTMENT, et al.,

Appellees

No. 71-5685

Washington, D. C.
November 8, 1972

Pages 1 thru 38



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| v. | : | No. 71-5685 |
| NEW YORK STATE EDUCATION DEPARTMENT ET AL. Appellees | : | |

Washington, D. C.

Wednesday, November 8, 1972

The above-entitled matter came on for argument at 10:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

CARL JAY NATHANSON, ESQ., Nassau County Law Services Committee, Inc., 1570 Old Country Road, Westbury, New York, 11590, for Appellants.

JOEL LEWITTES, ESQ., Assistant Attorney General of New York, New York, N.Y., for Appellees.

# C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first in No. 71-5685, Daisy Johnson against New York State Education Department.

Mr. Nathanson, you may proceed.

ORAL ARGUMENT OF CARL JAY NATHANSON, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. NATHANSON: Mr. Chief Justice, and may it please the Court:

Education has long been regarded as perhaps the most important function of both State and local governments. It is recognized as fundamental and preservative of the democratic society.

Education truly prepares the individual for meaningful participation in society, economically, socially, politically, intellectually.

New York State, like most States in the United States, considers education of such fundamental importance to both the individual and to society that it compels minors to attend upon compulsory instruction for a period of ten years.

It is against this background that the issue being presented in this Court must be considered.

New York's public school system continues to rely extensively upon textbooks as the basic core for their curriculum.

It remains a fundamental tool in the education of all youngsters in the public schools.

The question presented in this Court is whether the Equal Protection Clause of the Fourteenth Amendment forbids New York State from denying indigent school children textbooks essential for their required instruction solely because of the inability of their parents to pay textbook rental fees.

In all but six of New York's 756 school districts, the statutory scheme for providing textbooks is twofold.

With respect to students in grades 7 to 12, the Education Law requires that textbooks be provided free of charge to all students in both the public and the private schools.

With respect to students in grades 1 to 6 in the public schools, the legislative scheme provides that the authorized voters of a school district may vote a tax for the purchase and loan of textbooks free of charge to all students in grades 1 to 6.

However, the absence of such budget approval and such approval of a tax for that purpose, the local school districts are required to either rent or sell textbooks to all children in grades 1 to 6.

In June and July of 1970, the voters of the West Hempstead Public School District defeated a budget and a tax for the purchase of textbooks and the distribution of textbooks

free to children in grades 1 to 6.

Consequently, the local school district notified all parents of children in grades 1 to 6 that they would have to pay a textbook rental fee as a condition to their children obtaining textbooks.

MR. CHIEF JUSTICE BURGER: What is the situation today?

MR. NATHANSON: Mr. Chief Justice, subsequent to the granting of certiorari in this case, the school district did, in fact, approve a school budget and a tax for the purchase of textbooks.

MR. CHIEF JUSTICE BURGER: So that all of these students, grades 1 to 6, are now receiving books, are they?

MR. NATHANSON: All students in the elementary school are now receiving books.

However, the local school district is under an obligation under New York State law to hold annual budget referenda.

The preceding history of the pattern of voting in this district -- where six of seven school budgets have been defeated -- the fact that there are -- these local school boards admit that absent approval of this tax they are mandated to rent or sell textbooks to the students in the district, I think bears upon whether or not this case is moot or presents a justiciable controversy, and I cover that further subsequently

in the argument.

MR. CHIEF JUSTICE BURGER: Very well.

MR. NATHANSON: The petitioners in this case are parents of children in the elementary school grades.

They were notified, received letters -- the record bears it out -- prior to the commencement of the school term, that no textbooks would be provided to children unless their parents paid a textbook rental fee.

Petitioners are also recipients of public assistance in New York State and are unable to pay -- were unable to pay the textbook rental fee. That factor is uncontroverted by the record and there is no question of their indigency.

Q Part of their payments are for educational purposes?

MR. NATHANSON: Yes, with respect to that portion, New York State, in 1971, reduced the level of benefits for public assistance from 100% of need to 90% of need.

At the present time, recipients only receive 90% of what the State has determined to be the minimum need for sustenance.

So there is no question that even assuming there was a minimal allowance in the budget for education, the very fact that they have reduced the budget by that 10% deprives the recipient of any opportunity to purchase the textbooks.

Q Then what you are saying is that the educational increment is used for general support?

MR. NATHANSON: Yes, sir. The education increment is used for other items aside from textbooks. It would be used for purchase of sneakers for gymnasium classes. It would be used for purchase of gym suits. It would cover all items related to educational needs.

Q Well, inherent in your argument then is the fact that this isn't an educational increment at all, despite it's being so-called?

MR. NATHANSON: That's correct.

Q Does the record indicate the type of use you have just spoken of, Mr. Nathanson?

MR. NATHANSON: With respect to how the funds are used? No, there isn't. But this question was raised before the Court in the Rosado case with respect to the adequacy of the grant.

I have contacted the attorney who argued the case before the Court, and handled the Rosado case. I was informed by that attorney that the allowance is intended to cover all these other items and not intended to cover textbooks.

Q But that's not in the record here?

MR. NATHANSON: No, sir.

Prior to the commencement of this action, the petitioners, through their attorney, contacted the superintendent of the local school district and inquired as to whether or not some alternative method could be utilized to obtain textbooks

for these indigent children.

The superintendent of the school district, although sympathetic with the plight of the children, indicated that he was obliged under State law to exact textbook rental fee as a condition to furnishing textbooks.

The recipients also contacted the State and local welfare agency and requested an allowance to cover the textbook rental fees.

They were informed that New York State, when it went onto the flat grant system, eliminated all special grants and any opportunity to provide for this type of expenditure. That is borne out in the record in the affidavits of the petitioners.

Q Mr. Nathanson, let me ask you one other question. What, in fact, happened to the children of your petitioners for these past years? Did they ever receive textbooks in some way?

MR. NATHANSON: Yes, Justice Blackmun.

Subsequent in the term, five weeks after the commencement of the school term, and after the District Court dismissed the complaint for legal insufficiency, the named plaintiff's children did receive textbooks for the balance of the school term. They went through five weeks of the school term without textbooks.

Q May I ask the source of their receipt?

MR. NATHANSON: There was an arrangement entered into between counsel for the local school board and myself, whereby the sum of $30 was deposited by me to be held in escrow pending resolution of the controversy, and the local school board agreed to provide textbooks to only the named plaintiff's children without prejudice to maintaining the class action.

I might point out that the local school board in the matter, as it appeared in the lower Court, conceded that there were, in fact, other recipients in the school district who were similarly affected by this legislative scheme.

I have also attached as an affidavit to the reply brief an affidavit from another recipient who is a member of the class, and in the second school term, again, went without textbooks for a substantial period of the school year.

Q Of course, years ago, nobody got free textbooks.

MR. NATHANSON: That's true.

In New York State, textbooks -- I come from the City and New York City textbooks have always been provided free. They have always been thought of as a fundamentally basic part of the learning process.

Q Maybe in your day, but for an old-timer, not in my day.

Q How long has the Constitution of New York provided that all children must be given a free education, as a State

Constitutional thing?

MR. NATHANSON: I am sorry, Mr. Chief Justice?

Q How long has the provision for compulsory State education been in the New York State Constitution?

MR. NATHANSON: Goes back more than 100 years, sir.

With respect to -- this action was started as a class action in the District Court on September 16, 1970.

The petitioners asserted three basic claims in the District Court, all alleging a denial of equal protection.

The petitioners only press one claim in this Court and that is the poverty claim.

The petitioners allege that textbooks are essential for the education of their children, that the failure to provide textbooks by the State has denied them equal educational opportunity, and has further stigmatized them.

With respect to the stigma, the affidavit of one of the petitioners, Forestine Pressy, bears upon that.

In her affidavit submitted in the District Court, she said: "On the first day of school, my daughter asked the teacher for textbooks and was told that she would have to bring money from her mother to obtain textbooks. My daughter asked me upon her return from school why some children in her class were given books and I told her that the parents of those children were able to pay for the books."

Petitioners also allege that children being forced

to attend school under the Compulsory Education Law and then sit in classrooms alongside other classmates whose parents were able to afford textbooks were subjected to further stigmatizing by having a feeling of inferiority and unworthiness engendered upon them.

What came clear through this whole thing was an official State view of their worthiness, or, I should say, unworthiness. The classification creates two classes of children in grades 1 to 6, the poor and the non-poor.

The non-poor receive the full benefits of the State's educational program and the poor are barred from receiving those benefits.

Q The statute doesn't create that classification. Those classes exist quite apart from the statute, don't they?

MR. NATHANSON: Yes, but the impact of this textbook rental fee is, in fact, to deprive those children of equal educational opportunity.

The statute may be neutral on its face, but in operation it is discriminatory.

Q How do you distinguish your case from the general doctrine laid down in Dandridge v. Williams?

MR. NATHANSON: I think that this case satisfies the traditional test of Dandridge for the following reasons:

Dandridge said that minimally for a classification to cut mustard, under the E ual Protection Clause, it's got to

be rationally based and free from invidious discrimination.

I think this classification fails to satisfy those requirements for the following reasons.

First, in considering the rational basis for this legislation, I think we've got to look at the overall purpose of education in New York State, which is to provide a system of common schools where all the children of the State may be educated.

Secondly, I think we have to consider the fact that children are attending school under compulsion.

When measured against this overriding general purpose of the State, it can hardly be said to be rational to deny poor children the very basic tools they need to acquire learning skills.

Q You are talking about a classification. You are not talking about the distinction between elementary school children and children further along in school --

MR. NATHANSON: No.

Q -- So just what is the classification that you are talking about? The fact that New York doesn't give anybody free books from grades 1 to 6?

MR. NATHANSON: The fact that New York State gives books to those parents who are -- to children of those parents who are able to afford textbooks.

Q Well it sells them.

MR. NATHANSON: Rents them.

Q Rents them. It doesn't give them, does it?

MR. NATHANSON: The impact upon those who don't have the rental fee is to be denied equal educational opportunity.

Q Well, the classification, though, really, is almost non-existent, as I would see it. New York State says to children in the elementary school grades: "We will rent you books." And that's that. It isn't a classification in any orthodox equal protection sense.

MR. NATHANSON: I think the classification falls within those line of cases marked by Griffin. I think they are really on all fours with the Griffin case.

New York State tells -- accords a right of education to all students of the State.

Griffin accorded the right of appellate review.

There is no Constitutional basis for either right, Federal Constitution basis, it may be argued.

In Griffin, the statute was neutral on its face. Those who could afford the transcript fee attained adequate appellate review. Those who couldn't, were denied adequate appellate review.

I think itparallels this case.

Q Then you say basically that the rationale of Griffin should be carried over from the field of criminal law into this situation?

MR. NATHANSON: Yes. I don't think the Griffin rationale has been limited by this Court to only criminal law. I think the rationale in the Griffin case carried through in the Harper case.

I think the underlying rationale of that case was extended further in the Boddie case.

I think it is a continuous application of that principle. I don't think this Court has to abandon that rationale to find any other basis of deciding this case.

Q Mr. Nathanson, may I ask if this is a case in which a three-judge Court should properly have been convened. The Court of Appeals said it was not, but if it was then are the merits before us at all?

MR. NATHANSON: Your Honor, the third cause of action did seek declaratory relief. I think it is careful of resolution in that framework, that the Court can declare the right of those --

Q But I thought this case was litigated before Judge Travia before the Court of Appeals --

MR. NATHANSON: That is correct.

Q -- on the issue of whether or not a three-judge Court should have been convened, was it not?

MR. NATHANSON: Yes, sir.

Q And the Judge Travia said there was not a substantial Federal question and the majority of the Court of Appeals

agreed, isn't that so?

MR. NATHANSON: That is correct.

Q Well, if Judge Travia and the majority of the Court of Appeals are wrong, then shouldn't the disposition here be that they were wrong and send this back to the convening of a three-judge Court to determine the merits.

I don't see how the merits are here before us at all.

MR. NATHANSON: This Court could properly send the matter back for three-judge Court --

Q Don't we have to if it should have been a three-judge Court case in the first instance? We have no jurisdiction, do we?

MR. NATHANSON: Except that the Court of Appeals, I think, noted that because of the third cause of action, which sought declaratory relief, that it wasn't essential to convene a three-judge Court. If this Court should determine that jurisdiction lied and that relief was appropriate, that relief could be granted under the declaratory judgment cause of action, and that in view of the fact --

Q That would have been for a single judge?

MR. NATHANSON: That would have been for a single judge.

Q But we only reach the merits if we find that it is properly decided on the three-judge Court issue, isn't that

right?

MR. NATHANSON: That's correct.

The local school board -- the State Department of Education filed neither records nor affidavit in the District Court. The local school board filed answering papers and affidavits and admitted some very key matters.

First, they admitted that fees were demanded.

Secondly, they admitted that those unable to pay the textbook rental fees were denied textbooks.

Third, they admitted that the fee policy placed a burden upon the educational opportunity of those denied textbooks, and that those children were denied equal educational opportunity.

The board further admitted that textbooks in grades 1 to 6 are essential for the quality education of all children.

The District Court dismissed the case, finding legal insufficiency, without holding any evidentiary hearing.

There was no opportunity at District Court to either explore the class further or present any further information.

The Court of Appeals again affirmed the District Court's dismissal but, nevertheless, conceded that education was no doubt an area of fundamental importance, that those children who could afford textbooks no doubt received a better education than those who could not, but concluded that the statute was neutral on its face and free from any invidious

discrimination.

Q Do you have a figure for one year's textbooks, again? It is somewhere in the record here?

MR. NATHANSON: Actually, there are two parts to the costs. We are only pressing the textbook fee.

Textbook fees were $7.50 per child.

In addition to the textbook fee, there was a material fee, a fee for supplies and other related items.

That totalled some $15. So, all in all, the fee, with textbooks and that other item, ranged from $15 to $17 per child.

We are pressing only the claim of the textbooks as being essential to education.

Q Did I understand you to say that some of the school districts in the State of New York do provide free textbooks?

MR. NATHANSON: Yes, Mr. Justice Powell.

Q Do they do that as a matter of State law or --

MR. NATHANSON: Yes, the State law distinguishes between some school districts on the basis of size.

I am from New York City. New York City has never had a problem obtaining textbooks. Children always get textbooks free in the City.

Some of the other school districts which encompass cities are required under the State law to provide textbooks, irrespective of budget considerations.

Q If we reach the merits in this case, do you claim that that is a classification that violates the Equal Protection Clause, namely, a classification based on the size of cities within the State of New York?

MR. NATHANSON: We are not pressing such claim in this case. This case confines itself to whether or not the local school district can provide textbooks to those affluent children -- children of affluent parents who can pay and deny that essential tool of learning to those who are too poor to pay the required fee.

That's the premise of this case and we confine it to that issue.

Q While I have interrupted you, may I ask you this question? Assuming you are right with respect to school books, and I think you can make a very strong argument, as you are, on that point, how far would you carry the logic of your position? Would you carry it to free transportation, to free lunches, to provide adequate clothing? How far down the road would you suggest the Equal Protection Doctrine would carry?

MR. NATHANSON: We are not making that claim here, but I would say that with respect to transportation, the same argument can be made. Getting to school is essential to any education, and if some children are passed by at their door because they don't have the carfare to get on the bus, I would say that they, too, have an Equal Protection claim. We pass

into the gray area when we talk about clothing. I think that's where we've left the rationale of the Griffin case.

Q Free lunches?

MR. NATHANSON: Free lunches are basically handled under Federal legislation. I don't think we can anticipate that as a problem.

Q Mr. Nathanson, free glasses for the myopic child who is nearsighted and can't see without them?

MR. NATHANSON: Well, the problems of the handicapped child are a real problem. I would say that if the glasses are essential for the child to participate in the educational program, and if glasses are, in effect, provided to other children by the school district, then the same rationale would apply.

We are talking, I think, about something that's being provided to some children and not being provided to others. It is the obligation of the State to treat children equally.

Q The child of wealthy parents would have glasses supplied. Just as here the child of the more affluent parent would have his textbook rental paid.

I am asking in your case whether your logic doesn't take you to the end result that the district would have to provide glasses for the indigent child?

MR. NATHANSON: That problem is being addressed to by

the Social Services Law.

Q Suppose it isn't --

MR. NATHANSON: I don't think that that would necessarily carry forth.

Q Your argument doesn't turn, does it, Mr. Nathanson, on the fact that it's the school board itself which rents the textbooks?

Wouldn't your position be the same if the school board said, "Here's a list of books you have to have. Now you can go down to Joe's Book Store and rent them, if you've got the money."

MR. NATHANSON: If the textbooks were required -- and in New York State the textbooks that these children use are part of a required course of study -- if the school requires these textbooks be used, and children who can pay the rental fee get them, I think there is an obligation to provide it for those who can't pay rental fee.

Q It doesn't turn on the fact that the renting agency here happens to be the State here or the school board?

MR. NATHANSON: Well, we have State action because it is the school board involved.

Q But the State action is the requirement,isn't it, that books be used for the course?

MR. NATHANSON: If the State were to require that these books be used and the children had no way to obtain these

books because they lacked the fee, I think the same rationale would apply.

Again, in 1971, the school district on three occasions rejected the school budget.

Before I discuss the legal contention any further, I think it is important to consider two aspects of this case.

What's happened to these poor children has happened to them in schools they are compelled to attend.

Secondly, the injury they have suffered is due not to any conduct or demeanor on their part, but solely because of the fact of their status as members of poor families.

I think the State has -- while we submit that -- and we've argued in our brief that -- education could qualify under the more exacting standard of the Equal Protection Clause, we submit that for the purposes of determining this case, the Dandridge basis is sufficient, again that this classification is neither rationally based nor free from invidious discrimination.

I discussed the lack of rational basis before. I will just deal with lack of invidious discrimination here.

First, the State has stigmatized poor children.

I think it is significant that in the Court of Appeals the majority, although they affirm the lower Court, conceded that the plaintiffs had realistically described the potential plight of these children when they described the

psychological and emotional harm being engendered by being compelled to sit in classes with other students who were learning from textbooks while they don't have textbooks.

Q Do I have to get to the psychological thing? The child just doesn't get an equal education, doesn't he? Isn't that your point?

MR. NATHANSON: That's correct, Justice Marshall.

Q Why do we have to worry about the psychological. He doesn't learn that 2 times 2 is 4 because he doesn't have a book.

MR. NATHANSON: That's correct.

He also learns that wealth breeds favored treatment in the public school, which is a poor lesson for both rich and poor child in a classroom.

The further invidious discrimination in this case is the fact that children are being penalized for something over which they have no control.

Just as the child in the Levy case and in Webber case was penalized for illegitimacy, a condition over which he had no control, here too, the impact of this -- and the admitted impact of this classification -- is to deny equal education to poor children.

I think it is significant that the Brown case, which said that once the State offers the opportunity for education it must offer it upon equal terms. It is a right that must be

offered upon equal terms to all.

I don't think it is being offered upon equal terms in this case.

I think the Griffin case is parallel to this case, and again the Griffin case didn't depend upon the Court finding any Federal Constitutional right for appellate review. Instead the case was hinged upon the fact that the State had, in fact, provided appellate review and the fee prevented those people who couldn't afford the transcript from receiving an adequate appellate review.

I think that very same rationale applies to this case.

I think also the method in which the State has brought about achieving their purpose is ill-tailored and poorly tailored for the objective.

I fail to see how they maximize impact of the textbooks by denying textbooks to those who perhaps need them most.

It would seem that a less onerous alternative would be to deny textbooks to children in grades 1 to 12 who are able to pay the textbook rental fees.

In that case, all children would be able to obtain textbooks in the State.

I think this case also parallels the Harper case. In Harper, too, there was no Federal Constitutional right to vote in the State election. Nevertheless, the Court considered

the fundamental interest involved, the right to vote being preservative of all other rights.

I think education also shares that place in American society. It is preservative of every other basic civil and political right.

Q We've read these opinions of Judge Travia and the Court of Appeals and I don't find anything in them that suggests, as you have, that on the declaratory judgment the both Courts thought that this was proper for a single judge and then on appeal.

Page 63 of the record that reached the Court of Appeals approach this: "At the outset there must be a determination as to whether Judge Travia properly denied plaintiff's motion for the convening of a three-judge Court. The three-judge Court is ultimately decided upon the rationality of the New York State Legislature's enactment of 701 and 703. There is little to be gained by having this Court of three judges subject its own rationality to further scrutiny ..."

And everything else in the opinion is addressed to the question whether this is properly a case for a three-judge Court.

Now, I suggest to you that if we were to disagree with the Court of Appeals and Judge Travia, we ought pay no attention to your argument on the merits but send it back to a three-judge Court to address the merits.

MR. NATHANSON: I had based my statement on Footnote 5 in the Court of Appeals opinion in which the Court indicated that under the circumstances --

Q In the event that the complaint had been meritorious.

MR. NATHANSON: I interpreted that to mean that declaratory relief would have been appropriate even if the Court found that there was a substantial claim, would not have to have convened --

Q Well, I gather you do agree that the threshold question for us is whether or not the motion for a three-judge Court should have been granted.

MR. NATHANSON: Yes, sir.

Q And in order to decide that, we have to consider the merits of your Constitutional claim, don't we?

Q Consider it but not decide it, if it should have been for a three-judge Court.

Q If we say three-judge Court, it is a question of whether it is a substantial Federal question,and then necessarily to have to give some thought to the merits. We don't decide the merits to decide whether there should be a three-judge Court, just whether there is substantial Federal claim which requires the convening of a three-judge Court.

I thought that's what this case was all about and that's why we took it.

Q Mr. Nathanson, can you enlighten me. Suppose you had

simply sought declaratory relief in the District Court, or what was it, the Eastern District, and not sought an injunction?

Regardless of Judge Travia's opinion as to the substantiality of the Constitutional claim, would that have required the convening of a three-judge Court?

MR. NATHANSON: No.

Q I didn't think so.

MR. NATHANSON: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Lewittes.

ORAL ARGUMENT OF JOEL LEWITTES, ESQ.,

ON BEHALF OF THE APPELLEES

MR. LEWITTES: Mr. Chief Justice, and may it please the Court:

Q Are you going to address that question, Mr. Lewittes?

MR. LEWITTES: Yes, I will.

I would, initially though, like to analyze these two statutes and try and place this case, if I may, in its proper perspective.

The two statutes are Section 01 of the New York Education Law, and that deals with the provision for the furnishing of textbooks in grades 7 through 12, and which allows the local school board to pay up to $10 for books per child for the school year. That's $10. That's the outside limit they may spend in grades 7 through 12.

Section 703, dealing with the primary grades 1 through

6, speaks in terms of qualified voters of any school district may vote a tax for textbooks. If they do not, if they are under the austerity program, then they may charge a rental fee per year of $7.50 per child.

Now, this provision under 703, does not indicate the heavy areas, the urban areas, in New York State, because provisions there do allow the local school boards to provide textbooks without a referendum, and authorize them so to do.

It is noteworthy as well, that in these large urban areas, New York City, and we have set them forth, which they are, Buffalo and Rochester, Syracuse and Yonkers, it is noteworthy that these are concentrated areas of welfare.

So it is not quite justified on the part of the petitioners here to claim that the State of New York is discriminating against indigent welfare recipients. As a matter of fact, a large percentage of the welfare recipients do reside in these urban areas and are beneficiaries of the State statutes that do commit school textbooks to be distributed without any charge or rental fee.

Q You agree that Constitutional rights are personal to the individual, don't you?

MR. LEWITTES: Yes, they are.

If I may, Justice Marshall, I am simply trying to place this case in its perspective. I think it is getting a little out of hand.

Now, the $7.50 rental fee per year in grades 1 through 6, can actually be deemed a reasonable rate in light of the $10 limit that's applied in grades 7 through 12, under Section 701, and because the declaration of policy in the State of New York with regard to grades 7 through 12 is that because of the added cost of the textbooks and the technical nature of the textbooks, this heavy burden should not be passed on to any of the children and the State has formulated that declaration of policy in the statute itself.

So the $7.50 figure is a reasonable rate when we look at the $10 rate in Section 701.

Now, in New York State prior to this Court's decision in Rosado against Wyman, there were special need grants for AFDC or aid for dependent children, recipients included. There was included an item for textbooks in these special need grants.

This Court in Rosado determined that the State of New York may not so proceed with special need grants. There must be a flat general grant.

And in following this Court's dictates, New York's Social Services law was amended to read so that Section 131-A does eliminate all special grants, excluding rent and fuel, but it includes textbooks and related educational expenses under the general grant.

And the record shows,and it has been conceded by the petitioners in this case, that when Rosado case was remanded

to the District Court, the District Court determined that approximately $3 is included in the monthly grant for all educational expenses for a family of four.

So that amounts to $36 per year for a family of four.

Assuming that the 10% reduction is involved here, then that would be $32.40 per year for educational expenses.

Now, we have just noted that the rental fee is $7.50. So that it is noteworthy that it is not an unjustifiable rental fee and that these petitioners can afford this, assuming that they budget the welfare grants properly.

Q How about poor people who are not on welfare?

MR. LEWITTES: Those poor people are not in the class, I understand, this alleged class --

Q I am just asking what happens to them?

MR. LEWITTES: I assume, obviously, they are not recipients of welfare, and therefore would not be getting this $7.50, this $36.

Q And would not be getting books.

MR. LEWITTES: Yes. Technically, yes.

Q But you are not tying into welfare along with this statute when it was passed, are you?

MR. LEWITTES: Well, I think that we could conclude, could we not, that the State Legislature, when it passed this law which was passed in 1965, may have very well taken into

light the Social Service Law, and, in so doing, felt that it would cover the educational costs but that the welfare statute would not cover the educational costs when you got to the higher grades because of the heavier cost of textbooks.

Therefore, the difference between 701 and 703.

Q Of course, it could have been done by just giving them the books.

MR. LEWITTES: Well, it is quite clear, is it not, --

Q Am I correct?

MR. LEWITTES: Yes, but it is quite clear, is it not, that the State of New York really never has been in the business of loaning textbooks or of selling textbooks.

May I also note, by the way, that the educational --

Q How many States have this statute?

MR. LEWITTES: We have a compendium and there are at least 15 to 20 States that have this, if I am not mistaken.

The educational expenses --

Q Do you think a child can be educated without books?

MR. LEWITTES: Well, Justice Marshall, there are theories in education today, they tell me, that children may be educated without books. As a matter of fact, some of the theories claim that these textbooks are not at all helpful, that they are doing away with --

Q What study was that?

MR. LEWITTES: I believe it is mentioned --

Q Aren't there also studies that say if a child doesn't know how to read by junior college, forget about it? Am I right on that?

MR. LEWITTES: Well, yes, but they do not say that it is because of the textbook that he knows how to read.

Q Why do you allow for other people to buy them?

Why do you require them?

Aren't they required?

MR. LEWITTES: I think that the State of New York statute does not require the textbooks --

Q Doesn't the State Board of Education require certain textbooks?

MR. LEWITTES: They have an approved list of textbooks, yes, Your Honor.

Q Well, what's that for?

MR. LEWITTES: I am not saying -- I think the question was asked of me was whether or not it is essential that textbooks be used in education.

My answer was that I don't think it is necessarily true that I concede that because there are theories in educational circles today --

The question as to whether or not the State of New York --

Q What do you use in place of textbooks?

MR. LEWITTES: I am not that familiar with the

theory. It was noted, by the way, in the Circuit Court dissenting opinion that there are theories --

Q Are you relying on them?

MR. LEWITTES: No, I am just trying to answer your question.

You asked me, I believe, whether or not one can be educated without textbooks, and I am answering that there are theories that, yes, the answer is yes.

If you are asking me whether in this particular case the State of New York textbooks are involved in the educational process, the answer is yes.

Q Well, you know you go way back to before you had schools, like President Lincoln, at least he had books.

MR. LEWITTES: Well, I think with this modern age today --

Q I want you to show me somebody that's educated and passed an examination without books.

MR. LEWITTES: I can say that with the visual aids and the new developments in education --

Q Do you have visual aids in these schools in this county?

MR. LEWITTES: I think they probably do have visual aids --

Q Probably, probably?

MR. LEWITTES: I don't think --

Q It is probable they have visual aids, and it is probable they have this, but one thing is certain, these kids don't have books, that is certain.

MR. LEWITTES: But the thing that is certain is that the kids do have books. The school budget was voted and they have books.

Q And could that be changed next year?

MR. LEWITTES: Well, it may be changed next year, but let me say this, Justice Marshall, if I may. It has been determined that books are useable for 5 years.

Q Could it be changed 5 years from now?

MR. LEWITTES: Yes, it could, but I think the history of the school district, as a matter of fact, it has been alleged throughout that there were three votes that voted down the budget.

As a matter of fact, it was one school year that they voted down the budget. Prior to that, they had always voted for the budget.

I think that the fact of the matter is that because of the welfare and because these are welfare children that are bringing this, I think the welfare grants do cover this.

In the alternative, I think we could argue, and I say in the alternative because Dandridge talks in terms of allocation of financial resources. I think we've more than allocated. We cover them.

But in our own -- New York State does have a finite budget, and this is a welfare case.

As much as they would like to construct this to be one of fundamental liberty, it is not fundamental liberty. They are not arguing that it is really fundamental liberty because fundamental liberty would mean that the textbooks would be available to all the students, whether they are rich or poor.

They don't say that here. They say that we should provide textbooks for indigents.

If it is a fundamental liberty, they should be arguing it should be provided for all.

The fact of the matter is that it is not a fundamental liberty. It is not a question of fundamental liberty involved here because I don't think we have to reach that issue. I think it is one of the welfare cases under the -- one of the social economic cases under Dandridge, and that we have reasonably handled this problem with out Statute 701 with grades 7 through 12 and 703, 1 through 6.

Which is the most important accoutrement of an education? I don't think the State of New York has decided this and should be held to decide.

The school lunch program is a very important factor, no doubt. In Briggs v. Carrigan in the First Circuit, they held that they could restrict school lunch programs to

secondary schools even though that fell heavily upon indigent students who could not afford the lunches.

Q How long have you had school books in New York? Textbooks?

MR. LEWITTES: I frankly, Justice Marshall, cannot answer that. I would say for at least 50 years.

Now, I would like to get -- before I close, I would like to get to the question -- Justice Brennan's question -- yes, the only issue before this Court is whether or not a three judge-court improperly was denied and that is the sole issue here.

Of course, the merits have to be considered, but have they raised a substantial Federal Constitutional question?

This Court in the California Water Service v. Redding, has set forth the test whether or not the case is obviously without merit or whether it has been foreclosed by prior decisions of this Court. I think that it is possible that it has been foreclosed by prior decisions of this Court.

I think in Dandridge is the case that we could stand on. I think the language in Jefferson v. Hackney, as well.

I think that if they seek to attack the fact that there is a voter referendum here, I think James v. Valtierra covers that.

So, I think that it is clear that using either the test of the unsoundness or whether it has been foreclosed by

previous decisions of this Court, I think that the three-judge Court was properly denied below.

Q Mr. Lewittes, I understood Mr. Nathanson, in response to a question from Justice Brennan, to say that the Second Circuit here at least relied on an alternate theory for not convening a three-judge Court. That is, that whatever -- even conceding that the Constitutional question might have been substantial, the probability of injunctive relief would be virtually non-existent.

And, therefore, even if the plaintiffs had prevailed in their Constitutional claim, the most they would have gotten is a declaratory judgment.

And, under those circumstances, that it was unnecessary to convene a three-judge Court.

Do you agree or disagree with my --

MR. LEWITTES: That is correct, yes.

Q Granting or not granting an injunction is part of the evaluation the single judge must make in the first instance, is it not?

MR. LEWITTES: Yes.

Q That's no different, I gather, than the assessment that you've been suggesting had to be made to determine whether there should have been a three-judge Court.

MR. LEWITTES: Exactly.

Q So we don't escape it by that footnote?

MR. LEWITTES: No.

Q Mr. Lewittes, as I read the Second Circuit's footnote, Footnote 5 on page 65 of the record, their analysis of the probability of an injunction doesn't turn on the merits of the Constitutional claim, but on whether injunctive relief under the traditional equitable standard would be right.

I read that to suggest a test not based on the Constitutional merits, but on whether injunctive relief, in this or any other type of equitable action, would have been granted.

MR. LEWITTES: I think that's what they said in the footnote with regard to that Astrocinema Corporation, but I think a reading of the decision here in the Second Circuit shows clearly that they used a traditional test as to whether or not a substantial Federal question --

Q Certainly that's the way Judge -- understood that it wasn't --

MR. LEWITTES: Yes, exactly.

Q According to your brief, on May 3 of this year the school district reversed its policy and is now furnishing free school books to everyone. Is that right?

MR. LEWITTES: That is correct.

Q (inaudible)

MR. LEWITTES: We do urge that and I have also added the significant factor that because these books are useable for 5 years that even -- it is not in the realm of clear probability

that we are going to have this problem --

Q Is that the answer to Mr. Nathanson's suggestion that these budget elections are annual affairs? What you are saying is that the books that have been provided have a 5 year life.

MR. LEWITTES: Certainly. They don't become obsolete within one year.

Q So that, at least for the next 5 years, children in grades 1 to 6 are going to have textbooks in this school district.

Q One rental fee and that extends for 5 years?

MR. LEWITTES: They pay one rental fee per year, but the rental fee is only paid in case an austerity budget is voted.

Q I see.

Q So that while it is technically capable of repetition, you are suggesting, are you, that it is highly improbable that it will recur, at least for 5 years?

MR. LEWITTES: Exactly, I am.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lewittes.

The time is up for Mr. Nathanson.

The case is submitted.

(Whereupon, at 10:53 o'clock, a.m., the oral arguments in the above-entitled case were concluded.)