

In the

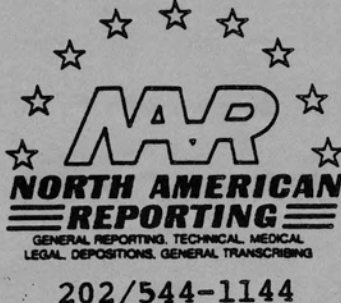
**Supreme Court of the United States**

UNIVERSITY OF TEXAS ET AL.,             )  
  )  
  PETITIONERS, )  
  )  
                                      V.                 )  
  )  
WALTER CAMENISCH                            )

No. 80-317

Washington, D.C.  
March 31, 1981

Pages 1 thru 50



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

-----	:	
	:	
UNIVERSITY OF TEXAS ET AL.,	:	
	:	
Petitioners,	:	
	:	No. 80-317
v.	:	
	:	
WALTER CAMENISCH	:	
	:	
-----	:	

Washington, D. C.  
Tuesday, March 31, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 A.M.

APPEARANCES:

- LONNY F. ZWIENER, ESQ., Assistant Attorney General of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711; on behalf of the Petitioners.
- STEPHEN J. POLLAK, ESQ., Shea & Gardner, 1800 Massachusetts Avenue, N.W., Washington, D.C. 20036; on behalf of the Respondent.
- PETER BUSCEMI, ESQ., Assistant to the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the United States as amicus curiae.

C O N T E N T S

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
LONNY F. ZWIENER, ESQ., on behalf of the Petitioners	3
STEPHEN J. POLLAK, ESQ., on behalf of the Respondent	18
PETER BUSCEMI, ESQ., on behalf of the United States as amicus curiae	33
LONNY F. ZWIENER, ESQ., on behalf of the Petitioners -- Rebuttal	45

- - -

P R O C E E D I N G S

1  
2 MR. CHIEF JUSTICE BURGER: We will hear arguments  
3 first this morning in University of Texas v. Camenisch.

4 Mr. Zwiener.

5 ORAL ARGUMENT OF LONNY F. ZWIENER, ESQ.,

6 ON BEHALF OF THE PETITIONERS

7 MR. ZWIENER: Mr. Chief Justice, and may it please  
8 the Court:

9 This case involves the Rehabilitation Act of 1973  
10 and especially the last provision of that Act, Section 504,  
11 which reads, "no other qualified handicapped individual will  
12 be excluded from or denied the benefits in any program or  
13 activity receiving federal financial assistance."

14 Now, in the Rehabilitation Act there were many  
15 sections, there were many programs, all of which set up  
16 appropriated money to accomplish the program. 504 and 503  
17 were sort of catch-all statutes at the end: you will not  
18 discriminate against the handicapped in any program receiving  
19 financial assistance.

20 Petitioners' first point, and I think I can charac-  
21 terize it as what we consider the most important point, is  
22 that 504 does not require the expenditure of any money by  
23 an institution, no affirmative action; it's a neutral statute  
24 which says that we will not discriminate the handicapped.  
25 You can participate; we will not deny you participation in a

1 program or activity if you are able to participate in it.

2 We say that for the Federal Government to require  
3 any type of affirmative action toward the handicapped, it  
4 will require a statute that's tied to the spending power of  
5 Congress. The Fourteenth Amendment, the Equal Protection  
6 Clause, again only requires the states to be neutral.

7 QUESTION: May I ask, Mr. Zwiener, your position is  
8 that there's absolutely no affirmative obligation under any  
9 circumstances toward the handicapped? No affirmative obliga-  
10 tion? Let me put this hypothetical to you. Suppose there is  
11 no way of getting to classes except by climbing several  
12 flights of stairs and you have a handicapped person who has to  
13 use a wheelchair. Do you have to provide a ramp?

14 MR. ZWIENER: I beg your pardon?

15 QUESTION: Do you have to provide a ramp for that  
16 handicapped person?

17 MR. ZWIENER: We would say not.

18 QUESTION: Say not?

19 MR. ZWIENER: We would say not, unless it's a pro-  
20 gram in which, which is designed to educate this handicapped  
21 in some way.

22 QUESTION: I'm assuming that's what it is, it's a  
23 program. You do have programs. He wants to be a teacher,  
24 for example. He can't get to the classrooms unless he has --

25 MR. ZWIENER: No, we would also say, we would also

1 say that it's not an affirmative action statute under any  
2 -- circumstance.

3 QUESTION: Right. And you don't even have to pro-  
4 vide a ramp, in those circumstances??

5 MR. ZWIENER: That's true. That's what we would say.

6 QUESTION: Unless you get the federal money to  
7 finance the program?

8 MR. ZWIENER: That's true, Your Honor. That's what  
9 we're saying. Now, as I said, we think that the Fourteenth  
10 Amendment requires no more, so we do have to tie, Congress  
11 cannot dictate to the states or to state institutions or a  
12 private employer that they provide affirmative action unless  
13 they tie it to some money given for a particular program which  
14 the handicapped is a beneficiary of.

15 Now, I think we need to make one point clear.  
16 The University of Texas, who is the petitioner in this case,  
17 is not heartless, nor are the other institutions in the State  
18 of Texas, and this case itself will not bankrupt the Univer-  
19 sity of Texas, nor will it bankrupt the smallest state college  
20 in Texas, the interpreter in this case.

21 QUESTION: Too many oil wells down there.

22 MR. ZWIENER: Yes, Your Honor, that has helped the  
23 University of Texas and Texas A&M. The other universities  
24 down there are not pleased with the fact that these two  
25 institutions are getting it all.

1 Well, to be perfectly frank, Mr. Justice Marshall,  
2 the University of Texas may be the richest university in the  
3 country now, more heavily endowed because of its oil proper-  
4 ties than even Harvard University. But what frightens  
5 everybody is not this case. What worries all state institu-  
6 tions, whether they be of higher education or other, is that  
7 the handicapped tie their demands to mainstream 100 deaf  
8 students at the University of Texas. We cannot segregate  
9 them; they want to be separate in the class, with an inter-  
10 preter for each one. And just take Camenisch here, Walter  
11 Camenisch. He got an interpreter to finish his master's  
12 degree. Suppose he wished to continue in a PhD program, no  
13 program having any federal financial aid?

14 And by the way, the University of Texas does get a  
15 lot of grants, but they're specific grants for research, that  
16 are sitting over here. Most of them, as a matter of fact,  
17 are not even close to the main campus of the University,  
18 they're out at the Balcones Research Center. There are pro-  
19 posals made, certain things done, and we say that program does  
20 not infect the rest of the University.

21 But to get back to Walter Camenisch, he gets his  
22 PhD with the services of an interpreter, the entire time,  
23 paid for by the University of Texas. Then he wishes to become  
24 a faculty member of the University of Texas. He's otherwise  
25 qualified, if he didn't have the deaf problem, but since he

1 can't communicate with students, they gave him a job, the  
2 University makes him an associate, or an assistant professor;  
3 he spends the rest of his career, academic career, with an  
4 interpreter that the University must provide him under the  
5 theory that Walter Camenisch, the respondent, and the other  
6 amici that support their position want.

7           Now, to carry it to the extreme -- and really this  
8 is -- if you read the briefs, and, gosh, I can't even remem-  
9 ber them all, because they're just too many; it's difficult  
10 for me to decide who supports what position, but otherwise --  
11 he's otherwise qualified, without the handicap. Now, this  
12 statute now applies to the Federal Government. It didn't.  
13 And they're required to take affirmative action under it;  
14 there's been amendments, but they left the states out when they  
15 put the part about the Federal Government.

16           But here is a man who wants to be a fighter pilot  
17 without hands. He's otherwise qualified; he's got a good  
18 mind, he can read the gauges. He just can't move the buttons,  
19 punch the buttons and the dials. What are you going to do  
20 with him? A ruling, like what's asked for by the respondent,  
21 will put this Court, and all the courts, and all the institu-  
22 tions, the Federal Government, not only the states, in a  
23 situation of with a little affirmative action, or a whole lot  
24 of it, in the case of a fighter pilot without hands. Where  
25 does it stop, is the point I'm making?



1           Now, again, the University of Texas is not heart-  
2 less, and even in its deaf programs -- I mean, even in its  
3 academic programs, it does provide deaf interpreters where  
4 there's a financial need. There have been millions of dol-  
5 lars spent, some of it federal money, some of it state money.  
6 We've got a state statute that forbids us from discriminating  
7 against the handicapped and makes us make building altera-  
8 tions. So we have spent a lot of money.

9           My feelings and sentiments -- I was interested,  
10 coming in last night, picking up a paper, hearing about the  
11 unfortunate tragedy as far as the President is concerned,  
12 but the paper that I picked up: "Colleges Find U.S. Regula-  
13 tions..." --

14           QUESTION: Mr. Zwiener, do you know of any evidence  
15 that is less reliable in a courtroom than a newspaper?

16           MR. ZWIENER: You're right, Your Honor. You're  
17 right, Your Honor. I certainly endorse that, but here, George  
18 Washington University is worrying about it and they're worry-  
19 ing about elevators for, I believe, seven handicapped people;  
20 seven. So the expenditure, they're just -- you have to spend  
21 too much for the return. And again, I'm not unsympathetic to  
22 the handicapped but society can only support so much, and  
23 we're saying that this statute, as respondents would have us  
24 to interpret it, just the imagination boggles. And that is  
25 why we're up here with this case.

1 QUESTION: Mr. Zwiener, I take it your real posi-  
2 tion is that the regulation that the Government has promul-  
3 gated is not authorized by the statute, is that -- ?

4 Because you would concede that the regulation would require  
5 that you provide the interpreter?

6 MR. ZWIENER: That's true, Your Honor.

7 QUESTION: So, basically, the question is whether  
8 the regulation is valid or not?

9 MR. ZWIENER: Well, it's also a question whether  
10 the United States Court of Appeals for the 5th Circuit is  
11 correct in saying, not just under the regulations, I think,  
12 but I think they went under the statute, so we do have that  
13 decision. We're saying that that's incorrect. We're saying,  
14 as many courts have interpreted this statute, that they're  
15 incorrect.

16 Now, our second point is that 504 does not confer  
17 a private cause of action. I would have rather argued this  
18 point before this Court decided *Maine v. Thiboutot*, because  
19 I'm not sure exactly how to handle this private cause of ac-  
20 tion now, since perhaps we don't have to state it but just  
21 have a statute and have a beneficiary, and then we have a  
22 1983 cause of action.

23 But I would say that Congress can enact a statute  
24 like this one, and certainly it could have put explicit lan-  
25 guage in the statute that would say, private plaintiffs

1 cannot bring suit; we do not mean this statute to cover that  
2 type of situation. Again, as I say, I would have been much  
3 more comfortable arguing this point before the Maine v.  
4 Thiboutot case, if I am pronouncing it anywhere close to  
5 being right.

6 Now, something that's not in our brief is an amend-  
7 ment to the rehabilitation statute, which is 505. And I  
8 point this out. I feel that the respondent in the principal  
9 brief and the brief of the Civil Liberties Union and its  
10 companion amici are misquoting 505. They say that now that we  
11 have 505, which does permit private causes of action in cer-  
12 tain circumstances, there's no question. However, they talk  
13 in terms of a private cause of action going to 504. If you  
14 look at the statute, it goes to 501, which is an employment  
15 type of statute, and under that statute a private cause of  
16 action is authorized. All the remedies provided by Title VI  
17 are authorized, but not 504, as is said by respondent, and  
18 also the brief for the American Civil Liberties Union and  
19 its companions on the brief.

20 As a matter of fact, that's the strongest evidence,  
21 I think, that we have of congressional intent, is that they  
22 did provide a private cause of action for a program designed  
23 to increase the employment of the handicapped, which is 501,  
24 but did not; 504. And as I say, I think that I'm reading  
25 the statute correctly.

1           Now, our third point is -- and this is critical; it  
2 ties into the first point -- that 504 refers to a program  
3 and activity that receives federal financial assistance  
4 and that's what it means, a program and activity. Just be-  
5 cause the University of Texas Maritime Center down on the  
6 coast gets a grant to study the fishing conditions in the  
7 Gulf of Mexico doesn't mean that 504 applies to Freshman  
8 English in Austin.

9           QUESTION: This argument, according to your bro-  
10 ther, was not raised until now, in this case.

11          MR. ZWIENER: We are saying that --

12          QUESTION: Is that correct?

13          MR. ZWIENER: That's true. It was raised in the  
14 petition for rehearing en banc in the 5th Circuit. I did not  
15 try this case in the trial court nor I didn't handle the  
16 original brief. I did make the argument for the first time  
17 in the 5th Circuit and put the argument into the petition for  
18 rehearing en banc, and then before this Court. We say that  
19 it is properly before this Court because it's a jurisdic-  
20 tional question.

21           You see, it's a threshold question. A plaintiff can-  
22 not show that he's entitled to any relief without first show-  
23 ing that the program about which he's complaining receives  
24 federal financial assistance. Again, we're saying that's a  
25 threshold question which must be proved.

1           Now, we do have some briefs here that say that it's  
2 our burden to prove that the program does not. I would say  
3 that would go in the teeth of a very, of a decision this  
4 Court rendered just a short time ago involving a Texas agency,  
5 the Texas Department of Human Resources v. Burdine, where  
6 someone sues because he's been discriminated against; he's  
7 got to show a little discrimination first before the defen-  
8 dant has to do anything. And we're saying that this question,  
9 the program-specific, is jurisdictional. The burden is on  
10 the plaintiff to prove it before he could even go forward  
11 with anything in his case. And I would try a case that way  
12 the next time we go around. And we say that Burdine mandates  
13 the fact, the premise, the conclusion that this is a juris-  
14 dictional question.

15           QUESTION: Counsel, the court of appeals said that  
16 the University of Texas is the recipient of over \$31 million  
17 of federal assistance and has agreed to comply with Section  
18 504 as a condition to continued receipt of federal funds.

19           MR. ZWIENER: Well, we did stipulate that the  
20 University got \$31 million. We didn't stipulate, so far as I  
21 know, that we agreed to comply. Now, each program, each  
22 program that's funded by the Federal Government -- and I  
23 would say that of that \$31 million I don't know that anybody  
24 knows whether those are student loans, by the way, or whether  
25 it's just grants and that sort of thing, but let's take the

1 ordinary grant.

2 A proposal may be paid to the University or some-  
3 times the Federal Government, some agency that needs some  
4 research done, will come to the state. They will get together,  
5 agree on what will be done; the Federal Government will ad-  
6 vance the money; they'll have a budget, so much for salary,  
7 so much for this, so much for that. And the Federal Govern-  
8 ment, the state government, or the particular agency involved,  
9 with respect to that program, will agree not to discriminate  
10 under Title VI and sometimes under 504, although a lot of the  
11 grants have not yet gotten 504 into them. But that is true.  
12 We say we agree not to discriminate with respect to this grant  
13 and with respect to dispersal of this federal money which we're  
14 getting. So, I would say that we haven't stipulated our-  
15 selves out of court.

16 QUESTION: If you're right, then, you could have  
17 denied this man admission to the University, period. Is that  
18 right, just on the ground that you don't like deaf people?

19 MR. ZWIENER: No, sir, we could not do that.

20 QUESTION: Why not? Why not?

21 MR. ZWIENER: No.

22 QUESTION: If you agree that ~~it is not possible~~ ~~to~~  
23 to programs that are supported with federal money?

24 MR. ZWIENER: That's true.

25 QUESTION: And he wants to be, say, an English

1 major and the English Department doesn't get any federal  
2 funds, you could say, we don't want deaf people in the  
3 English Department.

4 MR. ZWIENER: No, sir.

5 QUESTION: Why not?

6 MR. ZWIENER: No, sir, we could not do that. We  
7 could deny him admission to the University if he did not have  
8 the entrance requirements, even though he would say, I had a  
9 more difficult getting my education because I am deaf and  
10 therefore I am not in the top quarter of my class, or I don't  
11 have a certain score on the SAT. I have a difficult time  
12 passing these tests because of my disability. But we could  
13 not -- if he had the scores -- we could not say, we do not  
14 like deaf people --

15 QUESTION: Why not?

16 MR. ZWIENER: -- we don't like blind people, we  
17 don't like funny-looking people --

18 QUESTION: I'm asking you, what is it that would  
19 prevent you from saying that? Why couldn't you say that?  
20 Just say, we don't allow deaf people in the English Depart-  
21 ment?

22 MR. ZWIENER: We could say it, and I would say that  
23 if we did that, and they were otherwise qualified, brought  
24 their own interpreter along, were able --

25 QUESTION: I'm asking you, you keep saying you

1 can't do it. But is there a federal law that prevented you  
2 from doing it?

3 MR. ZWIENER: 504; it's in the statute.

4 QUESTION: Then you do not -- what happens to your  
5 argument that that only applies to programs that are funded  
6 with federal money?

7 MR. ZWIENER: All right; you're right, Your Honor,  
8 you're right. Because --

9 QUESTION: So you could in the English Department  
10 say, we don't want deaf people, under your view of the case?

11 MR. ZWIENER: We very possibly could, under the  
12 ultimate --

13 QUESTION: Not very possibly. Under your argument  
14 you have an absolute right to.

15 MR. ZWIENER: That's true. That's true.

16 QUESTION: Do I correctly understand that he has  
17 been allowed to have interpreters in the classes from time  
18 to time?

19 MR. ZWIENER: Yes, sir, he was always allowed inter-  
20 preters, and we would say, the reasonable accommodation which  
21 Southeast Community College v. Davis refers to is permitting  
22 an interpreter to be present, permitting an interpreter to  
23 distract, if you will -- and there are some people that  
24 fussed about some of our city council meetings. They said  
25 that the interpreter up there bothers me, I can't keep track



1 of what's going on. But, yes, I think we have to make that  
2 accommodation, perhaps. And we would have to -- a professor  
3 who had a rule that lectures could not be tape-recorded  
4 might have to bend that rule for the blind student so he  
5 could record the lectures. That kind of accommodation.

6 QUESTION: And what's the source of the obligation  
7 to make that kind of accommodation? 504?

8 MR. ZWIENER: Well, I would say -- without buying  
9 all of my argument, my argument ultimately goes, as indi-  
10 cated, to the fact that 504 doesn't require us to do anything  
11 unless the program receives federal financial monies.  
12 But if it has any effect on just a general handicap situa-  
13 tion -- you see, I would say, ultimately --

14 QUESTION: I'd still like to know what's the source  
15 of the obligation to make that accommodation. Is it 504?

16 MR. ZWIENER: Well, I would say it's this Court's  
17 opinion in Southeastern Community College v. Davis. My argu-  
18 ment, of course, goes a little further than that. My argu-  
19 ment goes to the fact that the Fourteenth Amendment --

20 QUESTION: What I was --

21 MR. ZWIENER: -- doesn't protect the handicapped,  
22 and therefore --

23 QUESTION: Wasn't Davis a construction of 504?

24 MR. ZWIENER: Yes, sir. And that's why I would  
25 say that Davis maybe requires us to do that even though

1 using my argument, and you've already adopted that --

2 QUESTION: Well, now, but you are conceding, con-  
3 trary to what you told me at the outset of your argument,  
4 that there are some things you have to do for the handicapped  
5 under 504. Is that right?

6 QUESTION: If the program receives federal assist-  
7 ance?

8 MR. ZWIENER: If the program receives federal as-  
9 sistance. Now, I'm not -- I must be dense this morning.  
10 Since this Court construed 504 to do something, I'm saying  
11 that you have decided it must do something. Now, to get  
12 back to your question, Your Honor, and your question, in a  
13 way, our state statute -- we have a state antidiscrimination  
14 statute that would require us to admit the deaf student and  
15 not discriminate on account of this particular handicap, and  
16 we say that's entirely within the powers of the state without  
17 the Federal Government.

18 QUESTION: Does your state statute reach so far as  
19 to require that you provide the deaf with an interpreter?

20 MR. ZWIENER: No, Your Honor, it does not. Actually,  
21 one of the problems that we've had in this case, and again I  
22 think these monies are confused in some of the amicus briefs  
23 -- there's a lot of money that goes to the states for assist-  
24 ance to the handicapped, but it does not go to the universi-  
25 ties, it goes to the Texas Rehabilitation Commission.

1 By the way, Texas has a constitutional amendment that says  
2 we cannot give money away, which this would be. We had to  
3 have a constitutional amendment to permit the Rehabilitation  
4 Commission to give money to the handicapped. We had to have  
5 a similar one, it was an earlier one, for our Welfare Depart-  
6 ment. So, you know, there isn't any, but there's a lot of  
7 money that goes to the Texas Rehabilitation Commission and  
8 other rehabilitation commissions.

9 As a matter of fact, these respondents have been  
10 suing the rehabilitation commissions and been winning some of  
11 the cases, and probably more justifiably so. And perhaps  
12 they should be the persons primarily responsible.

13 I would like to reserve some time to reply to the  
14 respondents if I may, Your Honor.

15 MR. CHIEF JUSTICE BURGER: Mr. Pollak.

16 ORAL ARGUMENT OF STEPHEN J. POLLAK, ESQ.,

17 ON BEHALF OF THE RESPONDENT

18 MR. POLLAK: Mr. Chief Justice, may it please the  
19 Court:

20 I would like to address my argument to the primary  
21 issue here, which is whether Regulation 84.44(d) is within  
22 the authority conferred by Section 504 of the Rehabilitation  
23 Act, as that regulation was applied in this case to require  
24 provision of an interpreter to a qualified handicapped person  
25 who had been admitted to the master's degree program of

1 Texas University in Education.

2 QUESTION: Mr. Pollak --

3 MR. POLLAK: Yes, sir?

4 QUESTION: It's pretty clear, is it not, that the  
5 statute does not and cannot mean exactly what it says? It  
6 says that no otherwise qualified handicapped individual shall  
7 solely by reason of his handicap be excluded from participa-  
8 tion in any program receiving federal financial assistance.  
9 Well, let's assume a blind person who would like to be a  
10 bus driver in a city transportation system that receives  
11 federal assistance, and except for his blindness he would be  
12 qualified but he can clearly be excluded from being a bus  
13 driver because of his handicap, because he's blind.

14 MR. POLLAK: Yes sir, we accept that, that's the interpre-  
15 tation in Mr. Justice Powell's opinion for the unanimous Court.

16 QUESTION: But the statute does not mean precisely  
17 what it says?

18 MR. POLLAK: No, it's admitted in spite of, and  
19 that's clearly made in the Powell opinion for the Court in  
20 Southeastern Community College, and this case does not  
21 re-present that issue; indeed the HEW regulations make that  
22 clear.

23 QUESTION: Well, the would-be airplane pilot without  
24 hands presents that issue.

25 MR. POLLAK: No, to the extent that the argument

1 presented by my worthy colleague suggested that we're taking  
2 a position that persons may be required to be admitted who  
3 cannot press the buttons. We are not taking that position.  
4 Indeed, Your Honor, the case comes to the Court on a stipu-  
5 lated record which we think is significant. It provides (1)  
6 that Camenisch is a deaf man; (2) that he is a qualified  
7 handicapped person, meeting all the academic and technical  
8 requirements of the program; (3) that he needs the services  
9 of an interpreter --

10 QUESTION: And that he is such, quite apart from  
11 his handicap?

12 MR. POLLAK: That's correct. Indeed, the record  
13 establishes that this man has gone through, completed, and re-  
14 ceived his master's degree, so he --

15 QUESTION: He's not somebody who would be qualified  
16 except for his handicap. He is somebody who is qualified  
17 despite his handicap.

18 MR. POLLAK: That's correct. That is a stipulated  
19 fact, Texas has stipulated he is a qualified handicapped  
20 individual. That is a major distinction, from this case,  
21 from the Southeastern Community College case, which was an  
22 admissions case. Now --

23 QUESTION: He might even be more qualified because  
24 of his handicap?

25 MR. POLLAK: There is no suggestion --

1 QUESTION: Qualified for the job that he wants?

2 MR. POLLAK: That's correct. We know from the  
3 record that he was the Acting Dean, at the time the case arose,  
4 of the East Campus of the School for the Deaf of the Univer-  
5 sity of Texas. Now --

6 QUESTION: As I understand it the regulations im-  
7 pose this obligation only in institutions of higher learning,  
8 is that correct?

9 MR. POLLAK: We are speaking about, Mr. Justice  
10 Stewart, subpart (e) which applies only to postsecondary insti-  
11 tutions; that's correct. And 84.44(d) applies to post-  
12 secondary institutions.

13 QUESTION: And is there any such requirement on  
14 secondary institutions or below?

15 MR. POLLAK: Elementary and secondary schools,  
16 which is a different subpart, do have a requirement for the  
17 children to be provided with interpreters, as HEW has inter-  
18 preted its regulations. That is not raised in this case,  
19 Your Honor.

20 QUESTION: But, I would think if the statute means  
21 what you say it means, then the obligation would run through-  
22 out.

23 MR. POLLAK: I think, while the HEW regulations for  
24 higher education have been drawn with the concerns expressed  
25 by universities and colleges during the comment period

1 respecting costs, and so as to provide a limited obligation.  
2 I don't want to suggest that "the obligation" runs throughout,  
3 because I think it's --

4 QUESTION: Well, the statute doesn't seem to permit  
5 any compromise or accommodation. It's either an obligation  
6 or it isn't.

7 MR. POLLAK: The obligation imposed by the statute  
8 runs throughout; that's right. The administrative agency  
9 charged with its application has drawn regulations which limit  
10 the obligation in several respects, and I am not master of the  
11 regulations which they have drawn respecting the elementary  
12 and secondary schools, since that was not the issue that  
13 arises here, but rather 84.44(d) as Your Honor suggests,  
14 which applies to the postsecondary schools.

15 QUESTION: And there is a different and lesser  
16 obligation imposed upon secondary and primary educational  
17 institutions?

18 MR. POLLAK: No, I don't represent that. What I  
19 was representing was that HEW in 44(d) drew a limited regula-  
20 tion which there's some indication in Mr. Zwiener's argument  
21 that the University may in certain circumstances not be re-  
22 quired to provide an interpreter. For instance, if it's a  
23 laboratory course where oral communication is not relevant,  
24 it would not need an interpreter, but if the situation is  
25 such where a transcript of the classroom proceedings or

1 classroom notes could be provided, the University can take  
2 that route. Additionally, HEW has indicated that there are  
3 other sources of funding and that its purpose is to assist  
4 the recipients of federal funds in utilizing vocational educa-  
5 tion funds or private charitable funds or other sources of  
6 money. So that in drawing the regulation, there was  
7 some attention paid to tailoring it to these  
8 financial concerns.

9 QUESTION: What does the record show, if anything,  
10 Mr. Pollak, about the financial ability of this respondent to  
11 provide his own interpreters?

12 MR. POLLAK: The record and stipulation indicates  
13 that Mr. Camenisch and his wife had earnings in excess of  
14 \$23,000. Mr. Camenisch's earnings were \$11,600, I believe.  
15 The record shows that the University received an application  
16 for financial aid from Mr. Camenisch and that it found him  
17 not eligible for financial aid. We do not believe that the  
18 University of Texas has urged that the regulation is satis-  
19 fied by a financial means test. And indeed, we believe it  
20 is not satisfied.

21 QUESTION: Then what would you say if the record  
22 showed that he had an income of \$100,000 a year from a family  
23 trust or otherwise?

24 MR. POLLAK: We would take the same position, Your  
25 Honor.



1 QUESTION: In other words, the University must pro-  
2 vide the expense of an interpreter even if the individual  
3 student has very large means of his own?

4 MR. POLLAK: The statute does not make lack of  
5 financial means a condition of the rights which it guaran-  
6 tees; that is our position. And, indeed, the HEW regulations  
7 have been interpreted by the agency charged with their inter-  
8 pretation so as to not permit a financial means test to be  
9 applied. We do not understand, Mr. Chief Justice, that Texas  
10 has urged upon this Court that it satisfies the regulation  
11 except as it may have argued this morning by a financial  
12 means test. We understand, looking at page 10 of its' brief,  
13 that Texas says that, concedes that 44(d) of the HEW regula-  
14 tions provides an entitlement to the provision of an inter-  
15 preter, and so we come before the court this morning and urge  
16 that 44(d) with its provision of the entitlement is within  
17 the statute and lawful, and entitles Mr. Camenisch as the  
18 two courts below ruled to the provision of the interpreter;  
19 and we say that the legislative history and words of 504  
20 show that Congress had in mind an equal opportunity for the  
21 handicapped, that it sought to provide against the effective  
22 exclusion of the handicapped from programs to which they were  
23 admitted. Indeed, that is a particular emphasis in the  
24 '73 Act legislative history that there was a concern --  
25 Senator Humphrey expresses it -- that the concern is not only

1 prejudice, but the presence of barriers, the lack of services,  
2 which effectively exclude the handicapped, and we have here  
3 a qualified handicapped person; he's admitted to the program;  
4 the absence of a service effectively excludes him from a  
5 classroom proceeding with --

6 QUESTION: Mr. Pollak, what's the evidence as to  
7 the amount of the federal support for this particular pro-  
8 gram?

9 MR. POLLAK: Your Honor, the stipulation provides  
10 -- pages 30, 31, and 32 -- that the University of Texas  
11 receives \$31.4 million. That's on page 32 of the Appendix.  
12 The stipulation further provides that this man is admitted to  
13 the graduate program in the University. We do not believe  
14 that the program specificity issue has been presented to  
15 any of the courts below, that it was not briefed, it was not  
16 argued, it was not decided, and indeed to the extent that it  
17 is in the petition for rehearing it was not ruled on by the  
18 court of appeals for the 5th Circuit. And I believe I'm  
19 correct as to the decisions of the court, that where an issue  
20 was not presented, briefed, argued, decided below, and then  
21 is put into a petition for rehearing, that that issue does  
22 not --

23 QUESTION: Let's get to the merits. Suppose it  
24 had been argued and decided below, what would your position  
25 here be?

1 QUESTION: Or suppose it is jurisdictional?

2 MR. POLLAK: My position is that the aid received  
3 by this University, \$31.4 million, aid to the University  
4 satisfies the requirement of 504. Mr. Camenisch is an ad-  
5 mitted student to the University. The stipulation provides  
6 the University receives \$31.4 million. That's satisfied.

7 QUESTION: So you feel it's a false issue?

8 MR. POLLAK: Your Honor, I feel that the issue has  
9 not been litigated and presented, and indeed there are inter-  
10 rogatories in the tail end of this brief in which  
11 Mr. Camenisch sought, following the decision on the prelimi-  
12 nary injunction, this case arises before this Court on a  
13 preliminary injunction needed by Mr. Camenisch in order that  
14 he could attend the summer session. There are interrogatories  
15 in the case which was proceeding ahead on the merits, in which  
16 Mr. Camenisch sought to elicit, more particularly, information  
17 as to the aid received by the University of Texas.

18 QUESTION: Well, I'm still trying to get at your  
19 position. Suppose it had been raised, would you not be making  
20 the same argument here today?

21 MR. POLLAK: I would be making that argument but I  
22 would also be strengthened with the detail of the type of aid  
23 which the University received. I am not in that position,  
24 Mr. Justice --

25 QUESTION: I know, Mr. Pollak, but are we to assume

1 that \$31 million, whether or not it supports this particular  
2 program, satisfies 504, or are we to assume that \$31 million,  
3 because it's not otherwise litigated, includes funds, federal  
4 funds, to support this program? Which is it?

5 MR. POLLAK: My position is that the program to which  
6 Mr. Camenisch by the record has been admitted is the Univer-  
7 sity program, and the University program receives \$31.4  
8 million, so that any program specificity --

9 QUESTION: Well, then, you're saying without identi-  
10 fication of specific programs the fact that the University  
11 receives \$31 million satisfies the requirement of the statute,  
12 "a program or activity receiving federal financial assistance."

13 MR. POLLAK: Where the record shows that the student  
14 has been admitted to the program of the University. This is  
15 not a case in which --

16 QUESTION: Yes, but, Mr. Pollak, what if the all of  
17 the \$31 million was specifically allocated to other programs  
18 within the University?

19 MR. POLLAK: Well, we would have a different situa-  
20 tion --

21 QUESTION: You would have a problem; you would have  
22 a little problem then, wouldn't you? What -- does the record  
23 show that or not?

24 MR. POLLAK: It does not show that.

25 QUESTION: Well, does it show that any of the

1 \$31 million is sort of a block grant to the University to do  
2 with it what it wants to do?

3 MR. POLLAK: It does not show that either. The  
4 extent of the record, as I understand it --

5 QUESTION: Well, does it disclose any part of it  
6 goes for overhead, administration, research, generally, or  
7 anything like that?

8 MR. POLLAK: It's -- I think the limit is the  
9 statement that the University of Texas at Austin receives  
10 federal financial assistance in excess of \$31.4 million.

11 QUESTION: Well, that might be all, technically,  
12 logically, it could be for, all \$31 million is allocated to  
13 another single program within the University. It could be.

14 MR. POLLAK: It could be, Your Honor, and that  
15 issue was not litigated below and is not before this Court.

16 QUESTION: Well, I know, Mr. Pollak, that's just  
17 the point; it wasn't.

18 MR. POLLAK: Yes, sir.

19 QUESTION: What premise are we to proceed on? That  
20 the \$31 million satisfies 504 whether or not it supports this  
21 particular program?

22 MR. POLLAK: I urge the Court to proceed on the  
23 premise that that requirement is satisfied, but I urge the  
24 Court preliminarily that the issue is not here and as in Lau  
25 and as in, I believe, Bakke, the program specificity issue

1 can be passed.

2 QUESTION: Well, Mr. Pollak, interrogatories were  
3 filed. At what stage of the proceedings were they filed?

4 MR. POLLAK: They were filed after the preliminary  
5 injunction had been granted by the Court, Your Honor. Texas  
6 moved to stay further proceedings and the Court granted the  
7 stay.

8 QUESTION: And they were never followed up on?

9 MR. POLLAK: No, Justice Rehnquist, they have not  
10 been pursued. The case is waiting on the merits below.  
11 And, indeed, as to the program specificity matter, that issue  
12 is capable of going forward on the merits just as down  
13 below. This case is here on the review of the preliminary  
14 injunction.

15 QUESTION: And the interrogatories were directed to  
16 HEW?

17 MR. POLLAK: No, the interrogatories are directed,  
18 I thought, to the University of Texas. I thought they were  
19 directed to the University. Plaintiffs request of defen-  
20 dants, Mr. Justice Rehnquist, that's on page A-75.

21 QUESTION: Well, Mr. Pollak, to the extent your  
22 case is a 1983 action under Maine v. Thiboutot, you have to  
23 prove the violation of the federal statute or the Constitu-  
24 tion, but it's only the federal statute, isn't it?

25 MR. POLLAK: That's right. We come here --

1 QUESTION: And when do you do that? Now, if you  
2 prevail today, then you go back for a trial, do you?

3 MR. POLLAK: The remaining proceedings would be  
4 pursued in light of this Court's opinion in the district  
5 courts.

6 QUESTION: Would it be an element of your cause of  
7 action to prove that this particular program under 504  
8 was in fact a program receiving federal financial assistance?

9 MR. POLLAK: If that contention is made against us,  
10 we would endeavor to prove that. Yes, Mr. Justice Brennan.

11 QUESTION: I thought you were arguing that the  
12 entire University educational program was a "program" within  
13 the meaning of the statute, in which event you wouldn't  
14 have to worry about allocation. If you're right about that;  
15 I don't know whether you are or not.

16 MR. POLLAK: Well, I am here -- first of all, I  
17 don't believe the issue is before the United States Supreme  
18 Court, but I'm here --

19 QUESTION: Well, even assuming it's before, if  
20 you're right as a legal matter, you have proved the jurisdic-  
21 tional requirement.

22 MR. POLLAK: I believe that in terms of the way the  
23 issue rests before the Court, we have proved enough; yes, sir.

24 I want to -- my time is fleeting, and I want to at  
25 least state that we believe that this Court may hold the

1 auxiliary aid interpreter regulation 44(d) to be within  
2 Section 504, consistent, wholly consistent with this Court's  
3 unanimous opinion in Davis. We are not here urging that there  
4 be retreat from the Davis case. That case is decided and it  
5 is a different case. It is an admissions case, it is signifi-  
6 cantly distinguished from what we have here today. The issue  
7 in that case was whether Ms. Davis was an otherwise qualified  
8 handicapped person. Could she meet the physical qualifications  
9 needed for the safety of the patients in the program of study, the  
10 clinical program, and could she serve as a registered nurse  
11 in the various activities of the job? The college said no  
12 and this Court decided that issue and said she was not an  
13 otherwise qualified person, and that the modifications that  
14 would be required to permit her to be admitted were so sub-  
15 stantial that they would constitute a proscribed or not-  
16 authorized affirmative action.

17           Look at the differences with Camenisch. He's a  
18 qualified handicapped person; he's been admitted to the pro-  
19 gram by the University. There is no modification of the aca-  
20 demic program required, there is no lowering of standards  
21 required. The HEW regs read directly on the Camenisch  
22 request.

23           QUESTION: Mr. Pollak, that case involved the  
24 meaning of the word "qualified" in the statute. This case  
25 involves the meaning of the word "discrimination"?



1 MR. POLLAK: This case involves -- pardon me, I  
2 didn't mean to interrupt.

3 QUESTION: And the question I have is, how far must  
4 one go to comply with the statutory requirement of not dis-  
5 criminating? How far? That's sort of this parade of horri-  
6 bles that your opponent raises.

7 MR. POLLAK: Yes, he does.

8 QUESTION: What is the limit on the University's  
9 obligations?

10 MR. POLLAK: First, I would say that there are three  
11 provisions that Congress has chosen to apply. There shall be  
12 no denial of benefits, there shall be no exclusion from parti-  
13 cipation, and otherwise, discrimination is proscribed. And we  
14 say to the Court that this case is before you to decide, and  
15 that we cannot come to you with all of the permutations and  
16 differences which other cases may present. The issue that the  
17 Camenisch case presents is the need for an interpreter expli-  
18 citly provided by the HEW regulations and I might say, that  
19 that reading of the language of 504 -- the language of 504 is  
20 comparable to the language of Title VI, and HEW's reading of  
21 that language has been consistent now for over a decade.  
22 It read the language of Title VI, which this Court interpreted  
23 in Lau, to require the elimination of communication barriers.  
24 This Court unanimously in Lau affirmed that regulation. It  
25 reads the same language which, Mr. Justice Stevens, you and I

1 are discussing, this discrimination exclusion benefit lan-  
2 guage, to require the elimination of a communications barrier.  
3 In this case consistent interpretation of the regulations is  
4 entitled to weight. We do not believe that what is required  
5 here is affirmative action. We believe it is the steps which  
6 the Court affirmed in Lau, not affirmative action. Thank you.

7 MR. CHIEF JUSTICE BURGER: Mr. Buscemi.

8 ORAL ARGUMENT OF PETER BUSCEMI, ESQ.,

9 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

10 QUESTION: Mr. Buscemi, before you commence, may I  
11 ask you a couple of questions? Would the Government's posi-  
12 tion be the same if the funding were \$31,000 rather than  
13 \$31 million, just generally to the University?

14 MR. BUSCEMI: I hesitate to answer that with a yes  
15 or no. I think if I had to I would say yes, Mr. Justice  
16 Powell, but I would also say that one of the critical points  
17 in these cases, cases under Title VI of the Civil Rights Act,  
18 Title IX of the Education Amendments, Section 504, is that  
19 the recipient of federal funds' obligation under the statute  
20 as a practical matter is invariably conditioned by the amount  
21 of federal aid that is received. There is naturally a cost-  
22 benefit calculus, or calculation, that is made by any reci-  
23 pient of federal funds.

24 QUESTION: I suppose my question is whether or not  
25 the Government has the authority under the Constitution to

1 order the elimination of what's characterized as this discri-  
2 mination, but irrespective of funding?

3 MR. BUSCEMI: Well, that issue is certainly not before  
4 the Court today.

5 QUESTION: I know. I just wondered whether it had  
6 been considered. My next question is whether or not in light  
7 of the position in your brief that the need of the particular  
8 student is wholly irrelevant. Is that issue before the  
9 Court, financial need?

10 MR. BUSCEMI: My answer to that question, Mr. Justice  
11 Powell, is that financial need is not a relevant criterion  
12 under the regulation.

13 QUESTION: Right. That's my second question. But  
14 the first one, I don't think it's made clear in the assign-  
15 ments in the petition in which it states the question, that  
16 that question is before us. Do you think it is?

17 MR. BUSCEMI: Well, I think that the question of  
18 whether financial need is an appropriate criterion has been  
19 abandoned at this point by the petitioners.

20 QUESTION: So you think it's not before us at this  
21 time?

22 MR. BUSCEMI: I don't think that it's the theory on  
23 which they bring the case here, although I suppose that if  
24 financial need, if the Court were to decide that financial  
25 need, notwithstanding the regulation, is an appropriate factor

1 that petitioners might be entitled to some relief from the  
2 preliminary injunction. So I don't want -- I mean, they're  
3 challenging the preliminary injunction but the theory on  
4 which they're challenging it, the question presented, if I  
5 understand the petition correctly, is not whether financial  
6 need is an appropriate factor, but only whether Section 504  
7 requires the expenditure of any money at all.

8 QUESTION: Well, if the question's here, the Govern-  
9 ment's position is that financial need is irrelevant?

10 MR. BUSCEMI: Under this regulation; that is true.  
11 We have not taken a position, Mr. Justice Powell, whether a  
12 regulation -- that should this regulation be changed, for  
13 example, to make financial need a relevant criterion, whe-  
14 ther such a regulation would or would not be consistent with  
15 the statute.

16 QUESTION: Do you really think the Congress of the  
17 United States intended financial need to be irrelevant?

18 MR. BUSCEMI: I think the Congress of the United  
19 States intended to give to funding agencies the power to  
20 promulgate rules and regulations to implement the antidiscrimi-  
21 nation, the antiexclusion guarantees of Section 504.

22 QUESTION: And without regard to the federal funds  
23 provided, and without regard to the financial need of the  
24 individual that claimed this help?

25 MR. BUSCEMI: Well, certainly not without regard to

1 the federal funds provided, because as I said at the very  
2 beginning, if there were no federal funds provided --

3 QUESTION: Well, I suggested \$31,000 instead of  
4 \$31 million.

5 MR. BUSCEMI: If there was \$31,000 provided, the  
6 University would of course make a decision as to whether  
7 that amount of aid was sufficient to justify the imposition  
8 of the requirements of the statute. The University might  
9 well conclude that it would rather do without. That's one --

10 QUESTION: Without the \$31,000?

11 MR. BUSCEMI: Exactly, Mr. Chief Justice. That is  
12 one of the areas --

13 QUESTION: Isn't it true that \$31 million to  
14 Texas is like \$31,000 to most schools?

15 MR. BUSCEMI: Mr. Justice Marshall, as I understand  
16 the record, it indicates that the \$31 million is approximately  
17 one-sixth to one-seventh of the University of Texas's  
18 annual budget.

19 QUESTION: What if the record showed a million-dol-  
20 lar grant to the Medical School, and this student is not part  
21 of the Medical School -- a \$1 million grant to conduct re-  
22 search on cancer. Then does that invoke the provisions of  
23 504, in your view?

24 MR. BUSCEMI: Mr. Chief Justice, I want to say that  
25 the question of the interpretation of the statutory language,

1 program, or activity is a very difficult one that has arisen  
2 under Title VI and Title IX, and Section 504. There has re-  
3 cently been a decision in the district court in Michigan  
4 holding that an athletic program in an university that  
5 does receive substantial federal funds is nevertheless not a  
6 covered program or activity because the federal funds do not  
7 specifically support the athletic program. Now, we don't  
8 know, in this case, what particular activities of the Univer-  
9 sity are supported by the \$31 million, but it is not the  
10 Government's position that part of that \$31 million must go  
11 directly, for example, to a professor who has taught  
12 Mr. Camenisch before he can be covered by this statute.  
13 Program or activity has to be defined in a somewhat broader  
14 way. Now, how broad it should be, whether as respondent  
15 contends, it should cover the entire University, the minute any  
16 federal funds are received, or whether it should be restricted,  
17 for example, to the Graduate School of Arts and Sciences, or  
18 to an undergraduate program, is not before the Court and  
19 because that's a difficult --

20 QUESTION: In a sense it is jurisdictional, and  
21 therefore in a sense it is before the Court. Let's assume  
22 that all of this \$31 million went to a program operated by  
23 the University down on the Gulf, not even in Austin, in  
24 marine biology. Then, unless the respondent is correct in  
25 his broad argument, this should not be a program or activity

1 receiving federal financial assistance in which the respon-  
2 dent is engaged. And --

3 MR. BUSCEMI: Well, I'm not sure that I agree with  
4 the characterization of that as jurisdictional, Mr. Justice  
5 Stewart. It seems to me that --

6 QUESTION: Well, let's say this institution received  
7 no federal aid at all. That would be jurisdictional.

8 MR. BUSCEMI: Well, it would have no substantive  
9 obligation under the statutes.

10 QUESTION: Precisely. And it would be jurisdic-  
11 tional. This statute would be totally inapplicable, would  
12 it not?

13 MR. BUSCEMI: Yes, but I think this Court would  
14 still have jurisdiction in the case.

15 QUESTION: And the plaintiff simply would not have  
16 proved a cause of action?

17 MR. BUSCEMI: Exactly. I think that is the dis-  
18 tinction that I want to draw here. And I want to emphasize  
19 the procedural posture of this case. There was really nothing  
20 that respondent could do to avoid the situation. He went  
21 into the district court and said, I am entitled to an inter-  
22 preter. The district court said, give him an interpreter.  
23 And then there was an immediate appeal by the University of  
24 Texas. There has never been any consideration of what the  
25 appropriate burden of proof should be, whether the respondent

1 should have to show that the money went to a program or  
2 activity in which he participated, or whether the University  
3 is in a better position to, you know, prove that question  
4 because they are the ones who know where the money went.  
5 So all of that is open.

6 If this Court affirms the judgment of the 5th  
7 Circuit, this case is not over. As respondent points out in  
8 a footnote in his brief, there doesn't even need to be a  
9 remand. There's automatically going to be further proceed-  
10 ings in the district court, in which this and other issues  
11 that may not have been raised before --

12 QUESTION: That's because we have only the temporary  
13 injunction here?

14 MR. BUSCEMI: That's correct, Mr. Justice Brennan.

15 QUESTION: So there are further proceedings before  
16 there's a final judgment on this, is that it?

17 MR. BUSCEMI: That's right.

18 QUESTION: And how about the question of mootness  
19 in this case? The respondent has graduated and got his degree,  
20 hasn't he?

21 MR. BUSCEMI: I would think, Mr. Justice Stewart,  
22 that there is a substantial question, and I think this is  
23 jurisdictional under Article III. I think there is a sub-  
24 stantial question of mootness here and it depends on how the  
25 preliminary injunction is characterized. If the injunction



1 bond is part and parcel of the preliminary injunction, then  
2 this Court retains jurisdiction. On the other hand, if the  
3 injunction bond is only something that goes to the ultimate  
4 merits and the preliminary injunction is only designed to  
5 hold the respondent harmless while the litigation is pending --

6 QUESTION: And he was held harmless, and he has his  
7 degree and he's gone and left the University, hasn't he?

8 MR. BUSCEMI: -- then the preliminary injunction no  
9 longer has any effect and the jurisdictional basis for this  
10 petition is no longer --

11 QUESTION: It's still not decided who has to pay  
12 for the interpreter?

13 MR. BUSCEMI: Oh, that's absolutely correct.

14 QUESTION: That's the issue, isn't it, who has to  
15 pay the \$3,000?

16 MR. BUSCEMI: Just the question of how this peti-  
17 tion should be disposed of.

18 QUESTION: Nobody has to pay for the interpreter  
19 anymore. He's left the University.

20 QUESTION: Yes, but if the University had no statu-  
21 tory obligation to pay him, they can get their money back  
22 from this student.

23 MR. BUSCEMI: That's right. That's why the injunc-  
24 tion bond is keeping the controversy alive.

25 QUESTION: That's *Liner v. Jafco*?

1 MR. BUSCEMI: I think that's one of the cases  
2 that's relevant to that.

3 QUESTION: Let me be sure I understand your posi-  
4 tion as a friend of the Court, in relation to what Mr. Jus-  
5 tice Powell was asking you, and what I have put to Mr. Pollak.  
6 If it were shown on this record that this man had \$100,000  
7 a year income from a trust from his grandfather or any other  
8 source, do you say that that's irrelevant under this statute?

9 MR. BUSCEMI: Under the regulation that has been  
10 promulgated by HEW in implementation of this statute, finan-  
11 cial need is not a relevant criterion. And I wanted to  
12 respond -- this gives me an opportunity, Mr. Chief Justice --  
13 to the question Mr. Justice Stevens posed to my colleague  
14 and that is, how far do we say that one has to go in order  
15 to avoid the discrimination? Because I think that is the  
16 critical question in the case.

17 And the Government's answer is, that one has to go  
18 as far as the reasonable regulations of the agencies charged  
19 with enforcing the statute require. That is the typical  
20 answer that the Court has given to cases in which Congress  
21 has given to the administrative agencies a broad delegation  
22 of power to enforce a particular provision. It's the rule  
23 that the Court applied in Mourning, it's the rule the  
24 Court applied in Thorpe, and it's the rule that the Court  
25 applied in Lau under a statute that is very similar to this

1 one, but Title VI of the Civil Rights Act provides, just as  
2 this statute does, that there shall be no discrimination.  
3 And HEW promulgated regulations reasonably related to that  
4 purpose that said that bilingual instruction or some other  
5 method of getting through to oriental children in the San  
6 Francisco School District was necessary to make the educa-  
7 tional opportunity meaningful. That surely would have  
8 required the expenditure of some funds.

9 QUESTION: Well, suppose, Mr. Buscemi, that suddenly  
10 someone shows up from Poland or Czechoslovakia to get a  
11 master's degree or a PhD and can't speak English. Would you  
12 say that Lau would require, Lau and 504 here would require the  
13 University of Texas to provide all the necessary aid?

14 MR. BUSCEMI: Well, of course Section 504 would  
15 have no application for someone, it would be a discrimination  
16 on the basis of national origin, I suppose, what you're re-  
17 ferring to.

18 QUESTION: No, no; he can't speak English.

19 MR. BUSCEMI: Well, I'm not sure --

20 QUESTION: That's my hypothesis.

21 MR. BUSCEMI: I don't think that qualifies as a  
22 handicap within the meaning of Section 504. I'm not sure  
23 that that is correct. In any event, the Lau decision was not  
24 under Section 504. It was discrimination on the basis of na-  
25 tional origin under Title VI of the Civil Rights Act, and

1 the question that Your Honor poses is the very question that  
2 was reserved in the concurring opinion by Mr. Justice Blackmun  
3 that you joined, Mr. Chief Justice, and that is whether the  
4 same result in Lau would have been required had there been,  
5 not 1,800 or 3,000 oriental children in the San Francisco  
6 School District that could not understand their instruction  
7 but only one? And we don't know exactly how the regulations  
8 would have treated just that one student. But here the regu-  
9 lations are clearly designed to treat individual handicapped  
10 persons.

11 QUESTION: May I ask one question before you sit  
12 down? What is the source -- I may have just lost it in the  
13 papers -- the source of the Government's view and your col-  
14 league's view that financial need is irrelevant? Because  
15 84.44(d) talks about such steps as are necessary, and if they  
16 were not necessary as a financial matter, would they clearly  
17 be necessary within the meaning of the regulation?

18 MR. BUSCEMI: Well, that was the argument,  
19 Mr. Justice Stevens, that petitioners made in the district  
20 court. The Government's position is that the agency's inter-  
21 pretation of its own regulation should govern.

22 QUESTION: It's not in the regulation itself? It's  
23 an interpretation that they're -- ?

24 MR. BUSCEMI: That's right. I mean, I will have to  
25 concede that the phrase, "take such steps as are necessary,"

1 concedes --

2 QUESTION: And then, well, it's really not neces-  
3 sary because he can afford his own interpreter?

4 MR. BUSCEMI: That would be a possible argument,  
5 and that's the argument that was made, because in the district  
6 court petitioners assumed that they were required to make  
7 some financial expenditures in some circumstances under the  
8 Act. That's one of the things we've pointed out in our brief.  
9 It's only now that they say nothing at all. But they argued  
10 solely on the basis of this language. But it seems to us,  
11 and petitioners now concede that this language requires them  
12 to pay, irrespective of financial need -- they've abandoned  
13 that argument. And furthermore, even if they had not, the  
14 consistent construction by the agency of its own regulations,  
15 we believe, should govern.

16 QUESTION: Why not say that it's not in this case,  
17 rather than to continue to say it's irrelevant?

18 MR. BUSCEMI: Well, I'll be happy to adopt your for-  
19 mulation, Mr. Justice Marshall. That is not part of the  
20 question in this case.

21 QUESTION: You're digging deeper all the time.

22 QUESTION: Well, the statute imposes no such require-  
23 ment or criterion whatsoever.

24 MR. BUSCEMI: The statute certainly does not refer  
25 to financial need; that's --

1 QUESTION: That's right.

2 MR. BUSCEMI: Thank you.

3 MR. CHIEF JUSTICE BURGER: Do you have anything  
4 further?

5 MR. ZWIENER: If I might, Your Honor.

6 ORAL ARGUMENT OF LONNY F. ZWIENER, ESQ.,  
7 ON BEHALF OF THE PETITIONERS -- REBUTTAL

8 MR. ZWIENER: The program-specific situation was  
9 considered by the 5th Circuit probably as early as any court.  
10 In the Finch case, which was cited in my brief -- and I think  
11 that their logic was excellent here; this was a Title VI case,  
12 a public school that did receive some Federal monies. But  
13 the court said, just because there were problems somewhere in  
14 the school, we are not going to cut off all the federal  
15 monies and do away with a lot of beneficial programs. The  
16 money had to be identified with the program. That was a '67  
17 case, I think, long before this came up, and I would like to  
18 say a word, I think, about Lau. Well, let me say a word about  
19 the regulations, if the Court will permit.

20 The regulations are strange because apparently a  
21 person has to buy his wheelchair but he may be able to get  
22 some sort of tape to help study, so there is absolutely no  
23 consistency with what is required by the HEW regulations.  
24 But we are not really complaining about the regulations except  
25 to say that the statute doesn't permit any of them. But they

1 are strange. I don't know what we'd do with eyeglasses for  
2 those that are severely handicapped. And the danger that  
3 occurred to me when the arguments were being made, one of the  
4 dangers of this 504 is that we had an employee at the  
5 University of Texas Health Science Center at Tyler, he was  
6 almost blind. He could see with things, perhaps, an inch from  
7 him. He was employed to work on wards and read charts, to  
8 fill syringes. He represented at the time that he came with  
9 us that new technology would permit him to get new glasses  
10 that he would be able to handle his work problem.

11 Well, that didn't work out that way, and it was not  
12 good. He couldn't read the charts. He could not read the  
13 markings on the syringes that he filled. And he was working  
14 with patients that were not seriously ill, but he could have  
15 by some of his activities made them so, rendered them so.

16 HEW investigated and said, you've got to get some-  
17 body to make the rounds with him to read the charts. You've  
18 got to get him a syringe that has raised characters on it so  
19 that he will be able to fill it properly. I think it's just out-  
20 rageous, but that's what scares us; not this case. That's  
21 the thing that scares us. Now --

22 QUESTION: Well, this case is the case we have  
23 before us.

24 MR. ZWIENER: And in this case, to summarize, Your  
25 Honor, we would say that 504 requires the universities to do

1 nothing; not, certainly not to spend money.

2           With respect to Lau, Lau was not decided under the  
3 Constitution, the Fourteenth Amendment, but was under Title VI  
4 and in that case there was no question of program specific;  
5 everybody assumed that the school district got substantial  
6 federal support. Title VI says you will not discriminate with  
7 respect to race.

8           Now, I would say that Lau was probably wrongly  
9 decided. I would decide it differently because I would say  
10 that Title VI says we cannot discriminate in a program re-  
11 ceiving federal financial aid, but it doesn't require us to  
12 go out of our way not to "discriminate."

13           QUESTION: This case isn't brought under the  
14 Constitution either, though.

15           MR. ZWIENER: No, Your Honor, it is not. We were  
16 talking earlier, Your Honor, that the Constitution and the  
17 Fourteenth Amendment does not, has nothing to say about handi-  
18 cap for discrimination. All we have to do is treat them  
19 neutral. If they can't play football and they have no legs,  
20 well, that's all we're required to do; they can have a chance  
21 to come out. We would say the Constitution -- and that's why  
22 I say that Lau may be wrongly decided from the viewpoint I'm  
23 advancing here, that unless you tie a direction to the states  
24 or to private industry not to discriminate against the  
25 handicapped to money, then there is no federal power to



1 prevent discrimination against the handicapped.

2 QUESTION: Well, what about 504 though? That cer-  
3 tainly addresses the question.

4 MR. ZWIENER: Addresses? Yes, sir. It says, very  
5 simply, that a recipient will not discriminate against the  
6 handicapped in any program receiving federal financial assist-  
7 ance. Now, if the program receives federal financial assist-  
8 ance and we agree that we will not discriminate, if we just  
9 agree not to discriminate, I might say that we don't have to  
10 do anything. We offered them the job merely because we don't  
11 like the deaf, we can't refuse to do it, but we don't have to  
12 help them.

13 QUESTION: Did the plaintiff's complaint allege  
14 that the program in which he was enrolled received federal  
15 financial assistance?

16 MR. ZWIENER: No, Your Honor.

17 QUESTION: Well, then, he didn't state a case, did  
18 he?

19 MR. ZWIENER: Well, I may be misstating it, Your  
20 Honor, but --

21 QUESTION: Well, that's quite important, I think.

22 MR. ZWIENER: I didn't -- I don't see that he did  
23 state it.

24 QUESTION: Did you file a motion to dismiss on that  
25 point?

1 MR. ZWIENER: We filed a motion to dismiss but --

2 QUESTION: On that point?

3 MR. ZWIENER: But not on that ground; no, sir.

4 QUESTION: Incidentally, did they plead 1983?

5 MR. ZWIENER: Yes, sir, they did. Which is why I  
6 talked about the Constitution today, because I'm worrying  
7 about Maine v. Thiboutot and then this statute. But again,  
8 because it's a private cause of action, I think there'll be  
9 certain statutes that you might say a plaintiff is a bene-  
10 ficiary of that would not permit a private cause of action to  
11 be brought, and I would say this is very close to one because  
12 there was a very recent amendment.

13 QUESTION: I think for your clarification, counsel,  
14 I have found the answer to my question on A-5, paragraph 5,  
15 paragraph 5 of the complaint, which appears on A-5.

16 MR. ZWIENER: Yes, it does say that. I didn't mean  
17 to misrepresent to the Court, I was just not familiar with it.  
18 He does say --

19 QUESTION: "A private institution of higher learning  
20 which receives federal financial assistance." And you did not  
21 deny that in your answer?

22 MR. ZWIENER: Your Honor, I don't know whether we  
23 did or not. I would say that the arguments I've advanced here  
24 make all that immaterial. I noticed, in closing, that  
25 the Court had a case in December, Pennhurst State School v.

1 and Hospital v. Halderman, in which --

2 MR. CHIEF JUSTICE BURGER: Your time has expired.

3 MR. ZWIENER: -- there was discussion about the  
4 spending power and the powers of Congress to do certain things.

5 MR. CHIEF JUSTICE BURGER: Your time has expired  
6 now, counsel.

7 MR. ZWIENER: Thank you.

8 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

9 The case is submitted.

10 (Whereupon, at 11:09 o'clock a.m., the case in the  
11 above-entitled matter was submitted.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 80-317

UNIVERSITY OF TEXAS ET AL.

V.

WALTER CAMENISCH

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Will T. Wilson

1981 APR 7 PM 4 57

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE